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CHALLENGES TO THE RULE OF LAW IN THE EU SYSTEM OF JUDICIAL COOPERATION WITH SPECIFIC REGARD TO PROCEDURAL GUARANTEES IN CRIMINAL LAW AND COOPERATION SYSTEMS BASED ON THE PRINCIPLE OF MUTUAL RECOGNITION

ABSTRACT

The EU is committed to the rule of law. This concept includes effective judicial protection. For a long time, judicial cooperation between member states of the EU has not focused on providing effective judicial protection for individuals in cross-border cooperation. Instead, it was rather focused on the efficiency of cooperation indicated by various judgements of the ECJ and the ECtHR. As a necessity to counter the harmful effects of this efficiency, the EU legislature started to focus on the protection of fundamental rights in this field as well. In addition, the ECJ also took a different approach in 2016, when it decided in joined cases Aranyosi and Caldaru, that judicial cooperation in criminal matters may be suspended if it resulted in the violation of fundamental rights of the concerned person. The hypothesis of this paper is that the EU has meaningfully developed the quality of rule of law in the field of judicial cooperation. The paper focuses on how the ECJ's case law and various directives adopted by EU institutions affected the protection of fundamental rights in this field. The paper first introduces the dilemma of efficient cooperation and the protection of fundamental rights. After that, the paper describes the added value of the directives harmonising procedural guarantees in criminal law in the member states. Moreover, it emphasises the ECJ's role in making judicial cooperation more protective of fundamental rights by establishing a coherent jurisprudence regarding the refusal of judicial decisions when they may jeopardise the protection of fundamental rights.

Keywords: Rule of law, judicial cooperation in criminal matters, ECJ, procedural guarantees, EU criminal law

1. INTRODUCTION

According to Article 2 of the Treaty on the European Union, the EU is founded on values including the rule of law.¹ Defining rule of law is almost an impossible task. It has various meanings depending on which policies it is utilised in the EU.² As far as this article is concerned, the rule of law can be defined as a set of values which must be adhered to in the formulation of the legal system. The Venice Commission, established by the Council of Europe, for example held that the rule of law first and foremost comprises of the principle of legality and the requirements of legal certainty, prohibition of arbitrariness, access to justice before an independent and impartial tribunal and the protection of fundamental rights.³

When considering the system of judicial cooperation between member states of the EU, one can see that the protection of fundamental rights was not always a priority goal. For a long time, the EU has created measures for criminal cooperation between member states for the sake of efficiency of that cooperation, while it failed to strengthen the protection of fundamental rights in the same process. This resulted in cooperation systems, lacking the fundamental guarantees against fundamental rights violations and consequently the real possibility of violation of fundamental rights in that process.

Even though efficiency of judicial cooperation is a very important goal to achieve in an EU area of free movement, the EU legislator and even the ECJ realised after some time that the protection of fundamental rights is just as important in criminal cooperation as its efficiency. As a result, through a series of directives and judgements, the EU legislator and the ECJ started to develop a framework for fundamental rights protection in the field of judicial cooperation in criminal matters as well. The hypothesis of this article is that through these measures, the EU has meaningfully developed the quality of rule of law in the field of judicial cooperation. It showcases this development via analysing the major novelties of the case law of the ECJ from the 2020s concerning the European Arrest Warrant and the directives of the European Parliament and of the Council which harmonise the procedural status of the suspect and the accused in the criminal procedure. Hence, the article starts with a brief introduction to the challenges to the protection of fundamental rights in the EU system of judicial cooperation in criminal matters which will be followed by the analysis of the so-called procedural directives. After

¹ Art. 2 of the Treaty on the European Union (consolidated version of 2012), OJ C 326, 26/10/2012.

² Smith, M., *Staring into the abyss: A crisis of the rule of law in the EU*, European Law Journal, 2019, p. 563.

³ *Ibid*, p. 563.

the directives, the article will proceed to analyse the most recent judgements of the ECJ concerning the European Arrest Warrant. Through this analysis, the article will shed light on the fact that the EU has developed a coherent system of fundamental rights protection during judicial cooperation between member states.

2. FUNDAMENTAL RIGHTS IN DANGER? THE CONSEQUENCES OF A VERY EFFICIENT JUDICIAL COOPERATION IN CRIMINAL MATTERS

2.1. The parameters of the EU system of judicial cooperation

The purpose of European criminal law is to facilitate judicial cooperation in criminal matters within an EU area of free movement. This freedom is not accompanied by a single area of criminal justice. Instead, 27 criminal justice systems continue to exist on a territorial basis.⁴ In such an area, it is easy for the perpetrator to leave the member state having jurisdiction over the offence to escape prosecution, or for the property acquired through the offence to be removed from that member state to prevent its recovery in criminal proceedings. Moreover, there are also cases where a transnational offence involves the territory of several member states, and the evidence is therefore located in their territories.⁵

The EU system of judicial cooperation in criminal matters is specifically designed to deal with such situations, as it is designed to secure fugitives (see the European Arrest Warrant),⁶ recover criminal assets located in another member state (see the mutual recognition of freezing and confiscation orders),⁷ obtain evidence abroad (see the European Investigation Order),⁸ and to enforce sentences in another member state based on the principle of mutual recognition (see for example the

⁴ Mitsilegas, V., *EU Criminal Law after Lisbon. Rights, Trust and the Transformation of Justice in Europe*, Hart, Oxford, 2018, p. 125.

⁵ An offence is considered to be transnational or cross-border, if it is committed in the territory of two or more states or otherwise creates the criminal jurisdiction of two or more states, for example if the offender and the victim are in different states, or if a criminal organisation commits the offence in a state other than the state in which it operates, such as preparing the offence in one state and committing the offence in another. In addition, a transnational crime also includes offences that affect the social, economic or political order of another state.

⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18/07/2002.

⁷ Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L 303, 28/11/2018.

⁸ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 01/05/2014.

mutual recognition of custodial sentences to be served or of sentences imposing financial penalties).⁹ Without this system, due to the strict territoriality of criminal law, the law enforcement authorities of the member states would not be able to deal effectively with offences that could be considered cross-border for any of the above reasons, since only in exceptional cases could they take any procedural steps in the course of criminal proceedings in the territory of another member state.¹⁰

Within this complex system, the application of the principle of mutual recognition is the driving force of cooperation,¹¹ since secondary sources of EU law based on this principle are the most helpful for judicial cooperation at the operational level, i.e. on a case-by-case basis. The principle of mutual recognition is intended to simplify cooperation between the criminal justice systems of the member states. Its essence is the same as that of the English and Scandinavian systems, i.e. that a judicial decision adopted in one member state can, and indeed must, be enforced in another member state without any further examination of its content.¹² The result of this regulatory technique is a quasi-automatic system whereby decisions falling within the scope of the principle of mutual recognition become enforceable in another member state without the executing member state having to examine the substance of the decision to see whether it complies with its own legal order.¹³ The main benefit of the principle of mutual recognition – and its intrinsic purpose – in the process of criminal cooperation is that it allows criminal justice systems to cooperate without the need for a particular harmonisation of the – often very

⁹ 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 Union, OJ L 327, 05/12/2018; Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22/03/2005.

