Stream

Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant

The European Arrest Warrant: Trust, Fundamental Rights, and the Rule of Law

A Comparative Report of 14 EU Member States

Anjum Shabbir[1]

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[1] Anjum Shabbir is Associate Researcher at CEPS. This Report has been carried out under the supervision of Prof. Sergio Carrera (CEPS and STREAM Project Coordinator). The author would like to express her gratitude for the comments and suggestions received by Petra Bard, Dominik Brodowski, Silvia Allegrezza and Sergio Carrera on a previous version of this Report.

Executive Summary

- This Comparative Report forms part of the STREAM Project – 'Strengthening Trust in the European Criminal Justice Area through mutual recognition and the streamlined application of the European Arrest Warrant'. STREAM aims to promote coherence in judicial cooperation between Member States in the criminal justice field, with a particular focus on the European Arrest Warrant system as established by Framework Decision 2002/584/JHA.
- It draws together research from 14 selected Member States. That research, based on the coordination and templates of the Centre for European Policy Studies, has been carried out by national legal experts who are part of the STREAM Academic Network.
- The Report analyses the Network's research on national case-law to show the relationship between (a) mutual trust and (b) EU values, fundamental rights and rule of law-protection in the selected Member States. There is a tension between the two where prioritisation of (a) leads to doubts over whether fundamental rights and EU values are sufficiently protected under the European Arrest Warrant system, and where prioritisation of (b) affects the operation of the principle of mutual recognition upon which the system is based. This is an issue that intensified with the Lisbonisation process and the elevation of the Charter of Fundamental Rights of the EU to the status of legally binding primary law – but which has become even more significant today due to the threat to EU values and rule of law backsliding in Member States such as Hungary and Poland.
- A pattern emerges to show incoherence and key divergences in interpretation and inconsistent application of the European Arrest Warrant system in the selected Member States. There is a tendency for some Member States to apply a higher level of fundamental rights review in what can be described as a context of 'limited mutual trust' or 'mistrust'. And there is an opposite tendency in others to deprioritise review of fundamental rights when considering whether to surrender persons in a spirit of a 'high level of mutual trust' or 'blind trust'.
- The Court of Justice's legal tests in the cases *Aranyosi* and *LM* opened up the possibility for fundamental rights assessments as a recognised limit to those principles (moving towards a balancing of (a) and (b) and a spirit of 'earned trust'). But in doing so, the Court imposed Herculean-level thresholds, and curbed wider fundamental rights protection (including constitutionally protected fundamental rights in Member States showing signs of 'mistrust'). Arguably the Court of Justice has preserved the status quo and not contributed to coherence in a manner that adequately balances the tension.
- The comparison of the selected Member States shows fragmentation in specific aspects too: relating to the review of whether the authority issuing a European Arrest Warrant is a valid 'issuing judicial authority' under the Framework Decision; which specific fundamental rights are protected; how effective judicial protection is considered; and how and whether proportionality assessments are conducted in European Arrest Warrant cases.

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Introduction

This Comparative Report is for the '*Strengthening Trust in the European Criminal Justice Area through mutual recognition and the streamlined application of the European Arrest Warrant*' (STREAM) Project which aims to promote coherence in judicial cooperation across Member States in the criminal justice field, with a particular focus on the European Arrest Warrant (EAW) system as established by Framework Decision 2002/584/JHA. It compares in-depth 'First Periodic Country Reports' and 'Country Research Briefs' produced by the STREAM Academic Network of leading criminal law experts[2] for 14 specifically selected EU Member States: Belgium, France, Finland, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, and Sweden[3].

It aims to be useful for policymakers, lawyers, judicial authorities, scholars and civil society, as more empirical research and evidence are required to examine the relationship between trust and fundamental rights and the rule of law on the ground, to consider how to improve coherence and the operation of the principle of mutual recognition while upholding fundamental rights to the requisite standards.

The national legal research gives indications of incoherence in how the European Arrest Warrant Framework Decision has been implemented and interpreted in each of those Member States[4], and inconsistency in how the relevant judicial authorities have interpreted and apply the Framework Decision. There is a particular focus on how those Member States address the challenge of upholding:

- the high level of 'mutual trust' deemed 'necessary' for the functioning of the cornerstone of judicial cooperation in the EAW system – the principle of mutual recognition, while still; importantly,
- protecting EU values, fundamental rights and the rule of law – as referred to in the recitals and Article 1(3) of the Framework Decision, and as established by EU fundamental rights law, and the Court of Justice's (CJEU) jurisprudence.

Structure of the Comparative Report

Section 1 will set the background and context for the Comparative Report. This is essential for at least three reasons. First, because the original complexities and even more intricate evolution of the legal framework of the Framework Decision are significant when considering the coherence of the instrument. Second, the elusive legal terminology – for example what 'mutual trust' means – is also imperative in that assessment. And third, it is imperative to take into account the

[2] https://stream-eaw.eu/stream-academic-network/. Periodic Country Reports for each of the 14 Member States are available on the STREAM website, along with 11 updating Country Research Briefs, at https://stream-eaw.eu/country-reports/. Many thanks to the STREAM Steering Committee members for their comments on a previous draft of this report.

[3] See the Annex for an explanation of why these 14 Member States were specifically chosen.

[4] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, p. 1.

consequences of rule of law backsliding, especially in Poland and Hungary (see Section 1.1. below), on an unchallenged and unchecked presumption that all Member States comply with EU values and fundamental rights equally in their application of the EAW system.

This is followed by a comparison of the 14 selected EU Member States in Section 2, where a pattern emerges to show incoherence and key divergences in interpretation and inconsistent application of the EAW system, in particular of Article 1(3) of the EAW F, in the selected Member States. At least four different categories of Member States can be observed with regard to implementation, interpretation, and application. Of those categories opposite approaches emerge: there is a tendency for some Member States to apply a higher level of fundamental rights review in what can be described as a context of 'limited mutual trust' or 'mistrust'. And there is an opposite tendency in others not to apply such a high level of review of fundamental rights when considering whether to surrender persons in a spirit of a 'high level of mutual trust' or 'blind trust'.

Section 2 also takes into account the CJEU's jurisprudence that aims at balancing the tension between the principle of mutual trust and fundamental rights which impacts the principle of mutual recognition. It opened up the possibility for fundamental rights assessments as a recognised limit to those principles (moving toward an approach of 'earned trust'). But in doing so it imposed Herculean-level thresholds, and curbed wider fundamental rights protection (including constitutionally protected fundamental rights in Member States showing signs of 'mistrust'). Arguably the CJEU preserves the status quo and has not contributed to coherence in a manner that adequately balances the tension.

The comparison of the selected Member States shows fragmentation in specific aspects of the EAW system too; this is discussed in Sections 3 and 4. These relate to the review of whether the authority issuing a European Arrest Warrant is a valid 'issuing judicial authority' under the Framework Decision; which specific fundamental rights are protected (some prioritised over others, but which ones varied according to Member State); how effective judicial protection is considered; and how and whether proportionality assessments are conducted in EAW cases.

Methodology

A note must be added here on methodology (see Annex): the Comparative Report is to be read in light of the difficulties reported at the national level in accessing complete and relevant data at the national level. This not only throws up the issue of the conclusions being tailored to specific sample sizes and the available data (*which significantly may or may not be representative*), but it also poses a much more serious issue of transparency – and therefore accountability (key tenets of the rule of law).

1. Background and Context

1.1. The evolving legal context

It is worth taking a look at the original legal context and purpose of the EU's Framework Decision[5] and the system it established to set the background to this Comparative Report. This is particularly important because the Framework Decision has a complex and evolutionary legal history that is highly significant to the operation of the EAW system today, and the partial cause of incoherency and inconsistency in its implementation and application.

The Framework Decision came into force on 1 January 2004, propelled by an impetus for greater transnational cooperation favouring strong *security and law enforcement* rules following the 9/11 terrorist attacks in the United States. The legislative proposal for it was presented 8 days after the attacks, on 9 September 2001[6]. The Council of Ministers agreed the draft version in just over 3 months, by 12 December 2001.

It remained under the umbrella of the intergovernmental 'Third Pillar' of police and judicial cooperation after the Treaty of Amsterdam entered into force on 1 May 1999, as a legal measure[7] designed as one of the 'compensatory measures' to further build an Area of Freedom, Security and Justice (AFSJ) in which internal borders are abolished in the Schengen area. This means the legislative proposal was adopted by the Council of the EU by a unanimous vote, on the initiative of the 15 Member States that were members at the time[8]. When the deadline for its implementation had expired, only eight Member States had begun to implement the new regime, the others having failed to integrate the Framework Decision into their national legal systems[9].

There was only a limited role for the Court of Justice of the EU in terms of jurisdiction, which applied only to those Member States that had accepted it. The European Parliament was completely excluded from the process. And the European Commission had no right of legislative initiative for such measures, and was not empowered to commence infringement proceedings against Member States on such measures either.

But the security and law enforcement landscape in which the Framework Decision was adopted has changed significantly. Threats to national security due to terrorism are not as high on the agenda as they were then, and newer threats such as cybercrime have grown in importance. Now the European Union faces a growing challenge of threats to the fundamental rights of individuals, as well as EU values, stability, and integration, as a result of rule of law backsliding. That backsliding was sparked among others by controversial judicial reforms in at least two Member

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[5] 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, p. 1.

[6] https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=53300&t=e&l=en.

[7] We have described the third pillar in the past as 'legally obscure' and 'rather opaque'. Apap and Carrera, https://aei.pitt.edu/6476/1/1096.pdf, p. 2.

[8] Apap and Carrera, p. 2.

[9] Apap and Carrera, p. 4.

States (Hungary and Poland, since 2010 and 2015 respectively)[10], that disregard Article 2 TEU values (and Article 19(1) TEU, and the Charter of Fundamental Rights). The escalating situation has seen ensuing legal battles through infringement proceedings and tussles through the preliminary ruling procedure before the CJEU, with some Member States questioning the primacy of EU law, and disregarding the CJEU's judgments. There have also been judgments of the European Court of Human Rights (ECHR) finding (structural) fundamental rights violations in some Member States.

And with the entry into force of the Treaty of Lisbon on 1 December 2009, the 'three pillar structure' of the European Union as foreseen by the Treaty of Maastricht was abolished. The EU acquired a single full legal personality. Decision-making changed to qualified majority voting in the Council of the EU, with the equal participation of the European Parliament through co-decision-making under the 'ordinary legislative procedure' (with certain exceptions[11] where unanimity voting remained the rule, and the European Parliament could only be consulted[12]). The Court of Justice's principles of Community law were to apply to the field, and it was granted unrestricted jurisdiction to include all EU activities (except in the area of Common Foreign Security Policy). Third pillar measures were transferred to Title V of the Treaty on the Functioning of the European Union (TFEU). The forms of legislative instruments available for use in the field changed: they now included Regulations and Decisions. Framework Decisions (the provisions of which could not have direct effect) were replaced by Directives (which can). And crucially, the Charter of Fundamental Rights became a legally binding source of primary law with equal value to that of the Treaty of the European Union (Article 6 TEU) and the Treaty on the Functioning of the European Union.

A five-year transitional period ending on 1 December 2014 was however put into effect by Protocol No. 36[13]. It established a complex legal and technical framework to limit some of the most far-reaching innovations of the Treaty of Lisbon in this area, to appease the interests of different Member States in limiting scrutiny and supervision[14].

Upon its expiry though, there were normative, policy, and jurisprudential changes, and the procedural and fundamental rights of suspects and accused persons were strengthened, bolstering the focus on the higher importance of fundamental rights protection together with the binding nature of the Charter. The CJEU's greater power of review ushered in a new phase through the preliminary ruling procedure under Article 267 TFEU, shaping the Framework Decision in response to common challenges arising from the system since its inception, and

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10 Pech, L., and Scheppele, K. L., 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies* (2017).

11 Such as operational police cooperation; administrative cooperation between Member States; the possible creation of a public prosecutor; and family law.

12 European Commission Memo 'Explaining the Treaty of Lisbon', 1 December 2009. Available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_09_531.

13 Protocol No. 36 on Transitional Provisions, OJ *115, 09/05/2008, p. 0322.*

14 Mitsilegas, V., Carrera, S., and Eisele, K., 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?' CEPS Paper in Liberty and Security in Europe No. 74, December 2014.

implementation of it. And the European Commission gained expanded powers of scrutiny in monitoring Member States' implementation of EU criminal justice law.

Under the new decision-making procedure, negotiations for certain EU-level procedural laws were 'unblocked'. Agreement was finally reached on six Directives strengthening the rights of persons in criminal proceedings: on the rights to interpretation and translation, to information, to access to a lawyer, to legal aid, the presumption of innocence, and procedural safeguards for children suspected or accused in criminal proceedings[15].

1.2. The 'principle' of mutual trust

Turning to the content of the Framework Decision, a new simplified and fast-track surrender system of 'judicial cooperation' was established by it. This replaced the traditional system used by Member States' governments to extradite suspected, accused, or sentenced persons. Under the old system, the final decision was often largely a political and diplomatic one. Under the Framework Decision, an 'issuing' judicial authority can send a European Arrest Warrant to an 'executing judicial authority' requesting that a person be surrendered for the purposes of prosecution or to serve a sentence or detention order. In order to achieve that simplicity and speed, and as the first legislative measure in the field of criminal justice to do so, the Framework Decision based the system on the 'principle of mutual recognition'.

The principle of mutual recognition first emerged in the economic context in 1957, through two internal market provisions (Articles 57(1) EEC and Article 20 TEEC). It was only given real shape 20 years later in the landmark ruling of *Cassis de Dijon.* Another two decades later, following the above-mentioned Treaty of Amsterdam and Tampere Programme in 1999, it was chosen as an EU integration mechanism in the highly politically sensitive area of extradition: one that could preserve national sovereignty and avoid harmonisation of substantive criminal law under the European Arrest Warrant Framework Decision of 2002[16]. The idea was that it would help construct an 'Area of Freedom, Security, and Justice', so national legal systems could operate together seamlessly for security and law enforcement purposes in an area without borders. And it was eventually formally enshrined in Article 82(1) of the TFEU. Broadly, it requires the judicial authorities in one Member State to accept decisions made by judicial authorities in another

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15 Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ L 280 p. 1; Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142 p. 1; Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294 p. 1; Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297 p. 1; Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65 p. 1; Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132 p. 1.

