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"The principle of mutual trust and fundamental rights protection in the execution of the European Arrest Warrant: Current issues and the way forward"

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
BVerfG	German Federal Constitutional Court
CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
EAW FD	Framework Decision on the European arrest warrant and the surrender procedures between Member States
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EIO	European Investigation Order
EU	European Union
IRG	German Implementing Law
IRK	International Legal Aid Chamber of the Amsterdam District Court
KRS	Polish National Council of the Judiciary
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union

PREFACE

The present dissertation aims to provide a critical overview of the uneasy relationship between, on the one hand, the principle of mutual trust as the bedrock of interstate cooperation in the European Area of Freedom, Security and Justice and, on the other hand, the protection of fundamental rights as core values that are integral to the European project. Essentially, the parameters of this relationship are not approached on a simple theoretical basis, but are rather explored in the light of their practical manifestation in the context of the European Arrest Warrant, the first and most symbolic measure applying mutual recognition in European criminal matters. Although in its almost two decades of operation the European Arrest Warrant has been hailed as an overall success, the instrument's unaltered focus on crime control has provoked worrying signals for the protection of the fundamental rights of the surrendered individual, the latter progressively conceived as a holder of rights with an inextricable role in the surrender procedure rather than as a mere tool to meet law enforcement aims. As the effective, on the ground protection of fundamental rights and principles serves as a prerequisite for genuine trust, legitimacy, and the ultimate survival of effective cooperation based on mutual recognition, the optimal co-existence and parallel promotion of these two *prima facie* conflicting interests is not only desirable, but necessary; hence the need to examine their mutual interaction in the context of current challenges and developments in the European area of criminal justice.

The introduction to the dissertation seeks to provide an insight into the ambiguous notion of mutual trust and its gradual embedment as the core, precondition principle for the mutual recognition-based system of cooperation in criminal matters. In particular, the complexity and distinctive characteristics of this system are outlined, taking into account the origins and historical development of European criminal law as well as the inevitable tension between the almost automatic, state-oriented recognition and execution of foreign judicial decisions and the protection of fundamental rights. On this premise, the main body of the dissertation is divided in *two parts*: the *first part* highlights the evolutionary path of the judicial conceptualization of mutual trust and its relationship with fundamental rights protection in the execution of the European Arrest Warrant, while the *second part* elaborates on the detailed application of the Court's narrative in two entirely different contexts, namely under the prism of absolute and non-absolute fundamental rights infringements.

More specifically, the *first part* traces the apex and the last episode of the Court's saga on mutual trust in criminal matters; from the initial premise of an almost absolute obligation to recognize and execute foreign judicial decisions, the Court has progressively moved towards a more lenient approach, accepting the possibility, although in exceptional circumstances, of rebutting the presumption of mutual trust in the defence of fundamental rights. The *first part* attributes this paradigm shift on the process of constructive judicial dialogue and external pressure, rather than on the Court's own realization of the need to rebalance enforcement demands with rights protection. In the same vein, the *second part* complements the preceding analysis by elaborating on the "two-tier test" employed by the Court in two distinct sets of factual circumstances. As the same approach seems to be followed, both for violations of the right against inhuman or degrading treatment and for violations of fair trial rights amidst the current rule of law crisis, the *second part* will discuss the practical challenges and, ultimately, the workability of the Court's

narrative in the light of the present challenging background of European integration. The main part will be followed by conclusions concerning the need to re-conceptualize the notion of mutual trust and its parameters, focusing on the available trust building mechanisms and the principality reserved for the individual in the post-Lisbon era.

In closing this preface, I would like to take the opportunity to acknowledge and thank my supervisor, Assistant Professor Mrs. Revekka-Emmanuela Papadopoulou, Assistant Professor Mrs. Metaxia Kouskouna and Assistant Professor Mr. Emmanuel Perakis, for reaffirming my decision to continue my academic path in European law as well as for their invaluable esteemed guidance. Furthermore, I would like to express my gratitude to my family and in particular to my grandparents, *Nikos* and *Niki*, for their wise counsel and multilevel support throughout my academic journey.

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Introduction

Operating as the foundation stone underpinning the entirety of the EU's Area of Freedom, Security and Justice (hereafter referred to as the "AFSJ"), the principle of mutual trust, along with critical questions regarding its scope, substance and precise parameters, has arisen as one of the most highly debated, yet still unresolved issues among academic scholars, practitioners, and even EU institutions. From a sociological perspective, trust is conceived as a psycho-sociological phenomenon of a multilevel nature, as a tool creating expectation of regular and honest behaviour among different stakeholders[1]. Notwithstanding its inherently subjective essence, the principle of mutual trust has been gradually embedded within the EU criminal law discourse as a systemic principle of a constitutional nature[2], proclaimed not only as one "among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect[3]", but also as a catalyst for integration[4]. Essentially, the Court of Justice of the European Union (hereafter referred to as the "Court") has emerged as the strongest advocate of mutual trust, elevating it as the *raison d'être*, as "a principle of fundamental importance in EU law[5]". Despite the ellipse of an explicit normative basis[6], mutual trust essentially serves as a prerequisite for the principle of mutual recognition of foreign judicial decisions, which is chosen as the method of interstate cooperation in the EU's area of criminal justice. The two principles are inextricably linked, with mutual trust in that capacity being regarded as the "principle behind the principle"[7].

Before delving into the phased conceptualization of the notion of mutual trust and its admittedly controversial relationship with the protection of fundamental rights, it is essential to cast light on the very design and operation of this very delicate area of EU law. The abolition of internal frontiers and the need to balance free movement with urgent security objectives, especially after the tragic events of 9/11[8], have intensified and justified the need of quasi-automatic interstate cooperation in criminal matters. In this context, mutual trust enables the "arm of law" to become longer by acquiring a transnational reach[9]; namely, it creates and maintains a presumption that every Member State, merely by virtue of its membership in the European Union, is fully compliant with fundamental rights norms, providing for a criminal justice system that, although different, offers an equivalent and sufficiently high level of fairness. In turn, this presumption

[1] Leandro Mancano, 'A New Hope? The Court of Justice Restores the Balance between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System', in C. Brière and A. Weyembergh (Eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Hart Studies in European Criminal Law, Hart Publishing 2018) p. 289.

[2] Koen Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (yet Not Blind) Trust' (2017) 54 Common Market Law Review 805, p. 806.

[3] Opinion by Advocate General Bot in Joined Cases C-404/15 and 609/15 PPU, *Pál and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, delivered on 3 March 2016, EU:C:2016:140, para 106.

[4] Oskar Losy and Anna Podolska, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' (2020) 8 Adam Mickiewicz University Law Review 185, p.185.

[5] CJEU, *Opinion 2/13* (2014), EU:C2014:2454, para 191.

[6] Tomasz Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6 New Journal of European Criminal Law 166, p.166.

[7] Auke Willems, *The Principle of Mutual Trust in EU Criminal Law* (Hart Studies in European Criminal Law, Hart Publishing 2021), p. 41.

[8] Frederik Naert and Jan Wouters, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism after "11 September"' (2004) 41 Common Market Law Review 909, p. 909.

[9] Koen Lenaerts (*supra* note 2), p. 809.

serves as the basis for mutual recognition of criminal decisions, the pattern being that a judicial decision is now quasi-automatically recognized and enforced beyond the territory of the issuing Member State, thus the will of the latter essentially acquires an extraterritorial[10] dimension across the borderless AFSJ.

The above described method of cooperation has not always been a distinctive element of the EU's criminal law agenda. As a principle of cooperation originating in the Internal Market[11], mutual recognition was "transplanted" and soon endorsed by Member States as "the cornerstone of judicial cooperation in criminal justice matters" during the Tampere European Council[12]. Since then and more than two decades later, the "principle behind the principle" mechanism is widely regarded as a mitigating factor between further harmonization and the preservation of national autonomy in the sovereignty-sensitive area of criminal law[13]. Nonetheless, mutual recognition as a transplanted principle could not possibly have identical implications in the AFSJ[14], an area characterized by the State's monopoly of power and deeply-rooted social, political, and constitutional choices[15]. Indeed, contrary to its beneficial towards private actors function in the Internal Market, mutual recognition in criminal matters necessarily sides with the State, primarily serving security and enforcement-oriented purposes. It did not take long before this divergence presented a number of challenges, most notably with regard to its diverse repercussions on the fundamental rights of the individual. These challenges soon found their practical manifestation in the operation of the first and most prominent instrument of mutual recognition in criminal matters, namely the Framework Decision on the European Arrest Warrant[16] (hereafter referred to as the "EAW FD").

Ever since its adoption in 2002, the European Arrest Warrant ("EAW") represents an emblematic procedural milestone in the construction of EU criminal justice as a *sui generis*, transnational area of law[17]. Premised upon the existence of trust among the collaborating legal systems, the EAW "europeanized" the former slow, cumbersome and uncertain concept of extradition[18], substituting the latter with a form of cooperation based on automaticity and speed. In a nutshell, the EAW FD removed the executive from the surrender proceedings, abolished the requirement of dual criminality for 32 listed serious offences, and provided for the surrender "as a matter of urgency[19]", namely under strict deadlines, with a minimum of formality and particularly limited

[10] Kalypso Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' (2007) 14 Journal of European Public Policy 682.
[11] Nathan Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market' (2017) 2017 2 European Papers - A Journal on Law and Integration 93.
[12] Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999), available at: https://www.europarl.europa.eu/summits/tam_en.htm , para 33.
[13] Suzanne Andrea Bloks and Ton van den Brink, 'The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant' (2021) 22 German Law Journal 45, p. 46.
[14] Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy' (2007) 14 Journal of European Public Policy 762.
[15] Valsamis Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice' (2020) 57 Common Market Law Review 45, p. 78.
[16] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002.
[17] Luisa Marin, 'Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant' (2014) 5(3) New Journal of European Criminal Law, pp 326-346, p. 330.
[18] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final, Brussels, 26 July 2000.
[19] EAW FD (*supra* note 16), Art. 17.

grounds for refusal[20]. Crucially, non-compliance with fundamental rights is not included as an explicit ground to refuse execution of an EAW. In this regard, considerable controversy remains over the legal value of the preamble's generic reference to fundamental rights and Article 1(3) EAW FD affirming the Member States' unaltered obligation to respect fundamental rights and principles as enshrined in Article 6 of the Treaty of the European Union[21] (hereafter referred to as the "TEU"). The above legislative choices, highly reflective of the prosecutorial orientation of the new instrument, came with serious ramifications, not only for the rights of the surrendered individual but also for the legitimacy and the acceptance of the EAW, leading to its distinctly fragmented domestication in the respective legal orders[22].

Essentially, the almost two decades of operation of the EU's flagship instrument applying mutual recognition in criminal matters have demonstrated beyond any doubt that automaticity and effectiveness do not always go hand in hand with good justice. The inherently insufficient regard to the rights of the surrendered individual has led to permanent contestation, diverged implementation and litigation both at national and EU level, the central question being whether, and to what extent, mutual trust and law enforcement priorities may have a detrimental effect to the protection of fundamental rights, especially with regard to the latter's centrality in an "order of values and of law"[23] after the Treaty of Lisbon. In the absence of legislative developments, the answer to the above question is constantly evolving through a series of admittedly controversial jurisprudence, in which the Court struggles to reach and maintain a balance between *prima facie* conflicting norms and interests. As this hard-won balance slowly emerges as a precondition for the future credibility and optimal functioning of the EAW, particularly within the currently worrying political framework and the rule of law backsliding in certain Member States[24], the "efficient enforcement versus fundamental rights" debate is far from over.

Via a twofold analysis, the present contribution aims at illustrating the current challenges in the implementation of the existing mechanism both from a fundamental rights and a rule of law perspective, focusing on the Court's evolving case law on fundamental rights implications as grounds to refuse execution of an EAW. In the end, crucial will appear the duty of the Court to reconfigure its present narrative and embrace a fundamental rights-based paradigm, by re-conceptualizing the notion of mutual trust and finally placing the individual at the heart of European criminal justice[25]. The key parameters and distinctive features of this open-ended jurisprudential narrative, as well as findings on its workability and potential reshaping will be analysed in the following Parts.

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[20] Nico Keijzer and Elies van Sliedregt, *The European Arrest Warrant in Practice* (TMC Asser Press/Cambridge University Press 2009).

[21] Treaty on European Union, OJ C 326, 26.10.2012.

[22] Renaud Colson, "Domesticating the European Arrest Warrant: European Criminal Law between Fragmentation and Acculturation" in R. Colson and S. Field (Eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016), p. 208.

[23] Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM(2019)163 final, Brussels, 3.4.2019.

[24] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, p.10.

[25] Valsamis Mitsilegas, *EU Criminal Law* (Modern Studies in European Law) (Hart Publishing 2022), p. 270-271.

Part I: Conceptualizing mutual trust through judicial dialogue: The evolutionary path of an effectiveness-oriented approach

In the absence of a solid normative basis of the notion of mutual trust and given the paramount importance of its interpretation in a criminal law context, the Court, more than any other EU institution, has undertaken the challenging duty not only to draw the crucial parameters of the principle, but also to demarcate its relationship with the fundamental rights of the individual. Hence it is not surprising that the Court's narrative forms the most important part of the conceptualization of mutual trust. Indeed, the Court has gradually emerged as one of its strongest advocates[26], perpetually upholding and ultimately qualifying its existence in every aspect of interstate cooperation in the AFSJ. Specifically in the sovereignty-sensitive area of criminal law, one could clearly distinguish between two eras in the Court's jurisprudence. In a first line of cases, and after validating the legitimacy of the EAW as the new instrument applying mutual recognition in criminal matters, the Court moved on to establish a quasi-absolute presumption of mutual trust, based on the existence of an almost "blind trust relationship" among the Member States' judicial authorities, by virtue of a presumed high level of fundamental rights respect throughout the Union. In this direction, the Court initially ruled that the execution of an EAW may not be refused on implicit fundamental rights grounds, or the optimal operation of the surrender system would be jeopardized.

Notwithstanding this clear and effectiveness-oriented initial mandate, it did not take long before worrying critiques against the Court's strict adherence to "blind trust" lead to a paradigm "wind of change". In the truly landmark *Aranyosi* ruling[27], the Court for the first time explicitly held that, in exceptional circumstances, an executing judicial authority must refrain to give effect to an EAW upon the establishment of a real risk of inhuman or degrading treatment of the surrendered individual. In this Part, the *Aranyosi* ruling will therefore be described both as a terminal and as a departure for intra-Union judicial dialogue, as its later and ever-evolving elaboration under specific factual backdrops confirms that "*the contours of the (mutual trust) principle are not carved in stone, but will make concrete shape by means of constructive dialogue between the Court, the ECtHR and national courts*"[28].

[26] Tomasz Ostropolski (*supra* note 6), p.166.
[27] CJEU, Joined Cases C-404/15 and C-659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] EU:C:2016:198.
[28] Koen Lenaerts (*supra* note 9).

1.1 The first era: The European Arrest Warrant as a sword for law enforcement priorities

In a first set of judgments, the Court upheld the legality of the EAW system (in *Advocaten voor de Wereld*[29]) and ruled on the right to be heard (in *Radu*[30]) and the right to be present at trial (in *Melloni*[31]), holding that under those specific circumstances the executing authority cannot refuse the execution of an EAW on fundamental rights grounds. The Court based its argumentation on the need to secure the effectiveness of a system of quasi-automatic mutual recognition as well as the primacy, unity and effectiveness of EU law. The same arguments were put forward in the broader context of the accession of the European Union to the European Convention of Human Rights[32] (hereafter referred to as the "ECHR"), in the highly contested *Opinion 2/13*[33]. The latter constitutes the last episode of the so-called first era of mutual trust jurisprudence, stirring up a major debate about the position of the individual in the EU's area of criminal justice.

a) The legitimacy concern: The Court's judgment in *Advocaten voor de Wereld*

In its very first ruling on the EAW, *Advocaten voor de Wereld*, the Court was called upon to respond to questions regarding the validity of the Belgian law transposing the EAW FD, namely whether the abolition of the obligation to verify the existence of the dual criminality requirement for the so-called listed offences violated the principles of legality, equality and non-discrimination. Indeed, the abolition of dual criminality signifies one of the most elemental differences of the newly established system of surrender with the traditional scheme of extradition, inevitably raising a number of crucial constitutional considerations[34]. Among the latter, various Member States raised the "moral distance" concern that the new, quasi-automatic system of surrender is capable of violating the principle of legality, as enshrined in the core precept "*nullum crimen sine lege*", a general legal principle underlying the constitutional traditions common to the Member States. According to the latter, a state may not be required to employ its criminal enforcement apparatus for behaviors that are not of a criminal interest, i.e. do not constitute a criminal offence in the domestic legal order[35]. This is particularly relevant in the sensitive area of criminal law, where the delicate relationship between the state and the individual must be negotiated and delineated via democratic processes. Given moreover the extremely limited leeway left to the executing authorities, the reconfiguration of traditional concepts linked to territoriality and sovereignty became imminent in the transposition of the EAW FD in the respective national systems.

In a long awaited judgment, the Court upheld the validity of the EAW FD, holding that the abolition of dual criminality does not breach the principle of legality, which is to be examined in accordance with the law of the issuing state. The latter not only establishes the actual definition

[29] CJEU, Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2005] EU:C:2007:261.
[30] CJEU, Case C-396/11 *Ciprian Vasile Radu* [2013] EU:C:2013:39.
[31] CJEU, Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.
[32] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms – European Convention on Human Rights (ECHR), 4 November 1950, ETS no 005.
[33] CJEU, *Opinion 2/13* (*supra* note 5).
[34] Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 Common Market Law Review 1277, p. 1286-1287.
[35] Maria Kaiafa-Gbandi, *To poiniko dikaio stin Europaiki Enossi* (*Criminal Law in the European Union*) (Sakkoulas, 2003), p. 328.

of the offences and the penalties applicable under Article 2(2) of the EAW FD, but must also respect fundamental rights and principles, and, consequently, the principle of the legality of criminal offences and penalties[36]. The Court further highlighted that the aim of the new framework is not to harmonize the substantive criminal legislation of the Member States, but is rather confined to "*creating a mechanism for assistance between the courts of different States during the course of proceedings to establish who is guilty of committing an offence or to execute a sentence*"[37]. In essence, the Court in *Wereld* left the executing state outside the equation of rights protection, affirming that it is solely for the issuing state to monitor the compatibility of a surrender request with fundamental rights. In this way, the Court embraced a teleological interpretation of the principle of mutual recognition, promoting its effective and unhindered operation towards the replacement of the multilateral system of extradition by a system based on speed and automaticity. The same teleological interpretation prevailed in the equally critical case of *Radu*, a few years after the entry into force of the Lisbon Treaty.

b) The Court's judgment in *Radu*: A missed opportunity?

