Judicial cooperation, detention conditions and equivalent protection. Another chapter in the EU-ECHR relationship

Bivolaru and Moldovan v. France

Judicial Cooperation, Detention Conditions and Equivalent Protection. Another Chapter in the EU-ECHR Relationship: *Bivolaru and Moldovan v. France*

Dr Leandro Mancano
Edinburgh Law School

Leandro.Mancano@ed.ac.uk

Revista General de Derecho Europeo 56 (2022)

ABSTRACT: The relationships between the European Union (EU) and the European Convention on Human Rights' (ECHR) systems of fundamental rights protection have evolved significantly over the years. As the number of EU competences has increased, so has the potential impact of EU law on fundamental rights. This is especially the case for judicial cooperation in criminal matters, and the European Arrest Warrant (EAW). While the European Court of Human Rights (ECtHR) has ensured coordination between the States' obligations under EU and ECHR laws through the *Bosphorus* doctrine, unanswered questions are still on the table. In light of the recent ECtHR's judgment in *Bivolaru and Moldovan*, the present contribution addresses important issues concerning the EU-ECHR interaction with regard to the EAW, and the implications thereof for the cooperating States.

KEYWORDS: European Arrest Warrant; Fundamental Rights; European Court of Justice; European Court of Human Rights; Detention Conditions.

Cooperación judicial, condiciones de detención y protección equivalente. Otro capítulo en la relación entre la EU y la CEDH: *Bivolaru y Moldovan c. Francia*

Resumen: Las relaciones entre los sistemas de protección de los derechos fundamentals de la Unión Europea (UE) y el Convenio Europeo de Derechos Humanos (CEDH) han evolucionado de manera significativa a través del tiempo. Con el aumento de las áreas de competencia de la UE, ha aumentado también el potencial impacto del Derecho de la UE en los derechos fundamentals. Esto es así, especialmente, en el caso de la cooperación judicial en material penal y de la Orden europea de detención y entrega (euroorden). Mientras que el Tribunal Europeo de Derechos Humanos (TEDH) ha garantizado la coordinación entre las obligaciones de los Estados bajo el derecho de la UE y la ECHR a través de la doctrina Bosphorus, existen aun cuestiones sin resolver. A la luz de la reciente sentencia del TEDH en Bivolaru y Moldovan, este trabajo aborda importantes cuestiones que conciernen la interacción entre la EU y el CEDH en relación con la euroorden, y las implicaciones que tienen para los Estados.

Palabras clave: Orden europea de detención y entrega; derechos fundamentales; Tribunal de Justica; Tribunal Europeo de Derechos Humanos; Condiciones de detención.

Fecha de recepción: 20.9.2021
Fecha de aceptación: 4.11.2021

I. INTRODUCTION

The complex relationship between the legal orders of the European Union (EU) and the European Convention of Human Rights (ECHR) has unfolded through many chapters, and so has the

dialogue between the two apical courts of those orders:[1] The Court of Justice (ECJ or the Luxembourg Court) and the European Court of Human Rights (ECtHR or Strasbourg Court), respectively.[2]

The expansion of the EU's competences, and the subsequent impact of its laws and policies on fundamental rights, has only increased that complexity. As time went by, the two legal spaces have undergone a process of mutual permeation. The EU has developed its own system of fundamental rights protection through case law-based general principles first,[3] and via the primary law-ranked EU Charter of Fundamental Rights (CFREU or the Charter), later.[4] In that context, fundamental rights as guaranteed by the ECHR are however general principles of Union law[5] and represent the 'floor' of fundamental rights protection in the EU.[6]

The ECtHR, on its part, created the *Bosphorus* presumption, refined over the years, which worked as a blueprint to govern the relationship with EU law: Member States' action taken in compliance with EU law obligations is justified, since the Union is presumed to offer a level of protection equivalent (read 'comparable') to that of the ECHR.[7] That is the case, at least, until and when that presumption is rebutted.[8] The interaction has been reinforced by examples of mutual deference, shown by the two Courts over the years.[9]

Opinion 2/13[10] was supposed to be the last tile in a perfect mosaic, and validate the agreement establishing the EU's accession to the ECHR (AA or accession agreement). As we know, that judgment opened a different path in the EU-ECHR relationships instead, by declaring the AA incompatible with EU law.[11] Among the different reasons adduced by the Court to the ultimate finding of incompatibility, there was the lack of a coordination mechanism in the AA between Article 53 ECHR, on the one hand, and Article 53 CFREU, on the other. The former allows the Contracting Parties to apply a higher standard of protection than that established by the ECHR; whereas the latter, as interpreted in *Melloni*, states that the application of national standards must not compromise the level of protection provided for by the Charter or the primacy, unity and effectiveness of EU law.[12]

The ECJ's interpretation rested - inter alia - on the principle of mutual trust between Member States, which is of fundamental importance to EU law. That principle implies, particularly with regard to the area of freedom, security and justice (AFSJ), that: Member States may not normally demand higher standards from another Member State than that provided by EU law; nor check, *save in exceptional circumstances*, whether that other Member State has actually, in a specific

---

1 MJÖLL ARNADÓTTIR O. and BUYSE A. C., *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal*, Oxon, Routledge, 2016.

2 TIMMERMANS C., 'Will the Accession of the EU to the European Convention on Human Rights fundamentally change the relationship between the Luxemburg and the Strasbourg Courts?' *Judicial Cooperation in Private Law*, European University Institute, Florence, Italy, 15-16.04.2013, 1-2.

3 Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114, para 4.

4 See PEERS S. ET AL., *The EU Charter of Fundamental Rights: a Commentary*, Oxford, Hart Publishing, 2nd edition, 2021.

5 Article 6(3) TEU.

6 Article 52(3) CFREU. The fact that the ECHR constitutes the minimum standard, below which the EU and Member States should not go, combined with the possibility for the latter to offer more extensive protection, is not necessarily risk-free in terms of potential conflicts between the two legal orders. In fact, human rights 'are often in a relation of reciprocal opposition, so that a broader expansion of one right implies a heavier limitation of the other'. CHERUBINI F., 'The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights in the View of the Accession', *German Law Journal*, no 6, 2015, p. 1380.

7 ECtHR's judgment, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, [GC], no 45036/98, 30 June 2005, paras 160-164.

8 The *Bosphorus* judgment was not the first case where the ECtHR had been confronted with questions related – directly or indirectly – to the EU-ECHR relationship, and specifically Member States' responsibility under the ECHR for actions taken to implement EC/EU law. See, above all, the ECtHR's judgment in *Matthews v. the United Kingdom,* no 24833/94, 18 February 1999, and the European Commission's for Human Rights decision in *X v. Federal Republic of Germany*, ECHR, no 235/56, 10 June 1958.

9 Examples of divergence have however emerged on more than one occasions. See CHERUBINI, fn 6 above, pp. 1377-1380.

10 *Opinion 2/13*, EU:C:2014:2454.

