The European Arrest Warrant system: Recent developments in the case law of the Court of Justice

Anne Pieter van der Mei*

Case C-271/17 PPU Openbaar Ministerie v. Sławomir Andrzej Zdziaszek, EU:C:2017:629
Case C-270/17 PPU Openbaar Ministerie v Tadas Tupikas, EU:C:2017:628
Case C-477/16 PPU Openbaar Ministerie v. Ruslanas Kovalkovas, EU:C:2016:861
C-453/16 PPU Openbaar Ministerie v. Halil Ibrahim Özçelik, EU:C:2016:860
C-452/16 PPU Openbaar Ministerie v. Krzysztof Marek Poltorak, EU:C:2016:858
Case C-294/16 PPU JZ v. Prokuratura Rejonowa Łódź – Śródmieście, EU:C:2016:610
Case C-108/16 PPU Openbaar Ministerie v. Paweł Dworzecki, EU:C:2016:346
Case C-640/15 Minister for Justice and Equality v. Tomas Vilkas, EU:C:2016:346
Case C-579/15 Openbaar Ministerie v. Daniel Adam Popławski, EU:C:2017:503
Case C-463/15 PPU Openbaar Ministerie v. A, EU:C:2015:634
Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen, EU:C:2016:198
Case C-241/15 Niculaie Aurel Bob-Dogi, EU:C:2016:385
Case C-237/15 PPU Minister for Justice and Equality v. Francis Lanigan, EU:C:2015:474
Case C-182/15 Aleksei Petruhhin v. Latvijas Republikas Ģenerālprokuratūra, EU:C:2016:630.

1. Introduction

Over the course of the last two to three years, the number of preliminary ruling requests concerning EU criminal law measures has increased significantly. This may come as no surprise and can be explained, at least partly, by the fact that as of 1 November 2014 the competence of the Court of Justice of the European Union (CJEU) to deliver preliminary rulings on EU criminal law measures is

*Maastricht University, Maastricht Center for European Law, Maastricht, The Netherlands

Corresponding author:
Anne Pieter van der Mei, Faculty of Law, Maastricht University, 6200 MD Maastricht, The Netherlands.
Email: ap.vandermei@maastrichtuniversity.nl.
no longer subject to the prior acceptance by the Member States. In principle, all national courts are now free to turn to the CJEU to obtain clarification on the meaning and validity of such measures.

What will also not come as a surprise is that many of the questions that these courts have recently referred to the CJEU concern the Framework Decision on the European Arrest Warrant (FDEAW). Adoped in the wake of 9/11, the FDEAW has replaced, among the Member States, the classic system of extradition with a more simple system that first and foremost aims to speed up the surrender of accused or convicted persons from one Member State to another. It is the first concrete measure in the field of criminal law that implements the principle of mutual recognition. The essence of the FDEAW-system is simple: a European arrest warrant (EAW) issued by one Member State (the ‘issuing’ Member State) must be executed by another Member State (the ‘executing State’), unless the FDEAW demands or permits non-execution.

Since its adoption, the FDEAW has been controversial, mainly because the execution of EAWs in furtherance of the mutual recognition principle may conflict with the accused or convicted person’s fundamental rights. Mutual recognition is based on mutual trust or confidence. It is presumed that the criminal law authorities of other Member States comply with the right to a fair trial and other (related) fundamental rights. In practice, however, this presumption does not necessarily hold true.

Of course, the EU political institutions are fully aware of this and it would be wrong to state that they, when creating the EAW-system, ignored the issue of fundamental rights protection. The FDEAW does contain provisions that protect procedural and fair trial rights and, more generally, it stipulates that ‘it shall not have the effect of modifying the obligation to respect fundamental rights’. However, the political institutions decided that not all violations of fundamental rights could justify the non-execution of EAWs. A breach of the general duty to respect (other) fundamental rights was not recognized as a separate ground for non-execution. In other words, the political institutions did not make full respect for all fundamental rights a precondition for the lawful application of the EAW-system.

In a Union that possesses its own Fundamental Rights Charter and expects from its institutions and – when they are implementing Union law – the Member States to respect the rights enshrined therein, this is of course not unproblematic. As significant as the goals of preventing and
combatting crime, and more generally creating the Area of Freedom, Security and Justice (AFSJ), may be, the Treaties require these goals to be pursued with respect for fundamental rights. As protecting fundamental rights is among its core tasks, one might perhaps have expected that the CJEU would carefully scrutinize whether the FDEAW itself, as well as national decisions on the issuing and execution of EAWs, comply with fundamental rights. In the first decade since the entry into force of the FDEAW, however, the CJEU did not appear willing to actually do so. It did not truly question the choices made by the political institutions and seemed particularly careful not to undermine the effectiveness of the EAW-system. The CJEU stressed the fundamental importance of mutual trust and refused to accept that a breach of EU or national fundamental rights could be a ground for non-execution of an EAW where none of the FDEAW-exceptions apply.

This article provides an analytical overview of the case law of the CJEU on the FDEAW since 1 November 2014. It considers how the CJEU has construed various FDEAW-provisions and explores whether, or to what extent, it has made use of the opportunities given to it by national courts to strengthen the protection of fundamental rights.

2. The concept of the ‘European Arrest Warrant’

A. European arrest warrant and national arrest warrant

The text of the FDEAW leaves numerous questions unanswered. These relate first of all to the notion of ‘EAW’ itself. Like a national arrest warrant, an EAW is a decision of a court or court-like body authorizing or ordering the arrest of a person for the purposes of conducting a criminal prosecution or executing a custodial sentence or comparable punishment. In Bob-Dogi, however, the CJEU made it clear that for the purposes of the FDEAW it is crucial to make a distinction between a national arrest warrant and an EAW.

The case concerned an EAW issued by Hungarian authorities seeking the arrest and surrender of a Romanian national, Mr Bob-Dogi, who was accused of having caused a road traffic accident in Hungary and causing serious bodily harm to a moped rider. The executing Romanian court noticed that the EAW also extended to the territory of Hungary and assumed that the EAW also constituted a national arrest warrant. This assumption appeared to be correct. Hungarian law provided for a ‘simplified procedure’ in cases where the requested person is already outside the territory of Hungary when an EAW is issued. In such a case, no separate national arrest warrant was issued. An EAW arrest constituted, at the same time, a national arrest warrant. The Romanian court doubted whether this was compatible with the FDEAW, which stipulates that an EAW must contain, amongst others, ‘evidence of an enforceable judgment, an arrest warrant or any other

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7. Article 3(2) read together with Article 6 TEU and Article 67(1) TFEU.
8. Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU: C:2014:2454, para. 191.
9. Case C-396/11 Ciprian Vasile Radu, EU: C:2013:39, para. 36-42.
10. Case C-399/11 Stefano Melloni v. Ministerio Fiscal, EU: C:2013:107, para. 61-64.
11. This article does not include an analysis of national judgments concerning the FDEAW and its potential conflict with national constitutional law. See further e.g. T. Reinbacher and M. Wendel, ‘The Bundesverfassungsgericht’s European Arrest Warrant II Decision – The BVerfG, Case 2 BvR 2735/14, Order of 15 December 2015 – EAW II’, 23 Maastricht Journal of European and Comparative Law (2016), p. 702-713; and L. Kimek, European Arrest Warrant (Springer, 2015), Chapter 12.
12. See below, Section 2.B.
enforceable decision having the same effect'. The court concerned decided to ask the CJEU whether the FDEAW requires a prior and separate national arrest warrant and, if so, whether the absence of such an arrest warrant implies a ground for the non-execution of an EAW.

The CJEU established that the FDEAW indeed requires an EAW to contain evidence of a national arrest warrant or a comparable decision. The CJEU interpreted this to imply that an EAW must be based on a separate national judicial decision that takes the form of a decision issuing a national arrest warrant or a similar decision. Referring to its aims, the CJEU explained that the FDEAW entails a dual level of protection for procedural and fundamental rights to be enjoyed by a requested person. The first concerns the judicial protection provided at the level at which a national arrest warrant is issued; the second level relates to the decision to issue the EAW. That dual level of judicial protection was lacking, in principle, under the simplified procedure that existed in Hungary as only a single decision was taken, and not two as stipulated by the provisions of the FDEAW.

What did this imply for the referring Romanian court? Did it have to, or was it allowed to, refuse the execution of the EAW? The CJEU observed that the absence of any indication in an EAW of the existence of a national arrest warrant is not one of the grounds for non-execution that are listed in the FDEAW. However, so the CJEU stated, the FDEAW is based on the premise that an EAW mentions a national arrest warrant or a comparable decision. Failure to do so implies that the EAW is invalid, which, in turn, means that the executing authority must refuse to execute the EAW.

