STUDY

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European Parliament

Prisons and detention conditions in the EU

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Prisons and detention conditions in the EU

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims to provide background information and policy recommendations concerning prisons and detention conditions in the EU, on the basis of European and national regulations, legislation, policies and practices.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

AFSJ	Area of Freedom, Security and Justice
CFR	Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CCSP	Conseil Central de Surveillance Pénitentiaire
CGLPL	Contrôleur Général des Lieux de Privation de Liberté
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJN	European Judicial Network
EU	European Union
Eurojust	European Union Agency for Criminal Justice Cooperation
EuroPris	European Organisation of Prison and Correctional Services
NPM	National Preventive Mechanism
P/CVE	Preventing/countering violent extremism
QER	Quartier d'évaluation de la radicalisation
QPR	Quartier de prise en charge de la radicalisation
SPACE	Council of Europe Annual Penal Statistics
SPIP	Service pénitentiaire d'insertion et de probation

EXECUTIVE SUMMARY

Background

Prisons and life inside prisons are often kept out of the public's sight. Nonetheless, the persistent shortcomings affecting European prisons have gained the ever increasing attention of the European Court of Human Rights and, subsequently, of the Court of Justice of the European Union. In particular, the persistent degrading prison conditions in many EU Member States have recently shown their relevance for the EU legal order. Indeed, not only are they in breach of the rights guaranteed by the EU Charter of Fundamental Rights, but they also proved a serious obstacle to the smooth functioning of mutual recognition, the cornerstone of judicial cooperation in criminal matters. After numerous calls to action by the European Parliament, on 8 December 2022 the European Commission launched the first instrument laying down common minimum (although non-binding) standards in the field of material detention conditions.

The pressing fundamental rights concerns stemming from degrading prison conditions, their detrimental effects on mutual recognition and the recent adoption of an EU Recommendation make the issue of prison conditions particularly topical and worth examining from an EU-law perspective.

Aim

This study aims to provide the European Parliament with background information and policy recommendations concerning prisons and detention conditions in the European Union, on the basis of European and national regulations, legislation, policies and practices.

It should provide a picture of the situation in the EU, based on a range of relevant sources, and assess the initiatives taken at EU level to support effective compliance with existing European standards. The result of this research should bring forth policy inputs and options for the future direction of the EU's work in this field.

Key findings

From the first pages, the study attempts to provide an overview of the wide range of problems faced by Member States in relation to detention conditions. In this regard, **it became clear during the course of the study that this latter notion should be understood in a broad way, including material detention conditions *stricto sensu* but also other related issues having a significant impact on life in detention (e.g. the excessive use and length of pre-trial detention)**.

While this research has identified particularly acute problems affecting many EU countries, this should not overshadow the wide range of issues identified at EU level, the severity of which varies from country to country. As it was not possible to carry out a comprehensive review of all detention issues, the study then focused in depth on two key issues that have gained importance at EU level, namely prison overcrowding and prison radicalisation.

Although the scale of the phenomenon of prison overcrowding is widely reported, **the lack of common measurement indicators has been identified as an important gap which does not allow for accurate cross-national comparison**.

With regard to prison radicalisation, which is a relatively new issue compared to prison overcrowding, **the study found that the challenges posed by radicalisation in prison are receiving considerable attention at EU level**. Among the important concerns highlighted by the study are the specific (and usually more restrictive) conditions of detention that apply to this category of detainees. This issue has caught the attention of prison oversight bodies both at European and national levels in view of their potential impact on fundamental rights and has become highly visible in some Member States as illustrated by the case of Belgium and France.

Shifting the focus on the cross-border context, the study has sought to assess the concrete impact of poor detention conditions on several mutual recognition instruments involving a deprivation of liberty measure, namely the Framework Decision 2002/584/JHA on the European arrest warrant and the Framework Decision 2008/909 on the transfer of prisoners. In this respect, it was found that considerations of detention conditions do not come into play in the same way in these two instruments. By way of comparison, while the Framework Decision on the transfer of prisoner has led to a very limited body of case-law, the tensions between the principle of mutual recognition and the lack of mutual trust in the detention conditions have become particularly conspicuous in several major preliminary rulings involving the use of the EAW.

Moreover, research has shown a greater alignment between the case law of the CJEU and the ECtHR when the issue of prison conditions arises in EAW cases. This is considered beneficial to ensure coherence between the legal systems of the EU and the CoE, but also to avoid messy and inconsistent (non) application of EU law as a result of conflicting obligations deriving from the two jurisdictions.

Regarding the concrete implications of the CJEU case-law, the study found that the Court's jurisprudence had an undeniable effect on EAW proceedings with a varying impact on the practice of national authorities, whether in terms of impact on mutual trust or in terms of the parameters used to assess the real risk of inhuman or degrading treatment resulting from detention conditions in the issuing Member State.

While some experts assert that the CJEU's case-law tends to be increasingly assimilated by practitioners and that many countries develop practices compliant with the Court's requirements, several remaining difficulties were pinpointed. In addition, despite the fact that many tools are available to help practitioners interpret and apply the case-law of the CJEU, the study identified several areas where EU support could be improved.

Among the key findings of the study, it is worth noting the lack of effective implementation of international and European standards governing crucial aspects of detention conditions (e.g. cell-space, access to health care, sanitary conditions, prison monitoring, etc.). This was highlighted in several parts of the study and is widely corroborated by empirical research, by the reports of European and national prison monitoring bodies, but also by the judgments of the ECtHR. Although matters of detention are the responsibility of Member States (in addition to the fact that many standards on prison conditions exist through the CoE and the ECtHR), **there seems to be a broad consensus on the need for EU action to secure a higher degree of compliance with these standards**.

In this respect, **the study identified the recent European Commission's Recommendation 'on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions' as a step forward**, as it is the **first EU instrument (although non-binding) laying down common minimum standards** in the two areas concerned. However, its concrete impact

remains difficult to gauge and only time will tell if this Recommendation leads to a more effective and convergent application of European standards.

The study has also identified several advantages in considering the adoption of EU minimum standards through a legislative instrument.

For the sake of completeness, the analysis was extended to alternative measures to detention which, although not intrinsically related to detention conditions, are advocated as an important lever to regulate the flow of incarceration. In a purely domestic context, the study highlighted the wide variety of legal cultures and practices that coexist at EU level as regards both alternatives to pre-trial and post-trial detention. Several good practices and possible hurdles to their use were identified.

As a general observation, **the study found that, although an essential lever for reducing the use of imprisonment, alternative measures are not sufficient on their own to tackle the problem of poor conditions of detention.** In order to produce effective results, alternative measures must be accompanied by coherent penal policies, taking into consideration all relevant criminal law measures that have an impact on the flow of imprisonment.

In a cross-border context, the study identified a general lack of awareness of several mutual recognition instruments that could be used as alternatives to the EAW to avoid an unnecessary deprivation of liberty measure, namely the Framework Decision 2009/829/JHA (on the European Supervision Order), the Framework Decision 2008/947/JHA (on probation measures and alternative sanctions) and the Directive 2014/41/EU (on the European Investigation Order). The lack of knowledge about these instruments is widely recognized by scholars, and concern not only judges and prosecutors, but also defence lawyers.

INTRODUCTION

Objective of the research

The overall aim of this study is to provide the European Parliament with background information and policy recommendations concerning prisons and detention conditions in the European Union (EU), on the basis of European and national regulations, legislation, policies and practices. This general objective is broken down into several axes of research covering specific topics.

Among the many issues raised by prisons, the study will provide a state of play on some of the issues identified as most important at EU level, as evidenced in particular by the case-law of the ECtHR, the reports of the prison monitoring bodies operating at European and national levels and the discussions taking place at EU level. For each of the issues covered, the study will attempt, where possible, to draw relevant comparisons between the Member States which are more particularly affected by those problems. The issues identified will be analysed not only from the angle of the challenges for the protection of prisoners' rights and more broadly for the prison system as a whole, but also from the angle of the practical consequences for judicial cooperation in criminal matters. Linked to this last point, the study will seek to assess the concrete impact of poor detention conditions on mutual recognition instruments involving a deprivation of liberty measure, namely the Framework Decision 2002/584/JHA on the European arrest warrant (EAW)[1] and the Framework Decision 2008/909/JHA on the transfer of prisoners.[2]

Given the diversity of standards dealing with various aspects of prison conditions and prisoners' rights, the study will also map the most relevant European standards applying to the prison context. This mapping is intended to shed light on the multiple standards that are intertwined in the penitentiary field; their main sources; how they influence each other; but also their ability to influence national legal systems in order to strengthen the protection of prisoners. In addition, the study will attempt to identify the main weaknesses of the European normative framework regulating prison conditions and to evaluate the initiatives promoted and/or adopted at EU level to remedy certain shortcomings.

For the sake of completeness, the study will also examine the different levers put forward to reduce the prison population and improve mutual trust between Member States. In line with this objective, particular attention will be given to non-custodial sanctions and measures promoted as alternatives to detention. The study will provide an overview of the diversity of existing national legal systems and practices, while seeking to identify good practices and possible hurdles to the use of alternatives measures to imprisonment.

Finally, based on the findings that emerge from this study, the research team will provide policy recommendations that could inform future policy developments.

Scope and limitations of the study

In accordance with the framework imposed for this study, the scope of the analysis is limited to prisons and detention conditions in the European Union and is confined to the mobilisation of sources of

[1] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002.

[2] 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 327/27, 5 December 2008.

European and national law, policy documents and practices. Thus, without disregarding the relevant international instruments for the protection of detainees such as those developed within the United Nations,[3] the study will focus on European instruments dealing with prison issues, and more broadly with custodial and non-custodial measures. A wide variety of Council of Europe (CoE) and EU instruments and mechanisms of different nature, with varying scopes and objectives will therefore be considered (as described in the 'methodology' Section). In addition, the study will focus on the detention conditions in 'prisons', understood as a closed penitentiary facility designed to accommodate offenders sentenced to a custodial sentence or remand prisoners awaiting trial.[4] Thus, the issue of detention in police stations and the deprivation of liberty in detention centres for illegal immigrants will not be addressed, although they raise significant concerns. Considering that prison matters fall within the primary competence of the Member States, domestic law and national practice will receive special attention. National law, in particular criminal and prison law, will be used to support the analysis in different parts of the study, notably to expose the diversity of criminal justice systems and cultural practices but also to assess Member States' compliance with relevant standards applicable at EU level. Since, within the time frame, a large-scale study cannot be carried out, the study will focus on a selection of national case studies in order to draw, where possible, relevant comparisons.

As regards more specifically the issues covered, the study will first provide background information on the prison situation at EU level, limiting the scope of the analysis to issues reported as most pressing, namely prison overcrowding and prison radicalisation. As it is not possible to carry out a comprehensive review of all detention issues, the above topics have been selected after they were identified as particularly salient at EU level. For each of these topics, particular attention will be paid to the issue of respect for human rights.

In a second complementary part, problems relating to poor detention conditions will be examined in terms of their practical consequences for judicial cooperation in criminal matters. To this end, the study will seek to assess the practical impact of inadequate detention conditions on several mutual recognition instruments facilitating the execution of pre-trial detention orders or of custodial sentences, namely the Framework Decision 2002/584/JHA on the EAW and the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

In a third step, the study will provide an overview of the relevant European standards applying to prison context while examinig their ability to influence national legal systems in order to strengthen the protection of prisoners. The scope of the study will focus in particular on European standards governing various important aspects of life in detention, in particular aspects relating to the material conditions of detention. Although there is no authoritative definition of the latter notion, it is generally understood in a broad sense to include access to the most basic services that should be guaranteed to prisoners such as accommodation, hygiene, nutrition, and access to medical care services to name but the main ones. That said, as some academic experts point out, the notion of detention conditions cannot be reduced to material aspects in the strict sense (at the risk of providing too restrictive protection for detainees) and cannot be considered in isolation from other aspects that significantly affect life in detention (e.g. contact of prisoners with the outside world, safety and security or even some penal

[3] See for instance the "United Nations Standard Minimum Rules for the Treatment of Prisoners" also known as "The Nelson Mandela Rules" or the "United Nations Rules for the Protection of Juveniles deprived of their Liberty".

[4] See Oxford dictionnary.

measures having an impact on detention conditions).[5] Thus, for the purpose of the study, standards applicable to detention conditions will be understood broadly as covering some crucial material aspects of life in detention but also the norms regulating the use of pre-trial detention and the standards for the establishment of monitoring mechanisms over places of deprivation of liberty. In relation to the latter, some international standards will be considered insofar as they create important obligations for EU Member States.

