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14.1 Introduction

EU criminal law is built around measures of mutual recognition and instruments harmonising substantive and procedural standards across the EU. The application of the principle of mutual recognition to judicial cooperation in criminal matters within the EU, put forward by the UK government at the Tampere European Council meeting in 1999, implies that a judicial decision issued in one Member State and addressed to another Member State must be recognised and executed by the latter automatically and without further formalities, unless specific grounds for refusal apply.¹ This system, now embedded even in primary law through Article 82 of the Treaty on the Functioning of the European Union (TFEU), relies on significant innovations:² the abolition of double criminality in thirty-two areas of serious crime, the establishment of tighter deadlines for executing the warrant, the judiciary taking over from the executive as the main actor of cooperation and the partial abolition of the nationality exception.

Two groups of measures have been adopted that relate directly to the right to liberty under Article 6 of the Charter of Fundamental Rights of the European Union (CFR or the Charter), understood as the right not to be deprived of liberty arbitrarily or beyond the cases and procedures established by law. On the one hand, deprivation of liberty has been addressed in framework decisions (FDs) on the European arrest warrant (EAW),³ the transfer of prisoners, probation measures and pre-trial measures other than detention.⁴ On the other hand, the directives on

¹ As is well known, the principle was first applied in the context of the free movement of goods. See K Armstrong, 'Mutual Recognition' in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart 2002).

² M Platcha, 'Non-Extradition of Nationals: A Never-Ending Story?' (1999) 13 *Emory International Law Review* 77.

³ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

⁴ 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 for the purpose of their enforcement in the European

the right to information⁵ and the presumption of innocence⁶ flesh out the right to liberty through specific rules of secondary law.

Against this background, the present chapter assesses the protection of the right to liberty under EU law by analysing the above-mentioned measures and relevant case law of the Court of Justice of the European Union (CJEU). The chapter will begin by briefly situating the subject within the broader context of EU criminal law. Next, the right to liberty under EU law will be outlined by reference to Article 6 CFR and the corresponding provision – Article 5 – of the European Convention on Human Rights (ECHR). Three specific topics will then be considered: detention pending recognition that exceeds the deadlines established by the EAW FD; protection of the right to liberty in the directives on procedural rights; and measures of mutual recognition as alternatives to detention. The chapter concludes that the protection of the right to liberty is undermined by the excessively long periods of continued detention that result from the wide discretion left to Member States' authorities and by practical difficulties in implementing the measures.

14.2 The Right to Liberty and Judicial Cooperation in Criminal Matters

The enhancement of judicial cooperation in the EU was triggered by the need to offset the unintended consequences of the abolition of internal frontiers.⁷ The cooperation would facilitate the fight against forum shopping by potential offenders (such as in situations where offences were not criminalised in the enforcing jurisdiction, led to lower penalties or were less effectively enforced). The emerging EU system of criminal justice consists of a combination of static

Union [2008] OJ L327/27; Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions [2008] OJ L337/102; Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20.

⁵ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1. Although not discussed in this chapter for reasons of space, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1 should also be mentioned.

⁶ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

⁷ See eg V Mitsilegas, J Monar and W Rees, *The European Union and Internal Security* (Palgrave Macmillan 2003); V Mitsilegas, *EU Criminal Law* (Hart 2009) 5ff.

and dynamic rules. The latter are laid down in instruments relating to the mutual recognition of judicial decisions, such as the EAW FD. Each such instrument governs the recognition of the decision to which it relates and the transfer of the person who is the subject of the decision. Static provisions are meant to foster the smooth functioning of judicial cooperation by establishing a level playing field among Member States. These static rules are aimed at both creating common definitions of offences and penalties and harmonising provisions concerning certain individual rights in criminal proceedings.⁸ An example of such rules is the system for the surrender of individuals suspected or convicted of criminal offences, which was set up with a view to preserving the safe exercise of freedom of movement, as called for in the Tampere Programme. The introduction of minimum standards throughout the EU is meant to increase mutual trust, which is grounded in a rebuttable presumption that Member States all comply with fundamental rights. This presumption constitutes the conceptual foundation of judicial cooperation.