¹⁰ One such exception is the cross-border pursuit under the Convention implementing the Schengen Agreement, which is possible if the offender is caught in the act of crossing a state border. In addition, there is almost no other measure under criminal procedure that could be carried out by an investigating or judicial authority of a member state on the territory of another member state without prior authorisation. See: Art. 41(1) of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 239, 22/09/2000.

¹¹ Schwarz, M., *Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice*, European Law Journal 2-3/2018, p.125.

¹² Karsai, K., *Az alapelvek rendszere az európai büntetőjogban*, Szegedi Tudományegyetem, Szeged 2015, p. 108.; In essence, the judicial decision is transformed from a request for legal assistance into a warrant that must be executed thanks to the principle of mutual recognition. See: Ambos, K., *European Criminal Law*, Cambridge University Press, Cambridge, 2019, p. 418.

¹³ Mitsilegas, V., *The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness based on Earned Trust*, Revista Brasileira de Direito Processual Penal, 2/2019, p. 571.

different - legislation of the member states, which would be a much more difficult task from a political and regulatory point of view.¹⁴

2.2. The lack of sufficient guarantees for the protection of fundamental rights

Even though this system is very efficient, it is not without its shortcomings. For a long time, efficiency has been the primary consideration in this cooperation. A major criticism of the system of criminal cooperation based on the principle of mutual recognition is that it provides no possibility of refusing to enforce the judicial decisions that are the subject of the principle if enforcement would result in a violation of fundamental rights.¹⁵ This system was based on a requirement of extreme trust between member states that they would fully respect fundamental rights in criminal proceedings simply because they had acceded to the ECHR.¹⁶ In practice, however, the opposite seemed to be the case, as the ECtHR has ruled in a number of judgments that member states were conducting criminal proceedings in a way that violates fundamental rights.¹⁷ Moreover, the literature has criticised the cooperation system for the abolition of the double jeopardy standard for certain offences, as the substantive criminal law of the member states is not harmonised. According to some authors, the lack of harmonisation and the exclusion of double jeopardy may result in someone being prosecuted in another member state for an act that is not a criminal offence in the enforcing member state or is not regulated as a criminal offence but only as a misdemeanour. This may violate the principle of legality.¹⁸ Other authors have criticised the lack of the principles of necessity and proportionality in connection with the flagship instrument of the system of criminal cooperation based on the principle of mutual recognition, the European

¹⁴ Bárd, P., *Jogállamiság és európai büntetőpolitika*, Jogtudományi Közlöny 9/2016, p. 437.

¹⁵ Fichera, M., *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?* European Law Journal 1/2009, p. 81.

¹⁶ Already in joined cases Gözütök and Brügge, the ECJ referenced this mutual trust between member states. See: Joined cases C-187/01 & C-385/01 Gözütök and Brügge [EU:C:2003:87] para. 33.

¹⁷ Alegre, S., Leaf, M., *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant*, European Law Journal, 2/2004, p. 201.

¹⁸ Alegre, Leaf, *op. cit.* note 17, p. 208.

Arrest Warrant.¹⁹ Last but not least, some authors have also criticised the lack of right to legal remedy.²⁰

Another well-founded criticism is that the cooperation systems do not take into account the diversity of national legal systems. This is a problem because, through the automatic recognition and enforcement of judicial decisions, member states do not merely enforce individual judicial decisions as if they had been issued in their own legal system, but recognise the criminal justice systems of other member states as equivalent to their own.²¹ This process results in a situation where the citizen staying in the executing member state becomes the subject to the legal system of another member state. This is a matter of concern from a fundamental rights point of view, because member states have different systems of procedural guarantees in criminal law, so it can be argued that the procedural guarantees of the executing member state cannot be fully enforced during the execution of a judicial decision.

Criminal law infringes on fundamental rights. Sanctions provided for by criminal law seriously infringe a person's fundamental rights, such as imprisonment and fines, which violate the right to personal liberty and the right to property.²² Moreover, criminal law restricts the fundamental rights of individuals during criminal proceedings. The ultimate aim of criminal proceedings is to prosecute the perpetrator of the offence to establish criminal liability and punish the offender.²³ To this end, the criminal procedure codes operate with a number of coercive measures that can be used by the investigating and judicial authorities to ensure that the prosecution is successful. Coercive measures usually restrict the personal liberty, privacy or property rights of the persons involved in the case.²⁴

As the defendant in criminal proceedings is a private individual confronted with the overwhelming power of the state, the principles and procedural guarantees of criminal law are of paramount importance.²⁵ Both the principles and the complex system of procedural guarantees are designed to protect the fundamental rights of

¹⁹ Marin, L., *Effective and Legitimate? Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant*, New Journal of European Criminal Law 3/2014, p. 335; Bachmaier Winter, L., *Mutual Recognition and the Role of the CJEU: The Grounds for Non-execution*, New Journal of European Criminal Law 4/2015, p. 514.

²⁰ Marin, *op. cit.* note 19, p. 343.

²¹ Karsai, *op. cit.* note 12, p. 108.

²² Kettunen, M., *Legitimizing European Criminal Law. Justifications and Restrictions*, Springer, Switzerland 2020, p. 60.

²³ Farkas, Á., Róth, E., *A büntetőeljárás (Negyedik, átdolgozott kiadás)*, Wolters Kluwer, Budapest 2018, p. 16.

²⁴ Farkas, Róth, *op. cit.* note 23, p. 26.

²⁵ Bárd, *op. cit.* note 14, p. 439.

the accused.²⁶ Both systems gained their current form over a long period of evolution. While the principles of substantive criminal law can be traced back to the Enlightenment, procedural guarantees are more closely linked to the development of human rights systems and are encapsulated in the right to a fair trial.²⁷ The Universal Declaration of Human Rights has already laid down the basic requirements of a fair trial, namely:

'Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

*No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'*²⁸

The European Convention on Human Rights is even more specific about the guarantees to be given to the accused. It states:

'Article 6

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
- (b) to have adequate time and facilities for the preparation of his defence;*
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
- (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'*²⁹

The above procedural guarantees were significantly strengthened and extended in their substance by the case law of the ECtHR as well. Consequently, the system of procedural guarantees for the accused includes the right to information,³⁰ the right

²⁶ Lárís, L., *Az alapvető jogok érvényesülésének problémái az Európai Unióban*, Eljárásjogi Szemle 3/2017, p. 3.