In a fourth part, the study will focus on the levers that have the potential to reduce the prison population and improve mutual trust between Member States. An exhaustive review would go beyond the scope of the study; hence the reflection will be limited to certain key levers identified as being paradigmatic with regard to the prison situation. In this respect, particular attention will be given to non-custodial sanctions and measures promoted as alternatives to detention, which are the subject of increasing attention in EU discussions and are at the heart of the reforms implemented in some Member States. The scope of this study will include both alternatives to pre-trial and post-trial detention, taking into account the diversity of national criminal justice systems and national judicial practices. Attention will also be paid to available means to decrease detention as a consequence of judicial cooperation and the main obstacles to their use in practice, with a particular focus on alternative measures to the EAW.

Methodology

This research will be conducted through a combination of desk research and empirical data resulting from interviews.

Desk research encompasses various sources and documents from the CoE, the EU, and national institutions. These include the primary legislation of the EU (i.e. EU treaties and the EU Charter of Fundamental Rights) as well as EU secondary legislation applicable to the areas covered by this study. When relevant, particular attention is paid to national transposition law and related case-law in selected Member States. Policy documents from EU institutions also account for an important part of the sources reviewed in the framework of this study, such as Council conclusions setting out priorities related to the issues of prisons and alternative measures to detention, discussion papers and recommendations produced by the European Commission (e.g. Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention) or the relevant resolutions from the European Parliament. Another strand of the research includes the jurisprudence of the Court of Justice of the European Union (CJEU), especially the clarifications provided by the Court on the conditions under which it is possible to suspend or even refuse the execution of an EAW on the grounds of detention conditions.

In addition to EU law, the research will draw extensively on relevant CoE sources dealing with prison. These include a range of general and sectoral legal and political instruments. With regard to legal instruments, the analysis will focus on the European Convention on Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR). Other more specific Conventions, such as

[5] See Van Zyl Smit, D. and Snacken, S., *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford, Oxford University Press, 2009) 126-127. A broad conception of the notion of conditions of detention is also favoured by the bodies of the Council of Europe, notably by the ECtHR and the CPT whose monitoring activities consist of examining a range of aspects relating to conditions of detention.

the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, may be included in the study, taking into account the mechanism for monitoring compliance with this convention, namely the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). Among the relevant case-law of the ECtHR dealing with the issue of the detention conditions and the treatment of detainees, we will select several cases related to the questions addressed in this study. In addition to legal instruments, the study will take into account several relevant policy instruments of various competent bodies, dealing with issues related to prisons. This includes documentation produced by the European Committee on Crime Problems (CDPC) and the Council for Penological Co-operation (PC-CP) but also a series of rules, recommendations and guidelines adopted by the Committee of Ministers and the Parliamentary Assembly of the CoE. The study will also pay particular attention to the reports of the CPT and to the relevant standards it has established for prevention purposes. Desk research also involves reviewing the existing literature in order to supplement the understanding of the many challenges raised by prisons and detention conditions in the EU.

The resources provided by EU agencies will also be taken into consideration, such as the assessments carried out by the Fundamental Rights Agency (FRA), Eurojust reports (e.g. Report of the College on "The EAW and Prison Conditions"). This comes in addition to other relevant reports from CoE bodies, such as the annual CPT report as well as statistical reports dealing with prisons and probation (e.g. 'Council of Europe Annual Penal Statistics' – SPACE). In addition, relevant reports from non-governmental organisations (NGOs) will also be incorporated in this study.

In order to enrich the documentary research and to better reveal the practical challenges posed by prisons and detention conditions in the EU, the research process will be complemented by several interviews. The interviews involve representatives/officials from the EU and CoE, as well as national policy makers and practitioners working in the prison and judicial sectors. At the EU level, interviews will mainly target officials working in the EU institutions and agencies. Interviews will also be conducted with practitioners at national level in order to gain concrete insights on the issues raised by prisons and related challenges (e.g. reducing prison population, improving mutual trust between Member States) as well as to identify possible area for improvement.

Structure

This study is structured in five main parts: **Chapter 1** provides background information on some pressing issues faced by Member States in relation to detention conditions. **Chapter 2** asseses the impact of poor detention conditions on mutual recognition in criminal matters, in particular on the implementation of the EAW Framework Decision and the Framework Decision on the transfer of prisoners. **Chapter 3** provides a map of the most relevant European standards regulating prison conditions while highlighting several shortcomings in their implementation. **Chapter 4** discusses the use of alternative measures and sanctions to detention as one of the key parameters promoted to reduce prison population and improve mutual trust between Member States. **Chapter 5** provides a general conclusion summarising the main findings of the study, as well as policy recommendations.

1. PRISONS AND DETENTION CONDITIONS IN THE EU

Prison conditions raise many issues that go beyond the scope of the present study. Without claiming to be exhaustive, the purpose of the following discussion is to provide background information on several issues identified as most pressing in the EU. In order to give a representative picture of the situation at EU level, the wide range of problems encountered by the Member States will first be highlighted (1.1.). As it is not possible to carry out a comprehensive review of all detention issues, the study will then focus on two key issues that have gained importance at EU level, namely prison overcrowding (1.2.) and prison radicalisation (1.3.).

1.1. A diversity of problems

While all Member States face problems related to detention conditions, it is difficult to provide an accurate and comprehensive overview of common detention issues at EU level.

First of all, it should be stressed that **the notion of 'conditions of detention' covers a wide range of issues with no authoritative typology to categorise them**.[6] Thus, beyond topics related to 'material conditions of detention' (including aspects such as cell-space, accommodation, hygiene and sanitary conditions, access to different types of activities, etc.), the professionals and experts interviewed identify many other recurring problems at European level which impact life in detention, such as the lack of access to adequate medical and psychiatric care, security problems for prisoners and prison staff, the insufficient training of prison staff, the lack of contact with the outside world, the high security prison regime with significant restrictions on freedom, or the precarious situation of foreign prisoners without residence permits, to mention only the main ones. These various issues feature prominently in the judgments of the ECtHR as well as in the reports and recommendations of the CPT and thus confirm the great diversity of problems observed at European level.[7] **A thorough analysis of the situation also requires looking at other related issues.** As the policy documents and recommendations adopted at European level show, the issue of detention conditions is often addressed in relation to certain trends in penal practice which have a significant impact on life in detention, such as the excessive use and length of pre-trial detention or the imposition of very long sentences with no prospect of release in the short term.[8] Similarly, in the opinion of several practitioners interviewed, the issue of poor detention conditions must be analysed in the light of its negative consequences for detainees during the period of their detention, but also in light of its negative impact on their chances of reintegration upon release (e.g. problem of lack of preparation for social reintegration due to inadequate conditions of detention). Thus, the emphasis placed in the following sub-sections on certain key issues identified at EU level should not give the impression of an overly narrow view of the

[6] See in the introductory part of the study 'Scope and limitations of the Study'.

[7] See the Annual reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishments (CPT). Also see Factsheets on the Court's case-law and pending cases on the theme of 'Detention' and in particular the ECtHR Factsheet on 'Detention conditions and treatment of prisoners' (December 2021).

[8] See Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, C(2022) 8987 final (8 December 2022); Recommendation CM/Rec(2003) 23 of the Committee of Ministers to member states on the management by prison administrations of life sentence and other long-term prisoners (9 October 2003); Also see Recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on 'Remand detention', CPT/Inf(2017)5 part.

subject. It is important to bear in mind the magnitude of the challenges in the area of detention and the many interconnected issues that require comprehensive analysis.

Furthermore, while it is possible to identify particularly acute problems affecting many EU countries (an emblematic example being the problem of prison overcrowding), this should not overshadow the wide range of issues identified at EU level, the severity of which varies from country to country.[9] As pointed out by some of the experts interviewed, all EU countries have prison problems, altough they differ in nature and intensity. Even at the level of the same State, the problems related to prison conditions vary greatly from one prison to another, so the situation cannot be generalised. In addition to the issue of cell overcrowding, the problems of lack of hygiene and appropriate sanitary conditions, the reduced opportunities for time spent out of cell, inadequate access to healthcare and lack of protection from inter-prisoner violence are regularly identified by prison monitoring bodies as pressing issues in many Member States, although to varying degrees.[10] This diversity of prison issues is also reflected in the case-law of the ECtHR which testifies to the many problems related to the conditions of detention which can lead to inhuman or degrading treatment contrary to Article 3 ECHR. Although there are no detailed statistics on convictions on grounds specifically related to the detention conditions, certain pressing and recurrent problems, such as poor sanitary conditions and the lack of adequate care for mentally ill prisoners, are generating important jurisprudential developments and give rise to repeated condemnations in some EU Member States.[11] **As pointed out by NGOs, some recurring issues such as violence in detention are, however, under-reported**.[12]

Related to this diversity, differences in penitentiary culture between Western and Central Europe have been observed by experts on a number of features with a high impact on detention conditions. This is the case, for example, for Eastern European penitentiary establishments that generally have a larger capacity considered to be more exposed to problems of inter-prisoner violence, in particular in overcrowded cells/dormitories. While inadequate protection against inter-prisoner violence is an important and pressing issue in many Member States' detention facilities,[13] cultural factors such as the existence of informal prisoner hierarchy, the prevalence of power relations between prisoners and prison staff or the lack of concern for the protection of inmates in the prison system are reported to be more widespread in Eastern Europe (although some progress has been reported in this regard).[14] **More generally, it is noted that EU prison systems differ on a number of other features**

[9] See Maculan, A., Ronco, D. and Vianello, F., 'Prison in Europe: overview and trends', European Prison Observatory (2013). Also see European Prison Observatory, 'Prisons in Europe. 2019 report on European prisons and penitentiary systems' (2019).

[10] European Union Agency for Fundamental Rights (FRA), 'Criminal detention conditions in the European Union: rules and reality' (2019); Also see the reports drawn up by the CPT following its visits to States.

[11] See European Court of Human Rights, Factsheet on 'Detention conditions and treatment of prisoners' (December 2021); European Court of Human Rights, Factsheet – Prisoners' health-related rights (February 2022).

[12] See Fair Trials, 'Rights behind bars. Access to justice for victims of violent crime suffered in pre-trial or immigration detention' (November 2019), < https://www.fairtrials.org/articles/publications/rights-behind-bars/ > (consulted on 15 February 2023). Also see in this study sub-section 3.2. 'The lack of EU (binding) standards?'

[13] European Union Agency for Fundamental Rights (FRA), (n 10) 42-43.

[14] For examples of CPT's visit reports showing the persistence of the issue of ill-treatment by prison staff see Report to the Romanian government on the ad hoc visit to Romania carried out by the CPT from 10 to 21 May 2021, Inf(2022) 06, 33; Report to the government of Montenegro on the visit to Montenegro carried out by the CPT from 9 to 16 October 2017, Inf(2019)2, 27-28; Report to the Croatian government on the visit to Croatia carried out by the CPT from 14 to 22 March 2017, Inf(2018)44, 21-25. For examples of recent judgments of the ECtHR on the issues of inter-prisoner violence and ill-treatment by prison

having a strong impact on detention conditions. As reported by interviewed experts and corroborated by empirical research, these include, among others, the ratio of detainee per prison officer/other professional; the organisation of prison health care in prisons; the collaboration between prison services, rehabilitation services and local authorities or the level of training received by prison officers to name but a few.[15] **Another important aspect on which significant variations are observed concerns the financial resources allocated to the prison service.** Recent empirical research shows that, in general, EU countries with the highest prison populations (i.e. Germany, France, Italy and Spain) allocate a substantial budget to the prison administration, with the exception of Poland.[16] It is further noted that Eastern European countries spend less resources (most of them less than 50,00€ per detainees per day) while Western European countries (Italy, France, Germany, and Austria) spend over 100,00€, which is still below the costs incurred by northern European countries such as Ireland, the Netherlands or Sweden (between 180,00€ and 380,00€).[17] Moreover, in some countries such as Portugal, the measures put in place in response to the economic crisis have considerably restricted the budget of prison administrations, which has led to shortages of available health care and hygiene products.[18] It is therefore important to keep this diversity in mind in order to get an accurate and differentiated picture of the prison situation at EU level, taking into account the many parameters that have a decisive impact on the detention conditions.

