Trust… but verify
Finding the right balance between the principle of mutual trust and fundamental human rights

Team Romania
Belu Cristina Alexandra, Eva Răzvan, Negruțiu Irina Alexandra
Tudorel Ștefan (trainer)
Table of Contents

1. ‘Trust... but verify’, says the CJEU. ‘And what next?’, says the Member State ............................ 1
2. The culprit – The European Arrest Warrant, aided by the principles of mutual recognition and mutual trust ................................................................................................................................. 2
3. The trigger – the facts behind the joined cases of Aranyosi and Căldăraru ....................... 4
4. The explosion - Aranyosi and Căldăraru cases as decided upon by the CJEU ......................6
5. The investigation of circumstances – CJEU judgements in the cases of Melloni and Radu .... 8
6. What the eye-witness says - Detention conditions as torture, inhuman or degrading treatment under the European Convention on Human Rights .................................................................................. 11
7. The aftermath and recovery plan – Proposals ............................................................................. 15
1. ‘Trust... but verify’, says the CJEU. ‘And what next?’, says the Member State

Last year, the Grand Chamber of the Court of Justice of the European Union delivered its much-awaited judgement in the joined cases of Aranyosi and Căldăraru. In this case, the Court had to strike the right balance between the principle of mutual trust between EU Member States and the fundamental human rights of an individual. The dilemma of the German judge who addressed the preliminary question in the case was: what to do in situations where there is evidence that the Member State requesting the execution of a European Arrest Warrant is systematically in breach of fundamental human rights provisions due to inadequate detention conditions? Should the principles of mutual recognition and mutual trust be applied in a way that would amount to blind trust? Or should the execution of the warrant be refused, despite the absence of an explicit legal ground?

The Court’s answer could be summed up as ‘Trust... but verify’. In other words, the Court held that the executing Member State should ask the requesting counter-part to provide information regarding the detention centre where the requested person would be detained and to provide guarantees that no violation of fundamental human rights will occur. However, if no sufficient guarantees are provided by the requesting state, the executing state must not refuse, but postpone the execution of the European Arrest Warrant.

The seemingly clear and quite applauded answer of the Court seems to have left national courts somewhat confused, asking themselves ‘And what next?’. A first instance court in Sweden, ruling after the Court delivered its judgement, refused to execute the European Arrest Warrant and surrender the requested person to Romania. It did so after inquiring about the details of the detention centre – about what detention centre it would be and what were the conditions there and after consultations with the EU agency for judicial cooperation. In the end, the Swedish court’s decision to reject the transfer request and to lift the restrictions imposed on the sentenced person was grounded on the concerns about detention conditions, but also concerns about the fairness of

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the trial and legality and proportionality of the sentence imposed.

The aim of the present paper is to tackle these questions and provide suggestions to solve the apparent misunderstanding of the European Court’s decision and prevent inconsistent case-law of European national courts, which would hurt the very core of the EU cooperation system.

2. The culprit – The European Arrest Warrant, aided by the principles of mutual recognition and mutual trust

The Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States⁴ (hereinafter ‘FDEAW’) was adopted with the main purpose of changing the old extradition system between member states of the European Union by removing the political and administrative phases of decision-making and converting the procedure into one driven exclusively by the judiciary. It establishes a simplified and effective procedure which can facilitate and accelerate judicial cooperation based on the principles of mutual recognition and mutual confidence⁵.

In the Area of Freedom, Security and Justice, the principle of mutual recognition is, as underlined by the European Council⁶, the ‘cornerstone’ concept in the sphere of judicial cooperation in criminal matters. The principle entails that the judicial decisions made by the national authorities of a Member State are recognised by other Member States (hereinafter ‘MS’) and are based on a high level of equivalence and trust. Mutual trust is crucial as extraterritoriality of judicial judgements will only be accepted if there is a high level of confidence between MS. It follows that the principle of mutual recognition can only be ensured if the MS have this high-level trust in each other.

Therefore, another principle of high importance in the European law is the principle of mutual confidence which is built upon the common values and common culture of the MS and imposes that each of the MS is obliged to consider ‘that all the other States are complying with Union law, and particularly with the fundamental rights recognised by that law’⁷.