In Bob-Dogi, the CJEU did not directly refer to the Charter of Fundamental Rights of the European Union (the Charter), but it is plain that the conclusions drawn are of the utmost importance for protecting the rights of requested persons. The structure of the FDEAW-system is such that first a decision must be taken as to whether an individual can or will be deprived of his or her liberty. That fundamental decision must be taken by a court on the basis of national criminal law rules and in accordance with the right to a fair trial and other fundamental rights norms that are guaranteed by national law and the European Convention on Human Rights (ECHR). If the prescribed conditions are satisfied, it is as a rule the national police or other criminal law enforcement authorities who will be authorized to arrest the individual concerned. It is only in cases where the accused or convicted person is (expected to be) present in the territory of another Member State that recourse to an EAW comes into play. The FDEAW does not require from the judicial authority that is competent to issue EAWs to reassess whether the requested person can actually be incarcerated. That judicial authority is allowed to simply base its decision on the national arrest warrant. An EAW is thus far less fundamental than a national arrest warrant is. In essence, an EAW is no more than a legal tool for the issuing Member State to have a person arrested by the authorities of another Member State, rather than its own authorities. If an EAW may also constitute a national arrest warrant, there is no guarantee of a court first having established that the requested person can actually be deprived his liberty in accordance with national and ECHR law. Moreover, in the absence of evidence of the existence of a national arrest warrant, it may be impossible for the judicial authority in the executing Member State to conclude that, what the CJEU calls, the first

13. Article 8(1)(c) of the FDEAW.
14. Case C 241/15 Niculae Aurel Bob-Dogi, EU: C:2016:385, para. 42-51.
15. Ibid., para. 55-57.
16. Ibid., para. 60-62.
17. Ibid., para. 63-64.
level of judicial protection has actually been offered. Hence, it is also nothing but logical that the executing authority is not permitted to execute the EAW.

Bob-Dogi does not clarify what the second level of protection actually entails. The text of the FDEAW permits the issuing judicial authority to base its decision on the national arrest warrant without having to explore whether the arrest is correct under national law. It can simply make reference to it. Should the second level of protection perhaps be interpreted to mean that the issuing EAW must nonetheless review the national arrest warrant and reassess its compatibility with national and ECHR law? Or does that second level consist of a duty to check whether the arrest in another Member State is compatible with EU fundamental rights norms? If so, what does this duty imply in concreto? Legal clarification would be welcome on this point.

B. Judicial authority

The FDEAW requires an EAW to be issued by a judicial authority. The same holds true for the execution of an EAW and the national arrest warrant on which it must be based. The FDEAW provides for a ‘judicialized’ system in which the key decisions are taken by judicial authorities and the role of governmental or executive organs, as so-called ‘central authorities’, is limited to offering administrative and practical assistance to the judicial authorities. The reason for this is twofold. First, as experiences with classic extradition rules have shown, entrusting key decisions on surrender to political bodies often implies delay. Second, judicial decision-making provides for a greater guarantee that the prescribed procedural rules and fundamental rights will be adhered to.

Hence, it is important to establish what actually constitutes a judicial authority. The FDEAW requires Member States to establish which judicial authority shall be competent to issue and/or execute EAWs, but it does not define the term ‘judicial authority’ itself. In practice, this has led to divergences among the Member States, with some of them having designated authorities that would appear to be political rather than judicial authorities.

In Poltorak, Kovalkovas and Özçelik, the Amsterdam District Court, which is competent to execute EAWs under Dutch law, decided to ask the CJEU for a legal clarification on the precise meaning of what constitutes a ‘judicial authority’. More concretely, the Amsterdam court wished to know whether it was obliged to execute EAWs issued by the Swedish police services (Poltorak), the Lithuanian Ministry of Justice (Kovalkovas) and a Hungarian prosecutor (Özçelik) respectively.

In the first two cases, the CJEU held that a ‘judicial authority’ is an autonomous concept of EU law that extends to ‘the authorities required to participate in administering justice in the system

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18. See, Article 1(1) of the FDEAW.
19. See, Recital 5 of the Preamble to the FDEAW and e.g. Articles 3 and 4 of the FDEAW.
20. The FDEAW thus has the system. O. Bures, EU Counterterrorism Policy: A Paper Tiger? (Ashgate, 2011), p. 153.
21. Article 7 of the FDEAW.
22. Proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, COM(2001) 522 final, p. 2.
23. See, Recital 8 of the Preamble to the FDEAW.
24. Articles 6(1) and (2) of the FDEAW.
25. L. Kimek, European Arrest Warrant, p. 78-80; and W. van Ballegooij, The Nature of Mutual recognition in European Law – Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area (Intersentia, 2015), p. 167.
26. Case C-452/16 PPU Openbaar Ministerie v. Krzysztof Marek Poltorak, EU: C:2016:858, para. 32; Case C-477/16 PPU Openbaar Ministerie v. Ruslanas Kovalkovas, EU: C:2016:861, para. 33.
concerned’. These include criminal courts and judges of a Member State, but not police services and executive organs such as ministries. The CJEU explained that the term ‘judiciary’ must be distinguished, in accordance with the principle of the separation of powers, from the executive. Thus, judicial authorities are traditionally construed as the authorities that administer justice, unlike, inter alia, administrative authorities or police authorities, which fall within the executive’s mandate. The issue of an arrest warrant by ‘central authorities’ like police services or ministries does not provide the executing judicial authority with an assurance that decisions relating to EAWs ‘are attended by all judicial guarantees’ and, therefore, cannot not provide the ‘high level of confidence’ between Member States’ that mutual recognition demands. Building on this reasoning, the CJEU found in Öçelik that, unlike police authorities or ministries, a public prosecutor’s office must be regarded as a judicial authority.

The CJEU’s conclusions are logical. Common sense simply dictates that police services and ministries cannot be regarded as judicial authorities. It would be odd and indeed undesirable if the courts in the executing Member State were obliged ‘to act on the orders of foreign policemen’ or politicians. For the entire system to be legitimate, there must be some guarantee that EAWs are issued with due respect for the right to a fair trial and other fundamental rights. That guarantee cannot plausibly be given by the police services or other politically controlled bodies. Whether the same always holds true for public prosecutors is not entirely clear, however. In Öçelik the CJEU established that the Hungarian public prosecutor’s office under consideration could be regarded as a judicial authority for the purposes of the FDEAW. The precise powers and tasks of public prosecutor’s offices in other Member States may differ, however, and not all such offices may provide the procedural and fundamental rights guarantees that are required in order to satisfy the CJEU. Thus, in determining whether or not public prosecutors can be designated as a ‘judicial authority’ that is competent to issue EAWs, a case-by-case analysis seems to be necessary.

3. Time-limits

To accelerate the surrender of accused or convicted persons, the FDEAW prescribes certain time-limits. First, the executing authority must decide on execution within a period of 60 days. Second, the authorities of the executing and issuing Member States must agree on a date for the actual surrender, which must take place no later than ten days after the final decision on the
execution of the EAW. In practice, however, these time-limits are not always strictly adhered to. What then are the implications? Can an EAW possibly expire? What about fundamental rights and the right to liberty in particular? Can the requested persons be kept in detention after the expiration of the time-limits and, if so, for how long? The CJEU was faced with these very questions in *Lanigan* and *Vilkas.*

### A. Expiry of time limits for the decision to execute the EAW

*Lanigan* concerned an EAW that was issued by a British court seeking the arrest and surrender by Ireland of Mr Lanigan, who was accused of inter alia murder. Mr Lanigan was indeed arrested, but he opposed his surrender. After a series of ‘procedural incidents’, the competent Irish court concluded that close to two years had elapsed since Mr Lanigan’s arrest. As the time-limit for executing the EAW expired, the court turned to the CJEU to ascertain, first, whether it could still execute the EAW and, second, whether a person in the situation of Mr Lanigan could still be remanded in custody.

The CJEU held that as the expiry of the time-limit is not among the grounds for non-recognition under the FDEAW, the executing judicial authority could not be relieved from the duty to execute. Any other conclusion would run contrary to the FDEAW’s objective of accelerating and simplifying judicial cooperation. In particular, the issuing Member State could possibly be forced to issue a second EAW and the execution of EAWs could be obstructed by delaying tactics.

What did this mean for Mr Lanigan? Could he be kept in detention? The FDEAW provides that when a person is arrested on the basis of an EAW, the executing authority shall decide whether he should remain in custody in accordance with the law of the executing Member State. The person may be released, provided that the executing authority takes all the measures it deems necessary to prevent the person from absconding. In the CJEU’s view, this did not imply that once the time-limits have expired, the executing judicial authority must release that person. Such an interpretation would, according to the CJEU, hinder the aims of the FDEAW.

If the CJEU had left it at this, the outcome would have been undesirable. After the expiry of the time-limit, the duty to execute and surrender still exists and the FDEAW would offer no protection against indefinite detention without trial. Hence, the CJEU continued by holding that in taking the decision on the possible release of the requested person, the competent national authorities must respect the right to liberty and security of person, as guaranteed by the Charter. Referring to the relevant ‘Strasbourg’ case law, the CJEU held that the executing judicial authority may decide to hold the requested person in custody only insofar as the procedure for the execution of the EAW has been carried out in a sufficiently diligent manner and, thus, so long as the duration of the custody is not excessive.

