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The cornerstones of the protection of fundamental rights in criminal matters in the EU

ABSTRACT: The present paper aims to provide an outline of the protection of fundamental rights, especially the right to a fair trial, from the perspective of criminal procedure and mutual legal assistance in criminal matters in the European Union. It concentrates on the attitude of the Court of Justice of the European Union (CJEU) towards the protection of fundamental rights on a European level - as opposed to national level -, also taking into account the evolution of the system of the European judicial protection of fundamental rights with respect to the dialogue between national ordinary courts and national constitutional courts and the CJEU. The central thematic element is the jurisprudence of the Court of Justice of the European Union, concentrating on the evolution of its case law concerning fundamental rights in criminal procedure and mutual legal assistance in criminal matters during the last two decades, which is the era of the growing importance of criminal law and criminal procedural law in EU law. The background is rather the horizontal and vertical cooperation in criminal matters, its evolution, the central role of the principle of mutual recognition and the underlying mutual trust of the Member States' authorities in respect of each other's criminal justice systems. The relevance of both harmonisation and the application of the mutual recognition principle to mutual legal assistance is inevitably connected to both the similarities and the differences of national legislation and criminal justice systems which are the basis of the preliminary ruling procedures of the Court of Justice of the European Union which also serves as a driving force of mutual trust and development in the area of European criminal law, while also bearing a growing importance in the system of judicial protection of fundamental rights throughout Europe.

KEYWORDS: fundamental rights, fair trial, criminal procedure, EU, CJEU.

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1. Interaction of multiple levels of judicial protection of fundamental rights

In the jurisprudence of the Court of Justice of the European Union, the collision between union law and its interpretation according to the case law of the CJEU and the core constitutional elements of national legal systems[1] is still prevalent today, also resulting in further conflicting dialogues between national constitutional courts and the Court of Justice of the European Union.

As for the present, the Treaty on the Functioning of the European Union (TFEU) lays down the most important legal rules on competence sharing between the European Union and its Member States dividing them to exclusive competences and shared competences (Article 2-4), as a basis of which the Treaty on the European Union (TEU) contains the fundamental rules of the principle of conferral, the principle of sincere cooperation, the equality of Member States before the Treaties and the framework of the use of union competences conferred to it by the Member States, that is the principles of subsidiarity and proportionality (Articles 4-5). Furthermore, Article 2 of the Treaty on the European Union lists the fundamental common values of the EU, thereby including the rule of law and the respect for human rights among the values on which the European Union is founded. Article 3 enshrines the objectives of the European Union, including then area of freedom security and justice without internal frontiers. Detailed rules for fundamental rights and freedoms are provided for by the Charter of Fundamental Rights of the European Union as part of the Treaties and by the six directives implemented by the Member States in the area of European criminal law. Not only as a historical forerunner and basis for EU legislation on fundamental rights, but also as a supplementary system of human rights protection and an essential reference point for legal interpretation, the European Convention of Human Rights and the case law of the European Court of Human Rights (ECtHR) play a significant role in the whole system of judicial protection of fundamental rights. Both the legal

[1] Case C-11/70 Solange I, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970; Case C-69/85, Solange II, *Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany*, 5 March 1986; Lisbon case of the German Federal Constitutional Court (BVerfG, 2 BvE 2/08 from 30 June 2009). For a detailed scrutiny of the latter decision introducing the so-called identity review see Wohlfahrt, 2009, pp. 1277-1286.

acts of the European Union - that is basically the Charter of Fundamental Rights of the European Union and the directives - and the judgments of the Court of Justice of the European Union when interpreting fundamental rights and ruling on the most important aspects of cooperation in criminal matters with a viewpoint to human rights protection, the Convention and the case law of the ECtHR serve as a significant reference point. That and the interplay between the jurisprudence of the European Court of Human Rights and that of the Court of Justice of the European Union based on the Charter of Fundamental Rights of the European Union after the Lisbon Treaty are core features and characterizing elements of fundamental rights protection in the European Union.

Originally the CJEU did not have any legal basis in the treaties to clearly use as a basis of its decisions of either the relationship between national law and community law and also fundamental rights, therefore it created the relevant basic principles from the perspective of the interests of the European Communities, where it belonged. The CJEU highlighted the relevance of fundamental rights as an integral part of general principles of law already in the International Handelsgesellschaft decision[2], where it also referred to common constitutional traditions[3], while in the Nold case[4] it broadened the list of outside legal references with international treaties for the protection of human rights, stating that those 'can supply guidelines which should be followed within the framework of community law' and thus including the Convention – as interpreted by the ECtHR - as valid basis for legal argumentation in respect of community law. In its Opinion no. 2/94, the CJEU emphasised that while 'fundamental rights form an integral part of the general principles of law whose observance the Court ensures' and primary sources of community law contain references to the respect for fundamental rights, 'no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'.[5]

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[2] Case C-11/70, *Internationale Handesgesellschaft mbH v. Einfuhr- un Vorratsstelle für Getreide und Futtermittel*, 17 December 1970.

