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Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant.

Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, Judgment of the Court of Justice (Grand Chamber) of 5 April 2016, EU:C:2016:198

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Abstract

'This case-note provides a critical overview of Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*. The CJEU provides a fair balance of the principles of mutual trust and recognition with the protection of the fundamental rights of the requested person. Instead of introducing a new ground of refusal for a European Arrest Warrant based on the breach of fundamental rights, the CJEU opted for a ground of postponement. Furthermore, it brings its two-tier 'systemic deficiencies' test closer to the standards used by the ECtHR and encourages dialogue between the issuing and executing judicial authorities. Nevertheless, the scope of application of the new ground of postponement is not entirely clear and it is not yet sure what happens after the executing judicial authority postpones its decision due to evidence of a real risk that the requested person will be subjected to inhuman and degrading treatment in the issuing Member State'

Keywords

European Arrest Warrant, Grounds of Refusal, Mutual Recognition, Fundamental Rights

1. Introduction

The Court of Justice of the European Union's (CJEU) case-law in matters concerning Justice and Home Affairs (JHA) is flourishing in the post-Lisbon era.[1] In the area of asylum the CJEU is not only providing interpretations of secondary EU law instruments,[2] but it is also faced with the interplay between the fundamental rights of asylum seekers and the principles

[1] See S. Peers, 'Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon', 48 *Common Market Law Review* (2011) 661-693.

[2] Interpretation of Council Directive 2003/9/EC: Case C-562/13, *Moussa Abdida* [2014] EU:C:2014:2453; Interpretation of Council Regulation (EC) No 343/2003: Joined Cases C-411/10 and C-493/10, *N.S. and Others v Secretary of State* [2011] EU:C:2011:865; Interpretation of Regulation (EU) No 604/2013 (Dublin III): Opinion of AG Sharpston in Case C-62/15, *Ghezelbash*, nyr and in Case C-155/15, *Karim v Migrationsverket*, nyr.

of mutual trust and recognition.[3] Mutual trust is also playing an increasing role in the area of civil cooperation and cases concerning the Brussels II Regulation.[4] With the integration of the former Police and Judicial Cooperation in Criminal Matters pillar into the overall EU (former Community) legal framework, the number of cases concerning the interpretation of legal instruments in this field has also increased. The interpretation of the Framework Decision on the European Arrest Warrant (FD-EAW) took centre stage in cases such as *Melloni*[5] or *Lanigan*.[6] Similarly to the asylum cases, in the criminal justice area as well the CJEU is increasingly faced with balancing fundamental rights with the principles of mutual trust and mutual recognition.

On a different note, the European Court of Human Rights (ECtHR) is also increasingly faced with asylum cases concerning EU Member States,[7] or cases on the prison standards in certain EU Member States.[8] Moreover, the relationship between the ECtHR and the CJEU has become colder following the CJEU's *Opinion 2/13* on the incompatibility of the Accession Agreement of the EU to the ECHR with the EU legal order.[9]

In this buzzling legal landscape Joined Cases *Aranyosi and Căldăraru*[10] bring much needed developments. The following sections, in the format of a traditional case note, will lay out the facts of the cases (Section 2), the arguments of the Advocate General (Section 3) and those of the Grand Chamber (Section 4). Section 5 will first provide a commentary of the Advocate General's Opinion, followed by a discussion of the Grand Chamber's judgment in light of three factors. First, given the constitutional importance of mutual trust and recognition in the Area of Freedom Security and Justice (AFSJ), and not only, it has to be assessed how this new judgment will affect the balance between these principles and the protection of fundamental rights. Second, the Grand Chamber introduced a new ground of postponing the execution of a European Arrest Warrant (EAW). Thus, it is important to understand how this new exception operates. Third, it is also important to see whether the CJEU decided to thaw the frosty relationship between it and the ECtHR by moulding its own standards of fundamental rights protection to better fit the standards used by Strasbourg.

2. The legal and factual background of the cases

In both *Aranyosi* (C-404/15) and *Căldăraru* (C-659/15 PPU) the Higher Regional Court of Bremen (*Hanseatisches Oberlandesgericht in Bremen*) referred two nearly identical

[3] C-411/10 and C-493/10, *N.S. and Others, loc. cit.*; Case C-394/12, *Abdullahi v Bundesasylamt* [2013] EU:C:2013:813; C-562/13, *Abdida, loc. cit.*

[4] Case C-428/15, *Child and Family Agency* (pending). See Sz. Gáspár-Szilágyi, 'Mutual Trust before the Court of Justice – a view from CJEU Judge Sacha Prechal' (2015) <https://acelg.blogactiv.eu/2015/11/11/mutual-trust-before-the-court-of-justice-a-view-from-cjeu-judge-sacha-prechal/>, accessed 18 April 2016.

[5] Case C-399/11, *Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

[6] Case C-237/15 PPU, *Minister for Justice and Equality v Francis Lanigan* [2015] EU:C:2015:474.

[7] ECtHR, *M.S.S. v Belgium and Greece* (No 30696/09) 21 January 2011, para 365; *Tarakhel v Switzerland* (No 29217/12) 4 November 2014, para 93.

[8] ECtHR, *Vociu v Romania* (No 22015/10) 10 June 2014; *Bujorean v Romania* (No 13054/12) 10 Sept 2014; *Marin v Romania* (No 79857/12) 10 June 2014; *Burlacu v Romania* (No 51318/12) 10 Sept 2014; *Varga and Others v Hungary* (Nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13) 10 June 2015.

[9] *Opinion 2/13 (Accession to the ECHR)* [2014] EU:C:2014:2454.

[10] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [2016] EU:C:2016:198.

questions under Article 267 TFEU to the CJEU concerning the interpretation of Articles 1(3), 5 and 6(1) FD-EAW.