11 Already in *Opinion 2/94*, EU:C:1996:140, the ECJ found that the EU had no competence to accede to the ECHR.

12 Case C-399/11, *Melloni*, EU:C:2013:107, para 60.

case, observed the standards guaranteed by the EU.[13] The role played by mutual trust in such a pivotal judgment points to its significance in the context of the EU legal order. As highlighted by the Court, the ubiquitous principle of mutual trust[14] is highly relevant to the AFSJ.[15] More specifically, mutual trust underpins the application of mutual recognition to judicial cooperation in criminal matters between Member States: this includes, most prominently, the European Arrest Warrant Framework Decision (EAW FD).[16]

Mutual recognition considerably streamlined law enforcement cooperation within the EU. The EAW is no exception, as it replaced extradition with a more efficient system of surrender of suspected or convicted persons between Member States. Concerns about the pursuit of effective cooperation at the expenses of individual protection have been voiced over the years, and especially towards the very strong presumption of Member States' compliance with fundamental rights standards.[17] The Court has opened the door to the rebuttal of that presumption, in cases where the protection against inhumane treatment,[18] or the right to an independent tribunal,[19] of the person subject to the EAW are under threat. However, it has been argued that the test set by the ECJ ('two-step test' or '*exceptional circumstances* doctrine') is very difficult to meet: A State normally obliged to execute the EAW (executing State), but wanting to reverse the presumption and refuse surrender to the EU State that issued the EAW (issuing State), would face a daunting task.[20]

Member States, in their simultaneous roles of EU law implementers and Parties to the ECHR, might find themselves between the proverbial rock and a hard place. Against that background, intertwined legal questions arise around the EU-ECHR relationship in the context of judicial cooperation in criminal matters: is the *Bosphorus* doctrine applicable to that area of law? Are the legal obligations of the cooperating Member States (and especially the executing one) under the EU and the ECHR entirely reconcilable? Are the ECJ's and the ECtHR's definitions of the relevant fundamental rights aligned? The present paper tries to answer those questions, and discusses their potential implications.

The paper is structured as follows. The EU legal framework of mutual recognition in criminal matters is provided, attention being paid to the EAW and the extent to which the presumption of mutual trust can be rebutted (section 2). Then, the focus moves on to the evolution of the *Bosphorus* presumption in the ECtHR's case law, and in the context of the EAW specifically (section 3). The recent ECtHR's judgment in *Bivolaru and Moldovan v. France*[21] is discussed, as it could open yet another route of dialogue between the two Courts around fundamental details of EU cooperation in criminal matters (section 4). Against that background, the paper addresses the questions raised above. Section 5 critically assesses the application of the equivalent protection presumption to judicial cooperation between Member States, and the impact that the ECtHR might have on the functioning of the EAW. Section 6 considers: if, and to what extent, the two Courts are aligned on the content of the protected rights; what might be the implications of divergences in this area for the EAW mechanism.

The conclusions reveal that, while the system of cooperation and the test to rebut the presumption of mutual trust are not being questioned by the ECtHR, two pivotal developments are on the horizon. On the one hand, the Strasbourg Court might play an important part in better defining the obligations of the cooperating States when implementing the two-step test. On the other, short-circuits could emerge from the divergence, between the two Courts, concerning the substantive content of the rights mainly exposed in the context of judicial cooperation in criminal matters, causing uncertainty on their possible impact on the EAW system.

---

13 *Opinion 2/13*, para 191.

14 CAMBIEN N., 'Mutual Recognition and Mutual Trust in the Internal Market', *European Papers*, no 1, 2017, pp. 93–115.

15 Among many, see MAIANI F., MIGLIORINI S., 'One principle to rule them all? Anatomy of mutual trust in the law of the Area of Freedom, Security and Justice', no 1, 2020, pp. 7–44.

16 Council Framework Decision 2002/584/JHA, OJ 2002, L 190/1.

17 See, inter alia, MITSILEGAS V., 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice', *New journal of European criminal law*, no 4, 2015, pp. 465 forward.

18 C-404/15 and C- 659/15 PPU, *Aranyosi and Căldăraru*, EU:C:2016:198.

19 C-216/18 PPU, *LM*, EU:C:2018:586.

20 See see BÁRD P. and VAN BALLEGOOIJ W., 'The Effect of CJEU Case Law Concerning the Rule of Law and Mutual Trust on National Systems', in MITSILEGAS, V. DI MARTINO, A., MANCANO. L. (eds), *The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis*, Oxford, Hart Publishing, 2019, pp. 455-467.

21 ECtHR's judgment, *Bivolaru et Moldovan c. France*, nos 40324/16 et 12623/17, 25 March 2021.

II. MUTUAL RECOGNITION IN CRIMINAL MATTERS IN THE EU

Mutual trust underpins measures of mutual recognition of judicial decisions in criminal matters within the EU, including the EAW. The fundamental objectives of the EAW are to prevent potential offenders from exploiting free movement for criminal purposes,[22] and to avoid impunity.[23] The (declared) existence of mutual trust was decisive to the introduction of a much swifter mechanism of cooperation, based on a series of significant changes as compared to extradition:[24] responsibility has been taken away from the executive and placed entirely in the hands of the judiciary; the principle of double criminality no longer applies;[25] the prohibition to extradite a State's own nationals has disappeared; tighter time limits for surrender have been introduced to considerably shorten the overall procedures.

The FD provides a list of cases when the executing judicial authority shall (mandatory grounds) or may (optional grounds) refuse execution of the arrest warrant. Apart from the exceptions working as coordination mechanisms, based on territorial jurisdiction,[26] these grounds for refusal and conditionality are clearly rooted in specific fundamental rights.[27] However, these are very much concerned with "accidental" fundamental rights violations.[28] Those exceptions do not originate from the fear that a State might be caught in systemic violations, or might be affected by structural problems capable of undermining mutual trust and the EAW mechanism. In that sense, the existence of commonly agreed and limited grounds for refusal reinforces the presumption of mutual trust.

Over time, however, serious issues of systemic compliance in some Member States have led the Court to introducing a mechanism for rebutting the presumption of mutual trust and refusing surrender on a case-by-case basis.[29] The general test consists of a two-step assessment, which must be carried out by the executing authority. Firstly, it must be verified that systemic deficiencies exist, which affect the right (allegedly) under threat in the issuing State.[30] Secondly, it must be ascertained specifically and precisely whether those deficiencies will pose a real risk to the right of the person concerned in the specific case. When the real risk exists that surrender to the issuing State will result in the breach of an absolute prohibition, the executing court can refuse execution even if that State is not affected by systemic deficiencies.[31] Furthermore, the executing courts must assess the conditions of detention in the prisons in which, according to the information available to them, it is actually intended that the person concerned will be detained, including on a temporary or transitional basis'.[32] Systemic deficiencies concerning judicial independence in the

---

22 See Tampere European Council, 15 and 16 Oct. 1999, Presidency Conclusion.

23 The Court has derived the objective of avoiding impunity from Article 3(2) TEU, although what that entails is not entirely clear. See, for example, Case C-220/18 PPU, *ML*, EU:C:2018:589, paras 85-86. For a systemic reconstruction of the concept of the fight against impunity in EU law, and in relation to mutual recognition specifically, see MITSILEGAS V., "Conceptualising impunity in the law of the European Union" in MARIN L. and MONTALDO S. (ed), *The Fight Against Impunity in EU Law*, Oxford, Hart, 2020, 21 ff.

24 EAW FD, recital 10.

25 The abolition of double criminality concerns, more specifically, a list of 32 areas of serious crime as per Art. 2(2) EAW FD. For other offences, States are still free to impose a verification of double criminality along the lines indicated by the ECJ in Case C-289/15, *Joszef Grundza*, EU:C:2017:4.

26 EAW FD, Art. 4(7). These include cases where the verification of double criminality is still allowed as per Art. 4(1) EAW FD.

27 These are the right to a fair trial EAW at Arts. 4(a) and 5(1)), the rights of the child at Art. 3(3), the principle of ne bis in idem EAW FD, Arts. 3(1) and (2), 4(2), (3), (4) and (5), the rehabilitative function and the proportionality of custodial penalties at EAW FD, Arts. 4(6), Art. 5(2) and (3).

28 These can be the age requirement for being held criminally liable, the different options given to the executing authority to avoid double jeopardy, the extreme case of life imprisonment, or the possibility to refuse execution because the person would have better chances of reintegration in the executing State.