[3] Though – pursuant to its case law – refused to attribute relevant significance to it in rivalry with community law.

[4] Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, 14 May 1974.

[5] For a detailed examination of the case law of the Court of Justice of the European Union regarding the relationship between fundamental rights, national constitutions and community law, see Rossi, 2008, pp. 65-77.

Regarding fundamental rights, simultaneously, the Council of Europe and especially the case law of the European Court of Human Rights had an enormous impact on common European standards, the human rights perspective of criminal proceedings and both directly and indirectly on national law. This resulted in the strengthening of the role of European values and fundamental rights – where the specific opportunity of their enforcement by individuals against the states played a significant role – and also in harmonizing of national laws and both the institutions and the workings of justice systems, a process still ongoing. However, this system of the protection of fundamental rights and the principles emanating from the jurisprudence of the European Court of Human Rights provided basis for the Court of Justice of the European Union for decades until the Lisbon Treaty.

The Lisbon Treaty explicitly refers to fundamental rights and the possibility of the accession of the European Union to the European Convention of Human Rights, while also stating that the fundamental rights enshrined therein constitute general principles of EU law, as it emanates from the common constitutional traditions of the Member States[6]

Furthermore, it establishes the Charter of Fundamental Rights of the European Union as a primary source of EU law[7], thereby creating a situation where a balance needed to be struck between the twofold protection of human rights at European level – in respect of the EU Member States – and

[6] '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.'
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

[7] Lucia Serena Rossi considers the Charter the first manifestation of the continuous intertwining of national constitutional orders and the EU legal system. Rossi, 2008, p. 87.

likewise the competences of the ECtHR and the CJEU regarding the interpretation of the rules on fundamental rights. The issue of simultaneous application of EU law and the Convention is partly the result of the fact that the above-mentioned developments led to establishing a strong legal foundation for the Court of Justice of the European Union to step on the territory of the European Court of Human Rights and the national courts, however it has an extensive range of decisions on the collision of competences with national (constitutional or ordinary) courts dating back to the 1960s.

It is worth noting that the case law of the European Court of Human Rights is largely based on domestic proceedings and usually does not give rise to questions of mutual legal assistance in criminal matters, whilst the corresponding jurisprudence of the Court of Justice of the European Union is based on cross-border cases requiring the application of EU law.[8] This is the result of the differences between the competence of the European Court of Human Rights and that of the Court of Justice of the European Union. However, issues concerning the possible violation of the fairness of the proceedings also arose in the context of mutual legal assistance in criminal matters and the subsequent domestic procedures and the right of individuals to enforce their rights enshrined in the Convention before the Strasbourg court resulted in cases that provided the opportunity for the ECtHR to develop its legal argumentation and interpretation in respect of Article 6 of the Convention in such cases as well, in the last few years also with the possibility to interpret the right to a fair trial in respect of the specific tools of mutual legal assistance in the European Union based on the principle of mutual recognition, that is most importantly the European arrest warrant.

In Soering v. the United Kingdom (1989)[9] the ECtHR established that ‘an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’, thus providing for a

[8] It is also worth noting the significant differences between extradition and surrender procedures in this regard, the special features of the European Arrest Warrant as a tool of mutual legal assistance based on mutual recognition – built on mutual trust, deeply rooted in common standards of fundamental rights protection - in an area of freedom, security and justice, strictly connected to the unique features of union law in the jurisprudence of the Court of Justice, which significantly differentiates surrender from extradition. Thus, the extradition cases before the ECtHR cannot be attributed prominent relevance regarding the subject of this paper.

[9] *Case of Soering v. The United Kingdom*, App. No. 14038/88, 7 July 1989.

foundation of the examination of the right to a fair trial in respect of extradition and expulsion cases and found violation in Othman (Abu Quatada) v. the United Kingdom (2012)[10]. The 'flagrant denial of justice' as referred by the ECtHR is found in cases of such a manifest and fundamental breach of the right to fair trial that results in the destruction of its very essence.