16 One author considers that 'The political dimension has always been highly present in this area, inter alia, due to the strong security focus and due to the various arrangements, that have characterised the area; and also refers to the opt outs secured by the UK and Denmark (E. Herlin-Karnell, The Politics of EU Law and the "Area of Freedom, Security and Justice", Handbook on the Politics of EU law, 2020, p. 1.).

Member State as having the same legal value and effect as their own. The consequences of transferring a principle from the economic to the criminal justice field are to be kept in mind[17], given the serious nature of the deprivation of liberty inherent to the latter (as emphasised by the ECtHR's case-law on Article 5 ECHR).

Application of the principle of mutual recognition under the EAW FD has been anchored in – or depending on perspective connected to[18], intertwined with, or dependent on[19] – a high level of 'mutual trust'. Precisely who that mutual trust is between, what is to be trusted, what the trust is based on, the level of trust that is required, and who monitors and ensures that trust remains in place was not defined[20]. Does it mean trust between individual judges? An agreed standard of trust between judicial systems? Trust between Member States' governments? Trust of an individual in the judiciary of a Member State? Does the individual have any role in the trust relationship? Is information in the media that may impact trust to be disregarded in all cases?

As a result of the lack of definition in the treaties or elsewhere, mutual trust has been described in the literature in different ways. It is seen as a *presumption*[21] – of compliance with EU law and EU fundamental rights law or flowing from membership of the EU[22], but also as inherently *subjective* and not objective[23]. Current CJEU Judge Prechal described it as a presumption that is in itself based on two *presumptions* that: (a) EU Member States observe EU law; and (b) that Member States offer an equivalent level of protection under EU law notwithstanding the

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17 See Bard, P., 'Saving EU Criminal Justice: Proposal for EU-wide supervision of the rule of law and fundamental rights', CEPS Paper in Liberty and Security in Europe, No 2018-01, April 2018, p. 5. She points out that: 'Unlike in the context of the internal market, however, mutual trust and mutual recognition in the AFSJ have different, considerably graver consequences for the individual'.

18 One author writes that 'a direct link' was established between mutual recognition and mutual trust and introduced such trust as a *presumption*: Member States trust each other's criminal-justice system since all systems share a commitment to fundamental principles of human rights and the rule of law', and later became by some known as 'a prerequisite for a successful application of the principle of mutual recognition'. He also points out that 'Numerous statement of EU officials and organs emphasise the importance of mutual trust'. A. Efrat, Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant, *Journal of European Public Policy,* 2019. p. 4.

19 It is pointed out that 'Such mutual recognition, in turn, relies on mutual trust: Member States are assumed to trust each other's justice system, since all EU countries share a commitment to democracy, human rights, and the rule of law'. (Efrat, p. 2.)

20 Francois-Xavier Millet provides a detailed background and interpretation of mutual trust, describing it as initially a vague assumption, where trust had an undefined subject matter. He points out that it 'operated rather like a self-fulfilling prophecy: one had only to believe in it for it to happen'. (FX Millet, The Protection of Fundamental Rights within the AFSJ: Through or Against Mutual Trust and Mutual Recognition? p. 63. Available at: https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781108769006.006). Herlin-Karnell refers to 'divergent criminal laws between the Member States to justify the application of a trade-based internal market model of mutual recognition in AFSJ law' and how this is 'based upon solidarity and trust across the European traditions'. (Herlin-Karnell, p. 2.)

21 Mitsilegas, V., 'Trust', *German Law Journal* (2020), 21, p. 69. Efrat also states that 'Mutual trust is a belief that the partner's legal system functions adequately and adheres to fundamental norms. The European Union builds its judicial-cooperation efforts on a presumption of mutual trust: EU members are assumed to trust each other's justice system since they share a commitment to human rights and the rule of law.' (Efrat, p. 1.)

22 Popelier, P., Gentile, G., van Zimmeren, E. 'Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context'. *Eur Law J.* 2022;1-18. doi:10.1111/eulj.12436, p. 6., p. 17.

23 Mitsilegas, V., 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', *New Journal of European Criminal Law*, Vol. 6, Issue 4, 2015, p. 476.

presence of regulatory divergencies[24]. The current President of the Court of Justice has described it as generating two enforceable *obligations*: (1) that Member States may not demand from another Member State a higher level of national protection of fundamental rights than that provided by EU law, and (2) that they are prevented from checking whether another Member State has observed the fundamental rights guaranteed under EU law, save in exceptional cases[25]. It is also being explored as a *psycho-sociological phenomenon* that draws on non-legal disciplines – such as sciences, social sciences, psychology, economics, management, history, philosophy but also biochemistry, neuroscience and genetics – and as being a subject of cross-disciplinary convergence[26].

But it is important to remember that the concept is likely to be anachronistic. As explained in Section 1.1 above, the Framework Decision was decided upon and signed by significantly fewer EU Member States than are members now, and whose legal systems are said to have been relatively similar. It could be said that the reference to mutual trust was quite different and easier to conceptualise back then. It is logical that it enshrined what it entailed at that time *factually* – it was based on the contractual agreement that a smaller number of Member States had signed up to (and by extension binding all authorities and organisations of those Member States): to respect fundamental rights, the rule of law, and the EU principles encapsulated in Article 2 TEU upon which it was agreed the EU was based (as described under the Treaty of Amsterdam back in 1999, but which became EU 'values' under the 2009 Treaty of Lisbon). That had the dual effect of creating trust – constituting a reinforcing loop.

The vague concept of mutual trust has faced many challenges and much criticism. Despite the choice of instrument – a Framework Decision – to respect divergences in the Member States' legal traditions and their national sovereignty in the criminal law field, the issue of mutual trust has been perceived as an issue due to the high degree of divergences amongst a much larger number of Member States' legal and political systems following enlargement of the Union. This divergence in the concept was particularly emphasised with the constitutionalisation of fundamental rights in the Treaty of Lisbon[27], further to the Lisbonisation of former Third Pillar measures, and the new legally binding status of the EU Charter of Fundamental Rights. Fundamental rights interests of the individual seem to be demoted at the expense of enhanced law enforcement cooperation and EU integration (in a political and security context that has

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[24] Popelier, p. 4. Prechal, S., Mutual Trust Before the Court of Justice of the European Union, *European Papers*, Vol. 2, 2017, No 1, pp. 75-92, ISSN 2499-8249 - doi: 10.15166/2499-8249/139. Available at: https://www.europeanpapers.eu/it/e-journal/mutual-trust-before-the-court-justice-of-the-european-union

[25] Popelier, p. 4; Lenaerts, K., 'La vie après l'avis: Exploring the Principle of Mutual (yet not blind) Trust', (2017) 54(3) *Common Market Law Review*, p. 813.

[26] Popelier, P., Gentile, G., van Zimmeren, E. 'Bridging the gap between facts and norms: mutual trust, the European Arrest Warrant and the rule of law in an interdisciplinary context'. *Eur Law J.* 2022;1-18. doi:10.1111/eulj.12436, p. 6.

[27] Indeed, it is argued that because of the complexity of the changes upon the entry into force of the Treaty of Lisbon, there should be a questioning of the extent to which fundamental rights concerns should be taken into account and form grounds of refusal in a system of mutual recognition based on mutual trust. Mitsilegas, V., 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', *New Journal of European Criminal Law*, Vol. 6, Issue 4, 2015, p. 467.)

changed significantly). Indeed, some scholars describe the 'trust dilemma' as a 'potentially serious threat' to fundamental rights such as the right to a fair trial due to discrimination, lengthy pre-trial detention, or inhumane and degrading treatment, including if exposed to poor prison conditions[28], and that the presumption of mutual trust as the basis for mutual recognition raises problems for national courts in reviewing the compatibility of an EAW request with fundamental rights[29].

The only indicator of its content since the Treaty of Lisbon comes from the Court of Justice's *Opinion 2/13* (para. 91) which surprisingly raised its constitutional status to that of a Principle (considering its inherent ambiguity and likely factual nature related to the specific legal origins of the Framework Decision)[30]. The Court in its Opinion 2/13 stated that the (newly coined) principle includes accepting that the fundamental rights of persons requested under a European Arrest Warrant would be upheld in other Member States to the same standards, and that it could only be considered otherwise in exceptional circumstances. Broadly, then 'mutual trust' can at the very least be understood to mean that all EU Member States must act as if they share and observe the same standards of integrity, guarantees, values and principles in their judicial systems and practices. But this does not take into account its dynamic and 'fluctuating' nature, which the European Commission has in the past emphasised, recognising that trust does not simply exist and must actually be constructed (and by extension, can be deconstructed)[31].

Challenges and criticism of the now 'principle' continue with even greater force against the backdrop of rule of law backsliding mentioned in Section 1.1. This decline further supports that by all logic, 'mutual trust' should have a dynamic meaning that can adapt to context[32]. Even the rarely used Article 7 TEU procedure to address repeated breaches by some Member States was triggered by this situation. And it is an outstanding reason to reassess quasi-automatic trust and confidence in each other's national criminal justice systems[33].

Several national courts have indeed expressed doubts about whether they could continue to execute EAWs issued by Polish authorities as a result of rule of law backsliding as evidenced through the eroding independence of the judiciary, by submitting preliminary rulings to the CJEU for clarification. This arguably reflects 'limited mutual trust' or 'mistrust'.

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28 Among others, Efrat points out examples of problems that could occur such as physical abuse, lack of due process, forced confessions, prejudices and more. Efrat, p. 7.

29 Herlin-Karnell, p. 4.

30 Mitsilegas points out that with Opinion 2/13 the Court showed a 'persistence in upholding an extreme model of mutual trust' pushed the limits and led national courts and the ECtHR to have 'serious issues of acceptance and credibility of the whole system' in Mitsilegas, V., 'Trust', *German Law Journal* (2020), 21, p. 69.

31 European Commission press release of 20 May 2005, Criminal justice: the mutual recognition of judicial decisions demands stronger mutual trust between Member States. https://ec.europa.eu/commission/presscorner/detail/en/ip_05_581.

32 It has been described as 'very contextual'. Popelier, p. 7.

33 Petra Bard warns that 'once the values of Article 2 TEU including the rule of law are not respected, the essential presumptions behind the core of the Union, such as mutual trust or mutual recognition, do not hold anymore'. Bard, P., 'In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law' *European Law Journal* Volume 27, Issue 1-3 (2022), p. 187.

1.3. Fundamental Rights under the Framework Decision

1.3.1. Transposition of Article 1(3) of the Framework Decision

Fundamental rights obligations are referred to in Article 1(3) of the Framework Decision, and its recitals 12 and 13.

That provision is brief, and the specific terminology used is passive: 'fundamental rights and fundamental legal principles' as enshrined by Article 6 TEU shall not be '*modified*' by the Framework Decision. Textually this means that fundamental rights obligations toward the relevant persons 'still stand' despite the simplified and swift new (judicial) surrender system (as opposed to more active language: 'fundamental rights cannot be breached', or that 'compliance with fundamental rights must be ensured'). And in terms of location in the Framework Decision, the provision is not listed in the mandatory or optional grounds on which an authority can refuse to surrender a person subject to a European Arrest Warrant, and is no more detailed than what has been expressed above.

Recitals 12 and 13 of the Framework Decision do not rule out that breach of (some) fundamental rights can at least *be connected with* a refusal to surrender a person (again rather than the more active 'breach of fundamental grounds is a ground for refusal to surrender a person'). Rather, the Framework Decision 'respects fundamental rights' as recognised by Article 6 TEU and reflected in the EU Charter; the Framework Decision *does not prevent* the refusal to surrender a person when there are 'reasons to believe, on the basis of objective elements' that the EAW aims to punish or prosecute a person on the grounds of 'his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons'. And a Member State is also not prevented from 'applying its *constitutional rules*' such as on 'due process, freedom of association, freedom of the press and freedom of expression in other media'.

In addition to the textual brevity and passivity on the role of fundamental rights in surrender procedures (see Section 2.1 above) in the Framework Decision, there is a 'looseness' in how Member States can transpose the EU instrument. By design a Framework Decision sets out objectives for Member States to fulfil in the form, method, and manner they see fit (Article 34(2)(b) TEU), and in which their legal traditions do not have be harmonised (Articles 31 and 34).

The evolving legal context referred to in Section 1.1. must be recalled here. The Framework Decision as a Third Pillar instrument of an intergovernmental, non-community nature (i) was not designed to be capable of having provisions with direct effect that individuals could rely on directly in legal proceedings with the aim of enforcing their rights; and (ii) was not formally envisaged to be an EU legal act subject to supervision and enforcement.

The Treaty of Lisbon should have ushered in changes in that respect, but Protocol No. 36 to the treaties stipulated 'Transitional Provisions' for legislative measures adopted prior to the entry into force of the Treaty of Lisbon[34]. This meant a limitation to the changes it entailed.

But since the expiry of that transitional period there has been: (i) a conversion of old EU Third Pillar legal and quasi-legal instruments into 'proper pieces of EU legislation [with] direct effect and enforceability', and 'new EU legislative measures' in this field take the form of Regulations and Directives that have been passed by use of the ordinary legislative procedure (with the European Parliament as co-legislator)[35]. Framework Decisions were replaced as a legislative tool by the Directive, an instrument which also sets out objectives and discretion in national implementation – but which crucially *can* contain provisions capable of direct effect, and Member States can be subject to late transposition of them. And (ii) there was a shift in 'supervision on compliance and faithful implementation of EU law on police and criminal justice from domestic authorities in the Member States to EU institutional instances'.

In the findings in this Comparative Report that follow in Section 2, it is therefore expected that there is a divergence in the means employed by Member States to implement the EAW FD, and resulting fragmentation that cannot be addressed by a potential judicial finding of direct effect of the fundamental rights provision, or by institutional supervision of how Member States have transposed the instrument. This also reveals the importance of the results of preliminary ruling requests on how to interpret the standard under which Member States must protect fundamental rights in surrender procedures and balance it with mutual trust (the Court has not avoided granting an autonomous and uniform interpretation to certain terms of the Framework Decision – consider its case *Kozlowski.* And in doing so it has creatively drawn on supporting case-law concerning the interpretation of terms in Directives).