One of the most important legal instruments built on trust in the European Union, described as ‘the

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first and the most symbolic measure applying the principle of mutual recognition\textsuperscript{8}, is the FDEAW which aims to secure stability between the member states, not only by institutionalizing the principles of mutual recognition and mutual trust, but also by respecting the fundamental rights and observing the principles established by the Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI. Therefore, as provided in the Recitals 12 and 13 of the Preamble, the issuing and the executing states must fulfil their obligations resulting from the international treaties regarding human rights, especially the European Convention on Human Rights (hereinafter, ‘ECHR’). Although these provisions of the Preamble stipulate that the MS within the European Arrest Warrant (hereinafter, ‘EAW’) procedure must respect the fundamental rights, it is questionable whether they are enough to guarantee an adequate protection.

Because of the diversity of the European judicial systems, there is an absence of a high degree of harmonisation of national legislations, so instead of establishing a uniformed criminal law, the MS cooperate based on the presumed mutual trust. However, there has been a series of obstacles implementing the system due to situations where there is a risk of violating the fundamental rights of the person under the EAW, prerogatives that are guaranteed by ECHR and constitute general principles of EU law, as stipulated in Article 6(3) in the Treaty on European Union (hereinafter, ‘TEU’). In this context, it is important to establish the extent to which fundamental rights should serve as limits to the principle of mutual recognition and the way in which the European Union can examine and protect them.

As an effect of the presumed trust, the Preamble of the Framework Decision states that the mechanism of the EAW may be suspended only if a Member State breaks the principles set out in Article 6(1) TEU in a serious and a repeated way. Moreover, the FDEAW states in Article 1(3) that it will not have the consequence of modifying the obligation to respect fundamental rights. Hence, although implicitly, the procedure of the EAW is based on the respect of the fundamental human rights.

However, non-compliance with fundamental rights is not included as a ground to refuse to execute the EAW. This legislative choice is often interpreted as reflecting the view that cooperation takes

place based on a high level of mutual trust in the criminal justice systems of MS, premised upon
the presumption that fundamental rights are in principle fully respected across the European Union.
The reality is, though, that there still are situations in which MS violate human rights and in which
the national judge is faced with a difficult question: in the absence of an explicit reason to refuse
the execution of the EAW, should he turn a blind eye to the violation of fundamental rights or
should he acknowledge the reality and act upon it?

3. The trigger – the facts behind the joined cases of Aranyosi and Căldăraru

The Aranyosi case (C-404/15) and Căldăraru case (C-659/15 PPU) were referred to the European
Court of Justice as a request for a preliminary ruling by the Higher Regional Court of Bremen
(Hanseatisches Oberlandesgericht in Bremen).

3.1. Aranyosi case

In the first case, the German court was invested with a case regarding the execution of an EAW
against Pál Aranyosi, a Hungarian citizen living in Bremerhaven (Germany). The requesting state
was Hungary, through the examining magistrate at the Court of first instance of Miskolc (Miskolci
járásbíróság), which issued two EAWs, seeking the surrender of Mr. Aranyosi to the Hungarian
judicial authorities for the purposes of criminal prosecution for two offences of burglary. Because
his location was unknown, the requesting judicial authority issued an alert for Mr. Aranyosi in the
Schengen Information System, in accordance with Article 9 FDEAW.

Consequently, on 14 January 2015, Mr. Aranyosi was located and temporarily arrested by the
Bremen authorities. During the proceedings, Mr. Aranyosi declared that he does not consent to the
execution of the EAW and thus, does not wish to resort to the simplified surrender procedure.

On the same day, the representative of the Public Prosecutor of Bremen ordered that Mr. Aranyosi
be released from custody, since there was no apparent risk that he would not cooperate. In addition,
the Office of the Public Prosecutor of Bremen asked the District Court of Miskolc to indicate the
prison in which Mr. Aranyosi would be detained in case of surrender, as detention conditions in
some Hungarian prisons did not meet European minimum standards. The Public Prosecutor of the
district of Miskolc responded by stating that the competence to decide the choice of penalties to be
imposed falls within the competence of the Hungarian judicial authorities.
The Bremen Court, based on the information that there was probative evidence that, if surrendered, the requested person would be subject to detention condition which violated Article 3 of the European Convention on Human Rights, decided to stay the proceedings and to refer two questions to the Court of Justice for a preliminary ruling.

3.2. Căldăraru case

In Căldăraru, the German court was invested with a case regarding the execution of a European arrest warrant against Robert Căldăraru, a Romanian citizen. The requesting state was Romania, through the Făgăraș Court of First Instance (Judecătoria Făgăraș), which issued a European arrest warrant against Mr. Căldăraru on the 29 October 2015.

