Use and Abuse of the Concept of Fundamental Rights

An Obstacle for Judicial Cooperation?

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Article

ABSTRACT

The focus of this article is on the challenge to which extent EU Member States cooperate. It describes the current landscape of judicial criminal cooperation in the EU, taking into account available data. Hence, one can state that cooperation tools are being increasingly used, but this creates imbalances, which naturally crop up in any cooperation system. This is the starting point for addressing a proper understanding of the various possible reactions in order to tackle these imbalances. One reaction relates to the breach of fundamental rights by the issuing Member State. The article outlines that the results of this strategy, however, could be negative in the long term. Merely mentioning fundamental rights will not make Member States more respectful of them. It is further argued that problems involving fundamental rights should be solved with already existing and tailor-made instruments for this purpose and not by altering the cooperation rationale.

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I. Major Current Challenges in the JHA Field: The Balance Between Cooperation and Fundamental Rights

Based on the privilege of being part of the complex European legislative procedure, it is possible to describe several main challenges regarding the next development in the field of justice in Europe.

The establishment of the European Public Prosecutor's Office constitutes the first challenge. Perhaps not because of the powers conferred to this new European body, but because of the simple fact of having a European body so inextricably linked to national criminal jurisdiction. Combining this new European body with national criminal systems, could turn out difficult. However, a swift establishment of the EPPO could overtake the current system of cooperation.

The second challenge arises from new technologies. They pose many questions, but, in general, the discussion revolves around what territoriality means when we discuss the borderless internet and which connecting factors should be used to determine jurisdiction. This discussion is global and not only European. The "Microsoft case", before the U.S. Supreme Court, the approval of the new Cloud Act in the meantime, and the Commission's new proposal about e-evidence reveal the common problems we have to face in the coming years.[1]

Yet another challenge comes from the field of European harmonisation: some Member States, in particular Germany, believe that the last Commission's proposals in this area may be partly too far-reaching in their criminalisation of conducts.[2] Therefore, they are calling for a restriction of this harmonisation trend.

The latter challenge turns around to which extent European Union Member States cooperate. Since 2004, the European Union has grown by 13 new Member. They joined when some of the main cooperation instruments had already been established. Furthermore, they introduced a new approach to cooperation in justice matters – as show figures, which indicate a considerable expansion of making requests for judicial cooperation.

The focus of this article will be on the latter challenge. The main question that is addressed in the following is in particular about the reasons for and the consequences of the aim of some Member States to systematically introduce a ground for refusal based on the respect for fundamental rights into all current instruments of judicial cooperation in the European Union. Taking into account available data, I will first describe the current landscape that led to the increasing use of cooperation tools and therefore created imbalances (below II.). From this starting point, the Member States' reactions are addressed under III, in particular the proposed proportionality check is analysed. Section IV outlines the diverging positions between the Council and the European Parliament regarding a multilateral fundamental rights control. My hypothesis that the current developments rather risks destroying trust as the basis of mutual cooperation than solving the occurred imbalances in cooperation is further underpinned in section V by examining the "fundamental rights clauses" in the different cooperation instruments as well as by analysing the recent CJEU's judgment in the *Aranyosi/Căldăraru* case. In the last section (VI.), I will suggest other ways to arrive at a suitable future solution limiting the abusive application of cooperation tools.

II. The New Landscape of Cooperation: Data on the Increasing Use of Cooperation Tools – Imbalances of this Use

In order to analyse any development in European judicial cooperation, it is necessary to look at the timeline, even if I can provide here a short glance only.

The use of cooperation tools has been undoubtedly increased within the EU in recent years. This would probably also have occurred in a EU of 12 or 15 Member States. The fact remains, however, that an exponential growth can be observed since the accessions of the Eastern European states. Everything reveals that the effects on cooperation by these new arrivals are not proportional to the populations of the new partners, but instead exponential because of different factors.

Some figures confirm this assumption. The successive accessions to the EU since 2004 implied more than a hundred million new European Union citizens.[3] In absolute terms, this is a lot. In relative terms, the 13 new Member States[4] represent a bit more than 20% of the total population of the European Union,[5] at least before Brexit.