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35. Articles 23(1) and (2) of the FDEAW.
36. Case C 237/15 PPU *Minister for Justice and Equality v. Francis Lanigan*, EU: C:2015:474, para. 37.
37. Ibid., para. 40-41.
38. Article 12 of the FDEAW.
39. Case C 237/15 PPU *Minister for Justice and Equality v. Francis Lanigan*, para. 45-52.
40. Compare, S. Peers, ‘Free at Last? Detention, the European Arrest Warrant and Julian Assange’, *EU law Analysis* (2016), http://eulawanalysis.blogspot.nl/2016/02/free-at-last-detention-european-arrest.html.
41. Article 6 of the European Union Charter of Fundamental Rights (the Charter).
42. ECtHR, *Quinn v. France*, Judgment of 22 March 1995, Application No. 18580/91; and ECtHR, *Gallardo Sanchez v. Italy*, Judgment of 24 March 2015, Application No. 11620/07, para. 40.
43. Case C 237/15 PPU *Minister for Justice and Equality v. Francis Lanigan*, para. 58.
In order to ensure that that is indeed the case, the executing judicial authority must carry out a concrete review of the situation. It must take into account all of the relevant factors, including the possible failure to act on the part of the authorities of the Member States concerned, any contribution of the requested person to that duration, the sentence that the requested person may face, the potential risk of that person absconding as well as the fact that he has been held in custody for a period, the total of which greatly exceeds the time-limits stipulated in the FDEAW. If the executing judicial authority concludes that the requested person’s custody should come to an end, it must attach to the provisional release of that person any measures that it deems necessary so as to prevent him from absconding and to ensure that the material conditions necessary for his effective surrender remain fulfilled for as long as no final decision on the execution of the EAW has been taken.

B. Expiry of the time-limits for the actual surrender

As was stated above, once the decision to execute an EAW has been taken, the authorities of the executing and the issuing Member State must agree on a date for the actual surrender within ten days. If the surrender is prevented by ‘circumstances beyond the control of any of the Member States’, then the authorities must immediately agree on a new date. In that event, the surrender shall take place within ten days of the new date being agreed. If these time-limits expire, and if the requested person is still remanded in custody, the FDEAW prescribes that he is to be released.

In Vilkas, the CJEU was faced with a case in which surrender had failed. Mr Vilkas was the subject of two EAWs issued by a Lithuanian court, which were to be executed by the Irish authorities. Mr Vilkas was put on a commercial flight, but he became agitated, aggressive and ultimately refused to board the plane. The pilot did not allow him on-board. Two weeks later, another attempt to surrender was made, but, for similar reasons, was unsuccessful. Thereupon, the Irish Minister of for Justice applied to the competent Irish court for a third attempt to surrender Mr Vilkas to the Lithuanian authorities, this time by sea and over land. That court refused and ordered his release. The Minister appealed this judgment before the Irish Court of Appeal, which subsequently decided to ask the CJEU whether the FDEAW allows for the agreement of a new surrender date where the first surrender failed because of the repeated resistance of a requested person like Mr Vilkas.

The CJEU concluded that where the reasons for a failed surrender are beyond the control of the Member States involved, new surrender dates may indeed be agreed upon. In fact, in order to achieve the FDEAW’s aim of establishing an effective surrender system, the Member States must do so.

The legal picture is different in cases where surrender fails, because, as in the case at hand, of the repeated resistance of the requested person. The CJEU established that ‘circumstances beyond the control of any of the Member States’ must be understood as referring to cases of force majeure. Citing settled case law, the CJEU defined this term as referring to ‘abnormal and unforeseeable

44. Ibid., para. 59.
45. Ibid., para. 60.
46. Ibid., para. 61.
47. Article 23(3) of the FDEAW.
48. Case C-640/15 Minister for Justice and Equality v. Tomas Vilkas, EU: C:2016:346, para. 25-33.
49. Ibid., para. 34-39.
50. Ibid., para. 45-52.
51. Case C-314/06 Société Pipeline Méditerranée et Rhône, EU: C:2007:817, para. 23; Case C-218/09 SGS Belgium and Others, EU: C:2010:152, para. 44; and Case C-99/12 Eurofit, EU: C:2013:487, para. 31.
circumstances which were outside the control of the party by whom it is pleaded and the consequences of which could not have been avoided in spite of the exercise of all due care’. Applying this general definition to the specific context of the EAW-system, the CJEU found it evident that the resistance to the surrender put up by someone like Mr Vilkas could be regarded as an ‘abnormal’ circumstance outside the control of the authorities concerned. However, it did not find that such resistance was ‘unforeseeable’. As Mr Vilkas had already resisted a first surrender attempt, his resistance against the second surrender attempt was foreseeable. The CJEU, however, left it to the referring national court to determine whether or not the resistance put up by someone like Mr Vilkas could actually have been foreseen or not, and whether the authorities concerned could have taken preventive measures. In case that court would conclude that there is situation of force majeure, the executing and issuing authorities must agree upon a new date for the surrender. In case the national court reaches the opposite conclusion, the authorities would remain obliged to execute the EAW. However, in such a case the requested person must, if he is still being remanded in custody, be released.

From a joint reading of Lanigan and Vilkas, one can conclude that the expiry of the time-limits contained in the FDEAW does not imply the expiration or the abandonment of the EAW. The duties to execute and to effectuate the surrender of the requested person remain unaffected. This, however, does not imply that the time-limits can be ignored without any consequences and respect for the right to liberty in particular. Where the delay in taking the final decision on execution or agreeing on a date for the surrender can be attributed to the authorities involved, the right to liberty may prevail over the goal of ensuring a speedy surrender.

4. Detention

In order to ensure that upon surrender the accused or convicted person will not be deprived of his liberty for a period longer than the one for which he has been sentenced, the FDEAW provides that the issuing Member State must deduct all periods that the person concerned has been in detention in the executing Member State from the total period to be served. What, however, must actually be understood by ‘detention’? Does this concept only cover imprisonment or perhaps also other measures such as, for example, curfew or duties to report regularly to the police or criminal law authorities?

That very question arose in the case of JZ. JZ was sentenced to a three year and two months custodial sentence in Poland. He absconded and an EAW was issued for his arrest. Several years later he was arrested in the United Kingdom. JZ was held in custody for one day and then released on bail. He was required, however, to stay at his residential address during the evenings, and in order ensure this he was subject to electronic monitoring. In addition, JZ had to report regularly to a police station, he was not entitled to apply for travel documents and he was obliged to keep his mobile phone switched on and charged at all times. After one year, he was surrendered to the Polish authorities. The competent Polish court wondered whether the measures to which JZ had been subject in the United Kingdom had to be regarded as ‘detention’ for the purposes of Article 26 of the EAWFD and thus whether it had to deduct, from the custodial sentence imposed on JZ, the period of almost one year during which these measures were applicable to him.

52. Case C-640/15 Minister for Justice and Equality v. Tomas Vilkas, para. 53 (emphasis added).
53. Ibid., para. 60.
54. Ibid., para. 73.
55. Article 26(1) of the FDEAW.
The CJEU noted that the terms ‘detention’ and ‘deprivation of liberty’ are used interchangeably throughout the FDEAW. The concepts are similar and evoke, in their ordinary meaning, a situation of confinement or imprisonment, and not merely a restriction of the freedom of movement. A person can be deprived of his liberty not only by imprisonment, but, in exceptional cases, also by other measures that are so restrictive that they must be treated, in the same way as imprisonment in the strict sense. Hence, the term ‘detention’ covers not only imprisonment but also any measure(s) imposed on the person concerned which, on account of the type, duration, effects and manner of implementation of the measure(s) in question have the effect of depriving the person concerned of his liberty in a way that is comparable to imprisonment. Furthermore, the CJEU pointed out that the ‘Strasbourg court’ has held that deprivation of liberty does not cover measures requiring the person concerned to report once a month to a monitoring police authority, to maintain contact with a hospital, to live in a specified place, not to leave the district in which he was residing and to stay at home between certain, specified times. From this, the CJEU concluded that the Polish court did not have to regard the measures imposed on JZ in the United Kingdom as a deprivation of liberty, even although it left that court free to offer ‘more generous’ treatment and to deduct the periods during which JZ was subject to these measures from the total period of the custodial sentence imposed on him.

5. FDEAW: grounds for non-execution

The FDEAW does not prescribe absolute mutual recognition. It provides for a series of exhaustively listed mandatory and optional grounds for non-execution. The latter include, amongst others, the absence of the requested person at his/her trial in the issuing Member State (this is known as in absentia and will be discussed further below in Section 5.A.), the fact that s/he is a national or resident of the executing Member State (Section 5.B.) and the fact that the act for which s/he is convicted in the issuing Member State does not constitute an offence under the law of the executing Member State (known as the ‘double criminality rule’, see below Section 5.C.).