Regarding the European arrest warrant, the ECtHR had to take into account the underlying principle of mutual recognition, which also requires that as a main rule, the court of a Member State shall presume that fundamental rights were observed by the issuing judicial authority and shall consider its act equivalent to a domestic act (principle of equivalence), otherwise it would question the basis of cooperation in criminal matters in the European Union. Nevertheless, if there are serious and substantiated grounds to conclude the possibility of a manifest violation of Article 6 and this cannot be remedied by EU law, the mere fact of application of EU law shall not prevent the domestic courts from examining these circumstances in the light of the Convention, thus applying EU law in conformity with the European Convention of Human Rights.[11]

Thus, the ECtHR developed the presumption of equivalent protection[12], meaning that it accepts the fundamental rights protection of the EU equal to that provided by its case law, therefore it will not scrutinize EU measures, only in exceptional cases. On the other hand, pursuant to the above rules of the TEU, fundamental rights as guaranteed by the European Convention of Human Rights belong to the general principles of EU law, without the incorporation thereof into EU law and the accession of the EU to the ECHR[13]. Due to these facts, the foundation for a cooperative relationship between the CJEU and the ECtHR – plus the national courts – in the area of the protection of fundamental rights in Europe seems sound enough. However, the Court of Justice of the European Union still takes the

[10] *Case of Othman (Abu Qatada) v. The United Kingdom,* App. No. 8139/09, 17 January 2012.

[11] See in detail: *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005.

[12] See *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland,* App. No. 45036/98, 30 June 2005.

[13] On the legal issues arising from – and barriers of - such an accession from the point of view of the CJEU, based on the specific features of EU law – also developed by the CJEU in its case law – see Opinion 2/94 of 28. 3. 96 and Opinion 2/13 of 18. 12. 2014 of the Court of Justice of the European Union.

standpoint that because of the particular characteristics of EU law, in order to preserve its autonomy and effectiveness, its competences in interpreting EU law shall remain and shall not in the least be affected by the competences of the ECtHR.[14]

In addition, the conformity clause of Article 52 (3) of the Charter declares that it relies on the provisions of the Convention, aiming at eliminating any differences in human rights protection:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 52 (4) contains mainly similar provision in respect of the common constitutional traditions of the Member States[15], however they are only the reference points and not the final determinative factors of interpretation:
'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'
The same common constitutional traditions form part of the general principles of the EU according to Article 6 of the TEU, as shown above.

These latter articles bring us to the issue of the judicial dialogue between the CJEU and the national courts concerning the protection of fundamental rights.

In respect of the area of freedom, security and justice the afore-mentioned provisions provide a strong basis for mutual trust, which is the basis of mutual recognition, that is the driving force behind and the foundation of both union-level legislative steps in this field and the workings of mutual assistance in criminal matters, including the jurisprudence of both the CJEU and the national courts. This level of

[14] See Opinion 2/13 of 18. 12. 2014 of the Court of Justice of the European Union. For an analysis of the possible clashes of competences between these courts in the area of freedoms, security and justice, see Kargopolous, 2015, pp. 96-99.

[15] Nevertheless, 'common' plays an important part here, meaning that specific constitutional traditions of a Member State may not be the basis of interpretation, thus the principles deriving from the jurisprudence of the CJEU in respect of the relationship between EU law and national law remains essentially the same in this field.

fundamental rights protection limit the risk of the overwhelming use of competence by EU legislative bodies and also guarantee a high level of respect for human rights in the area of freedom, security and justice, especially when taking into account the possible impact of criminal law on such rights.[16] The Court of Justice of the European Union accepts a wide interpretation of Article 51 (1) on the field of application of the Charter, regarding the restriction 'only when they are implementing Union law'. In the Åkerberg Fransson case[17] it stated that due to the connection between the national budgets and the EU budget on the revenue side, the harmonized VAT assessment bases, there is a direct link between the collection by the national authorities of VAT and the fact that the corresponding amount is transferred to the EU budget, therefore national criminal law in respect of taxing qualifies as an application of EU law, even if there is no actual implementation or application of a certain EU law provision, therefore the Charter shall be applicable to such cases as well and the legal issues arising from it are subject to the scrutiny of the Court of Justice of the European Union. However, this also means that national courts are required to take into account the provisions of the Charter – and of course the ECHR, as always – in the national procedures and shall provide full effect of EU law – based on the Simmenthal judgement – even without the involvement of the national constitutional court or if it is contrary to national law, which the courts must set aside in cases of conflict with EU law. This wide interpretation of the applicability of the Charter also involves an invitation of national judges in the European system of judicial protection of fundamental rights.

In its cornerstone judgement in the Melloni case[18], the Court of Justice of the European Union acknowledged the possibility of higher level of human rights protection by national legal systems in the light of Article 52 of the Charter, it also set aside such possibility for the prevalence of the principles of EU law and the aims of EU legislation, thus reaffirmed the primacy of EU law over constitutional rules of domestic legal systems. The Court did not accept the higher level of protection of the right to be present at the trial offered by the Spanish Constitution as a ground for refusal of executing a European arrest warrant, arguing in favour of the primacy, unity and effectiveness of EU law and the role of the uniformity for human rights

[16] Scalia, 2015, p. 101.
[17] Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 7 May 2013.
[18] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013.

protection in promoting mutual trust and ensuring the application of mutual recognition[19].