29 The two main arenas involved so far have been the prohibition of inhumane and degrading treatment and the right to an independent tribunal. One may imagine that the two-step test might apply to judicial cooperation in criminal matters more broadly. It is in the interpretation of the Dublin Regulation that the ECJ allowed, for the first time, a fundamental rights exception to a mutual trust-based mechanism of inter-State transfer of persons Joined Cases C-411 & 493/10, *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras. 105–108. See also the cross-references between case law on the EAW and that on asylum, testified by Case C-578/16 PPU, *C.K. and others*, EU:C:2017:127, paras 59 and 75.

30 The assessment should be based on objective, reliable, specific, and properly updated material. Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 89.

31 Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 104.

32 Case C-220/18 PPU, *ML*, para 87.

issuing State, on the other hand, constitute no sufficient grounds to refuse execution, unless the existence of the individual risk has been ascertained as well.[33]

Pursuant to Article 15 EAW FD, the executing court must request the issuing authority to provide any supplementary information that it considers necessary for assessing whether there is such a risk.[34] Article 15 EAW FD must be used as a last resort[35] and consistently with the duty of sincere cooperation under Article 4(3) TEU[36] to avoid delays and, ultimately, the risk of impunity.[37] If reassurance that the person's fundamental rights will not be breached comes from a (non-judicial) authority of the issuing State (such as the Ministry of Justice), the executing authority may rely on that in the context of the overall assessment.[38] If, instead, reassurance is given by the issuing judicial authority, the executing judicial authority must rely on that assurance, save in exceptional circumstances where there are specific indications to the contrary.[39] If, once the additional information has been obtained and the two-step test carried out, the real risk cannot be discounted, the executing authority must refrain from executing the EAW.[40]

The process whereby the cooperating authorities interact, and the executing State comes to the decision about surrender, have become increasingly important over the last years. The two-step test consists of a substantive and a procedural aspect. On the one hand, there is the substantive content of the right under threat, which forms the benchmark for the executing State's risk assessment. On the other, the two States involved have a manifold duty of cooperation. The issuing authority must promptly provide accurate information, whereas the executing court must request the information if need be, raise a question to the ECJ in case of doubts concerning the application of EU law, and carry out the risk assessment pursuant to the guidance given by the Luxembourg Court. These are all tasks that, in practice, can be quite complex. The specific discussion about the interpretation of the rights involved in the ECJ and ECtHRs' case law is developed below. At this stage, it is important to highlight the difficult balance that especially the executing court is called to strike between different interests. The two-step test applies at the intersection between different values of the Union: the respect of the rule of law and human rights, on the one hand, and justice 'channelled' through the objective of avoiding impunity, on the other. The executing judge, who is under the obligation to execute a warrant and surrender the person, operates in a legal minefield whose legal boundaries are defined by the principle of sincere cooperation. Additional information can and must be asked, but within the trail marked by the ECJ and in a way that does not jeopardise the attainment of the EU's objectives. For example, in applying the two-step test to inhuman detention conditions, the standards of the specific facility where the person will be detained must be the focus of the executing State's assessment. Therefore, the executing court cannot ask for information about the conditions in *all* the prisons in the issuing State. By the same token, the evidence used to carry out the risk assessment must have specific characteristics. In the case of judicial independence, the two steps cannot overlap with one another, and the information must be obtained according to different criteria.[41] Since the decision about surrender entails a probability assessment, the executing authority has inevitably a margin of appreciation in weighting the different pieces of evidence. Especially in cases with a complex factual background, that assessment is very unlikely to be straightforward. The case of *LM* – at present, *the* authority on the application of the two-step test to judicial independence - is emblematic. Both the Dublin High Court[42] (which had raised the question) and the Irish Supreme Court[43] (before which the Dublin High Court's judgment was appealed) ordered surrender, but whether their application of the tests to the fact of the case was sound might be seen as debatable.[44] The ECJ has set out a framework in which national authorities then exercise their

33 The Court has qualified this with specific guidance. See Joined Cases C-354 & 412/20 PPU, *L. and P.*, EU:C:2020:1033, paras 60 and 69.
34 Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 97; Case C-216/18 PPU, *LM*, paras. 76.
35 Case C-220/18 PPU, *ML*, para 79.
36 Case C-220/18 PPU, *ML*, para 104.
37 Case C-220/18 PPU, *ML*, paras 84–86.
38 Case C-220/18 PPU, *ML*, para 117.
39 Case C-128/18, *Dumitru-Tudor Dorobantu*, EU:C:2019:857, paras 68–69.
40 Joined Cases C-404 & 659/15 PPU, *Aranyosi and Căldăraru*, para 101.
41 Joined Cases C-354 & 412/20 PPU, *L&P*, para 56.
42 *The Minister for Justice and Equality v. Celmer* (No 5), [2018] IEHC 639, 19 Nov. 2018.
43 *The Minister for Justice and Equality v. Artur Celmer*, [2019] IESC 80, 12 Nov. 2019.
44 MANCANO, L., 'You'll never work alone: A systemic assessment of the European Arrest Warrant and Judicial Independence' *Common Market Law Review*, no 3, 2021, pp.705-706.

judgment. As shown below, the ECtHR might play an important role in determining whether the executing State has properly assessed the risk of fundamental rights violation in the issuing State.

III. III. THE PRESUMPTION OF EQUIVALENT PROTECTION AND JUDICIAL COOPERATION IN CRIMINAL MATTERS

The *Bosphorus* presumption is the device whereby the ECtHR has endeavoured to manage the 'challenge of symmetry': namely, reconciling the system of guarantees set up by the ECHR with the necessary uniformity of EU law and its compliance with the Charter.[45] Such a doctrine has developed over the years,[46] and aims also 'to determine in which cases the [ECtHR] may, in the interests of international cooperation, reduce the intensity of its supervisory role, with regard to observance by the States Parties of their engagements arising from the Convention'.[47] The EU is precisely one of those cases. According to the *Bosphorus* doctrine, actions taken by EU-ECHR States in compliance with obligations under EU law are considered justified, insofar as the Union is presumed to offer equivalent protection to that guaranteed by the ECHR.

The presumption is rooted in (a) the role of fundamental rights as a precondition of lawfulness of EU law instruments, (b) the ECJ's extensive references to the ECHR and the Strasbourg Court's case law, and (c) the value of primary law attached to the Charter since the entry into force of the Lisbon Treaty.[48] Two conditions must be satisfied, for the *Bosphorus* case law to apply. Firstly, the State must not have discretion in the implementation of its EU law obligations.[49] Secondly, the full potential of the mechanism for supervising observance of fundamental rights under EU law has been deployed, and especially with regard the role and power of the ECJ.[50] States are not exempted from complying with the ECHR for the mere fact that they are applying EU law.[51]

The presumption can be reversed when the protection of Convention rights has been manifestly insufficient. The interpretation of the two conditions for the application of the *Bosphorus* principle, and the assessment of manifest deficiency, have evolved significantly over the years and created a complex body of case law.[52] An exhaustive discussion of that case law would go beyond the scope of this paper. In line with the subject matter of this paper, it is important however to understand how the ECtHR has approached the operation of that presumption in the context of the EAW, and what that says – if anything at all - on the EU-ECHR laws more broadly.

At first, the ECtHR declared that the presumption of equivalent protection would only apply to the law of the (former) 'first pillar'.[53] Therefore, important instruments would have been excluded by the *Bosphorus* doctrine, such as those of mutual recognition in criminal matters. As time has gone by, the ECtHR has extended the presumption to EU measures of judicial cooperation,[54] including in criminal law.[55] In this specific area, the ECtHR has been confronted with cases concerning the risk of fundamental rights violations in the issuing State following surrender on the basis of an EAW. In general, the ECtHR has found that the EAW mechanism is compatible with the ECHR, while clarifying that instruments of that kind must not violate the fundamental rights of the person concerned.[56] More specifically, the *Bosphorus* doctrine can in principle apply to the EAW: The 'absence of discretion' condition is met, insofar as the national authorities are obliged to presume other States' compliance with fundamental rights. Nonetheless, the presumption of equivalent protection can be reversed in a specific case. In particular, the ECtHR will verify that the principle

---

45 ECtHR's judgment, *Romeo Castaño v. Belgium*, no 8351/17, 9 July 2019, concurring opinion of Judge Spano joined by Judge Pavli.