A. In absentia convictions

1. Proceedings at first instance and appeal proceedings

The FDEAW stipulates that the executing judicial authority may refuse to execute an EAW that is issued for the purposes of executing a custodial sentence or detention order if the person did not

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56. Case C 294/16 PPU JZ v. Prokuratura Rejonowa Łódź – Śródmieście, EU: C:2016:610, para. 40.
57. Ibid., para. 44.
58. Ibid., para. 47.
59. ECtHR, Villa v. Italy, Judgment of 20 April 2014, Application No. 19675/06, para. 43 and 44.
60. Case C 294/16 PPU JZ v. Prokuratura Rejonowa Łódź – Śródmieście, para. 53-54.
61. Case C 388/08 PPU Criminal proceedings against Artur Leymann and Aleksei Pustovarov, EU: C:2008:669, para. 37.
62. These grounds concern, in brief, (i) offences covered by amnesty, (ii) persons who are serving or have already served a sentence for the same act and (iii) persons who cannot be held criminally accountable for the acts concerned because of their age. Article 3 of the FDEAW. As regards (iii), in the pending case Piotrowski, the CJEU has been asked whether Article 3 of the FDEAW opposes the surrender of minors or whether it allows this in case minors can be held criminally responsible from a certain age. Case C-367/16 Openbaar Ministerie v. Dawid Piotrowski, pending.
63. In addition, the FDEAW recognizes that execution may be made subject to certain conditions. See Article 5 of the FDEAW.
appear in person at the ‘trial resulting in the decision’. How should this concept be interpreted in situations in which the person concerned was convicted at first instance but subsequently seeks a re-trial or appeals the decision? Does the concept refer to the proceedings at first instance, to the appeal proceedings or perhaps to both?

The CJEU was faced with such questions in *Tupikas*. The Amsterdam District Court was asked to execute an EAW issued for a Lithuanian national, Mr Tupikas, who was sentenced to imprisonment for one year and four months by a Lithuanian court. Mr Tupikas had appeared in person at the trial at first instance, but the EAW did not reveal that the same also held true for the appeal proceedings. If the FDEAW only applies to proceedings at first instance, the Amsterdam District Court could have found that it had no other choice than to authorize the surrender of Mr Tupikas to Lithuania. If, however, the FDEAW is also applicable in the context of appeal proceedings, the Dutch Court would – under Dutch law – not be allowed to do so.

The CJEU held that the concept of ‘trial resulting in the decision’ must be understood as referring to the ‘proceeding that led to the judicial decision which finally sentenced’ the requested person. The CJEU cited the case law of the European Court of Human Rights (ECtHR) from which it follows that (i) the term ‘conviction’ refers to both a finding of guilt and the imposition of a penalty or other measure involving the deprivation of liberty, that (ii) fair trial requirements also apply to appeal proceedings, and that (iii) these requirements are not automatically fulfilled when the person concerned was present at the first instance proceedings, but not at the appeal proceedings. Consequently, so the CJEU established, the concept of ‘trial resulting in the decision’ refers to the appeal proceedings, provided that the court in question made a final ruling on the guilt of the person concerned and imposed a penalty on him, following an assessment, in fact and in law, of the incriminating and exculpatory evidence. The CJEU explained that it is the judicial decision that finally disposes of the case on the merits which is decisive for the person concerned. It is this decision that directly affects his personal situation with regard to the finding of guilt and, where appropriate, the determination of the custodial sentence to be served. Accordingly, it is at the appeal stage that the person concerned must be able to fully exercise his rights of defence. If at the first instance proceedings, defence rights were not fully respected, such a breach can be remedied at the appeal stage.

In *Zdziaszek*, the CJEU specified the conclusion that was drawn in *Tupikas*. In this case, the Amsterdam District Court was asked to execute a ‘Polish’ EAW which referred to a ‘cumulative sentence’ that combined various custodial sentences that were previously imposed on Mr Zdziaszek and lowered the overall sentence. Mr Zdziaszek had not appeared in person at the proceedings which resulted the cumulative sentence. The Amsterdam Court thus needed to know, whether these proceedings were covered by the concept of ‘trial resulting in the decision’. It had doubts on this issue because, according to Polish law, such proceedings cannot affect the finding of guilt and only involve the penalties or the sentences imposed on the person concerned.

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64. Case C-270/17 PPU *Openbaar Ministerie v. Tadas Tupikas*, EU: C:2017:628, para.74.
65. Ibid., para. 78, citing ECtHR, *Del Río Prada v. Spain*, Judgment of 21 October 2013, Application No. 42750/09, para. 123.
66. Ibid., para. 79, citing inter alia ECtHR, *Hokkeling v. Netherlands*, Judgment of 14 February 2017, Application No. 30749/12, para. 56 and 58.
67. Ibid., para. 80, citing ECtHR, *Hokkeling v. Netherlands*, para. 57, 58 and 61.
68. Ibid., para. 81-86.
The CJEU held that the proceedings were covered by the aforementioned concept contained in the FDEAW.\textsuperscript{69} It cited ECtHR case law according to which the right to a fair trial applies not only to the finding of guilt but also to the determination of the sentence,\textsuperscript{70} provided the proceedings for determining an overall sentence ‘are not a purely formal and arithmetic exercise but entail a margin of discretion in the determination of the level of the sentence, in particular, by taking account of the situation or personality of the person concerned, or of mitigating or aggravating circumstances’.\textsuperscript{71} It follows, so the CJEU held, that a judgment handing down a cumulative sentence, such as the one at hand, constitutes a ‘trial resulting in the decision’. Because such proceedings determine the final overall sentence to be served, the person concerned must be able to effectively exercise his rights of defence in order to favourably influence the decision to be taken in that regard. The fact that the new sentence may be lower or otherwise more favourable to the person concerned was irrelevant in this regard.\textsuperscript{72}

_Tupikas_ and _Zdziaszek_, read together, demonstrate that for FDEAW-purposes it is immaterial whether or not the requested person appeared in person at the first instance of the trial. What is decisive is that the requested person was present at the final instances of the procedure at which guilt was established and the ultimate sentence was determined. If these two issues are dealt with in separate proceedings, the requested person must have been present at each. If the executing authority establishes that this was indeed the case, it must execute the EAW. If this authority concludes otherwise, it cannot automatically refuse execution. Before doing so, it must verify whether one of the exceptions to the _in absentia_ ground for non-execution are applicable.

2. Exceptions

The FDEAW stipulates that the executing authority may refuse the execution of the EAW if the requested persons did not appear in person at trial, unless, in brief, s/he (i) in due time was summoned in person or was otherwise informed of the date and place of the trial, (ii) was defended by a legal counsellor, (iii) decided not to contest a previous conviction or (iv) is given the right to a retrial or appeal in the issuing Member State after surrender.\textsuperscript{73}

In _Dworzecki_, the CJEU was asked to clarify the precise meaning of the first of the four exceptions. Mr Dworzecki, a Polish national residing in the Netherlands, was convicted of a custodial sentence _in absentia_ by a Polish court. The Polish authorities had issued an EAW, but the competent Dutch court concluded from the EAW that Mr Dworzecki had not been summoned in person. Rather, the summons was collected by his grandfather. This was in accordance with Polish law, which states that if the accused person is not at home, a summons may be served on an

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\textsuperscript{69} The CJEU also confirmed _Tupikas_ by holding that the concept of the ‘trial resulting in the decision’ refers to appeal proceedings. The mere fact that the sentence imposed on appeal was subsequently amended could not alter that conclusion. Case C-271/17 PPU _Openbaar Ministerie v. Sławomir Andrzej Zdziaszek_, EU: C:2017:629, para. 76-82.

\textsuperscript{70} Ibid., para. 87, citing ECtHR, _Dementyev v. Russia_, Judgment of 28 November 2013, Application No. 43095/05, para. 23.

\textsuperscript{71} Ibid., para. 89 (quoting ECtHR, _Eckle v. Germany_, Judgment of 15 July 1982, Application No. 8130/78, para. 77, and 28 November 2013, _Dementyev v. Russia_, Judgment of 28 November 2013, Application No. 43095/05, para. 25 and 26).

\textsuperscript{72} Ibid., para. 90-92.

\textsuperscript{73} Article 4a of the FDEAW, as inserted by Framework Decision 2009/299/JHA on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24. The exceptions to the _in absentia_ ground for non-execution are exhaustive. Member States are not entitled to refuse execution in other cases or on other grounds, such as the impossibility of having an _in absentia_ conviction reviewed in the issuing Member State. Case C-399/11 _Stefano Melloni v. Ministerio Fiscal_, para. 40.
adult resident of his household on the condition that he or she undertakes to pass the summons to
the accused person. The Dutch court, however, observed that it was not clear that the grandfather
had actually handed over the summons to Mr Dworzecki and that Mr Dworzecki had been aware of
the date and place of the trial.