In the Tarrico case[20] the CJEU took essentially the same viewpoint, this time in respect of the Italian rules on the limitation period for criminal offences relating to VAT. It basically ruled that the fact that the domestic courts shall set aside rules on the limitation period concerning such criminal offences – and as a result providing for the criminal responsibility of persons beyond the limitations of national law and thus conflicting with the fundamental principle of nullum crimen sine lege, nulla poena sine lege – as these prevent Italy from fulfilling its obligations resulting from Article 325 of the TFEU on combatting fraud and any other illegal activities affecting the financial interests of the European Union.[21] Notwithstanding, the Italian Constitutional Court declared that the rules the CJEU requires to be set aside by the Italian courts are parts of Italian constitutional identity and turned to the CJEU for a preliminary ruling on the domestic enforcement of its Taricco judgement. In the so-called Taricco II case[22] the CJEU somewhat softened its previous approach of the subject. It confirmed that national rules shall be disapplied in favour of the effectiveness of EU law, but also included an exception: 'unless that this application entails a breach of the principle that offenses and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed'. While still emphasizing the primacy of EU law, the Court acknowledged the prevalence of domestic law if national constitutional identity is affected.

2. The outlines of EU legislation on fundamental rights protection in criminal matters

As has already been referred to above, the provisions of the ECHR form a basis for the interpretation of the rights enshrined in the Charter. As the

[19] For the most important focus points in balancing between the protection of fundamental rights and the effectiveness of EU law in the area of freedom, security and justice see: Bachmaier, 2018, pp. 56-63; pp. 59-61.
[20] Case C-105/14, *Ivo Tarrico and Others*, 8 September 2015.
[21] For the merits of the decision in the context of the dialogue between the CJEU and the national ordinary and constitutional courts as interpreted in the light of the jurisprudence of the CJEU see: Scalia, 2015, pp. 106-107.
[22] Case C-42/17, *M.A.S. and M.B.*, 5 December 2017.

ECHR is interpreted by the ECtHR, its case law is indispensable when trying to unfold the meaning of the rules of the Convention.

Taking Article 6 of the Convention as a starting point of setting the framework of fair trial rights, Articles 47 and 48 shall be taken into account correspondingly. While Article 47 expressly refers to a fair trial, within the meaning if Article 6 of the Convention, the presumption of innocence and the right of defence provided for in Article 48 of the Charter form and essential element thereof as well, while Article 47 (1) also covers Article 13 of the Convention (the right to an effective remedy).

Article 47 covers the right to an effective remedy, the right to a fair hearing before a tribunal, also referring to the right to defence in its broader sense.[23] Article 48 includes the basic provisions on the presumption of innocence and the right of defence similar to Article 6 (2) and (3) of the Convention and shall have the same meaning and scope pursuant to Article 52 (3) of the Charter.

As it has already been mentioned, mutual trust in each other's justice systems is the basis for mutual recognition of judicial decisions that is the foundation of effective cooperation in criminal matters in the European Union. Article 67 (1) of the Treaty on the Function of the European Union ('TFEU') states that 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.', thereby providing for the basis of a single European judicial area in the field of criminal law, that is the area of freedom, security and justice. The basis of the cooperation between the judicial authorities of the Member State in this field shall be the principle of mutual recognition, as laid down in Article 82 (1) of the TFEU. This principle also bridges the gap between different legal systems and traditions of the Member States requiring that the national authorities execute each other's decisions in the same manner as in case of decisions of the authorities of their Member State without any regard to differences in legal provisions, unless these differences have impact on general principles of national legal systems or fundamental rights. The common standard of respect for the latter also forms an essential part of the area of freedoms, security and justice also provided for in Article 67 (1) TFEU, as referred to above. The implementation of the principle of mutual recognition

[23] See Explanations to the Charter on the website of the European Union Agency for Fundamental Rights (FRA) [Online], Available at: https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial, (Accessed 30 July 2024).

presupposes mutual trust of the Member States in each other's criminal justice systems, which is reliant upon – among other factors – common mechanisms for safeguarding procedural rights – especially of suspected and accused persons -, different elements of the right to a fair trial.
In connection with the above-mentioned, Article 82 (2) b) of the TFEU provides for the establishment of minimum rules in respect of the rights of individuals in criminal procedure, as the basis of harmonization of the laws of the Member States, by the means of directives.
According to EU legislation, the fact that all the Member States are party to the ECHR alone does not always provide a sufficient degree of trust in the criminal justice systems of the Member States.[24]