²⁷ Bárd, *op. cit.* note 14, p. 438-439.

²⁸ Art. 11. of the Universal Declaration of Human Rights, UN General Assembly A/RES/217(III).

²⁹ Art. 6(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette - International Conventions, No. 18/1997, 6/1999, 14/2002, 13/2003, 9/2005, 1/2006, 2/2010, 13 /2017 (hereinafter: ECHR).

³⁰ See for example Case of Pélissier and Sassi v. France, Judgement of 25 March 1999 (Application no. 25444/94)

of defence,³¹ the right to represent oneself and to be represented by a lawyer at the trial and be provided with legal aid if necessary,³² and the right to interpretation.³³ These rights can reduce the vulnerability of the accused by ensuring that they are informed in a timely manner of their procedural rights and obligations, of the offence of which they are suspected or accused of having committed, and of the facts and legal reasoning underlying the suspicion or accusation. They also guarantee that the accused can appoint a defence lawyer, participate in the proceedings and challenge witnesses' statements. Finally, the right to interpretation gives a defendant who does not speak the language of the proceedings the opportunity to understand the proceedings against him or her and can therefore be seen as a particularly important additional right.³⁴ This system was greatly relied on when the EU system of procedural guarantees were created.

However, for a long time before that, the only plane of contact between fundamental rights and criminal law was the national legal system. The procedural guarantees of national legal systems have evolved organically. The particularities of criminal justice systems are determined by the social and cultural structure of a given state, as there is a social consensus around the development of criminal law norms.³⁵ However, procedural guarantees emerged in a new nexus when EU member states started to create their system of criminal cooperation based purely on EU law. For this reason, they quickly became the focus of attention in this system, as the guarantees of the member states considerably differed from one another.³⁶ The reason for this was that this issue used to be a regulatory necessity only under national law, but the principle of mutual recognition resulted in the extension of the territorial scope of member states' criminal justice systems beyond their borders.³⁷ This principle makes a judicial decision taken in one member state enforceable in another member state, even though the decision was drafted in accordance with the procedural guarantees of the issuing member state, which may

³¹ See for example Case of Ibrahim and Othman v. The United Kingdom, Judgement of 13 September 2016 (Applications nos. 50541/08, 50571/08, 50573/08 and 40351/09).

³² See for example Case of Monnell and Morris v. The United Kingdom, Judgement of 2 March 1987 (Application no. 9562/81; 9818/82).

³³ See for example Case of Baytar v. Turkey, Judgement of 14 October 2014 (Application no. 45440/04).

³⁴ Hodgson, J., *Criminal procedure in Europe's Area of Freedom, Security and Justice: the rights of the suspect* in Mitsilegas, V., Bergström, M., Konstadinides, T. (ed.), *Research Handbook on EU Criminal Law*, Edward Elgar, Cheltenham, 2016, p. 171-172.

³⁵ Lárís, L., *Az uniós büntetőjog érvényesülésének problémái a belső jogban alkotmányjogi megközelítésben I.*, Magyar Jog, 10/2021, p. 621.

³⁶ Bárd, *op. cit.* note 14, p. 441-442.

³⁷ In essence, the principle of mutual recognition gives effect to judicial decisions in a Member State other than the one in which the decision was originally issued. See: Klimek, L., *Mutual Recognition of Judicial Decisions in European Criminal Law*, Springer, Cham 2017, p. 6.; Mitsilegas, *op. cit.* note 4, p. 126.

conflict with the procedural guarantees of the executing member state.³⁸ In several cases, this has led to a breach of fundamental rights in criminal cooperation between member states, which has been repeatedly pointed out by the ECtHR and the EU legislative institutions.³⁹

2.3. A turning point for the protection of fundamental rights in the EU system of judicial cooperation

Despite the well-founded criticism, the system of criminal cooperation based on the principle of mutual recognition has been slow to change. European criminal law has for a long time failed to provide sector-specific protection of fundamental rights, even though fundamental rights play a particularly important role in the field of criminal law. The protection of fundamental rights has followed a complex evolutionary path in the European integration. The EU was initially an exclusively economic integration and, as such, the founding treaties did not address the protection of fundamental rights for a long time. Nevertheless, it became necessary to develop a system of fundamental rights protection based on EU law, as national systems of fundamental rights protection could not be enforced because of the primacy of EU law. This was first attempted by the ECJ in case C-29/69 *Stauder*, in which it held that the fundamental rights of individuals form part of the general principles of Community law. Subsequently, the ECJ identified the source of inspiration for the protection of fundamental rights in the EU in case C-11/70 *Internationale Handelsgesellschaft*, namely the constitutional traditions of the member states. The protection of fundamental rights first appeared in written primary law in the Maastricht Treaty, which largely regulated it as already fleshed out by the ECJ. It set out that the EU – as a legal principle – is obliged to respect fundamental rights under the ECHR and the constitutional traditions of the member states. After the adoption of the Maastricht Treaty, essentially this primary legal framework defined fundamental rights protection in the EU until the adoption of the Lisbon Treaty. However, this system could not be applied in the field of European criminal law, since criminal cooperation between member states was governed by the primary framework of the third pillar that had an

³⁸ Farkas, Á., *Az Európai Bíróság és a kölcsönös elismerés elvének hatása az európai büntetőjog fejlődésére*, Miskolci Jogi Szemle, Special issue 2011, p. 73.

³⁹ Green Paper from the Commission, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*, 2003.02.19., COM(2003) 75; Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM(2004) 328, para. 10.; Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392, 2010/0215 (COD), 20/07/2010, p. 5.

intergovernmental nature, which limited the competence of the ECJ. Moreover, the first pillar principles were not applicable under it.⁴⁰

However, with the overhaul of the primary legal framework of judicial cooperation in criminal matters, it became possible to legislate on matters of criminal procedure.⁴¹ In addition, the ECJ also recognised the necessity to at least allow to suspend criminal cooperation when it would result in the violation of fundamental rights. Consequently, the legislative institutions adopted six directives which strengthen the status of the individual in the criminal procedure essentially executing the Roadmap for harmonising procedural guarantees in criminal law in the member states set out by the Council in 2009.⁴² Moreover, the ECJ has gradually extended the scope of suspension of judicial cooperation for the protection of fundamental rights. Thus, the combined efforts of the legislature and the ECJ has resulted in the significant improvement of the EU legal framework of judicial cooperation in terms of the protection of fundamental rights strengthening the quality of the rule of law as a whole in the EU.