The CJEU clarified that the FDEAW requires that an accused person was informed of the date
and place of his trial so as to allow him to organize his defence effectively. The CJEU recognized
that the accused may also be informed of the date and place fixed for his trial by ‘other means’, but
it stressed that it must then be ‘unequivocally established’ that the accused was aware of the
scheduled trial.\(^74\) That guarantee does not exist in cases where the summons was handed over
to a third party who undertook to pass it on to the accused.\(^75\)

For the executing authority it may not always be so easy to establish that the requested person
was actually summoned in person and was indeed aware of the trial. The CJEU stressed that the
issuing judicial authority must include in the EAW, evidence on the basis of which it found that the
person concerned actually received official information relating to the date and place of his trial
and that this authority must, at the request of the executing authority, provide supplementary
information. The CJEU added that the executing authority is free to rely on other evidence or
circumstances, including circumstances of which it became aware when hearing the person con-
cerned. Account may be taken of, for example, the conduct or any manifest lack of diligence on the
part of the person concerned, notably where it transpires that he sought to avoid the service of the
information addressed to him. Likewise, the executing judicial authority may take into consider-
ation the fact that the national law of the issuing Member State may provide – as is the case in
Poland – for a right to request a retrial, where – as in this instance – summons may be handed over
to adult family members.\(^76\)

These last observations demonstrate that the CJEU takes the right to a fair trial right and the right
to be present at trial particularly seriously. In \(Zdziaszek\), this was phrased more generally and even
more firmly: the executing authority ‘cannot tolerate a breach of fundamental rights’.\(^77\) At the same
time, the CJEU has indicated that it does not allow the executing authority to take too much time. If
this authority has not obtained enough assurances with regard to the rights of the defence, it may\(^78\)
refuse execution of the FDEAW, but it remains bound by the time-limits that are imposed by the

\(^74\) Case C 108/16 PPU \textit{Paweł Dworzecki}, para. 32.
\(^75\) Ibid., para. 47.
\(^76\) Ibid., para. 48-53, as confirmed by the CJEU in Case C-271/17 PPU \textit{Openbaar Ministerie v. Slawomir Andrzej
Zdziaszek}, para. 107-108; and Case C-270/17 PPU, \textit{Openbaar Ministerie v. Tadas Tupikas}, para. 96-97.
\(^77\) Case C-271/17 PPU \textit{Openbaar Ministerie v. Slawomir Andrzej Zdziaszek}, para. 105.
\(^78\) The \textit{in absentia} ground for non-execution is optional in nature. The Dutch legislation under consideration in \textit{Dwor-
zecki, Tupikas} and \textit{Zdziaszek} rather stipulates that surrender is not permitted if the requested person has not appeared
in person at trial. In other words, the Dutch legislator seems to have chosen for a mandatory ground for non-execution. In
his Opinions in \textit{Tupikas} and \textit{Zdziaszek}, Advocate General Bot concluded that Dutch legislation implied an incorrect
implementation of the FDEAW as it did not seem to permit the executing authority to take into account all of the
relevant circumstances. Opinion of Advocate General Bot in Case C-271/17 PPU \textit{Openbaar Ministerie v. Slawomir
Andrzej Zdziaszek}, EU: C:2017:612, para. 104-11; and Opinion of Advocate General Bot in Case C-270/17 PPU
\textit{Openbaar Ministerie v. Tadas Tupikas}, EU: C:2017:609, para. 72-128. The CJEU did not expressly confirm the
Advocat General’s conclusion and merely stated that the FDEAW ‘does not prevent’ the executing authority from
taking into account all of the circumstances. Case C-271/17 PPU \textit{Openbaar Ministerie v. Slawomir Andrzej Zdziaszek},
para. 110; and Case C-270/17 PPU \textit{Openbaar Ministerie v. Tadas Tupikas}, para. 97.
FDEAW for executing EAWs. Freely translated, this seems to imply that the executing authority has, in principle, 60 days to check whether the defence rights of the requested person have been respected.

B. Nationals and residents of the executing state

The FDEAW has partly done away with the classic rule of ordinary extradition law which stipulates that states cannot be compelled to extradite their own nationals. An EAW can be issued regardless of the nationality of the requested person and must be executed, also when the person concerned is a national of the executing Member State. Member States cannot prevent prosecution and trial of their own nationals in other Member States. However, they do still have powers to avoid their nationals having to serve a custodial sentence or detention order in other Member States. In particular, execution may be refused if ‘the requested person is staying in, or is an national or resident of the executing Member State’ and that Member State ‘undertakes to execute the sentence or detention order’ imposed in the issuing Member State itself.\(^{79}\) The goal of this ground of non-execution is to increase the requested person’s chances of reintegrating into society when the sentence imposed on him expires.\(^{80}\)

The CJEU was asked to clarify the latter ground for refusal to execute in *Poplawski*.\(^{81}\) In this case, the Amsterdam District Court was asked to execute an EAW issued by a Polish court for a Polish national, Poplawski, who was residing in the Netherlands. The Amsterdam court had doubts as to whether it could refuse execution. Dutch law stipulates that the surrender of a Dutch national or a foreign national possessing a residence of indefinite duration is not permitted if that surrender is sought for the purposes of executing a custodial sentence. Refusal to execute is, however, under Dutch law subject to the conditions, first, that a Dutch prosecutor ‘is willing’ to execute the judgment on the basis of a convention between the Netherlands and the issuing state, in casu Poland, and, second, that the latter state makes a request to that effect. However, according to Polish law, no such request can be made where the requested person is a Polish national. Thus, as the Amsterdam Court observed, in a situation such as the one of Mr Poplawski, a refusal to surrender could lead to a situation of impunity. The Amsterdam Court turned to the CJEU to ascertain, in essence, whether the FDEAW allows for the application of a national rule according to which the refusal to execute a custodial sentence imposed on a resident by judicial authorities of another Member State is merely subject to the obligation that its own authorities are willing to take over the enforcement of the sentence.

The CJEU answered this question in the negative. It recognized that the executing judicial authority must have a certain margin of discretion as to the application of an optional ground for non-execution such as the one under consideration, so as to give weight to the possibility of increasing the requested person’s chances of reintegrating into society upon the expiry of the sentence.\(^{82}\) However, the CJEU also held that it quite clearly follows from the FDEAW that any refusal to execute an EAW requires an actual undertaking to execute the custodial sentence. The mere fact that the executing Member State declares itself ‘willing’ to execute the sentence does not suffice. That Member State must examine whether it is actually possible to execute the sentence in

\(^{79}\) Article 4(6) of the FDEAW.

\(^{80}\) Case C-42/11 *Proceedings concerning the execution of a European arrest warrant issued against João Pedro Lopes Da Silva Jorge*, EU: C:2012:517, para. 32.

\(^{81}\) Case C 579/15 *Openbaar Ministerie v. Daniel Adam Poplawski*.

\(^{82}\) Ibid., para. 21.
accordance with its domestic law. If this appears impossible, that Member State must execute the EAW and thus surrender the requested person to the issuing Member State.\(^{83}\)

**C. The double criminality rule**

To accelerate the surrender of an accused or a convicted person, the FDEAW has softened the so-called double criminality rule, as it exists under classic international extradition law. For a series of 32 offences,\(^{84}\) the executing authorities must authorize surrender even if the acts concerned do not constitute an offense under their own national law. For other offences, however, the executing authority is permitted to first verify that the act for which an EAW is issued also constitutes an offense under its own law\(^{85}\) and, if not, it must refuse to execute the EAW.\(^{86}\)

In A, the CJEU was asked to clarify this optional ground for non-execution. The case concerned an EAW issued by the competent Belgian authority for the surrender of A, who had been convicted of a custodial sentence of five years and whom was detained in the Netherlands. The Amsterdam District Court, the competent executing authority, had doubts as to whether it had to execute the EAW. A had

\(^{83}\) Ibid., para. 22-23.

\(^{84}\) The offences must be defined by the law of the issuing Member State and punishable under that law by a custodial sentence or detention order of at least three years: Article 2(2) of the FDEAW. On Article 2(2), see also the pending case Akarsar in which the CJEU is asked whether a Member State may refuse to execute a European arrest warrant concerning the execution of a custodial sentence which was passed as a combined sentence for a number of offences, when one of those offences does not constitute an offence under the law of the executing Member State and it is not possible in the issuing Member State to order that the sentence be split. Case C-148/16 Riksåklagaren v. Zenon Robert Akarsar, pending.

\(^{85}\) The double criminality requirement permits the executing State to make the execution of an EAW subject to the condition that the acts concerned also constitute an offence under its own laws ‘whatever the constituent elements or however it is described’. In Grundza, the CJEU clarified the identically phrased ground for non-execution contained in the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008] OJ L 327/27 (FDCS). The case involved a Slovak national who was sentenced in the Czech Republic to imprisonment for 15 months for, amongst other things, ‘obstructing the implementation of an official decision’, implying more concretely breaching a temporary ban on driving imposed on him by a Czech court. The competent Czech court requested the judgment against Mr Grundza to be recognized, and for the sentence to be served in Slovakia. The executing Slovak authority, however, had doubts as whether or not it was bound to execute the warrant. Slovak criminal law does include the offence ‘thwarting the implementation of an official decision’, but explicitly refers in this regard to decisions of Slovak courts or bodies. As Mr Grundza had obstructed the decision of a Czech and not a Slovak body, the act concerned did not qualify as an offense under Slovakian law. The CJEU made clear, however, that this could not relieve the Slovak authorities from its duty to recognize and enforce the sentence. In brief, it held that the double criminality requirement must be interpreted strictly, as it constitutes an exception to the general rule of recognition and enforcement of judgments. Accordingly, the requirement demands from the executing Slovak authority court to ascertain that if the factual elements underlying the offense were present in Slovakia – so, if Mr Grundza had been driving a motor vehicle in Slovakia in breach of a ban imposed by a Slovak court – he would also be subject to a criminal sanction. Case C-289/15 Criminal proceedings against Jozef Grundza, EU: C:2017:4, para. 46-54.