In the case of Mr. Aranyosi the Hungarian District Court of Miskolc (*Miskolci Járásbíróság*) issued an EAW for the surrender of the defendant to the Hungarian judicial authorities for the purposes of criminal prosecution for several offences of theft.[11] In the case of Mr. Căldăraru the Romanian Court of First Instance of Făgăraș (*Judecătoria Făgăraș*) issued an EAW for the purposes of executing a prison sentence of one year and eight months for driving without a license.[12] Both defendants were arrested in Bremen, Germany, but did not consent to their surrender. The General Prosecutor of Bremen (*Generalstaatsanwaltschaft Bremen*), concerned about the detention conditions in some Hungarian and Romanian prisons, asked the issuing judicial authorities to provide information on the facilities in which the requested persons would be incarcerated.[13] The Hungarian court found the question to be irrelevant, since the requested person was not yet convicted and the Hungarian criminal system provided for other coercive measures, than the deprivation of liberty.[14] The Romanian court could not yet indicate in which detention facility would Mr. Căldăraru be incarcerated.[15]

The General Prosecutor of Bremen requested the German court to declare the surrender of the defendants as being legal.[16] The defendants, on the other hand, requested that the surrender be rejected, since it would be impossible to check the prison conditions, given that the national courts did not specify the prison in which the defendants would be held.[17]

The Higher Regional Court of Bremen held that the request by Hungary and Romania complied with the formal conditions laid down in the German implementing measure of the FD-EAW,[18] and the criminal offences committed by the defendants were punishable under both the laws of the issuing Member States and German Law. Nevertheless, the German court also held that the surrender could be declared illegal if it contravened Article 73 of the German Implementing Law, under which a judicial surrender could not contravene the essential principles of the German legal order and the principles stipulated in Article 6 TEU.[19] Based on the information before it, there were convincing indications that, if surrendered, the requested persons could be subjected to detention conditions which would violate Article 3 ECHR and the general principles of EU law enshrined in Article 6 TEU.[20]

In light of these considerations, the Higher Regional Court of Bremen referred the following two questions to the CJEU. *First*, whether Article 1(3) FD-EAW must be interpreted as meaning that a surrender for the purposes of prosecution *or* for executing criminal sanctions is illegal if serious indications exist that the conditions of detention in the

[11] ibid paras 29-31.
[12] ibid paras 47-52.
[13] ibid paras 33-34 and 56.
[14] ibid para 36.
[15] ibid para 56.
[16] ibid paras 37 and 56.
[17] ibid paras 37-39.
[18] ibid para 23. The FD-EAW was transposed into the German legal order in Articles 73 to 83k of the Law on International Legal Assistance in Criminal Matters (*Gesetz über die internationale Rechtshilfe in Strafsachen*).
[19] ibid paras 42, 57-59.
[20] ibid paras 40-42 and 61-62.

issuing Member State breach the fundamental rights of the individual and contravene the principles enshrined in Article 6 TEU or, whether in such cases the executing State can or should make its decision on the legality of a surrender dependent on assurances concerning the conditions of detention. In such a case can or should the executing State formulate minimum requirements as regards the conditions of detention? *Second*, Articles 5 and 6(1) FD-EAW must be interpreted as meaning that the issuing judicial authorities are also entitled to provide assurances regarding compliance with the conditions of detention or this right is in the competences of the executing State?

3. The Advocate General's Opinion. If not a ground for refusal then what?

Advocate General (AG) Bot began his fairly lengthy opinion[21] by laying out the main issue before the Court: the balancing of the protection of the fundamental rights of the requested persons with the principle of mutual recognition, which is the foundation of the AFSJ.[22]

Before going into his main arguments, the AG presented some preliminary observations on the difficulties and risks of transposing the principles developed in the Common European Asylum System (CEAS) to the very specific system of the EAW.[23] In *N.S. and Others*[24] the CJEU held that a Member State has the obligation not to transfer an asylum seeker to the Member State responsible for processing him/her, when the systemic deficiencies in the asylum process and in the reception conditions in that Member State could expose the asylum seeker to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter of Fundamental Rights (EU Charter).[25] According to the AG, an analogy between this case and the present joint cases was not possible for the following reasons.

First, *N.S. and Others* is a transposition of the principle recognized in Article 19(2) EU Charter and Article 3 ECHR, under which no one can be removed, expelled or extradited to a State where that person would be subjected to the death penalty, torture or inhuman or degrading treatment. On the other hand, according to a textual analysis of Recital 13 of the Preamble to the FD-EAW (a replica of Article 19(2) EU Charter), this principle was excluded from the FD-EAW since the legislator made no express reference to the surrendered person.[26]

Second, even though both the CEAS and the system of the EAW contribute to the achievement of the AFSJ, they pursue different objectives, are subjected to a different level of harmonization, and are structured around specific norms and principles.[27]

Following these considerations, the AG commenced the actual analysis, by first looking at whether Article 1(3) FD-EAW could be considered as a ground of refusal of an EAW. According to the AG, Article 1 FD-EAW recognizes the two founding principles of the EAW, the principles of mutual recognition of judgments, and the principle of mutual trust between Member States that they respected fundamental rights. Therefore, Article 1(3)

[21] Opinion AG Bot in Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [2016] EU:C:2016:140.
[22] ibid paras 3-4.
[23] ibid.
[24] C-411/10 and C-493/10, *N.S. and Others, loc. cit.*
[25] ibid para 42.
[26] ibid paras 45-48.
[27] ibid paras 49-54.

cannot be interpreted as providing for a new ground of refusal of an EAW, since it is merely a reminder for Member States to respect fundamental rights.[28] An interpretation according to which a new ground of refusal is created would upset the whole organization of the EAW system.[29] Such a situation was not envisaged by the drafters of the EAW and the CJEU also interprets the grounds of refusal in a restrictive manner.[30] Recital 10 of the Preamble to the FD-EAW, combined with Article 7(2) TEU, is a clear sign that the EU legislator aimed for a restrictive application of cases which involve the breaches of fundamental rights, because only the Council of the EU is given the prerogative to suspend the implementation of the FD-EAW in a given Member State, if persistent and systematic infringements of fundamental rights occur.[31]