The Făgăraș Court of First Instance in Romania had previously convicted Mr. Căldăraru, who was 29 years-old at that time, to serve an overall sentence of one year and eight months in prison after finding him guilty for driving on public roads without a driving licence.

As the Romanian court had issued the European arrest warrant and had entered an alert concerning the convict in the Schengen Information System, Robert Căldăraru was arrested in Bremen on 8 November 2015. The District Court of Bremen (Amtsgericht Bremen) issued an arrest warrant against Mr. Căldăraru who had declared, during his hearing, that he does not consent to the execution of the European arrest warrant and thus, does not wish to resort to the simplified surrender procedure.

The Public Prosecutor of Bremen requested that Mr. Căldăraru be arrested in view of extradition and the Higher Regional Court of Bremen granted this request through its ruling of 11 November 2015. On the risk of flight, the court ruled that, under the circumstances of the case, there was a risk that Mr Căldăraru would not cooperate for the surrender procedure.

The Public Prosecutor of Bremen applied for the surrender of Mr. Căldăraru to the Romanian authorities to be declared lawful. In dealing with this application, the Higher Regional Court of Bremen had to assess the conditions which had to be met for granting the surrender. The assessment was again a two-step process which included, on the one hand, the evaluation of the German criminal law provisions to establish whether the offence Mr. Căldăraru was convicted of in Romania is also an offence under German law and, on the other hand, whether there is any obstacle in the way of surrender among those stated in Article 73 of the IRG.
The first step of the evaluation was checked, as the offence was also incriminated under German law. The second step of the evaluation was the one to provide the question at the core of the case lodged with the European Court of Justice. During this assessment, the German court found that, although the Romanian authorities did not indicate where the convict was supposed to execute his sentence, there were significant clues to indicate that, in the case of the surrender to the Romanian authorities, Mr. Căldăraru would be subject to conditions of detention which did not comply with Article 3 ECHR or the general principles enshrined in Article 6 TEU.

The significant clues were extracted from European Court of Human Rights decision against Romania and a report of the issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The German court indicated several cases in which the European Court of Human Rights (hereinafter, ‘ECtHR’) found there was a violation of Article 3 ECHR because of the small cells, overcrowding and poor living conditions. The report the German court referred to maintained that, during visits in Romania the Committee observed the conditions in the Romanian detention centres and these did not meet minimal standards.

The German court could not assess whether, considering this information, the surrender of Mr. Căldăraru is lawful. The main issue which prevented such assessment was whether the assurances given by the requesting state, in such situation, are enough to consider that the rights of the person who is subject to a European arrest warrant will be respected if he is surrendered.

4. The explosion - Aranyosi and Căldăraru cases as decided upon by the CJEU

The main issues raised with the Court of Justice of the European Union (hereinafter, ‘CJEU’), as regarding the execution of a EAW can be summed up into a three-tier question cascade:

(1) Can Article 1(3) of the FDEAW be interpreted as requesting or permitting the refusal of surrender in cases in which the conditions of detention in the issuing Member State are in breach of Article 4 of the Charter?

(2) Can or should the executing state condition the surrender on receiving information from the issuing state which can lead to the conclusion that the detention conditions are compatible with human rights?
(3) Which procedure should be followed for such information to be supplied – should judicial authorities supply it or should the procedure be governed by domestic rules of competence in the Member State?

In grounding its decision, the CJEU pinned down several guidelines, which we shall summarize in the following section and pinpoint the answer to the above-mentioned questions.

The Court reminded that, in the application of the principle of mutual recognition, the executing judicial authority may refuse to give way to requests to surrender in the case of EAW only in the cases provided in Article 3 and Article 4 FDEAW, which are exhaustively listed. However, it also showed that, as per Article 1(3) FDEAW, the principles of mutual recognition and trust cannot have the effect of modifying the obligation to respect fundamental rights and that limitations to the aforementioned principles can be brought under exceptional circumstances.

The Court stated that, when deciding on the surrender of the person, the judicial authority of the executing Member State must assess the risk for the person under the EAW to be subjected to inhumane or degrading treatment in the requesting state. Furthermore, it also stated that the information which the courts use must be ‘objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and 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 Court then proceeded to guide the national courts as to what steps should be taken once they ascertain that there is a real risk of inhumane or degrading treatment, observing that such risk cannot lead, by itself, to a refusal to surrender, but that the court should further assess whether the actual person in front of them will be exposed to that risk in case of surrender. Therefore, the Court then mentioned that the executing authority must request that the issuing judicial authority provide, in an urgent manner, any further information regarding the conditions in which that person will be detained, including procedures and domestic or international mechanisms of control for the detention conditions.