Radu was the first case in which the Court was directly asked whether fundamental rights infringements could constitute a legitimate reason for refusing the execution of an EAW. The case concerned a Romanian national in respect of whom several EAWs had been issued by German judicial authorities for the purpose of prosecution. Mr. Radu opposed to his surrender, claiming, *inter alia*, that he had not been given the chance to be heard before the EAWs were issued, hence his right to a fair trial and his right to be heard[38] were violated. Under those circumstances, the competent Romanian court stayed its proceedings and made a reference for a preliminary ruling, essentially asking the Court whether the EAW FD, as interpreted in the light of the Charter of Fundamental Rights of the European Union[39] (hereafter referred to as the "Charter"), allows the executing authority to refuse execution of an EAW on the ground that the requested individual was not heard prior to the issuance of the warrant. This initiative of the Romanian court should also be viewed as a reflection of the raised expectations with regard to the protection of individual rights after the entry into force of the Lisbon Treaty and the consequent proclamation of the Charter as the Union's own "Bill of Rights"[40].

Building upon its previous mutual trust mandate, the Court answered the aforementioned question in the negative. Notwithstanding the revolutionary Opinion of Advocate General Sharpston[41], who defended a general refusal ground in case of fundamental rights violations, the Court followed its traditional line of reasoning. Upholding once again a teleological interpretation, the Court placed emphasis on the enforcement orientation of the EAW FD, the latter aiming at facilitating and accelerating judicial cooperation by replacing the multilateral

[36] *Advocaten voor de Wereld* (*supra* note 29), para 53.
[37] Opinion of Advocate General Ruiz-Jarabo Colomer in case C-303/05, *Advocaten voor de Wereld*, delivered on 12 September 2006, EU:C:2006:552.
[38] Article 6 ECHR and Articles 47 and 48 Charter.
[39] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012.
[40] David Anderson and Cian C Murphy, 'The Charter of Fundamental Rights', in A. Biondi, P. Eeckhout, and S. Ripley (Eds.), *EU Law after Lisbon* (Oxford University Press 2012), p. 155.
[41] Opinion of Advocate General Sharpston in Case C-396/11, *Radu*, delivered on 18 October 2012, EU:C:2012:648.

system of extradition with a mutual recognition-based surrender mechanism[42]. The Court further underlined the exhaustive nature of the refusal grounds in the EAW FD, which do not include a ground like one in the main proceedings[43]. In the same vein, neither the EAW FD, which expressly confines the right to be heard to a later stage of the procedure before the executing authority, nor the applicable provisions of the Charter require the hearing of the requested individual prior to surrender[44]. According to the Court, these legislative choices primarily aim to secure the effectiveness of the EAW system, which would otherwise be seriously compromised, as an arrest warrant must contain a certain element of surprise in order to prevent the individual concerned from fleeing[45].

Arguably, the Court's argumentation in *Radu* confirms and nurtures its enforcement-favouring logic, as unfolded in the *Wereld* case. Indeed, the Court seems to be content with the monitoring of fundamental rights compliance only in one Member State[46], as an extensive, two-fold protection would deprive the surrender scheme of its effectiveness. This subordination of fundamental rights under crime control objectives cannot easily be reconciled with the constitutalization and the primacy of the Charter in the post-Lisbon era, raising legitimate reservations on the protection of the individual as the most vulnerable subject in the area of criminal justice. Of course, one should not ignore the factual background in which the Court was called upon to deliver its judgment; in *Radu*, no procedural right was violated, as the right to be heard prior to surrender is not guaranteed per se in the Charter[47], therefore the Court was not obliged to engage in a theoretical and much heated conversation on the need to extend the exhaustive list of refusal grounds in the EAW FD to fundamental rights violations. Nonetheless, the *Radu* ruling was perceived by many as a missed opportunity to seriously address the already ever-increasing fundamental rights concerns.

c) <u>On the altar of primacy: The Court's judgment in *Melloni*</u>

Shortly after *Radu*, the prioritization of effective interstate cooperation based on mutual recognition and the consequently limited scrutiny of fundamental rights implications was reiterated and endorsed by the Court in *Melloni*[48], where mutual trust was intrinsically correlated with core principles of EU law, such as autonomy and primacy. The case involved the *in absentia* conviction of Mr. Melloni for bankruptcy fraud in Italy, and the subsequent issuance of an EAW by the Italian judicial authorities for the purpose of executing the imposed custodial sentence. Right after the Spanish executing authorities authorized his surrender, Mr. Melloni initiated proceedings before the Spanish Constitutional Court, claiming a breach of his right to a fair trial in case his surrender would not be made conditional upon a guarantee of a retrial in Italy. Mr. Melloni heavily relied on the special consideration of the right to be present at trial by the Spanish Constitutional Court, according to which this right forms part of the essence of the right

[42] *Radu* (*supra* note 30), paras 33, 34.
[43] *Ibid.*, paras 36-38.
[44] *Ibid.*, para 39.
[45] *Ibid.*, para 40.
[46] Here, it is the executing State which is under the duty to safeguard the right to be heard, while in the *Wereld* case the respective obligation fell on the issuing State.
[47] Christine Janssens, *The Principle of Mutual Recognition in the EU Law* (Oxford University Press 2013), p. 208.
[48] *Melloni* (*supra* note 31).

to a fair trial, affecting human dignity as guaranteed in the Spanish constitutional order[49]. The situation was particularly complex, as in the meantime the relevant provisions of the EAW FD were amended by Article 4(a)[50] on trials *in absentia*, triggering the Spanish Constitutional Court – for the first time in its history – to seek guidance from its Luxembourg counterpart. In this regard, two main questions were referred to the Court; firstly, whether Article 4(a) of the EAW FD is compatible with the right to an effective judicial remedy and with the right of the defence (Articles 47 and 48(2) of the Charter) and, secondly, whether Article 53[51] of the Charter authorizes the executing authority to make the surrender of the requested person conditional on the conviction being open to a review in the issuing State. The response of the Court reveals not only the continued prevalence of mutual trust, but also the constant competing paradigm of power between distinct constitutional orders.

In essence, the Court replied that Article 4(a) of the EAW FD is compatible with the Charter, and that Article 53 of the latter cannot be interpreted as authorizing the executing authority to make the surrender of a requested person conditional upon constitutional requirements that the conviction is open to judicial review in the issuing state. The Court's reasoning can be divided in three main parts; in the first part, the Court outlines the scope of the new Article 4(a), examining its wording, scheme and purpose. After reiterating the purpose of the EAW FD and the principal obligation of the Member States to act upon a European arrest warrant[52], the Court confirmed that Article 4(a) is a "closed" provision, which restricts the opportunities for refusing to execute a warrant, by "harmonizing" the specific conditions under which the execution of a decision rendered following a trial *in absentia* should not be refused[53]. In particular, the execution of an EAW must not be refused when the convicted person, being aware of the scheduled trial, had given a mandate to a legal counsellor to represent him/her, and was indeed represented by that counsellor at the trial[54]. As clarified by Advocate General in his Opinion, this provision represents a joint approach of the Member States which is compatible with the diversity of the national legal traditions[55], therefore any refusal of execution based on any non-explicit ground, including the conviction in question being open to review, is not acceptable.

In the second part, the Court ruled on the compatibility of Article 4(a) EAW FD with the contested provisions of the Charter, "which shall have the same legal value as the Treaties"[56]. In that respect, the Court underlined that the rights included in Articles 47 and 48(2) of the Charter are not absolute, but can be validly waived if certain safeguards are met. Accordingly, Article

[49] *Ibid.*, para 18.
[50] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009.
[51] Article 53 Charter provides that "nothing therein shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".
[52] *Melloni* (*supra* note 31), para 38.
[53] *Ibid.*, para 41.
[54] *Ibid.*, para 42.
[55] Opinion of Advocate General Bot in Case C-207/16, *Melloni*, delivered on 2 October 2012, EU:C:2012:600, para 145.
[56] *Melloni* (*supra* note 31), para 48.

4(a) EAW FD lays down the exact circumstances in which the person convicted *in absentia* must be deemed to have waived, voluntarily and unambiguously, his/her right to be present at trial, thus preventing any benefit of a retrial to hinder the attainment of the objectives pursued by the EAW FD, including, *inter alia*, the enhancement of the procedural rights of persons subject to criminal proceedings.

The last and most contested part of the *Melloni* judgment reveals the scope of Article 53 of the Charter in the light of European harmonization. In a far-reaching line of arguments, the Court held that although Member States are in principle free to apply their higher constitutional standards in the field of fundamental rights protection, the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law should not be thereby compromised[57]. According to the Court, were a Member State allowed to refuse surrender for a ground not provided for in the EAW FD, thereby disapplying harmonized EU rules which are fully compliant with the Charter, this would raise serious doubts on the uniform standard of fundamental rights protection under the EAW FD, undermining the principles of mutual trust and recognition which the latter is meant to uphold, and ultimately compromising its efficacy[58]. Clearly, specific emphasis is given by the Court to the consensus reached by all Member States in the framework of protection of procedural guarantees at trials *in absentia*. Hence, by virtue of such a consensus and the principle of primacy of EU law, mutual trust continues to be endorsed by the Court as the core foundation of the Union's AFSJ.

The *Melloni* ruling is emblematic in the effort of the Court to forcefully prioritize the effectiveness of the surrender system via a teleological, strict interpretation of the EAW FD. The Court's mandate appears however to be at odds, both with the discretion left by the Charter to the Member States to apply a higher standard of protection and with the admission that the EAW FD itself aims at upholding the procedural rights of the requested individual. Taking also into account the contextual framework in which the *Melloni* was released, the Court's strict adherence to the choices of the European legislator[59] might be explained by the justification that pervades the entirety of the judgment, namely that the contested procedural rights are already "harmonized" by the EAW FD, reflecting a consensus reached by all Member States regarding the scope to be given to them under EU law. Indeed, in later judgments, the Court seems to provide the States with a wider margin to offer additional fundamental rights safeguards, in the ellipse of a similar level of harmonization[60]. Nonetheless, from a fundamental rights perspective, we may not disregard two crucial observations concerning *Melloni*. Firstly, what the Court describes as "harmonization" via a "consensus" is nothing more than pure intergovernmental choices in the context of the former third pillar that is marked by the absence of the European Parliament[61]. Therefore, placing excessive importance to such choices, at the expense of fundamental rights protection, seems to ignore the significant advancements in the field that the post-Charter era has brought. Secondly and most importantly, the Court's narrative recognizes

[57] *Ibid.*, para 60.
[58] *Ibid.*, para 63.
[59] Aida Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue' (2014) 10 European Constitutional Law Review 308, pp. 317-318.
[60] See particularly CJEU, Cases C-617/10 *Å klagaren v Hans Å kerberg Fransson* [2013] EU:C:2013:105 and C-168/13 PPU *Jeremy F. v Premier ministre* [2013] EU:C:2013:358.
[61] Sionaidh Douglas-Scott, 'The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?' (2009) 11 Cambridge Yearbook of European Legal Studies 53, p. 57.

the primacy of a secondary, non-directly applicable instrument, i.e. of the EAW FD, over fundamental rights, i.e. over constitutional values that are now essentially primary EU law. In this way, the well-established balance between primary and secondary EU law seems to be blurred[62], posing a substantial threat to fundamental rights protection[63].

d) A showcase of the mutual trust principle in *Opinion 2/13*

The emphasis placed on the principle of mutual trust as the cornerstone of the EAW system of interstate cooperation was further demonstrated by the Court in the much wider context of the EU's accession to the ECHR. In the admittedly controversial *Opinion 2/13*[64], the Court found the draft Accession Agreement incompatible with primary EU law, *inter alia* because the Agreement fell short in sufficiently incorporating the importance of mutual trust as a prerequisite in order to create "an ever closer Union"[65]. Far beyond addressing the mere question of accession[66], the Court seized the opportunity to address key components of the EU as a distinguished legal order of a peculiar nature, whose own constitutional framework and founding principles - including mutual trust - affect the procedure for and conditions of accession to the ECHR[67]. The Court distilled its previous narrative on the role of mutual trust in two specific paragraphs.

In particular, the Court held that the principle of mutual trust between the Member States is *fundamental* in EU law, as it allows for an area without internal frontiers to be established and maintained. In the framework of its specific operation in the AFSJ, this principle further requires each Member State, *save in exceptional circumstances*, to consider that all the other Member States are in compliance with EU law, particularly with fundamental rights, as recognized and protected in the EU legal order[68]. Subsequently, when applying EU law, Member States are under a two-fold obligation, namely to refrain, not only from demanding from another Member State a higher standard of fundamental rights protection in the latter's legal order, but also from monitoring, save in exceptional circumstances, whether a cooperating Member State has observed the fundamental rights guaranteed by EU law in a specific case[69]. The above strong presumption of compliance with fundamental rights norms is essentially premised upon the striking finding of the Court that the EU's common values, as embedded in Article 2 TEU, both *imply* and *justify* the existence of mutual trust between the Member States that those values will be recognized, and that therefore the respective EU law provisions implementing them will be equally respected[70]. Along these lines, the Court qualified mutual trust as a constitutional principle pervading the entire European area of criminal justice, with its practical manifestation

[62] Leonard FM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39 European Law Review 531, p. 542.
[63] Valsamis Mitsilegas, 'Judicial Concepts of Trust in Europe's Multi-Level Security Governance: From Melloni to Schrems via Opinion 2/13' (2015) 3 Eucrim - The European Criminal Law Associations' Forum, p. 91.
[64] *Opinion 2/13* (*supra* note 5).
[65] *Ibid.*, para 167.
[66] Fisnik Korenica and Dren Doli, 'A View on CJEU Opinion 2/13's Unclear Stance on and Dislike of Protocol 16 ECHR' (2016) 22 European Public Law 269, p. 269.
[67] *Opinion 2/13* (*supra* note 5), para 158.
[68] *Ibid.*, para 191.
[69] *Ibid.*, para 192.
[70] *Ibid.*, para 168.

involving the imposition of two negative legal obligations upon the participating Member States[71].

The Court's *Opinion 2/13* was severely criticized as deifying the principle of mutual trust, by putting forward an almost absolute, irrefutable presumption of compliance with fundamental rights and by enhancing the already existing quasi-automatic system premised on mutual recognition. More specifically, the Court translates the principle of mutual trust into a clear obligation, disregarding the inherent incompatibility between an externally imposed duty and a genuine trust relationship between two equal counterparts. Hence, the imposition of the said negative obligations on the collaborating Member States seems to negate the existence of real trust relationships on the ground[72]. Furthermore, *Opinion 2/13* raises legitimate questions on the exact nature of mutual trust, which is not qualified as a general principle of EU law, neither as a mere presumption. Instead, the Court diplomatically labels it as a principle of fundamental importance, capable however of founding distinct legal obligations. Notwithstanding the admission that the fundamental rights of the individual, as recognized by the Charter, lie at the heart of the EU's legal structure[73], the individual seems to be entirely absent from the mutual trust equation, as *Opinion 2/13* refers only to trust between Member States. Therefore, the Court's Opinion appears to be at odds not only with crucial developments in EU secondary law that bring the individual at the forefront of their regulative scope[74], but also with the individualized approach of the ECtHR in similar cases[75], significantly disempowering the individual in the EAW scheme. On the altar of autonomy and primacy, *Opinion 2/13* appears therefore to impair the already sensitive balances in the field, casting doubts on the future of fundamental rights protection within the AFSJ.

e) Demystifying the Court's narrative and its (in) compatibility with fundamental norms

The above analysis clearly illustrates that the first era of the Court's case law is characterized by pure deference to the law enforcement orientation of the European legislator. From a policy perspective, this narrative may be understood by taking into account the significantly accelerated process of the EAW FD's negotiations and the high need to ensure the establishment on the ground and the effective operation of the EAW, towards the attainment of imperative security and crime control objectives. Soon after the adoption of the EAW FD, the Court therefore undertook the duty to defend an inevitably less than perfect set of provisions, emerging as an outcome of an intensified political and legislative process[76]. From a constitutional perspective, the first era's jurisprudence can also be explained by the eternal agony of the Court to safeguard the autonomy, unity and primacy of the EU legal order. Under this prism, the Court ultimately

[71] Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice' [2015] Il Diritto dell' Unione Europea 530.
[72] Andrew Willems, "The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal" (2019) 20 German Law Journal 468, p. 487.
[73] *Opinion 2/13* (*supra* note 5), para 169.
[74] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014.
[75] Piet Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue - Autonomy or Autarky' [2015] SSRN Electronic Journal, p.36.
[76] Lars Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice', in P. Cardonnel, A. Rosas and N. Wahl (Eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012), p. 141.

built an almost absolute obligation of trust between the Member States, on the sole premise that the latter (recognize that they) share a set of common values on which the EU is founded, as stated in Article 2 TEU[77]. As already supported, this view has had severe implications, both on the credibility of the EAW system and on the position of the individual, especially after the post-Lisbon constitutionalization of the Charter[78].

Furthermore, this perception of the principle of mutual trust leads to a paradoxical outcome; even though the Court places considerable weight on the rule that Member States shall execute any EAW on the basis of the principle of mutual recognition, thus endorsing the strict, literal interpretation of Article 1(2) EAW FD, it seems to follow a different interpretative path concerning the equally important provision of Article 1(3) EAW FD, according to which the Decision shall not have the effect of modifying the States' obligation to respect fundamental rights and principles. This inconsistency becomes even clearer in the light of the preamble's provision that a Member State is not thereby prevented from applying its own constitutional rules relating, *inter alia*, to due process[79]. This possible misconception of the States' expressed will had practical ramifications even from the outset of the EAW FD's implementation; recognizing the potential risk of breaching their fundamental rights obligations, stemming either from their own constitutional orders or from the ECHR, the Member States transposed and subsequently applied the EAW FD in a very divergent way, many of them including an additional, fundamental rights based ground of refusal. The Court's continuing disregard to fundamental rights seems to have affirmed and enhanced those initial concerns, perpetuating the fragmented domestic application of the EAW FD.

Nonetheless, this initially restrictive approach of the Court was to be significantly modified. Notwithstanding the clear stance of the Court in *Radu, Melloni* and *Opinion 2/13*, the doors to a more rights-friendly approach proved to be far from completely closed. In this respect, the *first* era analysed above could also be regarded as representing a modest turning point, after which the Court gradually started to shift its centre of gravity. A lengthy and challenging process towards the re-balancing between mutual trust and individual guarantees would soon commence, primarily triggered and facilitated by internal and external fundamental rights concerns and a vivid judicial dialogue that has since been ignited throughout the Union. These alarming voices towards a necessary reorientation of the Court's jurisprudence will be outlined in the following chapter.

[77] *Opinion 2/13* (*supra* note 5), para 168.
[78] Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 Common Market Law Review 1565, p. 1565.
[79] EAW FD (*supra* note 16), recital n. 12.