The AG then goes on to discuss the principles of mutual recognition and mutual trust. The principle of mutual recognition represents the foundation of the AFSJ, which contributes to the achievement of this common area, even when no harmonization occurred.[32] The Court in its case-law has always preferred a very restrictive interpretation of this principle, in the sense of the automatic surrender of a requested person by the executing State and the limitation of the usage of the grounds of refusal.[33] With regard to the principle of mutual trust, the AG argued that it belongs to the foundational principles of the EU, such as the principles of supremacy and direct effect.[34] Citing *Opinion 2/13*, the AG stated that the principle of mutual trust opposes one Member State checking whether another Member State has complied in a concrete case with EU fundamental rights, because such a check would compromise the balance on which the EU is founded.[35] The AG also cited *Melloni* in order to prove that mutual trust and recognition are powerful enough to make a Member State lower its higher standards of fundamental rights protection when these principles would be compromised.[36]

A last argument against acknowledging Article 1(3) FD-EAW as a ground of refusal for the execution of an EAW is a more practical one. Since a number of Member States have overcrowded prisons, the introduction of this ground of refusal would paralyze the EAW system, given the potential number of cases in which executing Member States would be unwilling to surrender a requested person due to the prison conditions in the issuing Member State.[37] Nevertheless, as acknowledged in *Opinion 2/13*,[38] in certain exceptional circumstances, such as the ones in the cases at hand when the ECtHR has found systemic deficiencies of the prison conditions in the issuing Member State,[39] the executing judicial authority can ask the question whether the surrendered persons face a 'real risk' to be

[28] ibid paras 72-78.
[29] ibid para 79.
[30] ibid paras 81-83.
[31] ibid paras 83-87.
[32] ibid para 96.
[33] ibid paras 102-104, with reference to Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] EU:C:2003:87 and Case C-123/08, *Wolzenburg* [2009] EU:C:2009:616.
[34] ibid para 106.
[35] ibid para 109.
[36] ibid paras 117-119.
[37] ibid paras 122-131.
[38] *Opinion 2/13, loc. cit.*, para 191.
[39] See fn 9.

detained under the conditions signalled by the ECtHR.[40] It follows that the executing authority has to appreciate, following an exchange of information with the issuing authority, whether based on the provided information the surrendered person would in fact be detained in conditions which are disproportionate.[41]

The AG then turned to the last line of arguments based on the principle of proportionality. In cases such as the present ones it is necessary to ensure that a balance is struck between the rights of the surrendered persons and the necessities imposed by the protection of the fundamental rights and freedoms of others.[42]

The principle of proportionality finds its application in the field of 'individual' sentencing, when a court must take it into account not only when the sentence is pronounced but also when it is executed.[43] When a court hands down a sentence that implies the deprivation of liberty, it must also look at the conditions of detention and the objectives to be achieved by the punishment.[44] Such a proportionality analysis should also be carried out when an EAW is issued for the purposes of prosecution.[45] Even though this principle is not expressly stated in the FD-EAW, Member States must conform to it when applying EU law, such as in the situation when they issue an EAW, because it is a general principle of EU law. Some Member States already apply this principle when issuing an EAW, while others, such as Romania and Hungary, prohibit the application of it during the prosecution phase. Such a choice is understandable within the Member States own system, however, when they issue a EAW which leaves the territory of the Member State, the decision of the issuing Member State has to be in conformity with the general principles of the AFSJ.[46]

With regard to the application of the principle of proportionality to the issuing of the EAW, if the executing authority, on the basis of reliable factual data, finds the existence of systemic deficiencies of the detention conditions in the issuing Member State, it must have the possibility to assess whether in the particular case the surrender of the person could be exposed to disproportionate detention conditions.[47] To this end, the executing authority must have the possibility to request the issuing authority all information it deems necessary.[48] However, it must not be forgotten, that the application of the principle of proportionality is ultimately left to the issuing authority.[49]

The Opinion ends with a request to the CJEU to act as a human rights court and with a critique of both the Member States and the EU institutions for not having made all efforts to ensure the proper application of EU detention standards across the Union.[50]

In light of the above, the AG proposed the following answers to the questions referred by the Higher Regional Court of Bremen. First, Article 1(3) FD-EAW does not constitute a

[40] Opinion AG Bot, *loc. cit*., para 133.
[41] ibid para 134.
[42] ibid para 135.
[43] ibid paras 137-138.
[44] ibid paras 139-144.
[45] ibid para 145.
[46] ibid paras 147-155.
[47] ibid para 167.
[48] ibid para 168.
[49] ibid para 173.
[50] ibid paras 175-181.

ground of refusal for the execution of an EAW. Second, it is up to the issuing authorities to make sure that they have undertaken a control or proportionality before issuing an EAW. Third, in cases of systemic deficiencies regarding the conditions of detention in the issuing Member State, the executing authority has the right to request from the issuing authority all the information necessary to appreciate whether in a given case the surrendered person would be subjected to disproportionate conditions of detentions. Fourth, the issuing Member State must ensure that based on the principles of loyal cooperation, mutual recognition and its obligation under Article 6 TEU, it will carry out the necessary reforms in order to ensure that fundamental rights of the detained person are respected.

4. The Judgment of the Grand Chamber. A new ground of postponement

The judgment of the Grand Chamber[51] follows a different, more concise line of argumentation. The CJEU began its analysis by pointing out the essential character of the principles of mutual trust and recognition for the AFSJ. It reiterated its previous case-law[52] according to which the EAW system is based on the principle of mutual recognition.[53] This principle in turn is based on the principle of mutual trust between the Member States that their respective national legal systems are able to provide an equivalent and effective protection of fundamental rights recognized at an EU level.[54] Due to the principle of mutual recognition Member States 'are in principle' obliged to act on an EAW and they must/may only refuse to execute an EAW under the exhaustive situations laid down in Articles 3 and 4 FD-EAW.[55] Nevertheless, in exceptional circumstances the principles of mutual trust and recognition can be limited.[56]

