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The evolving notion of mutual recognition in the CJEU's case law on detention

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Abstract

This article analyses the case law of the Court of Justice of the European Union (CJEU) on detention and the possible evolution of the understanding of mutual recognition stemming therefrom. In the *Lanigan*, *JZ*, and *Ognyanov* decisions, the CJEU assimilated mutual recognition with the effectiveness of cooperation, which should be understood as maximum compliance with the issuing state's interests. Arguably, this approach is detrimental to other important values, such as, for example, the rights arising from excessively long detention and a rational and meaningful approach to the enforcement of imprisonment. On the other hand, the *Aranyosi and Căldăraru* judgment has detached mutual recognition from the exclusive protection of the issuing state and has turned it into a neutral governance principle. If mutual trust is not a given and can be assessed on a case-by-case basis through common objective parameters, the decisions deserving recognition may be uttered either by the issuing or the executing authority.

Keywords

European criminal law, mutual recognition, detention, transfer of prisoners, Court of Justice of the EU

1. Introduction

This article analyses the case law of the Court of Justice of the European Union (CJEU) on detention and the possible evolution of the understanding of mutual recognition stemming therefrom. From a notion which was mainly intended to provide 'effectiveness' to the interests of the issuing state, mutual recognition might possibly be turning into a neutral principle of

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governance, which encompasses the protection of other matters of concern for the EU (for example, individual rights).

The EU has no specific competence to regulate detention in any of its forms. That being said, detention always constitutes an interference with fundamental rights, which are 'general principles of the Union's law'.[1] However, the CJEU has always refused to adjudicate on the violation of fundamental rights in the absence of further connections with EU law.[2] In this sense, fundamental rights are *conditional* general principles of EU law: unlike the other general principles, they only come into play when the situation entails an *additional* connection with that legal order. Otherwise, the violation of fundamental rights qualifies as a purely internal matter and is consequently immune from the CJEU's scrutiny.

This means that the possible violation of the right to liberty – as of any other fundamental right – does not *per se* attract the jurisdiction of the CJEU.[3] Hence, it is no wonder that the decisions on detention taken by the CJEU are collateral effects of incidents in cooperation procedures. Judicial cooperation was the additional connection present in the four cases whereby the CJEU had the opportunity to adjudicate on the concept of detention (*JZ*), the time limits to which it is subject in the context of the European Arrest Warrant (*Lanigan*), as well as on the conditions of its execution (*Ognyanov* and *Aranyosi and Căldăraru*).

2. The case-law of the CJEU on detention: *Lanigan*, *JZ*, *Ognyanov*, and *Aranyosi and Căldăraru*

In *Lanigan*,[4] the CJEU ruled on the expiry of time limits for the decision to execute a European Arrest Warrant (EAW) and its possible impact on the rights of the detainee.

The British authorities issued a EAW seeking the arrest and surrender, by the Republic of Ireland, of Mr Lanigan, against whom criminal proceedings were brought in the United Kingdom for alleged criminal offences committed in the UK. The suspect was arrested on the 16 January 2013 and, on the 15 December 2014 (almost two years after his arrest), he submitted that the request for surrender should be rejected, since the time limit for executing the EAW had expired.

The Irish High Court referred two questions to the CJEU. First, it sought to ascertain whether Articles 12, 15(1) and 17 of the Framework Decision on the EAW (FD)[5] should be interpreted in the sense that the expiry of the time limits laid down in Article 17 of the EAW (FD) precludes the executing judicial authority from deciding on the execution of the EAW. Second, the High Court

1. Article 6(3) of the Treaty on the European Union (TEU); see also, e.g., C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, para. 4.
2. See Case C-299/95 *Kremzow v Republik Österreich*, EU:C:1997:254.
3. Except when European (secondary) law itself provides for and regulates a fundamental right (e.g. the presumption of innocence), which then becomes a European connection *a se stante*: see P. Caeiro, 'Introduction', in P. Caeiro (ed.), *The European Union Agenda on Procedural Safeguards for Suspects or Accused Persons: the 'second wave' and its predictable impact on Portuguese law* (Instituto Jurídico, 2015), p. 16 et seq.; and V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe* (Hart Publishing, 2016), p. 171.
4. Case C-237/15 PPU *Lanigan*, EU:C:2015:474.
5. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, [2009] OJ L 81/24.

asked the CJEU whether the failure to observe said time limits conferred any rights upon the detainee.

The CJEU held that an interpretation according to which the judicial authority could no longer pursue the execution of the warrant after those time limits have expired would run counter to the objective pursued by the EAW FD, namely accelerating and simplifying judicial cooperation. In particular, if that interpretation were to be followed, the issuing Member State could be forced to issue a second EAW and this would encourage delaying tactics with the aim of obstructing the execution of EAWs.[6] Thus, the mere expiry of the time limits to take a decision on the execution of a EAW cannot relieve the executing court from its obligation to carry out the execution procedure and adopt a decision on the execution thereof.[7]

Concerning the second question, the CJEU held that there are no provisions within the EAW FD which state that the detainee must be released once the time limits have expired.[8] A general and unconditional obligation to release the person upon these time limits could reduce the effectiveness of the surrender system and undermine the accomplishment of its objectives.[9] Moreover, the CJEU noted that

> Article 26(1) of the Framework Decision provides that the issuing Member State is to deduct all periods of detention arising from the execution of a European Arrest Warrant from the total period of detention to be served in that state, thereby ensuring that all periods of detention, even those resulting from possibly being held in custody after the time-limits stipulated in article 17 of the Framework Decision have expired, will duly be taken into account if a custodial sentence is executed in the issuing Member State.[10]

Nevertheless, the CJEU pointed out that the EAW FD must be interpreted in light of the Charter of Fundamental Rights of the European Union (the Charter), particularly Article 6 thereof on the right to liberty and security.[11] The requested person may be held in custody – even if the total duration of custody exceeds the time limits for the decision to execute the EAW – as long as the duration of deprivation of liberty 'is not excessive'. In order to ensure that that is indeed the case, the executing judicial authority must carry out a concrete review of the situation at issue, taking account of all of the relevant factors that may justify the duration of the procedure,[12] by applying the 'sufficiently diligent manner' test imported from the 'relevant ''Strasbourg'' case law'.[13]

In the *JZ* case,[14] the CJEU ruled on the concept of detention and on the application of a more favourable regime by the executing authorities.