1.3.2. Article 1(3) of the Framework Decision as interpreted (or developed) by the Court of Justice

In recent years particularly, following the rule of law backsliding in certain Member States, the Court of Justice has been confronted with preliminary rulings from national courts seeking clarification of the undetailed concept of the (principle of) mutual trust. Alongside these clarifications, the national courts also seek advice on the interpretation of the vaguely worded role of fundamental rights in the EAW system, and when it can justify a refusal to surrender. Examples of some of the most important cases are *Aranyosi, LM,* and *OG and PI*[36].

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[34] Mitsilegas, V., Carrera, S., Eisele, K. 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area? CEPS Paper in Liberty and Security', No. 74, December 2014, p. 8.

[35] Mitsilegas, V., Carrera, S., Eisele, K. 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area? CEPS Paper in Liberty and Security', No. 74, December 2014, p. 5 and p. 8.

[36] *Aranyosi and Căldăraru*, Joined Cases C-404/15 and C-659/15 PPU. The Court establishes a two-step test to establish whether there is a real risk of a breach of fundamental rights (specifically the right not to be tortured or subjected to inhuman and degrading treatment concerning prison detention conditions, under Article 4 of the Charter) if the person in question were to be surrendered. This is the first time it acknowledges an exception to the principles of mutual recognition and mutual trust from this perspective. *LM* (C-216/88 PPU) extends that two-step test to the right to a fair trial with regard

Refusals to surrender on grounds not expressly set out in the Framework Decision are essentially a limit to the principle of mutual trust, and arguably an expression of a degree of mistrust rather than a high degree of trust (and by extension this conditions the principle of mutual recognition). The Court of Justice has – on the one hand – agreed to a limitation of the principle of mutual trust through its preliminary rulings. By establishing a two-part fundamental rights legal test in the seminal case *Aranyosi* to determine whether such a review can be carried out with a view to 'suspending' or 'postponing' (not refusing to execute) European Arrest Warrants, the Court of Justice at least accepts that mutual trust is not 'blind trust' or equivalent to 'loyalty'. This shows the beginnings of a move towards 'earned trust'[37].

On the other hand, it establishes *very high thresholds* that arguably render it meaningless in furthering fundamental rights protection in the EAW system. An executing judicial authority may only refuse to surrender a person in exceptional circumstances and subject to conditions. *Aranyosi* requires: first, a general assessment. There have to be elements demonstrating a real risk of inhuman or degrading treatment (as prohibited under Article 4 of the EU Charter) due to general detention conditions in the issuing Member State based on objective, reliable, specific and properly updated information. Second, there must be a specific assessment: there has to be evidence of a real risk in relation to general detention conditions, and it must be determined in the particular circumstances of the case that there are substantial grounds to believe that the person, if surrendered, will run a real risk of being subject to inhuman or degrading treatment[38].

In another landmark case, *LM,* this two-step test was developed to cover instances where there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter due to concerns about judicial independence in the issuing Member State[39]. It has to be determined: (i) whether the risk established in the first step applies at the level of the court with jurisdiction over the criminal proceedings to which the requested person will be subject, and (ii) whether the risk exists in the case of the requested person, having regard to his or her personal situation, as well as to the nature of the crime for which he or she is being prosecuted. The necessity of dialogue and requests for supplementary information between the issuing and executing authorities was also emphasised.

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to judicial independence, as guaranteed by Article 47(2) of the Charter and adds two sub-steps; and *OG and PI* (C-508/18) on the independence of an issuing judicial authority that requests the surrender of a person, and effective judicial protection – noting that independence is important so that the judicial authority may adequately perform its function in line with the principle of the separation of powers. See further Section III.2.2. and III.3 of the STREAM State of the Art report by Carrera, S., Bard, P., and Stefan, M., 'The Judicialisation of the European Arrest Warrant Rule of Law and Fundamental Rights as Preconditions for Merited Mutual Trust'.

37 Mitsilegas, V., in 'Trust' *German Law Journal* (2020), 21, p. 70 points out that 'by expressly granting, for the first time, the opportunity to the executing authority to suspend the operation of the system of mutual recognition if fundamental rights concerns persist...[the Court has] moved from a model of presumed or blind trust to one of earned trust.

38 Judgment of 5 April 2016, C-404/15, *Aranyosi and Caldararu*, EU:C:2016:198. See also Judgment of 25 July 2018, -220/18 PPU, *ML*, paragraphs 88-94; and Judgment of 15 October 2019, C-128/18, *Dorobantu*, EU:C:2019:857, paragraphs 52-55.

39 Judgment of 25 July 2018, C-216/18, *LM*, EU:C:2018:586. See also Judgment of 17 December 2020 in Joined Cases C-354/20 and C-412/20, *L and P*, EU:C:2020:1033.

While the Court places an emphasis on acquiring information where there are fundamental rights doubts (also an apparent move towards 'earned trust' given its function as a trust-building or a 'reassuring' tool) – it also requires that any assurances received should be relied upon unless it is egregiously evident that there would be a fundamental rights breach. This again may render the exercise meaningless, especially as it has been pointed out that a captured court or non-independent judicial authority is unlikely to be unbiased and provide reliable and objective assurances if the subject of the information exchange is its *own independence*[40].

Those high thresholds and assurance requirements set by the CJEU have been seen to sway the decision *against* refusal to surrender a person on fundamental rights grounds (consider the outcome in the six 2016 cases before the Luxembourg court; and the Dutch national legal experts' observation that there were few refusals to surrender, after the tests in *Aranyosi* and *LM were* established – Sections 2.2.1 and 2.2.3 below). This is not surprising considering that the nearly 100 Court of Justice cases on the European Arrest Warrant have the common thread of reinforcing a strict application of the principles of trust and mutual recognition, sticking closely to the letter of the 21-year-old Framework Decision.

It is arguable therefore that the consequences of the legal test(s) are confusing: while symbolically or seemingly shifting towards 'earned trust', the position now is simultaneously very similar to that of its previous interpretation to strictly follow the Framework Decision's principle of mutual trust – in a manner that is equally vague and ambiguous, and where there is still a lack of definition of 'mutual trust' or the precise role of fundamental rights under Article 1(3) of the Framework Decision and its recitals 12 and 13. This poses a serious obstacle to the Member States in navigating what the actual EU law standards are (evidenced by national courts sending further questions for clarification in the same case upon receiving a preliminary ruling), and that additionally prejudices the ability to uphold fundamental rights in EAW cases.

[40] See Bard, P., and Ballegooij, W. v., 'Judicial independence as a precondition for mutual trust? The CJEU in *Minister for Justice and Equality v. LM', New Journal of European Criminal Law* 9(3), p. 361: 'The Court's insistence that the executing authority acquire supplementary information from the issuing judicial authority and that the two courts should engage in a 'dialogue' presupposes that a captured court will admit its lack of independence. Such a self-criticism is highly unlikely, not only because the issuing court would destroy its own reputation but also because it would thereby criticize the issuing state's executive, that is, the branch of government upon which it is dependent'.

2. National Research: Divergences in Transposition and Implementation of Fundamental Rights

2.1. Different ways of approaching fundamental rights under Article 1(3) of the Framework Decision

The risk of fundamental rights violations related to the issuing of EAWs in other Member States' systems was addressed in all the selected Member States examined without exception. Such risk was revealed to be mainly expressed by executing judicial authorities in a Member State which receive a request to surrender a person subject to an EAW from an issuing judicial authority in another Member State.

On how fundamental rights as referred to in Article 1(3) of the Framework Decision (and recitals 12 and 13) were addressed, there is a spectrum of different approaches. As mentioned above, this is partly expected, due to the provision's textual brevity, the passive language in which it is couched, the varying methods of transposition and implementation, sometimes inherent due to the differing legal cultural traditions in these EU Member States, and the complexity in the evolution of the Framework Decision's legal nature and history. That spectrum of approaches however yields fragmented and substantial differences in the results of how Member States protect fundamental rights under the EAW system.

With regard to the transposition of the fundamental rights aspect of the Framework Decision, there was either (i) no specific legal basis in national law about it, (ii) a legal basis which is not relied upon in practice; (iii) a specific legal basis in a national law provision which is relied upon in practice for the purpose of fundamental rights protection in EAW cases (and iv – special cases). In some Member States there are no judgments where refusals to surrender a person based on fundamental rights concerns: in others there are judgments where there is serious consideration of whether to refuse surrender due to fundamental rights concerns.

The fragmentation can be illustrated (see image below) by a division into general groups.

- In the red category, Member States have not transposed the fundamental rights aspect of the Framework Decision by way of a specific legislative clause or by judicial precedent. This is coupled with a tendency not to refuse to surrender on fundamental rights grounds: or at least the accessible judgments do not show that the national courts treat it as a possibility.

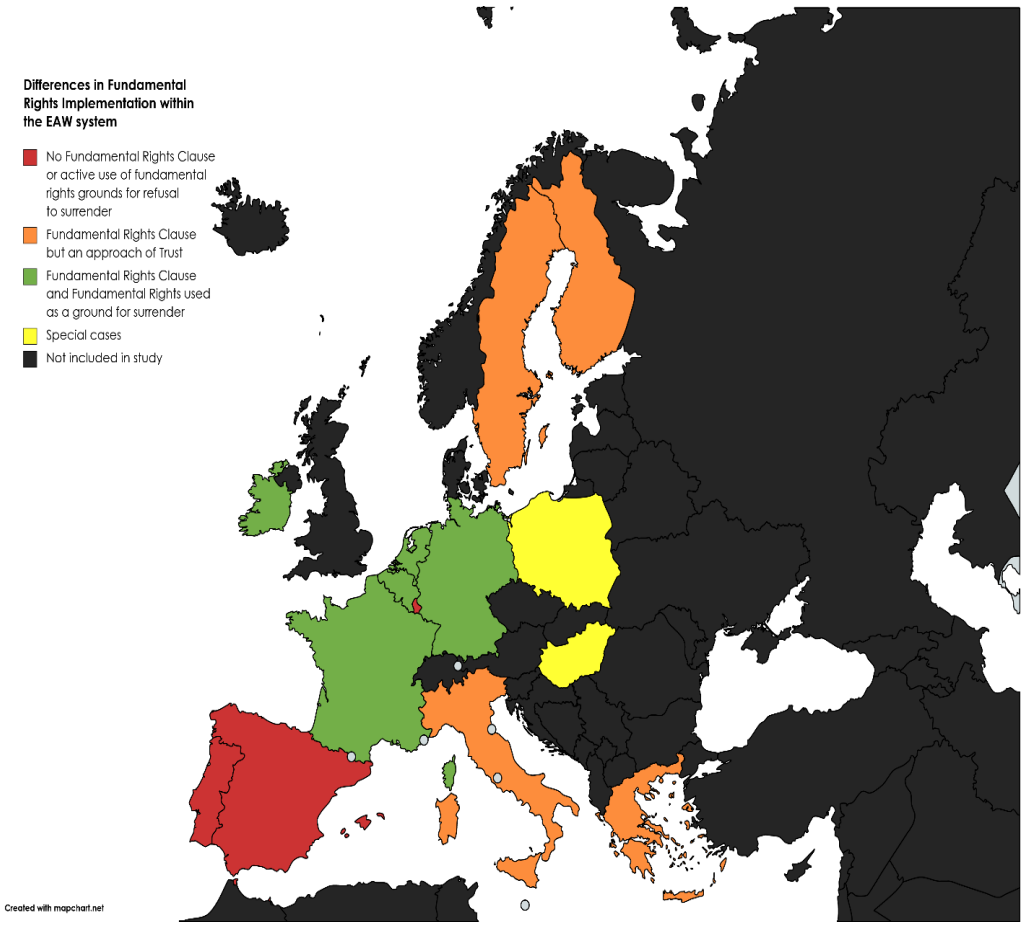
- In the orange category, Member States transposed the fundamental rights aspect of the Framework Decision by legislating a fundamental rights clause. But the tendency is against reliance on it in practice.

- In the green category, Member States transposed the fundamental rights aspect of the Framework Decision by legislating a fundamental rights clause which can be relied on as grounds for surrender.

- The yellow category shows anomalies: it includes Member States that have been subject to criticism and action of the EU institutions as a result of rule of law backsliding and are termed as such because they themselves are not considered compliant with

fundamental rights and the rule of law, and therefore not reliable assessors of the same for other Member States.

These categorisations of Member States are further explained below.



2.2. No Fundamental Rights clause – and no examples of refusal to surrender on those grounds

Luxembourg, Portugal, and Spain: strong reliance on mutual trust

The red category includes at least three Member States which do not have a separate (or known) statutory fundamental rights provision to transpose the Framework Decision: Luxembourg, Portugal, and Spain. Luxembourg's EAW law of 2017, Portugal's EAW law (No. 65/2003) (with the exception of *in absentia* cases in a 2015 amendment), and Spain's mutual recognition law

(23/2014) (with the exception of *in absentia* cases under its Article 49) do not contain a fundamental rights clause[41].

As well as there being no transposing fundamental rights clause in Luxembourg law, the national legal experts stated that there is heavy reliance on mutual trust in other Member States' systems, and as a result few refusals to surrender a person (by inference, including on fundamental rights grounds)[42]. An example was given where this was the case also after the CJEU's ruling in *Aranyosi,* where in six 2016 judgments, surrender was not refused on fundamental rights grounds (specifically concerning detention conditions). The reason given was that the CJEU's reasoning in that case on the need to trust that Member States comply with fundamental rights was 'generally' mirrored, and that upon application of the two-step test (which in fact it combined) it was found that the information relied upon to prove the elements of that test was not sufficiently 'objective, reliable, specific and properly updated'. Nor, in the cases examined, had the executing judicial authority requested 'supplementary information' about detention conditions[43].

Similarly, in Portugal, adding to the fact that there is no transposing fundamental rights clause under national law, the national legal experts' analysis of 166 judgments found that there were only nine refusals to surrender a person subject to a European Arrest Warrant. None of them were on fundamental rights grounds (with the exception of guarantees regarding *in absentia* trials which is part of the right to a fair trial, but which can be discounted given that it is the subject of a specific provision (Article 4A) amending the Framework Decision that has been transposed)[44].