1.2. Prison overcrowding

1.2.1. Background information

Reported as a recurring problem for many prison administrations in Europe,[19] 'prison overcrowding' generally refers to a social phenomenon that occurs when prison population exceeds the overall capacity of prison places in a given Member State or in a particular prison of that State, or even in parts of a prison.[20] This phenomenon is of particular concern because of the adverse consequences for the fundamental rights of prisoners[21] which are likely to result, in the most serious cases, in inhuman and degrading treatment. Overcrowding also poses many challenges to prison management as a whole

officers see ECtHR, *Gjini v. Serbia*, no. 1128/16, 15 January 2019; ECtHR, *Milic and Nikezic v. Montenegro*, nos. 54999/10 and 10609/11, 28 April 2015.

[15] See Maculan, A., Ronco, D. and Vianello, F., (n 9). For a comparison of the main features of the States' prison systems see Prison insider, 'comparison tool' < https://www.prison-insider.com/en/articles> (consulted on 1st January 2023).

[16] European Prison Observatory, 'Prisons in Europe. 2019 report on European prisons and penitentiary systems' (n 9) 21.

[17] *Ibid*.

[18] *Ibid*.

[19] See for instance, Council of Europe European Committee on Crime Problems, 'High-level Conference on prison overcrowding', 24 an 25 April 2019, < https://www.coe.int/en/web/cdpc/high-level-conference-on-prison-overcrowding> accessed on 8 September 2022; European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (P8_TA(2017)0385), para. D; Committee of Ministers of Council of Europe, 'White paper on prison overcrowding', CM(2016)121-add3, 23 August 2016, 4.

[20] See Committee of Ministers of Council of Europe, 'White paper on prison overcrowding' (n 19) 5.

[21] The negative consequences of overcrowding have been highlighted repeatedly by many supranational and national actors. These include a worsening of the material conditions of detention; a constant lack of privacy; reduced out-of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff; reintegration difficulties (the list is not exhaustive).

and to prison staff. To shed light on the magnitude of this issue, it is necessary first to discern the criteria against which overcrowding is assessed. **There is no precise internationally recognised definition of what constitutes overcrowding, nor harmonised methods to determine the threshold above which the number of prisoners exceeds the capacity of the prison**.[22] As will be seen in the following Sections of the study,[23] European standards have nevertheless been established as to the minimum space to be granted to each prisoner, which serve as a reference criterion for assessing the situation of overcrowding. According to the minimal standard for personal living space in prison establishments set by the CPT,[24] each prisoner should be afforded:

- 6 m^2 of living space for a single-occupancy cell + sanitary facility;
- 4 m^2 of living space per prisoner in a multiple-occupancy cell + fully-partitioned sanitary facility;
- At least 2 m between the walls of the cell;
- At least 2.5 m between the floor and the ceiling of the cell.

If these minimum standards are intended to serve as a benchmark to prevent overcrowding in prisons, it cannot be assumed that situations where these standards are not met are incompatible with fundamental rights. **Indeed, since the function of the CPT is mainly preventive, it is ultimately for the courts to decide whether the conditions in which the applicants were detained reached the threshold of inhuman or degrading treatment within the meaning of Article 3 ECHR, taking into account several factors.** In a significant number of complaints alleging a violation of Article 3 ECHR on account of insufficient living space available to an inmate, the ECtHR considers that when a detainee has less than 3 m^2 of floor space in multi-occupancy accommodation, there is a strong presumption that the conditions of detention constitute degrading treatment in breach of Article 3 ECHR[25] ('strong presumption test'). Such a presumption can only be rebutted if there are a series of mitigating factors compensating for the low allocation of personal space (e.g. short detention period). This means that the minimum personal space standard on which the Court relies to examine the compatibility with Article 3 ECHR is slightly lower than the minimal living space standard as recommended by the CPT.[26]

[22] See in this Section 'A lack of common indicators to accurately measure prison overcrowding at EU level'. Also see European Committee on crime problems (CDPC), 2nd meeting of the CDPC sub-group on prison overcrowding, 7 June 2017. The sub-group agreed that it is difficult to come up with a consensual definition of what is prison overcrowding as countries often use different criteria for measurement and also because a number of other factors need to be taken into account in order to define whether overcrowding situation may lead to inhuman treatment.

[23] See in this study Section 3 'European standards regulating conditions of detention'.

[24] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Living space per prisoner in prison establishments: CPT standards, CPT/Inf (2015) 44. It must be noted that 'minimum living space' standards used by the CPT differ according to the type of establishment and the duration of the detention (e.g. a police cell for short term detention of several hours does not have to meet the same size standards as a prison cell).

[25] See ECtHR (GC), *Muršić v. croatia*, no. 7334/13, 20 October 2016, paras 76; 105; 126. The Grand Chamber reiterated that the test for deciding whether or not there has been a violation of Article 3 of the Convention in respect of detainees' lack of personal space was three-fold: (1) each detainee must have an individual sleeping place in the cell; (2) each detainee must dispose of at least 3 sq. m of floor space; and (3) the overall surface of the cell must be such as to allow detainees to move freely between furniture. The absence of any of these elements created a strong presumption that the conditions of an applicant's detention were inadequate.

[26] ECtHR is watchful of the CPT's standards when ruling on complaints alleging a violation of Article 3 ECHR on account of insufficient living space available to a prisoner without being bound by these minimum standards. In a minority of cases, the Court has considered that personal space of less than 4 sq. m is already a factor sufficient to justify a finding of violation of Article 3 ECHR. The Court generally recalls that it 'could not decide, once and for all, how much personal space should be

Moreover, insufficient living space is an important but not necessarily sufficient factor in itself to infer that prison conditions are amounting to inhuman and degrading treatment. In cases where overcrowding is not so severe as to raise a problem in itself under Article 3 ECHR (e.g. in instances where the floor surface per detainee ranges from 3 to 4 sq. m), a violation will be found if the space factor is twinned with other negative conditions related in particular to access to outdoor exercise, natural light or air, availability of ventilation, the possibility to use toilet in private, sanitary and hygienic requirements, etc. Thus, **several standards coexist at European level to establish when the living space afforded to a detainee must be considered unacceptable or even deemed incompatible with Article 3 ECHR.**

As will be shown in other parts of the study,[27] **the standards established by the ECtHR have a decisive influence on the EU legal order.** In the absence of EU standards in the area of detention conditions, the CJEU explicitly refers to the applicable minimum standards in terms of cell space as developed in the case-law of the ECtHR.[28] In the same vein, recent initiatives taken at EU level to establish minimal standards on key aspects of pre-trial detention and material detention conditions take as a point of reference the minimum personal space standards as established by the CPT and in the case-law of the ECtHR.[29] As an illustrative example, the Commission has recently recommended that Member States assign a minimum amount of surface area of at least 6 m^2 in single occupancy cells and 4 m^2 in multi-occupancy cells and define the 3 m^2 deriving from the ECtHR case-law as an absolute minimum.[30]

1.2.2. A lack of common indicators to accurately measure prison overcrowding at EU level

While CPT and ECtHR standards are important in establishing a minimum cell living space that each prisoner should be afforded to ensure consistency with human dignity, **it remains difficult to gauge the exact extent of the problem of prison overcrowding in Europe**. This is mainly due to national discrepancies in the calculation of the prison population density criterion. According to the Council of Europe Annual Penal Statistics on Prison Populations 2021 (known under the acronym "SPACE I")[31], as of 31st January 2021, 10 of the 49 European prison administrations surveyed had a prison density above 100 inmates per 100 places,[32] which mainly concerns EU Member States. Of these ten prison administrations, three – i.e. Hungary, Sweden and France - had a density rating above 100 but below

allocated to a detainee in terms of the Convention. That depends on many relevant factors, such as the duration of the detention, the possibilities for outdoor exercise or the physical and mental condition of the detainee'.

[27] See in this study Section 3 'European standards regulating conditions of detention'.

[28] See Case C-220/18 PPU, *ML*, 25 July 2018, ECLI:EU:C:2018:589, paras 92-93 ; Case C-128/18, *Dorobantu*, 15 October 2019, ECLI:EU:C:2019:857, paras 70-77.

[29] Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention, 12161/21, 24 September 2021, Annex: Preliminary overview of the most relevant aspects of detention conditions and procedural rights in pre-trial detention.

[30] See the recent Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (n 8) paras 34 and 35.

[31] Marcelo F. A. and al., 'Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I report' (2021) 10. These statistics are based on data provided by 49 of the 52 prison administrations in the 47 Council of Europe.

[32] *Ibid.* It is also reported that the estimated level of occupation of the cells differs considerably among the prison administration that provided the relevant data, ranging roughly from 1 to 10 inmates per cell.

105. The other seven – including Italy, Belgium, Greece and Romania – were identified as facing serious overcrowding, with rates of more than 105 inmates per 100 places.[33] These statistical data show that European States are not affected the same way by the phenomenon of overcrowding; some EU Member States such as Latvia, Lithuania, Bulgaria, Spain, Finland or Norway report an occupancy rate below the European average prison density.[34] However, as highlighted by researchers and European bodies,[35] **the divergence of methods for calculating prison population density and overcrowding rates does not allow for a reliable cross-national comparison**. While it is commonly agreed that there is overcrowding when there are more inmates than the number of places available in penal institutions, the method of calculating prison capacity differs from one State to another.[36] Furthermore, the relevant statistical data as set out in the SPACE reports and CPT reports are not necessarily based on the same measurement indicators, so that it is difficult to have a precise picture of the prison overcrowding situation in Europe.[37] The lack of common criteria to measure and assess 'prison overcrowding' had already been identified as a problematic gap by the CoE Committee on crime problems, as the methods used to define it influence the consideration of the entire criminal justice system of a given country.[38] As the French General Controller of Places of Deprivation of Liberty (Contrôleur général des lieux de privation de liberté - hereinafter 'CGLPL') pointed out in her report on the impact of overcrowding on fundamental rights, the implementation of a policy to reduce prison overcrowding requires a precise knowledge of the situation.[39] In this regard, the French authority recommended that the calculation of prison places and capacity be reviewed and updated, taking into account the relevant recommendations of the CoE.[40] Since then, it seems that the issue of the lack of common indicators has not been addressed at European level, despite the persistence of the problem of prison overcrowding.

1.2.3. Empirical evidence showing the persistence of the problem

Without being able to make more precise comparisons on these issues, several relevant sources provide useful insight on the scale of the problem. In its 2021 report[41], the CPT underlines that despite the progress made by CoE Member States in tackling overcrowding over the past 30 years, the

[33] *Ibid*.

[34] *Ibid*.

[35] Marcelo F. A. and al., (n 31) 10; European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) para. 5.

[36] For the compilation of SPACE statistics, countries are asked to use the concept of design capacity, which refers to the number of inmates that a penal institution was intended to house when it was constructed ore renewed. However, many countries use the concept of operational capacity, which refers to the number of inmates that a penal institution can actually house while remaining functional.

[37] SPACE overcrowding is measured through an indicator of 'prison density' which is obtained by calculating the ratio between the number of prisoners and the number of places available in prisons, on the basis of data transmitted by the States and according to their own calculation methods. On the contrary, the CPT uses its own standards to calculate overcrowding.

[38] See European Committee on crime problems (CDPC), 2nd meeting of the CDPC sub-group on prison overcrowding (n 22).

[39] See Contrôleur general des lieux de privation de liberté (CGLPL), 'Les droits fondamentaux à l'épreuve de la surpopulation carcérale', Dalloz (2018) 29.

[40] *Ibid*. 34-35.

[41] Council of Europe, 31st General report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2021) 25-26.

phenomenon of overcrowding, far from being eliminated, remains an everyday reality in many prison systems, especially in establishments accommodating remand prisoners.[42] The report highlights that prison overcrowding is mainly the result of strict penal policies, often a more frequent and longer use of remand detention, lengthier prison sentences and limited recourse to alternative measures to imprisonment.[43] Moreover, the CPT warns that, with the end of the stricter measures to prevent Covid-19, the number of prisoners is increasing again in some countries, which may result in a larger number of overcrowded prisons in the future.[44] This increase in prison density since the end of the sanitary crisis is further corroborated by national sources[45] **highlighting the far-reaching adverse consequences of prison overcrowding on a range of other aspects** (relations between prisoners, relations between prison staff and prisoners, access to healthcare, access to training and work or preparation for reintegration). As pointed out by some practitioners interviewed, overcrowding has the effect of leaving some important issues unaddressed, such as the recurring problem of violence in prison. A typical example is that of a person who is subjected to violence by a fellow prisoner - which can pose a serious threat to his/her physical safety - but cannot be transferred to another cell due to lack of space. Finally, the CPT considers crucial to use a common measuring rod when it comes to the minimum of living space that should be offered to each prisoner and to determine with precision the actual level of overcrowding in each prison cell, in each prison and in the prison system as a whole.[46] While recalling that the minimum amount of living space per prisoner should be monitored in the light of the CPT standards and the ECtHR's case-law, it calls on European States with persistent prison overcrowding to address this problem **by increasing the use of alternative measures to imprisonment and by setting a maximum threshold to the number of prisoners in every penal institution ("numerous clausus")**.[47] Such limit would guarantee the minimum standard in terms of living space, namely 6 m^2 per person in single cells and 4 m^2 per person in multiple-occupancy cells (excluding the sanitary annex).