6. Case C-237/15 PPU *Lanigan*, para. 40–41.
7. Ibid., para. 42, 62.
8. Ibid., para. 44–46.
9. Ibid., para. 50.
10. Ibid., para 51.
11. Ibid., para. 53–54.
12. Ibid., para. 58, 59, 63. This attribution of competence to the executing state is a reflection of the division of tasks between the issuing State and the executing State, presupposed by the principle of mutual recognition (see A. Klip, *European Criminal Law. An Integrative Approach* (3rd edition, Intersentia, 2016), p. 429 et seq.
13. A.P. van der Mei, 'The European Arrest Warrant system: Recent developments in the case law of the Court of Justice', 24 *Maastricht Journal of European and Comparative Law* (2017), p. 888.
14. Case C-294/16 PPU *JZ*, EU:C:2016:610).

Mr JZ was arrested in the UK, as a result of a validly executed EAW, for the purposes of enforcing a custodial sentence of three years and two months in Poland; he was held in custody for one day and then released on bail. He was required to stay at the address he had given, between the hours of 22:00 and 7:00 and his compliance with that requirement was subject to electronic monitoring. In addition, he was obliged to appear regularly at a local police station, not to apply for foreign travel documents and to keep his mobile telephone switched on and charged at all times. These measures were applied until he was eventually surrendered to the Polish authorities some 13 months after his initial arrest.

In order to ensure that upon surrender the convicted person will not serve a total period of deprivation of liberty longer than the one he/she has been sentenced to, Article 26(1) of the EAW FD provides, as aforementioned, that the issuing Member State 'shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State'.

The District Court for Central Łódź sought to ascertain whether Article 26(1) of the EAW FD 'must' be interpreted as meaning that measures such as a curfew, together with the monitoring of the person concerned by means of an electronic tag, should be understood as 'detention' within the meaning of Article 26(1) of the EAW FD.

The CJEU held that the concept of 'detention' (Article 26(1) of the EAW FD) is 'an autonomous concept of EU law that must be given an autonomous and uniform interpretation throughout the European Union'.[15] The CJEU noted that 'detention' and 'deprivation of liberty' are similar concepts that evoke, in their ordinary meaning, a situation of confinement or imprisonment, and not merely a restriction of the freedom of movement.[16] By using this distinction between measures that *deprive* the person of his/her liberty, on the one hand, and measures that cause a mere *restriction* of freedom, on the other, the CJEU considered that a person can be deprived of his liberty not only by virtue of imprisonment, but also, in exceptional cases, of other measures that limit personal freedom to such a degree that they must be treated in the same way as imprisonment in the strict sense.[17]

Nevertheless, the CJEU held that the measures JZ was subject to were not so restrictive as to give rise to a deprivation of liberty comparable to imprisonment and thus to be classified as 'detention' within the meaning of Article 26(1) of the EAW FD.[18] However, the CJEU noted that the EAW FD 'merely imposes a minimum level of protection of the fundamental rights' of a person subject to the EAW and it does not preclude the issuing state from deducting from the total period of detention all or part of the period during which that person was subject, in the executing Member State, to measures not involving a deprivation of liberty but a restriction thereof.[19]

The CJEU's judgment in *Ognyanov*[20] resulted from the first request for a preliminary ruling concerning the interpretation of a provision of FD 2008/909/JHA (FD 2008/909).[21] The declared

15. Ibid., para. 37. Stressing the different legal nature of detention in the context of international judicial cooperation and domestic detention for the purpose of criminal proceedings, compare, E. de Souza and R. Oliveira, 'Sobre a detenção e as medidas de coacção nos processos de extradição e de entrega (em execução do Mandado de Detenção Europeu)', in P. Caeiro (ed.), *Temas de Extradição e Entrega* (Almedina, 2015), p. 115 et seq.
16. Case C-294/16 PPU *JZ*, para. 40.
17. Ibid., para. 44.
18. Ibid., para. 53–54.
19. Ibid., para. 55.
20. Case C-554/14 *Ognyanov*, EU:C:2016:835.
21. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty

purpose of this act is to foster the social rehabilitation of sentenced persons by enabling individuals who have been convicted to a custodial sentence in one Member State to serve their sentence in another Member State that is deemed more appropriate to that effect. The ruling addresses an important aspect of the provision: which law applies to the enforcement of the sentence in the executing state.

Mr Ognyanov, a Bulgarian national, was convicted by a Danish Court to 15 years imprisonment. He served part of his sentence in Denmark and then he was transferred to Bulgaria for the remainder of his sentence. While in prison in Denmark, he carried out a period of work in the general interest.

Article 41(3) of the Bulgarian Criminal Code provides that work done by a sentenced person shall be taken into account for the purposes of reducing the length of the sentence, so that two days of work equate to three days of deprivation of liberty. Moreover, the interpretative judgment No. 3/13 of 12 November 2013, delivered by the Bulgarian Supreme Court of Appeal, envisages that work in general interest, undertaken in the issuing state by a Bulgarian national convicted of an offence who is transferred to Bulgaria, shall be taken into account by the competent authorities of the executing state for the purposes of reducing the length of the sentence. In turn, the relevant Danish legislation did not permit any reduction of a custodial sentence on the basis that work was carried out during the enforcement of that sentence.[22]

The Sofia City Court had doubts as to whether, in order to determine the length of the sentence still to be served by the convict, it ought to take into account the days of work in the Danish prison. If it were to do so, the offender would qualify for a greater reduction in his sentence, which would result in him/her being released earlier.