In terms of the Portuguese authorities either as the issuing or executing judicial authority, it was remarked generally that there might be a lack of emphasis on fundamental rights, because a Member State 'will seldom acknowledge' its own shortcomings to the extent to prevent the issuing of a European Arrest Warrant, and because of difficulty in rebutting the presumption of fundamental rights compliance of another Member State 'in the ambit of the two-step process' (which can be inferred as referring to the high threshold set by the Court of Justice, for example in *Aranyosi*). There also appears to be an approach of upholding the principles of mutual trust and recognition strictly, as the experts' analysis of the judgments of the Portuguese courts shows that they are 'very cooperation friendly in the ambit of the EAW'[45], that generally there is a presumption that fellow Member States comply with fundamental rights[46], and that 'One cannot

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41 Country Research Brief: Luxembourg, p. 8; Country Research Brief: Spain, p. 5; First Periodic Country Report: Spain, p. 8; Country Research Brief: Portugal, p. 4.

42 First Periodic Country Report, Luxembourg, p. 23.

43 First Periodic Country Report: Luxembourg, p. 18.

44 The reasons for surrender were related to: lack of dual criminality of an offence; territorial offences; lack of guarantees regarding trials in absentia and the return of a Portuguese national for the execution of the sentence if convicted; execution of a prison sentence of less than 4 months; and statutory limitation. First Periodic Country Report: Portugal, p. 20 and footnote 123.

45 First Periodic Country Report, Portugal, p. 20.

46 Country Research Brief: Portugal, p. 5.

avoid the general perception that individual rights weigh less than those interests [simplicity, swiftness, trust and recognition] in dubious cases'[47].

Despite this conclusion, it must be added that this position of the Portuguese authorities is based on limited information. The experts recalled that not all judgments on European Arrest Warrants have been published, the total number of such cases is unknown, and the criteria for those that are selected for publication are also unknown[48]. The experts expressly state that it is 'not possible to determine the statistical significance of the stand taken by the Portuguese authorities'[49]. This lack of transparency is problematic not only for that reason – making monitoring and enforcement by the European Commission of implementation of the Framework Decision difficult – it also goes to the heart of the rule of law.

As a final note with regard to Portugal, a slight and unique caveat can also be mentioned to the position depicted above. A distinction is made between grounds for refusal to surrender either on (a) humanitarian grounds, and (b) fundamental rights protection[50]. This is worth noting because there is an overlap in subject matter between the two. The courts have consistently ruled for (a) that *general* non-compliance with fundamental rights is insufficient to lead to a refusal and a 'concrete risk' must be proven (seemingly a similar threshold to that established by the two-step test in *Aranyosi)*[51], on (b) the experts refer to a judgment on 'medical care and a suitable prison regime', for which Article 3 ECHR and Article 4 of the Charter of Fundamental Rights are relevant. Although judgments for (b) are characterised by high thresholds (only applying for a temporary period, when the matter is 'serious'[52]) they can yield different outcomes: in some cases there is a presumption of compliance with the requisite standards by the Member State issuing a European Arrest Warrant, but in others there is a 'different direction' and gaps in the law are plugged by drawing on national law (such as a national law provision covering humanitarian matters, and a rehabilitation-oriented clause). Therefore, there is an – even if it is remote – indication that fundamental rights are considered by judges in EAW cases through a uniquely created route. (As a side note, it might be noted that the reliance on national law to plug gaps in EU law is problematic from the perspective of incoherent implementation of the Framework Decision across the Member States, as is the finding that the Portuguese courts very rarely seek guidance on said 'gaps in EU law' from the Court of Justice about the Framework Decision through the Article 267 TFEU preliminary ruling procedure[53]).

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47 First Periodic Country Report: Portugal, p. 20.

48 First Periodic Country Report: Portugal, p. 1.

49 Country Research Brief: Portugal, p. 7.

50 See sections II.2.2. and II.2.3 of the First Periodic Country Report: Portugal.

51 Country Research Brief: Portugal, p. 5.

52 First Periodic Country Report: Portugal, p. 13.

53 Country Research Brief: Portugal, p. 7.

2.3. A Fundamental Rights Clause: but a (limited) ground for refusal to surrender in all cases

Most of the other Member States included in the national legal experts' research *have* legislated to include a fundamental rights clause: Belgium, Germany, Greece, Finland, Hungary, Ireland, Italy, the Netherlands, Poland, and Sweden (as well as a ninth, France, which allows refusals to surrender on the basis of judicial review and judicial precedent).

However, each of the experts' reports present different results on whether persons are actually surrendered due to how those clauses are framed and how they are interpreted. Some Member States' clauses are limited in nature and scope and are interpreted strictly / narrowly. In addition, the frequency with which, and how, they are relied upon and applied in practice also varies. There were also amendments to some of those fundamental rights clauses to be in line with the Court of Justice's case-law, which impacted decisions to surrender.

Therefore, there is a further division of the above-mentioned Member States' application of the fundamental rights aspect of the Framework Decision: the orange category – where the fundamental rights clause does not necessarily correspond to fundamental rights being employed as a ground for refusal to surrender; and the green category – where there is ample reliance on the fundamental rights clause in considering a refusal to surrender.

2.3.1. Greece, Finland, Italy, and Sweden: Leaning towards mutual trust at the expense of fundamental rights

The orange category includes Greece and Finland, which lean towards a strong application of mutual trust, as well as Italy and Sweden, which show more of an attempt at balancing mutual trust with fundamental rights concerns.

There is a national fundamental rights clause in Greek law – Article 1(2) of the transposing Statute No. 3251/2004 – incorporating the Framework Decision's general declaration to be compatible with fundamental rights, and it also states that its interpretation must be in line with fundamental rights protected under Article 6 TEU (a constitutional reference being removed further to an amendment)[54]. This was widely considered to be a ground for mandatory refusal to execute an EAW and was previously acted upon in particular concerning a risk that the death penalty will be imposed, or there is a breach of torture, inhuman or degrading treatment. Article 12(f) of the national law sets out an optional ground of refusal if the sentence was imposed *in absentia.*

However, the national legal experts' analysis notes that 'the approach of Greek judicial authorities gives rise to an appearance of "blind trust", refusing to "check" the judicial system of the issuing State for fear of exceeding their role in the context of judicial cooperation'[55]. They point out that the clause 'does not normally imply an actual judicial review' on fundamental rights

[54] Country Research Brief: Greece, p. 2; First Periodic Country Report: Greece, p. 12.

[55] First Periodic Country Report: Greece, p. 16.

breaches, nor lead to refusal to execute[56] – rather, that judicial cooperation is viewed as a form of 'quasi-administrative assistance', and that no fundamental rights review should be carried out – contrary to the Court of Justice's case-law[57]. And although Article 11(e) of the Act permits refusal to surrender on the ground of discrimination, the Greek issuing authorities apparently never rely on this ground to refuse an EAW[58]. The data for Greece state that the clause was ultimately abolished, and that in any event prosecutors did not carry out a fundamental rights review when issuing EAWs[59]. The Periodic Country Report and Research Brief for Greece state that the courts consider that Greek authorities cannot challenge the protection of fundamental rights in other EU Member States. The Country Report further notes it is an 'automated process'[60]. And while the prevailing view is that surrender can be refused where discrimination is concerned, no judicial decision could be found showing that[61].

In Finland, Section 5(1)(6) of the EU Surrender Act is a transposing clause which has been relied upon by the relevant authorities when considering whether to surrender a person subject to an EAW. In one case cited as an example, the Supreme Court considered that the person in question might face inhumane treatment as regards the prison conditions if surrendered, and that surrender ought to be refused based on that provision. It referred to the CJEU's case-law in coming to that conclusion (*Dorobantu* and *Generalstaatsanwaltschaft*). But it reversed its decision having received assurances about prison conditions in another two cases. The Periodic Country Report describes Finland as placing trust in other Member States' systems, and this is always the starting point, with far fewer examples of cases showing protection of fundamental rights as in the other Member States considered[62].

In Italy amended law no. 69/2005 included general clauses protecting fundamental rights established in international treaties (especially as arising from Articles 5 and 6 of the ECHR) as well as its own Constitution, described as privileging them over the EU principle of mutual trust[63]. This gave rise to a long list of mandatory grounds for refusal to surrender, for reasons ranging from discrimination, pre-trial detention, and freedom of the press and freedom of association[64]. However, it is included in this category because recent legislative changes by Decree 10/2021 narrowed the scope of refusing surrender on fundamental rights grounds and raised the threshold in a manner that codifies the Court of Justice's rulings in *Aranyosi* and *LM*. First, refusal is allowed when a Member State's participation in the reciprocity mechanism has been suspended by the EU Council because of a serious and persistent violation of the EU Treaty

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56 Country Research Brief: Greece, p. 6.

57 First Periodic Country Report: Greece, p. 11.

58 First Periodic Country Report: Greece, p. 12.

59 Country Research Brief: Greece, p. 5.

60 First Periodic Country Report: Greece, p. 16.

61 Two examples of refusals are, however, provided on pp. 13-14 of the First Periodic Country Report for Greece, showing refusals on the ground of fundamental rights, to show that it is 'not entirely unheard of'.

62 First Periodic Country Report: Finland, p. 14.

63 First Periodic Country Report: Ireland, p. 2.

64 First Periodic Country Report: Italy, p. 3.

(Article 1(3 ter)). Second, there is a general and mandatory ground of refusal when an EAW implies a breach of fundamental rights protected by the Italian Constitution or by the EU Charter or ECHR (Article 2)[65]. In the Periodic Country Report, the judiciary is described as being 'deferential' (i.e. 'always followed the indications coming from the Court of Justice'[66]) and 'entirely respectful' of the cases *LM* and *L and P*[67]. Recent case-law shows 'a strong will to execute the EAWs according to the principle of mutual recognition'[68]. But there is also a focus on receiving additional information on measures taken to avoid fundamental rights breaches, for example when verifying the existence of a general risk of degrading and inhuman treatment (that additional information request is justified by relying on the Italian Constitution, Article 6 TEU and the ECHR)[69]; compliance with the principles of mutual trust and recognition is sought in a way that does not renounce 'a serious attempt to preserve fundamental rights'[70].

In Sweden, point 2 in Ch. 2 Sec. 4 of the EAW Act provides that surrender may be refused if this would entail a violation of fundamental rights – with a direct reference to the ECHR, and the case-law shows that fundamental rights concerns are raised directly on the basis of, in particular, Articles 3, 5 and 6 ECHR[71]. This is qualified by the statement in the Periodic Country Report that 'the principle of mutual recognition has been given such a strong position that very little room can be given to substantive arguments on actual or potential violation of human rights in the issuing Member State' and that surrenders to Poland continue. It also shows a change in position post-*Aranyosi.* In one particular case surrender was initially refused by Swedish judicial authorities on the ground that there was a serious risk of violation of prohibition of inhuman and degrading treatment with respect to prison conditions (Article 3 ECHR)[72], and refused again in new proceedings despite additional information that was provided by the Romanian authorities that the person in question would not be subject to such treatment. The Swedish Supreme Court was asked to review whether surrender could be refused and based its reasoning directly on Article 3 ECHR and Article 4 of the Charter – but by simply reiterating the Court of Justice's two-step legal test in *Aranyosi*. This led to it focusing on the guarantee given by the Romanian authorities that the persons in question would not be subject to such treatment rather than carrying out 'a careful analysis of the detailed information provided… in order to determine whether there was a real risk of maltreatment'. The Supreme Court referred to the Court of Justice's ruling in *ML,* C-220/18 PPU*,* that in view of mutual trust, it had to rely on assurances to a high degree in the absence of any specific indications of a breach, despite the absolute nature of Article 3 ECHR. It was held that surrender could proceed.

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65 First Periodic Country Report: Italy, p. 3.

66 First Periodic Country Report: Italy, p. 17.

67 First Periodic Country Report: Italy, p. 9.

68 First Periodic Country Report: Italy, p. 12.

69 First Periodic Country Report: Italy, p. 13.

70 First Periodic Country Report: Italy, p. 17.

71 First Periodic Country Report: Sweden, pp. 2-3, and p. 17.

72 NJA 2020 s. 430, concerning the surrender of a person subject to a European Arrest Warrant issued by the Romanian judicial authorities for sentencing purposes.

2.3.2. Belgium, Germany, France, Ireland and the Netherlands: Active defenders of fundamental rights and a looser view of mutual trust

The green category includes Belgium, Germany, France, Ireland and the Netherlands, where as well as a fundamental rights clause in the national legislation, there is an active approach to ensuring fundamental rights protection.

In Belgium, Article 4(5) of the transposing EAW Act of 2003 sets out that 'serious reasons to believe' that surrender 'would infringe fundamental rights of the person concerned' give rise to a mandatory ground for refusal, and the Belgian model of EAW cooperation is described as being strongly defined by this both procedurally and substantively[73]. Indeed, there are at least three high-profile legal cases to show that fundamental rights grounds are relied upon to justify a refusal to surrender in practice.

In the earliest of the three cases, the Court of Appeal in Ghent (confirmed by the Court of Cassation) decided that the person in question's surrender ought to be refused because of a serious risk of violation of Article 3 ECHR due to 'incommunicado' detention conditions applied to persons suspected of belonging to ETA (the Basque resistance and separatist movement) which could also mean torture and very limited contact with family as well as legal and other assistance *(NJE)* – and a subsequently issued EAW was also refused by reference to the same pleas. That Belgian court considered that the presumption of Spanish compliance with human rights – an expression of mutual trust – was rebutted, and questioned the need to prove the threshold of absolute certainty that fundamental rights would be violated[74].

In the next fundamental rights refusal case (*Puig*), [75] the Court of Chamber and Court of Appeal agreed on the refusal to surrender a Catalonian politician – further to a third EAW issued in respect of him (the first EAW having been withdrawn, and the second EAW refused because it had not been based on a national arrest warrant and was, therefore, invalid). Referring to recitals 8 and 12 of the EAW FD, its Article 6(1), and Article 2(3) of the Belgian EAW Act, and referring to the ECtHR case *Claes* establishing on being judged before a competent court or otherwise breaching Article 6 ECHR, the Belgian courts considered the Spanish issuing authority was not competent to know the case and posed a risk to the fundamental right to a fair trial, including the presumption of innocence considering statements made by high-ranking officials[76]. The Court of Appeal made specific reference to *Aranyosi*.