3. DIRECTIVES STRENGTHENING THE STATUS OF THE DEFENDANT IN THE CRIMINAL PROCEDURE

3.1. A Roadmap calling for the implementation of ECHR guarantees of the right to a fair trial into EU law

Following the failure of the legislative procedure for the Commission's 2004 draft Framework Decision that already aimed to harmonise procedural guarantees in criminal law throughout the EU, the Lisbon Treaty has provided an explicit legal

⁴⁰ Szalayné Sándor, E., *Alapjogvédelem az Európai Unióban* in Horváth, Zs., Mohay, Á., Pánovics, A., Szalayné Sándor, E. (ed.), *Európai Közjog 2*. Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs 2016, p. 76-77.; Jeney, P., *Alapjogvédelem az Európai Unióban* in Kende, T., Jeney, P., Szűcs, T., *Európai közjog és politika*, ORAC, Budapest 2022, p. 700-705.; Mohay, Á., *Az Emberi Jogok Európai Egyezménye az uniós jogban – csatlakozás előtt és után(?)*, Jura 1/2018, p. 71.; Gárdos-Orosz, F., *Az Európai Unió alapjogvédelmi rendszere és a magyar alkotmányjog*, Jog Állam Politika: Jog- és Politikatudományi Folyóirat, 4/2011, p. 81.; Kostoris, R., *The Protection of Fundamental Rights* in Kostoris, R., *Handbook of EU Criminal Procedure*, Springer, Cham 2018, p. 69.; Art. 35(3) of the Treaty on the Functioning of the European Union (consolidated version of 2006) OJ C 321 E, 29/12/2006.

⁴¹ Art. 82(2) of the Treaty on the Functioning of the European Union (consolidated version of 2012), OJ C 326, 12/10/2012.

⁴² Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295, 04/12/2009 (hereinafter: Roadmap).

basis for harmonisation of criminal procedure law. In the new Lisbon framework in 2009, the harmonisation of the status of the suspect and the accused was brought back into focus after the Council set out its roadmap for the adoption of directives to harmonise procedural rights, which are the substance of the right to a fair trial. The growing importance of the harmonisation of procedural rights is demonstrated not only by the Council's roadmap, but also by the Commission's Communication issued during the process of drafting the Stockholm Programme, which confirmed the need to implement the roadmap drawn up by the Council.⁴³

In the roadmap, the Council called for the harmonisation of procedural safeguards, referring to the arguments presented earlier.⁴⁴ In doing so, it set the standards of the ECHR as the main quality requirement for legislation.⁴⁵ It has also identified the procedural rights that need to be harmonised, namely the right to translation and interpretation, the right to information, the right to legal assistance, the right to communication and guarantees for suspects and accused persons with special needs. It also instructed the European Commission to prepare a Green Paper on the harmonisation of rules on pre-trial detention.⁴⁶

After 2009, the Council and the European Parliament started to implement the objective set by the Council in its 2009 Roadmap, namely to harmonise the criminal procedure law of the member states with a view to strengthening the status of the suspect and the accused.⁴⁷ Eventually six directives and a Green Paper was adopted based on the call of the Roadmap.⁴⁸ The first was Directive 2010/64/EU, which regulates the right to interpretation and translation in criminal proceedings.⁴⁹ This was followed by Directive 2012/13/EU, which regulates the

⁴³ The Stockholm Programme – an open and secure Europe serving and protecting citizens, HL C 115, 04/04/2010, p. 10.; Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen, COM(2009) 262, p. 18.

⁴⁴ The Council reaffirms that the system of cooperation in criminal matters is based on mutual respect for fundamental rights as protected by the ECHR. It also stresses the need to harmonise procedural guarantees in the area of free movement within the EU, given the increasing frequency of offences committed by foreign nationals. See: Roadmap, paras. (1), (4)-(5).

⁴⁵ Roadmap, para. (13).

⁴⁶ Roadmap, p. 3.

⁴⁷ Harmonisation serves to increase trust between member states. See: Spencer, J., *The Principle of Mutual Recognition* in Kostoris, *op. cit.* note 40, p. 288.

⁴⁸ Ouwerkerk, J., *EU Competence in the Area of Procedural Criminal Law: Functional vs. Self-standing Approximation of Procedural Rights and Their Progressive Effect on the Charter's Scope of Application*, European Journal of Crime, Criminal Law and Criminal Justice, 2/2019, p. 89-90.

⁴⁹ 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, OJ L 280, 26/10/2010 (hereinafter: 2010/64/EU).

right to information,⁵⁰ followed by Directive 2013/48/EU, which implemented measures 'C' and partly 'D', regulating the right to communication and the right of defence.⁵¹ These sources of law are referred to in the literature as the ABC directives because they implemented the first three measures.⁵² After a three-year break, implementation resumed in 2016. Firstly, Directive (EU) 2016/343 on the presumption of innocence and the right to be present at the trial was adopted.⁵³ These rules were not part of the call in the Roadmap, however it called for the expansion the range of measures as necessary.⁵⁴ There is no doubt that the presumption of innocence and the right to be present at the trial is a cornerstone of the right to a fair trial, so the Directive is by no means a measure that stands out. This was followed by Directive (EU) 2016/800, which laid down special procedural safeguards for child offenders which partially implemented Measure 'E'.⁵⁵ Finally, Directive (EU) 2016/1919 regulates free legal aid, which fully implements Measure 'D'.⁵⁶

3.2. The positive impact of the directives

All the directives strengthen the procedural status of the accused by laying down minimum rules implementing the standards of the right to a fair trial as set out in the ECHR. Therefore, I will refer to them collectively as procedural directives.

⁵⁰ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142, 01/06/2012 (hereinafter: 2012/13/EU).

⁵¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 06/11/2013 (hereinafter: 2013/48/EU).

⁵² Allegrezza, S., Covolo, V. (ed.), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies*, Wolters Kluwer Italia, Milan 2018, p. XVII.

⁵³ 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, OJ L 65, 11/03/2016 (hereinafter: (EU) 2016/343).

⁵⁴ Róth, E., *A terhelti jogokat érintő uniós elvárások* in Farkas, Á. (ed), *Fejezetek az európai büntetőjogból*, Bíbor Kiadó, Miskolc 2017, p. 218.; Roadmap, para. (12).

⁵⁵ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21/05/2016 (hereinafter: (EU) 2016/800).

⁵⁶ Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 04/11/2016 (hereinafter: (EU) 2016/1919).

The content of the directives has already been described in detail in the literature,⁵⁷ so I will focus on how the ECHR standards are implemented and whether the directives go beyond them.