Consequently, the effective operation of the cooperation in criminal matters in the European Union - thus nourishing mutual trust - requires common standards of the protection of fundamental rights, based on the Charter, the Convention and the corresponding jurisprudence of the ECtHR and the CJEU, which led to the adoption of directives – in their preambles echoing the afore-mentioned aims and principles - concerning the right to information, the right to interpretation and translation, the right to have a lawyer, the right to be presumed innocent and to be present at trial, safeguards for children and the right to legal aid and recommendations on safeguards for vulnerable persons. The legislative procedure leading to the adoption of these directives was governed by the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[25]. It also acknowledges the relevance of the ECHR and its interpretation by the ECtHR in Recital (2) as a starting point of legislation: 'the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust' at the same time also aiming at ensuring full implementation and even raising of the level of fundamental rights protection throughout the EU: 'At the same time, there is room for further action on the part of the European Union to ensure full

[24] Expressly or implicitly in: Recital (7) of Directive 2012/13/EU, Recital (3) of Directive (EU) 2016/1919, Recitals (4) and (5) of Directive (EU) 2016/343 and of Directive 2013/48/EU, Recital (7) of Directive 2010/64/EU, Recitals (2) and (5) of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings.
[25] Official Journal C 295, 4.12.2009, pp. 1-3.

implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards.'

3. The cornerstones of the case law of the Court of Justice of the European Union regarding fundamental rights in criminal proceedings[26]

The Charter of Fundamental Rights of the European Union shall be applied only in cases of application of union law, meaning that it does not provide for an independent system of fundamental rights protection, but it is closely connected to and the corollary of applying other rules of the specific European Union legal system.[27] Therefore the case law of the Court of Justice of the European Union on procedural fundamental rights in criminal proceedings is always connected to the application of different tools of mutual assistance and is based on preliminary ruling procedures, where the CJEU interprets the rules of the underlying EU legal acts in the light of the Charter and of course - as it has been written above about the relationship between the Charter and the ECHR - the European Convention on Human Rights as interpreted by the European Court of Human Rights. The fact that these decisions of the CJEU are the results of preliminary ruling procedures means that the impetus for such decisions always lie with the domestic courts, thus providing for a singular dialogue between the CJEU and the national courts, interaction between European law and national law. The protection of fundamental rights throughout the European Union is a basic limitation to the prevalence of the principle of mutual recognition resulting in the obligation to execute decisions of Member States authorities,

[26] The case law of the Court of Justice of the European Union is significantly farther reaching than this paper could even attempt to show. The cases mentioned are closely connected to the subject of this paper and are the ones which are frequently cited in subsequent CJEU judgements as the basis and starting point of the argumentation in the individual cases, have substantial impact on the practice of mutual legal assistance – outside the scope of the given case - and together formulate the outlines of the judicial dialogue between national courts and the CJEU in this field and indicate the fundamentals of the prevalence of union law and its relation to human rights in the area of cooperation in criminal matters.

[27] Unlike of the protection offered by the European Convention on Human Rights as interpreted by the European Court of Human Rights, which is directly applicable to the national legal systems and exists as a single supranational set of rules and principles and not as a part of a unique supranational legal system that is union law.

therefore the fundamental rights control of cooperation in criminal matters in the European Union can be exercised via the interpretation of the conformity of Member States' legislations and decisions of domestic authorities with union law, which then - by significantly contributing to the harmonization of minimum standards in this field - shall result in enhancing the effectiveness of mutual legal assistance in criminal matters.

Being the most significant element of cooperation in criminal matters in the European Union, the European arrest warrant (EAW) and the application of the underlying framework decision in practice - from the point of view of the principle of mutual recognition - offered most of the possibilities for the CJEU to conclude on the different elements of the right to a fair trial.[28] The CJEU highlighted in its Bob-Dogi judgement[29] that the European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights: in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued. Nonetheless, the fundamental rights guarantee in respect of issuing an EAW can only be interpreted fully when taking into account the circumstances relating to its execution.

In the landmark Melloni case[30] the Court of Justice of the European Union had the opportunity to scrutinize the rules of in absentia proceedings in respect of decisions on surrender pursuant to the framework decision on the European arrest warrant. Previously in the Radu case[31] the CJEU – on the basis of Article 6 of the ECHR and Articles 47 and 48 of the Charter – found that the executing authority cannot refuse to execute the European arrest warrant on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued, arguing that besides the fact that the framework decision does not provide for such ground for refusal, Articles 47 and 48 of the Charter does not require such a decision either and emphasised the significance of the interest to effectively operate the surrender system which would be jeopardized by constructing an obligation of hearing the defendant before the issuing of a European arrest warrant, however, the right to be heard shall be observed in subsequent

[28] For an overview of the most important aspects thereof see the Eurojust, 2021, pp. 43-56.
[29] Case C-241/15, *Curtea de Apel Cluj and Niculaie Aurel Bob-Dogi*, 25 May 2015.
[30] Case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, 26 February 2013.
[31] Case C-396/11, *Curtea de Apel Constanța and Ciprian Vasile Radu*, 29 January 2013.

procedures. By this decision the CJEU ruled on the primacy of the interests of the criminal procedure compared to the fundamental rights of the defendant, as a logical consequence of the fact that the reasons for issuing EAW basically cover those where the issuing authority has no other means available to hear the defendant (also suggested by the principle of proportionality).