1.2 Pressing fundamental rights concerns towards a redefined approach

The consolidation of the Court's approach on mutual trust during the first era, especially after the highly contested rulings in *Melloni* and *Opinion 2/13*, were regarded as worrying challenges to fundamental rights scrutiny by a considerable part of the legal world. The very first signs of concern were expressed within the Court's own purview, by Advocate General Sharpston in the *Radu* case and were soon followed by persistent voices to extend the more fundamental rights oriented jurisprudence in the sphere of asylum law to the surrender scheme under the EAW FD. Sensitive questions regarding national constitutional identity and the appropriate level of fundamental rights protection within the respective legal orders were simultaneously spread throughout the Union, leading to considerable increase of the references for preliminary rulings by national courts. In this regard, the ECtHR's case law and its evolving and soothing approach towards the Court's mutual trust narrative are of paramount importance. Notwithstanding the inevitable tensions, the following period demonstrates the balance of power and the influential dynamics of constructive intra-Union judicial dialogue, which progressively led to the reconfiguration of the Court's stance and the final accommodation of more appropriate fundamental rights benchmarks in the EAW system.

a) Parallel developments in the field of asylum law

When examining the parameters of mutual trust and its relationship with fundamental rights protection, a specific reference to the Court's Common European Asylum System (or the "CEAS") narrative is imperative. As an integral part of the AFSJ, the CEAS is also governed by the principle of mutual trust[80]. Similar to the EAW system of surrender in criminal matters, the CEAS is identified by the so-called Dublin system of intra-Union transfer of asylum seekers, on the basis of the Dublin Regulation[81]. Under this scheme, responsibility for examining each individual asylum claim is allocated to a single Member State based on a hierarchical list of criteria, among which the "first entry" criterion, providing that the Member State responsible is the one through which the asylum seeker irregularly entered the European Union. The tracing of the Court's case law on the CEAS, a system also heavily criticized from a fundamental rights perspective[82], is necessary to complete the puzzle of the mutual trust's operation in the entire AFSJ. Notwithstanding its conservative approach in criminal matters, the seminal rebuttal of the presumption of mutual trust by the Court was made for the first time in an asylum case, marking a welcome turning point with implications far wider than the asylum context.

In the landmark *N.S.* ruling[83], the Court was called upon to answer whether a Member State's obligation to respect fundamental rights is discharged when an asylum seeker is sent by that

[80] Valsamis Mitsilegas, 'Solidarity and Trust in the Common European Asylum System' (2014) 2 Comparative Migration Studies 181.
[81] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national OJ L 50, 25.2.2003 ("Dublin II Regulation").
[82] Steve Peers, 'Reconciling the Dublin System with European Fundamental Rights and the Charter' (2014) 15 ERA Forum 485.
[83] CJEU, 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* [2011] EU:C:2011:865.

Member State to the Member State responsible under the Dublin Regulation, regardless of the circumstances prevailing in the latter, and, in particular, whether an irrefutable presumption of the responsible State's compliance with fundamental rights would be contrary to the obligation of the examining State to observe fundamental rights under EU law. Placing emphasis on the principal objective of the Dublin Regulation, namely to increase legal certainty and prevent forum shopping by speeding up the handling of asylum claims[84], the Court essentially held that the treatment of all asylum seekers in all Member States must be presumed to comply with fundamental rights[85]. The Court based this presumption on the CEAS' whole construction, which allows the assumption that all Member States observe fundamental rights, as enshrined in the Charter, the Geneva Convention and the ECHR, thus they can rely on the confidence they share with in each other in that respect[86]. The Court addressed the matter very carefully, holding that what is at stake is the *raison d'être* of the European Union and the creation of an area of freedom, security and justice, essentially based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights[87].

This mutual confidence narrative appears to have a striking resemblance to the mutual trust presumption developed by the Court in EAW cases. Nonetheless, the Court notably proceeded to an unexpected line of reasoning, holding that *it is not inconceivable* that the Dublin system may experience major operational problems on the ground of a specific Member State, resulting in a substantial risk that asylum seekers may be treated, when transferred there, in a manner incompatible with their fundamental rights[88]. In the same vein, the Court concluded that the prohibition of inhuman or degrading treatment precludes the referring State from consenting to the transfer of an asylum seeker, when it cannot be unaware that deficiencies in the asylum procedure and in the reception conditions in the responsible 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 within the meaning of Article 4 of the Charter[89]. A contrary, conclusive presumption of compliance with fundamental rights in the primarily responsible Member State would be incompatible with the duty of all Member States to apply the Dublin Regulation in a manner consistent with fundamental rights[90]. Hence, this presumption must always be regarded as rebuttable, able to admit any evidence to the contrary.

Arguably, the *NS* ruling serves as a legal vindication of fundamental rights[91], as the Court finally admits that a presumption of trust should not have a detrimental effect to the protection of transferred individuals within the CEAS. In reaching this conclusion, the Court mainly relied upon the very similar ruling of the ECtHR in *MSS v. Belgium and Greece*[92], where the Strasbourg Court placed the principle of non-refoulement above the existence of inter-state trust. Specifically, the ECtHR found Belgium in violation of both Articles 3 and 13 ECHR, as it

[84] *Ibid.*, para 79.
[85] *Ibid.*, para 80.
[86] *Ibid.*, para 78.
[87] *Ibid.*, para 83.
[88] *Ibid.*, para 81.
[89] *Ibid.*, para 94.
[90] *Ibid.*, paras 99, 100.
[91] Cathryn Costello, 'The Ruling of the Court of Justice in NS/ME on the Fundamental Rights of Asylum Seekers under the Dublin Regulation: Finally, an End to Blind Trust across the EU?' (2012) 2 Asiel & Migrantenrecht, p. 92.
[92] ECtHR, *M.S.S. v. Belgium,* App. No. 30696/09, judgment of 21 January 2011.

allowed the transferring to Greece of an asylum applicant despite being aware of the well documented structural shortcomings in the asylum procedure and of the systematic deficiencies in the detention and reception of asylum seekers in the Greek state. The above indicate a very close, dialogical relationship between the two leading European Courts, to an undeniable ultimate benefit of fundamental rights protection. This relationship became even clearer after the subsequent ECtHR's *Tarakhel* ruling[93]; in *Tarakhel*, the ECtHR found that even in the absence of systemic deficiencies as unfolded in *MSS* (and confirmed in *N.S.*), the effective protection of fundamental rights should always require an *in concreto*, individualized prior assessment of the impact of the transferring decision to the specific claimant in question. Following the same path, the Court soon hailed this approach in the *C.K*[94]., holding that indeed, individual circumstances may *per se* prevent the transfer of an asylum seeker under the Dublin regime.

The aforementioned found their practical manifestation in the final reform of the Dublin regime via the adoption of Dublin III Regulation, the latter encapsulating in its Article 3(2) the core conclusions of the *N.S.* judgment[95]. This clear example of how the constructive interaction between the Court and the ECtHR can lead to legislative initiatives upholding fundamental rights protection encouraged many scholars to support the widening of this successful paradigm to EU criminal matters. Indeed, there seems to be no particular reason why this rights-friendly jurisprudence on mutual trust should be confined in only one part of the AFSJ[96]. Notwithstanding their differences, both the EAW and the Dublin system operate within the same judicial area and in equally sovereignty-sensitive fields, having considerable effects on the individual rights of persons in a vulnerable – although different – position. An analogous application of the *N.S.* in the field of criminal law would signify the end of automaticity in interstate cooperation[97] or, according to others, an end to "blind trust across the EU"[98]. Regrettably, several years would follow before the Court extended the *N.S.* conclusions to the criminal law sphere.

[93] ECtHR, *Tarahkel v. Switzerland*, App. No. 29217/12, judgment of 4 November 2014.
[94] CJEU, Case C-578/16 PPU, *C. K. and Others v Republika Slovenija* [2017] EU:C:2017:127.
[95] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L 180, 29.6.2013.
[96] Lars Bay Larsen (*supra* note 77), p. 152.
[97] Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, p. 358.
[98] Cathryn Costello, (*supra* note 92), p. 83.

b) The ever-present AG's Opinion in *Radu*

Notwithstanding the Court's final response in *Radu*, as analysed above, special consideration should be given to the deviating Opinion of Advocate General Sharpston[99]. AG Sharpston elevated the status of fundamental rights in the system of mutual recognition in criminal matters, by constructing a general, additional ground of refusal implicitly derived from Article 1(3) EAW FD in case of fundamental rights infringements. In a well-structured Opinion, the AG took into account all conflicting interests at stake, essentially holding that although a presumption of compliance with fundamental rights by the participating Member States is in principle applicable, its absolute irrefutability can neither be justified nor accepted in a surrender scheme based on the existence of mutual trust between its members. The AG based her argumentation on the heterogeneous objectives pursued by the EAW FD, the status of fundamental rights under EU law and the already existing case law of the Court and the ECtHR, with particular emphasis placed on the *N.S.* case.

In particular, the AG held that although the primary objective of the EAW FD is the elimination of the delays inherent in the previous extradition system, thus the obligations imposed therein are essentially procedural, this does not mean that the EU legislator failed to take fundamental rights into account when enacting the new surrender scheme[100]. Therefore, it would be wrong to assume that the EAW FD is purely an enforcement-oriented instrument; via its adoption, the legislator intended to protect the fundamental rights of the requested person, improving also the protection afforded to victims of criminal offences by bringing their perpetrators to justice more rapidly and efficaciously[101]. Most importantly, the high level of mutual confidence underpinning the operation of the whole EAW system is *predicated* on the observance by each Member State both of the rights enshrined in the Convention and of the fundamental rights which form part of the constitutional traditions common to the Member States[102]. Therefore, as the record of the Member States' compliance with their fundamental rights obligations is far from pristine, there can be no valid assumption that individual rights will automatically be guaranteed after the surrender, solely because the latter took place upon request by a Member State[103].

Affirming that after the Lisbon Treaty the Charter has the same legal value as the Treaties and accordingly forms part of primary EU law[104], the AG moved on to provide a very clear answer on whether the executing Member State can refuse the execution of an EAW altogether, where the requested person's fundamental rights are at stake. In spite of the Member States' principal obligation to execute the issued EAWs, a narrow approach which would utterly exclude human rights reflections cannot be supported, neither by the wording of the Framework Decision nor by the case-law[105]. This is because the obligation to respect fundamental rights implicitly permeates the whole body of the EAW FD by virtue of its Article 1(3), otherwise the latter would be as useful as a mere elegant platitude[106]. In this respect, the AG also relied to the Advocate General

[99] Advocate General Sharpston in *Radu* (*supra* note 43).
[100] *Ibid.*, paras 35,36.
[101] *Ibid.*, paras 39,40.
[102] *Ibid.*, para 38.
[103] *Ibid.*, para 41.
[104] *Ibid.*, para 44.
[105] *Ibid.*, para 69.
[106] *Ibid.*, para 70.

Cruz Villalón's Opinion in *I.B.*[107], where he supported the view that fundamental rights compliance is a prerequisite granting legitimacy to the very existence and development of the AFSJ. Hence, Member States are bound to monitor fundamental rights compliance prior to the execution of every EAW[108]. This conclusion is also in line with the jurisprudence of the Court and the ECtHR, both of them accepting that fundamental rights implications may affect the legislative obligation of a Member State to transfer a person to another State[109].

By reference to Strasbourg case law, as well as to the Court's ruling in *N.S.*, the AG elaborated on the different elements of the fundamental rights tests employed by the two Courts, holding that the Strasbourg's "flagrant denial of justice" test with respect to the right to a fair trial seems unduly stringent. Instead, a more appropriate criterion to be adopted by the executing authority seems to be that the deficiency or deficiencies in the trial process should be such as fundamentally to destroy its fairness[110]. In such an exceptional case, the executing state should, after taking duly into account the well-established objections of the requested person, decide whether to proceed with or refuse the execution of the EAW. Importantly, the AG also extended her reasoning to the context of sufficiently serious past infringements, namely to those whose effect will of itself be such that no fair trial can be possible or whose past effects, if continuing, will have the same result[111] as well as to breaches of fundamental procedural requirements concerning the issuing of the EAW[112].

This Opinion arguably marks a crucial benchmark in the formation of the relationship between mutual trust and fundamental rights in the EAW, with its influence extending far beyond the *Radu* context. Ten years after the adoption of the EAW FD and in spite of the Court's still immature jurisprudence on this matter, the AG adopted a praiseworthily proactive stance on the fundamental rights scrutiny in the operation of mutual recognition, essentially extending, as many scholars had already proposed, the *N.S.* ruling to the criminal law sphere. Even though the Court did not ultimately share the AG's views and chose to focus on the unhindered attainment of only some of the objectives pursued by the EAW FD, the Opinion is of paramount importance; by accumulating the first voices in favour of a rights-friendly operation of the EAW scheme, it has served as a point of reference for future developments, with some of its far-reaching aspects still being relevant today.

[107] Opinion of Advocate General Cruz Villalón in Case C-306/09 *I.B.*, delivered on 6 July 2010, EU:C:2010:404.
[108] *Ibid.*, para 73.
[109] *Ibid.*, para 77.
[110] *Ibid.*, para 83.
[111] *Ibid.*, para 89.
[112] *Ibid.*, para 95.

c) The constitutional identity concern: A response from the German Constitutional Court

Especially after the *Melloni* judgment, questions concerning the so-called "Kompetenz-Kompetenz" issue, namely which court has the prerogative of ultimately deciding upon the EU law's compliance with fundamental rights started to re-emerge, years after the establishment of the renowned Solange doctrine[113] of the German Constitutional Court (hereafter referred to as the "BVerfG"). Following *Melloni*, the Spanish Constitutional Court diplomatically avoided a direct confrontation with the Court by modifying its interpretation of the contested constitutional provisions accordingly, in order to accommodate the findings of the ruling. Nonetheless, the latter were portrayed as if they had been independently rendered by the Spanish Constitutional Court, which in this way reserved its final say on future tensions with EU law[114]. In the same vein, the BVerfG, whose litigation has been proven to be decisive in the whole process of European integration, soon rendered a seminal order[115] on the compatibility of the execution of an EAW with fundamental rights, applying, for the very first time in EAW matters, its "constitutional identity doctrine"[116]. The order seems to have exerted a significant influence on the subsequent reconfiguration of the Court's perception of mutual trust.

The case concerned a UK national who was convicted and sentenced *in absentia* to 30 years of imprisonment by an Italian court. When he was later arrested in Germany on the basis of an EAW issued by the Italian authorities, he contested his surrender on the basis that Italian criminal procedure would deprive him from the right to a retrial with the hearing of evidence. In its long awaited order, the BVerfG dealt with the principle of individual guilt as a manifestation of the human dignity principle which is granted absolute protection in the German Constitution (the "GrundGesetz"), in the light of the EAW-based system of surrender. After affirming that mutual trust in criminal matters *can be shaken* upon indications based on facts that the requirements indispensable for the protection of human dignity would not be complied with in the case of surrender[117], the BVerfG established the constitutional obligation of the executing authorities to conduct an investigation in order to ensure that the minimum standards mandated by the German Constitution are complied with in the issuing state. Such investigation should place particular emphasis on the principle of individual guilt, which is *beyond the reach of European integration*[118]. According to the BVerfG, the principle of mutual trust that governs interstate cooperation in criminal matters is limited by human dignity, as enshrined in the GrundGesetz. Hence, where its observance by the issuing State is impossible, German authorities are bound to refrain from surrendering the person concerned[119].

[113] For an overview see Danial Thym, "Friendly Takeover, or: the Power of the 'First Word'. The German Constitutional Court Embraces the Charter of Fundamental Rights as a Standard of Domestic Judicial Review" (2020) 16 European Constitutional Law Review 187.
[114] Aida Torres Pérez (*supra* note 59), p. 320.
[115] BVerfG, Order of the Second Senate of 15 December 2015 - 2 BvR 2735/14 - http://www.bverfg.de/e/rs20151215_2bvr273514en.html.
[116] Elisa Uría Gavilán, 'Solange III? The German Federal Constitutional Court Strikes Again' (2016) 1 European Papers 367.
[117] BVerfG (*supra note* 115) paras 69,85.
[118] *Ibid.*, para 84.
[119] *Ibid.*, para 83.

Having ascertained that the above obligation of review is also an obligation under EU law[120], the BVerfG moved on to develop a detailed mechanism of such a review, based on an individualized, case by case examination of the respective factual backdrop. In particular, the BVerfG highlighted that a mere allegation of a treatment contrary to human rights does not suffice *per se* to prevent surrender. Rather, there need to be convincing reasons to believe that there is a considerable probability that the requesting state will not observe the minimum fundamental rights standards required in a specific case. As a general rule, the requirement to provide specific factual *prima facie* evidence can only be waived if there is a continuous practice of gross, obvious or systematic violations of human rights in the requesting state, in which event surrender would result in a violation of fundamental principles of the German constitutional order being probable[121]. With regard to the power of assurances, the BVerfG stated that an assurance or a guarantee provided by the requesting state during surrender proceedings is normally suitable to overcome potential concerns with regard to the permissibility of the surrender, unless it is to be expected that the assurance will not be complied with in the individual case at hand[122].

Most importantly, the BVerfG seems to embrace an approach close to that of the ECtHR, as it establishes the obligation of the German executing authorities to conduct an individualized, case by case examination of the facts of each case, including the legal situation and practice in the issuing state, as well as the treatment that the requested person will encounter upon surrender there[123]. According to the German court, even though extraditions within Europe are governed by the principle of mutual trust[124], the executing authorities are obliged to conduct the above scrutiny, using *ex officio* all means of investigation available to them in order to establish whether constitutional law principles are indeed violated, as asserted by the requested person[125]. Therefore, in spite of the divergent, well-established jurisprudence of the Court, the BVerfG appears to have adopted a different view, rejecting the blindfold operation of mutual recognition on the basis of automaticity and speed. By putting the individual at the forefront of its examination, the BVerfG essentially holds that the presumption of mutual trust in the operation of the EAW FD is, and must remain, rebuttable.