First and foremost, individually, the procedural directives represent a major step forward in the approximation of national criminal procedure systems, but it should also be stressed that, taken together, they achieve even more. Essentially, the directives strengthen the procedural standards laid down in each other. This is underlined not only by the literature,⁵⁸ but also the directives themselves.⁵⁹ For example, Directive 2012/13/EU strengthens the right to interpretation and translation and the right to legal assistance by requiring that the accused be informed of these rights.⁶⁰

The evaluation of the directives should also include an assessment of their legal basis. First of all, the directives are based on Article 82(2) TFEU, which allows for the harmonisation of the rights of parties to criminal proceedings in order to facilitate the mutual recognition of judgments and judicial decisions. Although the legal basis does not explicitly indicate that legislation based on it should apply only to criminal proceedings with a transnational element, some authors criticise the scope of the directives, since they apply not only to surrender procedures in the case of a European Arrest Warrant, but also to criminal proceedings in the member states which do not have an international, i.e. cross-border, element.⁶¹

⁵⁷ See: Tóth, D., *Az ártatlanság vélelméről szóló irányelv implementálása az Európai Unióban* in Ambrus, I., Köhalmi, L. (ed.), *Mészáros Ádám Emlékére*, Publicitas Art Média, Budapest 2022, p. 233-243.; Róth, E., *A sértett helyzete a büntetőeljárásban az Európai Unió elvárásainak tükrében*, Special Issue 1/2011, p. 155-167.; Nagy, A., *A büntetőeljárás során gyanúsított vagy vádlott gyermekek részére nyújtandó eljárási biztosítékok az Európai Unióban*, Miskolci Jogi Szemle, Special Issue 2/2019, p. 209-220.; Vinnai, E., *Tolmácsolás a jogi eljárásban*, Miskolci Jogi Szemle, Special Issue 2017, p. 133-142.; Róth, E., *A tájékoztatáshoz való jog* in Róth, E. (ed.), *Decem anni in Europaea Unione V.: Tanulmányok a büntügyi tudományok köréből*, Miskolci Egyetemi Kiadó, Miskolc 2016, p. 56-74.; Róth, E., *A hatékony védelemhez való jog* in Czine, Á. (ed.), *Király Tibor emlékkötet*, ORAC, Budapest 2022, p. 271-285.; Klimek, *op cit* note 37, p. 586-664.; Statzger, *International and European criminal law*, Hart, Munich 2018, p. 165-167.; Kostoris, *op. cit.* note 40, p. 85-90.; Balsamo, A., *The Content of Fundamental Rights* in Kostoris, *op. cit.* note 40, p. 99-172.; Ambos, *op. cit.* note 12, p. 137-141.; Quattrocchio, S., *The Right to Information in EU Legislation* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law*, Springer, Cham 2015, p. 81-95.; Vogler, R., *Lost in Translation: Language Rights for Defendants in European Criminal Proceedings* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law*, Springer, Cham 2015, p. 95-111.; Bachmaier Winter, L., *The EU Directive on the Right to Access to a Lawyer: A Critical Assessment* in Ruggeri, S. (ed.), *Human Rights in European Criminal Law*, Springer, Cham 2015, p. 111-135.

⁵⁸ Róth, *op. cit.* note 57, p. 220.

⁵⁹ See, para. (25) 2012/13/EU, para. (14) 2013/48/EU.

⁶⁰ Art. 3(1)(a)-(b),(d) 2012/13/EU.

⁶¹ Ouwerkerk, *op. cit.* note 48, p. 92.

This criticism is misplaced because harmonisation in order to achieve the underlying objective cannot be limited to criminal proceedings with a transnational element. If this would be implemented, it would result in an unjustified discrimination between the subjects of criminal proceedings. The result would be that the subjects of criminal proceedings with an international element would have at least partly different rights than the subjects of purely national criminal proceedings. If, for example, the Directives were to apply only to the surrender procedure for the European Arrest Warrant, it would not be appropriate to achieve the approximation member states' criminal procedure systems in any meaningful way.

This has led to a situation, unprecedented in the last three decades, where EU law directly influences member states' rules of criminal procedure. The explicit aim of the directives is to contribute to the functioning of a system of cooperation in criminal matters based on the principle of mutual recognition by harmonising the status of the person charged in criminal proceedings.⁶² Given that they have indeed been able to enforce ECHR rules and ECtHR standards, and in some cases even go beyond them, it can be said that the procedural directives have brought about substantial progress in the field of criminal cooperation. A number of procedural guarantees that fall within the scope of the right to a fair trial need to be applied in a uniform way in the member states, where different rules applied previously. In doing so, the Directives contribute to eliminating at least some of the cases in the criminal cooperation between member states where the protection of fundamental rights is jeopardized.

However, the advantage of directives is not only that they harmonise the law, but also that member states apply EU law in criminal proceedings, and indirectly the Charter of Fundamental Rights.⁶³ This established the jurisdiction of the ECJ, which has already been utilised by national courts in a number of cases.⁶⁴ As a consequence, the ECJ has started to develop its own case law on the right to a fair trial.

Consequently, the impact of the procedural directives is very positive. All procedural guarantees that are part of the right to a fair trial are adequately protected in the EU member states. Only the substantive elements of the right to a fair trial which are guaranteed by the legal systems of all member states as a

⁶² See Art. 82(2) TFEU which expressly states that harmonisation may take place for the purpose of facilitating the mutual recognition of judicial decisions in criminal law.

⁶³ Ouwerkerk, *op. cit.* note 48, p. 95.

⁶⁴ See for example Case C-377/18 AH and others [EU:C:2019:670]; Case C-209/22 Rayonna prokuratura Lovech, TO Lukovit [EU:C:2023:634]; Case C-615/18 Staatsanwaltschaft Offenburg [EU:C:2020:376]; Case C-564/19 IS [EU:C:2021:949].