Comparing over the respective population to the requests for cooperation is not an easy task. Proper data are hardly available. This is one of the reasons why all Commission proposals insist on the compilation and completeness of statistics. Nevertheless, it is possible to show some evidence confirming this increasing use.

The European Arrest Warrant (EAW), for instance – probably the most used and best known cooperation tool – offers various statistics that clearly confirm the increasing use of this tool and detail the origin and destiny of the requests. According to the latest data provided by the Commission (2015) 6,894 EAWs were issued in 2005 while 16,144 EAWs were issued in 2015 across the EU. During the same period, 836 EAWs were executed in 2005; while 5,304 EAWs were executed in 2015.

A country-by-country analysis for the period 2004-2015 in the mentioned Commission document shows for the Netherlands, for example, that the 13 new Member States (as mentioned above, representing 20% of the total population of the EU) issued 37% of the total EAWs to the Netherlands: 27% of them belong only to Poland.

The United Kingdom's National Criminal Agency also provided data on the use of the EAW. Although the data differ in terms of the total numbers,[6] comparable results occur: whereas 4,369 EAWs were issued in 2010, this number increased to 13,797 in 2017. From 2009 to 2017, Poland issued 13,185 EAWs to the United Kingdom (21,07% of the total). The 13 new partners represent almost 50% of the total EAWs addressed to the UK.

In conclusion: after having been put in practice in 2004, there is a considerable increase in using the EAW. This is a success. The same conclusion can be tentatively drawn about other cooperation tools, even when the data about them are not as clear and the tools are less successfully used in practice.[7] Use of the EAW is particularly important among many of the new EU partners, but disproportionate to their population rate in the Union. Therefore, the success of the judicial cooperation policy already depicted naturally creates imbalances among Member States. Awareness of these unequal flows in each Member State consequently determines the negotiation strategies concerning instruments of judicial cooperation.

III. Possible Reactions against Imbalances: Proportionality Checks and Possible Alternative Approaches

The 2007 Commission Report on the implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (EAW FD)[8] confirmed that the tool was a success since 2005.

Notwithstanding, two years later, in 2009, the Council faced problems involving implementation of the EAW. The UK, due to its particular situation, started asking for a proportionality test in the executing Member State as solution to the above outlined problems and imbalances. The final report of the Fourth Round Evaluation about the practical application of the EAW again mentioned the imbalances of this system.[9] The report suggested some ways to tackle this problem. In particular, it recommended a proportionality test in the issuing, not in the executing Member State: worth citing is the following passage of the Council's report: [10]

> "The application of a proportionality test in issuing an EAW was a recurrent issue during the evaluation exercise. Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context encompasses different aspects, mainly the seriousness of the offence in connection with the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW."

Therefore, recommendation number 9 urged the following:

> "The Council instructs its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any EAW with a view to reaching a coherent solution at European Union level. The issue of proportionality should be addressed as a matter of priority."

Consequently, in 2009, Member States agreed that it was better to leave the FD EAW untouched, but to improve its application by addressing existing concerns through guidelines compiled in a handbook, the latest one being issued in 2017.[11] However, this smart decision, which had the ultimate goal of creating a more balanced landscape, turned out to be insufficient in reducing the abusive use of EAWs by some Member States.

1. First Indicator: Seriousness of Offence

As we have seen, at least the Council arrived at the conclusion that self-control should constitute the first ingredient. The basis of this self-control should be first consideration of the seriousness of the offence or the use of alternative tools. Everything points towards the fact that this aim failed. In fact, the seriousness of the offence as a criterion for self-restraint when issuing requests is not very compatible with the existing thresholds in Art. 2 of the FD EAW, which itself intend to determine the seriousness of the offence. In relation to this indicator, however, we should mention the harmonisation policy as a possible way out. It could strive for a common sanctioning threshold, which could indirectly alleviate imbalances in the long term and take up so-called "eurocrimes", i.e. crimes mentioned in Art. 83 TFEU only.