With regard specifically to cases of overcrowding that are problematic from a human rights perspective, the ECtHR is frequently called upon to rule on complaints alleging a violation of Article 3 of the Convention on account of insufficient personal space allocated to prisoners, mainly in relation to multi-occupancy cells.[48] This has led and is still leading to decisions in individual cases and to pilot judgments, including with regard to certain EU Member States.[49] Considering that the detention

[42] *Ibid*. para. 89.

[43] *Ibid*. para. 91.

[44] Council of Europe media release, 'Prison overcrowding: Anti-torture committee calls for setting a limit to the number of inmates in every prison and promoting non-custodial measures', Réf. DC 073(2022). With regard to the pre-trial detainees population, the same findings are underlined in Fair Trials, 'Pre-trial detention rates and the rule of law in Europe' (2022), see in particular the graphs at pp. 5-7,< https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/ > (consulted on 17 November 2022).

[45] For Belgium see for instance Rapport annuel 2021 du Conseil Central de Surveillance Pénitentiaire (CCSP) (2021) 70. For France see Rapport d'activité 2021 du Contrôleur general des lieux de privation de liberté (CGLPL) (2021) 15-16.

[46] Council of Europe, 31st General report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (n 41) para. 100.

[47] *Ibid*. paras 101-102.

[48] For an account of the landmark judgements rendered on this issue see European Court of Human Rights, Guide on the case-law of the European Convention on Human Rights – Prisoners' rights, updated on 31 August 2022.

[49] See European Court of Human Rights Press Unit, Factsheet on 'Detention conditions and treatment of prisoners', December 2021. As examples of recent judgments concerning EU Member States see ECtHR, *Torreggiani and Others v. Italy*, no. 43517/09;

conditions challenged before the ECtHR are generally based on broader grounds than prison overcrowding, and that several other factors are generally taken into account by the Court to find a violation of Article 3 ECHR, it is difficult to isolate conviction decisions based solely on this ground. Among the Court's recent notable decisions, it is worth mentioning the case ***J.M.B. and others v. France***[50] which resulted in a conviction of the French State under Articles 3 and 13 ECHR, urging it to address the structural problems of persistent overcrowding in French prisons. The case concerned 32 applications in which the applicants complained about the indignity of their conditions of detention in metropolitan and overseas France due to overcrowding, in addition to the ineffectiveness of preventive remedies. After a case-by-case examination, the Court found a violation of Article 3 ECHR in respect of all the applicants whose complaints had been found admissible.[51] Although the Court did not use the pilot judgment procedure, the structural problems highlighted in the Court's judgment had a significant impact at national level, leading to the adoption of the French law of 8 April 2021 to guarantee the right to respect for human dignity in detention ('loi tendant à garantir le droit au respect de la dignité en détention').[52] Doubts have nevertheless been raised as to whether the planned measures are sufficient to address the problem of overcrowding in the long term.[53] More recently, the ECtHR delivered another landmark judgment in the case ***Bivolaru and Moldovan v. France,*** [54] in relation to the execution of EAWs challenged on the grounds of inhuman and degrading detention conditions in the requesting Member State (in this case Romania) due to overcrowding.[55] This is the first case in which the ECtHR has rebutted the *presumption of equivalent protection* in the context of the execution of an EAW. The Court found that there had been a sufficiently solid basis, deriving in particular from its own case-law, to establish the existence of a real risk that one of the applicants will be exposed to inhuman and degrading treatment on account of his future detention conditions in Romania.[56] The insufficient living space in the prison where the applicant was likely to be detained was a decisive factor in concluding that the execution of the EAW had violated Article 3 ECHR.[57]

46882/09; 55400/09, 8 January 2013; ECtHR, *Vasilescu v. Belgium*, no. 64682/12, 25 November 2014; ECtHR, *Varga and Others v. Hungary*, no. 14097/12, 45153/12, 73712/12, 10 March 2015; ECtHR, *Muršic v. Croatia*, no. 7334/13, 20 October 2016; *Rezmives and Others v. Romania*, no. 61467/12; 39516/13; 48231/13, 25 April 2017; ECtHR, *Sylla and Nollomont v. Belgium*, no. 377768; 36467/14, 16 May 2017; ECtHR, *Nikitin and Others v. Estonia*, no. 23226/16, 24 June 2019; ECtHR, *Badulescu v. Portugal*, no. 33729/18, 20 October 2020; ECtHR, *Lautaru and Seed v. Greece*, no. 29760/15, 23 July 2020.

[50] ECtHR, *J.M.B. and Others v. France*, no. 9671/15 and al., 30 January 2020.

[51] *Ibid*. paras 258-302. For a commentary of this decision see Renucci, J.-F., 'L'affaire *J.M.B. et autres c/France*: une condamnation retentissante', *Dalloz* (2020) 753.

[52] Loi n°2021-403 du 8 avril 2021 tendant à garantir le droit au respect de la dignité en détention, *JORF* n°0084 du 9 avril 2021.

[53] See Rapport d'activités 2021 du Contrôleur général des lieux de privation de liberté (CGLPL) (n 45) 20-23. Also see, Foucart, R., 'Un nouveau recours en trompe l'œil devant le juge judiciaire. À propos de la loi n°2021-403 tendant à garantir le droit au respect de la dignité en détention', *La Revue des droits de l'homme* (2021) 1-15.

[54] ECtHR, *Bivolaru and Moldovan v. France*, no. 40324/16 and 12623/17, 25 March 2021. For a commentary of this decision see Julié, W., and Fauvarque, J., 'Bivolaru and Moldovan v. France: a new challenge for mutual trust in the European Union?', Strasbourg Observers, 22 June 2021 < https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union/> (accessed on 15 September 2022); Wahl, T., 'ECtHR: EAW cannot be automatically executed', *Eurcrim* (2021); Also see Platon, S., 'La présomption Bosphorus après l'arrêt Bivolaru et Moldovan de la Cour européenne des droits de l'homme: un bouclier de papier?', *Revue trimestrielle des droits de l'Homme* (2022) 1(129).

[55] See in this study Secion 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'.

[56] *Ibid*. paras 117-126.

[57] *Ibid*. para. 122.

While there are no precise statistics on the number of convictions by the Strasbourg Court for detention conditions amounting to inhuman and degrading treatment, recent cases brought before the ECtHR are significant in that they demonstrate the persistence of the problem in certain European States, including EU Member States. However, they represent only part of the prison litigation as the Court plays a subsidiary role and only intervenes after all the internal remedies have been exhausted – the latter requirement proving particularly difficult to meet in the prison context.[58] **Indeed, the difficulty for detainees to have access to justice and obtain effective protection of their rights is a crucial problem widely noted by several NGOs**.[59]

The persistence of problems related to prison overcrowding in some EU countries is further corroborated by several recent cases brought before the domestic courts,[60] in addition to reports from national authorities and human rights organisations.[61]

1.2.4. Exchanges of experiences between Member States on how to tackle the problem of prison overcrowding: the example of the French initiative for 'prison regulation'

Discussions on how to tackle the problem of prison overcrowding recently led to an exchange of views between France and Belgium, two Member States particularly affected by this problem. On November 24, 2022, Dominique Simonnot, the French General Controller of Places of Deprivation of Liberty (Contrôleur général des lieux de privation de liberté - CGLPL) visited the Central Council for Prison Surveillance (Conseil Central de Surveillance Pénitentiaire - CCSP) in Belgium to present the 'prison regulation' mechanism, which she actively supports and which she would like to include in the law to address the phenomenon of overcrowding.[62] This system, mentioned by President Emmanuel Macron in 2018, has been tested since 2020 on two pilot sites with a particularly high overcrowding rate (namely Grenoble and Marseille). More concretely, the prison regulation system is based on the conclusion of multi-party agreements between different actors at local level (mainly the prison administration, the president of the court, the prosecutor and the probation services) and a review of

[58] For further developments on this issue see Tulkens, F., 'Droits de l'homme et prison. Jurisprudence de la nouvelle Cour européenne des droits de l'homme' in Olivier de Schutter and Dan Kaminski (dir*), L'institution du droit pénitentiaire. Enjeux de la reconnaissance de droits aux détenus* (Bruylant, 2002) 255.

[59] See in particular European Prison Litigation Network (EPLN), 'Bringing justice into prison: for a common European approach' (June 2019), < http://www.prisonlitigation.org/wp-content/uploads/2021/04/WHITE-PAPER-final-ENG.pdf> (consulted on 15 February 2023).

[60] For France see TA Toulouse, n° 2203925, ordonnance of 2 August 2022. For a commentary on this decision see Dominati, M., 'Des conditions de detention toujours indignes au centre pénitentiaire de Toulouse-Seysses', Actualité Dalloz (9 September 2022).

[61] For Belgium see for instance Rapport annuel 2021 du Conseil Central de Surveillance Pénitentiaire (CCSP), p. 70; Speech by the Belgian Federal Minister of Justice Vincent Van Quickenborne at round tables on 'prison overcrowding', 10 June 2022 < https://justice.belgium.be/sites/default/files/downloads/DiscoursMinistreTableRonde_100622.pdf>. For France see for instance Commission nationale consultative des droits de l'homme (CNCDH), 'Avis sur l'effectivité des droits fondamentaux en prison. Du constat aux remèdes pour réduire la surpopulation carcérale et le recours à l'enfermement', A-2022-5, 24 mars 2022; Observatoire international des prisons (OIP), Section française, < https://oip.org/decrypter/thematiques/surpopulation-carcerale/> (accessed on 15 September 2022)

[62] Visit from Dominique Simmonot at the Belgium Conseil Central de Surveillance Pénitentiaire (CCSP), Brussels, 24 November 2020. In the context of this visit, an exchange of views on the French experience of prison regulation took place in the presence of several Belgian actors from the judicial, academic and associative sectors.

the case of people close to release from prison in order to consider measures facilitating their early release or measures facilitating the execution of the sentence outside prison. According to this system, in a prison where the occupancy rate is close to 100%, each new incarceration must be compensated by the release (under supervision) of a detainee whose sentence is nearing its end. In other words, this regulatory lever focuses mainly on release from prison and less on limiting the inflow of entrants. In Grenoble, for example, an agreement was concluded in 2020 between the president of the judicial court, the public prosecutor, the director of the Grenoble-Varces prison and the probation and rehabilitation services (SPIP) providing the implementation of a regulation mechanism as soon as the prison reaches an occupancy rate of 130%. This agreement, considered as a good practice of dialogue between the prison administration and the judiciary, implies inter alia that the magistrates receive weekly information on the occupancy rate of the Grenoble-Varces prison. As Dominique Simmonot pointed out, the goal is to ensure that each stakeholder assumes responsibility at his level so that the whole 'penal chain' takes into account the prison issue. This regulation scheme, tested during the Covid-19 crisis, resulted in the release of between 6,000 and 7,000 detainees during the lockdown. Despite these encouraging figures, the prison occupation rates for the year 2022 seem to suggest that this mechanism (whose application is on a voluntary basis) is struggling to be applied effectively in the few sites that have implemented it and that its effectiveness remains dependent on an overly contingent will.[63] During the discussions within the Belgian Central Council for Prison Surveillance (CCSP), resistance to this system was also highlighted, in particular on the part of certain French magistrates who see in it a risk of shifting responsibility from politics to the judiciary or even a challenge to their independence. Considering such reticences, members of the French CGLPL and other organisations involved in the protection of the rights of detainees are actively campaigning for the principle of 'prison regulation' to be enshrined in the law – which they consider to be the only way to allow this system to produce effective results.