What should be highlighted with regard to the present case is that the BVerfG proceeded to a "constitutional identity review" without that being dictated by the facts of the case. Therefore, the judgment was criticized as trying to artificially employ the "constitutional identity review" mechanism in order to regain jurisdictional primacy and send a clear warning to the Court after the *Melloni*[126].The BVerfG seems to put clear limits on who has the ultimate authority to rule upon the compatibility of mutual trust with fundamental rights, linking the principle of guilt to the one of human dignity, and applying this combination to the operation of the EAW. This approach is also contrary to the Court's ruling in *Wereld*, where it was clearly established that the determination of guilt is not touched upon by the EAW FD, rather remains in the realm of the issuing state. Nonetheless, the importance of the BVerfG's answer to the evolution of mutual

[120] *Ibid.,* para 105.
[121] *Ibid.,* para 71.
[122] *Ibid.,* para 70.
[123] *Ibid.,* para 65,110.
[124] *Ibid.,* para 83.
[125] *Ibid.,* para 65.
[126] Frank Meyer, '"From Solange II to Forever I" the German Federal Constitutional Court and the European Arrest Warrant (and How the CJEU Responded)' (2016) 7 New Journal of European Criminal Law 277, p. 281.

trust is undeniable; the BVerfG made clear that fundamental rights concerns are primarily constitutional concerns. Hence the need to be elevated in the Courts' jurisprudence in order for the latter to maintain its credibility in the eyes of the most influential Constitutional Court in Europe.

d) A wind of change? The awakening of a new era

The worrying signals analysed above demonstrate beyond any doubt the practical difficulties and challenges of applying a system based on automaticity and speed in the sensitive area of transnational criminal law. As opposed to its operation in the Internal Market, the principle of mutual recognition and its extensive applicability in EU criminal matters had constitutional implications that the European legislator did not sufficiently take into account when enacting the EAW FD[127]. Indeed, the implementation of the EAW and its interpretation both by national and Union courts casted light on a series of intractable problems, the majority of which relating to the uniform and effective protection of fundamental rights throughout the Union. The lack of an adequate democratic legitimacy, along with the extensive proliferation of enforcement action and the enhancement of the punitive sphere in the AFSJ[128] were perceived by many national courts as an imminent threat to the time-honoured protection of their own constitutional principles. In the same vein, key developments in the field of asylum law revealed the existence of an alternative, more fundamental rights-oriented path, which might as well be transferred to the field of interstate cooperation in criminal matters.

Amidst the continuing pressure towards a shift of direction, the Court finally revised its original, restrictive stance on the relationship between mutual trust and fundamental rights protection, eventually uplifting the latter to a level more compatible with the requirements of the Charter. In a seminal ruling, the Court essentially extended the findings of the *N.S.* case to the criminal field, enhancing the legitimacy and credibility both of its own jurisprudence and of the EAW system, the latter based on an increasingly "built" mutual trust between the cooperating Member States. This awakening of a new era will be presented in detail in the following Chapter.

[127] Valsamis Mitsilegas (*supra* note 34).
[128] Bernd Schünemann, 'Fortschritte Und Fehltritte in Der Strafrechtspflege Der EU' (2004) Goltdammers Archiv für Strafrecht, p. 203.

1.3 A paradigm shift; The *Aranyosi* case as a terminal and departure for judicial dialogue in the European criminal justice area

The Court was given the opportunity to address the aforementioned concerns and reshape directly the relationship between mutual trust and fundamental rights in the joint cases *Aranyosi and Căldăraru*. Building upon its findings in the *N.S.*, the Court finally explicitly held that, in exceptional circumstances, the executing judicial authorities shall refrain from giving effect to an EAW, upon determination that the person in respect of whom the EAW has been issued will face a real risk of inhuman or degrading treatment if surrendered to the issuing State. The effects of this "eagerly awaited"[129] declaration were far-reaching; the Court employed its balancing techniques in order to safeguard the harmonious coexistence between two *prima facie* conflicting but equally essential objectives of the EAW FD, restoring its relations both with the national courts and the ECtHR[130]. Most importantly, the Court, taking duly into account the ever-increasing voices towards a necessary reassessment of the values that should govern the EU's area of criminal justice, proved that constructive judicial dialogue has the power to fill in legislative lacunae, ultimately elevating the intra-Union fundamental rights standards.

a) The Court's ruling in *Aranyosi*: A "two-tier" assessment as a fundamental rights shield

The joint cases *Aranyosi and Căldăraru*[131] concerned prosecution and conviction warrants issued by the Hungarian and Romanian authorities in respect of Mr. Aranyosi and Mr. Căldăraru respectively. Both defendants were arrested in Germany and contested their surrender to the issuing states. Even though the surrender requests were in compliance with the formal requirements laid in the EAW FD, the Higher Regional Court of Bremen held that the surrender could be declared unlawful in case of impediments under paragraph 73 of the German Implementing Law ("IRG"), according to which the surrender must not violate essential principles of the German legal order and those enshrined in Article 6 TEU[132]. In the light of worrying findings of fundamental rights violations due to prison overcrowding in both of the issuing states[133], the German authorities stayed their proceedings and referred the case to the Court, essentially asking whether, on the basis of Article 1(3) EAW FD, an executing authority can, or should refuse execution when there are serious indications that detention conditions in the issuing state are incompatible with fundamental rights or, whether in such cases, the surrender can, or should be made conditional upon assurances that detention conditions are adequately safeguarded[134]. In essence, the German authorities required the Court to take a clear position on the scope and parameters of mutual trust and its interaction with fundamental rights protection in the EAW context.

[129] Rebecca Niblock, 'Mutual Recognition, Mutual Trust?: Detention Conditions and Deferring an Eaw' (2016) 7 New Journal of European Criminal Law 250, p. 250.
[130] Szilárd Gáspár Szilágyi, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 European Journal of Crime, Criminal Law and Criminal Justice 197.
[131] *Aranyosi* (*supra* note 27).
[132] *Ibid*., paras 42, 57-59.
[133] ECtHR, *Voicu v. Romania*, App. No. 22015/10, judgment of 10 June 2014 and *Varga v. Hungary*, Apps. Nos. 14097/12, 45135/12, 73712/12, 44055/13, 64586/13, judgment of 10 June 2015.
[134] *Ibid*., paras 46,63.

Before delving into the Court's response, specific regard shall be given to the Opinion of Advocate General Bot[135]. AG Bot commenced his Opinion by identifying the underlying question raised in the proceedings, namely whether the force of mutual recognition principle, which is the "cornerstone" of the AFSJ, is limited in case of a breakdown in the confidence which the Member States should have in each other, due to a potential infringement of the fundamental rights which they are presumed to respect[136]. The Advocate General rejected the much anticipated transposition of the *N.S.* findings in the EAW framework, crucially holding that the principles developed in the CEAS are not applicable to the very specific system of surrender under the EAW FD; even though the two systems are integral parts of the AFSJ, they still pursue different objectives, are subject to variant harmonization levels and are governed by particular characteristics, rules and principles[137]. In a similar vein, the interpretation of Article 1(3) EAW FD as introducing an exception to the general rule of execution must be rejected, as this provision simply constitutes a mere reminder for the Member States to fulfil their fundamental rights obligations[138]. A different conclusion would not only clearly run counter to the structure of the EAW system, as the latter was envisioned by the European legislator[139], but would also paralyze the entire mechanism due to the numerous malfunctioning prison systems throughout the Union, ultimately nullifying the trusting relationships between Member States, and, consequently, the cornerstone principle of mutual recognition[140]. Nonetheless, the executing authority must be able, upon establishment of systemic deficiencies in the detention facilities of the issuing State, to assess whether in the specific circumstances at issue the requested person is likely to be exposed to disproportionate detention conditions[141]. Finally, AG Bot encouraged the Court to behave as a human rights court, openly criticizing both Member States and EU institutions for the disheartening picture of detention conditions across the Union[142].

Notably, and in the absolute antithesis of what had occurred in the *Radu* case, the Court disregarded AG Bot's Opinion, following an entirely different line of reasoning. In a departure from the first era judgments, the Court finally recognized that the execution of an EAW may be refused under exceptional, rights-related circumstances. Of course, the Court reiterated the utmost importance of the synergy between the principles of mutual trust and mutual recognition, on which the whole EAW system is based, highlighting that executing authorities are in principle obliged to give effect to an EAW, and may refuse to do so only in the situations exhaustively listed in the EAW FD[143]. Nonetheless, limitations of the foregoing principles can still be made "in exceptional circumstances"[144], in which Article 1(3) EAW FD appears particularly relevant. According to the Court, Member States are still bound to respect their fundamental rights obligations, including the prohibition of inhuman or degrading treatment, which, being closely linked to respect for human dignity as enshrined in the Charter, is absolute in nature[145]. Therefore, where the executing authority is in possession of evidence revealing a real risk of

[135] Opinion of Advocate General Bot (*supra* note 3).
[136] *Ibid.*, paras 3-4.
[137] *Ibid.*, paras 49-54.
[138] *Ibid.*, para 74.
[139] *Ibid.*, para 79.
[140] *Ibid.*, paras 122-123.
[141] *Ibid.*, para 167.
[142] *Ibid.*, paras 175,181.
[143] *Aranyosi* (*supra* note 27), paras 77-80.
[144] *Ibid.*, para 82.
[145] *Ibid.*, paras 83-86.

such a prohibited treatment in the issuing state, it is bound to assess the existence of this risk, before allowing the surrender of the requested person. Most significantly, the consequence of surrender must not be that the individual suffers inhuman or degrading treatment[146].

To this end, the Court introduced a "two-tier" test to be followed. Under the first step of the test, the executing authority must rely on "objective, reliable, specific and properly updated information" on the situation prevailing in the requesting Member State, in order to establish the potential existence of deficiencies, which may be "systemic or generalized or may affect certain groups of people of certain places of detention"[147]. This information may be retrieved from various sources, inter alia judgments of the ECtHR or of the courts of the issuing Member State, decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the UN[148] (*general assessment*). Nevertheless, even evidence of a real risk of inhuman or degrading treatment due to general detention deficiencies cannot *per se* justify a refusal to execute the EAW[149]. Under a second step, the executing authority must proceed to a further assessment, specific and precise, in order to determine whether, in the light of the particular circumstances of the case, there are substantial grounds to believe that the specific individual will run such a risk if he/she is surrendered to the issuing Member State[150](*specific assessment*). Accordingly, the executing authority must employ the "cooperative mechanism" of Article 15(2) FD EAW, urgently requesting of the issuing authority all the necessary supplementary information on the specific detention conditions which the detainee concerned will encounter after surrender[151].

The Court concluded its reasoning by holding that if the executing authority, based on all information at its disposal, finds that there exists a concrete risk of inhuman or degrading treatment of the requested person, it must postpone - but not abandon - the execution of the EAW[152], until additional information rule out the existence of such a risk. If the latter cannot be discounted within a reasonable timeframe, the executing authority must decide whether the overall surrender procedure should be brought to an end[153]. This last passage is striking, as it indicates the Court's strenuous efforts to maintain the unhindered, effective operation of the EAW system in a harmonious co-existence with the protection of the individual, where an absolute fundamental right is at stake. Therefore, and notwithstanding its nascent weaknesses, the "two-tier" assessment envisaged by the Court represents an arguably major step towards the deposition of the individual and its rights at the heart of the EU's area of criminal justice.

[146] *Ibid.*, para 88.
[147] *Ibid.*, para 93.
[148] *Ibid.*, para 89.
[149] *Ibid.*, para 91.
[150] *Ibid.*, para 92.
[151] *Ibid.*, para 95.
[152] *Ibid.*, para 98.
[153] *Ibid.*, para 104.

b) *Aranyosi* as a catalyst for harmony in the EU criminal sphere

The Court's ruling in *Aranyosi* represents a decisive moment in the Court's mutual trust narrative. For the first time in the field of EU criminal law, the Court opted for a more reconciliatory approach, essentially reaching a compromise between the effective operation of mutual recognition and fundamental rights protection in the EAW scheme.

On the one hand, the Court elevated fundamental rights to potential limitations of the mutual trust principle, at least when the right to human dignity is at stake, promoting a dual assessment that takes into account both general, systemic deficiencies, but also the individualized circumstances of the requested person. Such an assessment enables the executing authority to conduct a thorough investigation prior to surrender, not only of the laws and declarations but also of the daily practice prevailing in the issuing state. In this way, the Court finally proceeded to a long awaited shift from a quasi-automatic model of mutual recognition based on uncritical, almost "blind trust", to a "trust that it is built", with the requested individual and the fundamental rights implications of the surrender operating as the main point of reference. On the other hand, the Court seems to have established a considerably high threshold for the rebuttal of the mutual trust principle, which is still perceived as the cornerstone underpinning the whole EAW system, hence it can be overturned only in exceptional circumstances. In this respect, the Court carefully avoided introducing a new ground for refusal based on Article 1(3) EAW FD, inclining towards a much less drastic ground of postponement instead. To this end, phrases indicating that non-execution is perceived as a last resort are strategically used, namely that "the execution must be postponed but it cannot be abandoned" and that when the risk for the requested person cannot be discounted, "the executing authority must decide whether the surrender procedure should be brought to an end".

The foregoing seems to indicate that the EAW FD must henceforth be implemented in such a way as to live up to the trust which the Member States are presumed to share. This shift demonstrates that the Court has finally taken into consideration the status of fundamental rights as primary EU law and as core values of the EU legal order[154] that lie "at the heart of" the legal structure of the EU[155]. Nonetheless, the balance has not yet tilted in favour of fundamental rights, as both the latter and the principle of mutual trust are perceived as equally important parameters that need to be *ad hoc* weighed against each other. This balancing exercise seems to be in harmony also with the generally accepted interpretative methods of the Court, according to which each EU instrument is to be interpreted in the light of its objectives and the overall objectives of the EU[156]. Indeed, an opposite, strictly textual method of interpretation would be contrary to the will of the European legislator and would seriously compromise the inseparable and equally important aims that the EAW FD purports to uphold. Under the same prism, the application *mutatis mutandis* of the *N.S.* to the criminal sphere brings harmony between the inextricably linked fields of the AFSJ; the latter is perceived as an integrated, single legal space,

[154] Juliane Kokott and Christoph Sobotta, 'The Kadi Case - Constitutional Core Values and International Law - Finding the Balance?' (2012) 23 European Journal of International Law 1015.
[155] *Opinion 2/13* (*supra* note 5), para 169.
[156] Miguel Poiares Maduro, 'Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism' (2008) SSRN Electronic Journal, p.5.

pervaded in its entirety by the constitutional principle of mutual recognition[157]. As divergences within single legal areas are uneasily seated, the Court's findings in *Aranyosi* dynamically enhanced the credibility of the EAW system in the eyes of both the Member States and the citizens of the Union.

Furthermore, the Court's line of reasoning in *Aranyosi* seems to have been significantly influenced by the BVerfG's earlier jurisprudence on the principle of human dignity as limitation to mutual trust[158]. Elaborating on the dialogical model of interaction between the collaborating under the EAW FD national judicial authorities, the Court artfully avoided a collision with the German Constitutional Court, taking due note of the constitutional concerns that had already been raised throughout the entire Union. The subsequent jurisprudence of the BVerfG might well be seen as marking the outset of a more welcoming, synergetic approach towards the Luxembourg Court. In particular, the BVerfG in the post-*Aranyosi* era has placed strong emphasis on the duty incumbent upon regular courts under EU law to make use of the preliminary reference procedure on matters not yet fully resolved by the Court, including, *inter alia*, considerations on specific aspects of the detention conditions in the issuing state[159]. Hence, where doubts concerning the interpretation and application of EU law arise in the context of mutual legal assistance in surrender proceedings, a failure to comply with the said duty may infringe the constitutional right to one's lawful judge[160]. Inevitably, this openness of the BVerfG sparked a considerable increase in the preliminary references brought by German courts, opening a new circle of judicial dialogue in the field[161]. In the light of the ever evolving jurisprudence of the Court, which will be analysed in detail in the following Chapters, the BVerfG finally affirmed that it is the EU fundamental rights as stipulated in the Charter, rather than the GrundGesetz, which form the direct standard of review when the matter at issue is fully determined under EU law[162]. Even though the "identity review doctrine" is still far from being abandoned[163], this symbolic "coming-together" between the two courts and its effects on a more harmonized fundamental rights protection in the EAW regime cannot be disregarded.

[157] Ester Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in D. Acosta and C. Murphy (Eds.), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing 2014).
[158] Georgios Anagnostaras, 'Mutual Confidence Is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu' (2016) 53 Common Market Law Review 1675.
[159] BVerfG, Order of the Second Senate of 19 December 2017 - 2 BvR 424/17 -, para 48 http://www.bverfg.de/e/rs20171219_2bvr042417en.html.
[160] *Ibid.*, para 37.
[161] Simon Röß, 'The Conflict between European Law and National Constitutional Law Using the Example of the European Arrest Warrant' (2019) 25 European Public Law 25.
[162] BVerfG, Order of the Second Senate of 1 December 2020 - 2 BvR 1845/18 -, para 36 http://www.bverfg.de/e/rs20201201_2bvr184518en.html.
[163] *Ibid.*, para 58.

c) The ECtHR jurisprudence post *Aranyosi*: An armistice with the Luxembourg Court

Soon after the release of *Aranyosi*, the ECtHR was given the opportunity to comment on the nuanced perception of mutual trust and its relationship with fundamental rights in the post-*Opinion 2/13* era. In a series of seminal judgments, the Strasbourg court ensured its harmonious symbiosis with the Court's developing narrative, without however abdicating its role as a guardian of the fundamental rights enshrined in the ECHR.

In the case of *Avotiņš* [164], which concerned the observance of fair hearing guarantees in the context of mutual recognition in civil and commercial matters, the ECtHR provided extensive *dicta* that arguably go far beyond the facts of the case, shaping the protection of the individual under two divergent, but necessarily co-existent frameworks[165]. In particular, the ECtHR highlighted that it is mindful of the importance of mutual recognition for the construction of the AFSJ and of the level of mutual trust it requires, essentially holding that the latter is wholly legitimate from the perspective of the ECHR[166]. This statement is noteworthy, as the ECtHR not only confirms its commitment to European cooperation, but also embraces a conciliatory tone, without any sign of vindictiveness for the Court's stance against the accession in *Opinion 2/13*[167]. Notwithstanding the continuing validity of the *Bosphorus* presumption[168], the ECtHR expressed its concern that the effectiveness oriented methods used to create the AFSJ may result in the review of fundamental rights observance being tightly regulated or even limited. In the same vein, the "exceptional circumstances doctrine" may in practice run counter to the national courts being empowered to conduct a review commensurate with the gravity of any serious allegation of a fundamental rights violation in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient[169]. To this end, states cannot renounce their obligation to examine serious and substantiate complaints concerning manifest deficiencies on the sole ground that they are applying EU law[170], as it must always be ensured that mutual recognition is not applied automatically and mechanically, to the detriment of fundamental rights protection. In the subsequent *Pirozzi* case[171], the ECtHR in essence transferred the *Avotiņš dicta* to the EAW scheme; the latter is presumed to comply with the ECHR, as long as its operation on the ground does not manifestly violate the rights of the person concerned[172].