The Melloni judgement followed in the close footsteps of the previously mentioned decision of the CJEU. In this case the European arrest warrant was issued for the execution of ten years of imprisonment on the defendant, as a result of a criminal procedure conducted in absentia. The Spanish Constitutional Court referred the case in a framework of a preliminary ruling procedure to the Court of Justice of the European Union on the basis of applying Article 47 (right to effective judicial remedy), Article 48 (2) (right of the defence) and Article 53 (level of protection) of the Charter and thus focusing on the question of effective remedy, the counterbalancing of the violation of the right to be present at the trial. The Court of Justice found that the framework decision on the EAW is compatible with the requirements of the mentioned Articles of the Charter, while the rules on the level of protection offered by Article 53 of the Charter does not allow that the surrender of a person convicted in absentia is made conditional on a national (in this case: constitutional) rule that requires the conviction to be open to review in the issuing Member State, thereby setting aside the higher level of protection offered by national law for the sake of efficiency of cooperation based on the principles underlying the area of freedom, security and justice. The CJEU emphasized the importance of the right to be present at trial as an ‘essential component’ of the right to a fair trial, but at the same time ruling that it is not absolute, therefore is subject to limitations and the defendant may waive his right to be present, on the conditions discussed beforehand providing for the compatibility of such waiver with fairness and shall be counterbalanced by adequate safeguards resulting in an overall fair trial. The framework decision contains circumstances – relating to the conduct of the defendant - which establish the conclusion that the defendant implicitly waived his right to be present at the trial. The CJEU in this regard heavily relied on the corresponding case law of the ECtHR. Regarding the level of protection, it emphasised that the possibility of the Member States to provide higher level of protection of human rights is restricted by the requirements of primacy, unity and

effectiveness of EU law[32], therefore ruling on the utmost importance of uniformity of the level of human rights protection that serves mutual trust and the application of mutual recognition.[33]

In the Covaci case[34] the CJEU scrutinized the requirements of EU law in respect of the necessary measurements for redeeming the restriction of the right to be present at the trial – in penal order proceedings - and also the relationship between the right to interpretation and the right of defence, the provisions of the Directive on the right to interpretation and translation and the Directive on the right to information in criminal proceedings. In respect of linguistic assistance, the CJEU offered a strict interpretation, making a relevant distinction between the right to interpretation (oral statements) and the right to translation (written statements), stating that EU law does not require that Member States provide translation of an objection against penal orders (by which the defendant can achieve that his case is brought to trial he can participate at) for persons not understanding the language of the proceedings. Furthermore, the CJEU connected the procedural rights to linguistic assistance with the right to legal assistance by asserting that the defendants have the opportunity to obtain the assistance of a lawyer for drafting such an objection – in the language of the proceedings -, thus understanding these two otherwise complementary fundamental rights as alternatives.[35]

The Court of Justice of the European Union had the possibility to examine the independence of judges, judicial authorities – as a central element of fair trial – in its case law, resulting in relevant conclusions for the role and application of the mutual recognition principle in the area of freedom, security and justice.[36] In the Minister for Justice and Equality

[32] A significant requirement as a consequence of the attributes of EU law as developed by the case law of the CJEU to a supranational legal system, therefore an important point of collision of interpretation between the CJEU and the ECtHR that interprets similar fundamental rights provisions of the ECHR without this limitation, however, mainly for this reason reluctant to step in the margin of EU law, national legal systems and the ECHR.

[33] See also Bachmaier, op. cit. pp. 59-60.

[34] Case C-216/14, *Amtsgericht Laufen and Gavril Covaci,* 15 October 2015.

[35] Ruggeri criticizes the CJEU also for not focusing on the specific problems of penal order procedures in this judgement. See Ruggeri, 2016, pp. 43-44.