On the FDCS see also the rulings in Case C-554/14 Criminal proceedings against Atanas Ognyanov, EU: C:2016:835 (holding that the executing Member State is not permitted to grant the sentenced person a reduction in their sentence by reason of work that he carried out during the period of his detention in the issuing Member State, where no such reduction in sentence was granted by the authorities of the issuing Member State) and Case C-182/15 Criminal proceedings against Gerrit van Vemde, EU: C:2017:37 (holding that Article 28(2) of the FDCS, which allows Member States to make a declaration indicating that they will continue to apply existing rules on the transfer of sentenced persons rather than the FDCS for a certain period of time, only applies to judgments which become final before the date specified by that Member State).

\(^{86}\) Article 4(1) read together with Article 2(4) of the FDEAW.
been convicted in Belgium for intentional assault and battery of a spouse as well as possession of a prohibited weapon. These offenses, which are not on the ‘list of the 32 crimes’, constitute criminal offenses in both Belgium and the Netherlands. Dutch law, however, stipulates that surrender is only allowed when the requested person has committed an act that is punishable under the law of both the issuing state and in the Netherlands by a maximum custodial sentence of at least 12 months. Under Dutch law, the offence of carrying a prohibited weapon is punishable only by a fine. The Amsterdam court wondered, and it asked the CJEU, whether the execution of an EAW may be made subject to a double criminality requirement and to the condition that the offence concerned is punishable under the law of the executing Member State by a custodial sentence of a maximum of at least 12 months.

In the CJEU’s view, no reasonable doubt existed as to the correct answer. The FDEAW establishes that the executing authority may refuse to execute an EAW for certain acts that do not constitute an offence under the law that that authority applies. That option, however, does not extend to acts that do constitute an offence. Hence, the FDEAW does not leave room for a rule, such as the Dutch one under consideration, that in addition to double criminality requires a minimum custodial sentence. The CJEU explained that this conclusion was corroborated by the fact that under the FDEAW, criminal prosecutions or the execution of sentences for which an EAW is issued are conducted in accordance with the rules of the issuing Member State. The FDEAW does not take account of the level of punishment in the executing Member States and, this, so the CJEU held, contributes to ensuring the free movement of judicial decisions in criminal matters within the AFSJ.

6. Breach of fundamental rights: an unwritten ground for non-execution?

The grounds for non-execution contained in the FDEAW do not capture all violations of fundamental rights. Does this imply that Member States may have to execute an EAW even if it is plain that the requested person, upon surrender, will or may face such violations?

As was noted in Section 1, in the view of the drafters of the FDEAW the answer would be clear: yes. They did not make full compliance with fundamental rights a sine qua non for the application of the EAW system.

Initially, the CJEU gave the same answer. It confirmed that the execution of an EAW may only be refused on grounds mentioned in the FDEAW. More specifically, in Radu the CJEU held that a breach of a fundamental right (in casu, the right to be heard) that is recognized by EU law but not included in the FDEAW, cannot justify non-execution. The same, so the CJEU held in Melloni, holds true for a fundamental right that is guaranteed by national constitutional law but not stipulated in the text of the FDEAW.

87. Therefore, the CJEU made use of the possibility (Article 99 of the CJEU Rules of Procedure) to answer this question not by judgment but by a reasoned order. Case C 463/15 PPU Openbaar Ministerie v. A, EU: C:2015:634, para. 21-22.
88. Ibid., para. 24-25.
89. Ibid., para. 29-30
90. Case C-396/11 Ciprian Vasile Radu, para. 36-42.
91. Case C-399/11 Stefano Melloni v. Ministerio Fiscal, para. 61-64. On this ruling see e.g. V. Mitsilegas, ‘The Symbiotic Relationship between Mutual trust and Fundamental Rights in Europe’s Area of Criminal Justice’, 7 New Journal of European Criminal Law (2015), p. 457-481; A. Torres Pérez, ‘Melloni in Three Acts: From Dialogue to Monologue’, 10 European Constitutional law Review (2014), p. 308-331, 327-328; L. Besselink, ‘The Parameters of Constitutional Conflict after Melloni’, 39 European Law Review (2014), p. 531-552 and M. de Visser, ‘Dealing with Divergences in Fundamental Rights Standards – Case C-399/11 Stefano Melloni v. Ministerio Fiscal, Judgement (Grand Chamber) of 26 February 2013, Not Yet Reported’, 20 Maastricht Journal of European and Comparative Law (2013), p. 576-588. For a call for more
However, the ruling in the asylum case *N.S.* and Opinion 2/13 on the EU’s accession to the ECHR suggested a change in the CJEU’s approach vis-à-vis mutual trust and recognition. In *N.S.*, the CJEU held that national courts may not transfer an asylum seeker to the ‘Member State responsible’ where they ‘cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment’.

In Opinion 2/13, the CJEU confirmed that Member States must assume that other Member States comply with EU fundamental rights and that they may not, save in exceptional circumstances, check whether another Member State has actually, in a specific case, observed EU fundamental rights.

Did this imply that the CJEU might be willing to accept that a breach of fundamental rights may, in exceptional circumstances, be an additional and unwritten ground for the non-execution of EAWs? This was the core question that was referred to the CJEU in *Aranyosi and Căldăru*.94

### A. Aranyosi and Căldăru

*Aranyosi* concerned an EAW issued in Hungary seeking the surrender of a Romanian national who was accused of forced entry into a dwelling house and for theft. In *Căldăru*, a Romanian court issued an EAW for a Romanian national who had been convicted for driving without a driving licence. Both Mr Aranyosi and Mr Căldăru were arrested in Germany and in both cases the executing judicial authority had doubts as to whether the EAWs had to be executed. The reason for this consisted of evidence pertaining to the conditions in prisons in Hungary and Romania that were contrary to an individual’s human rights, and the right not to be subjected to inhuman and degrading treatment in particular, as the ECtHR had already established.95 The German court sought the guidance of the CJEU on how to proceed with the matter.

The CJEU confirmed that executing judicial authorities must execute EAWs, except in cases of expressly recognized grounds of non-execution.96 However, citing Opinion 2/13 and indirectly referring to the *N.S.* ruling concerning the Dublin-asylum system, the CJEU indeed recognized that

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92. Joined Cases C-411/10 and C-493/10 *N.S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU: C:2011:865, para. 94.

93. Opinion 2/13 on the *Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, para. 191-192.

94. Prior to *Aranyosi and Căldăru*, the CJEU had managed to avoid addressing the issue in *Radu*. Mr Radu had opposed his surrender arguing that he had not been heard before the EAW was issued. The competent national court asked the CJEU, in general terms, whether an executing judicial authority can refuse execution where the requested person’s fundamental rights, as mentioned in the EUCFR, are infringed. The CJEU limited itself, however, to dealing with the infringement of the right to be heard. As the FDEAW does not recognize the violation of this right as a ground for non-execution, the CJEU required the EAW at issue to be executed. Any other conclusion, so the CJEU observed, would inevitably lead to the failure of the EAW-system. Case C-396/11 *Ciprian Vasile Radu*, para. 36-42.

95. As regards Hungary, see, *ECtHR, Varga and Others v. Hungary*, Judgment of 10 March 2015, Application Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13. As regards Romania, see, *ECtHR, Vociu v. Romania*, Judgment of 10 June 2014, Application No. 22015/10; *ECtHR, Bujorean v. Romania*, Judgment of 10 June 2014, Application No. 13054/12; *ECtHR, Constantin Aurelian Burlacu v. Romania*, Judgment of 10 June 2014, Application No. 51318/12 and *ECtHR, Mihai Laurenţiu Marin v. Romania*, Judgment of 10 June 2014, Application No. 79857/12.

96. Joined Cases C-404/15 and C-659/15 *PPU Pál Aranyosi and Robert Căldăru*, EU: C:2016:198, para. 75-81.
in ‘exceptional circumstances’, limitations to the principles of mutual recognition and mutual trust can be made. The CJEU referred to the prohibition of inhuman or degrading treatment or punishment, which is absolute in that it is closely linked to respect for human dignity.\(^{97}\) It follows, so the CJEU held, that where the executing judicial authority is in possession of ‘evidence of a real risk of inhuman or degrading treatment’ of individuals detained in the issuing Member State, that authority is bound to assess the existence of that risk, having regard to the standard of protection of EU fundamental rights. The execution of an EAW must not result in the requested person suffering inhuman or degrading treatment.\(^{98}\)

In assessing this risk, the CJEU required from the executing judicial authority to engage in a two-step analysis. The first step concerned an assessment of the detention conditions in the issuing Member State in general. The executing judicial authority must rely on ‘general, reliable, specific and properly updated information’ on the detention conditions in the issuing Member State in order to establish whether or not there are deficiencies, which may be systemic or generalized, or which may affect certain groups of persons or certain places of detention. That information may be obtained from judgments of the Strasbourg court or other international courts, courts in the issuing Member State as well as decisions, reports or other documents produced by the Council of Europe or under the aegis of the United Nations.\(^{99}\)