Therefore, the question referred for a preliminary ruling was, *inter alia*, whether Article 17(1) and (2) of FD 2008/909 should be construed as precluding a national legal provision to be interpreted in such a way as to permit the executing state to grant a reduction in the sentence of an already sentenced person by reason of work carried out during the person's detention in the issuing state, although the issuing state's authorities did not, in accordance with the law of that state, grant such a reduction in the sentence.[23]

The CJEU ruled that Article 17 of FD 2008/909 must be interpreted as meaning that only the law of the issuing state is applicable, 'not least on the question of any grant of a reduction in sentence', to the part of the sentence served by the person on the territory of that state until he/she is transferred to the executing state. The law of the executing state 'can apply only to the part of the sentence that remains to be served by that person, after that transfer, on the territory of the executing State'.[24] Therefore, an authority in the executing state cannot grant a reduction that relates to the part of the sentence that has already been served on the territory of the issuing state, when no such reduction was granted by the authorities of the issuing state, in accordance with their national law.[25]

According to the CJEU, a contrary interpretation would be likely to undermine the objectives pursued by FD 2008/909, namely the respect for the principle of mutual recognition, which is

for the purpose of their enforcement in the European Union, [2008] OJ L327/27 as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24).

22. See Case C-554/14 *Ognyanov*, para. 13–15, 22.
23. Ibid., para. 29–30.
24. Ibid., para. 40.
25. Ibid., para. 45, 51.

based on the special mutual confidence of the Member States in their respective legal systems (Recitals 1 and 5 of the Preamble to FD 2008/909). If a national court of the executing state grants, in accordance with its national law, a reduction in a sentence which relates to the part of the sentence served by that person on the territory of the issuing state, although no such reduction in sentence was granted by the competent authorities of the issuing state, on the basis of its national law, the executing state would be 're-examining' the period of detention served on the territory of the issuing state, which would in turn 'jeopardise the special mutual confidence of Member States in their respective legal systems' and undermine the principle of mutual recognition.[26]

The *Aranyosi* and *Căldăraru* cases were combined because of the similarity of the questions they raised.[27] Two EAWs were issued by Hungarian authorities seeking the surrender of Mr Aranyosi, a Hungarian citizen, for the purposes of criminal prosecution. A Romanian Court also issued an EAW in respect of Mr Căldăraru, a Romanian citizen, for the purposes of executing a prison sentence of one year and eight months. Both defendants were arrested in Bremen, Germany.

Having gathered information according to which there was a risk that both citizens would suffer inhumane or degrading treatment after the surrender, the Court of Bremen was reluctant to surrender the requested persons and considered that it was not in a position to give a ruling on the lawfulness of their surrender. This position was based on the restrictions imposed by national rules (§ 73 of the *Gesetz über die internationale Rechtshilfe in Strafsachen*[28]) and also on Article 1(3) of the EAW FD.[29]

As a consequence, the German Court decided to stay the proceedings and refer two preliminary questions to the CJEU. The first inquired as to whether the executing authority should interpret Article 1(3) of the EAW FD as requiring a refusal of the execution of an EAW where there is solid evidence that detention conditions in the issuing Member State are incompatible with fundamental rights, in particular with Article 4 of the Charter, or rather make the surrender conditional upon assurances that detention conditions are compatible with fundamental rights. The second question sought to ascertain whether Articles 5 and 6(1) of the EAW FD are to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are sufficiently safeguarded, or if assurances in this regard remain subject to the domestic rules of competence in the issuing Member State.[30]

The CJEU first stated that Member States are bound by Article 4 of the Charter, concerning the prohibition of inhuman or degrading treatment or punishment, as per Article 51(1) of the Charter.[31]

Then the CJEU established a two-step test that the judicial authority of the executing Member State must follow whenever it is 'in possession of evidence of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State'.[32] First, the executing judicial

26. Ibid., para. 48-49.
27. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, EU:C:2016:198.
28. (DE) § 73 of the Law on International Mutual Assistance (*Gesetz über die internationale Rechtshilfe in Strafsachen*) states that 'in the absence of a request to that effect, mutual legal assistance and the transmission of information shall be unlawful if contrary to the essential principles of the German legal system. In the event of a request under Parts VIII, IX and X, mutual legal assistance shall be unlawful if contrary to the principles stated in Article 6 TEU'.
29. According to Article 1(3), the EAW FD 'shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 (TEU)'. See Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, para. 45 and 62.
30. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru*, para. 46 and 63.
31. Ibid., para. 83–88.
32. Ibid., para. 88.

authority must assess whether the detention conditions of the issuing Member State suffer from deficiencies, which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention.[33] However, the identification of a risk of inhumane or degrading treatment on the basis of general detention conditions is not in itself sufficient to refuse the execution of an EAW.[34] Such identification leads to the second step, where the executing authority must decide on the basis of a 'specific and precise' assessment, whether there are 'substantial grounds' to believe that, upon the surrender, the individual concerned will be exposed to the risk of being subject in the issuing Member State to inhuman or degrading treatment, within the meaning of Article 4 of the Charter.[35] In order to make this assessment, the executing authority must request from the judicial authority of the issuing Member State all additional information that is necessary to establish the conditions in which the person will be detained.[36] Nevertheless, even when the executing authority is convinced of the existence of a real risk of inhumane or degrading treatment, it does not have the power to refuse the execution of the EAW. In these circumstances, the execution of the warrant must be 'postponed' – but not abandoned – until the issuing judicial authority provides information discounting the risk of a violation of Article 4 of the Charter.[37] If the existence of that risk cannot be discounted within a 'reasonable time', the executing judicial authority must decide whether 'the surrender procedure should be brought to an end'.[38]