46 Among a plethora of academic contributions on the topic, see LOCK T., 'Beyond Bosphorus: The European Court of Human Rights' Case Law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights', *Human Rights Law Review*, no 3, 2010, pp. 529-545; DE HERT P., KORENICA F., 'The Doctrine of Equivalent Protection: Its Life and Legitimacy Before and After the European Union's Accession to the European Convention on Human Rights', *German Law Journal*, no 7, 2012, pp. 874 – 895.

47 ECtHR's judgment, *Michaud c. France*, no 12323/11, 6 December 2012, para 104.

48 ECtHR's judgment, *Avotiņš v. Latvia* ([GC], no 17502/07, 23 May 2016, para 102; *Michaud*, para 106. The reference is also to Article 52(3) CFREU.

49 See *Michaud*, para 103 and*, a contrario*, ECtHR's judgment, *M.S.S. v. Belgium and Greece*, no. 30696/09, 21 January 2011, para 338.

50 *Avotiņš*, para 104.

51 *Bosphorus*, para 154. *Avotiņš*, para 101.

52 See LOCK T., fn 45 above.

53 *M.S.S. v. Belgium and Greece*, para 338.

54 *Avotiņš* concerned the application of the presumption to judicial cooperation in civil justice.

55 ECtHR's judgment, *Pirozzi c. Belgique*, no 21055/11, 17 April 2018.

56 *Pirozzi*, paras 60-61.

of mutual recognition has not been applied in an automatic manner at the expenses of fundamental rights.[57] The Member States give effect to mechanisms of mutual recognition in the absence of any manifestly insufficient protection of the ECHR rights.[58] However, if serious and substantiated issues are raised before the executing authorities concerning manifest deficiencies in the issuing State, affecting the protection of a right guaranteed by the ECHR, and EU law does not allow for a remedy against such a deficiency, the executing State cannot refuse to examine the grievance for the sole reason that they are applying EU law.[59] The rules of EU law must be read and applied consistently with the ECHR.[60] The risk of being subject to inhuman and degrading treatments in the issuing State following surrender, constitutes a legitimate reason to refuse execution of the EAW. By relying on updated and detailed information, the executing court muss assess whether a real and individual risk exists, and has a sufficient factual basis.[61]

The presumption of equivalent protection applies to the EAW: the mechanisms of cooperation based on mutual recognition create no specific issues of compliance with the ECHR. The warning of the ECtHR with regard to the need to interpret and apply EU law in light of the ECHR is, in this context at least, only deceptively problematic. As discussed in the previous section, the ECJ has introduced a test to ensure that, if concerns are raised about possible fundamental rights violations post-surrender, the executing authorities must carry out the risk assessment through that test. The procedural language of the test concerning the characteristics that the evidence must possess (updated and specific), the standard of proof (real risk) and the need for an individualised evaluation place the two Courts on equivalent paths.

The similarities do not end here. We have seen in the previous section that the executing State is called to performing a difficult task: finding the sweet spot between protection of fundamental rights and avoidance of impunity. The Court draws the latter objective from Article 3(2) TEU, but it has arguably deeper roots in the values of the Union. On the one hand, there is the need to ensure that crimes are investigated and prosecuted, and that penalties are enforced. Denouncing that would equate to neglecting an essential function of a polity and, ultimately, justice. On the other, those essential functions must be carried out in line with fundamental rights and the rule of law. The two-step test shows that the legal conundrum concerns not only the underdeveloped definition of impunity in the ECJ's case law. Most fundamentally, the legitimacy of any legal reasoning relying on avoidance of impunity is heavily dependent on the fairness of the justice system bringing people to trial and meting out punishment. This is where the two-step test fulfils its systemic function. When the link between rule of law and justice is broken, the Court has found – not without controversy – that the way to halt the collapsing of the legal framework is by assessing, on an individual basis, whether judicial independence is so compromised that basing the implementation of cooperation on impunity avoidance becomes completely hollow.

The references to impunity and duties of inter-state cooperation emerge from the ECtHR's case law too. In the context of investigations into unlawful killings requiring the involvement of more than one State, the ECtHR found that Article 2 ECHR may oblige those States to cooperate with each other: stating otherwise would hamper investigations and lead to impunity for those responsible.[62] Such an obligation can be breached when the State that should have activated cooperation under the relevant legal mechanisms in place has failed to do so, or when the State from which cooperation is requested failed to respond or refused to cooperate on baseless grounds.[63] These findings apply to cooperation via the EAW too. While the ECtHR has found a EU-ECHR State refusing to execute an EAW in breach of its Article 2-based obligations of cooperation, the Strasbourg Court also took care to clarify that that judgment could not 'be construed as lessening the obligation for States *not* to extradite a person to a requesting country *where there are serious grounds to believe that if the person is extradited to that country he or she will run a real risk of being subjected to treatment contrary to Article 3* […], *and hence to verify that no such risk exists*' (emphasis added).[64]

The importance of avoiding impunity in the context of the ECHR has a different scope from the similarly-worded obligation that EU law poses on Member States. The latter is framed in a much

57 *Pirozzi*, para 62.
58 *Avotiņš*, para 116.
59 Ibidem.
60 *Pirozzi*, paras 63-64.
61 *Romeo Castaño,* paras 82-91.
62 ECtHR's judgment, *Güzelyurtlu and Others v. Turkey and Cyprus* [GC], no. 36925/07, 29 January 2019, paras 233-234.
63 *Güzelyurtlu and Others*, para 236.
64 *Romeo Castaño*, para 92.

more general way, whereas the former has been developed by the ECtHR in relation to either (a) the most serious violations such as Article 2,[65] 3[66] or 4[67] ECHR, or (b) the duty to investigate into breaches by States' agents for violations of eg Article 8[68] or 5[69] ECHR. Be that as it may, the issue of the fine balance to be found between paramount interests is apparent in both Courts' case laws. The interstice between different obligations is the legal space where the margin of appreciation of the executing court unfolds. We have seen that the ECtHR has already found a State in breach of their obligation to surrender. The next section offers instead an example of the ECtHR declaring that an executing State violated Article 3 ECHR, because its authorities underestimated the level of risk caused by the evidence at their disposal and thus failed to apply the two-step test properly.

IV. IV. A NEW CHAPTER IN THE EU-ECHR STORY? *BIVOLARU AND MOLDOVAN V. FRANCE*

The case of *Bivolaru and Moldovan v. France* concerned EAWs issued by Romanian judges to France against Romanian citizens. The key legal question was to do with the French authorities' assessment of the risk that the applicants would suffer inhuman and degrading treatments in the issuing State due to poor detention conditions. Far from questioning the EU system of judicial cooperation in criminal matters, the judgment offers valuable insight into the way national courts approach the exceptional circumstances doctrine. It constitutes an important chapter of the relationship between the EU and the ECHR legal orders in this area. On the one hand, it might have consequences on the EAW itself, as it might prompt national courts to ask the ECJ for clarifications about the way the risk assessment should be carried out. On the other, it is an example of the ECtHR finding a State in violation of ECHR obligations which are, at the same time, very much violations of EU law as well.