If the executing judicial authority concludes that there are general or systemic deficiencies, it must be proceed with the second step, which entails an assessment of the risk that the requested person himself will actually be exposed to inhuman or degrading treatment.\(^{100}\) The executing authority must ask the issuing national authority to provide, as a matter of urgency, all the necessary supplementary information on the conditions under which the person concerned will be detained.\(^{101}\) If, in the light of the information received, the executing authority finds that there is a risk that the requested person may indeed face inhuman or degrading treatment, it must postpone the execution of the EAW until it receives information that the risk allows it to discount the existence of such a risk.\(^{102}\) If this cannot be done within a reasonable period of time, the executing authority, so the CJEU held with reference to Lanigan, may only hold the person concerned in custody insofar as the duration of detention is not excessive.\(^{103}\)

**B. Comments**

*Aranyosi and Căldăraru* is a breakthrough judgment: the breach of a Charter right may in itself be a ground for postponement and, ultimately, for the non-execution of an EAW. In addition to the ones foreseen and recognized by the EU legislature, there are situations in which fundamental rights protection must prevail over the goals of fighting crime and ensuring the speedy surrender of accused or convicted persons. Mutual trust does not imply blind trust. At the same time, it is clear that *Aranyosi and Căldăraru* cannot be read as having introduced a general fundamental rights clause, prohibiting the execution and surrender whenever a breach of Charter rights in the issuing

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97. Ibid., para. 85.
98. Ibid., para. 88.
99. Ibid., para. 89.
100. Ibid., para. 91-94.
101. Ibid., para. 95-97.
102. Ibid., para. 98 and 103.
103. Ibid., para. 100.
Member State can be established. The scope of the rule of reason-like exception introduced by *Aranyosi and Căldăruț* is limited, albeit its precise contours are still not entirely clear.

The CJEU only expressed itself on the prohibition of inhuman and degrading treatment, which, as it emphasized, is absolute in nature as it is linked to human dignity. This suggests that only an infringement of this right, and perhaps a few other absolute rights, can justify the non-execution of an EAW. No certainty exists though. One cannot exclude the possibility that a breach of non-absolute rights, such as the right to family life, the rights of the child or the right to a fair trial, may justify non-execution as well. The intensity or the seriousness of the breach may play a role here.

Furthermore, the CJEU only permits the postponement of the execution of an EAW when there is evidence of a ‘real risk’ of inhuman or degrading treatment of individuals detained in the issuing Member State, ‘having regard to the standard of protection of fundamental rights guaranteed by EU law’. From this one may deduce, first, that only the fundamental rights situation in the issuing Member State is relevant and not, as Advocate General Bot had suggested in his Opinion, the nature of the crime the requested person is accused of having committed or for which he has already been found guilty. If this reading of *Aranyosi and Căldăruț* is correct, the conclusion is that not only a person found guilty for driving without a valid driving license, but also a convicted terrorist can be subjected to inhuman or degrading treatment, and thus rightfully oppose surrender. Second, it follows from the ruling that whether or not there is a risk of inhuman or degrading treatment must be assessed on the basis of EU standards, and not on the basis of national constitutional standards applicable in either the issuing Member State or the executing Member State. *Melloni* still stands, as the CJEU expressly confirmed.

The CJEU further demands from the judicial authority in the executing Member State to, first, judge the general conditions of detention in the issuing Member State and, then, to assess whether the individual concerned will be exposed to the risk of inhuman or degrading treatment. The focus thus must ultimately be on the individual and the risk s/he might face. It is not clear whether the first step of the analysis must always be followed. In other words, if the executing judicial authority finds no evidence of generalized or systemic fundamental rights breaches in the issuing Member State, does this imply that it can or must stop his analysis and conclude that the individual concerned will not be exposed to inhuman or degrading treatment? For example, if no such evidence is found, but the executing authority does possess information giving it reason to believe that the surrender of a requested person with a particularly serious mental or physical illness will result in a risk of a significant deterioration in the state of his health of the person concerned, would execution of the EAW constitute inhuman and degrading treatment? In such a situation, should the EAW be executed or not?

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104. Compare, S. Prechal, ‘Mutual trust before the Court of Justice of the European Union’, 2 European Papers (2017), p. 75-92, 88.
105. Compare, G. Anagnostaras, ‘Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: *Aranyosi and Căldăruț*, 53 Common Market Law Review (2016), p. 1675-1704, 1691; and Opinion of Advocate General Sharpston in Case C-393/11 Ciprian Vasile Radu, EU: C:2012:648, para. 82 (observing that breaches of the right to a fair trial of accused persons that are so severe that they deprive a trial of all its fairness may also be a ground for non-execution).
106. Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăruț*, para. 88.
107. Opinion of Advocate General Bot in Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăruț*, EU: C:2016:198, para. 75-81.
108. Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăruț*, para. 88.
109. The recent ruling in the asylum case *C.K.* suggests an affirmative answer to this question. Case C-578/16 PPU *C.K. and Others v. Republika Slovenija*, EU: C:2017:127. Compare also ECtHR, *Tarakhel v. Switzerland*, Judgment of 4 November 2014, Application No. 292117/12.
Aranyosi and Căldăraru is likely to trigger more preliminary rulings on the precise meaning of the duties that the CJEU has imposed on national courts. One preliminary reference has already been made. The same national court that referred questions in Aranyosi and Căldăraru has asked the CJEU whether it must assess the conditions of detention only in the first prison in which the requested person will be imprisoned following his surrender to the issuing Member State or also the conditions in the prison to which he may subsequently be relocated.\textsuperscript{110}

7. The EAW system and extradition to third countries

The EAW system only governs judicial cooperation among the Member States. The surrender of accused or convicted persons from EU Member States to third countries still is governed by national law and international extradition agreements. The ruling in Petruhhin, however, demonstrates that the FDEAW does play a role in situations whereby a Member State is asked to extradite an EU citizen to a third country.

The case involved an Estonian citizen, Mr Petruhhin, who was made the subject of a priority Red Notice on Interpol’s website and whom was subsequently arrested and remanded in custody in Latvia. The Latvian authorities received an extradition request from Russia, which the competent public prosecutor decided to honour. Mr Petruhhin opposed his extradition. Since Latvian law prohibits the extradition of Latvian citizens to a foreign country, extraditing him to Russia would imply discrimination on grounds of nationality that is contrary to EU law. The Latvian court appeared quite sympathetic to this argument. It considered the lack of protection of a national of a Member State Union against extradition from another Member State to a third country to be ‘contrary to the essence of citizenship of the Union’.\textsuperscript{111} The court turned to the CJEU to find out whether the TFEU opposes extradition in a situation such as the one under consideration.

In his Opinion, Advocate General Bot asserted that the Treaty does not do so.\textsuperscript{112} He accepted that an EU citizen like Mr Petruhhin who has moved to another Member State is entitled to be treated on the same footing as nationals of the host Member State, even in relation to extradition to third countries. However, in the Advocate General’s view, Mr Petruhhin would not be discriminated against as he would not find himself in a comparable situation to Latvian nationals. As regards the latter, the maxim aut dedere aut judicare, which is meant to combat impunity when the accused is located abroad, applies: Latvia must either extradite, or prosecute a Latvian national itself. That maxim, however, cannot be extended and applied to someone like Mr Petruhhin as, under Latvian law, only Latvians and Latvian residents can be prosecuted in Latvia for a crime that has allegedly been committed in Russia. Hence, in order to avoid impunity, Latvia would only have one option and that was to extradite him to Russia.

The CJEU did not follow its Advocate General. Remaining silent on the issue of comparable situations, it held that the unequal treatment of Latvian and non-Latvian nationals as regards extradition to a third country gives rise to a restriction on the freedom of movement within the Union.\textsuperscript{113} Such a restriction can only be justified by the objective of ‘preventing the risk of impunity’ that the extradition indeed seeks to achieve.\textsuperscript{114} The CJEU continued, however, by exploring whether

\textsuperscript{110} Case C-496/16 Criminal proceedings against Pál Aranyosi, pending (Aranyosi II).

\textsuperscript{111} Case C-182/15 Aleksei Petruhhin, EU: C:2016:630, para. 16.

\textsuperscript{112} Opinion of Advocate General Bot in Case C-182/15 Aleksei Petruhhin, EU: C:2016:330, para. 53-70.

\textsuperscript{113} Case C-182/15 Aleksei Petruhhin, para. 33.