Both dynamic and static measures in the area of procedural rights are relevant to the right to liberty. On the one hand, the directives on the right to information and the presumption of innocence lay down safeguards that protect the right to liberty in the pre-trial phase of criminal proceedings and – in the case of the directive on information – EAW procedures. On the other hand, the quasi-automatic nature of surrender calls for reflection on how the transfer from one state to the other may affect the right to liberty, given the time taken for a decision to be recognised and executed in the enforcing Member State. The time limits laid down in the FD (sixty days for recognition plus ten days for surrender after recognition) mean that pre-execution detention could last seventy days if the deadlines are met, and even longer if a dysfunction or delays occur. At the same time, consideration must be given to the level of rights protection in the issuing Member State. For years, the EAW FD and its interpretation by the CJEU have been criticised for failing to expressly allow execution to be refused when there are grounds to suspect fundamental rights violations in the issuing state. It is crucial to be able rely on the right to liberty for the purpose of refusing execution. However, as this chapter will show, that right is exposed to the impact of disruptions in the EAW system, as well as other relevant mutual recognition measures. The chapter will also discuss the static measures designed to strengthen that right and assess the level of protection they offer. Section 14.3 below will describe the key features of the right to liberty in EU law and in its main source of inspiration, the ECHR.

⁸ See nn 5 and 6 for examples of those measures.

14.3 The Right to Liberty in EU Law

Article 6 CFR states that '[e]veryone has the right to liberty and security of the person'. According to the Praesidium's explanations on the Charter,⁹ Article 6 CFR and Article 5 ECHR have the same meaning and scope.¹⁰ Article 5(1) ECHR commences as follows: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law'. Of the situations listed as justifying a deprivation of liberty, those described in subparagraphs (c) and (f) are particularly important for our purposes. Article 5(1)(c) concerns pre-trial detention, while Article 5(1)(f) – which serves as the principal reference for the CJEU in cases concerning the EAW – addresses 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. Article 5 reinforces the right to liberty with more specific guarantees: the right to be informed promptly of the reasons for the arrest and charges (para 2); the right – in cases of detention on remand – to be brought promptly before a judge and the entitlement to trial within a reasonable time or to release pending trial (para 3); and the right to have the lawfulness of detention reviewed speedily by a court and release ordered if the detention is not lawful (para 4).

To be an effective bulwark against arbitrary detention, the right to liberty calls first and foremost for legal certainty: deprivation of liberty must be limited to those cases and procedures foreseen by law. This presupposes clear and accessible legislative provisions regulating the deprivation of liberty and setting out the conditions under which it may be authorised. Broadly worded rules authorising detention and vague procedural norms are likely to lead to violations of the right.¹¹ First affirmed by the ECtHR, the importance of legal certainty has been embraced by the CJEU.¹²

Next, there is the question of what constitutes deprivation of liberty. Relying on the case law of the ECtHR,¹³ the CJEU has found that, although deprivation of liberty need not necessarily take the form of detention, factors such as the nature of the restriction, its duration, effects, manner of implementation and the severity of the measure must be taken into account to understand how that measure can be comparable to imprisonment.¹⁴

⁹ Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

¹⁰ CFR art 52(7). ¹¹ *Amuur v France* App no 19776/92, 22 EHRR 533, paras 50–54.

¹² Case C-528/15 *Al Chodor* EU:C:2017:213, paras 38–40.

¹³ *Villa v Italy* App no 42559/08 (ECtHR, 20 April 2010).

¹⁴ Case C-294/16 PPU *JZ v Prokuratura Rejonowa Łódź – Śródmieście* EU:C:2016:610, para 47.

With regard to the grounds for detention, the ECHR has clearly established that recourse may be had to pre-trial detention where there is a reasonable suspicion the person has committed an offence or where such detention is reasonably considered necessary to prevent evasion or recidivism.

As regards Article 5(1)(f), the ECtHR has interpreted this provision to mean that deprivation of liberty is lawful (not arbitrary) in situations where it is carried out in good faith; is closely connected to the ground for detention relied on by the executing judicial authority; is enforced in a place and under conditions that are appropriate; and is of a reasonable duration in light of the purposes pursued. The Strasbourg Court does not require that the decision to deprive someone of their liberty in this context must be necessary and proportionate, but only that extradition procedures must be in progress and conducted with due diligence.¹⁵ However, the Court recognises that the conditions under which a person is detained may be an indicator of the arbitrary nature of the detention and amount to a violation of the right to liberty. This is in keeping with a broader interpretation of the requirement that no one should be deprived of liberty under conditions that do not conform to the procedures established by law. Once an individual has been placed in detention, they are deprived of liberty which means that clear and accessible legal procedures must be applied for the entire duration of the detention. Thus, penitentiary rules and, more generally, detention conditions are relevant to the right of liberty.

As will become clear in the following discussion, the CJEU departs from the standard set by the ECtHR. On the one hand, and despite the relevance of detention on remand under Article 6 CFR and the directive on the presumption of innocence, the CJEU refrains from ruling on matters considered to be the preserve of national law. This has been so even when the Member State's standard was lower than that established by the ECHR. On the other hand, in EAW cases the Court refers to the standard set by the ECtHR under Article 5(1)(f), but also applies a proportionality test as required by Article 52 CFR. Therefore, CJEU judgments and secondary law play a part in filling out the right to liberty in EU law.