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[73] Country Research Brief: Belgium, p. 3; First Periodic Country Report: Belgium, p. 7.

[74] Ghent Court of Appeal, Kamer van Inbeschuldigingstelling, 14 July 2016, N.J.E, KI 2016/FP. BE CR pp. 8-9. Eventually however, the person in question was surrendered upon a fourth EAW-request, Spain having amended its incommunicado regime to be aligned with EU law, ETA having disarmed and dissolved itself, and assurances having been provided from the Spanish authorities on the person's detention and procedural rights. The CR points out that this decision was made in 2019 post-Aranyosi in 2016. First Periodic Country Report: Belgium, p. 11.

[75] Brussels Court of Appeal, Kamer van Inbesschuldigingstelling, 7 January 2021. *Puig Gordi* 2021/79. First Periodic Country Report: Belgium, p. 12.

[76] First Periodic Country Report: Belgium, pp. 13-16.

And finally, further to rulings of the Court of Chamber and Court of Appeal, surrender was refused (in *Valtonyc*)[77] on a fundamental rights refusal ground, namely infringement of the freedom of expression, and in the context of the Belgian Constitutional Court ruling that criminalisation of criticism against the monarch affecting his reputation was unconstitutional[78].

In Germany too, the transposing 'Act on International Mutual Assistance in Criminal Matters' contains a fundamental rights clause that executing the EAW request is not allowed if it would infringe basic principles set out in Article 6 TEU or core principles of the German legal system[79]. This is confirmed and supported in the Periodic Country Report by two judgments of the Second Senate of the German Federal Constitutional Court (*Bundesverfassungsgericht*) of 15 December 2015 and 1 December 2020, calling for a refusal to surrender if it would violate Germany's constitutional identity, and allowing judicial review by the constitutional court on the basis of the EU Charter of Fundamental Rights[80].

France also belongs to the category of Member States where fundamental rights is a ground for refusal to surrender: there is no *legislative provision* providing that fundamental rights is a ground for refusal, but it has been acknowledged as a ground for refusal by the *case-law* of the French courts[81]. Article 695-22 of the French Criminal Procedure Code provides for two more mandatory grounds for refusal than that provided in the EAW FD – including discrimination. But it is rather case-law of the Court of Cassation that increasingly balances EU and ECHR fundamental rights law with the strict application of mutual recognition, having set the judicial precedent that surrender can be refused if there is a violation of Articles 3, 5, 6 and 8 ECHR (on the basis of Article 170 CPC allowing general legal actions against the French prosecutor's issuing of an EAW)[82].

The national legal experts for Ireland recall that the judiciary is the guardian of the Constitution and must protect fundamental rights, including by making enquiries where surrenders are concerned[83]. Section 37 of the transposing 2003 EAW Act contains a fundamental rights clause, and that surrender must be refused where no decision to charge and to try the requested person exists at the time of issuing the warrant, and there are common law reasons for refusal (the principle of reciprocity and the doctrine of abuse of process)[84]. This was shown to be relied upon in practice: several cases of refusal to surrender on the grounds of fundamental rights (including on the ground of abuse of process, under common law doctrine) were reported, and five cases where it was decided that surrender should proceed. The specific grounds upon which the refusal

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77 Judgment of the Court of Justice of 3 March 2020, *X,* C-717/18, ECLI:EU:C:2020:142.

78 First Periodic Country Report: Belgium, p. 19.

79 Country Research Brief: Germany, p. 4.

80 Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 15 December 2015, 2 BvR 2735/14, ECLI:DE:BVerfG:2015:rs20151215.2bvr273514. On this decision, see, inter alia, Brodowski (2016), Kühne (2016), Meyer (2016a). Bundesverfassungsgericht (*German Federal Constitutional Court*), Order of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18, ECLI:DE:BVerfG:2020:rs20201201.2bvr184518. See First Periodic Report: Germany, p. 2.

81 First Periodic Country Report: France, p. 3.

82 First Periodic Country Report: France, pp. 1-3.

83 First Periodic Country Report: Ireland, p. 1.

84 First Periodic Country Report: Ireland, p. 2.

to surrender-cases were based on are detention conditions and Article 3 ECHR[85], on an 'exceptional' basis Article 8 ECHR[86], and where there is no decision to 'charge and try' the person before an EAW is issued (in line with this as a ground for refusal as mentioned above)[87].

Although Ireland is included in this category, there were cases where surrender proceeded: because of receipt of additional information[88], because the two-step test had not been satisfied with respect to its second part[89], because of the high threshold to prove Article 8 ECHR violation – 'well outside the norm' (two cases on this) and for a delay that was 'truly exceptional or egregious'. The Research Brief on Ireland in fact addressed that in the separate preliminary ruling request for *LM,* the national court asked whether it would be acceptable if only the first stage of the test were to be fulfilled (and receiving an answer in the negative, followed that finding). And, in practice arguments of the defence which are frequently raised by persons subject to EAWs to challenge the surrender are described as usually unsuccessful (in the context of family rights and rule of law concerns)[90]. This is because it sets a high threshold where cases must be truly exceptional.

In the Netherlands, Article 11 of the old Dutch Surrender Act of 2004 included a general fundamental rights clause transposing Article 1(3) of the EAW FD and was used as a basis to refuse surrender where prosecution was discriminatory, or would result in a flagrant violation of fundamental rights. Several examples were given in the expert reports of where the Dutch authorities refused surrender on fundamental rights grounds, and so it is included in this category.

But the clause was reformulated in light of criticism from the Dutch legislator that fundamental rights are not a ground for refusal in the EAW FD, post-*Aranyosi* and *LM*[91]. The new Article 11 takes those cases of the CJEU into account and states that surrender ought to be refused if there are serious and factual grounds that the requested person runs a real risk that his fundamental rights as guaranteed by the Charter will be violated after surrender. The fundamental rights clause – in both its old and new versions – is described as having been invoked 280 times since 2004, but only successfully in a few instances (and even then, it was sometimes not called a ground for refusal, but rather as 'not giving effect to the EAW').

Three of the examples given concern detention conditions; and other refusals are described as consistently referencing the Court of Justice's legal tests in *Aranyosi* and *LM*. Indeed, the Dutch report suggests that the Court of Justice's two-step test in those cases supplanted reliance on the old Article 11[92]. This results in an overall picture of a strong fundamental rights position on

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85 *MJE v Kinsella* [2017] IEHC 519; *Gheorge* [2020] IEHC 618. First Periodic Country Report: Ireland, p. 11.

86 First Periodic Country Report: Ireland, p. 11.

87 First Periodic Country Report, pp. 17-18 and p. 20, pp. 22-24; MJELR v Bailey [2012] IESC 16; McPhilips and Hatherley [2020] IEHC 414; MJE v J.A.T (No. 2) [2016] IESC 17; Bednarczyk [2021] IEHC 316.

88 First Periodic Country Report: Ireland, p. 11.

89 First Periodic Country Report: Ireland, p. 14; *Celmer* [2019] IESC 80.

90 Country Research Brief: Ireland, p. 3.

91 First Periodic Country Report: the Netherlands, p. 5.

92 Country Research Brief: Netherlands, pp. 5-7.

refusals to surrender (under the old Article) in the Netherlands being tamed and pulled back by the stricter standards set by the Court of Justice (the test in *Aranyosi*, after which there were fewer refusals).

2.4. Hungary and Poland: Special cases where mutual trust is 'undermined' due to rule of law backsliding

For the reasons mentioned earlier in this Comparative Report, Hungary and Poland fall into the yellow category of 'special cases' due to rule of law backsliding in their countries. But they would otherwise fall into the orange category.

In the case of Hungary this is because Hungary has a 2012 Act on cooperation in criminal matters that was described as including a mandatory ground for refusal if the execution of the EAW would cause a serious violation of the suspect's or the convict's fundamental rights as they are enshrined in an international treaty or in legal acts of the European Union. However, only one instance of refusal to surrender is detailed – as regards the *ne bis in idem* principle (fair trial rights). And concerning another, it was held by the Court of Justice that Hungary *incorrectly* refused surrender – not on fundamental grounds, but because the optional grounds for execution were misconstrued[93].

But Hungary is in the yellow category, and for the purposes of this Comparative Report this is also based on the national legal experts' examples that serve as evidence of the *undermining* of mutual trust. First, the European Court of Human Rights (ECtHR) declared an imprisonment for life-regime without parole or review (and later specifically with regard to Hungary) to be in breach of Article 3 ECHR. But Hungary failed to declare its own such rules to be unconstitutional. Second, the ECtHR's ruling in *Varga and Others v. Hungary* found that Member State's prison conditions to be in violation of Article 3 ECHR, which led a German court to doubt whether it could / how it should continue to surrender persons who would face those detention conditions. This was dealt with by the Court of Justice's case in *Aranyosi*, but it is the Court's judgment in *ML* that the expert points out as problematic. This is because 'Hungary seemingly complied with the requirements' of the ECtHR 'but in reality, it did not' and prisoners remained under 'horrible conditions'. It created a smoke-screen in the form of a fast-track compensation system to 'pre-empt' further condemnation, and then made that compensation system ineffective. The Court of Justice however took that compensation system into account in its judgment in *LM,* finding that in practice surrender requests could continue to be complied with in this regard[94].

Turning to why Poland could technically fall into the orange category, this is because there is also a fundamental rights clause included in Article 607p 1(5) of the Criminal Code of Procedure which expressly states that an EAW shall not be executed (as a mandatory ground of refusal) if it would violate the human rights of the requested person. This clause was acted upon, but only a few

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93 First Periodic Country Report: Hungary, p. 17.

94 First Periodic Country Report: Hungary, pp. 3-5, and pp. 9-10. For more on the *ML* judgment generally, see also State of the Art Report, pp. 15-16.

examples were given, and only in specific parental abduction cases of Poland refusing surrender on the basis of risks of violation of the right to private and family life[95].

But for similar reasons to that of Hungary, it has been included in the yellow category.

2.5. The Court of Justice's judicial tests for fundamental rights breaches as a limit to the principles of mutual trust and recognition: 'Herculean hurdles'

The reasons for refusals to surrender persons on fundamental rights grounds in some Member States could be distinguished as being specific to legal traditions there. For example, the approach to the mutual recognition system in Ireland is coloured by virtue of its common law system, which has a unique 'abuse of process'-reason for refusal – even though Irish courts accept it is not a formal ground for refusal). In Germany, a constitutional angle is more visible with constitutional-incompatibility as a ground for refusal. In Belgium the cases selected for analysis are described as being of a 'strong political nature'[96] and it could be argued that political incentives have re-entered the very system that aims to eliminate that element in motivating refusals to transfer persons for criminal justice purposes (see the high-profile cases *Puig, Valtonyc, and NJE* – on the grounds of judicial competence and inhuman and degrading treatment and torture).

But it can also be construed from the experts' research that the reasons for *not* refusing to surrender persons on fundamental rights grounds appear to be influenced by the requirement to fulfil the two-step test set out by the CJEU in *Aranyosi* (see Section 1.3.2.).

Most of the experts' research reflects the Court of Justice's rulings as being respected, referred to, cited, or applied (or 'deferential to'). For example, Belgian authorities refused to surrender the person in question in *NJE,* but later applied the *Aranyosi* test, finding it to be unfulfilled. In France, the Court of Cassation quoted *LM.* Adherence to the Court of Justice's case-law is especially the case for Ireland, which is important because it is also one of the most 'active' Member States in this Comparative Report in terms of raising fundamental rights concerns under the EAW system. But in fact, it is described as almost always following the Court rulings to the letter. In Italy, the judiciary is explicitly described as being 'deferential' (i.e. it 'always followed the indications coming from the Court of Justice'[97]) and 'entirely respectful' of the cases *LM* and *L and P*[98], and recent case-law shows 'a strong will to execute the EAWs according to the principle of mutual recognition'[99], plus a focus on receiving additional information on measures taken by

95 Country Research Brief: Poland, p. 9.

96 First Periodic Country Report: Belgium, p. 2.

97 First Periodic Country Report: Italy, p. 17.

98 First Periodic Country Report: Italy, p. 9.

99 First Periodic Country Report: Italy, p. 12.

the issuing State to avoid fundamental rights breaches[100]. Though it also shows there is a search for a way to do so 'without renouncing a serious attempt to preserve fundamental rights'[101].

Portugal, Spain, Germany, Greece and Luxembourg are also described as cooperation friendly. In the latter, the Court of Appeal said refusals could not take place on fundamental rights grounds on claims in six detention cases referring to Article 1(3) of the EAW FD and the *Aranyosi* test, and the experts' research could not find any example of that test being applied.

Along with this picture of adherence to the Court of Justice's rulings, it must be pointed out that the test has been described as too difficult to overcome.

In that respect the national legal expert for Hungary describes the *Aranyosi/LM* test as having several weaknesses: first, it places too high a burden on the individual to prove how they would be personally affected by systemic problems[102], and second it is an *ex post* technique which cannot prevent fundamental rights abuse or foster mutual trust. The *LM* and *L and P* tests referred to in the Court of Justice's rulings in *Orlowski* and *Celmer* led the Irish courts to decide against a refusal to surrender: they noted there was difficulty in fulfilling the second stage of the *Aranyosi* test – it is seen as impossible for the requested person, who bears the burden of proof, to produce the evidence that they will be specifically put at risk[103]. In the Netherlands, as mentioned in Section 2.3.2 above, the national fundamental rights clause was reformulated in light of criticism from the Dutch legislator that fundamental rights are not a ground for refusal in the Framework Decision post-*Aranyosi* and *LM*[104]. The new Article 11 takes those cases into account: and the clause (as well as its old version) only invokes the fundamental rights ground successfully in a few instances (framed rather as 'not giving effect to the EAW').

A Member State willing to refuse surrender on fundamental grounds often has that situation 'remedied' by having recourse to relevant preliminary rulings before the Court of Justice that call for a strict understanding of trust and focus on information exchange between the authorities rather than refusals to surrender.

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100 First Periodic Country Report: Italy, p. 13.