\textsuperscript{114} Ibid., para. 34-39.
there were no alternative measures that could achieve that impunity aim in an equally effective manner, but that are less prejudicial to the exercise of free movement rights within the Union. The CJEU indeed found that such alternative measures exist. Referring inter alia to the principle of sincere cooperation\textsuperscript{115} and the EAW-system, it held that a Member State (like Latvia) that has received an extradition request from a third country for a national of another Member State (Estonia), can and must inform the latter Member State of the request and give it the opportunity to prosecute the person concerned. If the competent authorities of that other Member State have jurisdiction to commence criminal proceedings for crimes that its own nationals may have committed abroad, it has the opportunity to issue an EAW so as to seek the surrender of the requested person.\textsuperscript{116}

So, in essence, the CJEU ordered Latvia to first give Estonia the opportunity to commence criminal proceedings. If Estonia does not do so, then Latvia may proceed with extradition to a third country, in casu Russia. In doing so, however, a Member State like Latvia must observe the Charter, and in particular the right of anyone not to be ‘removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’.\textsuperscript{117} The CJEU required from a Member State like Latvia to verify that an extradition would not prejudice these rights. That verification must entail more than checking whether the third country in question is a party to the ECHR or has acceded to other human rights treaties. Where ‘reliable sources’ have reported practices that are at odds with human rights, the Member State must assess whether there is a risk of inhuman or degrading treatment in the state that has requested extradition. Referring to \textit{Aranyosi and Căldărașu}, the CJEU held that that assessment must be premised on ‘general, reliable, specific and properly updated information’ and that such information may be obtained from ECtHR or other judgments from international tribunals, courts in the requesting third country or decisions, reports or other documents produced by the Council of Europe or under the aegis of the United Nations.\textsuperscript{118}

\textit{Petruhhin} teaches us that EU law imposes on Member States, two duties before they can extradite a national of another Member State to a third country. First, they must approach and invite the Member State of which the requested person is a national to commence criminal proceedings. This is important as it may imply that a Union citizen will be prosecuted in his own Member State, be able to defend himself in his own language and be detained at a place that is closer to family and friends.\textsuperscript{119} More generally, the priority given to EAWs to extradition requests from third countries strengthens the notion of the AFSJ as a common area in which accused or convicted persons remain protected by EU fundamental rights protection rather than the protection offered in the third country concerned. Second, if the other Member State decides not to prosecute, Member States must proactively verify whether extradition will lead to inhuman or degrading treatment in the third country concerned. That duty, however, does not reach as far as the duty that the CJEU recognized in \textit{Aranyosi and Căldărașu}. The CJEU only seems to require such verification if the requested Member State is already in possession of evidence of a real risk of degrading

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115. Article 4(3) TFEU.
116. Ibid., para. 42-50.
117. Article 19(2) of the Charter.
118. Case C-182/15 \textit{Aleksei Petruhhin}, para. 56-60.
119. See, S. Peers, ‘Extradition to Non-EU Countries: the Limits Imposed by EU Citizenship’, \textit{EU Law Analysis} (2016), http://eulawanalysis.blogspot.nl.
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or inhuman treatment. Moreover, the CJEU does not require from that Member State to approach the third country concerned and to ask it for all the information necessary to establish the implications of surrender for the individual concerned.

_Petruhhin_ triggers lots of new questions, some of which have already been referred to the CJEU. For example, is the duty to first assess the fundamental rights situation in a third country limited to the risk of the requested person being subjected to the death penalty, torture or any other inhuman or degrading treatment or punishment? Or should the executing authority also check whether fair trial standards are observed and, if so, should these then be EU standards or international human rights standards? Does or do to what extent should that authority taken into consideration the ne bis in idem rule? Furthermore, to what extent do the conclusions drawn in _Petruhhin_ extend to third countries with which the Union itself has concluded extradition agreements, such as the United States?

8. Concluding remarks

From its inception, the EAW system has triggered debate because of its alleged lack of sufficient fundamental rights protection. Initially, the CJEU did not seem particularly sensitive to the critique it received and, like the EU political institutions, rather seemed to have an eye on ensuring the effectiveness of the EAW system as a whole.

The cases discussed in this article, however, reveal an upward trend. The CJEU now gives more weight to fundamental rights, which are visible in various ways throughout the case law. First, although the CJEU does not mention them explicitly, fundamental rights may be pervading its reasoning or interpretation of provisions of the FDEAW. Fundamental rights produce such a ‘shadow effect’, for example, in those cases in which the CJEU interpreted concepts like ‘EAW’ (Bob-Dogi), ‘judicial authority’ (Poltorak, Kovalkovas, Özcelik) or ‘trial resulting in the decision’ (Tupikas, Zdíaszek). Second, the CJEU uses fundamental rights as a tool for interpreting the FDEAW. This holds true for cases concerning situations in which the FDEAW allows national authorities to deprive the person for whom an EAW is issued to be deprived of their liberty (Lanigan, JZ) or not to execute an EAW on the ground that fair trial rights are not respected (Tupikas, Zdíaszek). Third, fundamental rights may serve as a separate ground for the possible suspension or non-execution of EAWs (Aranyosi and Căldăraru) or for refusing extradition to a third country (Petruhhin).

One may safely assume that the CJEU will continue to use Charter rights when interpreting the FDEAW, be it either covertly or overtly. It is far less certain whether the CJEU will build on Aranyosi and Căldăraru and leave executing authorities with much room for the non-execution of EAWs on the ground of fundamental rights violations. An important reason for this is that the CJEU is not, and does

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120. See further, A. Klip, ‘Europeans First!: Petruhhin, an Unexpected Revolution in EU Extradition Law’, 25 European Journal of Crime, Criminal Law and Criminal Justice (2017), p. 195-204; and V.H. Glerum, ‘Bescherming van een Onderdaan van een andere Lidstaat tegenuitlevering naar Rusland – Zaak C-182/15 Aleksei Petruhhin’, SEW – Tijdschrift voor Europees en Economisch Recht (2016), p. 277-281.

121. See, Case C-473/15 Peter Schotthöfer & Florian Steiner GbR v. Eugen Adelsmayr, pending.

122. Agreement on extradition between the European Union and the United States of America, [2003] OJ L 181/27. See Case C-191/16 Romano Pisciotto v. Bundesrepublik Deutschland, pending.

123. Compare, C. Barnard, ‘The Charter, the Court – and the Crisis’, University of Cambridge Faculty of Law: Legal Studies Research Papers No. 18/2013 (2013), https://www.law.cam.ac.uk/press/news/2013/08/legal-studies-research-paper-series-vol-4-no-6/2310, p. 2.
not consider itself,\textsuperscript{124} to be the sole (and not even the prime) protector of such rights. The EU legislature has a role to play too. First, the case law reveals that, in the view of the CJEU, it is in principle for the EU legislature to determine on which grounds or in which situations the execution of EAWs in furtherance of the principle of mutual recognition may be refused. Second, the EU legislature can pursue the goals of simultaneously ensuring the effectiveness of the EAWs and protecting fundamental rights by adopting legislative acts that harmonize certain aspects of criminal law or procedures. In recent years the EU legislature has indeed adopted a series of such ‘trust enhancing’ pieces of legislation on topics like the right to access a lawyer, the rights to information, interpretation and translation in criminal proceedings,\textsuperscript{125} the presumption of innocence\textsuperscript{126} and the gathering of evidence.\textsuperscript{127} Such harmonization measures promote mutual trust, and thus decrease the need for exceptions to the mutual recognition of judicial decisions within the framework of the FDEAW.

Thus, although fundamental rights appear to play an increasingly important role in the case law, this does not imply that the CJEU assumes prime responsibility for the protection of such rights. On the contrary, it leaves it up to the EU legislature to strike an adequate balance between ensuring the effectiveness of the FDEAW system and protecting fundamental rights. The CJEU leaves the legislature with a ‘margin of appreciation’\textsuperscript{128} and will probably only intervene and assume responsibility in exceptional circumstances.

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\textsuperscript{124} Compare, K. Lenaerts, ‘La Vie après L’Avis: Exploring the Principle of Mutual (Yet not Blind) Trust’, 54 Common Market Law Review (2017), p. 805-840.
\textsuperscript{125} Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, [2010] OJ L 280/1; and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, [2012] OJ L 142/1. On these instruments see, Case C-25/15 Proceedings brought by István Balogh, EU: C:2016:423 (holding that Directive 2010/64 is not applicable to a national special procedure for the recognition of a final judicial decision of a court of another Member State convicting a person for the commission of an offence); Case C 216/14 Gavril Covaci, EU: C:2015:686 (holding, in brief, that (i) Directive 2010/64 only provides for a right to have ‘essential documents’ translated and that (ii) Directive 2012/13, in principle, does not object to a national rule according to which an accused person not residing in the Member State concerned must appoint a person authorized to the accept service of a penalty order) and Joined Cases C-124/16, C-188/16 and C-213/16 Criminal proceedings against Ianos Tranca and Others, EU: C:2017:228 (confirming and specifying the conclusions drawn in Covaci as regards Directive 2012/13). See also Case C 278/16 Criminal proceedings against Frank Sleutjes in which the CJEU held that an order imposing sanctions in relation to minor offences and delivered by a judge following a simplified unilateral procedure is to be classified as an ‘essential document’ in criminal proceedings which, pursuant to Article 3 of Directive 2010/64, must be translated if the person to whom it is addressed does not understand the language of the proceedings. Case C-278/16 Criminal proceedings against Frank Sleutjes, EU: C:2017:366.
\textsuperscript{126} Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, [2016] OJ L 65/1, as interpreted in Case C-439/16 PPU Criminal proceedings against Emil Milev, EU: C:2016:818 (holding that national courts are, until the expiry of Directive 2016/43 on 1 April 2018, not obliged to ‘pro-actively’ interpret national law in light of the directive and merely required to refrain as far as possible from interpreting domestic law in a manner which might seriously compromise the attainment of the objective pursued by directive).
\textsuperscript{127} Directive 2014/41/EU of the European Parliament and the Council of 3 April 2014 regarding the European Investigation Order in Criminal Matters, [2014] OJ L 130/1.
\textsuperscript{128} Compare, M. Dawson, The Governance of EU Fundamental Rights (Cambridge University Press, 2017), Chapter 2.
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