With the foregoing in mind, this chapter now hones in on three specific issues: first, it will discuss cases of continuing detention resulting from mutual recognition under the EAW system; secondly, it will examine EU legal measures that safeguard the right to liberty; and lastly, it will assess the effectiveness and limits of instruments of mutual recognition that (in theory) encourage alternatives to detention.

¹⁵ C Grabenwarter, *The European Convention for the Protection of Human Rights and Fundamental Freedoms: A Commentary* (Hart 2014) 60ff.

14.4 Detention Pending Recognition of the EAW

As outlined above, the EAW is a system involving more than one institutional actor. The executing judicial authority, in accordance with its national law, informs the requested person of the content of the EAW and of the possibility they have of consenting to their surrender to the issuing judicial authority. The executing judicial authority also decides whether, once arrested, the requested person should remain in detention in accordance with its national law. The person may be provisionally released at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of that Member State takes all measures it deems necessary to prevent the person from absconding.¹⁶ The EAW FD does not lay down specific rules for the executing judge in the event that the surrender deadline fixed in the EAW passes. Therefore, the words ‘at any time’ could be interpreted broadly as applicable to any situation.

Article 23 EAW FD, however, states that if timely surrender is prevented by circumstances beyond the control of any Member State, the executing and issuing judicial authorities shall immediately contact each other and agree on a new surrender date. The FD makes clear that the surrender must take place within ten days of the new date agreed, and that the requested person must be released if and when the new time limit expires. Unfortunately, the CJEU’s approach seems to depart from the logic of the FD.

In *Lanigan*, the interpretation of Article 17 read in conjunction with Articles 15 and 12 EAW FD was at issue. Articles 17 and 15 establish procedures and time limits for the decision on the execution of an EAW, while Article 12 provides the executing judge with the possibility of ordering the provisional release of the requested person.¹⁷ While the Advocate General and the CJEU agreed that the expiry of the time limit did not affect the validity of the EAW, as affirmed in the FD, their views diverged on the effects of expiry on the person’s right to liberty. The AG relied on Article 5(4) ECHR, according to which a court must speedily review the existence of the conditions for continuing detention on remand to ascertain its lawfulness. In the Advocate General’s view, the expiry of the time limit triggered the detainee’s right to legal remedy under Article 5(4) ECHR, entitling the detainee to a court decision on whether the continuation of provisional custody was justified by legitimate reasons beyond those that led to the issuing of the EAW, by duly identified individual grounds related to the execution of the particular warrant, or by exceptional, duly justified circumstances not imputable to the executing Member State. The AG opined that, depending on the court’s

¹⁶ EAW FD (n 3) arts 11, 12.

¹⁷ Case C-237/15 PPU *Minister for Justice and Equality v Francis Lanigan* EU:C:2015:474.

decision, either release should be ordered or, in the event that the detained person has to remain in custody, the competent national court must constantly ensure that the rights guaranteed by Article 6 CFR are upheld.¹⁸

The CJEU found that the expiry of the time limits neither foreclosed the execution of the EAW nor created a general and unconditional obligation to release the detainee.¹⁹ However, the Court ruled that Article 1(3) required the EAW FD to be interpreted in conformity with Articles 6 and 52 CFR. The right to liberty entailed that, for custody to be lawful, the procedures for the execution had to be carried out with due diligence. The executing judge was required to consider factors such as the Member State authorities' failure to act; whether the requested person bore any responsibility for the delay; the sentence potentially faced by the requested person; the potential risk of that person absconding; and whether the requested person had been held in custody for a period that greatly exceeded the time limits stipulated in Article 17. Were the court to find that release was warranted, measures should be adopted to ensure that the material conditions necessary to proceed with the surrender remain fulfilled.²⁰ Though neither the Advocate General nor the Court envisaged an automatic right to release, the Advocate General's interpretation seems more in tune with the right to liberty, for the expiry of the deadlines constitutes an exceptional – or at least anomalous – circumstance in that it results in the person being held in detention for longer than is normally allowed by the FD. This is why the stricter scrutiny proposed by the Advocate General is a sounder legal approach than that adopted by the CJEU.