2. Second Indicator: Cost/Benefit Analysis

A second consideration mentioned in the final Council evaluation report was the "cost/benefit analysis." In my opinion, this is the only feasible approach among the report's suggestions. Generally speaking, sharing costs is not contradictory with mutual recognition and mutual trust. In fact, assuming some costs by the issuing Member State is an indicator of self-trust, which is the minimum to offer to those whose trust is requested. In recent years some attempts were made to shift from an "each state bears costs occurred" approach to a "cost-sharing model". In practice, the latter approach implies more costs for the issuing Member State and, indirectly, a more responsible decision when issuing.

Regarding exclusively the EAW, Art. 30 FD EAW states that expenses incurred in the territory of the executing Member State for the execution of an EAW shall be borne by that Member State, but all "other expenses" shall be borne by the issuing Member State. This is the same criterion, in general terms, for all instruments of judicial cooperation up to 2011.

During the negotiations over the Directive (EU) 2016/1919 on legal aid in criminal proceedings, some Member States defended the position that these "other expenses," should be borne by the issuing Member State if it comes to legal aid in EAW proceedings.[12] The idea behind this argument was based on a twofold consideration: first, the necessity for the arrest and surrender of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence / detention order, as requested by the issuing Member State; second, the accessory service of providing legal assistance. In fact, the aim of this approach was to oblige the issuing Member States to finance the legal assistance of the requested person, because this was not included among the expenses to be borne by the executing Member State. Considering the assumption of these costs, the issuing Member State should limit itself to making proportionate requests. However, the majority of the Council rejected this approach.[13]

In the end, this indirect method of introducing proportionality into the issuing of EAWs determined at least the inclusion of current Art. 5(2) of the legal aid Directive, which ensures an "assisting lawyer" for the requested person in the issuing Member State. The provision underscores, however, the fact that this was an already existing right provided by Directive 2013/48 on access to a lawyer. There is no discussion that the costs for this assisting lawyer appointed in the issuing Member State should be borne by its authorities if legal aid requirements are fulfilled.

In any case, the will to introduce shared costs was not very extensive among the Member States, probably because sharing costs is viewed as something very burdensome from a practical point of view.

Other instruments of judicial cooperation in criminal matters also show less tendency for a shared costs model. Instead, the rule is predominant that an executing Member State bears costs incurred on its own territory, whereas the issuing Member State does not make any contribution to the executing one. Such is the case, for instance, in Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (Art. 17) or Directive 2011/99/EU on the European Protection Order (Art. 18).

Notwithstanding, some avenues for a shared-cost system, which indirectly encourages proportionality tests in the issuing Member State, are appearing. Arts. 21, 22(10), 23(3) or 30 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters constitute an example of shared costs, albeit based on whether they are extraordinary or not.

According to the draft Art. 32 of the Council's general approach on a Regulation on the mutual recognition of freezing and confiscation orders,[14] a voluntary sharing of costs is possible if these costs are not only excep-

tional, but also – simply – "large". In the Framework Decisions to be replaced by this new Regulation, the extraordinary costs-rule is already in place.

In conclusion, the Council considered a proportionality test to be carried out by the issuing Member State (based on the seriousness of the offence) as well as a cost/benefit analysis, in order to encounter the imbalances in judicial cooperation that were reflected on above. As regards the cost approach, the Council has only modestly addressed some effects. The result of the deterrent effect of these measures for disproportionate requests of assistance can be evaluated in a number of years only, but it can already be doubted whether the measures put in place constitute a sufficient remedy in order to balance the excessive inequalities in the field of judicial cooperation.

IV. Multilateral Control of Fundamental Rights: Diverging Views between the Council and the EP

Several years after the aforementioned report of the Fourth Round of Mutual Evaluation, devoted to the EAW, the European Parliament issued a Resolution – dated on 27th February 2014 –, with recommendations to the Commission on a possible review of the EAW.[15]

This Resolution urged to solve the problem of the imbalanced use of the EAW in issuing and executing Member States and offered nearly the same solutions as already outlined in section III. Therefore, the Parliament asked for[16]

> "(…) 7.b a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure."

By contrast to the Council's approach, however, the EP included a reference to the rights of the requested person, including a control of the fundamental rights consequences in each case.[17] More precisely its conclusions contain the claim for[18]

> "(…) 7.d. a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Art. 6 of the TEU and the Charter, notably Art. 52(1) thereof with its reference to the principle of proportionality."