Mr Moldovan had been convicted by Romanian authorities on account of different crimes. He invoked the Luxembourg Court's judgment in *Aranyosi and Căldăraru*, and opposed surrender as the poor detention conditions in Romania's prisons would violate his Article 3 ECHR rights. The *Chambre de l'instruction* of Riom appeal court requested that Romanian authorities provide supplementary information about the detention facility where Mr Moldovan would be placed after surrender. The applicant argued that the state of the relevant Romanian prison, as described by Romanian authorities, did not satisfy the requirements of the ECtHR's case-law.[70] However, Riom appeal court found no obstacles to surrender. The decision was appealed by Mr Moldovan to the *Cour de Cassation*, arguing that the appeal court had mischaracterised the information provided by the Romanian authorities, especially concerning the cell space available to the person. The *Cour de Cassation* rejected the appeal and ordered surrender.

Mr Bivolaru is the leader of the MISA (Movement for Spiritual Integration in the Absolute), an organisation established in 1990. He was prosecuted in Romania in 2004 for having sexual intercourse with a minor. In 2005, he applied for and was granted refugee status in Sweden because of the risk of persecution he (allegedly) faced in Romania due to his beliefs. On that basis, Sweden also rejected two extradition requests issued by Romania against Mr Bivolaru. He was eventually convicted in 2013 for the offences for which he had initially been prosecuted. In 2016, he was apprehended in Paris pursuant to an EAW and brought before the *Chambre de l'instruction* of Paris appeal court. By relying on his refugee status and the alleged political reasons behind his conviction, he argued that, if surrendered, he would face violations of Article 3 ECHR. France asked Swedish authorities for supplementary information concerning the applicant's refugee status. Despite the applicant's references to the climate of hate created by Romanian authorities against him and MISA's members, the appeal court ordered surrender, noting inter alia that the refugee status had been granted before Romania joined the EU, and that refusing surrender exclusively on the basis of the applicant's refugee status would question the uniformity of standards of fundamental rights protection in the EU as defined by the EAW FD, would threaten the principles of mutual trust and mutual recognition and would undermine the effectiveness of said FD.[71]

---

65 ECtHR's judgment, *Öneryıldız v. Turkey* [GC], no. 48939/99, 30 November 2004, para 95.
66 ECtHR's judgment, *Assenov and others v. Bulgaria,* no. 24760/94, 28 October 1998, para 102.
67 ECtHR's judgment, *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010, para 288.
68 ECtHR's judgment, *Mentes and others v. Turkey*, no. 23186/94, 28 November 1997, para 89.
69 ECtHR's judgment, *Kurt v. Turkey*, no. 24276/94, 25 May 1998, para 124; ECtHR's judgment, *Orhan v. Turkey*, no. 25656/94, 18 June 2002, para 369.
70 See in particular ECtHR's judgment, *Axinte v. Romania*, no 24044/12, 22 April 2014, para 111.
71 The original text of the judgment states that 'Un refus fondé sur ce seul motif aboutirait encore à remettre en cause, au sein de l'espace judiciaire européen, l'uniformité du standard de protection des droits

The ECtHR addressed the question as to whether the presumption of equivalent protection applied to Romania in the circumstances under consideration, and focused on the decision of the executing authorities. As for Mr Bivolaru, the ECtHR found that the two conditions for the presumption of equivalent protection were satisfied. By implicitly validating the two-step test, the ECtHR noted that the obligations of the executing authorities flow from the EAW FD as interpreted by the ECJ.[72] Firstly, the EAW and the ECJ's case law strictly define the discretion the executing authorities enjoy in assessing the risk of a fundamental right violation. Secondly, full use was made of the control mechanisms provided for in EU law.

That said, the ECtHR found that the national court failed to fulfil its obligations under the ECHR. The *Chambre de l'instruction* should have refused to execute the EAW, if the application of the two-step test had led to believe that a real risk existed that the person would be subject to inhuman and degrading treatments in Romania. Before the French courts, the applicant produced serious and precise evidence showing systemic deficiencies in the Romanian prison system. This information involved the Gherla facility as well, where he would be detained. On the basis of the additional information sent by the issuing authority, the executing authority however concluded that there was no risk of violation of Article 3 ECHR. That assessment was, in the opinion of the ECtHR, wrong. The ECtHR referred to the standards established in *Muršić v Croatia*,[73] and stated that the information provided by Romanian authorities led them to believe that a violation would have been likely, had there been surrender.[74] The flawed assessment of the French courts was compounded by the existence of the ECtHR's judgment in *Axinte*,[75] which concerned the endemic conditions of overcrowding in Gherla and was invoked by the applicant before the executing jurisdiction. Similar considerations applied to the facility where the applicant was going to be detained in custody, which was also the subject of ECtHR's judgments.[76]

Following Romania's suggestion that the applicant might have been detained in another prison, the executing authorities had recommended that the applicant be detained in a facility in comparable or better conditions. However, the ECtHR stated that that was not sufficient ground to discount a real risk of inhuman or degrading treatment. In fact, such a generic recommendation would not have allowed for the evaluation of the existing conditions in a specific facility. The issuing State had not fulfilled its duty of cooperation either.[77] The ECtHR found that the information about important aspects of detention conditions had been framed by the issuing authorities in a stereotyped way.[78] In conclusion, the executing court had sufficient materials, notably ECtHR's case law, to find the existence of a real risk for the applicant and could not rely exclusively on the declarations of the Romanian authorities. The ECtHR found, for those reasons, that there was a manifestly insufficient protection of fundamental rights which led to a reversal of the presumption of equivalent protection.[79]

As to Mr Bivolaru, the ECtHR found that the *Cour de cassation* failed to meet the second condition required for the application of the *Bosphorus* doctrine, in that it refused to raise a question to the Luxembourg Court concerning the impact of his refugee status on the execution of the EAW.[80] Against that background, the ECtHR considered whether the surrender of the person was contrary to Article 3 ECHR. The *Cour de Cassation* concluded that refugee status cannot alone preclude execution of an EAW. This, the ECtHR found, might be compatible with Article 3 ECHR as long as the executing authority concretely assessed whether the surrender would expose the applicant to a real risk of inhuman treatment.[81] The *Court de Cassation* had carried out such an assessment, by asking the Swedish authorities for additional and updated information concerning the refugee status of the person concerned. Those authorities did not clarify whether the conditions for maintaining the status of refugee persisted. Furthermore, the executing court verified that the EAW was based on offences that were nothing to do with the applicant's political

---

fondamentaux défini par cette décision-cadre, à porter atteinte aux principes de confiance et de reconnaissance mutuelles que celle-ci tend à conforter et, partant, à compromettre l'effectivité de ladite décision-cadre'.

72 *Bivolaru et Moldovan*, paras 114-116.

73 ECtHR's judgment, *Muršić v. Croatia* [GC], no 7334/13, 20 October 2016, para 137.

74 *Bivolaru et Moldovan*, para 123.

75 *Bivolaru et Moldovan*, para 121.

76 ECtHR's judgment, *Voicu c. Roumanie*, no 22015/10, 10 June 2014, para 51; ECtHR's judgment, *Constantin Aurelian Burlacu c. Roumanie*, no 51318/12, 10 June 2014, para 27.

77 *Bivolaru et Moldovan*, para 125.

78 *Bivolaru et Moldovan*, para 124.

79 *Bivolaru et Moldovan*, para 126.

80 *Bivolaru et Moldovan*, para 132.

81 *Bivolaru et Moldovan*, para 137.

opinion. The applicant had not adduced evidence to substantiate the claim that he would be subject to violations of Article 3 ECHR, so that the executing court was not in possession of sufficient grounds to believe that a breach would occur. The ECtHR did not believe that the protection of fundamental rights by the executing authority was manifestly insufficient to the extent that the presumption of equivalent protection should have been reversed, in which case the respect of the ECHR should have prevailed over the interests of international cooperation.[82]
The judgement is important in several respects. Firstly, the ECtHR has found a breach by the executing State in the context of the EAW, based on the wrong assessment of the evidence at the disposal of that State's authorities. Secondly, it sheds light on the executing court's duty to refer a question to the ECJ, which is important for the overall assessment at the basis of the surrender decision. Thirdly, it constitutes an example of the cross-fertilisation between the two Courts concerning the definition of the content of the rights (allegedly) threatened by the execution of an EAW. The next two sections discuss the key questions raised in this paper. Firstly, the ECtHR's application of the *Bosphorus* doctrine to the EAW mechanism is analysed. Thereafter, the paper considers to what extent the rights mostly affected (so far, at least) by the EAW are defined consistently by the ECJ and the ECtHR. These reflections unfold against the background of the obligations of the Member States under the EU and the ECHR, and the relationship between the two legal orders in the specific area of judicial cooperation in criminal matters.

