

## **Informal JHA Ministerial Meeting (Justice)**

**31 January 2025, Warsaw**

### **Working session I – Discussion paper:**

#### **Rule of Law challenges and their impact on mutual cooperation in the Area of Justice**

### **Introduction**

“Each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU” declared the Court of Justice of the European Union (CJEU) in its landmark *Opinion 2/13*. In this opinion, the CJEU indicated that the principle of mutual trust requires Member States, particularly in the Area of Freedom, Security, and Justice (‘AFSJ’), to consider that the other Member States are complying with EU law and particularly with the fundamental rights recognised by EU law. As such, except in exceptional cases, they may not check whether another Member State has, in a specific case, observed the fundamental rights guaranteed by the EU.

Since then, notably as the result of a number of preliminary references, CJEU jurisprudence has outlined the conditions under which mutual trust may be questioned, limiting in certain circumstances the application of the mutual recognition principle. At the same time, the CJEU has in recent years paid closer attention to the erosion of the rule of law at the national level, which not only undermines the EU’s core values, but also disrupts daily cooperation between EU Member States and, ultimately, affects individuals.

This discussion paper summarises the developments in EU law and in CJEU case law concerning the relationship between the mutual recognition mechanism, on the one hand, and the need to uphold the rights enshrined in the Charter of Fundamental Rights, on the other. It invites reflection on the best way to ensure the smooth functioning of the AFSJ, while protecting fundamental rights and preserving the rule of law.

### **What the CJEU says**

The CJEU’s case law, among others, has highlighted instances of breaches of democratic values and fundamental rights, which have in turn impacted the functioning of legal instruments such as the European Arrest Warrant (EAW). The potential impact of this response was perhaps not initially foreseen – with both *Opinion 2/13* and the *Melloni* judgement prioritising the objectives that underpin mutual recognition requests over the protection of fundamental rights.

This perspective evolved in the *Aranyosi and Căldăraru* joint cases judgment, which mandated the executing state authorities to base surrender decisions on an informed and more rigorous assessment of fundamental rights compliance linked to detention conditions in the state issuing an arrest warrant. If the executing judicial authority has evidence of a potential for or risk of inhumane treatment, it should assess whether the general detention conditions in the issuing Member State could pose a real risk of breaching Article 4 of the Charter (i.e. prohibition of torture and inhuman or degrading treatment or punishment) and whether there are substantial grounds for believing that the person in question will be exposed to that risk.

Subsequent cases addressed critical aspects of the EAW, such as its validity (*Bob-Dogi*), the definition of judicial authorities (e.g. *Poltorak*, *Özçelik*, *Kovalkovas*), or trials in absentia (*Dworzecki*). Gradually, the role of the executing authorities in terms of ensuring respect for the Charter has been further clarified.

Last but not least, a significant evolution came with the 2018 *L.M.* case (C-216/18 PPU), where the CJEU introduced a two-step test for executing judicial authorities that harbour doubts as to the independence of the issuing Member State's judiciary:

“Where the executing judicial authority ... has material ... indicating that 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, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which the European arrest warrant was issued, and in the light of the information provided by that Member State pursuant to Article 15(2) of that framework decision, there are substantial grounds for believing that that person will run such a risk if he or she is surrendered to that Member State”.

This two-step test was reaffirmed in *Openbaar Ministerie* (joined cases C-354/20 PPU and C-412/20 PPU), leading to instances where EAW requests have been denied after executing authorities applied the test. *Although not without alternative proposals in the legal doctrine (Rizcallah, 2022)*, the exceptional character of the two-step test has been confirmed in the judgments in *Puig Gordi and Others* (C-158/21) and *Breian* (C-318/24 PPU). Other important cases pending before the CJEU on the interplay between mutual recognition and fundamental rights are C-528/24, *Boothnesse* (the scope of the notion of an offence) and C-483/24, *Tagu (disproportionate sanction)* on the EAW, as well as case C-8/24 concerning Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders and the concerns regarding trials in absentia.

It should be added that, while the CJEU allows for the suspension of mutual recognition under certain conditions, it has not established new grounds for refusal, leaving such prerogatives to the EU legislator, while the matter remains relevant not only for the EU but also for the entire European Economic Area (EEA) area, as well as the United Kingdom.

At the same time, FRA reports, such as the 2020 Report on Detention Conditions – New Tool for Legal Practitioners Dealing with EAWs, exemplify the growing interest in the role of fundamental rights in the mutual recognition system.

## What EU Law says

EU law indeed does, in some instances, explicitly allow refusal of recognition and execution decisions on fundamental rights grounds, although such provisions are relatively recent. For example:

1. The **2024 Regulation on the transfer of proceedings in criminal matters** provides for the possibility of refusing the execution of EAW, in exceptional situations, where there are substantial grounds to believe, on the basis of specific and objective evidence, that the surrender would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right, as enshrined in Article 6 TEU and the Charter.
2. The **2023 e-evidence Regulation** permits, where notification has taken place, an objection by the Member State where a service provider is located to the transfer of the evidence by the service provider if “in exceptional situations, there are substantial grounds to believe, on the basis of specific and objective evidence, that the execution of the order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in Article 6 TEU and in the Charter”.
3. The **2018 Regulation on the mutual recognition of freezing and confiscation orders** provides a ground for refusal where, in exceptional situations, the execution of the confiscation/freezing order would, in the particular circumstances of the case, entail a manifest breach of a relevant fundamental right as set out in the Charter, in particular the right to effective remedy, the right to a fair trial or the right of defence, as well as a separate ground for refusal based on the impossibility of executing an order in view of the rights of the affected persons.
4. Going even further back, the **2014 European Investigation Order Directive** includes a ground for refusal when “there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter”.

The existence of fundamental rights-related grounds for refusal has become one of the key contentious issues during the legislative work, with two important objectives (mutual trust and respect for fundamental rights and the rule of law) being subject to a careful balancing act.

## Conclusions and Questions

While the General Affairs Council remains a key forum for discussing rule of law and democratic standards among EU Member States, the importance of respecting fundamental rights and the rule of law within the EU's justice area cannot be overstated, since well-functioning, efficient and fully independent justice systems are crucial for the application and enforcement of EU and national law.

Therefore, Justice ministers are invited to further discuss the current state of play on the functioning of mutual cooperation in the Justice Area with a view to ensuring respect for fundamental rights and the rule of law, mindful of its relevance for the whole EU/EEA area.

1. **Glass Half Empty or Half Full?** Does the current legal framework achieve the right balance between mutual recognition and the protection of fundamental rights? Is there a trend of invoking fundamental rights violations that risks undermining the mutual recognition system, or does this represent a critical assessment of EU values that all Member States must adhere to?
2. **Strengthening Mutual Trust.** What measures can further enhance mutual trust and ensure the smooth functioning of the mutual recognition principle? Are there specific areas - such as judicial independence, the right to a fair trial, or detention conditions – on which greater focus is needed?