The Grand Chamber then emphasized the importance of Article 1(3) FD-EAW and the obligation of Member States to comply with the EU Charter when implementing EU law, including Article 4 of the Charter on the prohibition of inhuman and degrading treatment. The absolute character of this prohibition is also strengthened by its Article 3 ECHR correspondent and the case-law of the ECtHR.[57] From this it follows that whenever the executing authority has evidence of a 'real risk' of inhuman and degrading treatment of detainees in the issuing Member State, measured by the standards of fundamental rights protection guaranteed by EU law, it is required to assess the existence of this risk when deciding to surrender the requested person to the issuing authorities.[58]

The CJEU introduced a *two-step test* to this effect. Under the *first step* the executing authority must rely on objective, reliable, accurate and duly updated information on the prevailing detention conditions in the issuing Member State, which proves the reality of systemic or general failures, or touch upon certain groups of people or certain detention

[51] C-411/10 and C-493/10, *N.S. and Others, loc. cit*.
[52] Case C-192/12 PPU, *West* [2012] EU:C:2012:404, para 54; C-399/11, *Melloni, loc. cit.*, para 36; Case C-168/13 PPU, *F* [2013] EU:C:2013:358, para 34; C-237/15 PPU, *Lanigan, loc. cit.*, para 27.
[53] C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru*, *loc. cit.*, para 75.
[54] ibid para 77.
[55] ibid paras 79-80.
[56] ibid para 82 with reference to *Opinion 2/13, loc. cit.*, para 191.
[57] ibid paras 83-87.
[58] ibid para 89.

centres. To this effect several sources can be used, such as the decisions of international courts like the ECtHR, the decisions of courts of the issuing Member State or even documents and reports drawn up by organs of the Council of Europe or the UN. The Court then referred to ECtHR cases which provide for the positive obligation of Member States to ensure detention standards which guarantee the respect of human dignity.[59]

The *second step* is for the executing authority to ascertain whether in the specific case the requested person would face such a real risk of inhuman or degrading treatment. Thus, it is not enough to prove a general and systemic failure of the detention system in the issuing Member State, but it has to be proven that in the specific circumstances of the concrete case there are substantial grounds to believe that the requested person would face a real risk of being subjected to inhuman or degrading treatment.[60] To this end, the executing authority must, under Article 15(2) FD-EAW, request the judicial authority of the issuing Member State to urgently provide supplementary information regarding the detention conditions of the facility where the requested person will be held. The executing authority can also set a deadline for the receipt of the additional information and can also avail itself of international procedures or mechanisms for the monitoring of detention conditions.[61]

It is in light of these various sources of information that the executing authority must *postpone* the execution of the EAW if a real risk of inhuman or degrading treatment exists. However, the execution of the EAW cannot be abandoned, only postponed (!).[62] In case of a postponement the executing authority shall inform Eurojust under Article 17(7) FD-EAW. Furthermore, in line with *Lanigan* and Article 6 of the EU Charter, the executing authority can only detain the requested person if the execution of the EAW was done in a sufficiently diligent manner and the duration of the detention is not excessive. To this effect, the proportionality requirement under Article 52(1) of the EU Charter must be respected. If the executing authority finds that no real risk of inhuman or degrading treatment exists, it must adopt a decision on the implementation of the EAW, without prejudicing the remedial rights of the requested person.[63]

The CJEU thus concluded that Article 1(3), 5 and 6(1) FD-EAW must be interpreted in the following way. In the presence of objective, reliable, accurate and duly updated information that demonstrate the existence of either systemic or general failures or affecting certain groups of people, or even some detention centres as regards detention conditions in the issuing Member State, the executing judicial authority shall verify, in a concrete and precise manner, if there are substantial grounds for believing that the requested person faces a real risk of being subjected to inhuman or degrading treatment due to the detention conditions in the issuing State. To this end, the executing authority shall request the provision of additional information from the issuing authority, which must provide this information within the time fixed in such a demand. The executing judicial authority shall defer its decision on the surrender of the person until it received additional information enabling it to rule out the

[59] ibid paras 89-90, with reference to ECtHR, *Torreggiani and Others v Italy* (Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10) 8 January 2013.
[60] ibid paras 92-94.
[61] ibid paras 95-97.
[62] ibid para 98.
[63] ibid paras 99-103.

existence of such a risk. If the existence of this risk cannot be ruled out in a reasonable time, the executing authority has to decide whether it should terminate the surrender procedure.

5. Commentary

5.1. *Comments on the Opinion of the Advocate General*

The AG's Opinion includes some laudable parts that raise valid critiques of the issues faced by the EU criminal justice area. It is commendable that AG Bot started his Opinion by pin-pointing the core issue faced by the CJEU in this case: the balancing of the protection of the fundamental rights of the requested person with the necessity to ensure a well-functioning AFSJ. He discusses the concerns of executing authorities when they are faced with the surrender of a requested person to Member States that do not comply with their obligations to provide decent standards of detention. The AG also openly criticizes the Member States and the EU legislator for not yet having achieved adequate detention conditions throughout the EU. Furthermore, he urges the exchange of information between the executing and the issuing authority. It is also laudable that the AG and the CJEU have provided somewhat similar answers to the questions referred by the German court, albeit taking a different course in their argumentation. Nevertheless, other aspects of the Opinion warrant critique.

5.1.1. Are the CEAS and the FD-EAW that different from each other?

The AG spends a substantial part of his Opinion proving that the CEAS and the FD-EAW are two different systems, pursuing distinct objectives, and the principles developed by the CJEU for the CEAS are not applicable in case of the FD-EAW.