1.3. Prison radicalisation

1.3.1. Background information

In recent years, radicalisation in prisons[64] has become a major concern to several EU Member States. This concern is correlated with the large number of people accused or sentenced to prison terms for terrorism,[65] as well as the perception of prison as an incubator of radicalisation.[66] According to counter-terrorism experts, 'Throughout Europe, the extremist offender population has changed profoundly

[63] Rapport d'activité 2021 du Contrôleur général des lieux de privation de liberté (CGLPL) (n 45) 18. Also see Observatoire Internationale des Prisons (OIP) French section, 'Mécanismes expérimentaux de régulation carcérale : un bilan qui peine à convaincre',<https://oip.org/analyse/mecanismes-experimentaux-de-regulation-carcerale-un-bilan-qui-peine-a-convaincre/> consulted on 24 December 2022.

[64] While there is no commonly accepted definition of radicalisation, it is generally defined as the phenomenon of people adhering to an extremist ideology which could lead to terrorism. Counter-radicalisation efforts focus on different contexts which are deemed to foster radicalisation, including prison.

[65] According to Europol statistics, the number of convictions for terrorism increased significantly during 2018. This rate has decreased slightly since 2019 and has remained more or less stable in recent years. See Europol, 'European Union Terrorism Situation and Trend report ('TE-SAT report)' for the years 2017 to 2022; Also see European Union agency for fundamental rights (FRA), 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (2016).

[66] See European Parliament, 'Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations' (P8_TA(2015)0410), paras 10-14.

over the past decade. Not only are there *more extremist inmates* – that is, those convicted of terrorism-related offences, as well as those convicted of regular criminal offences who have become radicalised in prison – but such inmates are also of more variated backgrounds and are serving a wider range of sentences, many of them relatively short-term.'[67] From the experts' point of view, the combination of these factors makes the issue of managing extremist offenders even more urgent and challenging.[68] Not to mention the role of other factors linked to detention conditions such as prison overcrowding which is deemed to be a factor likely to exacerbate radicalisation.[69]

In order to contain the spread of radical violent ideologies in prison, prison services of the most affected Member States have been experimenting with different strategies for dealing with 'radicalised' inmates over the past five years.[70] A variety of experimental prison regimes have thus been reported across the EU, ranging from dispersal, concentration and isolation with a majority of countries now moving towards a 'mixed regime'.[71] Building on these experiments, some countries like France have also set up specific separate units to assess the risk posed by prisoners identified as 'radicalised' and to decide, on the basis of this assessment, the appropriate detention regime.[72] When dealing with the risk of radicalisation in prison, Member States face a number of legal, ethical and practical challenges.[73] In this regard, it should be noted that practices for managing 'radicalised' offenders have been built up empirically and are constantly being adjusted. Apart from the need to develop scientifically reliable risk assessment methods, these practices have been criticised for their lack of transparency, and for the harmful consequences that can result for the rights of detainees categorised as 'radicalised'.[74]

The management of 'extremist offenders' also raises challenges in terms of preventing the risk of re-offending. Despite the low recidivism rates recorded in Europe for those convicted of terrorism,[75] this issue has gained momentum following recent terrorist incidents in several Member States which were

[67] Neumann, P., and Basra, R., 'Prison and Terrorism: 5 key challenges', in Christiane Höhn, Isabel Saavedra and Anne Weyembergh (eds.), *The fight against terrorism: achievements and challenges. Liber Amicorum dedicated to Gilles de Kerchove* (Bruylant, Brussels, 2021) 801 ff.

[68] *Ibid*.

[69] See in this regard European Parliament, 'Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations' (n 66) para. 10; Also see European Parliament, 'Resolution of 12 December 2018 on findings and recommendations of the Special Committee on Terrorism' (P8_TA(2018)0512), para. 58.

[70] See in this regard, Basra, R. and Neumann, P., 'Prison and Terrorism: extremist offenders management in 10 European countries', International Centre for the Study of Radicalisation (ICSR) (2020).

[71] Prison regimes qualified as 'mixed' involve concentrating or isolating the most dangerous inmates while dispersing the remainder.

[72] If the category of prisoners convicted of terrorism is primarily targeted by this type of measures, these specific detention regimes also apply to the category of prisoners sentenced for ordinary offences but identified as being at risk of radicalisation.

[73] Council, 'Radicalisation in prisons', Document 11463/21 (8 September 2021). For empirical research on these specific detention regimes in France and Belgium see Chantraine, G., Scheer, D. and Beunas, C., 'Pour une approche 'par le bas' des effets institutionnels de la lutte contre la radicalisation', *Déviance et Société*, Vol. 46 (2022) 273-287.

[74] See in this sub-section 'What assessment in terms of respect of fundamental rights? The case of France'. Concerning the detention regime in the 'D-Rad:ex' units set up in Belgium see Teper, L., 'Zone d'ombre carcérale: l'isolement en aile D-Rad:ex', *Journal des tribunaux* (2018) 961 ff.

[75] See Europol, 'European Union Terrorism Situation and Trend report ('TE-SAT report)', 2021; Also see Renard, T., 'Overblown: Exploring the Gap between the Fear of Terrorist Recidivism and the Evidence', Combating Terrorism Center at West Point (2020) 13(4), 19.

committed by 'radicalised inmates' and by recently released former terrorist convicts.[76] As reported by Europol in 2020, at least five jihadist attacks in Europe (Austria, Germany and the UK) involved perpetrators who were either released convicts or prisoners at the time they carried out the attack.[77] These incidents have reignited the debate on the need to assess the effectiveness of 'disengagement'/'deradicalisation' programmes aimed at facilitating the reintegration of terrorist convicts into society – the persistent adherence to an extremist ideology being deemed to be a significant risk factor justifying not only rehabilitation programmes but also specific monitoring measures.[78] The challenge posed by the release of several allegedly very 'radicalised' detainees in certain Member States has also revived debates on the difficulty of reconciling the restrictive probation regime which generally applies to the category of terrorist offenders with the need to prepare their future release through appropriate resocialisation measures.

While the concern of radicalisation in prison is relatively new compared to the problem of prison overcrowding, the issue of radicalisation in prison has nevertheless received considerable attention at EU level.

1.3.2. A priority receiving significant attention at EU level

Since 2015, a number of EU policy documents have addressed the issue of radicalisation in prison,[79] which is often dealt within broader debates on preventing radicalisation[80] and countering terrorism.[81] It is noteworthy that guidelines on the management of radicalisation in prison have recently been adopted as part of a Commission Recommendation on the establishment of minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.[82] More incidentally, the question of prison radicalisation also permeates discussions on alternative measures to detention. Indeed, in the EU Council conclusions on alternative

[76] Radicalisation in prison has become a focus of Europol's strategic analysis activities from 2020. See Europol, 'European Union Terrorism Situation and Trend report ('TE-SAT report)', 2020. As stated in this report at p. 13, 'EU Member States reported that individuals imprisoned for terrorist offences and prisoners who radicalise in prison pose a threat both during their imprisonment and after release. In 2019 the failed attack on 5 March in a French prison, the thwarted 23 July attack on prison guards in France and the 29 November attack in London (UK) by a recently released prisoner, are indicative of the threat'.

[77] Europol, 'European Union Terrorism Situation and Trend report ('TE-SAT report)' (n 75) 16-17.

[78] See French law n° 2021-998 of 20 July 2021 on the prevention of terrorist acts and on intelligence ('loi relative à la prevention d'actes de terrorisme et au renseignement'), *JORF* of 31 July 2021. This law introduced a new judicial measure to prevent terrorist recidivism and to facilitate reintegration which applies to certain terrorist convicts demonstrating a particular dangerousness characterised by a persistent adherence to an ideology inciting to terrorism.

[79] Council conclusions on preventing and combating radicalisation in prisons and on dealing with terrorist and violent extremist offenders after release, Document 9227/19 (6 June 2019); Speech by former Commissoner Jourová, in charge of Justice, Consumers and Gender Equality, at the Conference on 'Radicalisation in prisons' (Brussels, 27 February 2018).

[80] See for instance Strategic orientations on a coordinated EU approach to prevention of radicalisation for 2022-2023, p. 3; Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (20 November 2015); European Parliament, 'Resolution of 25 November 2015 on the prevention of radicalisation and recruitment of European citizens by terrorist organisations' (n 66), paras 10-14.

[81] See European Parliament, 'Resolution of 12 December 2018 on findings and recommendations of the Special Committee on Terrorism' (n 69), paras 54-61.

[82] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) paras 82-86.

measures to detention, [83] alternative measures are identified as a relevant lever for reducing radicalisation in prison, in addition to the expected benefits of these measures on prison overcrowding and the mutual trust between Member States.

Since the issue of radicalisation in prison falls primarily within the competence of the Member States, most of the policy documents produced by the EU institutions are limited to defining work priorities, promoting guidelines and recommendations, which add to the various non-binding guidelines and handbook generated by various international fora.[84] As from 2015, the Council called for a range of actions to address the issue of radicalisation in a criminal justice context, including in prison.[85] The issue of managing radicalised prisoners is thus addressed within the framework of broader Council's related priorities, namely 'the structure and organisation of detention regimes', 'alternative or additional measures to prosecution and/or detention' and 'Integration, rehabilitation and re-integration'. In 2019 and 2021, prison radicalisation received renewed attention in the Council[86] in a context marked by the imminent release of former terrorism convicts in several Member States. The main actions promoted by the Council during and after imprisonment include, among others, the development of specific detention regime and risk assessment tools; continued efforts to improve 'de-radicalisation, disengagement and rehabilitation programmes'; take advantage of good practices developed at EU level as well as training activities organised within different EU agencies and networks. For its part, the European commission is mainly called upon to support the work of the Member States through funding and by facilitating the exchange of good practices between them. The above-mentioned priority areas of action are largely in line with the recommendations of the European Parliament Special Committee on Terrorism ("TERR") which devoted part of its 2018 final report to the issue of 'prisons'.[87] While recognising the need to establish differentiated detention regimes to prevent radicalisation in prisons, **the TERR Committee stresses in particular that such specific regime applicable to certain groups of detainees must respect the same human rights and international obligations as those granted to any inmate**.[88] More recently, the European Commission has adopted specific guidelines on radicalisation in prisons as part of a wider initiative to help Member States comply with minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.[89] Under these broadly worded guidelines, Member States are invited to

[83] Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C 422/9 (16 December 2019) para. 11.

[84] See for instance United Nations Office on Drugs and Crime (UNODC), 'Handbook on the Management of Violent Extremist Prisoners and the Prevention of Radicalisation to Violence in Prisons', 2016; Council of Europe handbook for prison and probation services regarding radicalisation and violent extremism, PC-CP (2016) 2rev 4; Council of Europe Committee of Ministers, 'Guidelines for prison and probation services regarding radicalisation and violent extremism' (2 March 2016).

[85] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (n 80).

[86] Council conclusions on preventing and combating radicalisation in prisons and on dealing with terrorist and violent extremist offenders after release, Document 9227/19 (n 79); Council, 'Radicalisation in prisons', Document 11463/21 (8 September 2021).

[87] European Parliament, 'Resolution of 12 December 2018 on findings and recommendations of the Special Committee on Terrorism' (P8_TA(2018)0512) (n 69) paras 54-61.

[88] *Ibid*. para. 58. Also see European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19), para. 50.

[89] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8).

take various measures to ensure, *inter alia*, that radicalisation risk assessments are conducted in an appropriate manner; that staff are sufficiently trained to detect signs of radicalisation and that rehabilitation, deradicalisation and disengagement programmes in prison are put in place to prepare for the reintegration of detainees convicted of terrorist and violent extremist offences.

Radicalisation in prison has thus become a priority topic regularly debated within networks, groups of experts and coordination bodies on the prevention of radicalisation set up by the European Commission. The strategic orientations on a coordinated EU approach to prevention of radicalisation for 2022-2023 has identified 'Prisons, Radicalisation, Rehabilitation, and Reintegration' as one of the key common working priorities for EU support.[90] Among the issues and avenues of work to be explored in connection with the above themes are the training of prison staff in detecting signs of radicalisation or the need to ensure an effective transition between the detention period and the post-detention period. 'Prisons, rehabilitation and reintegration' is also among the key priorities of the 'Prevent' strand of the EU Counter-Terrorism agenda adopted by the Commission in 2020.[91] In addition to the recurring priorities for which the Commission intends to continue to provide support (i.e. risk assessment of radicalised inmates; training of prison staff), priority is given to the development of a methodology with common standards and indicators to assess the effectiveness of reintegration programmes. For the first time, the priorities supported by the Commission in the EU Counter-Terrorism agenda extend to the challenges posed by foreign terrorist fighters and their family members, including those currently located in detention centres and camps in North East Syria.[92] In light of the foregoing, one cannot fail to note the evolving nature of the priorities relating to radicalisation in the prison environment and the many challenges connected to this issue.

