

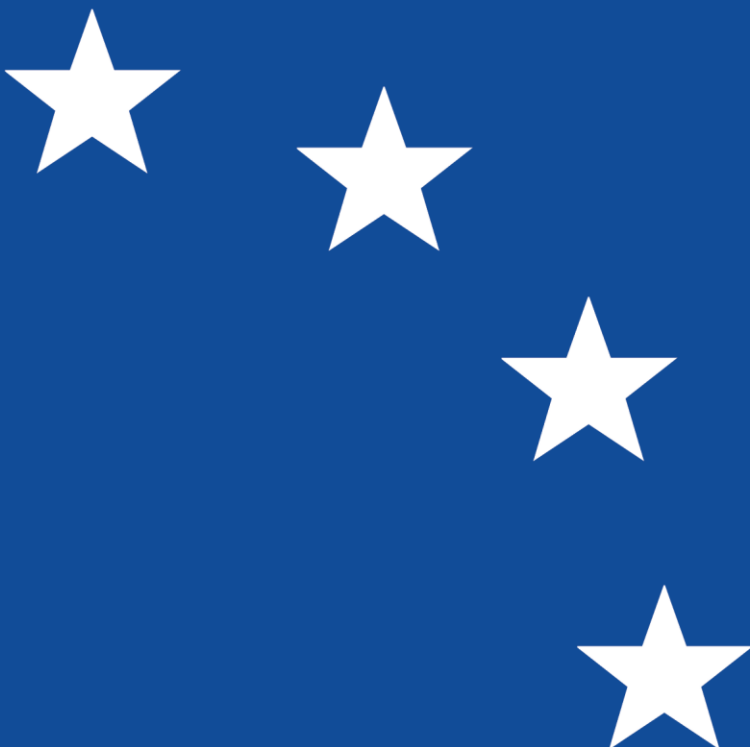


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The Principle of Mutual Recognition Based on Mutual Trust and the Respect for Fundamental Rights: The Case of the Framework Decision on the European Arrest Warrant

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Executive Summary

This study examines whether, when applying the principle of mutual recognition based on mutual trust, a balance should be found between this principle in the case of the FD EAW and the protection of FR, and if yes, what kind of balance could be found. A first element stressed is the existence of a problematic issue through an analysis of the mutual recognition principle based on mutual trust in the European criminal justice system, of the respect for FR at EU Level and the relationship between them in the case of the EAW. Secondly, due to the presumption of compliance by other MSs with EU law and specifically with FR, the explicit referral of the grounds of non-execution of the EAW and the absence of an explicitly declared and accepted legal basis of the violation of FR as a ground for refusal to execute a EAW, the analysis of the relevant jurisprudence at European level (namely of the ECtHR and the CJEU by focusing on the two cases C-404/15 *Aranyosi* and C-659/15 *PPU, Căldăraru*) is essential. Under this jurisprudence the need and the willingness to secure on the one hand the effectiveness of mutual recognition and consequently of the EAW mechanism and on the other hand the protection of FR is affirmed. Consequently, as the obligation to find a balanced relationship between mutual recognition and protection of FR is demonstrated, the elements, which can lead to an effective balance, such as the violation of FR as a ground of non-execution of a EAW and the harmonisation of national legislation in the area of EU Criminal Procedural Law are examined.

List of Abbreviations

art	article
CahdrEurop	Cahiers de droit européen
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of European Union
CMLR	Common Market Law Review
EAW	European Arrest Warrant
ECLR	European Criminal Law Review
ECHR	European Convention on Human Rights
EctHR	European Court of Human Rights
Edn	edition
eds	editions
ELR	European Law Review
EPL	European Public Law
EU	European Union
FD	Framework Decision
FD EAW	Framework Decision on the European Arrest Warrant
FR	Fundamental Rights
JprIL	Journal of Private International Law
JZ	Juristen Zeitung
MJ	Maastricht Journal
MS	Member State
MSs	Member States
NJECL	New Journal of European Criminal Law
RGDIP	Revue Générale de Droit International Public
RLR	Ritsumeikan Law Review
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZIS	Zeitschrift für Internationale Strafrechtsdogmatik

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1. Introduction

Nearly 12 years of practice with the FD EAW¹ have demonstrated that EAW was not only the first but probably also the most important instrument of enhancing judicial cooperation between MSs of the EU in criminal matters based on the mutual recognition principle.