V. V. EQUIVALENT PROTECTION, JUDICIAL COOPERATION AND THE ROLE FOR THE ECTHR IN EU LAW

The *Bivolaru and Moldovan* judgment enriches the picture of the EU-ECHR law relationship in the area of inter-state cooperation in criminal matters. The introduction of the two-step test by the ECJ in the context of the EAW has certainly added a layer of complexity to that relationship. *Bivolaru and Moldovan* shows once again that the two systems of protection – the EU's and the ECHR's – can reinforce one another. The (potential) novelty is in the more direct impact on issues of EU law. Two of the key questions raised in this paper concern the application of the *Bosphorus* doctrine to EU judicial cooperation in criminal matters, and the reconciliation of States' obligations under EU and ECHR laws.
As for the equivalent protection presumption, it is important to note that the ECtHR essentially 'validated' the two-step test. At no point, there was a suggestion – even indirectly - that the *exceptional circumstances* doctrine might inherently pose challenges to the presumption of equivalent protection or raise issues of compliance with the ECHR. While the two-step test seems unproblematic, the ECtHR's interpretation thereof in the context of the *Bosphorus* presumption deserves attention. The enduring application of that presumption to the EAW in the context of the fundamental rights check stems from the absence of any discretion left by the two-step test to the national authorities. At least, this is the opinion of the ECtHR, which thus considers that the first condition of the *Bosphorus* doctrine has been satisfied. The line of reasoning behind that argument is that the national authorities operate within the perimeter strictly defined by the EAW FD and the ECJ's case law. This is different from the situation in *M.S.S.*, where the Dublin Regulation allowed the Member State to take charge of the asylum application, and not to transfer the applicant to the State identified as responsible on the basis of the criteria laid down in said Regulation.[83] It is true that the two legal frameworks appear to be quite different. In *Bivolaru and Moldovan*, however, the ECtHR seamlessly found that the two-step test meets the first condition of the *Bosphorus* presumption, described as follows

'the alleged threat to a right protected by the Convention must flow from an international legal obligation imposed on the defendant State, which leaves its authorities no margin of appreciation or manoeuvre vis-à-vis its implementation'.[84]

The ECtHR found that the discretion left to the executing authority 'is exercised in the context strictly defined by the case law of the Court of Justice and with the view to ensuring the execution of a legal obligation in full compliance with EU law, namely Article 4 CFREU, which in turn ensures equivalent protection to that resulting from Article 3 ECHR', meaning that 'the executing judicial

82 *Bivolaru et Moldovan*, paras 143-145.
83 *M.S.S.*, paras 338-340.
84 'L'atteinte alléguée à un droit protégé par la Convention doit découler d'une obligation juridique internationale qui pèse sur l'État défendeur et pour l'exécution de laquelle les autorités internes ne disposent *ni d'un pouvoir d'appréciation ni d'une marge de manœuvre*' (emphasis added). *Bivolaru et Moldovan*, para 98.

authority cannot be regarded as enjoying, in ensuring or refusing the execution of the EAW, an autonomous margin of manoeuvre of such a nature as to cause the non-application of the presumption of equivalent protection'.[85]

On the one hand, the ECtHR seems to admit that the two-step test does indeed leave some discretion to the executing State, while that margin not being sufficient to reverse the *Bosphorus* presumption. In light of the complex background lying behind the executing court's risk assessment in the context of the two-step test, doubts can at least be cast on the ECtHR's application of the first condition of the *Bosphorus* principle to the exceptional circumstances doctrine. On the other, the practical implications of the application of the *Bosphorus* doctrine to the two-step test might be limited. If anything, the judgment shows that the ECtHR will step in and oversee the risk assessment carried out by States' courts in particularly controversial cases. In *Moldovan*, the *Bosphorus* presumption was reversed because the executing court had misapplied the test. On the basis of the available evidence, the person should not have been surrender because the two-step test had, indeed, been satisfied.

The second condition of the *Bosphorus* doctrine can be relevant to EU law too. In *Bivolaru*, the ECtHR found that that condition had not been met. By refusing to raise a question to the ECJ, the French courts had not made full use of the mechanisms of control of fundamental rights protection at their disposal. The ECtHR made that point in the context of the equivalent protection presumption. It did not consider whether the *Cour de Cassation*'s refusal resulted in a breach of Article 6(1) ECHR. In general, the ECtHR will find a national court or tribunal in violation of Article 6(1) ECHR for failure to refer a question to the ECJ *if* the national authority has not indicated the reasons why it considered that the situation brought before it fell under one of the *CILFIT* criteria. Based on the judgment in *Moldovan and Bivolaru*, the French authorities failed to do precisely so, being thus potentially in breach of the ECHR.[86]

In both *Moldovan* and *Bivolaru*, the ECtHR's findings are particularly relevant in terms of the executing State's compliance with EU law. The implications can be significant. With specific regard to the EAW and judicial cooperation in criminal matters, the case law of the ECtHR might be relied on by national courts to seek clarification from the ECJ about the application of the two-step test. The ECJ can seize the opportunity to elucidate certain aspects of the risk assessment and, most importantly, to establish further principles in this area which would make subsequent national decisions - such as that of the French courts - *explicitly* in breach of EU law. Similar considerations apply to the failure to refer a question to the ECJ by a national court or tribunal against whose decisions there is no judicial remedy,[87] with the Commission potentially being able to open an infringement procedure under Article 258 TFEU.[88] The scenario of a formal breach of EU law opens questions about the remedy thereto, the choice of which is still very much in the hands of the Member State pursuant to the principle of national procedural autonomy.[89] Mr Moldovan was awarded monetary compensation for the violation by French authorities. It is very unrealistic to imagine that the ECJ might order a specific measure such as the reversal of the EAW process. This makes the wrong risk assessment in cases involving the right to an independent tribunal in the issuing State even more problematic.

A last note on the responsibility of the issuing authorities. Though the latter was not the focus of the ECtHR in *Bivolaru and Moldovan*, there were specific points in the judgment where the issuing State was found to be acting below the expected standards of cooperation. It is difficult to predict what the development of the law on this aspect can be, but once again we have an example of

---

85 'Est exercé dans le cadre strictement défini par la jurisprudence de la CJUE et pour assurer l'exécution d'une obligation juridique dans le plein respect du droit de l'Union européenne, à savoir l'article 4 de la charte des droits fondamentaux qui assure une protection équivalente à celle qui résulte de l'article 3 de la Convention', meaning that 'l'autorité judiciaire d'exécution ne saurait être regardée comme disposant, pour assurer ou refuser l'exécution du MAE, d'une marge de manœuvre autonome de nature à entraîner la non-application de la présomption de protection équivalente'. *Bivolaru et Moldovan*, para 114.

86 See in this regard ECtHR's judgments in *Ullens de Schooten and Rezabek v. Belgium,* nos 3989/07 and 38353/07*,* 20 September 2011, para 61, as recently clarified in *Bio Farmland Betriebs S.R.L. v. Romania*, no *43639/17*, 13 July 2021.

87 Article 267(3) TFEU.

88 It is however important to remember that the ECJ will find a breach of EU law for failure to refer only in exceptional circumstances. In fact, this happened for the first time in Case C-160/14, *Ferreira da Silva e Brito and Others*, EU:C:2015:565.