3. A critical appraisal of the four decisions

In *Lanigan*, *JZ*, and *Ognyanov*, the CJEU stated that effectiveness of cooperation should be given priority, and that national authorities are allowed to take decisions in favour of individual rights only to the extent that cooperation is not jeopardized (in line with *Melloni*[39] and *Jeremy F.*[40]). This stance is confirmed by the construction of mutual recognition as a principle that imposes on the executing state the duty to abide by the claim of the issuing state to the maximum extent and as swiftly as possible.[41] Nevertheless, assimilating mutual recognition to the interests of the issuing state leads to an unwarranted reduction of EU law, setting aside other interests that are also of concern to the EU, as the following considerations purport to show.

The *Lanigan* case has made clear that the EAW FD does not provide for the release of the detainee once the time limits for the decision to execute the EAW have expired. This seems to have been a deliberate decision by the EU legislator.[42] Arguably, imposing the person's release within

33. Ibid., para. 89.
34. Ibid., para. 91, 93.
35. Ibid., paras. 92, 94.
36. Ibid., para. 95.
37. Ibid., para. 98, 104.
38. Ibid., para. 104.
39. Case C-399/11 *Melloni*, EU:C:2013:107, para. 60–64.
40. Case C-168/13 *Jeremy F. v. Premier ministre*, EU:C:2013:358, para. 51–53.
41. With reference to case law where the Court of Justice has linked the principle of mutual recognition with the need to ensure the effectiveness of the FD by ensuring that procedures are carried out in a swifter and simpler manner, see V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*, p. 132.
42. Compare Article 23(5) of the EAW FD. See also the Commission's proposal which led to the adoption of the FD (Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, COM(2001) 522, p. 305), which provided that the requested person must be released both upon expiry of the time limits for the adoption of the decision on the execution of the EAW (Article 21 of the EAW FD) and upon expiry of the time limits for surrender (Articles 23(2) and (3) of the EAW FD).

the same deadlines could either lead, undesirably, to hasty decisions, if the executing authority considers that there are no other appropriate means of preventing the arrested person from absconding, or to the frustration of surrender due to the actual absconding of the person concerned before the decision is made.

Nevertheless, the effectiveness of the surrender system cannot be called upon to validate every limitation to the fundamental rights of the requested person.[43]

Admittedly, by invoking Article 26 of the EAW FD[44] as one of the grounds for the decision, the CJEU intended to convey that any 'excessive detention' would not be detrimental to the suspect because the whole period of detention would be deducted from the time of imprisonment imposed in the sentence rendered by the issuing state. However, this argument is not convincing. In the first place, the EAW is executed for the purpose of criminal prosecution, at a moment where the presumption of innocence is entirely operative. Arguably, one cannot justify the possible violation of the detainee's rights with the mitigating effects provided in the event of a conviction, which is, at that point, uncertain. Such reasoning is at odds with the presumption of innocence. The fact that the suspect is eventually convicted (and detention is consequently deducted) does not eradicate the unlawful nature of custody. Moreover, Article 26 of the FD is not meant, in general, to *validate* the detention of an individual. Detention (just like remand) is legitimate if it is necessary to ensure the effectiveness of the proceedings; the deduction of time spent is therefore based on humanitarian grounds. Therefore, lawful detention is compatible, within certain limits, with the presumption of innocence, even if the detainee is eventually acquitted and no deduction can take place. However, if the detention is, for any reason, unlawful (for example 'excessive'), there is a violation of the right to freedom that cannot be justified with the deduction of the time spent in detention from the ultimate penalty. Otherwise, one would assume at that point in time that the innocent detainee will be eventually convicted. In the second place, and as a consequence, the deduction might prove immaterial in the case where the suspect is acquitted or sentenced to a non-custodial sanction (in those legal systems that do not provide for the deduction of penalties of a different nature). In the third place, the very circumstance that the time spent in detention in excess of the time limits for the decision is deducted *in the same way* as the 'regular' period of detention shows that deduction is not an appropriate mechanism for addressing the *specific* problem of 'excessive' detention.

Even if it is true that the imposition of time limits for the adoption of decisions concerning the EAW intends to ensure the effectiveness of judicial cooperation, and not the rights of the wanted person, it is submitted that those limits create *expectations* for individuals that remain in detention. Such expectations are generated by a EU legal instrument and should be addressed, in one way or another, by EU law. Thus, the CJEU could have delved deeper into the question of whether or not such expectations are legitimate and deserve to be acknowledged. If appropriate, the CJEU could even have elaborated on the conditions of a right to damages *under EU law*.[45] Instead, by referring

43. According to L. Bachmaier, 'this ruling is very indicative of the stance the ECJ is following in the field of criminal cooperation: priority to the effectiveness of EAWs above any consideration of the fundamental rights of individuals affected by a deprivation of liberty' (L. Bachmaier, 'Mutual recognition instruments and the role of the CJEU: the grounds for non-execution', 6 *New Journal of European Criminal Law* (2015), p. 522).
44. Case C-237/15 PPU *Lanigan*, para. 51.
45. On the right to compensation in the framework of an EAW, see H.B.F.M. Sørensen, 'Mutual recognition and the right to damages for criminal investigations', 5 *European Criminal Law Review* (2015), p. 194 et seq. On the need for the EU legislator to adopt an instrument providing a compensation regime for unjustified detention in cross-border proceedings, see A. Weyembergh, I. Armada and C. Brière, 'Critical assessment of the existing European Arrest Warrant

the issue back to domestic courts to assess the 'excessive' length of detention in the light of domestic law and the ECHR, the CJEU seemed to suggest that mutual recognition, and EU law as a whole, are exclusively concerned with protecting the issuing state's interest, even when the concrete terms in which the principle is implemented raise issues from the perspective of fundamental rights.