101 First Periodic Country Report: Italy, p. 17.

102 First Periodic Country Report, Hungary, p. 20.

103 First Periodic Country Report: Ireland, p. 28.

104 First Periodic Country Report: the Netherlands, p. 5.

3. Hierarchy of Fundamental Rights?

A comparative analysis of the Periodic Country Reports and Research Briefs reveals a further fragmentation: based on the available data, some fundamental rights are prioritised above others, revealing a 'hierarchy' of protection.

3.1. Generally greater focus on the right to a fair trial and detention conditions

Certain fundamental rights such as detention conditions (as protected by Article 4 of the Charter), and those that are also procedural criminal law provisions tend to be paid more attention: namely those that make up the right to a fair trial, especially with respect to *in absentia* cases.

In the German reports for example, the will to prevent *in absentia* trials, and to protect the rights to silence, access to the case file, and an effective legal remedy were singled out[105]. The Greek reports only really mentioned *in absentia* rights as being protected successfully, the prosecutor being obliged to mention whether the trial took place *in absentia* when issuing an EAW, and whether the decision was served properly[106]. In Luxembourg a refusal to surrender is reported among the selection of cases analysed only in an *in absentia* case[107]. And in Spain, *in absentia*, *non bis in idem* rights and double criminality, and prescription were highlighted as important[108]. The selected cases in Sweden were all on the right to a fair trial[109].

The 322 judgments taken into account in both the Periodic Country Report and Research Brief for Portugal showed greater focus on EAW issues such as *in absentia* rights, dual criminality, procedural rights, and life sentences: there was no mention at all of the rule of law, and the right to family life.

3.2. National reports where other fundamental rights were at least mentioned

Fundamental rights such as the right to respect for private and family life, to non-discrimination, and rights of vulnerable categories such as children and disabled persons (as protected by the EU Charter and ECHR) were not discussed in general, or there was a lower priority in protecting them. Coincidentally such rights do not have an absolute nature, compared to Article 3 of the ECHR for example (that absolute nature being recognised also for the corresponding Article 4 of the Charter by the Court of Justice). It is also arguable that Article 6 of the ECHR on the right to a fair trial is absolute as a whole, even though it is not described as such under Article 15 ECHR, because it overlaps with the common Article 3 of Geneva Conventions which describes trial rights as not being possible to derogate from. This is also supported by the interdependence of the right

[105] Country Research Brief: Germany.

[106] Country Research Brief: Greece. First Periodic Report: Greece.

[107] Country Research Brief: Luxembourg. First Periodic Report: Luxembourg.

[108] Country Research Brief: Spain. First Periodic Report: Spain.

[109] First Periodic Country Report: Sweden.

to a fair trial with other absolute rights, which may otherwise not be protected according to their absolute nature[110].

The national legal research also, however, shows that there is one group of Member States where a broader range of fundamental rights was at least mentioned in the jurisprudence analysed: Ireland, France, Greece and the Netherlands. Apart from Greece, this group overlaps with the green category referred to above: where the Member State has a fundamental rights clause and refusals have actually been seriously considered or actually taken place on fundamental rights grounds.

For example, in Ireland, there was a focus on poor detention conditions and 'case-readiness'[111], with fair trials raised 'to a lesser extent' – though it stood out from other reports for detailing cases on the right to family life and Article 8 ECHR (and the abuse of process doctrine). Those family rights claims were described as almost automatically dismissed unless there was a truly exceptional case, though this aspect is taken into account as a cumulative element in abuse of process claims. It was also pointed out that there was no possibility of protection of the right to private and family life when persons are surrendered and held in pre-trial detention for lengthy periods before their trial commences[112].

In France, the Court of Cassation had considered cases on whether the investigating judge assessed whether the person's right to family life was disproportionately affected (Article 8 ECHR). It found a refusal to surrender by the investigating chamber to be justified where, for example, the person in question has French family members and has worked in France for a certain number of years[113]; as well in a case on the rights of the defence (Articles 5 and 6 ECHR, Article 47 of the Charter). In both examples given however, refusal to surrender was unjustified. It was also unjustified in a case concerning ill-treatment and conditions of detention (Article 3 ECHR and Article 4 of the EU Charter) – finding that more information should have been requested – and with an example drawing on the information that should be requested as set out in *Aranyosi*. It should be noted that in 2021, the European Court of Human Rights held that France was in violation of Article 3 ECHR on the grounds that its protection of fundamental rights was manifestly deficient by the failure to act on sufficient evidence establishing a real risk of inhuman and degrading treatment of the person in question[114].

In the Netherlands, on the other hand, the rights to a fair trial, to be informed, access to a lawyer, to silence, to access the case file, to interpretation, and prison conditions were mentioned expressly[115]. Fundamental rights defences were described as related to detention facilities, fair trial

[110] See the interventions of Fair Trials International in the cases ECtHR interventions in the cases of Ibrahim and Beuze.

[111] Country Research Brief: Ireland. First Periodic Country Report: Ireland.

[112] Country Research Brief: Ireland, p. 3.

[113] First Periodic Country Report: France, p. 15.

[114] First Periodic Country Report: France, p. 18.

[115] First Periodic Country Report: the Netherlands, p. 2.

rights, the rule of law, or an impartial and independent court. Although that list also includes the right to family life[116], such defences were described as 'fruitless'[117].

In the case of Greece, the right to non-discrimination, human dignity, and violation of private and family life were mentioned as being taken into account to varying degrees by Greek authorities – but there was little evidence of refusals on such grounds[118].

3.3. Only two Member States raising rule of law issues

Less attention was paid to potential rule of law breaches across the board. This is despite the fact that there is significant rule of law backsliding (see Section 1 above, and the STREAM State of the Art report on how an EU values decline directly affects the Framework Decision as a mutual recognition instrument)[119].

This is with the notable and prominent two exceptions of Ireland and the Netherlands, which, on the contrary, both stand out as taking a rather active stance to safeguard against the erosion of the rule of law. The Irish Periodic Country Report and Research Brief discuss the case of *LM* (*or Celmer*) which reached the Court of Justice, whereby the courts had doubts about surrendering a person subject to an EAW due to rule of law backsliding in Poland, which impacted judicial independence and the right to a fair trial. In turn, in the Netherlands, all EAWs for prosecution purposes were suspended pending the outcome of that case, pending confirmation of whether this prejudiced the right to a fair trial[120]. Moreover, the Dutch courts requested another preliminary ruling, showing the importance it attached to the legal issue and to obtain clarification of the Court's judgment in *LM* – which added two sub-steps to the *Aranyosi* legal test, by the *L and P* judgment. It is the only Member State that has refused surrender on fundamental grounds that has applied the recent Court of Justice's case-law precedent[121].

3.4. Very little attention to the right to health

There was little mention of particularly vulnerable persons who are seriously ill and whose health and life expectancy may be endangered by surrender, which has recently been addressed in the Court of Justice's ruling in *E.D.L*[122] in the light of Article 1(3) of the Framework Decision and Article 4 of the Charter. The national legal research for the Netherlands, Italy[123] and Portugal[124] showed it as being couched in terms of being a 'humanitarian' issue (though for the latter, it was not an

[116] First Periodic Country Report: the Netherlands, p. 5.

[117] First Periodic Country Report: the Netherlands, p. 10.

[118] Country Research Brief: Greece, pp. 5-6.

[119] Especially pp. 31 to 48.

[120] First Periodic Report: the Netherlands, p. 8.

[121] First Periodic Report: the Netherlands, p. 10.

[122] Judgment of the Court of Justice of 18 April 2023, *E.D.L,* C-699/21, ECLI:EU:C:2023:295.

[123] First Periodic Country Report: Italy, p. 14.

[124] First Periodic Country Report: Portugal, p. 14.

autonomous ground for refusal to surrender despite nuances in the Portuguese practice which draw on humanitarian law to fill gaps in the law, as mentioned above).

In the case of the former, mention of reliance on a humanitarian clause arose in relation to the Covid-19 pandemic, however. That was a trend also seen in Spain and Sweden, where health as a concern in EAW proceedings was only mentioned in the context of the Covid-19 pandemic[125].

The opposite position emerged from the national research on Greek and Luxembourg. In the Greek Periodic Country Report, it was discarded as a ground for refusal to surrender. Although a judgment was referred to where factually the person in question had health issues (p. 11), from a legal perspective the Supreme Court noted in another judgment that health conditions (and family circumstances) would never in themselves be a ground for refusal to surrender. Taking a similar approach, in the Luxembourg Periodic Country Report, it was said that 'even if the current detention conditions in the issuing Member State were, from the point of view of health care, more unfavourable than those existing in Luxembourg, this element was not, in itself, sufficient to justify the refusal of the appellant's surrender'[126].

[125] First Periodic Country Report, Spain, pp. 16-18. First Periodic Report: Sweden, p. 7.

[126] First Periodic Country Report: Luxembourg, p. 19.

4. Proportionality

There is a clear reluctance in *all* Member States to conduct a proportionality assessment of the EAWs they receive. Proportionality is described as not being dealt with by the Spanish courts or covered specifically in Spanish law as a requirement, even for the issuance of an EAW, but it is mentioned in the preamble of the Spanish mutual recognition Act[127]. In the Belgian and Hungarian reports, proportionality is not discussed. But there is generally a spectrum in approach: with Greece and Luxembourg clearly at one end, and the Netherlands on the other.

4.1. Greece, Luxembourg, and Italy: no proportionality assessment

On one end of the spectrum, proportionality assessments are not carried out even when issuing EAWs in Greece. The national legal research observes that it is rare that proportionality assessments are carried out in EAW cases despite the principle of proportionality being constitutionally protected and a general principle – it 'does not appear to be a major concern' and such questions are 'seldom discussed'[128]. For EAWs issued for prosecution purposes, a reason given for the perceived lack of need for a proportionality assessment is because EAWs issued for prosecution purposes apply 'only to felonies and are issued only against persons against whom criminal proceedings have already been brought'. But there appears to be a lack of proportionality assessment also for EAWs issued for sentencing purposes, and which can be issued for 4-month sentences[129]. The judicial authorities also seem reluctant to refuse the execution of EAWs based on the principle of proportionality[130].

There were no relevant cases found on how Luxembourg's issuing authorities conduct a proportionality analysis before issuing an EAW[131]. Generally though, the investigating judge is obliged to assess whether the conditions necessary for issuing an EAW for prosecution purposes have been fulfilled. This in turn obliges the judge to assess its proportionality in the specific circumstances, taking into account the seriousness of the offence and mitigating factors, though no evidence of a challenge to the proportionality of the decision had been observed in Luxembourg[132]. As an executing authority, Luxembourg acted in the opposite way to Germany where the person in question had been arrested in Germany pursuant to the same EAW, and the German executing authority had reviewed and found the sentence disproportionate and refused to surrender the person[133]. Luxembourg instead actively refused to carry out the proportionality test of the EAW, considering this was not a ground for refusal.

In Italy, there is a Vademecum adopted by the Ministry of Justice for judicial authorities to take into account the proportionality principle, which is a 'possibility' but not a duty. It offers

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127 Country Research Brief: Spain, p. 3.

128 First Periodic Country Report: Greece, p. 5 and p. 9.

129 Country Research Brief: Greece, pp. 2-3.

130 First Periodic Country Report: Greece, p. 16.

131 First Periodic Country Report: Luxembourg, p. 11.

132 Country Research Brief: Luxembourg, p. 5.

133 First Periodic Country Report: Luxembourg, p. 14.

guidelines in particular on the disproportionality of issuing a European Arrest Warrant where the penalty against them does not include deprivation of liberty (for example, house arrest). But there is also a judgment of the Cassation Court rejecting the non-issuing of a European Arrest Warrant for that reason, stating that the issuing authority's role in that regard was limited and that there should be a focus on 'judicial cooperation within the EU'[134].

The Finnish Periodic Country Report noted that there were no cases on the proportionality of EAW decisions in Finnish legal practice[135], and that the Supreme Court 'viewed that the principle of proportionality could not be considered as grounds for refusal of surrender' as that would be 'likely to violate the FD's objective of mutual recognition and its consistent interpretation', in a case where a District Court viewed the surrender as a whole to be against the principle of proportionality[136].

Coincidentally, these Member States also fall into the red and orange categories of Member States leaning either quite strongly or mostly in the direction of adherence to mutual trust which correlates to a lower level of fundamental rights review compared to other Member States.

4.2. Sweden and Poland: Proportionality assessment only at the issuing stage

In Sweden, the public prosecutor is required by law to determine whether the requirement of proportionality is met for EAWs *issued* for prosecution and sentencing purposes, though it is remarked that there is little guidance for the public prosecutor on how to assess it[137]. But there is no specific statutory requirement to assess proportionality as an executing authority, and there is no report of cases in which a domestic order for remand into custody is refused on the ground that the issue of a European Arrest Warrant is disproportionate[138].

In Poland, Article 607b of the CPP includes a principle of proportionality that significantly limits the *issuing* of an EAW if the 'interest of justice' does not require it in certain cases[139]. Where acting as an executing authority, defence counsels often raise pleas of violation of Article 607p § 1 point 5 of the CCP: but the courts usually consider them unfounded, and therefore do not refuse surrender. The threshold of proving an infringement is stated to be very high, bordering on certainty.

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134 First Periodic Country Report: Ireland, pp. 5-6.

135 First Periodic Country Report: Finland, p. 8.

136 First Periodic Country Report: Finland, p. 10.

137 First Periodic Country Report: Sweden.

138 First Periodic Country Report: Sweden, p. 10.

139 Country Research Brief: Poland, pp. 4-5.

4.3. Germany, Ireland, France and Portugal: Some degree of proportionality assessment at the issuing and executing stages

In Germany proportionality as an issuing authority was considered when reviewing a suspect's rights during questioning and detention, for example, but it was highlighted that it is restricted to the national arrest warrant upon which the EAW is based[140]. From the perspective of an executing authority, it was reported that there are far fewer decisions addressing – and basing the non-execution of EAWs – on matters of proportionality[141].

A proportionality assessment of the EAW is considered to be beyond the competence of the national authorities in Ireland – there is no duty conferred by s33 of the Irish transposing law to assess proportionality above and beyond what is required when deciding on prosecution[142]. But as regards the issuing of an EAW, the public prosecutor does assess proportionality as a matter of course to assess if a prosecution is warranted, and the High Court does conduct a proportionality test, taking into account the seriousness of the offence, whether the penalty is custodial, the cross-border element, the public interest, and the interests of the victim[143]. Oddly, it was noted that the courts 'appear not to consider the possibility of using less coercive measures in their consideration of proportionality'[144].