In light of the central presumption that MSs should trust each other,² there is an objective to limit the restrictions of free movement between them and to create an Area of Security, Freedom and Justice. On the basis of a simplified mechanism,³ a MS executes a EAW which is issued by another MS, by surrendering the requested person to the issuing MS.

Although mutual recognition based on mutual trust is the key principle of the FD EAW, its application is limited by grounds for refusal and other guarantees. It is evident that the concept of mutual recognition is restricted, flexible and quasi-automatic. However, so as to maintain the effectiveness of mutual recognition, the referral of the grounds for refusal to execute an EAW is explicit.

The FD EAW is simultaneously one of the most debatable instruments.⁴ Its disputable character is caused by the fact that many issues have been raised on the basis of its interpretation; this concerns maintaining a fragile balance between its effectiveness, in terms of the effective application of the principle of mutual recognition based on mutual trust and the protection of FR.

2. The Problematic Issue

By recital 12 of the FD: ‘This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union’. Under Recital 13 ‘no person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. Under art 1(3), the ‘Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the

¹ Council Framework Decision 2002/584/JHA of June 2002 on the European arrest warrant and surrender procedures between Member States (OJ 2002 L190/1).

² Lars Bay Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’ in P Cardonnel/A Rosas/N. Wahl (eds) *Constitutionalising the EU judicial system: Essays in Honour of Pernilla Lindh* (Oxford, Hart Publishing 2012) 139, 148.

³ Valsamis Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing 2009) 116.

⁴ Ester Herlin-Karnell, ‘From mutual trust to the full effectiveness of EU laws: 10 years of the European arrest warrant’ (2013) ELR 373, 373-374; Luisa Marin, ‘Effective and Legitimate?, Learning from the lessons of 10 Years of Practice with the European Arrest Warrant’ (2014) 5 [3] NJECL 327, 327.

Treaty on European Union.’⁵

Based on the mutual recognition principle and the obligation to respect FR the presumption that the issuing MS fulfills its obligation and so the executing MS should rely on this fact and trust the criminal justice system of the issuing MS is justified.⁶ Following this mechanism art 1(3) can be regarded as a general declaratory confirmation of the obvious obligation of the MSs to protect FR when issuing and executing a EAW.⁷ Additionally, the effectiveness of the EAW constitutes a priority, which can be endangered in cases of a double control of FR by both the issuing and the executing MSs concerning the situation in the issuing MS, mainly due to the fact that it is time-consuming.

Notwithstanding the presumption of compliance by other MSs with EU law and specifically with FR, mutual trust can be shaken or broken in case of an insufficient protection of FR in the issuing State. This is the consequence of the actual divergent level of protection of FR amongst MSs and the absence of a certain degree of harmonisation or approximation.⁸

Literature⁹ based on recitals 12 and 13 and art 1(3) indicates that the grounds for non-execution are not made explicit and the respect for FR constitutes an additional condition of EAW execution. Consequently, art 1(3) allows the executing MS to check if the issuing MS respects FR during the criminal procedure.¹⁰

In the area of asylum law, the ECtHR¹¹ and the CJEU¹² have decided that despite the existence of the presumption of protection of FR, serious indications of an insufficient treatment could not be ignored and the issue of FR should be effectively addressed.¹³ In contrast with the area of asylum law, there has not been a similar decision in EU criminal law. However, on 5 April 2016 the CJEU addressed these questions in two cases C-404/15, *Aranyosi* and C-659/15

⁵ Ibid 1.

⁶ Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’ (n 8) 148.

⁷ Joachim Vögel, in H Grützner/P-G Pötz/C Kreß (eds) *Internationaler Rechtshilfeverkehr in Strafsachen* (IRG-Kommentar, 5th edn, CH BECK 2012) art 73, Rn 138.

⁸ Torbjörn Andersson, ‘Harmonisation and mutual recognition: how to handle mutual distrust’ (2006) 17 [3] ELR 747, 751-752.

⁹ Paul Garlick, ‘The European Arrest Warrant and the ECHR’ in R. Blekxtoon/W van Ballegooij (eds) *Handbook on the European Arrest Warrant* (The Hague, TMC Asser Press 2005) 167, 169; Wouter van Ballegooij, Geraldine Gonzales, ‘Mutual Recognition and Judicial Decisions in Criminal Matters: A ‘Rule of Reason’ for Surrender Procedures?’ in A Schrauwen (ed) *Rule of Reason: Rethinking another Classic of European Legal Doctrine* (Europa Law Publishing 2005) 163, 165; Nicola Vennemann, ‘The European Arrest Warrant and Its Human Rights Implications’ (2003) 63 *ZaöRV* 103, 115.