Building upon *Avotiņš*, the ECtHR made a key step towards the convergence of intra-Union fundamental rights benchmarks in its prominent *Romeo Castaño* ruling, where, for the first time, an executing Member State was found in violation of its fundamental rights obligations for

[164] ECtHR, *Avotiņš v. Latvia*, App. No. 17502/07, judgment of 23 May 2016.
[165] Giacomo Biagioni 'Avotiņš v. Latvia. The Uneasy Balance between Mutual Recognition of Judgments and Protection of Fundamental Rights European Papers' (2016) 1(2) A Journal on Law and Integration, 579.
[166] *Avotiņš* (*supra* note 166), para 113.
[167] Matti Pellonpää, 'Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe', in K. Karjalainen, I. Tornberg, A. Pursiainen (Eds.) *International Actors and the Formation of Laws* (Springer, Cham 2022), p. 55.
[168] ECtHR, *Bosphorus v. Ireland*, App. No. 45036/98, judgment of 30 June 2005. According to the *Bosphorus* presumption, actions taken by states in compliance with obligations stemming from their membership in the EU are justified, as the Union is presumed to offer protection equivalent to that guaranteed by the ECHR. The presumption is rebutted when in a particular case the protection of the ECHR rights proves to be manifestly deficient.
[169] *Avotiņš* (*supra* note 166), para 114.
[170] *Ibid.*, para 116.
[171] ECtHR, *Pirozzi v Belgium*, App. No. 21055/11, judgment of 17 April 2018.
[172] *Ibid.*, paras 60-62.

failing to surrender an individual requested in EAW proceedings[173]. The ECtHR based its reasoning on the cooperative model established under the procedural limp of Article 2 ECHR ("right to life"). According to the latter, contracting states are under a twofold obligation to act jointly, both seeking and affording assistance, exhausting in good faith all possibilities available to them under the applicable mutual cooperation instruments in criminal matters[174]. Endorsing the *Aranyosi* approach, the ECtHR affirmed that even though a real risk of the requested person being subjected to inhuman or degrading treatment on account of the prevailing detention conditions in the issuing state may indeed constitute a legitimate ground for refusing execution of an EAW, the finding of such a risk must have a sufficient factual basis[175]. By failing to conduct a thorough and updated examination in order to identify the existence of a concrete risk or of any structural shortcomings in the contested detention conditions, the executing Member State refused too readily to execute the EAW, failing to engage seriously with the individualized assessment put forward in *Aranyosi* and ultimately violating its ECHR obligations. Without a doubt, this approach represents not only an important alignment with the precedence set by the Court, but also a step further in the continuing "challenge of symmetry" ("souci de symétrie") between EU law and the ECHR[176]. As judge Spano essentially held in his Opinion, this challenge requires carefully crafted interpretative solutions so as to retain, as far as possible, the principled character and integrity of the ECHR without upsetting the delicate institutional balance and fundamental elements inherent in EU law. In this respect, the *Romeo Castaño* judgment "has succeeded in achieving just that"[177].

d) Questions left unanswered? Towards a second round of judicial dialogue

In the light of the foregoing, it is evident that *Aranyosi* represents a paradigm shift in the conceptualization of the "principle behind the principle" mechanism, marking the commencement of a new era in terms of both vertical and horizontal relationships between the Union courts. Nonetheless, even if the pressing fundamental rights concerns were gradually embodied in the Court's perception of mutual trust, its exact parameters in the equation of rights protection are far from being permanently defined. In reality, the *Aranyosi* doctrine leaves open a series of challenging questions, regarding the mode and substance of the fundamental rights scrutiny in the EAW regime, as well as the exact nature and extent of the dialogical model of cooperation assigned to national judicial authorities. Therefore, issues including, *inter alia*, the potential applicability of the *Aranyosi* test to non-absolute rights, the exact effect of what seems to be a *de facto* ground for refusal, the evidentiary threshold required for the rebuttal of mutual trust presumption as well as the inherent shortcomings in the workability of the newly introduced *modus operandi*, are still open and remain to be resolved. In this respect, *Aranyosi* appears as both a terminal and a departure for judicial dialogue across the Union; the ever-emerging findings of this versatile dialogue will be demonstrated in the following Part.

[173] ECtHR, *Romeo Castaño v. Belgium*, App. No. 8351/2017, judgment of 9 July 2017.
[174] *Ibid.*, para 81.
[175] *Ibid.*, para 85.
[176] Nasiya Ildarovna Daminova, 'ECHR Preamble vs. the European Arrest Warrant: Balancing Human Rights Protection and the Principle of Mutual Trust in EU Criminal Law?' (2022) 49 Review of European and Comparative Law 97, p. 116-121.
[177] Concurring Opinion of Judge Spano, joined by Judge Pavli in *Romeo Castaño v. Belgium*, Section III.

Part II: One test to rule them all? Challenging the parameters of mutual trust in the post-*Aranyosi* era.

The *Aranyosi's* contribution to the beginning of a new era, one characterized by a more peaceful co-existence and mutual complementarity between the various constitutional regimes throughout the Union is undeniable. Inevitably, the accommodation of some of the fundamental rights concerns that had been raised in the first years of the EAW FD's operation soon opened up the way to the addressing of others[178]. The commencement of a closer scrutiny of fundamental rights compliance in the issuing state proved to be a particularly challenging mission for the executing authorities, initiating an ever-accelerating dialogue with the Court via the preliminary reference procedure. Particularly pro-active national judicial authorities now engage in a new form of judicial discourse, contesting the set parameters of mutual trust not only in the context of inhuman or degrading treatment of surrendered detainees but also of other fundamental rights infringements, namely those relating to the non-absolute right to a fair trial and its constituent elements. This evolving discourse is inextricably linked to the very notion and extent of mutual trust under the EAW FD and, in essence, to the serious rule of law backsliding in various Member States[179] and its worrying effects on the "trust building" processes in today's European area of criminal justice.

In light of the above, the Court progressively elaborated on its perception of the mutual trust principle. With regard to absolute rights violations due to poor detention conditions, the Court expanded upon the two-tier test developed in the *Aranyosi*, identifying with greater accuracy the extent to and the exact manner in which the executing authority is called upon to evaluate elements prevailing in a foreign legal system, so as to ensure the latter's compliance with fundamental rights norms. In the same vein, the Court substantially responded to whether, and to what extent, the principle of mutual trust can still govern the relationship with states that do no longer operate under the realm of the rule of law. In a line of landmark rulings, the Court essentially extended the *Aranyosi* doctrine in cases where judicial independence or the right to a tribunal established by law is at stake. Notwithstanding the positively assessed analogous application of the *Aranyosi* in another set of rights, the rule of law decline and the proliferation of its ramifications across the Union have raised serious concerns on the workability of the Court's approach, questioning once again the credibility of the whole EAW system.

The following Part aims to provide a critical overview of the above, with particular emphasis placed to the Court's mode of thinking and its viability in view of the current challenges overshadowing the so far earned trust between the collaborating judicial authorities.

[178] Steve Peers, 'Human Rights and the European Arrest Warrant: Has the ECJ Turned from Poacher to Gamekeeper?' (EU Law Analysis, 12 November 2016).
[179] Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU', in E. Hirsch Ballin, G. van der Schyff, M. Stremler (Eds.) *European Yearbook of Constitutional Law* (T.M.C. Asser Press, The Hague, 2019).

2.1 The contours of *Aranyosi* in absolute rights violations: The risk of inhuman or degrading treatment in detention

The exact parameters and remit of evaluation by the executing authorities of the level of fundamental rights compliance in the issuing state were established by the Court in the cases of *ML* and *Dorobantu*. Elaborating on the *Aranyosi's* requirement for a thorough, individualized assessment, the Court placed considerable weight on the notion of assurances under Article 15 EAW FD. Despite the Court's clarifications and the useful guidance provided in this respect by the ECtHR, the whole idea and operation of assurances in absolute rights violations remain highly contested within the EAW framework.

a) A breakdown of the "two-tier" assessment: The Court's guidelines in *ML* and *Dorobantu*

In the *ML* case[180], which was initiated by a preliminary reference of the High Court of Bremen, an EAW for prosecution purposes had been issued in respect of a Hungarian national who had been convicted *in abstentia* to a custodial sentence in Hungary. Given the German authorities' concerns about the existing situation in the Hungarian prisons, the Hungarian Ministry of Justice provided assurances that the requested individual would not be subjected to any inhuman or degrading treatment by virtue to his proposed detention in Hungary. Subsequently, the Court was called upon to respond to a number of crucial questions, relating to the extent of assessment of the detention conditions in Hungary and the taking into consideration of the assurances provided by the Hungarian Ministry.

After reiterating the "golden dictum" according to which the execution of an EAW is the rule, while refusal only constitutes an exception to be interpreted strictly, the Court confined itself on the detailed presentation of the second sub-part of the *Aranyosi* test. In particular, the Court clarified that the existence of a legal remedy in the issuing state concerning the legality of the detention conditions is not capable *per se* to rule out a potential risk for the requested individual[181]. Therefore, the executing authorities are still bound to proceed to an individualized assessment of the specific situation before them. As for the extent of this assessment, and in light of the overall objectives of the EAW FD, the executing authorities are solely required to assess the detention conditions in which, based on the available information, it is actually intended that the individual concerned will be detained, including on a temporary or transitional basis[182]. According to the Court, a more extended request would be clearly excessive, running counter to the overall effectiveness of the EAW scheme[183]. In the same vein, the no fewer than 78 questions raised by the German authorities to their Hungarian counterparts could result in the operation of the EAW being brought to a standstill, undermining the duty of sincere cooperation[184] which should govern the inter-state dialogue pursuant to Article 15 EAW FD[185]. Crucially, the same applies to the content of the questions raised, as the latter should concern only aspects of detention that are relevant for the purposes of the *Aranyosi* assessment. In the ellipse of minimum standards under EU law regarding detention conditions, the Court referred to the case law of the ECtHR, according to which the ill-treatment must attain a minimum level of severity

[180] CJEU, Case C-220/18 PPU *ML* [2018] EU:C:2018:589.
[181] *Ibid.*, paras 72-26.
[182] *Ibid.*, paras 87-89.
[183] *Ibid.*, para 84.
[184] Article 4(3) TEU.
[185] *Ibid.*, para 104.

in order to fall within the notion of inhuman or degrading treatment. This depends on all the circumstances of the case, including, *inter alia*, the duration of the treatment, its physical and mental effects and the particular situation of the victim. The Court made specific reference to the space factor in the overall assessment, holding that a strong presumption of prohibited treatment arises when the personal space available to the detainee is less than 3m² in multi-occupancy accommodation[186].

The Court further employed the duty of sincere cooperation "in full mutual respect" also with regard to the process of accommodating the assurances given by the issuing authorities. According to the Court, the dialogical model of cooperation under Article 15 EAW FD requires the respective judicial authorities to either request information or give assurances concerning the actual and precise conditions in which the requested person will be detained after surrender[187]. In any event, the assurances provided under this model cannot be disregarded by the executing authority. More specifically, and in the name of the mutual trust principle, if the assurance is given, or at least endorsed by a judicial authority, the executing authority must rely on it, at least in absence of specific indications that the conditions in the particular detention facilities are in violation of the absolute prohibition of inhuman or degrading treatment. Whereas, if the assurance is neither provided nor endorsed by a judicial authority, such as in the present case, it must be only evaluated by the executing authority in the course of the overall assessment to be carried out before a final decision on surrender is taken[188]. In view of the foregoing, the Court completed its reasoning by reiterating the duty of the executing authority to examine the accuracy of the information brought before it based on all the available and updated data[189].

The considerably limited ambit of the individualized assessment to be carried out by the executing authorities was further demonstrated in the *Dorobantu* case[190], which concerned an EAW issued in respect of a Romanian national residing in Germany for the purpose of conducting a criminal prosecution. The executing authorities, namely the Regional Court of Hamburg, requested additional information from Romania, among which an assurance that Mr. Dorobantu would dispose at any time a minimum space of 3m² in his cell. Even though such assurance was not provided, the Regional Court did not establish the existence of a concrete risk for Mr. Dorobantu, ultimately authorizing his surrender to Romania. Nonetheless, the BVerfG set aside this decision by virtue of a constitutional complaint, essentially holding that the defendant's right to a lawful judge had been violated on the ground that the Regional court had failed to request a preliminary ruling. Most importantly, the BVerfG directed the German authorities to request necessary clarifications from the Court, both on the minimum standards of detention under the ECHR and its relation with EU law, and on the exact role of potential impunity concerns in determining the scope of the absolute rights under Article 4 Charter[191]. As analysed above, this ruling of the BVerfG can be regarded as another sign of alignment with the Court's revised stance.

[186] *Ibid.*, paras 90-92.
[187] *Ibid.*, para 109-110.
[188] *Ibid.*, paras 112-114.
[189] *Ibid.*, para 117.
[190] CJEU, Case C-128/18 *Dumitru-Tudor Dorobantu* [2018] EU:C:2019:857.
[191] BVerfG, 2 BvR 424/17 (*supra* note 158), para 58.

In its reply, the Court mainly reiterated its findings in the *ML*, providing some additional details that deserve special attention. Particularly, the executing authority must assess all the physical aspects of the detention in relation to the prison in which it is intended that the individual will be detained, with the assessment not being limited to obvious inadequacies only because the prohibition of inhuman or degrading treatment is of an absolute nature[192].In this regard, and in the absence of minimum EU standards on detention conditions, the executing authority must rely on the ECtHR's case law, not only for the minimum space required but also for other elements of an acceptable prison environment[193]. Crucially, a finding of a "real risk" of inhuman or degrading treatment cannot be weighed, for the purposes of deciding on the surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters, nor to the principles of mutual trust and mutual recognition[194]. Nevertheless, the Court went even further than its *ML* ruling by reiterating the *Melloni* doctrine; while it is open to the Member States to provide higher minimum standards in terms of detention conditions than those resulting from Article 4 Charter and Article 3 ECHR in their respective prison systems, the surrender of an individual under the EAW scheme cannot be made conditional upon the fulfilment of those higher national benchmarks, or the efficacy of the EAW FD would be seriously compromised[195].

The Court's response in the cases of *ML* and *Dorobantu* arguably provides the executing authorities with useful guidelines, elaborating on the scope of and the way in which the *Aranyosi* individualized assessment shall be carried out when the absolute right of Article 4 is at stake. Notably, the Court's approach represents also a continuation in the symbolic "coming-together" with the Strasbourg Court, as the latter's jurisprudence is directly installed within the Court's toolbox in the current ellipse of corresponding harmonized standards at the Union level. Nonetheless, the Court's approach is not immune to considerable lacunas. On the one hand, the Court leaves open questions with regard to parameters of detention that are not yet settled in the ECtHR's case law, refraining from adopting more generalized standards of reference for the benefit of both the national authorities and the principle of legal certainty[196]. On the other hand, the Court poses substantial limitations to the judicial dialogue between the collaborating authorities, placing extensive weight to the notion and operation of the assurances provided therein. The problematic aspects of this dialogical model will be demonstrated in the following Chapter.

[192] *Dorobantu* (*supra* note 192), paras 61-62.
[193] *Ibid.*, paras 71-77.
[194] *Ibid.*, paras 82-84.
[195] *Ibid.*, para 79.
[196] Auke Willems (*supra* note 7), p.104.

b) In a delicate balance between trust and mistrust: The *problématique* of a restrained model of cooperation

The Court's elaboration on the practical operation of Article 15 EAW FD raises considerable concerns in two principal directions. Firstly, the Court seems to unduly restrict the powers of the executing authority to proceed to a thorough, individualized assessment, placing considerable limitations to the dialogue with the issuing authorities. In this respect, the Court employed the duty of sincere cooperation to outline the number and the content of the questions that can be validly raised by the executing authority, essentially holding that only the conditions of the prison in which the surrendered person is intended to be held shall be examined, thus those prevailing in other prisons in which the person may potentially be held or transferred is a matter to be regulated exclusively by the issuing state. Following the same logic, the Court struggles to reach a balance between the uncritical refusal of execution and the overloading of the issuing authority with a plethora of time-consuming inquiries. An extended list of questions seems to be regarded more as a sign of mistrust rather than as an effort of the executing authority not to readily co-authorize a potential violation of an absolute fundamental right. In this way however, the lurking risk for the individual cannot be fully averted prior to surrender, enhancing the fears of the executing authorities that by embarking to a "journey into the unknown", they may themselves be in breach of their fundamental rights obligations[197]. Furthermore, the absolute nature of the contested rights seems to seat uneasily with the Court's enforcement considerations, including the combat of impunity, the speedy surrender and the workload imposed on the issuing authority. Similarly, the Court's resurgence of *Melloni* appears as another attempt to ensure that national benchmarks will not compromise the unity and effectiveness of EU law, even when, contrary to the facts of *Melloni*, no harmonization currently exists in terms of detention conditions.

Secondly, the Court seems to associate the effective operation of the EAW collaborative mechanism with the notion and provision of assurances, as the executing authority cannot disregard an assurance given by the issuing state, especially when the latter is provided or endorsed by a judicial authority. The concept of assurances is not unknown in the field of interstate cooperation. Rather, it seems to be a concept retrieved from classic international law, according to which a state is called upon to provide a promise, a guarantee of future practice in a specific set of events. In this way, the reliance on assurances already presupposes a certain situation of shaken trust, thus assurances are employed to counterfactually reaffirm the trustworthiness of the trustee[198]. Nonetheless, the transfer of this notion to the EAW framework and the growing reliance upon it may pose a significant threat to fundamental rights protection. In particular, the Court seems to propose a sort of uncritical faith in assurances provided by foreign judicial authorities, bringing back the quasi-automatic, almost blind form of mutual trust that the very ruling in *Aranyosi* aimed to abandon. According to Mitsilegas, blind trust is now re-introduced by the back door during the second stage of the *Aranyosi* assessment[199], impeding the

[197] Miguel Poiares Maduro, 'So Close and yet so Far: The Paradoxes of Mutual Recognition' (2007) 14 Journal of European Public Policy 814, pp. 814-25 and Valsamis Mitsilegas (*supra* note 128), p. 1278.
[198] Pedro Caeiro, "Scenes from a Marriage": Trust, Distrust and (Re) Assurances in the Execution of a European Arrest Warrant", in S. Carrera, D. Curtin, A. Geddes (Eds.), *20 Year Anniversary of the Tampere Programme: Europeanisation Dynamics of the EU Area of Freedom, Security and Justice* (European University Institute 2020), p. 243.
[199] Valsamis Mitsilegas (*supra* note 25), p. 234.

meaningful and thorough scrutiny that the executing state should be empowered to conduct in order to rule out any potential risks. Indeed, the "exceptional circumstances doctrine" appears now three times in the Court's construction. Specifically, the executing authority can monitor the issuing state's compliance with fundamental rights only *in exceptional circumstances*, it can further request supplementary information under Article 15(2) EAW DF *in exceptional cases* and as a last resort[200] and, finally, only *in exceptional circumstances*, and on the basis of precise information, can the executing authority conclude that, notwithstanding an assurance provided, the real risk for the person concerned remains[201]. Admittedly, the threshold for the rebuttal of mutual trust remains particularly high. In this way however, the Member States are in effect deprived of the powers confined upon them by the *Aranyosi*, while being dissuaded from improving the systemic inadequacies prevailing in their respective criminal systems.

c) The EAW cooperative mechanism from the ECtHR's perspective: The "Do's and Don'ts"

The preceding implies that the current conversation on the EAW cooperative mechanism is far from over. Beyond assurances, another critical aspect is the duties undertaken by the participating Member States, which should collaborate in good faith, while focusing on individual protection. In this regard, valuable guidelines have been provided also by the ECtHR's latest jurisprudence. In the aforementioned *Castaño* case, the ECtHR found that the refusal of execution lacked a sufficient factual basis, as the executing authorities had failed to efficiently cooperate with the issuing state by requesting additional information on the applicable detention regime in order to ascertain the existence of a real and concrete risk for the surrendered person[202]. In the even more recent *Bivolaru and Moldovan* joint cases[203], the ECtHR for the first time rebutted the presumption of equivalent protection[204], citing a manifest deficiency in the protection of the ECHR rights within the EAW scheme.