As an executing authority, in a 'leading decision', the Irish High court refused surrender on the ground of disproportionate interference with the person in question's fundamental rights for the offence of possession of a small amount of marijuana when five years had passed since the act occurred. The Supreme Court however overturned the decision stating that it was not for the High Court to exercise a proportionality test either as to whether the EAW should have been issued, or with respect to the potential sentence[145].

In France, the Court of Cassation recalled that the investigating judge issuing an EAW must examine necessity and proportionality when considering a given case[146]. Although described as an argument not thoroughly analysed by the Court of Cassation, this is noted as changing after 2019[147]. However, there is no explicit definition and no reference to guidance from the EU Courts on proportionality[148]. As an executing authority, consideration of proportionality by the Court of Cassation was rare between 2005 and 2012, thought it did occur occasionally, and more frequently after 2015, for example in the case of an EAW issued for a minor offence. Persons subject to an EAW in this context are described as submitting arguments invoking a violation of

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140 Country Research Brief: Germany, pp. 2-3.

141 Country Research Brief: Germany, p. 5.

142 Country Research Brief: Ireland, pp. 2-3. First Periodic Country Report: Ireland.

143 Country Research Brief: Ireland, pp. 2-3

144 First Periodic Country Report: Ireland, p. 6.

145 First Periodic Country Report: Ireland, pp. 9-10. *Ostrowski* [2013] IESC 24

146 First Periodic Country Report, France, p. 4.

147 First Periodic Country Report, France, p. 9.

148 First Periodic Country Report, France, p. 9.

the European Convention of Human Rights (and to a lesser extent, the EU Charter). In a 2021 case the Court of Cassation conducted a more in-depth analysis of the proportionality argument, making reference to the Court of Justice's case-law, and using a number of legal provisions as the basis for its reasoning on the proportionality of penalties that are overly severe[149].

As issuing authorities, Portuguese courts utilised proportionality as a 'determining principle' but only 'in some instances'[150]. As executing authorities, the judgments were described as 'quite diverse', the criterion to assess the proportionality of a sentence was 'vague', and the burden for proportionality assessments was considered to lie on the issuing judicial authority[151].

4.4. The Netherlands: Proportionality considered at both the issuing and executing stages

An approach that stands out as being on the far end of the spectrum is that noted by the national legal experts for the Netherlands. Although it is not required strictly by the Framework Decision, the Netherlands considers proportionality at both issuing and executing stages. The investigative judge must ensure the 'observance of the conditions necessary for the issuing of the European Arrest Warrant' and 'examine whether, in the light of the particular circumstances of each case, it is proportionate to issue that warrant'[152]. With regard to EAWs issued by other EU Member States, while the Amsterdam District Court assumes that the Framework Decision is based on the principle of 'system proportionality', under specific circumstances the surrender of a requested person could be considered and found disproportionate for the person concerned – in 'extraordinary circumstances'. In coming to its decision, the seriousness of the offence, and/or the damages caused by the offence are taken into account[153].

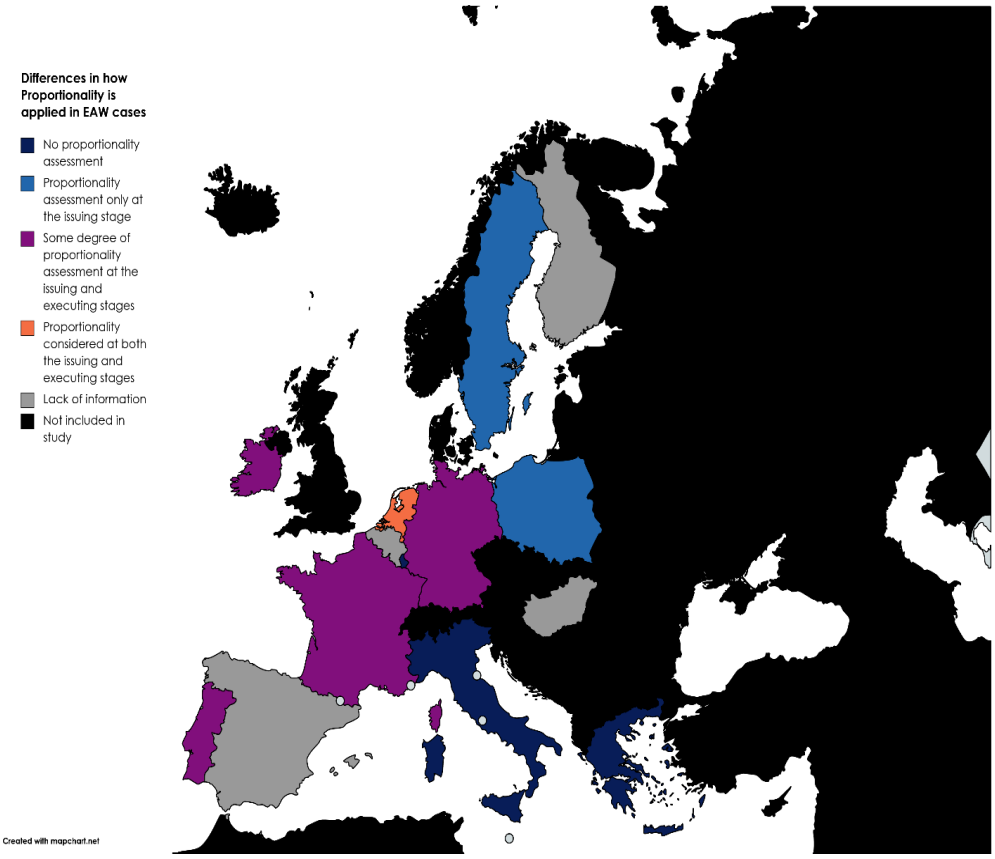
[149] First Periodic Country Report, France, pp. 13-15.

[150] First Periodic Country Report, Portugal, p. 4.

[151] Country Research Brief: Portugal, pp. 4-5.

[152] Country Research Brief: Netherlands, p. 2; First Periodic Report: the Netherlands, p. 4.

[153] First Periodic Country Report: the Netherlands, p. 11.


Differences in how Proportionality is applied in EAW cases
No proportionality assessment
Proportionality assessment only at the issuing stage
Some degree of proportionality assessment at the issuing and executing stages
Proportionality considered at both the issuing and executing stages
Lack of information
Not included in study
Created with mapchart.net

5. Independence of the Issuing Judicial Authority

5.1. EU Courts' standards: who can be an 'issuing judicial authority'?

As Petra Bard recalls, judicial independence 'is the *sine qua non* of separation of powers. Lacking the power of the purse or the sword, it is their independence that ensures their legitimacy and authority'. This is important from the individual's perspective on the right to a judicial remedy and fair trial, but also from the perspective of a European Community of judges ensuring that EU and national authorities uphold the rule of law[154].

The seminal *Portuguese Judges* ruling of the Court of Justice[155] confirmed that national judges uphold effective judicial protection in the areas covered by EU law, which is significant in ensuring compliance with that EU law. A guarantee of independence of those judges is inherent in the task of their very function, and essential for the proper functioning also of the preliminary ruling procedure[156]. The Court of Justice also held that the independence of judges of the EU from the legislative and executive powers, in line with the principle of the separation of powers characterising the rule of law, must be guaranteed[157].

More specifically where criminal proceedings are concerned, the independence of the issuing judicial authority is key in ensuring there is no undue influence of the executive branch, safeguarding the right to a fair trial, as well as effective judicial protection, the rule of law, and EU law generally. This has been a crucial issue that has reached the Court of Justice through several preliminary rulings, given that (as mentioned above), the Framework Decision by design enables Member States to preserve their legal frameworks rather than requiring full harmonisation. The divergences in national criminal justice systems have however led to doubts as to what can only be termed as a lack of trust or 'mistrust' between Member States, in view of the fact that legal proceedings have been commenced by some Member States questioning the independence of an issuing judicial authority in another Member State, and whether they are entitled and can validly issue an EAW.

The main divergence is that in some legal systems, only a judicial authority (in the strict sense of the term) may issue an EAW, meaning that review of it by a court is likely to be possible in line with effective judicial protection. In others, however, a public prosecutor or public prosecutor's office also has the power to issue an EAW – while it is also subject to orders or instructions from an executive branch of the government – and such decisions may not be open to review by a court.

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154 Bard, P., 'In Courts We Trust', 25 April 2022, p. 10.

155 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* C-64/16, paragraphs 31, 32 and 33.

156 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas,* C-64/16, paragraphs 41 et seq.

157 *Poltorak*, C-452/16, paragraph 35.

The Court of Justice has ruled that an 'issuing judicial authority' cannot be a public prosecutor's office if they are exposed to the risk of being directly or indirectly subject to directions or instructions in a specific case from the executive in connection with the issuing of an EAW. But it did not rule out that otherwise a public prosecutor's office can issue EAWs, if 'participating in the administration of justice'. However, its decision to issue such an arrest warrant and, *inter alia*, the proportionality of such a decision must be capable of being the subject, in the Member State, of court proceedings that meet in full the requirements inherent in effective judicial protection[158].

5.2. National reports: Independence of the issuing judicial authority

Among the Member States covered by this Comparative Report, only Spain[159] and the Netherlands grant the competence to issue EAWs exclusively to a judicial authority rather than a public prosecutor[160], securing against any risk of questionable independence at least in the sense referred to above. In other Member States, a combination of judges and (public prosecutor's offices) have the power to issue EAWs.

One group of Member States with such 'hybrid' system reported that there was no problem with independence in those legal systems: Finland[161], Ireland[162], Italy[163], Poland, [164] Portugal[165] and Sweden[166]. Another group – Belgium, France, and Greece – deserve comment based on the information provided by the experts' reports.

Doubts were raised before the Court of Justice by another Member State – the Netherlands – about the independence of the issuing judicial authority in Belgium[167]. There, the investigating judge generally issues EAWs for prosecution and sentencing purposes. But the public prosecutor may also do so with regard to minors, sentences already decided by a judge, or for EAWs based on arrest warrants issued by courts in the trial phase. The Court of Justice confirmed they were

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158 *OG and PI.*

159 First Periodic Country Report: Spain, p. 3.

160 Country Research Brief: Spain, p. 2; Country Research Brief: Netherlands, p. 2.

161 The independence of authorities requesting the surrender had not been questioned. Periodic Country Report: Finland, p. 14.

162 Safeguards are said to be in place to limit undue influence from the executive through a three-layer tier of decision-makers, each subject to scrutiny. First Periodic Report: Ireland, p. 3. IR RB p. 2.

163 In Italy, The authority issuing an EAW is either a judge, or a prosecutor (when the EAW concerns a sentence or different measure based on a final sentence, and 'has never been questioned in terms of independence or impartiality'. The Italian Constitution protects the role of the prosecutor as fully independent from any interference of other powers. First Periodic Country Report: Italy, p. 5.

164 Country Research Brief: Poland, p. 3.

165 The competence to issue an EAW is the authority that can order detention: both prosecutors and judges. Prosecutors, although they are hierarchically subordinate to the executive, do not receive orders or instructions from the executive, and enjoy the status of magistrates: their independence not often being questioned. First Periodic Report: Portugal, p. 4. Country Research Brief: Portugal, p. 1.

166 In Sweden the public prosecutor and a national unit within the prosecution authority issue EAWs for prosecution and sentencing purposes: but a potential problem is flagged as it is noted that this can be requested from the public prosecutor by three administrative authorities whose decisions are not subject to judicial review. First Periodic Country Report: Sweden, p. 6.

167 *ZB* Case C-627/19 PPU.

valid issuing authorities of EAWs for **sentencing purposes** *despite there being no separate legal remedy against such public prosecutor decisions*. The procedure for EAWs issued **for prosecution purposes** in Belgium also involves the public prosecutor – once an investigating judge has concluded an investigation, the case is sent back to the public prosecutor which can seek dismissal, more investigations, or refer it to the Court in Chambers for a decision on opening a trial, which also includes a member of the public prosecutor's office. The expert reports reveal there is controversy in this process on whether there is a decision to try and charge behind the orders – and which have led to at least two opposite outcomes on refusal which hinged on the information provided by the Belgian authorities upon request[168].

Similarly, doubts were raised before the Court of Justice on the issuing judicial authority in France[169]. There the status of public prosecutors was described as being a 'longstanding and controversial issue in the issuance of EAWs'[170]. Ultimately though, as there must first be a prior court decision before the public prosecution office of the investigating court can issue an EAW, independence was not an issue: the Court of Justice's *OG and PI* ruling had been taken into account, and it was held that the French prosecutor was sufficiently independent to be considered as a judicial issuing authority, and not at risk of being instructed by the executive in a specific case[171].

5.3. Legislative reform

In France, Greece, and the Netherlands, legislative reform has been carried out to improve independence (and may potentially be the case in Luxembourg too).

In France, a 2013 legislative reform enshrined a general prohibition for the Minister of Justice to issue instructions in specific cases[172].

In Greece the Public Prosecutor at the Court of Appeals of the locally competent court is hierarchically structured and receives orders from senior prosecutors, it was described as independent because prosecutors are constitutionally considered to have the same status and guarantee of independence as judges[173]. Legislative reform through a new Code of Criminal Procedure also abolishes a provision permitting the Minister of Justice from ordering a preliminary examination from a prosecutor[174].

In the Netherlands, competence to issue EAWs was changed from the public prosecutor to a judicial authority (the investigating judge) in 2019 by an amendment to the Dutch Surrender Act

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168 First Periodic Country Report: Belgium, pp. 3-6; Country Research Brief: Belgium, p. 2.

169 *Parquet Générale.*

170 First Periodic Country Report, France, p. 4.

171 First Periodic Country Report, France, pp. 4-5.

172 First Periodic Country Report, France, p. 6.

173 Country Research Brief: Greece, p. 2.

174 First Periodic Report: Greece, p. 4.

to be in line with *OG and PI*[175]. This was seen as an issue because the Minister of Justice could issue general and specific instructions in a specific case. Now the Dutch prosecutor has to ask the investigative judge to issue an EAW[176].