¹⁰ Vögel, in J Vögel/M. Grotz (eds) *Perspektiven des internationalen Strafprozessrechts* (n 61) 27.

¹¹ *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

¹² *Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and M E and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

¹³ Larsen, ‘Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice’ (n 8) 149.

PPU, Căldăraru.¹⁴

In conclusion, due to the absence of a declared clear legal basis and the unavoidable ‘conflict’ between the protection of FR and the effectiveness of the EAW mechanism,¹⁵ it is questionable whether, when applying the mutual recognition principle based on mutual trust, a balance should be found between this principle in the case of the FD EAW and the protection of FR? And if yes, what kind of balance could be found.

3. The Relationship Between the Mutual Recognition Principle and the Respect for FR Under European Jurisprudence

Although the CJEU and the ECtHR have different competences and in Opinion 2/13 the CJEU rejected the accession of the EU to the ECHR, the CJEU followed the *MSS* case of the ECtHR¹⁶ in the area of asylum law. Specifically, both courts accept the presumption of compliance by other MSs with EU law and specifically with FR and at the same time acknowledge how these presumptions can be undermined. Despite some differences both courts seek to reinforce the protection of FR of individuals and have decided that under specific conditions in exceptional circumstances a violation of FR can result in a limitation of mutual recognition and trust.

Additionally, a strong willingness to find a balance and a resonant change of the direction of CJEU jurisprudence concerning the problematic issue in the area of the EAW is evident after its *Aranyosi* and *Căldăraru* judgments. Before these cases the CJEU had not decided upon this matter. Although it recognised the importance and obligation of respect for FR, it did not want to undermine the effectiveness of mutual recognition and did not recognise the violation of FR as a ground of non-execution of the EAW. Nevertheless concerning *Aranyosi* and *Căldăraru* cases, under which the CJEU applied the *NS* case¹⁷ with some differences, not only can the violation of an absolute FR lead to a refusal of the execution of the EAW. But the executing and issuing MSs are also obliged to cooperate and exchange information about the situation in the issuing MS concerning the conditions of detention for the individual requested. The main problematic issue, which remains questionable, is in cases of a violation of a derogable (relative) and not absolute FR the execution of the EAW could also be

¹⁴ Joined Cases C-404/15 and C-659/15 *PPU Pál Aranyosi and Robert Căldăraru v Generalstaats-anwaltschaft Bremen* [2015].

¹⁵ Vögel, in H Grützner/P-G Pötz/C Kreß (eds) *Internationaler Rechtshilfeverkehr in Strafsachen* (n 105) Art 73.

¹⁶ *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011).

¹⁷ Joined Cases C-411/10 and C-493/10 *NS v Secretary of State for the Home Department and ME and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECR I-13905.

refused.

In trying to respect and maintain the effectiveness of the mutual recognition mechanism and to reinforce cooperation between MSs, the CJEU has adopted a more effective balance between mutual recognition and the respect for FR, in the Area of Freedom, Security and Justice, between security (the battle against impunity) and freedom (the protection of FR),¹⁸ than the ECtHR. In this way it is proven that not only is mutual trust not blind but also that it is being built between MSs.

4. The Need of a Balance Between Mutual Recognition Principle and the Respect for FR in the Case of the FDEAW

4.1. The Violation of FR as a Ground for Refusal to Execute a EAW

The EAW mechanism constitutes a distributive intergovernmental process. This means that the two cooperating MSs can only have responsibility for part of the procedure which takes place in their territory under the condition that this sharing procedure, in its entirety, assures the protection of FR of the requested person.¹⁹

However, the fact that the EAW mechanism has been adopted under the Area of Freedom, Security with the aim to reinforce judicial cooperation between MSs in criminal matters cannot and should not have as a result the mutual transfer of responsibilities between the issuing and executing MS. The mutual recognition mechanism cannot lead to a bipolar system of judicial cooperation under which the requested person is only the object of this procedure and is left without personal rights.