In *JZ*, the CJEU seems to have given more weight to the consideration of human rights, by leaving the issuing state 'free to offer ''more generous'' treatment' to the convicted person,[46] through the application of a higher standard of protection at national level. However, in this case, there was no real conflict between the interests of the individual and effective cooperation, since, as it has been aptly noted,[47] the person had already been surrendered.

A further point of interest in this decision is that, by ruling that the issuing state remained free to deduct the periods of house arrest from the imprisonment sentence, the CJEU implicitly acknowledged that the way in which the penalty is executed is of no concern to the EU, as long as the minimum deduction provided for in Article 26(1) of the EAW FD is complied with.

Turning now to the *Ognyanov* case, which dealt with the FD 2008/909, the declared purpose of this act is to foster the social rehabilitation of sentenced persons by enabling individuals who have been deprived of their liberty as a result of a criminal conviction to serve their sentence, or the remainder thereof, within their own social environment (Recital 9 and Article 3(1) of FD 2008/909).[48] By pursuing rehabilitation, it also ensures that the Charter's essential provisions are respected, since the offender's rehabilitation is considered to be closely connected to the principle of human dignity (Article 1 of the Charter).[49]

If the transfer of the convict takes place so as to foster rehabilitation, it is logical to assume that the executing state is in a better position to decide on how the enforcement of the penalty shall take place. However, the CJEU has limited that power by ruling that the executing authorities are not allowed to take into account, for the purposes of calculating the remainder of the penalty, the fact that the convict worked while serving his sentence in the issuing state. This decision raises critical issues:

Framework Decision', *European Parliament* (2014), http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf, p. 41 et seq. This solution is in line with the case law of the European Court of Human Rights and has been endorsed by the European Parliament: see European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), para. 11.

46. A.P. van der Mei, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 891.
47. Conversely, in *Melloni*, the application of the national, higher standard could have led to the non-execution of the warrant. Pointing out this difference, L. Mancano, 'A new hope? The Court of Justice restores de balance between fundamental rights protection and enforcement demands in the European Arrest Warrant system', in C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future* (Bloomsbury, 2017), p. 312.
48. Criticizing the fact that the person can be transferred even when he / she has not consented, or indeed against his / her will, see, among others, V. Mitsilegas, 'The third wave of third pillar law: Which direction for EU criminal justice?', 34 *European Law Review* (2009), p. 541–542; and L. Mancano, 'The right to liberty in European Union law and mutual recognition in criminal matters', 18 *Cambridge Yearbook of European Legal Studies* (2016), p. 231–232.
49. See P. Mengozzi, 'La cooperazione giudiziaria europea e il principio fondamentale di tutela della dignità umana', 9 *Studi sull'integrazione europea* (2014), p. 230; and S. Montaldo, 'Judicial cooperation, transfer of prisoners and offender's rehabilitation: No fairy-tale bliss. Comment on *Ognyanov*', 2 *European Papers* (2017), p. 715; A. Martufi, 'The European dimension of punishment and the right to rehabilitation: new challenges for an old ideal?', 25 *Maastricht Journal of European and Comparative Law* (2018).

(i) Since the 19th century, rehabilitation through imprisonment has been associated with the establishment of a customized programme of treatment, which addresses the individual condition of each inmate.[50] Such a plan is drafted, developed and adapted as a preparation for life upon release. It *evolves* through several stages, where responsibility, privileges and competences are blended in variable proportions, which provides the enforcement of the penalty with a 'unity of meaning'.

Transferring the convict to another Member State for the sake of improving his/her rehabilitation interrupts the programme that has been organized in the issuing state.[51] In that case, the unity of meaning of the penalty needs to be *reconstructed*, and, in the absence of common rules, this can only be effected by the authority who *is* in charge of enforcing the penalty (which does not equate to *applying* it in a 'tailored' fashion[52]). In other words, the executing authority must be able to look at the penalty *as a whole*. Otherwise, the penalty being enforced is no longer the same penalty that was initially applied by the issuing state, but instead a *new* penalty, with significant consequences. In doing so, it is not only natural, but indeed desirable, that the executing Member State takes into account, to the fullest extent possible, all the relevant facts pertaining to the enforcement of the sentence, even if they have taken place in a different jurisdiction; all the more so when those facts produced no consequences there, as it was the case in *Ognyanov*.

In light of the foregoing, the judgment creates an artificial and detrimental *scission* in the enforcement of the penalty. The CJEU tried to justify the decision on the basis that giving effect to circumstances which occurred during the enforcement of the penalty in the issuing state equates to retroactively applying the law of the executing state.[53] This is actually not the case: the latter is applying its law to a question that is evidently *present* (the determination of the remainder of the imprisonment sentence). A simple hypothetical case might shed some light on the problem: if the issuing authority does not ask for information regarding early release, or does not withdraw the certificate when provided with it (Article 17(3) of the FD), should the executing authority be prevented from taking into consideration the time served in the issuing state with a view to granting early release at, say, half of the sentence, in the case where the law of the issuing state provides for a stricter regime? It is submitted that the answer to that question should be in the negative.

(ii) Secondly, and above all, the ruling of the CJEU is the epitome of the understanding of mutual recognition as a principle that is designed to pay homage to the interests of the issuing state, irrespective of the *common material goals* being pursued. At least from a

50. Compare UNODC, 'The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)', *UNODC* (2015), https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf, Rule 94: 'As soon as possible after admission and after a study of the personality of each prisoner with a sentence of suitable length, a programme of treatment shall be prepared for him or her in the light of the knowledge obtained about his or her individual needs, capacities and dispositions'.