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9 CJEU, Aranyosi and Căldăraru, cited above, paras. 82-83.
10 Ibidem, paras. 88-89.
11 Ibidem, paras. 91-92.
12 Ibidem, paras. 95-96.
The Court concluded that, based on the assessment that the executing judicial authority makes, it can postpone the execution of the EAW, but the procedure cannot be abandoned\(^\text{13}\).

5. The investigation of circumstances – CJEU judgements in the cases of *Melloni* and *Radu*

5.1. *Melloni* case

In its previous case-law, the CJEU established the extent of the limits of mutual recognition in cases concerning fundamental rights. The case of *Melloni* (C-399/11) was a landmark case regarding the relationship between the national standards regarding fundamental rights and the European legislation.

What made the case of *Melloni* so important? Mr. Melloni is an Italian businessman who was prosecuted for bankruptcy fraud and after being released on bail, hid in Spain, so that he would not face trial in Italy. In 1996, the Criminal Division of the High Court in Spain authorised the extradition of Mr. Melloni to Italy, but by that time he was already hiding in Spain. Mr. Melloni was found guilty by the Italian authorities and sentenced to 10 years’ imprisonment. In 2004, after the judgement became final, Italy issued an EAW ordering Spain to surrender him. Melloni argued that once surrendered, his right to a fair trial would be violated, due to the fact that he had been convicted in his absence, although he was represented by his lawyers during the entire criminal proceedings. Approached by the Tribunal Constitucional of Spain, the Court stressed that the grounds for the refusal of an EAW included in the FDEAW are exhaustive, even in the matter of fundamental rights\(^\text{14}\). In addition, if the conditions provided by Article 4a are not fulfilled, MS cannot refuse to execute an EAW.

Furthermore, the Court confirmed the primacy of EU law over the national constitutional standards regarding fundamental rights and stated that MS cannot interpret and apply the Article 53 of the Charter in order to refuse the execution of an EAW for the reason that the standard of the national constitution is higher than the one provided by EU legislation. There is no possibility for a MS to enforce a higher standard of procedural safeguards, even on the ground of their national constitution, whenever the EU legislator harmonises the fundamental rights in a certain domain in an exhaustive way.

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\(^{13}\) Ibidem, para. 98.

5.2. Radu case

In Radu case (C-396/11), the Court was asked to establish the extent to which MS should take into consideration the fundamental rights when assessing whether to execute an EAW. The Appeals’ Court of Constanța (Curtea de Apel Constanța) was invested by the German judicial authorities with four EAW against Mr. Radu, who opposed their execution, arguing that he should have been heard by the Romanian authorities before the arrest warrants were issued. He claimed that the FDEAW should be interpreted according with both the Charter and the ECHR. Thus, when asked to execute an EAW, the judicial authorities of a Member State should be obliged to verify whether the fundamental rights guaranteed by those legal instruments are being respected in the issuing State. Therefore, although the FDEAW does not explicitly provide a ground for the refusal, the judicial authorities of the issuing state should have that possibility if justified by human rights.

The judgement of the Court of Justice was short and relatively surprising for the importance and the gravity of the preliminary questions. The Court stressed that ‘contrary to what Mr. Radu argues, the observance of Articles 47 and 48 of the Charter does not require that a judicial authority of a Member State should be able to refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued’15. The judgement is, in our opinion, quite founded, as after the surrender, the person will be heard when he arrives in the requesting State, so it is not absolutely imperative to hear him before issuing the request for the arrest warrant.

The opinion of the General Advocate Sharpston is interesting, as it was made clear that the competent judicial authority of the State executing an EAW can refuse the solicitation without violating the obligations authorised by the founding Treaties, when there is proof that the fundamental rights of the requested person have been infringed, or will be infringed, but only in exceptional circumstances16. Albeit there is a presumption of mutual trust between MS, ‘simply because the transfer of the requested person is requested by another Member State, that person’s human rights will automatically be guaranteed on his arrival there’17, but the refusal must be supported by specific evidence, since general propositions will not be enough.