A similar constitutional amendment, was stated to be in the pipeline in Luxembourg to strengthen safeguards there too. There, the investigating judge in the pre-trial Chamber of the District Court of the relevant judicial district issues EAWs for prosecution purposes, and the Chief Public Prosecutor issues EAWs for sentencing or detention purposes. No cases are reported where their qualification or independence is challenged, although the CPP is not part of the judiciary and is under the authority of the Minister of Justice[177], but the latter 'does not appear to extend to an ability to order the execution of custodial sentence or detention orders'[178]. The amending legislative proposal was reported at the time of the report to be underway to formally enshrine the public prosecutor's independence in that respect, 'without prejudice to the government's power to issue criminal policy guidelines'[179].

In Germany, following the Court of Justice's *OG and PI* ruling, Local Courts (*Amtsgerichte*) and other courts of first instance are now generally considered to be competent to issue EAWs based on a generic legal basis in the German Code of Criminal Procedure and the German Act on International Mutual Assistance in Criminal Matters, even without explicit legislative reform[180].

5.4. Reviewing the independence of other Member States' issuing judicial authorities

Countries that are stringent with respect to the independence of the issuing authority in their own country can be seen on a comparative analysis as applying the same standards to other Member States: Irish[181] and Dutch[182] executors have been particularly proactive in assessing the independence of an issuing authority of another Member State – the Netherlands vis-à-vis Belgium, but both especially with regard to Poland. On the other hand, with regard to Portugal, where independence of the issuing judicial authority (as it includes the public prosecutor's office) is not an issue (given it is an independent body not subject to influence from the executive or a political body), it was pointed out that as executing authorities, 'the independence of the authority issuing the European Arrest Warrant was seldom questioned'[183].

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175 Country Research Brief: Netherlands, pp. 1 to 2; First Periodic Country Report: the Netherlands, p. 3.

176 First Periodic Country Report: the Netherlands, p. 4.

177 First Periodic Country Report: Luxembourg, p. 3.

178 First Periodic Country Report: Luxembourg, p. 8.

179 First Periodic Country Report: Luxembourg, p. 9.

180 First Periodic Country Report: Greece, p. 5.

181 Country Research Brief: Ireland, pp. 2-5, First Periodic Country Report: Ireland, p. 9.

182 First Periodic Country Report: the Netherlands, pp. 8-9.

183 Research Brief: Portugal, p. 5.

In Ireland, there have been 'several cases where the qualification of the issuing authority has been challenged'. In one case, the Supreme Court stated that the surrender could have been refused if there were cogent grounds that the issuing authority was not a judicial authority (although not established in that case); and another two linked cases concerning the German and Lithuanian issuing authorities' independence, although they ended in opposite outcomes[184].

For France on the other hand, there was a less probing approach: the French Court of Cassation ruled that the General Prosecutor of Croatia had a sufficient degree of independence to qualify as a judicial issuing authority in a case in 2019, and reference was made to the Court of Justice's rulings to determine the same for a judge in Germany, coming to the same conclusion. Deficiencies raised in another case on judicial independence in Poland were also not considered to affect the right to a fair trial[185].

The Greek authorities are reluctant to question the independence of executing authorities. Although the independence of a Danish issuing judicial authority was questioned by the Appeals Chamber of Athens in 2005, and the EAW refused, the Supreme Court overturned the decision on the basis that it must be the issuing State itself that determines such independence – and ever since then case-law for the last 15 years has consistently emphasised that the issuing State has a broad margin of discretion in determining the actor that can be an issuing judicial authority and the degree of independence it must have[186]. The Greek courts have thus interpreted the concept of judicial authority in a broad way, and never questioned the independence of the prosecutors as issuing authorities in other Member States – even after the European Commission's Article 7 TEU infringement procedure against Poland on the flawed independence of its judiciary and systemic threat to the rule of law[187].

5.5. Effective judicial protection

The Treaty of Lisbon's elevation of the Charter of Fundamental Rights as a legally binding instrument increased the significance of 'the right to an effective remedy before a tribunal [an independent and impartial one established by law]' for breaches of EU law rights and freedoms (Article 47(1) of the Charter), which is applicable to Member States when implementing EU law (Article 51(1) of the Charter). It is both a fundamental right and a general principle of EU law, and is important because it preserves all other rights by enabling the ability to challenge and remedy potential breaches of such rights. The review procedure must include minimum procedural guarantees of fairness.

The Court of Justice confirmed in *PF,* C-509/18, *JR and YC/Parquet général du Grand-Duché de Luxembourg (Procureurs de Lyon et Tours)*, Joined Cases C-566/19 PPU and C-626/19 PPU, and *PI*

184 First Periodic Country Report: Ireland, p. 9; McArdle [2015] IESC 56; Dunauskis and Lisauskas [2018] IESC 43; and one for which preliminary questions were referred to the Court of Justice for clarification of the concept of an issuing judicial authority – PF C-509/18.

185 First Periodic Country Report: France, p. 12.

186 First Periodic Country Report: Greece, p. 7. Supreme Court, Decision No. 1735/2005, Poinika Chronika (2006).

187 Country Research Brief: Greece, pp. 6 to 8.

(C-648/20 PPU) that the Framework Decision is to be interpreted in the light of Article 47 of the Charter. It specified that, where both the national arrest warrant and EAW for prosecution purposes were issued by a public prosecutor, then there had to be the possibility of judicial review at the pre-surrender stage of at least one of those decisions in order for effective judicial protection to be ensured, that there were fundamental rights safeguards, and that the proportionality of the EAW was considered. It also ruled on the interpretation of an 'issuing judicial authority' in *OG and PI,* as discussed in Section 5.1. above.

The Research Briefs for 11 Member States show that all of those Member States understood effective judicial protection to include the competence of the issuing authority and its independence. The majority considered whether there was a right to review the issuance of an EAW (with the exception of Hungary), and there was some reference to the minimum procedural safeguards pre-and post surrender (with a reference to trial readiness in the Belgian Research Brief but no others). But it was not always clear in every Research Brief whether there was a right to judicial review with respect to the specific procedural or fundamental rights ensured by EU law.

In Belgium, France, Finland, and Portugal[188] it emerged that it was possible to challenge a European Arrest Warrant at the issuing stage. With regard to Belgium, it was noted that effective judicial safeguards had to be assessed on a case-by-case basis[189]. In France, the procedure followed by the public prosecutor's office when issuing an EAW is subject to review by a court, and once subject to a criminal investigation order issued by a French investigating judge, the EAW procedure can be challenged before the investigative chamber[190]. For EAW cases in Finland, an appeal to the Supreme Court may be lodged against the Helsinki District Court's judgments to surrender persons, that court being the one that decides whether to issue an EAW[191].

But there were some Member States that have a legal tradition that does not allow for review by a court of the EAW until **after** surrender: Greece, Ireland, Italy, Luxembourg, the Netherlands, or **at all** – Sweden[192], and that it was rather the national arrest warrant that was reviewable in Germany. In Greece, while there is a possibility to appeal the arrest (on the ground of mistaken identity) and provisional detention, it is considered to be for the issuing State to ensure the (defence) rights of the person in question[193]. The 'Irish courts have consistently held that the defence rights can be respected, and effective judicial protection ensured through any proceedings that will take place in the issuing state following surrender'[194]. In Italy it was simply

188 First Periodic Country Report: Portugal, p. 6.

189 Research Brief: Belgium, section 1.

190 First Periodic Country Report, France, p. 8.

191 First Periodic Report: Finland, p. 2.

192 First Periodic Country Report: Sweden.

193 First Periodic Country Report: Greece, p. 6 and p. 10.

194 The opportunity to seek a remedy if an application for habeas corpus is unsuccessful is not allowed until the trial for the offence is held (and that can take some time): First Periodic Report: Ireland, p. 7. First Periodic Report: Ireland, p. 13.

the case that the issuing decision cannot be appealed before the courts[195]. In Luxembourg, appeals against the CPP's decisions in the context of the execution of sentences, including the issuing of a custodial EAW, is possible (though not expressly mentioned in the CCP), but generally rights are considered to arise post surrender, shifting the responsibility to the issuing State[196]. And in the Netherlands, an appeal or challenge to the issuing of an EAW is not seen to be required and there is no legal remedy available against the judgments of the District Court executing the EAW, other than an appeal in cassation. Persons subject to an EAW who object to it being issued can lodge a complaint during trial / the criminal proceedings about alleged breaches of rights[197].

[195] First Periodic Country Report: Italy, p. 7.

[196] Research Brief: Luxembourg, section 1.

[197] First Periodic Country Report: the Netherlands, p. 1 and p.4.

6. Conclusion

The picture that emerges from this comparison of the STREAM national experts' research is of a spectrum of too many different (sometimes opposite) approaches with respect to (i) the mutual trust placed in other Member States' systems, (ii) the protection of fundamental rights, (iii) proportionality assessments, (iv) the independence of the issuing authority; and (v) the right to effective judicial protection.

At one extreme end of that spectrum are 'laissez-faire' countries such as Greece and Luxembourg, which have a hands-off approach and appear to blindly trust that the system functions by prioritisation of the principle of mutual recognition. They also coincidentally take a less active stance in the protection of fundamental rights for the specific aspects addressed for the purposes of the STREAM project. To recall, the Luxembourg transposing EAW law has no fundamental rights clause (unlike most of the other selected Member States) and does not rely on this as a ground for refusal to surrender; it explicitly does not carry out proportionality assessments and does not question the independence of other Member States' issuing authorities – with the exceptional example of the case that led to *Parquet Générale* before the Court of Justice. While the Greek transposing law has a 'fundamental rights clause', it is viewed as having no chance of success according to the national research; nor does it carry out proportionality assessments; and it is not one of the Member States that is likely to challenge the independence of another Member State's issuing authority.

Conversely, on the other end of the spectrum, refusals to surrender on fundamental grounds have been taken seriously and acted upon in countries such as Belgium concerning detention conditions, torture, fair trial rights, rule of law to an extent, freedom of expression[198] (though two cases eventually resulted in surrender despite an initial refusal – *NJE, Valtonyc*). And the Netherlands – where refusals have been considered on the grounds of the rule of law, an independent court, fair trial, and detention conditions. The Netherlands stands out of all the countries as it suspended all EAWs issued by Polish authorities on the basis of rule of law and judicial independence concerns. It has also, at least once, successfully fulfilled the CJEU's two-step test to be able to refuse a surrender where there has been violation of the right to a fair trial[199].

The research has also shown, however, that Member States tend to adhere to the CJEU's rulings, and in some cases, it was pointed out that the test imposes an overly high threshold. There was indeed no real corresponding increase reported in cases (in this specific research sample) where the person subject to a European Arrest Warrant was successful in their claim of a fundamental rights breach.

Finally, in many countries, a lack of public access to judgments on EAWs contributes to a context of low accountability and prejudice to the rule of law. But there were also specific Member States (Hungary and Poland) where a lack of information combined with clear rule of law and human

[198] Country Research Brief: Belgium.

[199] First Periodic Country Report: Poland.

rights violations within their own system set them apart, even if they were amenable to some extent of fundamental rights protection in potential refusal cases.

It appears that almost all the Member States follow the Court's emphasis on following the mutual recognition principle as it stands, which is argued in this report as seemingly moving towards an approach of 'earned trust', but which is really a continuation of its earlier strict interpretation (an 'extreme degree of trust') bordering on loyalty.

ANNEX: Methodology

There are some methodological challenges shaping the Comparative Report that must be mentioned.

First, the sources relied upon are – exclusively – Periodic Country Reports dated January 2022 from 13 Member States: Belgium, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and Sweden[200], and Research Briefs from 11 Member States: Belgium, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Poland, and Spain, which were submitted between 2022 and 2023. The content of those documents are not updated to the present date. These Member States were carefully selected: (i) because their criminal law traditions are representative of the different criminal law traditions existing in the EU; (ii) because of their track record in making use of the EAW; (iii) because they maintain intense cross-border cooperation in criminal matters, most notably in surrender procedures; and (iv) to represent a geographic balance. Where specific information is referred to from those documents, a reference will signal its source as either the First Periodic Country Report or the Research Brief.

Second, the national experts' reports take into account developments during differing time periods that are specific to each of them, for example based on national law amendments; four examples are the Netherlands, Germany, Ireland and Italy. The expert reports on the Netherlands have a focus post-2019, further to a legislative amendment to change the competent authority to issue European Arrest Warrants to be 'investigative judges'. For Germany and Ireland, there was a focus post-2020 due to legislative changes or in judicial approach. And in Italy too, there was a legislative reform post-2021 that significantly changed the list of grounds for non-execution of an EAW (though the national legal expert took into account the entire case-law dating further back in order to provide a complete overview).

Third, in all cases a selection of case-law was made to draw out the state of the law, challenges, and solutions – but the number and nature of cases varied. By way of example, a wide range of cases were examined in the Italian reports; in the reports for the Netherlands, over 2 500 cases were mentioned as existing, and for Portugal an 'exhaustive survey' of around 300 judicial decisions on the European Arrest Warrant was carried out. But in Luxembourg and Sweden a smaller selection of 17 cases (which have a connection to preliminary rulings / the CJEU) and five cases (respectively) was focused on.

Fourth, and crucially, there was an issue of availability of data. In at least eight of the 14 Member States, either a lack of, or difficulty in, access to EAW decisions and related case-law was pointed out, as not all of them are published or publicly available. Specific examples are the Belgian, French, Hungarian, Irish, and Swedish reports – and also in the case of Portugal. With regard to Belgium, the lack of access to EAW decisions was described as seriously hindering the study of its implementation. For France, difficulty was reported in accessing the investigating chamber's appellate decisions on issuing and executing EAWs, and it was highlighted that there is more available case-law on France's issuing rather than executing authority. With regard to Hungary,

[200] https://stream-eaw.eu/country-reports/

'judgments rendered by ordinary courts are not accessible'[201]. In the case of Ireland, cases on the issuing of EAWs and non-opposed EAWS from other Member States were not published, and cases were selected spanning a period from 2012 to the present. And in Sweden cases of the prosecutor issuing EAWs were not published or were linked to custody interim measures which were difficult to search for, and where search results in different databases reveal discrepancies, or the decisions were brief (including in reasoning).

[201] Country Research Brief: Hungary, p.1 and p. 6.