In *Moldovan*, the ECtHR essentially found that both the assurances given by the issuing Romanian authorities and their subsequent assessment by the executing authorities were equally problematic. Namely, the information provided on prison conditions had not been placed sufficiently in the context of the existing case-law concerning endemic overcrowding in the cell where the applicant was to be held, where he would have had less than 3m² of personal space, while other aspects of detention had been described in stereotypical fashion by the Romanian authorities[205]. Notwithstanding these clear shortcomings and even though the applicant had produced weighty and detailed evidence pointing to systemic or generalized deficiencies in the Romanian prisons, these were not taken in due account by the Belgian executing authorities, which discounted the existence of an individualized risk in respect of Mr. Moldovan. The executing authorities had even made a recommendation that the applicant should be held in better conditions, which however was deemed insufficient by the ECtHR to preclude a real risk of inhuman or degrading treatment[206]. In *Bivolaru*, the ECtHR found the *Bosphorus* presumption

[200] *ML* (*supra* note 182), para 79.
[201] *Dorobantu* (*supra* note 192), para 69.
[202] *Castaño* (*supra* note 175), paras 89-90.
[203] ECtHR, *Bivolaru and Moldovan v. France,* Apps Nos. 40324/16 and 12623/17, judgment of 25 March 2021.
[204] *Supra* note 170.
[205] *Bivolaru and Moldovan (supra* note205), paras 123-124.
[206] *Ibid.,* para 125.

inapplicable, as the respective national court had rejected the applicant's call for a preliminary ruling request, despite the emerging of serious issues which the Court had never previously examined[207]. Nonetheless, no breach of Article 3 ECHR was ultimately found. What is interesting for our analysis is that the ECtHR found the applicant's description of the detention conditions insufficiently detailed or substantiated to constitute prima facie evidence of a real risk of inhuman or degrading treatment in the event of his surrender, hence the executing authority was released from the obligation to request additional information from its Romanian counterpart concerning the applicant's future place and conditions of detention[208]. Consequently, no solid factual basis existed to allow refusal of surrender in respect of Mr. Moldovan.

The preceding findings arguably represent a sign of increasing convergence with the Court's jurisprudence and a new setback for the operation of the dialogical, cooperative mechanism established therein[209]. Despite the different methodologies employed by the two Courts, their perceptions on the exchange of information and provision of assurances are complementary. The ECtHR made a step further, highlighting that the executing authorities cannot simply defer to the statements made by the issuing state, especially when the latter are based on clichéd terms rather than on a quality and reliable description of the detention conditions in question[210]. On the contrary, the executing authority must be able to completely rule out the existence of a real risk of inhuman or degrading treatment, by proceeding to a sufficiently thorough individualized assessment. Therefore, mere recommendations or encouragements towards the issuing state to comply with its fundamental rights obligations do not suffice to avert a potential threat to the individual's rights at stake. In this way, the Member States seem to have at their disposal a plethora of useful guidelines, in order to properly counterbalance their obligations under both the EU and the ECHR legal framework.

[207] The questions concerned the implications for the execution of an EAW of the granting of refugee status by a Member State to a national of a third country which subsequently also became a Member State.
[208] *Bivolaru and Moldovan (supra* note 205), paras 144-145.
[209]Tomas Wahl, 'ECtHR: EAW Cannot Be Automatically Executed' (Eucrim - The European Criminal Law Associations' Forum 26 April 2021)
[210] Julié William, 'Bivolaru and Moldovan v. France: A New Challenge for Mutual Trust in the European Union?' (Strasbourg Observers22 June 2021).

2.2 The *Aranyosi* by analogy: Fair trial guarantees as an integral part of the Rule of Law principle

In the preceding rulings, the Court attempted to illustrate its understanding of mutual trust and its practical operation in the EAW regime in cases involving potential violations of the absolute right enshrined in Articles 3 and 4 of the Charter. Nuanced concerns soon emerged with regard to the possible application of the same approach on infringements relating to another set of rights, namely the right to a fair trial and its constituent elements. These concerns were hardly surprising, given the current deteriorating background of the rule of law decline in several states that continue to participate in the EAW system as equally trustworthy counterparts. In light of persistent attacks, including on the independence of the judiciary and on the right to a tribunal established by law, the Court was requested to either affirm or revoke its previous approach on mutual trust and its relationship with fundamental rights. The key aspects of this seminal jurisprudence will be presented in the following Chapters.

a) The rule of law principle in an EU criminal law context

Before delving into the particularities of each case examined by the Court, it is essential to cast light on the very notion of the rule of law and its importance for the operation of the cooperative mechanisms governing the whole AFSJ. Originally, the rule of law has been perceived as one of the foundational values of the Union enshrined in Article 2 TEU, essentially meaning that neither the EU institutions nor the Member States are above EU law[211]. In this capacity, the rule of law serves as the cornerstone both of every modern constitutional democracy and of the European project *per se*, ensuring that *all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts*[212]. Emerging as a principle of a constitutional nature, the rule of law thus represents a concoction of variant principles and standards, including, *inter alia*, legal certainty, independent and impartial courts, effective judicial review, respect for fundamental rights and equality before the law[213]. In turn, the synergistic compilation of these principles operates as a *condition sine qua non* for the existence and development of the common spiritual heritage that the Member States share with each other, making "integration through the rule of law[214]" what the European Union essentially stands for.

Within the EU, the rule of law is of utmost importance, as it is a precondition not only for the respect of all other fundamental values listed in Article 2 TEU, but also for the Member States' compliance with the whole range of their obligations stemming from EU law. The latter arguably include the obligations deriving from the principle of mutual trust, as described in the preceding Chapters. Therefore, and particularly in the context of criminal justice, the rule of law principle is the *alpha* and *omega* for the construction of an area without internal frontiers, in which Member States place trust in each other's criminal justice systems, however different they may be, by virtue of their shared commitment to the principles of freedom, democracy, respect for

[211] Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) 38 Yearbook of European Law 3.
[212] Communication From The Commission To The European Parliament And The Council "A new EU Framework to strengthen the Rule of Law" COM/2014/0158 final , Brussels, 11.3.2014.
[213] *Ibid.*
[214] Koen Lenaerts, "New Horizons for the Rule of Law Within the EU" (2020) 21 German Law Journal 29, p. 29.

human rights, fundamental freedoms and, ultimately, the rule of law[215]. In this respect, the rule of law and fundamental rights are co-constitutive and inextricably linked, in such a way that judicial independence and the surrendered individual's fundamental rights represent two sides of the same coin; if the former is attacked, the latter cannot be guaranteed either[216].Subsequently, the establishment of a persistent rule of law decline in a specific Member State, due to systemic threats on the independence of its judiciary, may have as an imminent consequence the undermining of its trustworthiness in the operation of the EAW regime. Due to this undermining of mutual trust on the ground, the execution of an EAW issued by the afflicted state will inevitably encounter serious obstacles, as the executing authorities will hesitate and eventually probably refuse execution so as not to become complicit in fundamental rights violations. Consequently, a generalized fear of refusal could bring the whole EAW system to a standstill, jeopardizing the very existence of mutual trust and, in turn, of the EU's AFSJ.

In light of the above, and amidst the generalized rule of law backsliding in certain Member States, it did not take long before the Court received pressing requests for preliminary rulings by particularly worried executing judicial authorities. As the collapse of the rule of law in any Member State is tantamount to the rupture of a legal space in the entire European Union[217], with spill-over effects endangering its very essence as a "Union of values", the Court's intervention was indeed indispensable.

b) Judicial independence at the heart of the rule of law: The dawn of a new era in the *LM* case

In the landmark *LM*[218]case, the Court was asked for the first time to determine the applicability of the *Aranyosi* test in assessing judicial independence and fair trial guarantees through a rule of law prism. The case concerned the execution of three EAWs issued by Polish judicial authorities for the purpose of conducting a criminal prosecution against a polish national. Upon his arrest in Ireland, the requested individual opposed to his surrender since it would expose him to a real risk of a flagrant denial of justice, citing in particular the Commission's reasoned proposal of 20 December 2017 submitted in accordance with Article 7(1) TEU[219]. The Irish High Court, recognizing the cumulative negative impact on the rule of law of the legislative reforms in the Polish judiciary since 2015[220], referred to the Court for a preliminary ruling, essentially asking whether the *Aranyosi* test of individual guarantees is applicable when there is strong evidence that the very system of justice in the issuing state "no longer operates under the rule of law"[221]. The Court's response has far-reaching implications, ushering in a new era in its "*mutual trust v. fundamental rights*" mandate.

[215] Oskar Losy and Anna Podolska, 'The Principle of Mutual Trust in the Area of Freedom, Security and Justice. Analysis of Selected Case Law' (2020) 8 Adam Mickiewicz University Law Review 185, p. 187.
[216] Petra Bárd, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust' (2021) 12 Pravni zapisi 371, p. 372; Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU' (CEPS20 November 2013).
[217] Marek Safjan, 'The Rule of Law and the Future of Europe' (www.dirittounioneeuropea.eu2019).
[218] CJEU, Case C-216/18 PPU *Minister for Justice and Equality v LM* [2018] EU:C:2018:586.
[219] European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20.12.2017.
[220] For a comprehensive analysis on the rule of law crisis in Poland see Jan Winczorek and Karol Muszyński, 'The Access to Justice Gap and the Rule of Law Crisis in Poland' (2022) 42 Zeitschrift für Rechtssoziologie 5.
[221] *LM* (*supra* note 218), para 25.

Building upon its previous *Associação Portugueses* judgment[222], which concerned the reduction in the remuneration of national judges, the Court placed particular emphasis on judicial independence, a right of cardinal importance, which not only forms part of the essence of the fundamental right to a fair trial, but also serves as a guarantee that all the rights that individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, including the value of the rule of law, will be safeguarded[223]. The Court expanded its reasoning even further, holding that as the very existence of effective judicial review is of the essence of the rule of law, the requirements of effective judicial protection, including judicial independence of "courts or tribunals" within the meaning of EU law, are also imperative in the context of the EAW system, a system of surrender in which judicial authorities play the primary role[224]. Therefore, all judicial authorities - executing and issuing - involved in the EAW scheme should meet the requirements inherent in effective judicial protection, particularly the guarantees of independence and impartiality[225]. Notwithstanding the dominance attributed to judicial independence as an integral part of the rule of law, the Court pointed out that attacks against this independence in the issuing state, even if ascertained as rule of law violations by a Commission's reasoned proposal on the basis of Article 7(1) TEU, are not sufficient *per se* to automatically suspend execution. This falls exclusively upon the European Council under the specific provision of Article 7(2) TEU, thus if the latter is not activated, the EAW mechanism continues to operate also with respect to the "crisis-ridden" issuing state[226].

This statement however does not deprive the executing authorities from their powers and obligations under Article 1(3) EAW FD. That is, in cases where the very essence of one's fundamental right to a fair trial is at stake due to an imminent surrender to an impaired legal space, the executing authority can exceptionally refrain from giving effect to an EAW, only after verifying the existence of a real, individualized risk following the well-established *Aranyosi* doctrine[227]. To that end, the executing authority must primarily carry out a first, "systemic" assessment on the basis of objective, reliable, specific and properly updated material on the operation of the justice system in the issuing Member State, in order to determine whether there is a real risk, connected with the lack of judicial independence due to systemic or generalized deficiencies, of the fundamental right to a fair trial being infringed. Particularly relevant for this general assessment is the Commission's reasoned proposal on the basis of Article 7(1) TEU[228]. At a second stage, the executing authority must assess, specifically and precisely, whether in the particular circumstances of the case, there are substantial grounds for believing that the requested individual will run such a risk if surrendered to the issuing state. What is particularly interesting for the present analysis is that the Court seems to introduce a determining, intermediary stage of individualized assessment[229], concerning the independence of the very courts that have jurisdiction over the proceedings to which the requested person will be subject upon surrender.

[222] CJEU, Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117.
[223] *LM* (*supra* note 220), para 49.
[224] *Ibid.*, para 55.
[225] *Ibid.*, paras 57-58.
[226] *Ibid.*, paras 69-73.
[227] *Ibid.*, paras 59-60.
[228] *Ibid.*, para 61.
[229] Stanisław Biernat and Paweł Filipek, "'The Assessment of Judicial Independence Following the CJEU Ruling in C-216/18 LM', Defending Checks and Balances in EU Member States" in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, C., Taborowski, M., Schmidt, M. (Eds.), *Defending Checks and Balances in EU Member States* (Springer 2021), p. 413-414.

At this stage, the executing authority is bound to assess whether the already established systemic deficiencies in the issuing state may specifically affect the courts competent to hear the particular case at issue[230]. Only in the case of an affirmative answer can the executing authority move on to the second and last part of its individualized assessment. Having regard to the individual's specific concerns, as well as to his/her personal situation, the nature of the offence for which he/she is being prosecuted and the factual context that forms the basis of the EAW, the executing authority must ultimately respond to whether a concrete risk of a breach of the fundamental right to a fair trial still exists[231]. If, even after the operation of the collaborative mechanism pursuant to Article 15 EAW FD this risk cannot be discounted, the executing judicial authority must refrain from giving effect to the EAW in question[232].

In the *LM*, the Court reappeared as a "gatekeeper" of its *Aranyosi* doctrine, essentially extending its application to an entirely divergent factual backdrop, one which could be approached either from a rule of law or from a fundamental rights perspective[233]. This is due to the very nature of judicial independence, which, as analysed above, operates both as a stand-alone subpart of the rule of law, but also as a constitutive element of the fundamental right to a fair trial. It is because of this peculiar nature of judicial independence that the proposed identical application of the *Aranyosi* test proved to be a particularly challenging task for the executing authorities in cases involving Polish EAWs. As the rule of law crisis in Poland reached its peak in the post-*LM* era, with the latest legislative reforms in 2019 and 2020 indicating a worrying increase in the executive's influence over the judiciary[234], it did not take long before the appropriateness of the *Aranyosi* two-pronged test was openly contested.

c) The *Aranyosi* doctrine in the line of fire: The Court's ruling in *L&P*

In view of the deteriorating situation in Poland, the Amsterdam District Court decided not to uncritically embark on a "journey into the unknown" regarding the pending Polish EAWs[235]. To this end, the Dutch court engaged in a detailed dialogue with the polish issuing authorities concerning two EAWs issued in August 2015 and February 2019 against two Polish nationals for the purposes of conducting a criminal prosecution and executing a custodial sentence[236]. The executing authority considered that the latest developments in Poland, especially those relating to the Disciplinary Chamber of the Polish Supreme Court, had severely undermined the independence of all Polish courts and, consequently, the fair trial rights of every individual in Poland. The suspicion intensified especially after the failure of the Polish authorities to directly respond on the aforementioned issues, referring the respective questions to the Polish Supreme

[230] *LM* (*supra* note 220), para 74.
[231] *Ibid.*, para 75.
[232] *Ibid.*, para 78.
[233] Petra Bárd and Wouter van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust' (Verfassungsblog4 October 2018).
[234] In this regard, see in particular the cases C-791/19 *Commission v Poland (Régime disciplinaire des juges)* [2021] EU:C:2021:596, C-192/18 *Commission v Poland (Independence of ordinary courts)* [2019] EU:C:2019:924, Joined Cases C-585/18, C-624/18 and C-625/18 *A.K.* [2019] EU:C:2019:982.
[235] Adriano Martufi and Daila Gigengack, 'Exploring Mutual Trust through the Lens of an Executing Judicial Authority: The Practice of the Court of Amsterdam in EAW Proceedings' (2020) 11 New Journal of European Criminal Law 282.
[236] CJEU, Joined Cases C-354/20 PPU and C-412/20 PPU *L&P* [2020] EU:C:2020:1033.

Court, which refused to engage in any dialogue with the executing state[237]. On this basis, the Dutch court stayed its proceedings and referred the case to the Court, essentially encouraging it to rethink the applicability of its *Aranyosi* two-pronged test in cases revealing a rule of law deadlock of that magnitude. In particular, the executing authority raised the key question of whether the very status of "issuing judicial authority" should be denied to the issuing court, whose independence is no longer guaranteed, resulting to a refusal of execution at the very first step of the *Aranyosi* test, namely without carrying out a specific and precise individualized assessment based on the criteria set in the *LM*[238]. Clearly, these questions present an unprecedented interest, as they involve the Court's regime of autonomous concepts[239] in the context of a multifaceted EAW case.

In a long awaited judgment, the Court upheld the application of the *Aranyosi* test, repelling the Dutch court's proposal to the opposite. Specifically, the Court held that an executing judicial authority in possession of evidence of systemic or generalised deficiencies concerning the independence of the judiciary of the issuing Member State cannot simply deny the status of "issuing judicial authority" to all judges or all courts of that Member State acting by their nature entirely independently of the executive, mainly because the existence of such deficiencies does not necessarily affect every decision that these courts may be led to adopt in each particular case[240]. According to the Court, a different conclusion would amount to unduly extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond the "exceptional circumstances doctrine", leading to a general exclusion of the application of those principles in the EAWs issued by the afflicted Member State, and, in parallel, to the impairment of the preliminary procedure system under Article 267[241]. Therefore, and notwithstanding the Court's jurisprudence on autonomous concepts[242], the latter cannot be transplanted to the EAW judicialized enforcement system[243]. Instead, the Court moved once again the shift towards law enforcement objectives, namely the need to fight impunity, and employed the principle of separation of powers in order to justify its reluctance to accept an automatic, *de facto* suspension of the EAW system in the absence of the European Council's statutorily prescribed intervention[244].

Consequently, the potential avenues of the executing authority are necessarily limited to the demonstration of "vigilance" at the second stage of the *Aranyosi* assessment, on the basis of the well-established guidelines provided by the Court in the *LM*. This unwillingness of the Court to accommodate the ever-accelerating rule of law concerns echoes its enforcement-oriented stance in the pre-*Aranyosi* era, bringing to the forefront a series of crucial issues with regard to the mutual trust principle and its parameters in the light of the rule of law backsliding besetting the Union. Some of these issues will be demonstrated in the last chapter of the present Part.