17 Opinion of General Advocate Sharpston in the Radu case, previously cited, para. 41.
Although the judgement of the Court did not follow either of the preliminary questions, nor the structure presented by the General Advocate, it is certain that the procedure of the EAW based on the principle of mutual recognition and the presumption of mutual trust could have a negative impact on the judicial protection of the requested person’s fundamental rights.

As opposed to case Aranyosi and Căldăraru, in Melloni, due to the principle of the supremacy of EU law over national legislation of the MS, the national standards regarding the human rights protection were lowered, because they conflicted with one EU principle – the mutual recognition. Hence the conclusion that the possibility of ‘postponement can be applied only when EU standards of fundamental rights protection are involved and not those of the Member States’ 18.

5.3. The interpretation of the German Federal Constitutional Court (Bundesverfassungsgericht)

The balance between the principle of mutual trust and the protection of human rights was also tackled by the German Federal Constitutional Court (hereinafter ‘GFCC’) in a constitutional complain raised after the Higher Regional Court declared the extradition of a citizen to be permissible.

The facts of the case examined by the GFCC are similar to those in the case of Melloni. The complainant, a United States of America citizen, was sentenced in absence to a custodial sentence of thirty years for participation in a criminal organization and import and possession of cocaine, by the Florence Court of Appeal. In 2014, he was arrested in Germany based on a European arrest warrant. He opposed his surrender, claiming that in Italy he would not be provided with the opportunity to have a new evidentiary hearing in the appeals proceedings.

In the grounds of the order 19, the Court specified that the principle of mutual trust does not apply without limits if there are factual indications that minimum standards are not met. Consequently, German courts are obliged to investigate the legal situation if the requested person has submitted sufficient indications to warrant such investigations.

The GFCC also stated that there is no conflict between Union law and the protection of human dignity under the Basic Law in this case, because the FDEAW is completely in line with the

18 CJEU, Aranyosi and Căldăraru, previously cited; Szilard Gaspar-Szilagyi, cited above, p. 212.
German constitution. Also, according to the Court, ‘the way in which the Union law must be applied correctly is that obvious that there does not remain any room for reasonable doubts (acte clair)’.

6. What the eye-witness says - Detention conditions as torture, inhuman or degrading treatment under the European Convention on Human Rights

Article 4 of the Charter of Fundamental Rights of the European Union (hereinafter ‘CFREU’) provides that ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’. The exact same wording is used by the European Convention on Human Rights in Article 3, under the headline ‘Prohibition of torture’.

Some might wonder whether these identical provisions cover the same situations or if there is conceptual autonomy giving rise to different interpretations. Article 52 (3) CFREU solves this apparent puzzle providing that, in cases such as this one, the meaning and scope of these rights are the same as those laid down by the ECHR. Despite some discussion caused by Opinion 2/13 of the CJEU of December 2014 and a general trend of so-called ‘charter centrism’\(^\text{20}\), there is no doubt that the developments in the ECtHR case-law regarding Article 3 of the ECHR are taken into account by the CJEU, following the application of Article 52 (3) CFREU. Even more so, as in the judgement delivered in the joined case of Aranyosi and Căldăraru, the Court itself mentions the ECtHR case-law\(^\text{21}\).

The matter of being updated on the ECtHR case-law is particularly pressing, as the one of the clues which can lead to the conclusion that there is a general risk for the person under the EAW to be subjected to detention conditions which amount to a degrading or inhuman treatment is a high number of situations in which the ECtHR found that the requesting state violated Article 3 ECHR.

In order to be able to make a thorough analysis of what kind of violations of Article 3 ECHR and Article 4 CFREU must the national judge have in mind when it comes to determining the risk of inhuman and degrading treatment, we will identify the criteria that the ECtHR applies when deciding if a certain situation falls under the ‘inhuman or degrading treatment’ or even ‘torture’ (3.1), the particularities in the case of detention conditions (3.2) and the type of situations where


\(^{21}\) CJEU, Aranyosi and Căldăraru, previously cited, para. 90.
the ECtHR finds that the requested state should have refused the transfer of the applicant due to detention conditions in the requesting state (3.3).

6.1. Torture, inhuman or degrading treatment or punishment – ECtHR criteria

The very definition of the three types of conducts falling under the scope of Article 3 of the Convention was coined in the early days of the ECHR, in the Commission Report in the Greek case (5 November 1969). In short, although the distinction between the three types is mostly one of intensity, there are some particularities regarding each of them, which we shall present in the following lines. However, one thing they have in common is that the said conduct must reach a minimum of severity to be considered in breach of Article 3 ECHR.