The approach of the Parliament further differs from the Council's in that a fundamental rights control is not only incumbent to the issuing Member State (which is already obliged to perform a control), but can also be carried out by the executing Member State.

Since the Lisbon Treaty, the link to the principle of mutual trust and fundamental rights is not new, and it has been extensively analysed by many authors, who generally underline the importance of respecting fundamental rights.[19]

Even before the Lisbon Treaty, the fundamental rights question in fact appeared at the very beginning of the transposition period of the EAW. Not few Member States included a human rights safeguard in their legislation when implementing the FD. Section 21 of the UK Extradition Act 2003, for instance, obliges national judges to consider whether the person's extradition would be compatible with convention rights within the

meaning of the Human Rights Act 1998 and, where deemed incompatible, to discharge the person. Other Member States took up the general clause, as formulated in Art. 1(3) FD EAW, and implemented it as a refusal ground (e.g., Section 73 of the German Act on International Cooperation in Criminal Matters). Yet others rarely apply the fundamental rights clause (but all have included it in their legislation in one way or another). What is certain is that a significant number of Member States interpret the EAW as permitting refusal to execute on human rights grounds.

The Commission uttered concerns when it states in its 2007 EAW Report:[20]

> "some Member States have provided for additional mandatory grounds for refusal. Many of these correlate to the Art. 4 optional ground for refusal or to fundamental rights and are discussed under their respective headings (....). However, (…) they go beyond Framework Decision."

The report goes on by mentioning the human rights interventions by some Member States:

> "For example, an executing authority from Italy may refuse to execute an EAW if the requested person is pregnant or is the mother of a child less than 3 years old, except in circumstances of an exceptional gravity; Denmark shall refuse surrender on the ground of possible threat with torture, degrading treatment, violation of due process as well as if the surrender appears to be unreasonable on humanitarian grounds; in Lithuania, the Criminal Code provides for a mandatory ground for refusal in case where the surrender of the person would be in breach of fundamental rights and (or) liberty.".

Against these national behaviours, the 2009 final report on the Fourth Round Evaluation adopted by the Council called for not adding obstacles to mutual recognition. It stated as follows:[21]

> "there are diverging tendencies in the transposition by the Member States of the optional and mandatory grounds for non-execution laid down in the FD. (…) Some experts noted the different approaches to incorporating Art. 1(3) and related recitals 12 and 13 of the FD into the implementation law and the creation of a specific mandatory ground for refusal on this basis in some Member State. (…)The Council, however calls upon Member States to review their legislation in order to ensure that only ground for non-execution permitted under the FD may be used as a basis for refusal to surrender."

For the time being, the current debate between mutual recognition and fundamental rights has shifted in favour of mutual recognition. Things have gradually changed along the developmental lines chronicled in the next point.

V. Multilateral Control of Fundamental Rights: the Current State of Play

Nowadays, there is a sustained will on the part of some Member States, particularly Germany, but also Austria and a few others, to utilize fundamental rights as a filter for foreign decisions. It seems that the European Parliament supports this approach as do a large number of academics.. In the following, I will show some consequences of this approach to fundamental rights as an excuse not to cooperate.

1. First consequence: fundamental rights as a refusal ground in criminal cooperation instruments

An explicit refusal ground based on fundamental rights appears in only one instrument: Directive 2014/41/EU regarding the European Investigation Order – EIO (Art. 11(1) lit. f)).

An explanation why this refusal ground was introduced can be found in the recitals: Recital 12 underlines:

> "the issuing authority should pay particular attention to ensuring full respect for the rights enshrined in Art. 48 of the Charter of Fundamental Rights."

Recital 18 further clarifies:

> "as in other mutual recognition instruments, this Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty on European Union (TEU) and the Charter. In order to make this clear, a specific provision is inserted in the text."[22]

In connection with these ideas, two issues need to be explained:

(1) It is true that neither previous nor posterior mutual recognition instruments provided for a refusal ground based upon fundamental rights. They usually contained mention of the obligation to respect them, which naturally flows from primary Union law. This is the case for Art. 1(3) FD EAW (which uses the same language as the first sentence of Recital 18 of the EIO Directive). This is also true for Art. 3 of the FD on financial penalties, Art. 3(4) of the FD on custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement, Art. 1(4) of the FD on probation decisions, and Art. 5 of FD on supervision measures as an alternative to provisional detention.