fundamental requirement of the rule of law (e.g. the right to an independent and impartial tribunal established by law; the requirement of public trial and the right to be tried within a reasonable time) are not regulated. In an even greater result, the EU legislator has repeatedly overachieved its original goal, that is implementing the guarantees of the right to a fair trial as set out by the ECHR. This is demonstrated by the fact that Directive 2010/64/EU requires member states to provide a written translation of so called essential documents that guarantees that the accused understands the criminal procedure against them.⁶⁵ The necessity to translate essential documents is even strengthened by the ECJ's case law which identified the definitive elements of what constitutes an essential document.⁶⁶ In addition to that, Directive 2012/13/EU sets out a list of procedural rights that the suspect and the accused must be informed of.⁶⁷ The written form of the list specifically strengthens the position of the suspect and the accused, as they can easily get to know what they are entitled to. Moreover, Directive 2013/48/EU codifies the standards regarding the limitations on the right to access to a lawyer established in the case law of the ECtHR by stipulating that derogations from this right shall be proportionate and necessary, strictly limited in time and the decision on derogation shall be made by judicial authority or by an authority whose decision may be challenged before a judicial authority.⁶⁸ The right to access to a lawyer was reiterated by the ECJ as well in a preliminary ruling procedure where it established that the execution of procedural measures after the initial testimony of the suspect indicating their guilt shall be interpreted as the communication of suspicion against the subject of the criminal procedure. Hence, the right to access to a lawyer – and information about other procedural rights – should be communicated to the subject right after their testimony even if they are not officially notified about the suspicion.⁶⁹ Another novel addition to the right to legal assistance is that Directive (EU) 2016/1919 defines the criteria that shall be taken into account when assessing the financial means of the subject.⁷⁰ The directives lists a number of very pragmatic aspects which authorities should consider. By setting out such a definitive list, the directive achieves greater harmonisation than the ECHR that results in a more coherent practice among member states. Last, but not least, Directive (EU) 2016/800 sets out a very detailed list of further procedural guarantees for child suspects and accused persons. They represent a special group of subjects of the criminal procedure who is more vulnerable. Even though the

⁶⁵ Art. 3 2010/64/EU.

⁶⁶ Case C-242/22 PPU TL [EU:C:2022:611], para. 60.

⁶⁷ Art. 3-4. 2012/13/EU.

⁶⁸ Art. 8. 2013/48/EU cf. European Court of Human Rights: Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal limb) (updated version of 31 August 2024), paras. 480-485.

⁶⁹ Art. 2(1) 2013/48/EU; Case C-209/22, paras. 18-19, 23, 35-36, 43-44.

⁷⁰ Art. 4(3) (EU) 2016/1919

ECtHR has some general references to vulnerable defendants, it does not establish the special procedural status of the child which – in contrast – the Directive does.

It is also worth pointing out that Article 47 of the Charter of Fundamental Rights is almost identical in content to Article 6 of the ECHR. Both regulate the right to a fair trial. It is important, however, to draw attention to the differences in substance between Article 6 ECHR and Article 47 of the Charter. I believe that the directives play a very important gap-filling role, because if we compare the relevant articles of the ECHR and the Charter, we can see that Article 47 of the Charter does not regulate the guarantees of the right to a fair trial, i.e. the procedural guarantees that these measures are intended to implement, in the same detail as the ECHR does. While Article 6(3) ECHR expressly lays down multiple procedural guarantees, the Charter of Fundamental Rights regulates them rights as follows:

„Article 47

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”⁷¹

From this wording, only the right to representation by a lawyer and to be represented free of charge can be explicitly inferred from the above-mentioned procedural guarantees. This does not mean that these guarantees cannot be derived from Article 47 of the Charter, but their absence undoubtedly results in a more precarious status for the person charged in criminal proceedings.⁷² It can therefore be said that the procedural directives codified the guarantees of the right to a fair trial in EU law, as enshrined in the ECHR and elaborated in the case law of the ECtHR, but obviously based on Article 47 of the Charter of Fundamental Rights. The European Commission itself has confirmed that the directives will achieve more consistent jurisprudence by regulating the guarantees of the right to a fair

⁷¹ Art. 47 of the Charter of Fundamental rights of the European Union, OJ C 364, 18/12/2000 (hereinafter: CFR)

⁷² This is because Article 52(3) of the Charter of Fundamental Rights provides that where a right under the Charter is identical to a right under the ECHR, the content and scope of that right must be considered to be identical to that set out in the ECHR. Thus, of course, the right to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights also includes the procedural guarantees laid down in the procedural directives, but enshrining them in written form, in secondary EU sources of law, increases legal certainty and substantially improves the status of the accused in criminal proceedings. *Ld.: Art. 52(3) CFR; Statzger, op. cit. note 57, p. 51.*

trial.⁷³ In addition, the EU Agency for Fundamental Rights also sees the procedural directives as clarifying the content of Article 47 of the Charter, as it includes the directives under consideration in the connection with this article.⁷⁴ Moreover, the directives have the added value that EU law is clearly more effectively implemented and enforced in the member states than the ECHR rules. Thus, the directives play a major and efficient role in the strengthening of the status of the individual in the criminal procedure.⁷⁵

3.3. The shortcoming of the directives

Even though it is clearly visible that the directives carry a variety of novelties even in contrast to the ECHR standards regarding the procedural guarantees of the right to a fair trial, it is without question that the EU legislator has failed to introduce a comprehensive harmonisation of the rights of redress for breaches of these procedural guarantees. In general, even though the directives do prescribe the provision of remedial procedures – most of them having meaningful substance –, they do not set out the means of provision of those procedures.⁷⁶ Instead, member states are free to establish remedial measures for guarantees under their procedural autonomy.⁷⁷

⁷³ Report from the Commission to the European Parliament and the Council on the implementation of 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, (COM(2018) 857), p. 2.; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (COM(2018) 858), p. 1.; Report from the Commission to the European Parliament and the Council on the implementation of Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third person informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (COM(2019) 560), p. 1.

⁷⁴ Collection of the EU Agency for Fundamental Rights: <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#eu-law>.

⁷⁵ Kistoris, *op. cit.* note 40, p. 84.

⁷⁶ See for example Arts. 2(5) and 3(5) 2010/64/EU; Art. 8 2012/13/EU; Art. 8 2013/48/EU.

⁷⁷ The procedural autonomy of Member States in the area of remedial rights under EU law means that they are free to develop their own rules on legal remedy, provided that they comply with the requirement of the right to an effective remedy laid down in Article 47 of the Charter of Fundamental Rights. If it is left to the discretion of the Member States to establish such a right, it can only be judged *ex post* whether it meets this requirement. To assess this, the ECJ applies the principles of effectiveness and equivalence. It has applied these principles as assessment criteria in a number of judgments, such as in Case C-33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG c Landwirtschaftskammer für das Saarland, case C-300/17 Hochtief AG. See: Neframi, E., Article 47 of the Charter in the Opinion Procedure: Some Reflections Following Opinion 1/17, European Papers, 1/2021, p. 748.