In *Vilkas*, the Court broadened the margin of discretion left to national courts.²¹ The question there was as to whether Article 23(5) EAW FD – the obligation to release on the expiry of surrender deadlines – applied to a situation where the new date for surrender agreed pursuant to Article 23(3) could not be met because of the offender's continuing resistance to the execution of the EAW. While confirming that states are not relieved of the obligation laid down in the FD once the new deadline for surrender has passed, it also found that there was no obligation to release the requested person where the second attempt to surrender within the deadline is prevented by circumstances beyond the Member State's control.²² The Court held that under Article 12 EAW FD the executing authority had discretion to decide whether the circumstances were such that the person could be freed.²³ It did not expound on the interpretation of circumstances beyond the control of any of the Member States' in Article 23(3). The Advocate General, on the other hand,

¹⁸ Case C-237/15 *PPU Minister for Justice and Equality v Francis Lanigan* EU:C:2015:509, Opinion of AG Cruz Villalón, para 179.

¹⁹ *Minister for Justice and Equality v Francis Lanigan* (n 17) para 50. ²⁰ *ibid* paras 53ff.

²¹ Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2017:39.

²² *ibid* para 74. ²³ *ibid* para 42.

compared the different language versions of the FD and came to the conclusion that these circumstances were equivalent to *force majeure*. In the case in question, where the first surrender attempt was frustrated by the person's aggressive behaviour, that behaviour could be qualified as *force majeure* only if the national judicial authorities could not reasonably have foreseen the turn of events based on the facts of the case or the elements in the file. A repetition of almost identical behaviour preventing a subsequent surrender attempt could not reasonably be qualified as *force majeure*, unless, on the facts of the case, the competent authority had reason to believe that such a scenario would not recur.²⁴

In *TC*,²⁵ however, the Court found that the FD precluded a national provision imposing a general and unconditional obligation to release a requested person after ninety days where there is a very serious risk of flight and that risk cannot be reduced to an acceptable level through appropriate measures. The Court also stated that Article 6 CFR precluded national case law allowing for detention beyond that ninety-day period on the ground that the period was interrupted if the executing authority refers a question to the CJEU for a preliminary ruling or is waiting for the Court to reply to a request for a preliminary ruling made by another executing authority, or if the executing authority postpones the decision on surrender on account of a real risk of inhuman or degrading detention conditions in the issuing Member State. Such case law failed to ensure that the national provision was interpreted in conformity with the EAW FD and was a source of variations that could result in differences in the length of detention.²⁶

This last point tends to confirm a principle first posited in *Căldăraru*, according to which an EAW should not be executed where there is risk of inhumane treatment in the issuing state.²⁷ While the judicial authorities are exchanging information to determine the extent of the risk of ill-treatment, the duration of the requested person's detention must not exceed what is judged proportionate, as required by Article 52(1) CFR.²⁸

The introduction of strict time limits for recognition and surrender has undeniably improved the right to liberty as compared to extradition. Within and beyond those limits, the executing judge has an obligation to interpret the EAW in conformity with Articles 6 and 52 CFR. The applicability of the principle of proportionality in the context of the EAW has been heavily debated.²⁹ The

²⁴ Case C-640/15 *Minister for Justice and Equality v Tomas Vilkas* EU:C:2016:826, Opinion of AG Bobek, para 84.

²⁵ Case C-492/18 PPU *TC* EU:C:2019:108. ²⁶ *ibid* para 77.

²⁷ Joined Cases C-404/15 and C-650/15 PPU *Aranyosi and Căldăraru* EU:C:2016:198.

²⁸ *ibid* para 101.

²⁹ A Weyembergh, *European Added Value Assessment: The EU Arrest Warrant, Annex I: Critical Assessment of the Existing European Arrest Warrant Framework Decision* (EU 2014) 35, doi: 10.2861/44748.

executing authority must refer to those provisions when deciding whether to hold the requested person in detention after receipt of the EAW. National courts have asked a variety of questions about how to interpret the FD in relation to detention beyond the time limits set in the FD, which again points to its controversial nature.

In an exercise of – understandable – judicial subsidiarity, the CJEU has for the most part deferred decisions to national courts. In doing so, it has outlined a few principles. To begin with, the expiry of the deadline does not trigger a right to be released, nor does the detention clock stop ticking in the event of an exchange of information between judicial authorities – including information to ascertain the risk of possible inhumane treatment in the issuing state. The Court has also indicated that detention should not be prolonged excessively, although it is lawful when execution of the EAW is prevented by circumstances beyond the Member State's control. On the one hand, we see no automatic triggering of the right to release through non-compliance with the deadlines, and on the other hand a reaffirmation of the principle that detention should not be prolonged excessively. In between lies a vast grey area where the person can be lawfully held in detention in the executing state if circumstances beyond the Member State's control materialise. While the principle of non-automatic release is fairly straightforward, the same cannot be said of the ban on excessive detention or the definition of circumstances beyond the Member State's control. The result is that judges are left with extremely broad discretion, the only guidance being the criteria mentioned in *Lanigan*. How the judges weigh those criteria against each other remains unknown, however, as the CJEU has not addressed the EU legislative provision on automatic release in specific circumstances contained in Article 23 EAW FD. It could be inferred from the Court's finding in *Lanigan* that detention could continue in the event of lapses on the part of authorities in other Member States. It is understandable that in *Vilkas* the Court objected to the application of Article 23(5) EAW FD – obligation to release the person after the expiry of the deadlines laid down in Article 23(2)–(4) – to situations where the delay was caused by the surrender. However, the CJEU worded its objection more broadly when it came to the undefined 'circumstances beyond the control of any of the Member States'.