The treatment or punishment of a person is said to be degrading if it humiliates him in a significant way, if it puts him in a position of inferiority or if it drives him to act against his will and conscience. The existence of a degrading treatment is not dependent upon the presence of another person to witness it in order to consider that the person was humiliated and it does not necessarily imply the intention of the direct perpetrator to humiliate.

Inhuman treatment was defined as to cover ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’. In some cases, the Court made a distinction between inhuman treatment and torture by using the criterion of the specific purpose. When the treatment inflicted upon the applicant was deliberate, but not with the purpose of making him confess, breaking his physical or psychological resistance or with other such purposes, if the treatment was applied over a short period of time, the ECtHR found that there was inhuman treatment, rather than torture.

Torture is the most serious treatment falling under Article 3 ECHR – most commonly, it is described as an aggravated inhuman treatment, which is inflicted with a specific purpose, such as obtaining a confession, or certain information. Although torture takes many forms, the most telling example used by legal scholars to illustrate it is a ECtHR judgement regarding English

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22 ECtHR, Tyrer v. The United Kingdom, 25 April 1978.
24 Commission report in the Greek case, precited, p. 186.
26 Commission report in the Greek case, previously cited, p. 186.
interrogation techniques used against terrorism suspect. These were: covering the person’s head with black hoods, obliging him to stand on his toes against the wall for a long period of time, subjecting him to an intense and constant noise and depriving him of sleep and sufficient food and/or water.

6.2. Detention conditions as degrading or inhuman treatment

A specific and extremely important obligation incumbent upon the state is that whenever a person is deprived of liberty under the control of the authorities, state officials must refrain from inflicting treatment in breach of Article 3 ECHR. Thus, a balance must be struck between security, which grounds the deprivation of liberty, and the individual rights of the detained person: “the manner and method of execution must not subject the person to a distress or hardship of an intensity exceeding the unavoidable level of suffering inherent to detention”. However, as previously mentioned, in order to constitute a breach of the Convention, the above-mentioned treatments had to be of a certain minimal severity.

The detention conditions which prompt analysis include a wide range of conditions: solitary confinement, constant artificial lightning, permanent supervision by CCTV, denial of access to outside news, (poor) hygienic conditions of cells, overcrowding, lack of personal space, inadequate healthcare and/or assistance for vulnerable persons, ill-treatment by cell-mates and/or prison officers, repeated transfers, strip searches, and so on. These must be analysed in concreto, regarding the overall situation of each applicant and the circumstances which called for the specific measure.

A recent example of the kind of analysis the Court makes regarding the overcrowding and the (precarious) hygiene conditions of the prison cell as a reason for ruling that there has been a violation of Article 3 ECHR is the Pendiuc case. The Court re-affirmed its case-law by which a floor surface of under 3 sq. m per person in multi-occupancy accommodation gives rise to a strong presumption of a violation of Article 3, which can only be rebutted by the respondent State if

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27 Commission, Ireland v. the United Kingdom, 18th of January 1978.
29 Commission, Kudla v. Poland, 26 October 2000, para. 94.
several factors are cumulatively met. In the present case, although the applicant spent only one day in a cell of 2.21 sq.m., there was no compensation in terms of sufficient freedom of movement outside the cell and adequate out-of-cell activities. Moreover, there were other aggravating conditions, such as the fact that ‘the toilet was separated from the room by a simple plastic curtain and had to be plugged by a plastic bottle to prevent rats from entering the cell’, that there was no segregation between smokers and non-smokers and that the shower was fitted above the toilet and was also used for flushing it.

In ruling on the cases regarding detention conditions, the Court often refers to guidelines and reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment (hereinafter, ‘CPT’) and findings of the Helsinki Committees for Human Rights\(^{32}\), and, where applicable, to the reports of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment\(^{33}\).

Regarding Member States, since the beginning of this year, the ECtHR has found violations of Article 3 because of detention conditions in ten cases, seven of which regarding Romania\(^{34}\).

### 6.3. Detention conditions as grounds for refusing transfer (extradition, EAW, asylum)

While the previous section dealt with violations of Article 3 ECHR due to detention conditions in the state against which the application was filed, the present section will analyse the situations in which the Court found that the decision to transfer a person to another state, where he would be subjected to degrading or inhuman treatments or even torture, is equally in breach of the Convention.