51. For further discussion on the detrimental consequences of the interruption of a sentence that transfers entail, see I. Wieczorek, 'EU Constitutional limits to the Europeanization of Punishment: A case study on offenders' rehabilitation', 25 *Maastricht Journal of European and Comparative Law* (2018).

52. Compare to the Opinion of Advocate General Bot in Case C-554/14 *Ognyanov*, EU:C:2016:319, para. 76 et seq., 84 et seq.

53. Case C-554/14 *Ognyanov*, para. 44, 49; see also A. Martufi, 25 *Maastricht Journal of European and Comparative Law* (2018).

formal perspective,[54] FD 2008/909 was adopted so as to allow for a swifter transfer of convicts in order to foster rehabilitation, which means that, in the concrete instance, the executing state is viewed as a *more appropriate forum* to that effect than the issuing state.[55] Nevertheless, the enforcement programme of the executing state is limited by the way the issuing state deals with a problem that is no longer of concern to that state.

The judgment *Aranyosi and Căldăraru* marked a major shift in the history of mutual recognition in general, and surrender procedures in particular.[56] The CJEU ruled that the execution of an EAW must be deferred ('postponed') if and for so long as there is a real risk of inhumane or degrading treatment arising from detention conditions in the issuing Member State, up to a moment where the executing authority might have to put an end to the proceedings. On the one hand, the decision raises some concerns, mostly at an operational and pragmatic level (see *infra*, A)). On the other hand, it should be regarded as a clear attempt to reconcile the protection of fundamental rights of the requested person with judicial cooperation.[57] In the process, it enhanced the institutional dimension of mutual recognition as a *common framework* that serves interests other than those pursued by the issuing state (see *infra*, B)).

A), The trend of polarisation in the Union, between Member States with 'bad prisons' on the one hand, and those with 'good prisons', on the other, was indirectly reinforced by this judgment, and a phenomenon of 'prison shopping' may emerge as a result.[58] The possibility of refusal also raises

54. But see A. Martufi, 'Assessing the resilience of "social rehabilitation" as a rationale for transfer. A commentary on the aims of Framework Decision 2008/909/JHA', 9 *New Journal of European Criminal Law* (2018).
55. See S. Montaldo, 2 *European Papers* (2017), p. 718. Upholding the need to develop a common European approach to the offenders' social rehabilitation, see the same author, p. 716 et seq. Pointing out a different solution for the case *Ognyanov* in a moment where the CJEU had yet to pronounce the judgment, M. Morales Romero, 'The role of the European Court of Justice in the execution of sentences', in A. Bernardi (ed.) *Prison Overcrowding and Alternatives to Detention. European Sources and National Legal Systems* (Jovene Editore, 2016), p. 105 et seq.
56. On this case see, among many others, E. Bribosia and A. Weyembergh, 'Arrêt "Aranyosi et Căldăraru": imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale', 6 *Journal de Droit européen* (2016), p. 25–27; S. Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru: Converging human rights standards, mutual trust and a new ground for postponing a European Arrest Warrant', 24 *European Journal of Crime, Criminal Law and Criminal Justice* (2016), p. 197–219; R. Niblock, 'Mutual Recognition, Mutual Trust? Detention Conditions and Deferring an EAW', 7 *New Journal of European Law* (2016), p. 250–251 and A. Willems, 'Improving detention conditions in the EU – Aranyosi's Contribution', *EUSA Fifteenth Biennial Conference* (2017), https://www.eustudies.org/conference/papers/download/374, p. 1–10.
57. See S. Gáspár-Szilágyi, 24 *European Journal of Crime, Criminal Law and Criminal Justice* (2016), p. 211; and A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 10. The case *Aranyosi / Căldăraru* was the first concrete application to a criminal case of the exception contained in the definition of the principle of mutual trust in *Opinion 2/13*. According to this definition, 'each Member State, *save in exceptional circumstances*, (must) consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law' (Opinion 2/13 of the Court of Justice of the European Union on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, para. 191. However, the CJEU had already visited that avenue in the field of asylum law: see Joined Cases C-411/10 and C-493/10, *N.S.,* EU:C:2011:865, which has been deemed by Mitsilegas a 'seminal ruling' (p. 81), a 'turning point' (p. 84), a 'significant constitutional moment in European Union law' (p. 140) (V. Mitsilegas, *Justice and Trust in the European Legal Order. The Copernicus Lectures* (Jovene, 2016), p. 81, 84 and 140), and to which *Aranyosi / Căldăraru* seems heavily indebted.
58. See Council of the EU, The EAW and Prison Conditions . . . op. cit., p. 1. On the polarisation between states with good and with bad prisons, see T. Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the

the question as to the ultimate impunity of the offenders.[59] Some 'assurances' requested by the executing judicial authority may lead to discriminatory treatment between prisoners.[60] Another problem is the reliability of the system of guarantees and assurances itself: once the requested person has been surrendered to the issuing state, the executing state does not have enough control over the conditions under which the prisoner is detained.[61] Concerning the evidentiary requirements, the CJEU is not clear as to on whom the burden of proof rests, nor on the precise type of information that should be relied upon for the executing state when the two-step test must be used.[62] The effects of postponing surrender were not fully addressed either: the CJEU has avoided creating a new ground for refusal, but it is unclear how Member States are to define what a 'reasonable' period of time is. This ground for postponement might therefore 'easily amount to a *de facto* ground of refusal to surrender the requested person'.[63] A further issue concerns the scope of application of the new ground for postponement, as the decision did not detail whether it covered only Article 4 of the Charter or also other fundamental rights.[64] In a recent decision, the CJEU has answered the question in the affirmative and has extended the *Aranyosi and Căldăraru* ruling to cover the real risk of a breach of the fundamental right to a fair trial as per Article 47(2) of the Charter.[65] Finally, there is a risk of politicising the judicial proceedings, since the situations

European Arrest Warrant and the transfer of Prisoners Framework Decisions', 25 *Maastricht Journal of European and Comparative Law* (2018).