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[237] *Ibid.*, paras 12-13.
[238] *Ibid.*, para 33.
[239] On autonomous concepts see *supra* note 15.
[240] *L&P* (*supra* note 237) paras 41-42.
[241] *Ibid.*, paras 43-44.
[242] Key aspects of this jurisprudence will be presented in the following Chapter 2.3.
[243] *Ibid.*, paras 45-50.
[244] *Ibid.*, paras 59, 62-64.

d) The right to a tribunal established by law: The closing episode in the post-*LM* series

Notwithstanding the clear response of the Court in the aforementioned cases, where the continuing validity of the *Aranyosi* test with regard to Polish EAWs was repeatedly affirmed, many executing authorities continued to be particularly mindful of the deteriorating situation in Poland. In the most recent *X&Y* case[245], the Court was persistently asked by the Rechtbank Amsterdam District Court whether the *Aranyosi* test is still applicable when there is a real risk that the person concerned will stand trial before a tribunal not previously established by law. The referring court emphasized the role of the Polish National Council of the Judiciary (hereafter the "KRS") in the nomination of Polish judges[246]. As a flagship project of the ruling "Law and Justice" Polish party, the reconstituted KRS was soon portrayed as "unduly influenced by legislative and executive powers[247]", raising questions on the legality of its appointments. Against this background, and by reason of the fact that the composition of the court cannot be definitely determined at the time of the surrender, while there is no effective remedy in Poland to challenge the validity of any judicial appointment, the legitimately concerned Rechtbank Amsterdam openly questioned the appropriateness of the *Aranyosi* in the particular case[248].

In its response, the Court stressed the inextricable link between the guarantees of judicial independence and that of access to a tribunal established by law, the latter being a safeguard necessary to observe the fundamental principles of the rule of law and the separation of powers[249]. As for the judicial appointment procedure, its role for the legitimacy of the judiciary in a democratic state governed by the rule of law is undeniable, as what constitutes a tribunal and how it is composed represent the cornerstone of the right to a fair trial, affecting the confidence which all courts must inspire in those subject to their jurisdiction[250]. Nonetheless, the Court highlighted that the mere fact that the body involved in the judicial appointment is predominantly made up of members representing or chosen by the executive, such as the Polish KRS, is not *per se* sufficient to justify a refusal of surrender, as it cannot, in itself, give rise to any doubts as to the independence of the judges appointed at the very end of the procedure[251]. Therefore, the executing authority still needs to conduct the "two-tier" *Aranyosi* assessment, for which the Court provides worth-mentioning, detailed guidelines. Specifically in terms of the general assessment, the Court added to the list of factors that are particularly relevant the constitutional case-law of the issuing Member State which challenges the primacy of EU law and the binding nature of the ECHR, arguably hinting at the disreputable *K3/21* judgment of the Polish "Constitutional Tribunal"[252]. In terms of the individualized assessment, the Court essentially added that it is for the persons subject to an EAW to adduce specific evidence

[245] CJEU, Joined Cases C-562/21 PPU and C-563/21 PPU *X&Y* [2022] EU:C:2022:100.
[246] Paweł Filipek, 'The New National Council of the Judiciary and Its Impact on the Supreme Court in the Light of the Principle of Judicial Independence' (2018) 16 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 177.
[247] ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, Apps. Nos. 49868/19 and 57511/19, judgment of 8 November 2021.
[248] *X&Y* (*supra* note 247) para 39.
[249] *Ibid.*, paras 55-56.
[250] *Ibid.*, para 58.
[251] *Ibid.*, paras 75-76.
[252] Polish Constitutional Court, *K3/21*, judgment of 7 October 2021; Petra Bard and Adam Bodnar, 'The End of an Era: The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust' (2021) SSRN Electronic Journal.

demonstrating that the deficiencies in the contested judicial system had, or are liable to have, a tangible influence on the independent handling of their specific case at hand. Importantly, the mere participation in the proceedings that led to the conviction of one or more judges appointed by the KRS is not sufficient either. Instead, the applicant's capability to reject members of the set panel of judges due to reservations about their independence must be well considered[253].

In the *X&P* case, the Court confirmed that the *Aranyosi* test is still "alive and kicking", despite the openly expressed national concerns and opposite suggestions. Reiterating once more the legitimate objectives of the combat of impunity and the protection of victims' rights, along with the respect for the competence of the European Council on the basis of Article 7(2) TEU, the Court limited itself to the provision of detailed instructions on the applicability of the two-fold assessment. As the case serves as the last episode in the post-*LM* series, the evolution of the Court's reasoning in view of the open-ended rule of law crisis in Poland remains to be seen.

e) The *LM* jurisprudence as a "safety valve" for the intra-Union rule of law scrutiny

Notwithstanding its weaknesses, the *LM* and its aftermath arguably represent a genuinely ground-breaking jurisprudence, a new milestone in the Court's "mutual trust and fundamental rights" narrative[254]. For the first time, the Court openly recognizes that fair trial rights, i.e. rights of a non-absolute nature, can also serve as limitations of the mutual trust principle when linked to the operation of the rule of law, albeit in exceptional circumstances. In this respect, the Court extended its *Aranyosi* test to potential violations of the right to a fair trial and its constituent elements, namely the right to an independent and impartial court previously established by law. Furthermore, the Court shaped its line of reasoning by taking duly into account the specific factual backdrop in which the executing authorities' concerns were raised, demonstrating the relationship between mutual trust, fundamental rights and the rule of law. In a truly essential statement, the Court held that judicial independence, forming part of the "essence" of the fundamental right to a fair trial, is a prerequisite to effective judicial protection and in turn to upholding the rule of law within the Union[255].

Notably, the importance of the *LM* jurisprudence particularly lies with the fact that it paves the way towards a much-needed defence of the European legal order and its values against persistent onslaughts on the rule of law, restraining the spill over effect of the latter's backsliding in the European area of criminal justice. Indeed, going beyond the facts of the cases, the Court manages to amplify the sources of rule of law scrutiny on the ground, allowing for an evolving, bottom-up monitoring of the rule of law compliance through a horizontal judicial dialogue between the executing and the issuing authorities under Article 15 EAW FD[256]. Continuing to uphold the principle of mutual trust in the operation of the EAW, the Court affirms that the preservation of the Union values and the subsequent responsibility lies with all the Union courts, which are now called upon to operate as "safety valves", preventing the proliferation of the ramifications of the rule of law decline to the enjoyment of individual rights. Moving from the

[253] *X&Y* (*supra* note 247) paras 87, 91.
[254] Florentino-Gregorio Ruiz Yamuza, 'LM Case, a New Horizon in Shielding Fundamental Rights within Cooperation Based on Mutual Recognition. Flying in the Coffin Corner' (2019) 20 ERA Forum 371.
[255] Laenarts (*supra* note 213).
[256] Mitsilegas (*supra* note 201).

classic paradigm of "judges asking judges" to a more demanding "judges monitoring judges[257]", the Court seems to realize that a "de-centralized" rule of law scrutiny is inescapable, as other avenues in the EU's toolbox against rule of law violations have not being properly used in their full capacity[258].

Nonetheless, and despite the Court's best efforts, the judicialized format employed for the monitoring of the rule of law compliance cannot operate as a panacea in light of the present situation in Member States actively participating in the EAW scheme. What is even more worrying is that the Court's unmodified transfer of the admittedly restricted *Aranyosi* doctrine in the rule of law context places particularly heavy obligations upon both the executing states and the requested individual, favoring law enforcement objectives. Consequently, the application of the "two-tier" assessment at national level is increasingly divergent, with worrying rule of law concerns leading either to a quick refusal of execution, or to a fruitless judicial dialogue with the issuing authorities. Hence, the Court's perception is far from being anonymously accommodated and is openly questioned both by national courts and legal scholars, resulting in a foggy situation to the detriment, ultimately, of fundamental rights and rule of law protection. These ever-accelerating arguments towards a new paradigm shift in the Court's *modus operandi* will be demonstrated in the following Chapter.

[257] Tomasz Tadeusz Koncewicz, 'The Consensus Fights Back: European First Principles against the Rule of Law Crisis (Part 1)' (Verfassungsblog5 April 2018).
[258] Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2021) 39 Yearbook of European Law.

2.3 Need for a further reset? Thoughts on the workability of the Court's narrative

The still ongoing dialogue on the suitability of the *Aranyosi* test to address rule of law concerns in the EAW context indicates beyond any doubt that the almost automatic transfer of the same *modus operandi* to an entirely different and particularly complex factual background has not been fully successful[259]. This is mainly because of the inherent differences existing between the evaluation, on the one hand, of the general and systemic deficiencies prevailing in a certain prison system and on the other hand, of those prevailing in a justice system that no longer operates under the rule of law. Indeed, and despite their *prima facie* similarities, the two situations are hardly comparable in terms of the appropriate mechanism of assessment to be employed. As demonstrated above, the rule of law is a much wider concept, a principle that encompasses key other values and standards, among which respect for fundamental rights, regardless of their absolute or non-absolute nature. In the same vein, the independence of the judiciary, which lies at the heart of the rule of law, has a polymorphic function. As a principle itself, judicial independence is a prerequisite for the true respect of fair trial guarantees, which in turn serve as a precondition for the safeguarding of all other individual fundamental rights, including, *inter alia*, the absolute right against inhuman or degrading treatment under any social condition. Hence, the diagnosis of an extensive rule of law backsliding in a specific state has much wider and sophisticated connotations. The latter are particularly intensified in the operation of the EAW scheme, which is largely relied on the trusting relationships between equally fair justice systems. Inevitably, when mutual trust is ruptured on the ground by virtue of a generalized "crisis of values" in the issuing state, the corresponding coping mechanism must be diversely equipped. For these reasons, the workability of the current methodology will be principally examined in light of the *LM* saga, taking necessarily into consideration the concerns already expressed in terms of detention conditions. A comprehensive overview of these preliminary observations will be provided in the following Chapters.

a) <u>The two-pronged test on the ground: Practical challenges and lacunae</u>

As analysed above, the transfer of the *Aranyosi* test to the *LM* line of cases has raised considerable concerns and severe critiques[260] with regard to its feasibility and practical implementation in cases involving allegations of rule of law violations due to systematic interference with judicial independence and other fair trial guarantees in the issuing state. In essence, this multilevel test seems to be particularly complex and hard to apply in practice, as the obligations incumbent both on the executing authorities and the surrendered individual seem to increase when passing to each subsequent level. Apart from a noticeable shift to law enforcement priorities, the Court's reasoning seems to disregard not only the imminent risks for the fundamental rights of the individual, but also the almost inviable position of the executing

[259] Stanisław and Paweł (*supra* note 231), p. 404.
[260] Agnieszka Frąckowiak-Adamska, 'Drawing Red Lines with No (Significant) Bites: Why an Individual Test Is Not Appropriate in the LM Case', in von Bogdandy, A., Bogdanowicz, P., Canor, I., Grabenwarter, C., Taborowski, M., Schmidt, M. (Eds.), *Defending Checks and Balances in EU Member States, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol 298* (Springer 2021); Febe Inghelbrecht, 'Avoiding the Elephant in the Room Once Again' (Verfassungsblog25 February 2022).

authorities when called upon to collaborate, on the basis of the dialogical model under Article 15 EAW FD, with states openly violating the most basic tenets of the rule of law[261].

Arguably, the easiest step to be carried out by the executing authority is the first one, i.e. the general risk assessment on the basis of objective, reliable and properly updated evidence concerning the overall operation of the contested judicial system. In this respect, Polish EAW cases almost automatically fulfil the criteria set for the determination of a real risk of breach of fair trial guarantees due to systemic rule of law deficiencies, mainly because of the high standard of reliability attributed by the Court to a plethora of evidentiary sources, including, *inter alia*, the Commission's reasoned proposal under Article 7(1) TEU, the ECtHR's jurisprudence and the constitutional case law of the issuing state. Nonetheless, as easy as it is for the executing authority to complete the first prong of the test, it is equally difficult to proceed to the next step of the examination in order to establish the existence of an individualised risk. As explained in the preceding Chapters, the executing authority will firstly need to assess whether the already identified general deficiencies in judicial independence may indeed affect the courts having jurisdiction over the specific criminal proceedings at issue, and secondly, only if the answer to the above is in the affirmative, whether such a risk is likely to materialize if the person concerned is surrendered to the issuing state. Both stages of this individual assessment present notable weaknesses and operational challenges.

To begin with, the "intermediary" stage of individualized assessment appears to ignore that the identification of the domestic courts competent to hear the case of the specific individual requires either the reliance on the information provided from the issuing authorities, if any, or the *ad hoc* application of the procedural criminal law of the issuing state. In any event, and in accordance with what has already been noted with regard to detention conditions, these preliminary determinations, even if correct, are not capable of fully averting the risk for the individual, thus are of limited usefulness to properly safeguard the fundamental rights at stake. Indeed, just like the individual may be subsequently transferred to a prison different from the one initially identified, changes of jurisdiction in the course of criminal proceedings cannot be excluded either, hence the individual is only partially protected from violations of fair trial guarantees after the surrender. In the same vein, the adherence of the Court to the last part of the individualized assessment is particularly contested as unduly restricting the executing authority's avenues to ultimately refuse surrender[262]. In essence, the executing authority ought to take into account the specific concerns raised by the individual, together with elements such as his/her personal situation, the nature of the offence and the whole context in which the EAW is issued, in order to finally ascertain the chances that the person concerned will be tried in accordance with acceptable standards of judicial independence. Quite controversially, the Court seems to *de facto* admit that even though grave rule of law violations may relate to the individual case in question,

[261] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, '1825 Days Later: The End of the Rule of Law in Poland (Part I)' (Verfassungsblog13 January 2021).
[262] Michał Krajewski, 'Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges: ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM' (2018) 14 European Constitutional Law Review 792, p. 805.

there is still room for a further assessment before refusal is allowed, thus establishing a very high, almost unreachable threshold for the mutual trust presumption to be rebutted[263].

The above make up an admittedly worrying picture, especially when the notion and operation of assurances are considered. Contrary to the *Aranyosi* line of cases, where the assurances provided by the issuing authorities related to detention conditions, i.e. a field falling within the scope of control and responsibility of the executive, the *LM* saga relates to fair trial guarantees and judicial independence of the very judicial authorities that comprise the justice system under investigation. Ergo, these authorities are necessarily required to provide assurances and guarantees either for fellow competent courts or for the domestic justice system in general, or even for themselves, giving rise to considerable conflicts of interest that were not foreseen in the evaluation of domestic prison systems[264]. As the principle *nemo iudex in causa sua*, a principle of natural justice according to which no person can judge a case in which they potentially have an interest inescapably comes into play[265], legitimate concerns arise where a part of the judiciary is asked to affirm its own independence, especially within a problematic rule of law background. In this context, the reliance of the entire *Aranyosi* assessment on the effective operation of a dialogical model which in turn is based on the provision of assurances by the issuing state appears duly problematic. Even if these assurances are indeed provided, the limited trustworthiness of the issuing authority would inevitably raise questions on the objectivity, credibility, and ultimately appropriateness of the provided guarantees to form part of the executing authority's risk assessment. On top of the inherent difficulty to substantiate the individual risk, the complexity of the situation rises considerably if we take into account that the burden of proof also lies with the requested individual; the latter is called to adduce specific evidence in order to suggest that the dysfunction of the contested judicial system has had, or is liable to have, a tangible influence on the handling of his/her criminal case. Paradoxically, the primary source for adducing such evidentiary material and, in turn, for founding an individual concern, is the very court whose independence is in doubt. Therefore, one might wonder whether, under the foregoing mechanism, any room of maneuver is left for the real protection of the individual.

b) The uniqueness of the Polish case: Lessons learned from the post-*LM* practice

In addition to the above general difficulties, the workability and, finally, the credibility of the Court's approach are substantially affected by the existence and operation on the ground of mutual trust, a principle that comprises, *inter alia*, by considerable psycho-sociological and contextual elements. That is, just like we must distinguish between sporadic instances of rule of law violations from systemic rule of law decline, we also need to distinguish the case where the systemic decline occurs incessantly, and despite repeated efforts and initiatives to the contrary, in a state of "constitutional capture" that no longer operates as a constitutional democracy. Clearly, when a Member State appears to have definitively and persistently departed from the values that the whole Union is based on, including the very understanding of the rule of law and judicial

[263] Theodore Konstadinides, 'A. Court of Justice Judicial Independence and the Rule of Law in the Context of Non-Execution of a European Arrest Warrant: *LM*' (2019) 56 Common Market Law Review 743, p. 751.
[264] Stanisław and Paweł (*supra* note 231), pp. 423-424.
[265] Adrian Vermeule, 'Contra "Nemo Iudex in Sua Causa"' (2011) Public Law & Legal Theory Working Paper Series.

independence, thus jeopardizing the European project from within, the essential presumptions behind core principles such as mutual trust and mutual recognition do not hold anymore[266]. This is a necessary consequence of the mutual trust's twofold status as both a contextual and multifaceted legal principle, but also as a reality on the ground. Should the first ignore the latter, mutual trust becomes closer to a "legal fiction" which, by not living up to the reality, will ultimately endanger the enforcement aims that it purports to uphold. Therefore, the particularities of the broader context in which each particular EAW case arises may not be overlooked by the Court when designing the appropriate test applicable.

These particularities become decidedly relevant in the case of Poland. As demonstrated above, the rule of law decline in the Polish state has reached its peak since and despite the Court's judgment in the *LM*, leading to the increase of voices suggesting a temporal suspension of the EAW surrender scheme in relation to the non-compliant state[267]. Poland serves as a unique case study in the rule of law context, as it constitutes the first Member State with respect of whom the preventive arm of Article 7 TEU was activated by the Commission, after endless diplomatic attempts and dialogue with the Polish government to stem the cascade of legislative reforms impeding the independence of the judiciary. Notwithstanding this historic step in the European integration and the subsequent political and judicial upheaval, the Polish executive continued undeterred to pursue legislative changes potentially affecting the entirety of the country's judiciary. Notable in this respect is the so-called "muzzle law", which introduced new types of disciplinary torts and proceedings against Polish judges, preventing the latter from controlling the validity of judicial appointments authorized by the government and from openly criticizing the new judicial reforms. By rubber-stamping the deprivation of judicial independence and the separation of powers *en masse*, this legal act that has been duly characterized as a "Black Friday for the European judiciary"[268], alarming many Union courts involved in EAW proceedings. In the same vein, the Polish Constitutional Tribunal in cases *K3/21* and *K6/21*[269] found the very EU understanding of judicial independence and Article 6 ECHR incompatible with the Polish Constitution, affirming the rebuttal of the presumption of mutual trust on the ground. Indeed, as all polish judges need to obey this problematic jurisprudence, at least in theory and under the threat of disciplinary proceedings and sanctions, their assurances can hardly be relied upon by their European counterparts in the EAW context, a fact clearly depicted in the post-*LM* follow up by national courts[270].