The case considered to have been the breakthrough regarding the possibility to engage the liability of the deporting state for the actions of the state where the person was (going to be) deported which implied treatment amounting to torture was the *Soering* case\(^{35}\). In this case, Mr. Soering, if surrendered to the United States of America, would have been exposed to the ‘death row phenomenon’ – a very long period of time spent waiting for the execution of the death penalty,


\(^{35}\) ECtHR, *Soering v. The United Kingdom*, 7 July 1989.
over which the person would experience severe stress, a treatment which the Court considered to be in breach of Article 3 ECHR. Therefore, the decision to extradite also violates the Convention.

As legal scholars\(^{36}\) were quick to notice, the Court readily applied the same reasoning in other cases regarding expulsion, applying the same reasoning according to which there is a violation of the Convention if there is an undisputable connection between the expulsion and the torture, inhuman or degrading treatment the person suffers in the state where he is returned. For instance, the Court found that there was a violation when the treatment in breach of the ECHR was related to detention conditions, such as lack of adequate healthcare for particular illnesses\(^{37}\).

Regarding asylum, the Court was confronted with a case which also involved the application of EU law, namely the Dublin Regulation. This was the *M.S.S.* case\(^{38}\), in which the Court found a violation of the Convention when the Belgian authorities failed to refrain from transferring the applicants to Greece, where systemic deficiencies in the reception arrangements for asylum seekers occurred without individual guarantees provided for the applicants.

However, regardless of the way of transfer of a person to another state – be it through extradition, expulsion or asylum – the risk of torture, inhuman or degrading treatment must be indubitable and present.

Following the previous presentation, we firmly believe that this reasoning would apply *mutatis mutandis* in the case of the European arrest warrant, as it also involves the transfer of a person to another state, albeit this state is a member of the EU.

7. **The aftermath and recovery plan** – Proposals

We have thoroughly analysed the issue at the core of this debate, namely the fine balance between the mutual recognition and mutual confidence principles and the obligation to respect fundamental human rights which the CJEU tried to restore in its *Aranyosi and Căldăraru* judgement and identified the main elements which define the overall context. In the beginning of the present study we also indicated that, regarding national courts, there is still some misunderstanding and/or reluctance in applying the CJEU’s solution as it is and that provides non-unitary case-law and

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further hinders international judicial cooperation. In the present section, we set out to provide some suggestions that could eventually lead to solving the subsequent problems of the Aranyosi and Căldăraru judgement.

Before we begin, a quick reminder that the objective of establishing an Area of Freedom, Security and Justice by the Treaty of Amsterdam is to assure the freedom of movement without internal frontiers by, among other things, developing judicial cooperation in criminal matters, especially regarding the prevention and combat of crime (Article 3(2) TEU, Article 67 TFEU). This development is based on the principle of mutual recognition, which implies that the MS should have trust in each other’s criminal judicial systems.

The EAW is a practical instrument for judicial cooperation, providing a more efficient and simplified procedure than that of extradition, while still providing safeguards against the arbitrary. As proven by the CJEU case-law, the FDEAW cannot be interpreted in a way contrary to the obligation of respecting human rights. Turning to the text of the framework decision, Recitals 12, 13 and 14 FDEAW refer in an implicit way to the respect of fundamental rights, but the Preamble is not legally binding. Although Article 1(3) FDEAW states that it shall not have the effect of modifying the obligation to respect fundamental rights as recognised in Article 6 TEU, the fact that the violation of the fundamental rights is not included among the explicit and exhaustive grounds for the refusal of executing the arrest warrant led to divergent practices among MS and, despite the Aranyosi and Căldăraru CJEU judgement, it is evident that this problem has not been solved yet.

In this regard, the European Parliament stated\(^3^9\) that, due to the absence of an explicit motive of refusal, where there is evidence to believe that the execution of the EAW would be in contradiction with the MS obligations derived from Article 6 TEU and the Charter, MS should implement in a rapidly and effective manner all the legal measures needed so that the judicial authorities could use alternative and less intrusive mutual recognition instruments.

We firmly believe that, to solve this problem, there has to be a binding legal instrument, clear enough to leave no room for interpretation, which should encompass all safeguards for the fundamental human rights, while also protecting the very essence of the EU – effective cooperation

\(^3^9\) European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)).
7.1. The FDEAW should be replaced by a new Directive

The main argument for backing up this solution is represented by the direct effect that a Directive has and a FDEAW does not.