14.5 The Right to Liberty and the Procedural Rights Directives

As the EU's involvement in criminal law increased over the years, discussions turned to the guarantees to which persons subject to investigation and EAW procedures are entitled. The 2009 Roadmap on individual rights in criminal

proceedings³⁰ promoted during the Swedish presidency has so far resulted in a number of initiatives that are relevant to the right to liberty – namely, directives on (1) the right of information and (2) the presumption of innocence, and a Green Paper published in June 2011 examining appropriate measures concerning the period of pre-trial detention.³¹

The directive on the right to information of suspects or accused persons in criminal proceedings and of persons subject to an EAW is particularly important for the right to liberty. The person concerned must be provided with a Letter of Rights containing information on: the right of access to a lawyer; any entitlement to free legal advice, and the conditions for obtaining such advice; the right to be informed of the accusation; the right to interpretation and translation; the right to remain silent; the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority; and the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, and making a request for provisional release. Member States shall ensure that suspects or accused persons receive the Letter of Rights in a language that they understand. The rights can be communicated orally if they cannot be provided in writing in that language. The person must be informed of the reasons for their arrest or detention, including the criminal act of which they are suspected or accused of having committed. No later than when the merits of the accusation are submitted to a court, information must be given on the accusation, including the nature and the legal classification of the criminal offence, and the level of involvement of the person concerned. Any subsequent changes to the information given must be communicated to the person when necessary for the fairness of the proceedings. Member States must ensure that suspects or accused persons or their lawyers have the right to challenge the possible failure or refusal of the competent authorities to provide information as required by the directive following the procedures established under national law.³²

Many aspects of the directive – as well as other measures in the Roadmap – have been closely scrutinised by scholars.³³ For one thing, the piecemeal nature of the EU legislation in this area has drawn criticism from those who believe that

³⁰ Council of the EU, 'Roadmap with a view to fostering protection of suspected and accused persons in criminal proceedings' doc 11457/09, 1 July 2009 (Roadmap); Draft Resolution 12116/09, 15 July 2009.

³¹ Commission, 'Green Paper on the application of EU criminal justice legislation in the field of detention' COM (2011) 327 final.

³² See Dir 2012/13/EU (n 5) arts 3–7.

³³ L van Puyenbroeck and G Vermeulen, *Towards Minimum Procedural Guarantees for the Defence in Criminal Proceedings in the EU* (2011) 60 *International and Comparative Law Quarterly* 1017; JR Spencer, *EU Fair Trial Rights: Progress at Last* (2010) 1 *New Journal of European Criminal Law* 457.

the directives do not demonstrate a ‘holistic understanding of the criminal justice process and this is exposed in an incremental methodology which articulates defence rights individually, arbitrarily compartmentalising them’.³⁴ Secondly, the directive on the right to information provides for no consequences for violations of the rights enshrined in it.³⁵ Thirdly, and relatedly, limitations on the rights foreseen in the directive may be contested on grounds of legal certainty.³⁶ For example, the imprecision of ‘safeguarding the fairness of the proceedings’ as a condition for any restrictions on those rights introduces a degree of uncertainty. These controversial aspects notwithstanding, the directive has the merit of reducing the distance between the protection afforded by the right to liberty in criminal proceedings and that afforded by ongoing EAW procedures.

Also closely connected to the right to liberty in the context of pre-trial detention is the directive on the presumption of innocence. Consideration must be given to the presumption of innocence when deciding to deprive someone of their liberty. To that effect, the directive establishes that Member States are to take the measures necessary to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, all public statements made by public authorities, as well as judicial decisions other than those on guilt, refrain from referring to that person as guilty. Furthermore, Member States must ensure that suspects and accused persons are not presented as guilty, in court or in public, through the use of measures of physical restraint. This is without prejudice, however, to acts of the prosecution aimed at proving the guilt of the person, preliminary decisions of a procedural nature based on suspicion or incriminating evidence,³⁷ or measures required for case-specific reasons relating to security or to preventing suspects or accused persons from absconding or contacting third parties.³⁸

The standard used to decide on pre-trial detention (initially and in the event of its continuation) is therefore key to upholding the right to liberty and the presumption of innocence. The ECtHR has consistently stated that detention under Article 5(1)(c) is lawful in the presence of a reasonable and persistent suspicion

³⁴ D Sayers, ‘Protecting Fair Trial Rights in Criminal Cases in the European Union: Where Does the Roadmap Take Us?’ (2014) 14 Human Rights Law Review 733, 760.