89 In general, the means of redress in these cases are rather limited and difficult to obtain. For an exhaustive discussion, see LACCHI C., 'Multilevel Judicial Protection in the EU and Preliminary References', *Common market law review*, no 3, 2016, pp. 679–707.

how the ECtHR might prompt the ECJ to establish principles on what kind of conduct is in compliance with the duty of sincere cooperation, and what is not.

VI. ALIGNMENT ON THE CONTENT OF THE PROTECTED RIGHTS

The risk assessment hones in on the threat to a right, so the definition of that right lies at the core of the two-step test. This section revolves around the two rights at the centre of the *exceptional circumstances* doctrine – at least, as the law stands at present: the right not to be subject to inhuman and degrading treatments, and the right to an independent tribunal. This part shows that, while the ECJ and ECtHR are particularly aligned when it comes to the definition of degrading detention conditions, the situation is slightly different with regard to judicial independence. On that basis, the issues possibly ensuing from the different approaches taken by the two Courts are considered.

1. Inhuman and degrading conditions

The Court of Justice introduced a fundamental rights exception into the EAW system for the first time in *Aranyosi and Căldăraru*.[90] The Court relied on Article 1(3) FD to do so.

The first aspect to be considered, in analysing the role for detention conditions in halting judicial cooperation, concerns the legal obligations of the cooperating States. On the one hand, the responsibility to ensure that detention conditions are in line with fundamental rights standards lies primarily with the State where the person is detained.[91] The existence of a remedy, in the issuing state, enabling prisoners to challenge the legality of the conditions of their detention in the light of the fundamental rights cannot, on its own, suffice to rule out a real risk that the individual concerned will be subject to inhuman or degrading treatment.[92] On the other, the executing court must request additional information to the issuing State in compliance with the duty of sincere cooperation under Article 4(3) TEU.[93] The number and content of questions asked must be pertinent to the specific case. The executing State can establish higher standards of detention conditions than those laid down and developed in EU law and the ECHR. However, the State can make the surrender subject to compliance only with the latter requirements, and not with those resulting from its own national law. According to the Court of Justice, the opposite interpretation would undermine the uniformity of the standard of protection of fundamental rights as defined by EU law, the principles of mutual trust and the efficacy of the EAW FD.[94] However, the executing court must not balance the risk of inhuman treatment against the effectiveness of judicial cooperation. Such a balancing exercise is prevented from the absolute nature of the prohibition stated in Article 4 CFREU.[95]

Secondly, there is the question of what determines the risk of inhuman treatment. In order for a violation of Article 4 CFREU to occur, a minimum level of severity is required which depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[96] There is a strong presumption of a violation of that prohibition, when the personal space available to a detainee is below 3m^2 in multi-occupancy accommodation.[97] The presumption can be rebutted only if: the reductions in space are short, occasional and minor; such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities; the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the person's detention.[98] In the assessment of detention conditions, the space factor must be considered jointly with other aspects such as access to outdoor exercise, natural light or air, ventilation, room temperature, privacy in the use of the toilet, basic sanitary and

---

90 Although the Court has not applied the *exceptional circumstances* doctrine to asylum and criminal law cooperation exactly in the same way, there are similarities and cross-references between the CJEU's case-law in the two areas. *Aranyosi and Căldăraru* is referred to in C-578/16 PPU, *C.K. and Others*, paras 59 and 75. There, the CJEU further clarified that the prohibition of transfer of an asylum-seeker may apply even in the absence of systemic deficiencies in the state responsible, where there is a real risk that the transfer will lead to a breach of the prohibition of inhumane treatment.

91 Case C-220/18 PPU, *ML*, EU:C:2018:589, para 90. The ECJ here refers to the ECtHR's case law in *Rezmiveș and Others v. Romania*, nos 61467/12 and 22088/04, 25 April 2017, para 72.

92 Case C-220/18 PPU, *ML*, para 73.

93 Case C-220/18 PPU, *ML*, para 104.

94 Case C-128/18, *Dumitru-Tudor Dorobantu*, para 79.

95 Case C-128/18, *Dumitru-Tudor Dorobantu*, para 84.

96 Case C-220/18 PPU, *ML*, para 91. See also the references to ECtHR, *Muršić*, paras 97 and 122.

97 Case C-220/18 PPU, *ML*, para 92; *Muršić*, para 124.

98 Case C-220/18 PPU, *ML*, para 93; *Muršić*, para 138.

hygienic requirements.[99] These additional factors must be taken into account even if the personal space in multi-occupancy prison accommodation exceeds 4m^2 of personal space. The calculation of that personal space must include the space occupied by furniture, with the detainees still being able to move around normally within the cell.[100]
The risk of inhuman treatment might also arise in relation to detention in a facility intended to last only for the duration of the surrender procedure, before transfer to where detention will be actually spent. While the length of a detention period may be a relevant factor in assessing the gravity of the treatment,[101] an overall evaluation of all the factors involved must be carried out. A period of a few days, spent in a detention space below 3m^2, might be considered as a short period. The same may not hold true for a period of around 20 days, especially if that period may be extended in the event of undefined circumstances.[102] In general, there cannot be any automatism between the brevity of detention and the discount of the risk of inhuman treatment.
The role for detention conditions in the context of EU judicial cooperation has become increasingly prominent, with the Court of Justice acting as the driving force in this regard. Member states cannot use their (possibly) higher standards of detention conditions as a ground to refuse surrender. However, the executing judge must be satisfied that the issuing State will comply with the requirements established by the ECtHR, on which the Court of Justice heavily relies. There are constraints on the extent to which the executing court can inquiry about detention conditions in the issuing state, mostly related to the need to ensure compliance with the time-limits established by the EAW FD (or at least trying to). That, in any case, creates no obligation for the judge to surrender within those terms, or to weight that risk against the effectiveness of judicial cooperation. Rather, the constraints orient and focus the assessment of the executing judge on the relevant aspects of the risk-calculation.

2. Judicial independence

If the ECtHR and the ECJ seems aligned on Article 3 ECHR/Article 4 CFREU, the approach to judicial independence tells a slightly different story. Two levels of analysis – though related – must be distinguished very clearly: on the one hand, the definition of judicial independence; on the other, the standard of proof required to refuse surrender/extradition in cases of threat to that right.
Article 2 TEU and the rule of law are the cornerstones of the CJEU's approach to judicial independence and are identified as the sources of salient provisions.[103] Firstly, there is the right to a fair trial and to an effective remedy as per Article 47 CFREU. Secondly, Article 19 TEU requires that national courts and the CJEU ensure the full application of EU law in all Member States and judicial protection of the rights of individuals under that law.[104] The right to an independent tribunal is key to the protection offered jointly by Articles 47 CFREU and 19 TEU: it forms part of the essence of the right to a fair trial, and is vital to the effective judicial review of any decision or measure relating to the application of EU law.[105]
The Court sees independence as consisting of an internal and external dimension. External independence presupposes autonomy of judicial functions 'without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions'.[106] This requires certain guarantees concerning, especially, protection against removal from office, remuneration commensurate with the importance of the functions and a disciplinary regime not prone to being used as a system of political control.[107] Internal independence is linked to impartiality and seeks to ensure equal distance from the parties to the proceedings, which comes with objectivity and the absence of any interest in the outcome apart from the strict application of the rule of law.[108] These rules are meant to preclude any influence – direct or indirect - which is