According to Article 82(3) TFEU, in order to facilitate mutual recognition between the judicial decisions of the MS national authorities and to develop judicial cooperation in criminal matters which have a cross-border dimension, the European Parliament and the Council may establish minimum rules through a Directive adopted in accordance with the ordinary legislative procedure.

Therefore, the European legislator should adopt a Directive to replace the FDEAW, but preserve the very institution of the EAW, which proved itself as an extremely effective means of cooperation between the Member States and contributed to the prevention and combating of crime across the European Union.

7.1. A new Article shall be inserted in the Directive

The Article we would suggest comprises the following aspects: the implementation of a ground for postponing the execution of the EAW, for a reasonable period of time, in case there is a present risk for the fundamental human rights of the requested person, the obligation for the executing MS to request information on the conditions in the detention facility where the requested person will be detained and the obligation for the requesting state, in the case of postponement, to periodically provide updated information regarding the detention conditions relevant to the case.

(a) A ground for postponing, rather than refusing execution

This Article would provide a ground for postponing the execution of the European arrest warrant issued for the purpose of criminal prosecution or the execution of a custodial sentence or detention in cases where there are breaches of human rights amounting to torture, inhuman or degrading treatment, thus rightfully balancing the need for effective cooperation based on mutual trust with respecting the fundamental human rights of the individual.

We believe that the Article should not provide a ground for non-execution of the EAW, because this would infringe the principle of mutual confidence at the basis of the EU. The fact that this particular principle stands at the core of the EU is emphasized best by the distinction between the
way Member States cooperate among themselves versus the way Member States interact with states which are not part of the Union (and consequently share a lower level of trust).

For instance, in the *Petruhhin* case, the CJEU had the opportunity to assess the degree of trust which is supposed to exist between a Member State and a third country in the implementation of an international convention on extradition. According to the CJUE assessment, the national judge is not obliged to determine whether there are substantial grounds to believe that the convicted or suspected person will be exposed to a real risk, but only to make a one-step verification in assessing whether there is a general risk of inhuman or degrading treatment of individuals in the requesting third State.

In order to accomplish the objective of our proposal, the postponement should not be made *sine die*, as it would then turn into an implicit refusal.

On the basis of the evidence mentioned above, the executing authority will be obliged to request supplementary information from the issuing judicial authority before taking the decision to postpone the surrender of the requested person.

(b) A present risk for the fundamental human rights of the requested person

The decision to postpone the surrender will only be possible if the executing judicial authority determines, specifically and precisely, that there are sufficient grounds to believe that the requested person will be exposed to a real risk of an infringement of his fundamental rights. Therefore, the risk should not be general, but applicable to that individual.

The executing judicial authority should establish that there is objective, reliable, specific and properly updated evidence on the risk of an infringement of the fundamental rights of the requested person in the issuing Member state before postponing the execution.

Moreover, the risk should be assessed as existing in the present time, rather than assume a past violation is still ongoing. ECtHR judgements where the Court holds that there had been a violation of the Convention reflect past breaches, which occurred some time before the application was lodged. This is why, even if such findings provide an indication that there was a violation of fundamental human rights, the national court ruling on the transfer request must make sure, before

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deciding to postpone, that this risk is still present.

(c) The obligation for a permanent and effective exchange of information

The cooperation mechanism must run smoothly, especially in cases where, on the one hand, there is the freedom of movement of a person at stake and, on the other hand, the effectiveness of cooperation is hindered by any delays.

In order to achieve that, we believe that there are two obligations to be imposed on the MS for the purposes of assessing a request under the FDEAW:

The obligation, also imposed by the CJEU in *Aranyosi and Câldăraru*, for the executing state to ask for information from the requesting state before ruling on the existence of the risk for violation of fundamental human rights.

The obligation, for the requesting state, in case of postponement of execution, to periodically update the information on the detention conditions or provide information regarding other detention facilities which would fulfil the minimal requirements.

7.2. Protecting the fundamental human rights at risk of an infringement through other European legislative acts

The underlying problem, that of the existence of detention conditions that do not meet minimal requirements and thus can be considered in breach of Article 3 ECHR, cannot and should not be solved through the EAW instrument. There are other EU legal instruments, which are adequate to deal with the issue of overcrowded detention facilities and other problems regarding detention conditions.

Just to name some of them: Framework Decision on probation and alternative sanctions[^41^], Framework Decision on transfer of prisoners[^42^], Framework Decision on the European Supervision Order[^43^], EU Directive on the presumption of innocence[^44^] etc.