Beyond the reflection that has been undertaken on 'prison radicalisation' through exchanges of views and the definition of work priorities within different EU fora, the EU also intends to support the Member States in a more concrete way. The exchange of good practices and experiences is an important part of the support that the Commission intends to provide through horizontal collaboration formats, in particular through the Radicalisation Awareness Network (RAN). This network includes a working group dealing specifically with the prison issue ('RAN prisons') whose purpose is to bolster police, prison and probation services across Europe through exchange of ideas, best practices and guidelines. The practical resources that emerged from discussions within this working group (e.g. ex-post papers, recommendations) cover a range of practical issues such as 'Effective management of the prison-exit continuum', 'How to effectively train prison staff and partner for preventing/countering violent extremism (P/CVE)' or 'Risk Assessment in Prison'.[93] The Commission also supports projects led by like-minded Member States ('Project Based Collaboration') to enable swift and flexible exchanges and cooperation on priority topics, including radicalisation in prisons. As part of this new format of collaboration, in 2019, France and Sweden carried out a project on 'Radicalisation in prisons, reintegration and rehabilitation' aiming at fostering exchanges between policymakers on how to manage terrorist and extremist offenders during and after release and to better respond to some of the specific challenges such as the need to balance risk monitoring and reintegration efforts.

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[90] Strategic orientations on a coordinated EU approach to prevention of radicalisation for 2022-2023, p. 3.

[91] European Commission, 'Communication to the European Parliament, the European Council, the Council, the European economic and social committee and the Committee of the regions on a Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond', COM(2020) 795 final (9 December 2020) 8-9.

[92] *Ibid*. 8.

[93] See dedicated page on the Commission website, <https://home-affairs.ec.europa.eu/networks/radicalisation-awareness-network-ran/topics-and-working-groups/prisons-working-group-ran-prisons_en> (consulted on 4 October 2022).

In addition to initiatives aimed at fostering the exchange of experience between policy makers and practitioners dealing with this problem, the provision of European funding is another aspect of the Commission's support. In 2018, the former EU Commissioner for Justice, Consumers and Gender Equality, Vera Jourovà, took the decision to redirect some EU funding under the Justice Programme towards the prevention of radicalisation in prisons.[94] Several projects, each focusing on different aspects of the prevention of radicalisation in prison (e.g. risk assessment), have thus been funded under this programme.[95] More recently, the European Commission has pledged to support projects for the disengagement and reintegration of extremist offenders through a dedicated Internal Security Fund of 4 million euros.[96]

These different forms of support are in addition to numerous training activities offered by some specialised EU agencies and networks of professionals. For instance, in June 2022, the European Union Agency for Law Enforcement Training (CEPOL) organised training activities focused on 'Radicalisation in prison' for law enforcement officials, prison staff and probation officers in the area of preventing and countering radicalisation leading to violent extremism and terrorism.[97] A number of training activities, workshops and projects dealing with radicalisation in prison are also organised/implemented with the support of the European Organisation of Prison and Correctional Services (EuroPris).[98]

While the issue of radicalisation in prison is a relatively new priority that continues to evolve as a result of experiments conducted on the grounds as well as under the influence of terrorist events, fundamental rights issues should not be overlooked. In certain Member States most affected by radicalisation in prison, concerns have emerged regarding the specific regime that applies to prisoners categorised as 'radicalised'.

1.3.3. The management of 'radicalised' prisoners and respect for fundamental rights: the cases of France and Belgium

Radicalisation in prison is a much less documented emerging concern compared to other older concerns related to the material conditions of detention. In recent years, the management of 'radicalised' detainees has nevertheless aroused the interest of prison oversight bodies both at European and national levels because of the specific (and usually more restrictive) conditions of detention that apply to this category of detainees. This issue also seems to have caught the attention of some EU bodies, leading **the TERR Committee of the European Parliament to stress that any specific regime applicable to 'radicalised' prisoners must respect the same human rights and**

[94] Speech by Commissioner Jourová, in charge of Justice, Consumers and Gender Equality, at the Conference on radicalisation in prisons, Brussels, 27 February 2018.

[95] See dedicated page of the Commission website, <https://home-affairs.ec.europa.eu/policies/internal-security/counter-terrorism-and-radicalisation/prevention-radicalisation/funding-research-and-projects-radicalisation_en> (consulted on 9 October 2022).

[96] See European Commission, 'Communication to the European Parliament, the European Council, the Council, the European economic and social committee and the Committee of the regions on a Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond' (n 91) footnote n°25.

[97] See dedicated page of the CEPOL website, < https://www.cepol.europa.eu/education-training/what-we-teach/onsite-activities/472022ons-radicalisation-prison> (consulted on 4 October 2022).

[98] See dedicated page of the Europris website, <https://www.europris.org/?s=radicalisation> (consulted on 4 October 2022).

international obligations as those granted to any inmate.[99] These concerns do not apply to all Member States but to some of them. They have especially become highly visible in France and Belgium where the detention regimes applicable to prisoners identified as 'radicalised' are subject to similar criticism.

In the course of its periodic visits, the CPT has recently had the opportunity to visit specific prison units for radicalised prisoners in France. Since 2017, France has set up six radicalisation assessment units ('Quartiers d'évaluation de la radicalisation' also known under the acronym 'QER') and six units for the treatment of radicalisation ('Quartier de prise en charge de la radicalisation' – 'QPR') in several prisons. During a periodic visit to France in 2019, CPT members were able to visit three radicalisation assessment units in the prison at Vendin-le-Veil prison and a radicalisation treatment unit at Lille-Annoeullin prison. The findings of this visit were compiled in a specific Section of the CPT's report,[100] as part of a wider assessment of detention conditions in French prisons. On the positive side of its assessment, the CPT notes that these units have sufficiently trained prison staff and provide adequate material conditions.[101] However, the activities offered to prisoners are considered insufficient. The members of the CPT also wonder about the real purpose of the evaluation carried out in these units since the resulting evaluation reports are also transmitted to the judicial authorities, which can be perceived negatively by the detainees concerned. Other negative aspects pointed out by the members of the CPT relate to the security measures which apply indiscriminately to the entire population detained in these units. This is seen as contradictory to the objective of individualising the treatment of these detainees and as contributing to labelling them as dangerous.[102] Overall, the CPT's report recommends that the French authorities review their policy for managing radicalised prisoners, in particular the specific security measures applying to detainees held in these units, by taking into account the CoE guidelines for prison and probation services regarding radicalisation and violent extremism.[103]

The CPT's findings are mostly in line with those of the French 'Contrôleur général des lieux de privation de liberté' but the latter draws a much harsher appraisement of the prison regime applied to radicalised prisoners. In 2020, the CGLPL published a report specifically devoted to the management of 'radicalised' prisoners and the respect for fundamental rights[104] with a view to give an account of the current practices for dealing with this specific category of prisoners.

On the basis of complaints received, visits and interviews carried out, the CGLPL observes that the management of prisoners categorised as 'radicalised' is far from satisfactory and is likely to infringe their fundamental rights in a number of ways. **Among the most salient concerns are the lack of transparency and procedural safeguards over decision of placement in specific units for radicalised prisoners (i.e. QER and QPR) and the lack of remedies against such a decision.** In this

[99] European Parliament, 'Resolution of 12 December 2018 on findings and recommendations of the Special Committee on Terrorism' (n 69).

[100] Report to the French government on the periodic visit to France carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 18 December 2019, CPT/Inf (2021) 14, paras 70-74.

[101] *Ibid.* para. 72.

[102] *Ibid.* paras 72-74.

[103] Council of Europe handbook for prison and probation services regarding radicalisation and violent extremism (n 84).

[104] Contrôleur général des lieux de privation de liberté (CGLPL), 'Prise en charge pénitentiaire des personnes "radicalisées" et respect des droits fondamentaux', 2020.

respect, the CGLPL considers that although these specific units are now regulated by decree, the regime applicable to them is not sufficiently regulated by law; the texts do not provide for legal guarantees in terms of right to information and possible remedies to challenge the result of the assessment carried out on the detainee. The French prison monitoring body therefore recommends that the criteria for placement in these specific units be clarified and that sufficient information be given to the persons concerned. Similarly, remedies against the decision of placement in specific units for radicalised prisoners must be provided for by an explicit legislative provision. Other more general criticisms relate to the negative consequences of this specific detention regime on the daily life of detainees and on the preparation for their release from prison. Overall, the report concludes that while the principle of specific prison regime for detainees categorised as 'radicalised' does not seem to be called into question, the current system cannot be regarded as satisfactory and requires a number of improvements. In its latest 2021 annual report assessing the detention conditions in France,[105] the CGLPL regrets that, despite the progress made, several of the recommendations made in 2020 regarding the management of 'radicalised' prisoners have not yet been taken into account by the French government. Although the findings of the CGLPL have been taken into account by the French commission of inquiry into the dysfunctions of the French prison policy, the latter considers that much progress has been made in developing practices that respect the fundamental rights of the persons places in QER and QPR.[106]

By way of comparison, similar concerns have been expressed about the 'D-Rad:Ex' units set up in the Belgian prisons of Hasselt and Ittre in 2016. These units can accommodate up to 40 inmates and are used for isolation of prisoners considered the most radicalised from other prisoners, as a last resort.[107] In 2019, some detainees and ex-detainees in these units filed a complaint against the Belgian State invoking several violations of their fundamental rights as provided by the ECHR. In support of their claims, the applicants argued that their conditions of detention were inhuman and degrading within the meaning of Article 3 ECHR and that the lack of judicial remedy to challenge the decision to place them in such units violated Articles 6 and 13 ECHR. Only the violation of the right to an effective remedy was ultimately upheld against the Belgian State by the Court of Appeal.[108] Although these units now seem to have almost no detainees, civil society organisations active on these issues regret the lack of evaluation by the Belgian authorities of this specific detention regime.[109] Compared to France, the question of the detention regime applicable to detainees labelled as 'radicalised' is thus becoming less important in Belgium insofar as the 'D-Rad:Ex' units have gradually been emptied. Nevertheless, the Belgian and French cases are indicative of the concerns raised by 'ultra-secure' (and therefore much more restrictive) detention regimes applied to prisoners categorised as particularly dangerous. The latter category extends well beyond detainees identified as adhering to a radical ideology and includes more broadly those suspected or convicted of terrorism-related offences who are subject to a detention regime of particular concern from a fundamental rights perspective in some Member States. In Spain, for instance, the use of 'incommunicado detention' for terrorist suspects raises long-standing

[105] Rapport d'activité 2021 du Contrôleur général des lieux de privation de liberté (CGLPL) (n 45) 310.

[106] See Rapport n°4906 fait au nom de la Commission d'enquête visant à identifier les dysfonctionnements et manquements de la politique pénitentiaire française (12 January 2022) 139; 142.

[107] See Renard, T., 'Extremist offender management in Belgium', Country reports, London, ISCR (2020) 9.

[108] See < https://www.rtbf.be/article/prisons-letat-belge-condamne-a-indemniser-des-detenus-d-radex-10744656> (consulted on 4 October 2022).

[109] See report from the Comité de vigilance en matière de lutte contre le terrorisme ('Comité T'), 'Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains' (2022) 88-90.

concerns that have attracted the attention of various UN bodies, the CPT, and human rights organisations.[110] Under this derogatory regime, people are denied basic procedural rights such as access to a lawyer as well as access to a doctor of their own choice and are deprived of the possibility to inform their family and friends of their detention. Despite the legislative changes that have been made to restrict the use of 'incommunicado' regime and to provide more guarantees to the persons concerned, the CPT remains concerned about the effects of such regime on respect for fundamental rights.[111] These concerns have recently surfaced in the context of judicial cooperation in criminal matters, giving rise to reluctance to execute an EAW due to detention conditions for terrorist suspects in the issuing State. In the case ***Castaño v. Belgium*** [112] – discussed in more detail in the following Sections of the study – the Belgian judicial authorities refused to execute the EAW issued by the Spanish authorities, arguing that, based on the 2011 report of the CPT, there were indeed 'substantial reasons for believing that the execution of the EAWs would infringe the defendant's fundamental rights because persons charged with punishable offences with an alleged terrorist motive are held in Spain under a different custodial regime in degrading conditions possibly accompanied by torture, and with very limited contact with the outside world (family, lawyer and assistance)'.[113]

2. IMPACT OF POOR DETENTION CONDITIONS ON MUTUAL TRUST AND MUTUAL RECOGNITION INSTRUMENTS

In order to operate effectively, the principle of mutual recognition[114] requires a high level of trust between judicial authorities, including with regard to the detention conditions offered to pre-trial and convicted detainees. This is all the more true as several mutual recognition instruments in criminal matters involve the facilitation of the execution of pre-trial detention orders or of custodial sentence, namely the Framework Decision 2002/584/JHA on the EAW and the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty.