99 Case C-128/18, *Dumitru-Tudor Dorobantu*, paras 75-76; *Muršić*, paras 139-140.
100 Case C-128/18, *Dumitru-Tudor Dorobantu*, para 77; *Muršić*, paras 75 and 114 and the case-law cited.
101 Case C-220/18 PPU, *ML*, para 97; *Muršić*, para 131.
102 Case C-220/18 PPU, *ML*, para 99; *Muršić*, paras 146, 152 and 154.
103 Case C-216/18 PPU, *LM*, para 35.
104 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, paras 31-41.
105 Case C-216/18 PPU, *LM*, paras 49-51.
106 Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, EU:C:2019:531, para 72.
107 Case C-64/16, *Associação Sindical dos Juízes Portugueses*, para 45; C-506/04, *Wilson*, EU:C:2006:587, para 51.
108 Case C-506/04, *Wilson*, para 52.

liable to have an effect on the decision of the judges concerned.[109] Appearances matter too: 'What is at stake is the confidence which the courts in a democratic society must inspire in the public'.[110] In other words, 'justice must not only be done, it must also be seen to be done'.[111] On that basis, the judicial dialogue via (mostly) Article 267 TFEU between Polish judges and the ECJ has led the latter to upholding judicial independence against the authoritarian reforms introduced by the current Polish government.[112]

While the Luxembroug Court's approach is largely reliant on the understanding of judicial independence developed by the ECtHR, a degree of variance exists between the two that is worth highlighting. In general, it is important to remember that the guarantees of independence are required of a 'tribunal' in the context of the right to a fair trial, but also of a 'judge or other officer authorised by law to exercise judicial power' in relation to the habeas corpus.[113] The ECJ follows the ECtHR, as it regards impartiality as subjective and objective.[114] The ECtHR, however, sees *internal independence* as freedom from within the judiciary,[115] whereas *external independence* as concerning external pressure - from e.g. the executive.[116] Is this divergence purely terminological, or can there be practical consequences attached to it? The Court seems to treat independence and impartiality as cumulative parts of one single test. Both the Luxembourg Court and the ECtHR hold that independence and objective impartiality 'are closely linked'. The former, however, finds that this generally means they require joint examination,[117] whereas the latter states that they *may* require joint examination, *depending on the circumstances* (emphasis added).[118] If those sub-tests are indeed cumulative, who would benefit in the context of the *exceptional circumstances* doctrine? The answer depends on the party bearing the burden of proof. If the burden is on the court or tribunal under the spotlight, that would make harder for them to satisfy the relevant legal requirements: an easier test for the court to fail lends a hand to the defendant. The opposite would be true if the burden were on the person subject to the EAW, and both parts of the test would have to be met to convince the executing judge not to execute the warrant.

An opportunity for re-alignment might come from the recent ECtHR's case law on the Disciplinary Chamber of the Polish Constitutional Court, where the Strasbourg Court found that that Chamber did not satisfy the requirement of a 'tribunal established by law'. In the same judgment, the ECtHR also found that the National Council of the Judiciary – which plays a role in the appointment and promotion of judges in Poland – lacked independence.[119] In light of these developments, challenges to EAWs issued by Poland are being raised before Member States courts.[120]

It is also worth noting that the ECJ and the ECtHR have set different standards of proof, as far as refusing surrender/extradition on the basis of a threat to the right to a fair trial. While the ECtHR

---

109 Joined Cases C-585/18, C-624/18 and C-625/18, *A. K. v Krajowa Rada Sądownictwa, CP*, *DO v Sąd Najwyższy*, EU:C:2019:982, para 125.

110 Joined Cases C-585/18, C-624/18 and C-625/18, *A. K., CP and DO*, para 128. Here, the CJEU quotes verbatim the ECtHR. Among many, see *Morice v. France* [GC], no 29369/10, 24 April 2015, para 78.

111 ECtHR's judgment *De Cubber v. Belgium*, no. 9186/80, 26 October 1984, para 26; ECtHR's judgment, *Micallef v. Malta* [GC], no. 17056/06, 15 October 2009, para 98.

112 Joined Cases C-585/18, C-624/18 and C-625/18, *A. K., CP and DO*; Case C-192/18, *European Commission v. Republic of Poland*; Case C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

113 Article 5(3) ECHR. ECtHR's judgment, *McKay v. the United Kingdom* [GC], no. 543/03, 3 October 2006, para 35.

114 Subjective impartiality is related to the personal conviction or interest of a judge in a case, whereas objective impartiality aims to determine whether the judge offered sufficient guarantees to exclude any legitimate doubt in this respect and whether there are ascertainable facts which may raise doubts as to its impartiality. See the ECtHR judgments in *Cubber v. Belgium*, no. 9186/80, 26 October 1984, para 25; *Grieves v. the United Kingdom* [GC], no. 57067/00, 16 December 2003, para 69; *Morice v. France* [GC], no 29369/10, 24 April 2015, para 76.

115 ECtHR's judgment, *Parlov-Tkalčić v. Croatia*, no. 24810/06, 22 December 2009, para 86.

116 ECtHR's judgment, *Henryk Urban and Ryszard Urban v. Poland*, no 23614/08, 30 November 2010, para 45.

117 Joined Cases C-585/18, C-624/18 and C-625/18, *A. K., CP and DO*, EU:C:2019:982, para 129.

118 ECtHR's judgment, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para 150.

119 ECtHR's judgment, *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021.

120 See the two pending preliminary rulings: Case C-563/21 PPU, *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*; Case C-480/21, *Minister for Justice and Equality*.

uses 'risk of flagrant denial of justice',[121] the ECJ has stated that there must be a *real risk for* the right to an independent tribunal, which forms part of the essence of the right to a fair trial. In this sense, the ECJ seems to be relying on a milder standard, despite the EAW being based on a much stronger level of mutual trust than, for example, traditional forms of cooperation such as extradition.

VII. CONCLUSIONS

The history of the EU-ECHR relationship is rich and complex. Often there have been fruitful episodes of dialogue, accompanied by setbacks embodied most powerfully by *Opinion 2/13*. Both legal orders have established flexible mechanisms of coordination, such as Article 6 TEU and 53 CFREU, on the one hand, and the *Bosphorus* doctrine, on the other. The application of mutual recognition to judicial cooperation in criminal matters, and the introduction of the EAW especially, have posed challenges to fundamental rights compliance within the EU. This was compounded, until relatively recently, by the absence of an explicit exception to surrender on grounds of fundamental rights concerns. Even after the two-step test was introduced, the ECtHR has not called into question either the latter, or the general system of mutual trust and mutual recognition underlying the EAW. This approach is embodied by the decision to continue to apply the equivalent protection presumption to cases of surrender. The ECtHR has however made clear that the conduct of national authorities will not escape scrutiny, should the protection of ECHR rights appear to be manifestly insufficient. The *Bivolaru and Moldovan* judgement opens the door to new scenarios in the EU-ECHR relationship with regard to the EAW, and the two-step test in particular. The judgment shows the role the ECtHR could play in situations highly relevant for EU law. This holds true not only for the obligation to raise questions to the ECJ, but also for the way in which the cooperating States act in the context of the *exceptional circumstances* doctrine. On the one hand, the executing court cannot order surrender where the evidence indicates a clear risk for a fundamental right of the person subject to the EAW. On the other, the issuing authority must cooperate constructively too, without providing standard or formulaic responses to the request for further information made by the executing State. The developments in the ECtHR's case law might then pave the way to the ECJ establishing more specific authorities about the *exceptional circumstances* doctrine, as well as finding Member States responsible for breaches of EU law. If the two Courts are on the same wavelength when it comes to the definition of what constitutes degrading and inhuman detention conditions, the same might not be said about their approach to judicial independence. The practical relevance of such divergence has not surfaced prominently so far, and might be nuanced by the development of the case law on the concept of 'tribunal established by law'. This, of course, on the assumption that the ECJ will espouse the path taken by the ECtHR: another chapter to look forward to in this never-ending tale of two Courts.

121 ECtHR's judgment, *Soering v. United Kingdom*, no 14038/88, 7 July 1989, para 113.