³⁵ Michele Caianiello, ‘To Sanction (or Not to Sanction) Procedural Flaws at EU Level? A Step Forward in the Creation of an EU Criminal Process’ (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 317. However, a state might be found in breach of Article 47(1) of the Charter for failing to provide an effective remedy against the violation of a right guaranteed by EU law.

³⁶ Authors point to the practical difficulties that lawyers encounter in protecting suspects’ rights across the EU. See V Mols, ‘Bringing Directives on Procedural Rights of the EU to Police Stations: Practical Training for Criminal Defence Lawyers’ (2017) 8 New Journal of European Criminal Law 300.

³⁷ See Dir (EU) 2016/343 (n 6) art 4(1). ³⁸ *ibid* art 5(2).

that the arrested person has committed an offence.³⁹ Furthermore, Article 5(4) ECHR requires the national judge to address any concrete facts invoked by the detainee that cast doubt on the lawfulness of the deprivation of liberty.⁴⁰

The CJEU's interpretation of the presumption of innocence directive in the *Milev* case points to a different standard.⁴¹ The case involved the compatibility of Bulgarian legislation and case law with the directive. The national law had evolved such that the court hearing the case, at both the pre-trial and trial stages, was to rule on the basis of *prima facie* rather than detailed knowledge of the evidence that the person had committed an offence.

Against that background, the referring court asked the CJEU whether a *prima facie* examination of the reasonable grounds for believing that the suspect had committed the offence was compatible with the presumption of innocence directive (in particular, Articles 3, 4(1) and 10) and Articles 47 and 48 of the Charter, and whether a court ruling on a motion to modify a pre-trial detention measure could give reasons without comparing the incriminating and exculpatory evidence.

The Advocate General found an inseparable link between the right to liberty and the presumption of innocence and ruled that pre-trial detention could be justified only if there were specific indications that, notwithstanding the presumption of innocence, considerations of public interest outweighed the rule of respect for individual liberty. The Advocate General also pointed to the difficulty of balancing the standard for detention under Article 5(1)(c) ECHR and the presumption of innocence. For example, imposing the requirement of a 'strong likelihood' that the person committed the offence would certainly safeguard the right to liberty, but might prejudice the presumption of innocence. The Advocate General concluded that Articles 6 and 48 CFR and the directive must be interpreted as meaning that where an accused person submits exculpatory evidence that does not appear implausible or frivolous, the judge examining an appeal against the person's pre-trial detention must take that evidence into account, together with the incriminating evidence, in assessing whether that person can reasonably be suspected of having committed the offence at issue.⁴²

The CJEU departed quite significantly from the Advocate General's opinion. Firstly, the right to liberty did not enter into the CJEU's reasoning.⁴³ In a rather laconic judgment, the Court found that the directive confined itself to establishing common minimum rules for protecting the procedural rights of suspects

³⁹ *McKay v United Kingdom* App no 543/03 (ECtHR, 3 October 2006) para 40.

⁴⁰ *Nikolova v Bulgaria* App no 31195/96 (ECtHR, 25 March 1999) para 61.

⁴¹ Case C-310/18 PPU *Criminal proceedings against Emil Milev* EU:C:2018:732.

⁴² See Case C-310/18 PPU *Criminal proceedings against Emil Milev* EU:C:2018:645, Opinion of AG Wathelet, paras 61–88.

⁴³ The national court did not address the right to liberty.

and accused persons in order to strengthen Member States' trust in each other's criminal justice systems and thus facilitate mutual recognition of decisions in criminal matters. According to the Court, therefore, the directive did not preclude the adoption of preliminary decisions of a procedural nature, provided that such decisions did not refer to the person in custody as guilty. Moreover, matters relating to the circumstances in which a decision on pre-trial detention could be adopted were not governed by that directive but were rather the preserve of national law.⁴⁴