Such an approach, however, seems to neglect the importance of the Treaty of Lisbon in creating an integrated AFSJ and extending the former 'Community method' to all areas of JHA.[64] It is true that the area of criminal cooperation is less harmonized than the area of asylum and most older secondary EU law instruments on criminal cooperation focus less on fundamental rights.[65] Nevertheless, after Lisbon both policy areas appear under Title V, TFEU entitled 'Area of Freedom Security and Justice'. They are part of an overarching integrated policy area with common objectives and principles, which are set out in the general provisions of Chapter 1, Title V, TFEU. Thus, the creation of the AFSJ has to respect fundamental rights[66] and the principle of mutual recognition is a cornerstone for civil cooperation,[67] criminal cooperation[68] and asylum policy.[69] As Lenaerts notes, mutual

[64] *See* Peers, *loc. cit.*, 664-667.
[65] Ch. Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford: OUP, 2013), p. 262.
[66] Article 67(1) TFEU.
[67] Article 67(4) TFEU; Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters, Recitals 16, 17.
[68] Article 67(3), 81 and 82 TFEU; Cases C-187/01 and C-385/01, *Gözütok and Brügge, loc. cit.*, para 33.
[69] Article 70 TFEU; Cases C-411/10 and C-493/10, *N.S. and Others, loc. cit*., para 83.

recognition is a constitutional principle that pervades the *entire* AFSJ.[70] The creation of the AFSJ is in itself one of the main objectives of the EU set out in Article 3 TEU

In light of the above, AG Bot should have focused on the common elements that bind asylum policy and criminal cooperation, the most important of which are the respect for fundamental rights and the principle of mutual recognition. It is not surprising that the CJEU chose not to discuss the differences between these two policy areas and instead chose an approach which bridges the CEAS and the EAW system under the umbrella of balancing mutual recognition with fundamental rights.

5.1.2. Article 19(2) EU Charter applies to the EAW as well

The AG seems to downplay the importance of the principle codified in Article 19(2) EU Charter and in Recital 13 of the Preamble to the FD-EAW, when he argues that it only applies to a part of the AFSJ, mainly the asylum system,[71] but not to the EAW system. According to this principle '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'. Based on an overly textual analysis of Recital 13, the AG concludes that this principle is inapplicable to a person requested under an EAW, since the EU legislator did not mention requested persons expressly in Recital 13!

Such an interpretation, however, seems to neglect three important considerations. *First*, according to Article 67(1) TFEU the AFSJ, including the system of the EAW, shall respect fundamental rights, which also include Article 19(2) EU Charter. *Second*, the EU Charter and the rights protected within it apply to all EU acts, including the FD-EAW. As the CJEU has repeatedly noted, all acts of the EU institutions must respect fundamental rights.[72] Therefore, mutual trust and recognition has to be balanced with other important societal interests, such as the protection of fundamental rights.[73] *Third*, the CJEU in general prefers a systemic teleological interpretation over a textual one. Thus, acts of the EU must be interpreted in light of their objectives and the overall objectives of the EU.[74] Two such objectives are the creation of the AFSJ and the protection of fundamental rights. A textual analysis of both Recital 13 and Article 19(2) EU Charter clearly indicates that this principle applies to 'extradition'. It is true that the system of the EAW was created in order to simplify the old

[70] K. Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', *Fourth Annual Sir Jeremey Level Lecture* (Oxford, 2015), 6 <https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf>, accessed on 18 April 2016. See E. Herlin-Karnell, 'Constitutional Principles in the EU Area of Freedom, Security an Justice' in D. Acosta and C. Murphy (eds.) *EU Security and Justice Law* (Oxford: Hart Publishing, 2014); E. Brouwer, 'Mutual Trust and the Dublin Regulation; Protection of Fundamental Rights in the EU and the Burden of Proof', 9(1) *Utrecht Law Review* (2013) 135.

[71] On the application of Article 19(2) EU Charter see E. Guild, 'Article 19 – Protection in the Event of Removal, Expulsion or Extradition', in S. Peers et al (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Oxford: Beck, Hart, Nomos, 2014) pp. 543-562. For an opposite view to that of the AG see Ch. Janssens, *loc. cit.*, p. 266.

[72] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission (Kadi I)* [2008] ECR-06351, para 284; *Opinion 2/94 (WTO Agreement)* [1996] ECR I-1759, para 34.

[73] Janssens, *loc. cit.*, p. 263.

[74] M.P. Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', 1(2) *EJLS* (2008) 1, 5.

extradition procedures by introducing a less cumbersome 'surrender' procedure among the EU Member States.[75] Thus, the term 'surrender' should be used among EU Member States, while the term 'extradition' should be left to procedures between EU Member States and third states.[76] However, an overly textual interpretation would mean that the principle enshrined in Recital 13 only has an outward application to extradition to third countries, but it would not have an inward application to the surrender procedures between EU Member States. Such an interpretation would defeat the objective of the AFSJ to ensure the respect of fundamental rights.

5.1.3. The balance tilting in favour of mutual trust and recognition

The AG stresses the importance of balancing the principles of mutual trust and recognition with the protection of the fundamental rights of the requested person. Nevertheless, the AG seems to overemphasise the importance of mutual trust and recognition when interpreting the FD-EAW, downplaying the importance of fundamental rights.

Such an approach is unwarranted since the FD-EAW has to be given a reading according to the post-Lisbon realities. The FD-EAW entered into force in 2002, a time when the EU did not yet have express competences over human rights,[77] *Kadi* and the inclusion of fundamental rights in the core values of the EU legal order was not yet discussed in detail by the CJEU,[78] and the EU Charter was not yet in force. Since then fundamental rights are quint-essential to the EU's constitutional order.

These newer developments have been taken into consideration by the CJEU in *N.S. and Others*, which brought an end to automaticity for the system of negative mutual recognition in the asylum area, in case exceptional circumstances arise.[79] By tilting the balance in favour of mutual recognition, and as such the FD-EAW, the AG blurs the lines between the hierarchically superior fundamental rights, as parts of EU primary law and the 'core' EU values, and a piece of EU secondary legislation adopted in different times.[80] Moreover, the AG mentions *Melloni*[81] as an example of how the principle of mutual recognition can even trump higher standards of fundamental rights protection of Member States. However, such an example can cause confusion. In *Melloni* the overall supremacy of EU law, in the form of the principle of mutual recognition, trumped the national constitutional standards. In the present