The sharing procedure of the EAW mechanism consequently has the force of the ‘Kombinationsprinzip’.²⁰ This means that the executing and issuing MSs have the responsibility to assure a certain level of legal protection whereby legal gaps – which have been known to exist due to this cooperating procedure²¹ – concerning the legal protection of the requested person must be avoided. Indeed, the CJEU affirms this consideration by stating that the executing and issuing MS have an obligation to cooperate in case of the existence of

¹⁸ Anne Weyembergh, Emmanuelle Bribosia, ‘Les affaires Aranyosi et Caldaru ou la contribution de la Cour de justice de l’Union européenne à l’équilibre entre liberté et sécurité’ (n 181).

¹⁹ Albin Eser, ‘Human Rights Guarantees for Criminal Law and Procedure in the EU-Charter of Fundamental Rights’ in International Symposium on EU-Integration and Guarantee of Human Rights Session II (2009) [26] R:L-R-163, 168; Vögel, in H Grützner/P-G Pötz/C Kreß (eds) Internationaler Rechtshilfeverkehr in Strafsachen (n 105) art 1, Rn 40.

²⁰ Vögel, in H Grützner/P-G Pötz/C Kreß (eds) Internationaler Rechtshilfeverkehr in Strafsachen (n105) art 1, Rn 41.

²¹ *ibid* art 1, Rn- 41.

a lack of legal protection of the requested person.²²

However, the high level of mutual trust between MSs, on which the EAW mechanism is based, must also be taken into consideration. The principle that MSs trust the criminal justice system of the other MSs and the presumption of protection of FR create a likelihood or expectation of legality of the EAW and criminal procedure. Nevertheless, mutual trust constitutes a dynamic concept, and the mutual recognition principle is restricted, flexible and quasi-automatic and the protection of FR can be endangered in exceptional cases. Consequently, the presumption can be falsified in exceptional cases.

The obligation of the EU legislator and MSs when they are implementing EU law is to respect FR. Article 1(3) FD EAW merely confirms that the FD EAW does not oblige MSs to execute the EAW when it is in opposition to the general principles of the EU and FR under art 6 TEU. The FD EAW must be interpreted, and is interpreted by the CJEU, in that way so as to be in conformity with primary EU law and specifically with art 6 TEU.²³

As a result, the FD EAW excludes the execution of the EAW when the surrender of the requested person is in opposition to FR guaranteed under the ECHR, CFREU and constitutional traditions common to MSs.

However, MSs have the possibility to limit the above prohibitions by adopting relative grounds of non-execution.²⁴ This must be achieved without adopting other grounds of non-execution which do not come from the FD EAW and endanger the effectiveness of the EAW mechanism.²⁵ Due to the possibility of general suspension of the EAW mechanism in cases of a serious and constant violation of FR guaranteed under art 6 TEU, as noted in recital 10 FD EAW,²⁶ there is a real risk of violation of FR of a requested person. This must be assessed *in concreto*, which is necessary for the non-execution of the EAW.²⁷ Taking into consideration these limitations and the above possibilities many MSs, such as United Kingdom, Austria, Germany and Greece, have adopted, under their national legislation, the general ground for non-execution on the basis of the violation of FR guaranteed under the ECHR or under art 6 TEU.²⁸

For these reasons the violation of FR constitutes a ground for refusal to execute the

²² Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaats-anwaltschaft Bremen* [2015].

²³ Martin Böse, i H. Grützner/P-G Pötz/C Kreß (eds) *Internationaler Rechtshilfeverkehr in Strafsachen* (n 105) art 78, Rn 20; Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285, para 59.

²⁴ *TI v UK* App no 43844/98 (ECtHR, 7 March 2000); *KRS v UK* App no 32733/08 (ECtHR, 2 December 2008).

²⁵ Μουζάκης, 'Το ευρωπαϊκό ένταλμα σύλληψης' (n 195) 369.

²⁶ Verena Murschetz, 'Auslieferung und Europäischer Haftbefehl' (Wien New York, Springer 2007) 349.

²⁷ Rohlff, *Der Europäische Haftbefehl* (n 63) 75.

²⁸ Μουζάκης, *Το ευρωπαϊκό ένταλμα σύλληψης* (n 195) 369-370.