59. See G. Anagnostaras, 'Mutual confidence is not blind trust! Fundamental rights protection and the execution of the European Arrest Warrant: *Aranyosi and Căldăraru*', 53 *Common Market Law Review* (2016), p. 1696; M. Morales Romero, in A. Bernardi (ed.) *Prison Overcrowding and Alternatives to Detention. European Sources and National Legal* Systems, p. 95; and A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 10.
60. See M. Morales Romero, in A. Bernardi (ed.) *Prison Overcrowding and Alternatives to Detention. European Sources and National Legal Systems*, p. 103–104: 'if the people named in an EAW are surrendered subject to specific guarantees that will place them in better conditions than the other inmates in the issuing state, the latter would be benefitting from unequal and clearly unfavourable treatment'.
61. J. Graat, et al., 'Part IV – Dutch Report', *Transfer of Prisoners in Europe project*, *Utrecht University* (2018), https://euprisoners.eu/wp-content/uploads/sites/153/2017/10/NL-report-transfer-judgments-conviction-european-union-v3.pdf, p. 30–31.
62. See S. Gáspár-Szilágyi, 24 *European Journal of Crime, Criminal Law and Criminal Justice* (2016), p. 213 et seq.; A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 9; and Council of the EU, 'The EAW and Prison Conditions, Outcome Report of the College, Thematic Discussion', *Council of the European Union* (2017), http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/ejstrategicmeetings/Outcome%20report%20of%20College%20thematic%20discussion%20on%20EAW%20and%20prison%20conditions%20(May%202017)/2017-05_9197-17_Outcome-Report-on-EAW-and-Prison-Conditions_EN.pdf, p. 2.
63. S. Gáspár-Szilágyi, 24 *European Journal of Crime, Criminal Law and Criminal Justice* (2016), p. 216 and A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 8.
64. See S. Gáspár-Szilágyi, 24 *European Journal of Crime, Criminal Law and Criminal Justice* (2016), p. 212 and 214; E. Xanthopoulou, 'Mutual trust and rights In EU criminal and asylum law: Three phases of evolution and the uncharted territory beyond blind trust', 55 *Common Market Law Review* (2018), p. 505; W. van Ballegooij and P. Bárd, 'Mutual recognition and individual rights, did the court get it right?', 7 *New Journal of European Criminal Law* (2016), p. 461; G. Anagnostaras, 53 *Common Market Law Review* (2016), p. 1691; P.J. Martín Rodriguez, 'La emergencia de los límites constitucionales de la confianza mutua en el espacio de libertad, seguridad y justicia en la Sentencia del Tribunal de Justicia *Aranyosi y Căldăraru*', 55 *Revista de Derecho Comunitario Europeo* (2017) p. 887; A.P. van der Mei, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 900; and A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 8.
65. Case C-216/18 PPU *LM*, EU:C:2018:586. The issue had already been raised in the literature: see A.P. van der Mei, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 900; and A. Willems, *EUSA Fifteenth Biennial Conference* (2017), p. 8.

where the assurances cannot be satisfied by the issuing state may be solved through dialogue between authorities (for example, through diplomatic channels), which is clearly against the spirit of the EAW.[66]

B), Despite the issues and concerns described in the foregoing paragraphs, which might have to be addressed one day in the future, it is important to stress that this judgment is, in many respects, a one-of-a-kind decision, bringing up four aspects that should be highlighted:

(i) The protection of individual rights can be an actual obstacle to surrender pursuant to a EAW;
(ii) The presumption underlying mutual trust (and hence mutual recognition) can be rebutted;[67]
(iii) Implicitly, the CJEU has admitted that trust does not relate to the legal systems of the states, but to the *practice* of the respective authorities.[68] Trust is needed for taking a decision in circumstances where we do not know the factors that might be relevant for taking that decision. The legal systems of other states can be researched and assessed by the authorities of the requested state, in terms of evaluating whether or not they comply with human rights standards. Indeed, the Hungarian and Romanian *legal systems* are certainly commensurate with the jurisprudence of the European Court of Human Rights and the Charter;
(iv) Last but not the least, one of the most important consequences arising from *Aranyosi and Căldăraru* is, in our view, the pressure that is now put on Member States to make their prison system comply, in the actual practice, with human rights standards. Otherwise, they face the risk of having their requests for cooperation denied across the whole Union, in a systematic way. It may seem paradoxical, but, in the long run, nothing reinforces mutual trust more than ruling that trust is not a mere normative assumption: it must be earned and deserved.[69]

66. E. Sellier and A. Weyembergh, 'Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation. Study requested by the LIBE committee, Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union PE 604.977 - August 2018', *LIBE Committee* (2018), http://www.europarl.europa.eu/supporting-analyses, p. 114 et seq.
67. See also G. Vermeulen and W. de Bondt, who state that 'the politico-legal presumption (which has been upheld for too long) that EU Member per se comply with fundamental rights, has herewith come to an end' (G. Vermeulen and W. de Bondt, *Justice, Home Affairs and Security. European and International Institutional and Policy development* (2nd edition, Maklu, 2018), p. 97. J. Ouwerkerk wonders whether the little significance of the criminal offences that underlay the Hungarian and Romanian EAW's may have impacted to some extent on the Court's decision to accept the possibility for rebuttal of the mutual trust principle – 'the very foundation of the mutual recognition model after all' (J. Ouwerkerk, 'Balancing mutual trust and fundamental rights protection in the context of the European Arrest Warrant: what role for the gravity of the underlying offence in CJEU case law?', 26 *European Journal of Crime, Criminal Law and Criminal Justice* (2018), p. 108).
68. See P. Caeiro, 'Una nota sobre reconocimiento mutuo y armonización penal sustantiva en la Unión Europea', in L. Arroyo Jiménez and A. Nieto Martín (eds.), *El Reconocimiento Mutuo en el Derecho español y europeo* (Marcial Pons, 2018), p. 305–310.
69. As K. Lenaerts has put it, 'the ECJ has made it crystal clear that *mutual* trust is not to be confused with *blind* trust. Trust must be "earned" by the Member State of origin through effective compliance with EU fundamental rights standards' (K. Lenaerts, 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', 54 *Common Market Law Review* (2017), p. 840).