In some cases, a recital underlines that is compatible with a refusal on a case-by-case basis. Recital 16 of the FD on supervision measures clearly expresses that

> "(nothing) should be interpreted as prohibiting refusal to recognise a decision on supervision measures if there are objective indication that it was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person might be disadvantaged for one of these reasons."[23]

The Council's general approach on the Regulation on the mutual recognition of freezing and confiscation orders[24] does, however, not include – like its precedents – any refusal ground based on fundamental rights; it only includes a general reference along the lines expressed above by simply stating in Art. 1(2): "this Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 TEU".

Notwithstanding, Germany presented a declaration not to join the general approach. This declaration[25] perfectly sums up the discussion:

> "However, cooperation reaches its limits when, in altogether exceptional cases, fundamental rights are no longer safeguarded. From the outset of the negotiations, Germany has therefore advocated drafting a Regulation text that is not only precise and easy to implement in practice, but also includes clear and transparent wording emphasising compliance with fundamental rights in the recognition and enforcement of decisions. Germany's various suggestions to the Member States and the Commission for compromise, some of which were quite far-reaching,

> were made not least to take account of the most recent case-law of the European Court of Justice. Although the text is otherwise successful in creating a good and practicable legal basis for effective cross-border asset recovery, unfortunately a majority could not be found for anchoring fundamental rights in the text. We will not do justice to the great importance of fundamental rights if we do not clearly and unequivocally emphasise their importance, as we have done in the Directive on the European Investigation Order."

The Parliament defends a similar approach: Amendment 71 of the report on the mentioned proposal for a Regulation on the mutual recognition of freezing and confiscation orders, dated January 2018, introduces a new refusal ground when "there are substantial grounds for believing that executing the confiscation order would be incompatible with the obligations of the executing State in accordance with Art. 6 TEU and the Charter.'[26]

In June 2018, trilogue negotiations about this issue are taking place. All Member States have accepted introducing a fundamental rights clause: now, the discussion is revolving around using the EIO text or a more restrictive alternative.

It should be noted that, in the given case – regulation on freezing and confiscation –, the objective is mainly to freeze and obtain properties: apart from those related to fair trial, the fundamental right affected could be the right of property, which has a rank and limitation quite different from other fundamental rights at stake in other cooperation instruments, such as human dignity, liberty, or life. This regulation does not require such a refusal ground compared with the EIO, because the rights at stake are not as basic and unlimited.

(2) The respect for fundamental rights is out of question. The question under discussion is *how* to ensure the adherence of all European authorities, including judicial ones, to fundamental rights when requesting recognition or execution of their decisions in the territory of another Member State.

If we opt for a general clause that mentions fundamental rights outside provisions entailing a refusal ground, we assume that all Member States generally respect fundamental rights, as they should since human rights are a fundamental value of the European Union according to Art. 2 TEU. For this reason, several arguments can be put forward against an exceptional fundamental rights clause giving the executing authorities the possibility of avoiding cooperation when felt necessary or desirable.

First, one should recall that all partners of the EU, which are at the same time partners in the Council of Europe and its flagship the ECHR, assume fundamental rights as a cornerstone of their democracies and constitutional systems, and they control the reality of this statement with their own domestic institutions. On top of that, two European courts (the European Courts of Justice and the European Court of Human Rights) concur with the domestic authorities in ensuring the respect for fundamental rights. As a last resort, Art. 7 TEU introduces a mechanism to be applied to gross breaches of the values enshrined in Art. 2 TEU, including respect for fundamental rights. On this basis an additional supervision by executing Member States about the respect of foreign authorities for fundamental rights when it comes to international cooperation is not considered necessary: the affected person whose rights could be damaged always has remedies and authorities to turn to.

One may argue that certain EU Member States have high rates of convictions by the European Court of Human Rights in Strasbourg,[27] and therefore, Member States with low convictions' rates (such as Germany, Denmark, or Spain) may take this as an incentive to control how others apply fundamental rights. This situation, however, cannot justify a general cross-checking of fundamental rights. In particular, when the data of EU Members are compared with the rate of Council of Europe members not belonging to the EU, the well-functioning of the outlined internal controls in the EU is confirmed.