The discussions over the EAW and the directives reveal the importance of pre-trial detention in the EU criminal justice system. As early as 2011, the Commission emphasised the following issues concerning pre-trial detention within the EU. Firstly, the proportionality principle required that pre-trial detention be used only when absolutely necessary and only for as long as required. Secondly, national judicial authorities were responsible for ensuring that pre-trial detention complies with the proportionality principle as well as the presumption of innocence and the right to liberty. Thirdly, excessively long pre-trial detention might undermine mutual trust and mutual recognition. For that reason, the Commission singled out EU countries that imposed no maximum duration on pre-trial detention. The justification for continued detention should be reviewed periodically by the competent judicial authorities. The Commission thus pondered the adoption of minimum rules on pre-trial detention in order to improve mutual trust. As Coventry has shown, however, most Member States rejected the claim that issues of pre-trial detention put mutual trust in jeopardy, with fourteen of them opposing the adoption of any EU action in this regard.⁴⁵ Besides the political reasons for opposing such action because of the possible impact on certain Member States' criminal justice systems, there were important legal issues touching on the very competence of the EU in this realm. The scepticism related to the potential tension between a legislative initiative, the principle of subsidiarity and the wording of Article 83(2) TFEU, which authorised the adoption of minimum rules (1) to the extent necessary to facilitate mutual recognition (2) in criminal matters (3) having a cross-border dimension.⁴⁶ As a matter of fact, the Commission has not put forward any proposals so far. What the 2011 Green Paper and the analysis of the Member State practices highlighted, however, is the greater impact of pre-trial detention (and

⁴⁴ See *Milev* (n 41) paras 48–49.

⁴⁵ T Coventry, 'Pretrial Detention: Assessing European Union Competence under Article 82(2) TFEU' (2017) 8 *New Journal of European Criminal Law* 43, 57–58.

⁴⁶ While authors such as Peers embrace a more flexible understanding of the conditions laid down in the founding treaties, Coventry expresses serious doubts about such an interpretation and, in general, about the EU's competence to act in this area. See S Peers, *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 670.

custodial measures more broadly) on non-nationals. This is the focus of Section 14.6, which discusses EU instruments on the mutual recognition of alternatives to the deprivation of liberty.

14.6 The Right to Liberty and Transfer of Prisoners, Probation Measures and Alternatives to Pre-Trial Detention

The creation of a borderless zone increases the possibility that persons are investigated, tried and convicted in Member States of which they are not nationals. Research has shown that judicial authorities are not inclined to grant pre- and post-conviction measures other than deprivation of liberty to non-residents, as they cannot be monitored properly.⁴⁷ Furthermore, people sentenced to custodial penalties are less likely to reintegrate in other Member States than in their countries of nationality or residence. The three FDs on the transfer of prisoners, probation measures and pre-trial measures (European Supervision Order or ESO) as alternatives to detention aim to overcome these problems through a system of mutual recognition of judicial decisions followed by the transfer of the person to the Member State where they can benefit from alternatives to detention (or, in the case of transfer of prisoners, where they have substantial economic and social ties).

The instruments are particularly relevant to the right to liberty. They all result in the person concerned being deprived of liberty (coercive transfer) if the judicial decision in question is recognised. Once the transfer has taken place, the individual will be subject to a new legal regime, which will differ from that of the issuing state, possibly entailing different rules on the substantive basis for detention and different procedural measures to deprive a person of liberty. For example, the breach of a pre- or post-trial measure other than detention may have different consequences in different Member State. Rules on the enforcement of detention – therefore concerning the procedures through which someone is deprived of liberty – may also vary significantly. However, the FDs give no assurance that individuals will be adequately informed of a potential alteration of their right to liberty. In general, the FDs provide no effective procedural safeguards in this respect.

This creates a gulf between these measures for the recognition of alternatives to detention and the measures discussed in Sections 14.4 and 14.5. The procedural rights directives – except the one on the presumption of innocence – lay down

⁴⁷ E Cape and others (eds), *Suspects in Europe: Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, 2007); AM van Kalmthout and others (eds), *Pre-Trial Detention in the European Union: An Analysis of Minimum Standards in Pre-Trial Detention and the Grounds for Regular Review in the Member States of the EU* (Wolf Legal 2009).

rules concerning these rights in (1) criminal proceedings and (2) proceedings for the execution of an EAW.⁴⁸ The EU legislature recognises that there is a difference between these two kinds of procedures. While the directives reduce the divergence between criminal proceedings and the EAW with respect to the degree of protection they offer, the same cannot be said of the other FDs. However, the other FDs significantly affect the right to liberty, especially in the case of alternatives to pre- and post-conviction detention, where the available measures are less coercive. The person concerned may remain unaware of these issues due their lack of involvement in the recognition procedures, and as a result find themselves deprived of their liberty. On the one hand, the FDs allow for and regulate – minimally – deprivation of liberty and the transfer of the person concerned. On the other hand, they provide no guarantees ensuring that the individual is made aware of their rights with regard to transfer procedures or of the difference between legal regimes that may affect their right to liberty.