[75] A. Klip, *European Criminal Law: an integrative approach* (Cambridge: Intersentia, 2nd ed, 2012), p. 412.
[76] For e.g. the UK implemented the FD-EAW by the *Extradition Act (2003)*, which still uses old terminology pertaining to 'extradition' and does not adopt the newer EU terminology of 'surrender'. *See* L. Klimek, *European Arrest Warrant* (e-Book: Springer, 2015) p. 208.
[77] See Article 6 TEU.
[78] *Kadi I, loc. cit.*, para 282. *See* J. Kokott and Ch. Sobotta, 'The *Kadi* Case – Constitutional Core Values and International Law – finding the Balance' (2012) 23(4) *European Journal of International Law* 1015.
[79] Lenaerts, *loc. cit.*, 24 with reference to V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', 31 *Yearbook of European Law* (2012) 319, 358.
[80] *See* V. Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', 7(4) *New Journal of European Criminal Law* (2015) fn 75 with reference to L.F.M. Besselink, 'The Parameters of Constitutional Conflict after *Melloni'* 39(4) *European Law Review* (2014) 531-552, 542.
[81] C-399/11, *Melloni, loc. cit.*

case the German Court and the German implementing legislation also referred to the human rights standards under Article 6 TEU. Thus, the situation is different from that in *Melloni*, since we are confronted with the EU standards of fundamental rights protection which are hierarchically equal, if not superior, to the principle of mutual recognition.

5.1.4. Was the Discussion on Proportionality Necessary?

One might wonder whether the lengthy discussion of the AG on the principle of proportionality does not raise more issues than it solves and whether this discussion was necessary in order to answer the questions posed by the German court. The CJEU for example decided not to delve into such a complicated debate.

The AG mentions at least three different instances when proportionality has to be taken into account by the *issuing* authority: a) before a sentence is handed down, when the objectives of the punishment have to be taken into account; b) when the sentence has to be executed, taking into consideration the conditions of detention; c) and before issuing an EAW, when the seriousness of the offence is important. The AG also touches upon the debated question of whether the *executing* authority may refuse to execute an EAW issued for the purposes of executing a sentence which, under the laws of the executing Member State, is disproportionate in light of the seriousness of the offence in question.[82] According to Lenaerts the answer should in principle be negative given that the rational of mutual recognition implies that the executing MS must accept 'variations in sentencing levels'.[83] Furthermore, such an analysis of proportionality by the executing Member State could seriously upset the autonomy enjoyed by the national authorities of the issuing Member State to apply their own national standards of sentencing.

In the present case the EAW issued for Mr. Căldăraru concerned the execution of a prison sentence of one year and eight months for driving without a license. This offence is not listed as a serious offence under Article 2(2) FD-EAW and the German authorities have checked that the double criminality requirement was met. While it is true that the issuing authority under Article 2(1) had the discretion of issuing an EAW or not, the conditions (a sentence exceeding four months) required by that provision were met. It is important for the issuing authorities to check whether the issuance of an EAW is proportionate or not, taking into consideration the seriousness of the offence. However, giving the power to the executing authority to check for the proportionality of a sentence rendered by the issuing authority could seriously upset national procedural autonomy and the principle of mutual trust. Furthermore, if in the case of offences falling under Article 2(1) FD-EAW the issuing States should prefer not to issue an EAW, potential offenders could circumvent the penalties of the national legal system by moving to a different Member State. This in turn could jeopardize the well-functioning of the criminal justice system of the issuing Member State.

Another criticism of the proportionality argument has to do with the operation of the proportionality review. While it is true that proportionality is a general principle of EU law, the AG did not provide indications of how the proportionality analysis should be conducted.

[82] Lenaerts, *loc. cit.*, 12. See Opinion of AG Sharpston in C-396/11, *Radu* [2012] EU:C:2012:648, para 60.
[83] ibid.

Furthermore, the 'margin of appreciation' doctrine of the ECtHR[84] is also a valid legal doctrine under which it should be up to the discretion of the issuing authority to hand down the sentence for the offence and to decide whether an EAW should be issued or not.

5.2. *Comments on the Judgment of the Grand Chamber*

5.2.1. What effects on Mutual Trust, Recognition and Fundamental Rights?

The principles of mutual trust and recognition are inspired by internal market principles and they are the 'cornerstone' principles for the various policy areas of the AFSJ.[85] These two principles are intrinsically linked.[86] According to the CJEU the legal structure of the EU is based on the fundamental premise that Member States share and recognize a set of common EU values and this premise 'implies and justifies the existence of mutual trust between the Member States.'[87] The successful operation of the principle of mutual recognition presupposes mutual trust and comity among the national judiciaries.[88] Furthermore, both principles are especially important in policy areas, such as criminal cooperation, in which Member States resist further harmonization or unification.[89]

Nevertheless, they are not absolute and can be limited in 'exceptional circumstances',[90] such as in the case of systemic deficiencies in a Member State's asylum procedures and in the reception conditions of asylum seekers.[91] Furthermore, the principle of mutual recognition implies the balancing of different objectives in the criminal justice area as well.[92] As the CJEU noted, fundamental rights recognized by the EU Charter are 'also at the heart of' the legal structure of the EU and must be interpreted 'within the framework and structure of the EU'.[93] It follows that in the eyes of the CJEU the principle of mutual trust/recognition and the protection of fundamental rights are equally important for the legal structure of the EU and they have to be balanced against each other.

Before the rendering of the present judgment, Mitsilegas has provided an overview of the existing CJEU cases[94] in the area of criminal cooperation and concluded that the CJEU always preferred the effectiveness of the principle of mutual recognition based on mutual trust, in the detriment of protecting the fundamental rights of the individual.[95] The question is whether the CJEU managed to create a proper balance in the present case. The CJEU had three options at its disposal.