2. Second consequence: the intervention of the European Court of Justice

Recently, we identified another manifestation of the fundamental rights debate through the jurisprudence of the CJEU. The foundations of this jurisprudence appear in its Opinion 2/13, paragraphs 191 to 193 concerning the following ideas: any control by one Member State of the respect for fundamental rights in other Member State should be an exception, because it is contrary to the general principle of mutual trust. Each Member State cannot demand a higher level of protection than that provided by EU law; therefore, any refusal should be interpreted restrictively and the respect for fundamental rights presumed.

This jurisprudence has been reinforced in the *Aranyosi/Căldăraru case* decided by the CJEU.[28] The Higher Regional Court of Bremen, Germany, filed two requests for a preliminary ruling, which were joined. In the first case, Mr. Aranyosi, a Hungarian national, lived in Bremerhaven (Germany) with his mother, was unmarried, and had a girlfriend and an eight-month-old child. He denied the offences of which he was accused by the Hungarian authorities – stealing goods twice with a total value around €3700 – and declined to consent to the simplified surrender procedure. In the second case, Mr. Căldăraru, a Romanian national, was convicted and sentenced in Romania to imprisonment of one year and eight months for the offence of driving without a driving licence. In both cases, the German authorities raised concerns about the prison conditions in Hungary and Romania – concerns founded on ECtHR convictions against those states. Therefore, the German court doubted the lawfulness of surrender.

The Court concludes in paragraph 104 of the judgment:

> "that Art. 1(3), Art. 5 and Art. 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Art. 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end".

In order to justify this conclusion, the Court takes particularly the following into account:

- "limitations of the principles of mutual recognition and mutual trust between Member States can be made 'in exceptional circumstances' (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191)";[29]

- "As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Art. 4 of the Charter, that prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Art. 1 of the Charter (see, to that effect, judgment in Schmidberger, C-112/00, EU:C:2003:333, paragraph 80). That the right guaranteed by Art. 4 of the Charter is absolute is confirmed by Art. 3 ECHR, to which Art. 4 of the Charter corresponds. As is stated in Art. 15(2) ECHR, no derogation is possible from Art. 3 ECHR."[30]

They should be exercised after the cooperation between authorities in order to dispel any initial doubt on the part of the executing state. Nobody doubts that it is possible to denounce the conditions of Hungarian and Romanian prisons and demonstrate that they are inhuman and degrading. This is the reason why the Bremen court could find convictions against those countries and information about such facts – for instance, through the factsheets of the ECtHR. Hence, there is no doubt that there are ways to avoid this inhuman treatment in the judicial systems of these Member States, even before the ECtHR if necessary – where they are often convicted.[31]

Therefore, control by a Member State of any breach of fundamental rights related to a decision of another Member State should be an exception, taking into account the absolute nature of the rights at stake. It should also follow any exchange between authorities in order to clear up any misgivings. In order to exercise this control, a general mention of fundamental rights is sufficient: a specific clause applicable before executing all cases would be too far-reaching and is not endorsed by this jurisprudence.

VI. Which Solution in the Future?

I outlined in this article that the current tools of judicial cooperation in the EU are used unevenly among the EU Member States. The triggered imbalance constitutes a real problem for some Member States. This problem has been tackled by some remedies that have been modestly proposed but not properly developed, mainly a proportionality check on the basis of the seriousness of the offence by the issuing state and a costs/benefit approach. It was further submitted here that the temptation reappeared to use fundamental rights as an anchor at the disposal of executing Member States in order to limit "excessive" cooperation rather than really protect the rights of individuals. It was further argued that a generalised use of fundamental rights by the executing Member States in order to refuse or deny cooperation would lead to more problems than real benefits.

I share the vision of the CJEU, in the sense that, if a risk for an absolute fundamental right appears during an execution procedure, the executing authority cannot look away. It should have a critical eye and inform its counterpart. If the risk persists, the executing authority can refuse the request. For this very reason, the ruling of the Court in fact negates the alternative of having a fundamental rights-based refusal ground in practice. The judgment in *Aranyosi and Căldăraru* therefore underpins my previous hypothesis that a (general) ground for refusal based on respecting fundamental rights in favour for the executing Member State is not necessary. On the contrary, it will only lead to a real step backwards in judicial cooperation, because it would be disproportionately used.