4. Mutual recognition: from being the 'drive belt' of the issuing state to a neutral principle of governance?

The decisions analysed above are based on two different understandings of mutual recognition.[70]

The first perspective views mutual recognition as a principle, the primary function of which is to convey the punitive claims of the Member States throughout the EU, pursuing the transnational enforcement of domestic decisions. As a matter of fact, such an understanding comes very close to what the International Criminal Tribunal for the Former Yugoslavia has named a 'vertical model' of cooperation.[71] In this sense, the principle is a command that is addressed to the executing state(s) ('you shall recognize') and greater and swifter judicial cooperation equates to abiding by the issuing state's warrants and decisions. In other words, mutual recognition works as an *amplifier*, a driver for the pan-European reach of the criminal policy of every single Member State.

The second perspective is construed as a neutral governance principle, which binds Member States to recognize each other's interests within a common framework of values, regardless of whether or not this leads to the actual 'execution' of the issuing state's decisions. 'Recognition' is not meant to prompt blind execution against the implicit guarantee of reciprocity ('mutual'); rather, it represents the acknowledgment of a particular duty to cooperate *because* the executing authority pertains to an integrated legal-political environment, bound by *common* rules and policies, the compliance with which is monitored and ensured by a preeminent authority (the EU). Who shall recognize what depends on the *concrete* features of each legal instrument at hand, with the help of the CJEU's interpretation. In this sense, the decisions taken by the executing authority that deny the cooperation sought, or provide it in a way that does not perfectly match the endeavour of the issuing Member State, are also positive candidates for mutual recognition,[72] *as long as they comply with the common applicable framework*.

The early case law on detention seems to have embraced different aspects of the first notion of mutual recognition.

In *Lanigan*, mutual recognition was reduced to securing effective cooperation within a strictly bilateral structure that does not accommodate other interests, such as the legitimate expectations for a swift surrender procedure created by the time limits for the decision laid down in the EAW FD. The regulation of those interests was excluded from the framework of mutual recognition and referred back to the states, even when it is of European concern, because such interests are

70. On the absence of a binding definition of the principle of mutual recognition in European or Portuguese law, P. Caeiro and S. Fidalgo, 'O Mandado de Detenção Europeu na experiência Portuguesa: tópicos da primeira década', in P. Caeiro (ed.), *Temas de Extradição e Entrega* (Almedina, 2015), p. 162 and 194; see also A. Klip, *European Criminal Law. An Integrative Approach*, p. 26.

71. On the distinction between the 'horizontal' and 'vertical' models of judicial cooperation, see B. Swart, 'International cooperation and judicial assistance – general problems', in A. Cassese, B. Gaeta and J. Jones, *The Rome Statute of the International Criminal Court – A Commentary* (Volume II, Oxford University Press, 2002), p. 1592 et seq.

72. The argument is fully in line with the perspective pursued in the first decision of the CJEU on *ne bis in idem*: see Joined Cases C-187/01 and C-285/01 *Gözütok and Brügge*, EU:C:2003:87, para. 33: 'there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States *even when the outcome would be different if its own national law were applied*' (emphasis added). This is particularly significant, because *ne bis in idem* is arguably the *sole* instance of true and proper recognition in the area of criminal justice, if we take the expression in its strict sense: compare, C. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press, 2013), p. 133 et seq.; and P. Caeiro, in L. Arroyo Jiménez and A. Nieto Martín (eds.), *El Reconocimiento Mutuo en el Derecho español y europeo*, p. 306 et seq.

generated by EU law. The *JZ* judgment, along with a negative definition of the 'autonomous' EU concept of detention, has applied the reasoning followed in *Melloni* and *Jeremy F*. to the field of detention: the minimum rights granted by the FD can be upgraded so long as they do not jeopardize cooperation. Finally, in *Ognyanov*, the CJEU implied that mutual recognition binds the executing state to respect the interest of the issuing state, even when it leads to manifestly awkward results from the perspective of the goal pursued by the European act at stake (fostering better social rehabilitation).

Conversely, in *Aranyosi and Căldăraru*, one can perceive some opening to a more neutral understanding of the principle of mutual recognition. The CJEU introduced a dynamic notion of mutual trust as a precondition to mutual recognition, which can lead to an appreciation of whether the conditions for trust, and thus mutual recognition are met. This postulates the construction of mutual recognition as a neutral governance principle. Indeed, if mutual trust is not a given, as the CJEU seems to suggest, and it can be assessed on a case by case basis *through common objective parameters*, the decisions deserving recognition may either be rendered by the issuing or the executing authority.

The implications of *Aranyosi and Căldăraru* will probably improve conditions for cooperation, and hence boost mutual trust and the effectiveness of cooperation, to the extent that the ruling forces Member States to raise/keep their fundamental rights standards, for example in terms of detention conditions, fair-trial, and so forth, if they wish to see their requests executed.

If the CJEU continues to uphold this line of reasoning, mutual recognition could evolve from a content-laden principle – aiming at amplifying the punitive claim of a given Member State all over the area of freedom security and justice – into a more neutral principle, under which the decisions of the executing state that do not provide the sought-after cooperation are not seen as a failure of the EU legal regime of judicial cooperation, but rather as a normal result of the mechanism embedded therein.

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