The question of the impact of detention issues on mutual trust, and therefore on mutual recognition and judicial cooperation, is not new.[115] In 2011, the European Commission had already expressed its concerns that poor detention conditions and excessive length of pre-trial detention would undermine trust between Member States and would have correlatively adverse effects on the mutual recognition

[110] See Amnesty International, 'Spain: out of the shadows – Time to end incommunicado detention' (2009, < https://www.amnesty.org/ar/wp-content/uploads/2021/07/eur410012009eng.pdf> (consulted on 23 January 2023).

[111] Regarding the specific 'incommunicado detention regime' applied in Spain and the legislative development it has undergone since 2015, notably under the pressure of the CPT, see Report to the Spanish Government on the visit to Spain carried out by the European Committee for the prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 14 to 28 September 2020, CPT/Inf (2021) 27, para. 10.

[112] ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019.

[113] *Ibid*. para. 15.

[114] The principle of mutual recognition rests on the idea of mutual trust between Member States. According to this principle, judicial decisions are to be recognised as equivalent and executed throughout the Union regardless of where the decision was taken. This is based on the presumption that criminal justice systems within the EU, whilst not the same, are at least equivalent. The principle of mutual recognition of judgments and judicial decisions is itself based on mutual trust and on the rebuttable presumption that other Member States comply with EU law and, in particular, fundamental rights.

[115] See 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 295/1 (4 December 2009) Annex, measure F.

of judicial decisions.[116] In 2014, the European Parliament expressed concerns that the unacceptable conditions in detention facilities within the Union, could impact upon the effectiveness of EU's mutual recognition instruments.[117] It was therefore considered that without mutual trust in the area of detention, EU mutual recognition instruments involving the use of detention would not work properly, as a Member State might be reluctant to recognise and enforce the decision taken by the authorities of another Member State.

In the beginning, based on the presumption that all Member States respect fundamental rights,[118] the number of refusals to cooperate on the grounds of detention conditions was extremely limited. This was in particular obvious in the case of the EAW.[119]

However, the situation has clearly evolved over the years, especially due to the evolution of the case-law of the CJEU. Recent years have shown that mutual trust should not be taken for granted, as evidenced by the reluctance of some national authorities to execute surrender requests in case of serious doubts as to the respect of fundamental rights in the issuing State. This concern has become particularly conspicuous in several major preliminary rulings involving the use of the EAW, giving the CJEU the opportunity to clarify that 'mutual trust does not mean blind trust'.[120] The question of the impact of detention conditions on the EAW mechanism as well as the effect of the case-law of the CJEU on national law and judicial practice will be examined in more detail in the subsequent Section (2.1.). For the sake of completeness, this study will also seek to measure the impact of detention issues on other mutual recognition instruments that facilitate the transfer of a custodial measure, namely the Framework Decision 2008/909/JHA 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 EU (2.2.).

2.1. Detention conditions and surrender procedures under the Framework Decision on the EAW

The tensions between the principle of mutual recognition and the lack of mutual trust in the detention conditions of the Member States have crystallised in the context of the EAW - one of the oldest and most used judicial cooperation mechanisms in criminal matters.

[116] European Commission, Green paper 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', COM(2011) 327 final (14 June 2011).

[117] European Parliament, 'Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant' (P7_TA(2014) 0174).

[118] CJEU, Opinion 2/13 on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 18 December 2014, EU:C:2014:2454, para. 191. The principle of mutual trust requires Member States to assume, save in 'exceptional circumstances', that all other Member States comply with EU law and, in particular, with fundamental rights recognised by EU law.

[119] Empirical research shows that even if poor detention conditions are a long-standing concern, few cases of refusal based on this ground have been reported before the *Aranyosi and Căldăraru* judgment, even for those States that have included such a ground for refusal in their legislation. See Weyembergh, A., Armada, I. and Brière, C., 'Critical Assessment of the Existing European Arrest Warrant Framework Decision', Research paper for the European Parliament, PE 510/979 (2014) 11.

[120] On this evolution of the CJEU case-law, see *inter alia* Lenaerts, K., 'La vie après l'avis: exploring the principle of mutual (yet not blind) trust', *Common Market Law Review* (2017) 54(3) 805-840.

Replacing the classic extradition procedure with a simplified surrender procedure characterised by minimum formalities and speed, 'the European arrest warrant is a judicial decision issued by a Member State for the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order'.[121] In practice, EAWs are usually accompanied by detention in the executing Member State pending surrender, and then in the issuing Member State upon return of the person, at least until the person is heard by the relevant authority. [122] Thus, the EAW generally involves a minimum of several weeks in detention (more if the EAW is challenged).

Cases of poor detention conditions in some EU Member States amounting to inhuman and degrading treatment prohibited by Article 4 of the Charter have long been a concern which is well documented by the CoE. While this issue is not confined to cross-border situations, such violations can also arise in the context of EAW proceedings, since a surrender decision may have the direct result of exposing the requested person to a risk of inhuman and degrading treatment in the issuing State. It is not insignificant that a few rare cases of non-execution based on this ground have already been identified as early as 2010.[123] While the implementation of the EAW mechanism has quickly proved to be the source of tension for the protection of fundamental rights (in general), the priority given to the efficacy of the EAW has long prevailed in the CJEU case-law.[124]

In this regard, it must be recalled that the room for manoeuvre offered by the Framework Decision on the EAW remains limited. Since national authorities are bound by a presumption of compliance with fundamental rights in the context of the execution of an EAW, the executing authority must, in principle, agree to recognise and execute an EAW unless there are grounds for refusal. Among the mandatory and optional grounds for non-execution[125] provided for by the EAW Framework Decision, no one relates to fundamental rights. But considerations relating to human rights are not entirely absent from this instrument [126]: on the basis of Article 1(3) of the Framework Decision (which does not

[121] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18 July 2002.

[122] See Fair Trials, 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (2021) < https://www.fairtrials.org/app/uploads/2021/11/EAW-ALT_Report.pdf> (consulted on 15 October 2022). This report is produced as part of the project 'Addressing the overuse of pre-trial detention and the disproportionate use of EAW with alternative cross-border instruments' (EAW-ALT).

[123] See Sellier, E. and Weyembergh, A. (eds.), *Criminal Procedures and Cross-Border Cooperation In The Eu's Area Of Criminal Justice – Together But Apart?*, Bruxelles, éditions de l'Université de Bruxelles, (2020) 354-356.

[124] For an in-depth reflection on the evolution of the case-law of the CJEU in relation to the EAW see Weyembergh, A., 'The Contribution of the CJEU in setting the Parameters of Mutual Recognition in criminal matters', in Lazowski, A. and Mitsilegas, V. (eds.), *The European Arrest Warrant at 20*, Hart Publishing (2023, forthcoming). Also see Weyembergh, A. and Pinelli, L., 'Detention conditions in the issuing Member State as a ground for non-execution of the European Arrest Warrant: state of play and challenges ahead', *European Criminal Law Review* (2022) Vol. 12(1), 25-52.

[125] See Articles 3 and 4 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. These grounds for refusal were introduced to alleviate concerns resulting from the almost automatic character of this mutual recognition instrument.

[126] Recital 10 of the Framework Decision on the EAW indicates that the "mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6(1) of the Treaty on European Union (…)". Recital 13 provides that 'No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'. Article 1(3) of the Framework Decision provides that 'This Framework Decision shall not have the effect of modifying the

constitute an explicit ground for non-execution of an EAW), a significant number of national implementing legislation explicitly provide for a mandatory ground of non-execution based on the violation of fundamental rights.[127] Moreover, questions of interpretation relating to this provision have become increasingly important in recent years, urging the Court to acknowledge that mutual recognition is not absolute and that the protection of fundamental rights may justify limitations on the duty to execute an EAW.

Since then, it seems that fundamental rights concerns have had a significant impact on the practice of this instrument, leading to denial of execution of EAWs in 81 cases according to the Commission's most recent statistics for 2021.[128] Although these statistics do not allow to segregate the cases of refusal resulting specifically from the detention conditions in the issuing Member State, recent empirical research shows that the non-execution of EAWs due to poor conditions of detention has significantly increased since the Court's landmark decision in the ***Aranyosi and Căldăraru*** case.[129] Thus, while most Member States were initially reluctant to rely on conditions of imprisonment to deny surrender, the development of the case-law of the CJEU on these issues has been a turning point.

By admitting that inhuman and degrading detention conditions can constitute 'exceptional circumstances' justifying the postponement/non-execution of a EAW, the Court has provided long-awaited clarification in defining the limitations of mutual trust in criminal matters.[130] Remarkably, this case-law suggests a tendency for the Court to move away from its initial focus on the effectiveness of the EAW mechanism in an attempt to reconcile the principles of mutual trust and recognition with the protection of fundamental rights. Before delving into the practical implications resulting from this case-law, it is first necessary to recall the key contents and stakes of these rulings. In view of the growing role of the Strasbourg Court in these matters, the relevant case-law of the ECtHR will also be taken into account. The following paragraphs will focus on case-law developments related to the risk of violation of Article 4 of the Charter due to poor detention conditions. Still, it is worth mentioning that the CJEU has extended the circumstances in which limits may be placed on mutual trust to risks of infringement of other fundamental values relating to the rule of law, i.e. the respect for the independence of the judiciary.[131]

obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

[127] See Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2020) 270 final (2020) 9.

[128] European Commission staff working document, 'Statistics on the practical operation of the European arrest warrant – 2019' SWD(2021) 227 final (6 August 2021) 22. According to the statistics reported by the Commission, "In 2019, fundamental rights issues led to a total of 81 refusals reported by 9 Member States out of 23 replying Member States. 65 of these refusals were registered in Germany alone. By way of comparison, 5 Member States reported cases of refusal in 2018, of which 76 cases were reported by Germany".

[129] See in this Section 'Case-law development in the field'.

[130] Such 'exceptional circumstances' have so far been recognised in situations where there is a real and individual risk that the requested person will suffer a breach of his fundamental rights, whether because of poor conditions of detention or because of the threat to the independence of the judiciary in the issuing Member State.

[131] Case C-216/18, *LM*, 25 July 2018, ECLI:EU:C:2018:586.

2.1.1. Case-law developments in the field

A major decision in this context has been the ***Aranyosi and Căldăraru***[132] judgment in which the CJEU ruled that the execution of a EAW should be deferred if there is a real risk that the person sought is exposed to inhuman or degrading treatment because of the detention conditions in the issuing Member State. If the existence of the risk cannot be discounted within a 'reasonable' time, then the executing judicial authority must decide whether the surrender process should be ended. This judgement is considered as 'a breaking point for mutual recognition and mutual trust in criminal matters'[133] as it is the first case where the Court recognised the existence of 'exceptional circumstances' justifying limits to mutual trust in the context of surrender procedures under the Framework Decision on the EAW.

It follows from that judgment that, **when the executing authority is in possession of evidence of a *real risk* of inhuman or degrading treatment of persons detained in the issuing Member State, that judicial authority is required to assess the existence of this risk before deciding to surrender the individual concerned**. **The Court then specified the two-step test to be carried out by the executing judicial authority.** The requested authority must first assess the existence of a general risk of inhuman or degrading treatment due to systemic or generalised deficiencies in the detention conditions in the prisons of the issuing Member State. This assessment must be carried out on the basis of objective, reliable, specific and correctly updated information on the detention conditions prevailing in the issuing Member States.[134] As the Court clarified, **proof of existence of a real risk of inhuman or degrading treatment resulting from the general conditions of detention in the issuing Member States cannot, on its own, lead to refusal of execution of the EAW. If there is evidence of a real risk arising from the general conditions of detention, the executing judicial authority must then assess whether there are substantial grounds for believing that the person sought, if surrendered, will concretely be exposed to this risk**.[135] Thus, the executing authority cannot rely solely on general information that a Member State has a very poor human rights record affecting one or more detention facilities. The executing authority is also required to carry out an assessment *in concreto* in order to determine whether, in the specific circumstances of the case, the person concerned runs a real risk of being subject to inhuman or degrading treatment in the issuing Member State. **To this end, the executing authority must request supplementary information from the issuing authority on the conditions in which the person is likely to be detained**.[136] If, in the light of the information provided or any other information available to it, the authority responsible for executing the warrant finds that there is a real risk of inhuman or degrading treatment, **the execution of the warrant must be deferred until additional information is obtained on the basis of which this risk can be discounted. If this risk cannot be ruled out within a reasonable period, that authority must decide whether to terminate the surrender procedure**.