If we deny using a fundamental rights-based refusal ground as the way out in order to restrain abusive use of cooperation tools, we have to work with other solutions. Cost-sharing clauses derived from a cost/analysis approach could be the best way to respond to the challenge of excessive cooperation. It is better to develop systems able to calculate and exchange these costs than putting at risk all the achievements of almost two decades of improving cooperation. Unfortunately, the proposed solution seems to be more a wish than a

reality: the fundamental rights clause is about to be confirmed in future cooperation instruments. This is not a good solution for the European Union we need.

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1. The Microsoft case had to do with the following main question: whether, in light of EU law and the EU and Irish MLATs, 18 U.S.C. § 2703 nonetheless authorizes a court in the United States to issue a warrant that compels a US-based provider of e-mail services to disclose data stored outside of the United States, i.e. in the EU. On 17 April 2018, after being approved in the Cloud Act, the US Supreme Court issued a *per curiam* opinion stating that the case was rendered moot and vacating and remanded the case back to the lower courts to dismiss the lawsuit. While the case was pending in the Supreme Court, US Congress passed the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), which amended the Stored Communications Act (SCA) of 1986 to resolve concerns from the government and Microsoft related to the initial warrant. The Commission's proposals on e-evidence are in the first phase of negotiation (cf. COM(2018) 225 final 2018/0108(COD; see also the summary of Th. Wahl in this issue).↩
2. After harsh exchanges of views, the proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA was approved by the Council during its last JHA meeting in March. The negotiation on the Directive (EU) 2017/541 on Combating Terrorism took a similar course.↩
3. Currently, the population of the new partners is more than a hundred million inhabitants in total (specifically 104,153,854 according to Eurostat´s statistics for 2017).↩
4. Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.↩
5. Staff Working Document C(2017) 6389 final/SWD(2017) 319 final, https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (accessed: May 2018): Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant - Year 2015.↩
6. The reason for this is probably that they are based on statistics of the SIS. Every country in the EAW system has a Sirene (Supplementary Information Request at the National Entry) Bureau. In the UK, this is the NCA. Sirene Bureaux are the legal gateways between authorities requesting an arrest and those carrying out an arrest. Based on their information, statistics are stored at the following site: http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/829-eaw-part-1-master-calendar-year-v1-0-final-2009-2017 (accessed: May 2018).↩
7. Such conclusions cannot be drawn so easily in relation to other instruments, both in criminal and civil cooperation. It seems that some instruments are not used frequently at all, e.g., the European Protection Order, for which only seven cases have been identified, according to a recent European Parliament report on the topic. The instruments for requesting freezing or confiscation of property or assets may probably used more, but useful data are not available.
   The Report from the Commission pursuant to Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, COM(2010) 428 final of 23.8.2010 mentions that only 13 MS had transposed the FD 15 months after the deadline. No figures, however, are mentioned. The Impact Assessment accompanying the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders {COM(2016) 819 final} SWD(2016) 469 final} confirms the lack of statistical data, while the 2014 Directive relating to the EIO did not develop provisions on this topic.
   The Report from the Commission based on Art. 14 of Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, dated in 2008, mentions that its implementation "is not satisfactory". This conclusion is mainly drawn from the low number of notifications: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0885&from=EN. This is one of the reasons for the current negotiation of a Regulation on the mutual recognition of freezing and confiscation orders.↩
8. Cf. Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC(2007) 979: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0407&from=EN (accessed: May 2018).↩
9. Cf. Council document 8302/4/09 REV 4 LIMITE CRIMORG 55 COPEN 68 EJN 24 EUROJUST 20 of 28 May 2009.↩
10. Council doc. 8302/4/09 REV 4, op. cit., p. 13.↩
11. Handbook on how to issue and execute a European arrest warrant (2017/C 335/01), see also eucrim 4/2017, p. 177.↩
12. Cf. Council document 14302/14 DROIPEN 120 COPEN 251 CODEC 2019.↩
13. The CATS minutes (Council document 14984/14 CATS 167) concluded by saying: "The majority of delegations informed that according to their national legislation and ensuing practice they interpret the cost associated with legal aid for the purposes of the execution of an EAW, as cost "incurred in the territory of the executing Member State", as provided under Art. 30(1) of Framework Decision 2002/584/JHA. Consequently, this cost should be borne by the executing Member State. In this respect, some delegations referred to the need to apply consistently the principle of proportionality when issuing EAW. This issue will be referred for further discussions to the EAW experts formation of the Working Party on Cooperation in Criminal Matters (COPEN)."↩
14. Council document15104/17 JAI 1128 COPEN 380 DROIPEN 178 IA 202 CODEC 1946 of 1 December 2017; available at: http://data.consilium.europa.eu/doc/document/ST-15104-2017-INIT/en/pdf (accessed May 2018).↩
15. Report with recommendations to the Commission on review of the European Arrest Warrant (2013/2109(INL)), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: *Sarah Ludford,* available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0039+0+DOC+XML+V0//EN (accessed: May 2018).↩
16. See endnote 15, ibidem, page 7, recommendation 7.b.↩
17. As highlighted in the aforementioned citation by the author.↩
18. See endnote 15, ibidem, page 7, recommendation 7.d.↩
19. This topic is often dealt with by academics, among others:
   V. Mitsilegas, "The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice", (2015) 6(4), *NJECL*, 457; V. Mitsilegas, "Mutual recognition, mutual trust and fundamental rights after Lisbon", in: V. Mitsilegas, M. Bergström, and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, 2016, pp. 148 et seq.; ", T. Cormon, *A Utopia of Mutual Trust: Fundamental Rights in the European Arrest Warrant*, master thesis 2015 Univ. Gent; S. Montaldo, "On a Collision Course! Mutual Recognition, Mutual Trust and the