[36] Lorena Bachmaier considers that the Aranyosi and Caldărăru case (Case C-404/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen,* 5 April 2016, in connection with the role the degrading and inhuman conditions in detention facilities in Hungary and Romania as a basis for denial of execution of EAWs) posed the risk of reversing the mutual recognition principle in Bachmaier, L.: op. cit. p. 61.

case[37] the defendant submitted to the executing Irish court that his surrender to the Polish judicial authorities would expose him to the real risk of a flagrant denial of justice therefore violating Article 6 of the European Convention on Human Rights and expressly relied on the proposal of the European Commission regarding Poland on the basis of Article 7 (1) of the TEU. The CJEU stated that if the executing judicial authority has material indicating the real risk of the breach of the right to a fair trial as provided by Article 47 (2) of the Charter on the basis of systematic or generalised deficiencies in the criminal justice system of the Member State of the issuing judicial authority, the executing judicial authority must thoroughly examine the case at hand in a detailed manner and is not allowed to base its decision on denial of execution of the EAW on these systematic or generalised deficiencies alone.[38] Therefore it must determine, specifically and precisely, whether, having regard to the individual's personal situation, to the nature of the offence and the factual context of the EAW, in the light of the supplementary information provided by the issuing Member State, whether there are substantial grounds for believing that that individual will run such a risk if he is surrendered to that Member State. In its argumentation the CJEU emphasised the central role and utmost importance of mutual trust and mutual recognition in the area of freedom, security and justice, the limitations of which shall be exceptional. On the other hand, it established that the right to an independent tribunal is the essence of the right to a fair trial[39] and may therefore be a basis of restrictions of mutual recognition. The Court requires a two-step assessment for establishing the denial of the execution of an EAW: the first is the systemic assessment based on objective, reliable and up-to-date evidence aiming at the examination of systemic or generalised deficiencies in a justice system of a Member State in connection with the lack of independence, resulting in a

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In my opinion the references for preliminary ruling in respect of the independence of judges in Poland carry the same primal risk in respect of the foundation of the area of freedom, security and justice.

[37] Case C-216/18 PPU, *High Court (Ireland) and LM*, 25 July 2018.

[38] This is the same logic as the Court of Justice used to put forward its arguments in favour of the application of the principle of mutual recognition and the need for the detailed examination of the situation of the defendant from the fair trial point of view on a case-by-case basis in the Aranyosi and Caldărăru case referred to above.

[39] For a thorough scrutiny of the jurisprudence of both the ECtHR and the CJEU in respect of the essence of the right to a fair trial and the issues to be clarified in the future judgements of the CJEU in this regard see Gutman, 2019, pp. 883-903.

real risk of the breach of the right to a fair trial. Only if on the basis of an Article 7 (2) TEU procedure the European Council adopted a decision and suspended the EAW framework decision in respect of that Member State would the systematic test itself serve as a ground for refusing the execution of a EAW. In any other case, the executing authority is required to carry out also a specific assessment taking into account the particular circumstances of the case at hand.

The Court of Justice of the European Union confirmed its above-mentioned standpoint in the Openbaar Ministerie judgement[40], again in respect of surrender procedures based on EAWs issued by Polish judicial authorities. It emphasised that allowing for an automatic refusal of the execution of an EAW based only on the first – general, systemic - step of assessment, would be against the main objectives of the EAW mechanism, namely, to combat impunity. Furthermore, the CJEU established that the examination of the particular circumstances of the case shall include the consideration of deficiencies that arose after the EAW has been issued – if for the purpose of prosecution -, as the executing authority is required to scrutinize the situation at the time of its decision in respect of the possible risk of breach of the essence of the right to a fair trial, irrespective of the fact that those circumstances did not exist at the time of the issuing of the EAW and could not therefore be applied to the executing authority at that time. If the EAW is issued for the purpose of execution of a custodial sentence, the scrutiny shall cover only the circumstances that prevailed at the time of the issuing of the EAW, but also in respect of the court that imposed the custodial sentence (not restricting to the judicial authority that issued the EAW), thereby widening the scope of the scrutiny from surrender procedure to the main criminal procedure and logically bonding them in respect of the requirements of fair trial.

The relevance of independence of judicial authorities as an essential element of the right to a fair trial was also examined by the CJEU from the point of view of the notion of issuing and executing judicial authorities, reflecting on the institutional requirements and workings of the criminal justice systems of the Member States, starting from a fundamental principle of the rule of law, the separation of powers. In the OG and PI (Public

[40] Joined Cases C-354/20 and C-412/20, *Rechtbank Amsterdam and L and P*, 17 December 2020.

Prosecutor's Offices in Lübeck and Zwickau) judgement[41] also referred to in the above-mentioned decision, the CJEU found that the concept of an issuing judicial authority within the meaning of the framework decision on the EAW must be interpreted as not including public prosecutors' offices of a Member State which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice, in connection with the adoption of a decision to issue an EAW.