The procedural autonomy of the member states in creating their own procedures for remedial rights was reiterated by the ECJ in more cases. For example, in a preliminary ruling procedure which was initiated for not informing the suspects about their privilege against self-incrimination upon taking their testimony, the ECJ held that French legislation forbidding the court to take into account this fact as jeopardising the fairness of the procedure is in line with Directive 2012/13/EU as the very same legislation provides the right to the defendant to challenge the testimony taken without prior information about the right to silence.⁷⁸

Thus, I am led to believe that the current system for setting out procedures for remedial rights for cases when the procedural guarantees of the suspect and the accused are violated is going to remain in member states' competence. Consequently, the current EU system on procedural guarantees will continue to lack a very important aspect of strengthening the status of the individual in the criminal procedure which is the harmonisation of the right to legal remedy. This is currently protected by the principles of equivalence and efficiency. Even though they do require member states to provide the same quality of protection for defendants regardless of their place of residence – be it in the member state of the criminal procedure or elsewhere –, harmonisation of remedial rights through the directives would approximate the status of the individual in a uniform manner in every member state.

4. FURTHER CLARIFICATION OF THE ARANYOSI TEST

The ECJ's judgment in the Aranyosi and Căldăraru cases has had the biggest impact so far on the protection of fundamental rights in criminal cooperation.⁷⁹ An outstanding number of studies have been produced that deal with this judgment from several different angles,⁸⁰ and a number of judgments have served to clarify

⁷⁸ Case C-660/21 K.B. and F.S. [EU:C:2023:498], paras. 15-17, 19, 49.

⁷⁹ Joined cases C-404/15 & C-659/15 PPU Aranyosi and Căldăraru [EU:C:2016:198] (hereinafter: C-404/15).

⁸⁰ Aizpurua, E., Rogan, M., *Understanding new actors in European Arrest Warrant cases concerning detention conditions: The role, powers and functions of prison inspection and monitoring bodies*, New Journal of European Criminal Law 2/2020; Bárd, P., Ballegooij, W., *Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*, New Journal of European Criminal Law, 3/2018; Karapatakis, A., *Case C-128/18 Dorobantu – the Aftermath of Aranyosi and Căldăraru* <https://europeanlawblog.eu/2019/10/28/case-c-128-18-dorobantu-the-aftermath-of-aranyosi-and-caldararu/>; Peers, S.: *Human Rights and the European Arrest Warrant: Has the ECJ turned from poacher to gamekeeper?* <https://free-group.eu/2016/11/12/human-rights-and-the-european-arrest-warrant-has-the-ecj-turned-from-poacher-to-gamekeeper/>.

the Aranyosi test developed in the joined cases in subsequent case law of the ECJ.⁸¹ In this judgment, the Court developed the Aranyosi test after it became clear that the fundamental rights risks inherent in the cooperation systems based on the principle of mutual recognition could no longer be tolerated. The Aranyosi test provides a compromise instead of an immediate refusal of a judicial decision. In the two-step test, once the executing authority has recognised that there is an abstract risk of a breach of fundamental rights in the issuing member state due to general or systemic deficiencies, it is obliged to examine whether these deficiencies may also give rise to a risk of a breach of fundamental rights in the individual case of the person concerned.⁸² When assessing the risk of an *in concreto* breach of fundamental rights, the executing and issuing authorities are obliged to consult, during which the issuing authority can provide guarantees to avoid a breach of fundamental rights.⁸³ The executing authority may refuse to execute a judicial decision only if, on the basis of information from the issuing authority, it cannot exclude the risk of a fundamental right being infringed in the individual case of the person concerned by the judicial decision.⁸⁴ In fact, this is what we call a fundamental rights ground for refusal, and it is the only unwritten exception to the general rule of mandatory enforcement in cooperation systems based on the principle of mutual recognition. The application of the two-step test serves the exceptional nature of the ground for refusal for the protection of fundamental rights and can be interpreted as a confirmation of the principle of mutual trust, which is the basis for presuming that member states respect fundamental rights when applying EU law.

For the past eight years, the ECJ has strictly adhered to this two-phase test. Although the omission of the first (see Case C-699/21 E.D.L.) or second (see Case C-158/21, Puig Gordi and Others) phase of the test has been raised in several cases,⁸⁵ the ECJ has proved to be uncontentious on this issue and has not recognised the possibility that it could be applied even if one of the conditions is not fulfilled.⁸⁶ The only exception to this was in case C-852/19, Gavanovov II, where the ECJ considered it appropriate to suspend cooperation by way of a judicial decision based on the principle of mutual recognition, even without

⁸¹ Case C-220/18 PPU Generalstaatsanwaltschaft [EU:C:2018:589] (hereinafter: C-220/18. PPU); Case C-216/18 PPU Minister for Justice and Equality [EU:C:2018:586] (hereinafter: C-216/18. PPU); Case C-128/18 Dorobantu [EU:C:2019:857] (hereinafter: C-128/18).

⁸² Marguery, T., *Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is „Exceptional” Enough?* European Papers, 1/2016, p. 954.; C-404/15, para. 91-94.

⁸³ C-404/15, para. 95.

⁸⁴ C-404/15, para. 97.

⁸⁵ Case C-158/21, Puig Gordi and others [EU:C:2023:57] (hereinafter: C-158/21), para. 92.; Case C-699/21, E. D. L. [EU:C:2023:295] (hereinafter: C-699/21), para. 19.

⁸⁶ C-158/21, para. 119.; Meulen, L. *Another exception to the rule: the E.D.L case on EAW surrenders of seriously ill persons*, Common Market Law Review, 1/2024, p. 232.

carrying out the second phase of the Aranyosi test.⁸⁷ However, the reason for this was really simple. The EIO planned to be issued by the Bulgarian court would have ordered the execution of investigative measures against which the persons concerned would not have had any legal remedy. In this respect, however, the ECJ considered that the investigative measures in question interfered with the private and family life of the persons concerned to such an extent that a right of appeal would be justified.⁸⁸ Since this was not the case, it held that any EIO issued by a Bulgarian court ordering the investigative measures concerned would be in breach of the fundamental rights of the *fortiori*.⁸⁹ This would mean that such an EIO would have to be continuously refused. This would be contrary to the principle of mutual trust. For this reason, Bulgarian courts are not allowed to issue such an EIO.⁹⁰

The circumstances of case C-852/19, Gavanozov II thus essentially justified the solution advocated by scholars and the referring courts, namely to allow the possibility of refusing a judicial decision even if the executing authority only detects systemic or general deficiencies which entail an abstract risk of a breach of fundamental rights. In essence, these systemic deficiencies described in Case C-852/19, Gavanozov II were of such a degree that they not only risked a breach of fundamental rights, but actually did so, as the ECtHR has also held.⁹¹ Two conclusions can be drawn from this. On the one hand, if, notwithstanding the judgment of the ECJ, any authority were to issue an EIO in which the investigative measures ordered are not subject to a right of appeal and those investigative measures so seriously restrict the fundamental rights of the person concerned that a right of appeal would be justified, the execution of that EIO should be refused after that fact has been established. On the other hand, the ECJ's judgment also shows that the omission of the second phase of the Aranyosi test is only possible in very specific circumstances, namely where the legislation of a member state covers all persons concerned without exception, in this case the person charged in the criminal proceedings or other interested parties. This situation has never occurred except for case Gavanozov II. Therefore, even though the solution advocated by scholars has a very high threshold of application set by the ECJ, it can be inferred from its case law that it is possible to refuse to enforce a judicial

⁸⁷ Case C-852/19, Gavanozov II [EU:C:2021:902] (hereinafter: C-852/19), para. 62.