Legal uncertainty stems not only from the lack of involvement of the person concerned but also from the procedures and the transfer itself. Let us take the example of continuing detention. The FDs on probation and alternatives to pre-trial detention require the decision on recognition to be taken within sixty days. They also allow this time limit to be disregarded in exceptional circumstances.⁴⁹ No further deadlines are laid down, so the transfer of the person concerned – and therefore their early release – can be suspended *sine die*.⁵⁰ Allowing for continued detention of the individual on a very broadly worded legal basis with no date set for a decision could be highly detrimental to the right to liberty. Comparative analysis has revealed significant underuse of the ESO as well as practical issues such as the difficulty of adapting measures in the Member State to which the person is transferred.⁵¹

The relationship between the FDs and the EAW should also be highlighted. The FD on transfer of prisoners provides that a Member State requested to permit transit of the prisoner must inform the issuing Member State if it is unable to guarantee that the sentenced person will not be prosecuted or detained. In such a case, the issuing Member State may withdraw its request.⁵² But what if the latter

⁴⁸ See T Spronken and others, *EU Procedural Rights in Criminal Proceedings* (Maklu 2009); E Guild and L Marin (eds), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant* (Wolf Legal 2009).

⁴⁹ See FD 2008/909/JHA (n 4) arts 12(2) and (3) respectively.

⁵⁰ However, the FD on probation measures states that a new time limit should be established by the authority of the executing Member State (art 12(2)).

⁵¹ 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* (EU 2018) 99, doi: 10.2861/928251.

⁵² See FD 2008/909/JHA (n 4) art 16.

decides not to withdraw its request despite the warning? Also, the risk that the Member State of transit might issue such a warning as a ruse to circumvent the EAW procedures should not be underestimated. Doubts also arise from the ESO FD, which provides that if the competent authority in the issuing Member State has issued an EAW or any other enforceable judicial decision having the same effect, the person shall be surrendered in accordance with the EAW FD.⁵³ The reference to other decisions having the same effect is not altogether clear. These provisions raise more issues of legal certainty, further justifying the circumspect remarks made throughout this chapter on the impact of mutual recognition measures on the right to liberty.

14.7 Conclusions

The present chapter has addressed the impact of EU criminal law on the right to liberty and security. Broadening the perspective, the assessment started by placing the EAW in context, pointing out that mutual recognition was introduced to compensate for the unintended consequences of the abolition of internal frontiers. It was then shown that, while considerably streamlining interstate cooperation, the application of that principle to criminal matters has, brought new challenges for fundamental rights protection. Thirdly, and relatedly, streamlined cooperation has been possible largely because of mutual trust – that is, the reciprocal presumption that Member States observe fundamental rights save in exceptional circumstances. Fourthly, the measures of mutual recognition involving deprivation of liberty have combined to form a system of forced movement of persons within the EU. Fifthly, that system works through the joint operation of static (approximation of certain procedural rights) and dynamic (regulation of the interstate transfer) rules.

The chapter has shown that EU criminal law is affecting more and more aspects of the right to liberty. The law and practice in both the executing Member State and the issuing Member State are particularly relevant to the functioning of the system, which in turn can have significant consequences for the right to liberty. The EAW FD sets specific deadlines for recognition and surrender, but governs the timeline of possible disruptions only to a limited extent in Article 23. In situations where the person subject to an EAW might continue to be detained for long periods of time beyond the deadlines established in the FD, the CJEU has not been at all exacting on such extended deprivation of liberty. While it has found that the FD must be interpreted in keeping with Articles 6 and 52 CFR and has stated that detention should not be prolonged excessively, it is hardly imaginable that

⁵³ *ibid* art 21.

the Luxembourg Court judges could have said anything else. Moreover, the Court has been similarly undemanding in its understanding of ‘circumstances beyond the control of any of the Member States’, leaving executing Member States with broad discretion to keep the person in detention beyond the time limits mentioned in the FD.

Static and dynamic measures have been adopted to reduce and regulate recourse to deprivation of liberty before and after conviction. Examples include the directives on the right to information and the presumption of innocence. These instruments must be commended for attempting to create a level playing field on certain rights in criminal proceedings. However, the broad wording of the directives’ provisions and the hands-off approach taken by the Court give cause to doubt their effectiveness for harmonisation purposes. This is especially so when it comes to national laws and practices that clearly fall below the standard established by the ECtHR. Similar concerns may be voiced with regard to the FDs that set up a mechanism of mutual recognition for pre- and post-trial alternatives to detention alternatives. While the FDs make it possible for a person to be transferred to the Member State where they will benefit from those measures, they also provide a one-size-fits-all legal basis for postponing that transfer indefinitely. Furthermore, the implementation and use of those measures – especially the ESO– have not, at least so far, lived up to expectations.