To begin with the *LM* case itself, the referring High Irish Court, following the Court's instructions, proceeded to the second step of the *Aranyosi* test, seeking further information from the Polish authorities. Even if the most detailed response highlighted that Poland is a democratic state operating under the rule of law, more critical responses were also provided, holding that even though real risks for judicial independence in Poland do exist, judges still try "to perform

[266] Petra Bard, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) European Law Journal 1, p. 3.
[267] Petra Bárd (*supra* note 218).
[268] Laurent Pech, Wojciech Sadurski and Kim Lane Scheppele, 'Open Letter to the President of the European Commission Regarding Poland's "Muzzle Law"' (Verfassungsblog9 March 2020).
[269] Polish Constitutional Court, *K6/21*, judgment of 24 November 2021.
[270] Thomas Wahl, 'Refusal of European Arrest Warrants due to Fair Trial Infringements: Review of the CJEU's Judgment in "LM" by National Courts in Europe' (2021) Eucrim - The European Criminal Law Associations' Forum 321.

their obligations to the best of their abilities and administer justice impartially and free from any pressure[271]". Quite paradoxically, this very last response was perceived as "an impressive exercise in judicial independence", serving as an argument in favor of surrender, which finally prevailed notwithstanding the finding of systemic deficiencies. This is another hint of the psychological elements inherent in the mutual trust principle; the provision or the absence of an assurance may be practically capable of either re-building or demolishing trust respectively. Similarly in the *L&P* case, the Amsterdam District Court finally authorized the individual's surrender, finding that "there is no reason to believe that the fundamental right to an independent tribunal has been violated, as the person claimed has not argued that he has not had a fair trial and has not provided any information to indicate this[272]".

Nonetheless, in a more recent case[273], the International Legal Aid Chamber (IRK) of the Amsterdam District Court waived the surrender of a Polish national, considering that there is a real risk that his fundamental right to a fair trial will be violated if he faced trial in Poland. The Amsterdam Court followed the path carved by the Karsruhe Higher Court of Germany, which in 2020 became the first judicial authority to establish a concrete, individualised risk for the essence of the right to a fair trial on the basis of the *LM* jurisprudence, suspending two surrenders to Poland on rule of law grounds[274]. The main reason behind this decisive shift was the activation of the Polish "muzzle-law", as the latter was described above. This legislative reform was deemed as the "last straw" for the German court, which finally held than unfair trials due to the lack of judicial independence is not an abstract danger anymore, thus non-surrender is principally to be assumed for the time being. In the previous years, the Karsruhe Higher Court had made strenuous efforts to accommodate the *LM* findings of the Court, without however refusing surrender. In 2019, it released a considerably interesting judgment, shedding light on the challenges faced by the executing authorities in their dialogical cooperation with the Polish judiciary[275]. Despite the failure of the Polish authorities to provide a binding assurance that no disciplinary proceedings would be instituted against the judges participating at the trial, the German court deemed it sufficient to allow the surrender under the condition that the German ambassador would be authorised to be present at the trial and, in case of a conviction, visit the surrendered person in custody[276]. This reasoning arguably went beyond the Court's guidelines in the *LM*, however its outcome remained the same; unable to establish an individualized risk for the person concerned, the German court necessarily limited itself in the first prong of the test and allowed the surrender.

The above highlight that the threshold to refuse surrender remains particularly high, despite the uniqueness of the Polish case. Nonetheless, as rule of law concerns are extenuated over time, with legitimately concerned authorities having already shown the way for a more rigorous

[271] Ireland High Court, *The Minister for Justice and Equality v Celmer (No.5)*, judgment of 19 November 2018, [2018] IEHC 639, para 103.
[272] Court of Amsterdam, RK 20/3065 13/751520-20, judgment of 27 January 2021, NL:RBAMS:2021:179.
[273] Court of Amsterdam, RK 20/771 13/751021-20, judgment of 10 February 2021, NL:RBAMS:2021:420.
[274] Karlsruhe Higher Court, Case *Ausl 301 AR 95/18*, judgment of 17 February 2020 and Case *Ausl 301 AR 104/19*, judgment of 17 November 2020; For an overview, see Anna Wójcik, 'A German Court Refuses to Extradite a German Citizen to Poland, because of the State of the Polish Judicial System – Rule of Law' (ruleoflaw.pl14 January 2021).
[275] Karlsruhe Higher Court, Case *Ausl 301 AR 95/18*, judgment of 7 January 2019.
[276] Stanisław and Paweł (*supra* note 231), p. 417.

approach, the Court's strict adherence to enforcement objectives may become increasingly difficult to follow in the years ahead.

c) A new first era? The need for a holistic revision

The narrative embraced in the Polish case clearly indicates that the Court is still geared towards a law enforcement direction, reluctant to risk compromising the effectiveness of the EAW system by accommodating critical rule of law concerns. Despite the admitted progress that has characterized the Court's jurisprudence since the so-called first era, the central axis remains unaltered. The surrender of an EAW can be refused only in exceptional circumstances, with the latter being also limited to a considerable extent in order to ensure objectives co-existent with fundamental rights protection, namely the autonomy and effectiveness of EU law.

The above are distinctly illustrated in the Court's counter-arguments in the post-*LM* era. Indeed, the Court has insisted that if the existence of systemic or generalized deficiencies was sufficient in itself to enable the executing authorities to refuse surrender without proceeding to the second step of the "two-tier" *Aranyosi* assessment, that would entail a high risk of impunity for persons attempting to flee from justice, even in the absence of a real and concrete individualized risk[277]. Most importantly, the Court holds that the preceding approach would ultimately lead to a *de facto* suspension of the EAW mechanism in respect of the issuing Member State, in disregard of the competences of the European Council in this respect[278]. Therefore, all is left to the executing authority is to exercise "vigilance" at the second stage of the assessment, which, as already demonstrated, is deemed insufficient to avert the risk for the individual. The Court's reasoning seems to be further complicated by its narrow and somehow paradoxical approach with respect to the concept of "judicial authority". In particular, instead of consolidating its doctrine on autonomous concepts[279], the Court seems to create an "artificial distinction" between the judicial independence needed to enable a judicial authority to issue an EAW, i.e. to legitimately operate as an issuing authority under the EAW FD, and judicial independence of the very same authority at the stage of evaluation of generalized and systemic rule of law deficiencies prevailing in the issuing state[280]. According to the Court, this distinction is necessary as a different conclusion would deprive the issuing authorities of their very nature as courts, while rule of law deficiencies, as serious as they may be, cannot deprive courts of their status[281].

These arguments are largely contested as failing to properly accommodate the rule of law concerns expressed by national executing authorities, to the detriment, ultimately, of fundamental rights protection. Indeed, the Court seems to embrace an unduly formalistic approach, disregarding key aspects of the mutual trust principle, as analysed above. With regard to the "separation of powers" principle in terms of Article 7 TEU, the Court does not seem to

[277] *L&P* (*supra* note 237) para 64 and *X&Y* (*supra* note 247) para 62.
[278] *Ibid.*, paras 57-58 and 63-65 respectively.
[279] On autonomous concepts see *supra* note 15 and Valsamis Mitsilegas, 'Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts" in R.Colson and S. Field (Eds.), *EU Criminal Justice and the Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016).
[280] Mitsilegas (*supra* note 201), p. 241.
[281] Opinion of Advocate General Campos Sánchez-Bordona in Joined Cases C-354/20 PPU and C-412/20 PPU *L&P*, delivered on 12 November 2020, EU:C:2020:925, para. 72.

convincingly respond to the arguments put forward in the *LM* by the Irish High Court. According to the latter, the process set out in Article 7 is ultimately political and not legal, thus it is vital for a judicial authority deciding on surrender, but not because of its outcome. Much more significantly, the very process has value as persuasive evidence[282]. In this critical statement, the Irish court seems to suggest that mutual trust should be suspended, irrespectively of the positive or negative outcome of the Article 7 TEU procedure, if there are other pieces of persuasive evidence indicating a systemic crisis in the issuing state. Taking into consideration that the sanctioning prong of Article 7 has never been activated, while the preventive one is perpetually halted at the "negotiations stage"[283], the Irish court's concerns seem to be founded on a sound basis. With regard to the judicial independence requirement, and given the ever-deteriorating rule of law situation in certain Member States, the Court will eventually be required to fill in the gaps emerging in its understanding of the term "judicial authority", in order to maintain and enhance the credibility and usability of its autonomous concepts mandate in the EAW context.

In light of the above, the executing Member States have found themselves between a rock and a hard place when confronted with fundamental rights concerns, especially within the Polish framework. On the one hand, the Court's restrictive interpretation of the "exceptional circumstances doctrine" considerably limits their discretionary power to refuse surrender under Article 1(3) EAW FD, while on the other hand, the authorization of surrender when the imminent risk for the individual concerned is not fully averted increases the danger that the executing state will become complicit in fundamental rights violations[284]. Notably, the heavy burden placed on the executing authorities, i.e. to engage in a dialogue with the issuing state about the latter's own independence in a struggle to found an individualized risk and suspend execution, poses a threat to both fundamental rights protection and the rule of law across the Union. Most importantly, by turning a blind eye to legitimate constitutional concerns raised by European judges, the Court undermines once more the hard-earned credibility and authority of the EAW scheme, risking a possible revival of the *Aranyosi* tale[285].

[282] Ireland High Court, *The Minister for Justice and Equality v Celmer (No.1)*, judgment of 12 March 2018, [2018] IEHC 119, para. 116.
[283] Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz (*supra* note 260).
[284] Robert Spano, 'The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary' (2021) European Law Journal. The article describes the "symbiotic" relationship in the field of judicial independence between the ECtHR and the Court, referring to a potential conflict of the Court's "rule of law narrative" with the ECHR.
[285] Mitsilegas (*supra* note 201), pp. 241-242.

Conclusion

The preceding Parts have revealed that the relationship between the principle of mutual trust and fundamental rights protection in the execution of the EAW is still evolving through a complex dialogical process. The latter has materialized under the auspices of the European judiciary and the Court's primary guidance, which has managed to carve the contours of mutual trust in an admittedly sensitive legal area, gradually accommodating fundamental rights concerns that arise at each successive stage of European integration. Notwithstanding the notable progress in the configuration of this delicate relationship, the Court's approach remains overly dependent on enforcement considerations, leading to a vicious circle that undermines the very authority and credibility of the EAW scheme. Hence, it appears imperative to rethink the prevailing jurisprudential narrative in the light of the multilevel and dynamic nature of mutual trust. Rather than insisting on its presumed existence whilst overlooking empirical evidence on the contrary, emphasis should be hereafter placed on bridging the gap between mutual trust as a legal principle and mutual trust as a reality on the ground, by laying down the conditions of real trustworthiness in the operation of the EAW[286]. To this end, the constructive mobilisation and optimisation of the trust-building mechanisms available in the Court's arsenal, as well as the coalition of all EU institutions in defence of the Union's ideals are of paramount importance.

Concerning the revision of the Court's perspective, mutual trust should be regarded less as an axiomatic given and more as a versatile and flexible legal presumption, whose exact parameters are constantly evolving based on the specific context and the relationship to which they apply. Inherent in the nature of this legal presumption is that it is expected to gradually develop into a "full-fledged legal principle"[287]. To this aim, the Court's mechanism should have as its center of gravity the real trustworthiness of the issuing state, which may be more or less present in each particular case. This is because of the contextual nature of mutual trust; a state may be more easily trusted for specific modalities of judicial cooperation (i.e. for ensuring decent detention conditions) but not for others (i.e. for ensuring the independence of its judiciary)[288]. At the same time, different contexts may require a different sense or level of trustworthiness. For instance, even if non-absolute rights may generally tolerate a higher extent of national diversity than absolute rights, thus setting the bar for non-surrender particularly high[289], this is not the case when a collapse in the rule of law is established in the issuing state, in which event mutual trust as a reality is severely impaired, lowering the bar for non-surrender. On top of the above, the Court's nuanced perception of mutual trust should also involve the requested individual and its inherently vulnerable position in the EAW equation. Quite paradoxically, this consideration appears to be absent in the present static narrative that disregards the trusting relationships existing not only between the collaborating states, but also between the latter and the requested

[286] Patricia Popelier, Giulia Gentile and Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2021) 27 European Law Journal 167.
[287] Christiaan Timmermans, 'How Trustworthy is Mutual Trust? Opinion 2/13 Revisited' in K. Lenaerts, J. Bonichot, H. Kanninen, C. Naômé & P. Pohjankoski (Eds.) *An Ever-Changing Union?: Perspectives on the Future of EU Law in Honour of Allan Rosas* (Hart Publishing 2019), pp. 21-34.
[288] Auke Willems (*supra* note 7), p.30.
[289] Matti Pellonpää (*supra* note 168), p.51.

person[290]. Last but not least, the Court's mandate should be able to properly accommodate the multi-level conceptualization of trust. In this regard, the Court seems to be aware that the different stages of assessment proposed in the *LM* correspond to the consecutive levels in which trust operates, namely the systemic, the organizational and the interpersonal or individualized level, however it appears to overlook that these levels are interconnected[291]. Hence, when the trustworthiness of the issuing state is nullified due to systemic rule of law deficiencies in the first two levels (i.e. the general justice system and the specific competent courts) it seems paradoxical for trust to be "enforced" at the very last interpersonal level.

In light of the above, the Court may soon be requested to review its insistence on the second prong of the *Aranyosi* test, at least when serious rule of law concerns arise. In such a scenario, the Court may well consider to employ its resourcefulness in balancing mutual trust with fundamental rights concerns, potentially by finding a middle ground between imposing a non-earned trust and suspending the whole surrender system with respect to the issuing state. To this aim, solutions including the rollover of the burden of proof from the individual to the issuing state and the overall loosening of the restrictive "exceptional circumstances doctrine" in order to allow for further room for rebuttal under certain circumstances may also be viewed as possible alternatives. Furthermore, as trust requires a developmental "learning process" in order to solidify[292], emphasis should be placed to the already existent in the Court's armory trust-building tools, including its autonomous concepts doctrine and the process of judicial dialogue.

The Court's autonomous concepts are indeed pivotal in managing national legal diversity while ensuring the uniform and independent interpretation of EU law[293]. These concepts appear even more valuable in the unique EAW context, as they supplement to a considerable extent the ellipse of an EU-wide level playing field in criminal matters owing to limited harmonization[294]. In this respect, the Court's perception of "judicial authority" which underpins the new "judicialized" system of surrender is critical and open to future consolidation. As who is considered independent enough to fall within the concept of judicial authority seems to vary depending on the exact stage of the EAW proceedings, the scenery appears particularly hazy for the executing authorities, hence the Court may need to further elaborate on its approach in order to enhance legal certainty and accommodate critical concerns, especially amidst the current rule of law decline. Regardless of the contribution of autonomous concepts, the most powerful weapon at the Union's disposal is the promotion of constructive judicial dialogue, both at horizontal and vertical level, i.e. both between national authorities and between the latter and the Court. On the one hand, national judicial authorities are required to collaborate in good faith via the dialogical model of assurances, by ensuring that the EAWs issued are thoroughly examined before refusal or execution and by taking duly into account the guidelines provided by the Court to that end, while on the other hand, the Court is required to be equally proactive, by taking due account of the constitutional concerns raised at national level and by taking up its role as the guarantor of fundamental rights protection within the EU. In a similar vein, trust as a reality

[290] Patricia Popelier, Giulia Gentile and Esther van Zimmeren (*supra* note 288), p. 8.
[291] *Ibid.,* pp. 9-10.
[292] Auke Willems (*supra* note 7), pp. 24-25.
[293] Azoulai Loic, 'The Europeanisation of legal concepts', in Ulla B. Neergaard and Ruth Nielsen (Eds.), *European legal method: In a multi-level EU legal order* (DJØF Publishers 2012) pp. 165-182.
[294] Mitsilegas (*supra* note 201), p. 242.

would be considerably fostered through the indispensable *symétrie* with the ECtHR's jurisprudence on the compliance of transnational criminal cooperation with the ECHR requirements.

Nonetheless, saving constitutionalism may not be regarded solely as a task for the courts. While it is true that the opening of dialogical avenues amongst the Union's judiciary is imperative, it does not suffice in itself to secure an effective and credible system of interstate cooperation based on the synergistic attainment of mutual trust and fundamental rights protection[295]. Rather, what seems to be needed for a definite paradigm shift in the intra-Union protection of individual guarantees is the "coming-together" between all EU institutions in order to "finally bring the European values back"[296]. Instead of hiding behind the veil of autonomy and separation of power concerns, EU institutions should coordinate their actions in order to ensure the very legitimacy and credibility of the "principle behind the principle" mechanism in the EU's area of criminal justice. To this aim, mutual recognition-based legislation should be necessarily amended in order to effectively accommodate human rights considerations and the primary role reserved for the individual in the post-Lisbon era. The path has already been laid by the European Investigation Order, serving as an irrefutable proof that mutual trust and fundamental rights protection are in fact mutually complementary rather than conflicting interests, capable of growing together "holding hands" in the EU legal sphere[297]. Most crucially, the Union is called to employ promptly, forcefully and in a coordinated manner its already sophisticated apparatus against rule of law decline, by realizing that a failure to do so may soon pose an existential threat to the very European project[298]. Therefore, instead of relying on the Court's contribution as a trust-building agent, the Union shall not hesitate to elevate Article 2 TEU values above the instrumentalism distinguishing them today, embracing the rule of law as an "institutional ideal"[299].

In conclusion, it is now the Union's turn to (re) act, re-building the *raison d'être* of its perception of mutual trust, namely the harmonious symbiosis of national legal systems equally committed to the same standards and values, those underpinning the very system of mutual recognition in the AFSJ. Under the prism of trustworthiness, the execution of an EAW shall hereafter be based on a "trust that is built" rather than on an uncritical loyalty to EU law. The heart of the latter can only lie with the individual and its progressive emergence from a silent actor to an equal participant in the European area of criminal justice. Only in this way can the Union reborn as "*a community of values", a representative of a certain tradition, which has created – though amongst pain and failures – patterns for a humane and at the same time viable world order*[300]". Whether fundamental rights implications in the EAW scheme have the dynamics to eventually transform the European *acquis* in its above ideal version is presently unknown, and remains to be seen.

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[295] Renáta Uitz, 'The Perils of Defending the Rule of Law through Dialogue' (2019) 15 European Constitutional Law Review 1.
[296] Petra Bard (*supra* note 268), p. 26.
[297] Wouter 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. 358.
[298] Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 Yearbook of European Law.
[299] Gianluigi Palombella, 'The Rule of Law as an Institutional Ideal' in L. Morlino and G. Palombella (Eds.) *The Rule Of Law And Democracy. Internal And External Issues* (Brill Publishing 2010).
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