⁸⁸ C-852/19, para. 50.

⁸⁹ C-852/19, para. 62.

⁹⁰ C-852/19, para. 59.

⁹¹ Case of Posevini v Bulgaria, Judgment of 19 January 2017 (Application number 63638/14), para. 3.

decision without having to examine the individual circumstances of the person concerned in the particular case.⁹²

In addition, the newer judgments of the ECJ also provide important conclusions on the unwritten ground for refusal. First and foremost, the Court recognised that the ground for refusal can be applied where there is a risk of infringement of at least four fundamental rights. These are the prohibition of torture or inhuman or degrading treatment,⁹³ the right to a fair trial,⁹⁴ the right to private and family life,⁹⁵ and the right to an effective remedy.⁹⁶ Of these four fundamental rights, all but the first can be restricted, so it can be argued that the ground for refusal may also apply to other fundamental rights, but so far only these have been examined by the ECJ. The violation of these four fundamental rights can be considered as the "main" cases of application of the ground for refusal. These main cases include certain situations in which the risk of a breach of the fundamental rights of the person concerned by the judicial decision must be assessed. In the case of the prohibition of torture or inhuman or degrading treatment, it is not only poor prison conditions that may result in a breach of the fundamental right,⁹⁷ but also if the person sought through the EAW has a serious medical condition, which may contribute to the deterioration of his or her health.⁹⁸ Infringements of the right to a fair trial also include infringements of the right to a court established by law,⁹⁹ or the right to an independent tribunal. Two aspects of the latter were examined by the ECJ. On the one hand, this right may be infringed if judges are supervised by a disciplinary board which cannot be considered independent of the executive,¹⁰⁰ or if judges are appointed by a body which cannot be considered independent.¹⁰¹ Furthermore, the ECJ has held that the right to private and family life may be violated if the person raising the child concerned by a judicial decision is detained in conditions which do not have regard to the best interests of the child.¹⁰² Last but not least, it is a violation of the right to an effective remedy if a particular investigative measure

⁹² It is worth pointing out that the ECJ has not developed a fully consistent practice with regard to the two steps of the *Aranyosi* test. In its case law, there were judgments in which it focused on the first stage of the test, while in other judgments it focused on the second stage. Ld.: Rizcallah, C., *The principle of mutual trust and the protection of fundamental rights in the Area of Freedom, Security and Justice*, Maastricht Journal of European and Comparative law, 3/2023, p. 268.

⁹³ C-404/15.

⁹⁴ C-216/18.

⁹⁵ Case C-261/22 GN [EU:C:2023:1017] (hereinafter: C-621/22).

⁹⁶ C-852/19.

⁹⁷ C-220/18.

⁹⁸ C-699/21.

⁹⁹ C-216/18.

¹⁰⁰ Case C-354/20 PPU *Openbaar Ministerie* [EU:C:2020:1033].

¹⁰¹ C-158/21.

¹⁰² C-261/22.

restricts the fundamental rights of the person concerned to such an extent that a right to a remedy would be justified but is not guaranteed by the law of the issuing member state.¹⁰³

5. CONCLUSION

In conclusion, the EU legislator has managed to strengthen the quality of fundamental rights protection through the adoption of the procedural directives to a great extent. They do not only implement the standards for procedural guarantees set out by the ECHR and elaborated by the case law of the ECtHR, but they also extend them on multiple accounts. As already detailed, they introduce higher standards for the suspect and the accused such as the mandatory translation of essential documents, and they also codify in secondary sources high standards of protection which only existed previously in the case law of the ECtHR such as the definitive list of procedural rights which must be communicated to the defendant and the exceptional nature of derogation from the right to legal assistance with strong procedural safeguards. Not to mention that the directives even clarify the standards applied by the ECtHR when specifying what are the criteria to be assessed during a means test for free legal aid. Last, but not least, the EU system of procedural guarantees created a list of special procedural safeguards for vulnerable defendants, namely, child suspects and accused persons. All of these landmarks are also backed up by the ECJ which formulated a jurisprudence which generally favours these procedural rights and occasionally even extends their substance as it happened with the definition of essential documents, or the scope of the right to information and the right to legal assistance.

Moreover, the ECJ – through a series of judgements – clarified the unwritten ground for refusal in terms of cooperation systems implementing the principle of mutual recognition in the process of judicial cooperation in criminal matters by setting out multiple fundamental rights which may be the basis for suspending criminal cooperation if their execution would result in their violation. Furthermore, arguably, the ECJ set out an option to refuse to execute a judicial decision even without carrying out the full Aranyosi test if it is certain that the execution of the judicial decision would result in the violation of a fundamental right of the concerned person.

In conclusion, the above efforts of the EU legislator and the ECJ definitely increased the quality of rule of law in the EU with developing the fairness of the criminal procedure in every member state. Modifying the procedural directives so

¹⁰³ C-852/19.

that they incorporate the standards set out by the ECJ and harmonise remedial rights attached to the procedural safeguards could be another step in this direction. In another greater effort, the codification of the Aranyosi test could also be very beneficial for the rule of law and the protection of fundamental rights especially in the field of judicial cooperation in criminal matters, as jurisprudence is always harder to acknowledge and follow than written sources of law. Not to mention that it would be easier to enforce these standards if they were codified in written sources as currently, it is up to the ECJ to monitor their implementation on a case-by-case basis. As for the viability of such reforms taking place in the future, I am inclined to believe that the EU legislator will not aim for the modification of the analysed directives as it has a tendency to neglect its previous legislation in the field of judicial cooperation in criminal matters. This is evidenced by the fact that it has only modified such secondary sources of EU law on one account before,¹⁰⁴ and it did not replace legislation originating from before the Lisbon framework, and instead, the full powers of the EU institutions are applicable after the five-year transitional period laid down in Article 10 of Protocol (No 36) TFEU.¹⁰⁵ In addition, it is also worth noting that the European Council's proposals for the development of this policy do not include the refinement of these directives either.¹⁰⁶ As such, I believe that the ECJ will maintain its influential role in the field of judicial cooperation in criminal matters – a role that it is fully accomplished to take as evidenced by its several judgements delivered concerning criminal cooperation.

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