To some extent supplementing this breakthrough interpretation – and again requiring primacy over the Member States' decisions on designating and appointing issuing judicial authorities pursuant to the framework decision on the EAW in line with the concept of procedural autonomy, by considering this notion an autonomous concept of European Union law –, in the recent AZ case[42] the CJEU dealt with the notion of executing judicial authority within the framework of the same legal instrument, again starting with the question of whether it is an autonomous concept of EU law and whether the same principles apply to it as were elaborated in the OG and PI decision. The CJEU ruled that on the same grounds as it took into consideration in the OG and PI judgement in respect of the issuing judicial authority, the executing judicial authority is also an autonomous concept of EU law and its interpretation: on the basis of procedural autonomy, the Member States may designate the judicial authority to issue or execute an EAW, but the meaning and the scope of this concept cannot be left to the assessment of each Member State as it requires an autonomous and uniform interpretation throughout the European Union. Compared to the two-level protection in the issuing phase (referred to in the Bob-Dogi and OG and PI cases mentioned previously), the execution phase of the surrender procedure entails only one level of protection, that is the intervention of the executing authority which shall ensure the respect for fundamental rights. Therefore, it ruled that the relevant Articles of the framework decision on the EAW must be interpreted as meaning that the public prosecutor of a Member State who, although participates in the administration of justice, may receive in exercising its decision-making power an instruction in a specific case from the executive, does not constitute an 'executing judicial authority' within the meaning of those provisions.

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[41] Joined Cases C-508/18 and 82/19 PPU, *Minister for Justice and Equality and OG and PI,* 27 May, 2019.

[42] Case C-510/19, *Hof van beroep te Brussel and AZ,* 24 November 2020.

Besides the European arrest warrant, another central instrument of the area of freedom, security and justice is the European Investigation Order (EIO) as the main instrument of gathering and obtaining evidence based on the principle of mutual recognition[43], which is a highly sensitive matter in respect of the protection of fundamental rights and the dominant component of criminal procedure. In the A and Others judgement[44] the CJEU faced with the issue of interpreting the concept of judicial authority, issuing authority in respect of the Directive on the EIO, thereby obliged to reflect on the requirements deriving from its previously examined case law on the matter regarding the EAW and subsequent surrender procedures between Member States. On this basis it also had to focus on the possible relationship of legal subordination of the public prosecutor or public prosecutor's office to the executive with a view to the risk of being subject to orders or individual instructions from the executive and its relevance to the issuing and executing of the EIO. Based on argumentation focusing the significant added-value of fundamental rights guarantees included in the Directive, specific provisions intended to ensure that the issuing or validation of an EIO is accompanied by guarantees specific to the adoption of judicial decisions – specifically those relating to respect for the fundamental rights of the person concerned and, in particular, the right to effective judicial protection, the requirements of necessity, proportionality and adequacy when issuing an EIO, the legal remedies and alternatives available when executing it –, the CJEU arrived at the conclusion that the Directive contains a normative framework comprising a set of safeguards both at the stage of the issuing or validation and of the execution of the EIO, whose aim is to ensure the protection of the fundamental rights of the person concerned. It also added that the aim of the issuing of the EIO is to conduct investigative measures to obtain evidence which are not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter – as opposed to the execution of an EAW. Based on these arguments, the CJEU concluded that the Directive on the EIO must be interpreted as meaning that the concepts of 'judicial authority' and 'issuing authority', within the meaning of the provisions of the Directive, include the

[43] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, Official Journal L 130, 1.5.2014, pp. 1-36.

[44] Case C-584/19, *Landesgericht für Strafsachen Wien and A and Others*, 8 December 2020.

public prosecutor of a Member State or, more generally, the public prosecutor's office of a Member State, regardless of any relationship of legal subordination that might exist between that public prosecutor or public prosecutor's office and the executive of that Member State and of the exposure of that public prosecutor or public prosecutor's office to the risk of being directly or indirectly subject to orders or individual instructions from the executive when adopting a European investigation order. In this decision the CJEU acknowledged the relevant differences between the diverse tools of cooperation in criminal matters in the European Union from the aspect of the respect of fundamental rights to the point where it managed to provide significantly diverse meanings of the formally same notions, thereby distinguishing them as two distinct autonomous concepts of European Union law – for the purposes of criminal investigations and prosecutions.

The Court of Justice based its decision partly on the added value of fundamental rights guarantees referenced in the text of the Directive[45]. However, in relation to what has been mentioned in respect of the reversal of the mutual recognition principle regarding the Aranyosi and Caldărăru case and also the preliminary ruling references of national courts based on the report of the Commission on the independence of the judiciary in Poland, to some extent, such guarantees may be perceived as further grounds for refusal of the recognition of the decisions of national judicial authorities – contrary to Article 82 (1) of the TFEU – and from this perspective can only be justified – in terms of their inclusion in the Directive – if they offer an added value to the protection already provided by the system of the ECHR – Charter – Directives triad on procedural rights of individuals.[46]

[45] For an overview of the relevant legal provisions and their role in the EIO procedures see Montero, 2017, pp. 45-49.

[46] As Spanish State Attorney and Justice Counsellor-Coordinator at the Spanish Permanent Representation before the EU, David Vilas Álvarez details these doubts and provides a comprehensive overview in Álvarez, 2018, pp. 64-71.

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