Protection of Fundamental Rights in the Recent Case-law of the Court of Justice", (2016) 1(3), *European Papers*, 965-996; E. Gill-Pedro and X. Groussot, "Mutual Trust and EU Fundamental Rights after Opinion 2/13", (2017) 35(3), *Nordic Journal of Human Rights*; S. Douglas-Scott, "The EU's Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?" (2009) Cambridge Yearbook of European Legal Studies, 53–85; E. Xanthopoulou, "Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Unchartered Territory beyond Blind Trust." (2018) 55, *Common Market Law Review* 489-509; J: Emaus, "The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU's Aspirations Relating to Contractual Relations", (2017) 2(1), *European Papers*, 117-140; L. Bachmaier, "Towards the transposition of Directive 2014/41 regarding the European investigation order in criminal matters", (2014) *eucrim*, 47–60; L. Bachmaier, "Mutual recognition instruments and the role of the CJEU: the grounds for non execution", (2015) 6(4) *New Journal of European Criminal Law*, 505-526.↩

20. See endnote 8.↩
21. See endnote 9, ibidem, p. 13.↩
22. Emphasis by author.↩
23. See also Recital 12 of the FD EAW.↩
24. See endnote 14.↩
25. Council document 15104/17 ADD 1 JAI 1128 COPEN 380 DROIPEN 178 IA 202 CODEC 1946, http://data.consilium.europa.eu/doc/document/ST-15104-2017-ADD-1/en/pdf (accessed: May 2018).↩
26. See EP document, A8-0001/2018 (Rapporteur: Nathalie Griesbeck).↩
27. Bulgaria, Croatia and Slovenia belong to this group. Data calculated by the author. These data and the rate of convictions by year and by population can be calculated from the publicly available statistics of the ECtHR, taking into account the respective population of the Member States and the number of years from accession to the ECHR.↩
28. CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU.↩
29. § 82 of the judgement, ibid.↩
30. §§ 85-86 of the judgment, ibid. This case has been mentioned several times since its issuing. In the *Piotrowski* case, C-367-16, paras 48 to 50, the CJEU confirm the above-mentioned jurisprudence.↩
31. These countries occupy 20th and 25th posts among the EU 28 Member States regarding the number of ECtHR convictions per capita and per year; for reference see endnote 27.↩

About eucrim

eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
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