EAW in exceptional cases under the legal basis of art 6 TEU, although it is not referred to explicitly. In my view the CJEU has also affirmed this practice.²⁹ The recognition of the violation of FR as a ground of non-execution of the EAW means that a more effective protection of FR is established in the EU and mutual trust is in fact built between MSs without being blind and engenders a real and effective cooperation between MSs. An indifference to the protection of FR would not only lead to a violation of EU law but also to an underestimation of trust and belief in the integrity and efficiency of other MS's judicial systems. As a result, a balance between the mutual recognition principle and the respect for FR in the case of the EAW due to the reinforcement of the cooperation between MSs has been found by respecting a fair Unity in Diversity.

4.2. The Need of Harmonisation/Approximation over Mutual Recognition?

The main reason why it is difficult to achieve a harmonious balance between the mutual recognition principle and the respect for FR is the lack of harmonisation/approximation of criminal law – both substantial and procedural. As Gomez-Jara Diez states, the ‘cart of mutual recognition’ has been put before the ‘horse of harmonisation’.³⁰

The aim of the mutual recognition mechanism is to achieve unity at EU level but also for this to be based on a background characterised by diversity. This diversity provides many benefits but also challenges, such as the endangerment of the protection of FR. If this diversity is not managed effectively, for example through harmonisation/approximation of national laws, unity and the means of achieving it, the mutual recognition will also be endangered. Harmonisation facilitates mutual recognition; it is therefore necessary for its effectiveness and reinforces mutual trust. This is the reason why the European Commission has proposed a noteworthy list of Green Papers on harmonisation/approximation of criminal procedural law³¹ and this is explicitly stated under its communication of 19 March 2014.³²

²⁹ Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaats- anwaltschaft Bremen* [2015].

³⁰ Carlos Gomez-Jara Diez, ‘European Arrest Warrant and the Principle of Mutual Recognition’ (2006) [1-2] *Eucrim* 23, 23.

³¹ Green Paper on compensation to crime victims, 28 September 2001, COM (2001) 536 final; Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, 11 December 2001, COM (2001) 715 final; Green Paper from the European Commission – Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, COM (2003) 75 final; Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM (2004) 334 final; Green paper on obtaining evidence from one MS to another and securing its admissibility, COM (2009) 624 final.

³² Communication from the Commission to the European Parliament and the Council A new EU Framework to strengthen the Rule of Law of 19 March 2014 COM (2014) 158 final/2.

This begs the question: can a MS recognise and trust, upon a logical basis, a decision of another MS, which is completely different from its own? The right answer in my opinion is in the negative.

Consequently, the harmonisation of criminal law can effectively help find a real balanced relationship between mutual recognition and respect for FR.

Although there is no need to prioritise harmonisation over mutual recognition, there is a need to combine the two so as to ensure the effectiveness of the EAW mechanism and respect for FR. Unity in Diversity and a balance between mutual recognition and the respect for FR is possible only if on the one hand Diversity and respect for FR do not endanger Unity and mutual recognition and on the other hand Unity and mutual recognition do not ignore its being influenced by Diversity and respect for FR.

5. Concluding Remarks

At EU level there is Unity between MSs but it should not be ignored that it is a Unity in Diversity. The existence of this diversity, especially in the area of EU criminal law cannot lead to an automatic and absolute mutual trust. Furthermore, at the EU level, specifically in the case of the EAW, there is the need and an obligation placed on MSs to protect FR. Despite the explicit referral of the grounds of non-execution of the EAW under art 6 TEU, a violation of FR under specific conditions leads, and should lead, to a limitation of the mutual recognition principle and as a result of the execution of the EAW.

Nevertheless, in my opinion the only remarks upon the balance decided by the CJEU are that a limitation of the EAW mechanism should also be applied in case of a violation of FR of a relative character. Any violation of FR should be recognised explicitly as a ground of refusal of execution of a EAW based on art 6 TEU. In this way an even more effective balance would be found.

However, a complete assurance of the protection of FR cannot be achieved only by balancing mutual recognition and respect for FR. Due to this fact a parallel harmonisation/approximation of national laws would substantially ensure both the effectiveness of the EAW mechanism and the respect for FR.

In conclusion, a balance between the principle of mutual recognition based on mutual trust and the respect for FR can be found. Specifically the objectives of this balance should be the simultaneous assurance of the effectiveness of protection of FR and the mutual recognition mechanism. This balance is possible, as the CJEU has recently confirmed, but it is also

necessary for the creation of an Area of Freedom, Security and Justice based on Unity in Diversity.

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