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[84] ECtHR, *Handyside v United Kingdom* (No 5493/72) 7 December 1976.
[85] Klip, *loc. cit.*, p. 356; Articles 67(3)-(4), 70, 81(1)-(2) and 82(1) TFEU; C-237/15 PPU, *Lanigan*, *loc. cit.*, para 27; C-411/10 and C-493/10, *N.S. and Others*, *loc. cit.*, para 79; *Opinion 2/13, loc. cit.*, para 191.
[86] Janssens, *loc. cit.*, p. 141.
[87] *Opinion 2/13, loc. cit.*, para 168.
[88] Lenaerts, *loc. cit.*, 4.
[89] Mitsilegas, 'The Symbiotic Relationship', *loc. cit.*, fn 41.
[90] *Opinion 2/13, loc. cit.*, para 191.
[91] See C-411/10 and C-493/10, *N.S. and Others*, *loc. cit.*; C-394/12, *Abdullahi*, *loc. cit.*
[92] Janssens, *loc. cit.*, p. 261.
[93] *Opinion 2/13, loc. cit.*, paras 169-170.
[94] C-396/11, *Radu*, *loc. cit.*; C-399/11, *Melloni*, *loc. cit.*; C-168/13 PPU, *F*, *loc. cit.*
[95] Mitsilegas, 'The Symbiotic Relationship', *loc. cit.*, fn 69 *et seq.*

First, it could have placed fundamental rights at a higher position than mutual trust and recognition, and hold that whenever a conflict exists between these various principles, fundamental rights prevail and the EAW cannot be executed. This would have been the option preferred by the ECtHR, which does not recognise the principle of mutual recognition as being at the heart of ECHR law. Such a solution would have also made those Member States happy that have enacted a fundamental rights clause when implementing the FD-EAW.[96] However, such a solution would have ran against the clear text of the FD-EAW, which does not include fundamental rights among its grounds of refusal; it could have also upset the overall functioning of the FD-EAW. Furthermore, the CJEU would have gone against its own statement, according to which EU fundamental rights must be interpreted in light of the EU's objectives, one of which is the creation of the AFSJ.

Second, the Court could have followed its earlier approach and balance the two values, but in the end prefer to protect the effectiveness of mutual recognition in the detriment of the fundamental rights of the individual. Such a solution would have put extra pressure on the CJEU, further propagating the image of a fundamental rights court that prefers concepts of EU law over universally accepted fundamental rights. Following the mostly negative comments[97] over *Opinion 2/13*, such a solution was to be avoided. Furthermore, given the absolute character of the right not to be submitted to inhuman or degrading treatment, a judgment favouring mutual recognition would have created another wave of criticism.

Third, instead of the afore-mentioned options the CJEU struck a fair balance between the two competing values. *First*, it protected the principle of mutual trust and recognition by not introducing a new ground of refusal into the text of the FD-EAW. If such a ground is to be introduced, it should be left to the EU legislator to do so. Instead of a ground of refusal, the CJEU opted for the less drastic ground for postponement. Thus, if it is proven that the requested person faces a real risk of inhuman and degrading treatment in the issuing country the executing authority *must* postpone the execution of the EAW. *Second*, the CJEU also protected the fundamental rights of the defendants by loosening its 'systemic deficiencies' test and supplementing the test for assessing whether in a concrete case a 'real risk' existed that the requested person's rights under Article 4 of the EU Charter would be infringed.

5.2.2. How does this new ground for postponement operate?

[96] Two-thirds of EU Member States have enacted such clauses. See N.M. Schalmoser, 'The European Arrest Warrant and Fundamental Rights', 22 *European Journal of Crime, Criminal Law and Criminal Justice* (2014) 135-165, 145. In some Member States (Denmark, Lithuania) a potential breach of fundamental rights was included as a mandatory grounds of refusal. See Klimek, *loc. cit.*, p. 215.

[97] See 16(1) *German Law Journal* (2015) 'Special Section – Opinion 2/13: The EU and the European Convention on Human Rights'. Ch. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13'; S. Øby Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences'; A. Lazowski & R.A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR'; S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare'. See also Editorial Comments, 'The EU's Accession to the ECHR – a 'No' from the ECJ!', 52(1) *CMLR* (2015) 1. P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?', 38 *Fordham Int'l LJ* (2015) 955.

The CJEU did not introduce a new ground of refusal and opted instead for a ground of mandatory postponing of the execution of an EAW. Nevertheless, some questions are warranted on how this ground for postponement operates.

First, does it apply to all fundamental rights? The answer is a nuanced one. The *first step* is to know whether it applies to both EU and national standards of fundamental rights protection. From the judgment it is fairly clear that the CJEU was concerned with fundamental rights standards at EU level and not those at national level. After *Melloni* we know that national standards of fundamental rights protection can even be lowered if they conflict with the principle of mutual recognition. This is due to the supremacy of EU law over all sources of Member State law, and it is not the result of the balancing of EU norms of an equal value, such as in the present case. Therefore, *Melloni* is still good law. This means that the newly introduced ground for postponement will only apply when EU standards of fundamental rights protection are involved and not those of the Member States.[98] The *next step* is to know whether this new exception covers other fundamental rights protected by the EU Charter or whether it only applies to Article 4 of the Charter. This is a more difficult answer since the operative part of the judgment seems to indicate that it only applies to the prohibition of inhuman or degrading treatment. Furthermore, we have seen in *Radu*[99] that the CJEU, when confronted with preliminary references concerning the relationship between fundamental rights and the FD-EAW in a general manner, prefers to answer by referring to a specific right (e.g. the right to be heard) instead of referring to all fundamental rights.[100] Nevertheless, in the interest of protecting the fundamental rights of the requested person, national courts should be able to postpone the execution of an EAW if a 'real risk' exists that also other EU fundamental rights of the requested person, such as the right to effective judicial remedies, would be breached in the issuing Member State.

Second, who bears the *burden of proof* [101] and what *evidence* is allowed? Since the CJEU introduced a two-tier test, it has to be first proven that 'systemic deficiencies' exist in the standards of detention of the issuing Member State. Then, it has to be proven that in the concrete case a 'real risk' exists that the requested person would be subjected to inhuman and degrading treatment. The CJEU is not very clear on the burden of proof, which seems to be shared between the requested person, the executing authority and the issuing authority in the different stages of the two-tier test. Thus, the requested person will first have to raise as a defence before the executing judicial authority the overall 'systemic deficiencies' of the detention conditions in the issuing Member State. The executing authority will then have the duty to check whether such allegations are founded, by relying on both national and international sources, such as domestic court decisions of the issuing Member State, ECtHR decisions, and Council of Europe or UN reports. In order to prove the existence of the 'real risk' part of the test, the executing authority will have to ask the issuing authority to provide further information on the standards of detention in the facility in which the requested person will be kept. The burden then shifts to the issuing authority, which has to supply the requested information to the executing authority in the time limits specified by it.

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[98] See the German Constitution Court's 'identity control' in a recent case involving a trial *in absentia*. D. Sarmiento, 'The German Constitutional Court and the European Arrest Warrant: The Latest twist in the Judicial Dialogue' (27 January 2016) <http://eulawanalysis.blogspot.nl/2016/01/the-german-constitutional-court-and.html>, accessed on 19 April 2016.

[99] C-396/11, *Radu*, *loc. cit.*

[100] See Klimek, *loc. cit.*, Chapter 11.5.

[101] This question has also been raised in the context of asylum law. See Brouwer, *loc. cit.*

Third, what if the executing authority *decides to postpone* the surrender based on the information it gathers? According to the CJEU, in such a situation Eurojust shall be informed and in line with *Lanigan*, the requested person cannot be excessively detained.[102] Nevertheless, the execution of the EAW can only be postponed, but not abandoned.[103] This statement, however, seems to be in contradiction with the last sentence of the operative part of the judgment. According to this, if the existence of the risk of inhuman and degrading treatment cannot be ruled out within a 'reasonable time', the executing authority has to decide whether it should 'terminate' the surrender procedure. Given the difficulty and the lengthy time period needed to bring prison conditions in certain Member States or in certain facilities to the standards set by the EU, does this mean that this new ground of postponement might actually amount to a ground of refusal if the detention conditions in the issuing Member State cannot be changed in a reasonable time?

5.2.3. Converging Standards with the ECtHR?

Following the CJEU's judgments in *N.S.* and *Abdullahi* the academic community[104] was critical of the stricter 'systemic deficiencies' standard employed by the CJEU in its asylum cases when a breach of Article 4 EU Charter needs to be proven, compared to the standard of an individualised examination of a 'real risk' of inhuman or degrading treatment, employed by the ECtHR in asylum cases involving EU Member State breaches of Article 3 ECHR.[105]

It seems that in the present cases the CJEU introduced a new standard for proving a breach of Article 4 EU Charter. Thus, proving 'systemic deficiencies' is not sufficient; it also has to be proven that in a concrete case the requested person would face a 'real risk' of inhuman and degrading treatment. This second part of the two-tier test is much closer to the standard used by the ECtHR. Nevertheless, the 'systemic deficiencies' test already included the 'real risk' component in *N.S.*[106] and *Abdullahi*.[107] The difference is in the way in which the standard was administered. Before the present cases most of the emphasis fell on proving the existence of 'systemic deficiencies'.[108] In the present cases the 'real risk' part of the test is fleshed out and becomes the predominant element of the test.

Thus, it is clear that the CJEU once again preferred a balanced approach. On the one hand, it does not abandon its two-tier 'systemic deficiencies' test. On the other hand, it answers its critics by placing more emphasis on the second part of the test concerning the existence of a 'real risk' of inhuman or degrading treatment in the concrete case. This way the standard used by the CJEU is brought closer to that used by the ECtHR, possibly amending some of the wounds created by *Opinion 2/13.*

6. Conclusion

[102] *Aranyosi and Căldăraru* , *loc. cit.*, paras 99.
[103] ibid para 98.
[104] See Mitsilegas, *loc. cit.*, fn 79-88; S. Peers, '*Tarakhel v. Switzerland*: Another Nail in the Coffin of the Dublin System? (2014) <http://eulawanalysis.blogspot.nl/2014/11/tarakhel-v-switzerland-another-nail-in.html> accessed 19 April 2016.
[105] ECtHR, *Soering v UK* (No 14039/88) 7 July 1989, paras 90-91; *M.S.S. v Belgium and Greece*, *loc. cit.*, para 365; *Tarakhel v Switzerland*, *loc. cit.*, para 93.
[106] C-411/10 and C-493/10, *N.S. and Others*, *loc. cit.*, para 94.
[107] C-394/12, *Abdullahi*, *loc. cit.*, para 60.
[108] C-411/10 and C-493/10, *N.S. and Others*, *loc. cit.*, para 106.

Joined Cases *Aranyosi* and *Cărtăraru* bring much needed developments for the interplay between criminal cooperation and fundamental rights. The CJEU seems to offer a fair balance between the protection of the integrity of the EAW system and the fundamental rights of the requested person. In an effort not to undermine the principles of mutual trust and recognition, the Grand Chamber does not introduce a new ground of refusal for the execution of an EAW based on the protection of fundamental rights. Instead it opts for the less drastic ground for postponing the decision on the execution of an EAW.

The protection of the fundamental rights of the requested person is also improved. The CJEU does not abandon its 'systemic deficiencies' test, but puts a larger emphasis on making sure that in a concrete case the executing authority checks whether a real risk exists that the requested person would be subjected to inhuman or degrading treatment in the issuing Member State. This second part of the two-tier test also brings the CJEU standard closer to the one used by the ECtHR, thus amending some of the bitterness caused by *Opinion 2/13.* It is also laudable that the CJEU tackled the issue of evidence and promotes judicial dialogue between the executing and issuing judicial authorities.

Nevertheless, some issues will need further discussion. First, it is not entirely clear whether the new ground of postponement only covers Article 4 EU Charter or also other fundamental rights. Second, the CJEU emphasized the EU level standard of fundamental rights protection. The question is how national courts will react to these developments, knowing that some Member States have implemented the FD-EAW in such a way as to include the breach of fundamental rights as a ground of refusal of an EAW. Third, the CJEU is not entirely clear on how the burden of proof shifts when the two-tier test has to be administered. Fourth, the CJEU is also not entirely clear on what happens if in a concrete case the two-tier test is proven. Should the executing authority still hand over the requested person? Fifth, it seems imperious that the FD-EAW is revised and that these issues are handled by the legislator. Last, as noted by AG Bot, Member States and the EU institutions have to strive to ensure that the minimum EU detention standards are met.