[132] Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198.

[133] Lazowski, A., 'The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldararu', *Croatian Yearbook of European Law and Policy*, 2018(14) 29.

[134] Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* (n 132) para. 89.

[135] *Ibid*., para. 92.

[136] *Ibid*., para. 95.

The *Aranyosi and Căldăraru* ruling was subsequently confirmed and refined by the Court in the ***ML*** and ***Dorobantu*** judgments, in which the Court provided further guidance on how the two-stage assessment should be conducted by the executing authority.

In the ***ML***[137] judgement, clarifications were sought concerning the extent of the review which the judicial executing authority is required to undertake to determine whether the person sought could be exposed to a real risk of inhuman or degrading treatment in the issuing Member State. The questions referred to the Court focused more specifically on whether a legal remedy in the issuing state can remove such a risk; in the event of a negative answer, whether the assessment of the detention conditions must cover all the prison establishments in which the person sought could potentially be detained or only those in which he/she is likely to be detained most of the time. In relation to the previous question, the referring court asked about the relevant criteria/information that should be taken into account when assessing the conditions of detention in the issuing State and the reliability of the assurance given by the issuing authority.

In its judgment, the CJEU first clarified that **the existence of legal remedies to review the legality of detention conditions in the issuing Member State is not sufficient to eliminate the risk of inhuman treatment**. The executing authority is therefore still required to carry out an individual assessment. Secondly, with regards to the scope of the review, the Court held that **the executing judicial authority is solely required to assess the conditions of detention in the prisons in which the person concerned is specifically intended to be detained, including temporarily**. Hence, the executing authority is not required to assess the conditions of detention in all the prisons in which the individual concerned might be detained. As specified by the Court, the compliance with the fundamental rights of the conditions of detention in the other prisons in which that person may possibly be held at a later stage is a matter that falls exclusively within the jurisdiction of the courts of the issuing Member State. Thirdly, the Court clarified that the executing judicial authority must assess solely **the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman and degrading treatment with the meaning of Article 4 of the Charter**. In the absence of EU norms, the Court confirmed the relevance of the standards established in the case-law of the ECtHR for assessing the conditions of detention in the issuing Member State (in particular as regards the minimum level of severity of ill-treatment and the minimum personal cell space that must be afforded to a detainee).[138] Conversely, requesting additional information from the issuing authorities by asking 78 questions on issues such as religious worship facilities or laundry services, is not of obvious relevance for the purpose of this assessment and went too far according to the Court. Fourthly, the CJEU addressed the question to what extent the assurances given by the issuing State must be taken into account by the executing judicial authority. In this regard, the Court considered that **given the mutual trust on which the EAW mechanism is based, the executing judicial authority must rely on the assurance given by the issuing judicial authority as to the actual and precise conditions in which the person concerned will be detained, at least if – as in the present case – there are no specific indications that the detention conditions in a particular prison centre are in breach of Article 4 of the Charter**. When such assurance is not provided by a judicial authority in the issuing State, the executing authority must evaluate the safeguard it represents by carrying out an overall assessment of all the available information. In the present case, the CJEU considers that ML's surrender to the Hungarian authorities

[137] Case C-220/18, *ML* (n 28).

[138] For further developments on these issues, see in this study sub-section 1.2. 'Prison overcrowding'.

could seem to be authorised without any breach of Article 4 of the Charter. The final verification, however, is the responsibility of the referring court.

In the ***Doranbantu*** case,[139] which followed on from the previous ***Aranyosi*** and ***ML*** cases, the Court provided further clarification as to the extent and scope of the review that should be undertaken by the executing judicial authority, as well as to the standards against which such a review must be carried out and the possibility (or not) of weighing the detention conditions against considerations relating to the principles of mutual trust and recognition. Firstly, the Court specified that **the assessment undertaken by the executing authority cannot be limited to the review of obvious inadequacies of conditions of detention in the issuing State, since the prohibition of inhuman and degrading treatment is absolute**. Instead, the judicial authority must take into account all the relevant physical aspects of the conditions of detention in the prison in which, according to the information available, the person requested is likely to be detained (e.g. personal space available to detainees, sanitary conditions, and freedom of movement of detainees inside the prison). Secondly, the Court addressed the question of the standards by which the conditions of detention must be assessed, in particular with regard to the minimum personal cell space, in order to establish a violation of Article 4 of the Charter. **In the absence of EU standards on the matter, the CJEU relies entirely on the case-law of the ECtHR**,[140] **according to which there is a strong presumption of a violation of Article 3 ECHR when the personal space available to a detainee is less than 3m² in multi-occupancy accommodation.** The calculation of this space should not include sanitary facilities but should instead include the space occupied by furniture, provided that the detainees are still able to move around normally inside the cell. In this respect, the Court further clarified that while the Member States are free to provide more favourable detention conditions in accordance with their national law, surrender remains subject to compliance with the European requirements and not with the more stringent national ones. Otherwise, this would cast doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law and could in turn undermine the principles of mutual trust and mutual recognition. **Thirdly, on the question of the weight to be given to the existence of an effective mechanism for monitoring conditions of detention in the issuing Member State, the Court specifies that, albeit an important factor, the existence of such mechanisms cannot as such rule out the real risk of inhuman or degrading treatment**. Consequently, in such circumstances, the executing judicial authority is still required to carry out an individual assessment of the situation of each person concerned in order to ensure that its decision to surrender will not expose him/her to a real risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter. Finally, the Court held that **the finding of a real risk that the person concerned will be subject to inhuman or degrading treatment because of detention conditions in the issuing Member State cannot be weighed against considerations on effectiveness of judicial cooperation in criminal matters and the principles of mutual recognition and mutual trust that underpin it**. The fundamental right not to be subject to any inhuman or degrading treatment is absolute and cannot in any way be limited for reasons related to the functioning of criminal justice systems.

Interestingly, the Luxembourg court has recently been called upon to clarify whether the *Aranyosi* judgment can be transposed, by analogy, to the execution of an EAW which may create

[139] Case C-128/18, *Dorobantu*, 15 October 2019 (n 28).

[140] For an in-depth reflection on the interaction between EU law and CoE standards as regards human rights of prisoners see Cliquennois, G., Snacken, S. and Van Zyl Smit, D., 'Can Europe human rights instruments limit the power of the national state to punish? A tale of two Europes', *European Journal of Criminology* (2021) Vol. 18(1), 11-32.

a serious risk to the health of the person whose surrender is requested.[141] **While the case is still pending before the Court and does not specifically involve a risk of inhuman and degrading treatment arising from the poor conditions of detention in the issuing State, it does have a link to detention issues (detention being considered here as an aggravating factor to mental health problems).** More specifically, the case concerns an EAW issued against a person who is found to be suffering from a psychotic disorder requiring treatment and at high risk of suicide associated with the possibility of his imprisonment. On the basis of these elements, the Italian referring court considered that the surrender of the person concerned to Croatia in execution of the EAW would halt the possibility of treatment, resulting in a worsening of his general condition and a genuine risk to health. However, it noted that none of the grounds for refusal exhaustively provided for in the Italian transposition law include the possibility of refusing to execute an EAW in such a case. In this context, the Italian referring court decided to ask the CJEU whether Article 1(3) of the Framework Decision on the EAW, examined in the light of Articles 3, 4 and 35 of the Charter, must be interpreted as meaning that, where it considers that the surrender of a person suffering from a serious chronic and potentially irreversible disease may expose him/her to the risk of suffering serious harm to his or her health, the executing judicial authority must request information from the issuing authority to rule out such a risk, and must refuse to surrender the person in question if it does not obtain assurances to that effect within a reasonable period of time.

In contrast to the previous cases, this is the first time that the Court has been asked to rule on a situation where the risk of infringement of fundamental rights may materialise irrespective of the existence of systemic or generalised deficiencies in the issuing State.[142] This could lead to important new clarifications regarding the articulation of the two-step test as established by the Aranyosi case-law. Indeed, while the Luxembourg judge already had the opportunity to clarify that the second stage of the *Aranyosi* test is mandatory, even if there is substantiated evidence of a general risk of violation of fundamental rights due to systemic or generalized deficiencies[143] (first stage of the *Aranyosi* test), the converse has not yet been clarified by the Court. More generally, this case represents a further opportunity to clarify the scope of the limits recognized by the CJEU on the execution of an EAW where fundamental rights are at stake (beyond the risk of violation of Articles 4 and 47 of the Charter).[144]

Besides the CJEU which has a crucial role to play in the interpretation of EU law, and *a fortiori* for specifying the *exceptional circumstances* which may justify limits to mutual trust between Member States, the execution of an EAW also remains subject to control by the ECtHR. [145] According to a well-established case-law, the ECtHR may be called upon to review judicial decisions taken by national

[141] See Case C-699/21, *E.D.L.*, request for preliminary ruling submitted to the Court on 22 November 2021.

[142] See Opinion of Advocate general Campos Sánchez-Bordona delivered on 1st December 2022, Case C-699/21, *E.D.L.*, ECLI:EU:C:2022:955, paras 33 ff.

[143] Case C-216/18, *LM* (n 131) paras 60; 68-69.

[144] In addition to Article 4, possible violations of Articles 3 ('Right to the integrity of the person') and 35 ('Health care') of the Charter are invoked in this case.

[145] The ECtHR has established a stable framework for interaction with the CJEU through the Bosphorus presumption according to which the EU legal order provides at least equivalent protection of fundamental rights to that offered by the ECHR. See ECtHR (GC), *Bosphorus v. Ireland*, no. 45036/98, 30 June 2005.

authorities pursuant to an obligation under EU law, such as that of executing an EAW.[146] While the ECtHR is committed to respect the specificity of the mechanism established by the EAW, **it follows from its case-law that it also intends to check that the presumption of respect for fundamental rights which is binding on EU Member States does not apply automatically to the detriment of fundamental rights protected by the Convention**.[147] This was recently confirmed by the ECtHR in the case ***Bivolaru and Moldovan v. France***,[148] in which two national decisions authorising the execution of an EAW were respectively challenged on the basis of Article 3 ECHR, including on grounds relating to poor conditions of detention in the issuing Member State. This judgment of the ECtHR is a major decision, not only because this is the first time that the Court has to rule on the execution of EAWs challenged on the grounds of detention conditions,[149] but also in view of the unprecedented conclusions reached by the Court: with regard to the application of Moldovan, this is the first judgment in which the ECtHR rebutted the *presumption of equivalent protection* and concluded that the execution of an EAW violated Article 3 ECHR.

It is worth recalling that where Member States implement the Framework Decision on the EAW, they are presumed to respect the ECHR because of the *presumption of equivalent protection* which applies.[150] According to this presumption (also referred to as 'the Bosphorus presumption'), when a State implements its obligation arising from a supranational organisation to which it is party (such as the EU), the State is presumed acting in compliance with the ECHR, provided that protection of human rights in that supranational organisation is equivalent to that provided by the Convention (which is the case for the EU).[151] This presumption may nevertheless be rebutted in the event of a serious assertion of a violation of a right protected by the Convention which is such as to impair the protection offered by the Convention. [152] In the context of the EAW, this means that where a person subject to a EAW alleges a serious and substantiated claim that the protection of one of his or her rights has been manifestly deficient and cannot be remedied by EU law, the executing judicial authority has the obligation under the Convention to assess this grievance and cannot refrain from doing so on the sole ground that it is applying EU law. Concerning the application of ***Moldovan***, the Court found that there had been a

[146] For an in-depth reflection on the interactions between the two Courts regarding the EAW mechanism see Spielmann, D. and Voyatzis, P., 'Le mandat d'arrêt européen entre Luxembourg et Strasbourg: du subtil exercice d'équilibriste entre la CJUE et la Cour EDH', in Beaugrand, V. et al. (dir.), *Sa justice*, 1ère edition, (Bruxelles, Bruylant, 2022) 255-301.

[147] While acknowledging the importance of the principle of mutual trust within the area of freedom, security and justice, the ECtHR considers that it is its responsibility to verify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights. See for instance ECtHR (GC), *Avotiņš v. Latvia*, no. 17502/07, 23 May 2016, para. 113. Also see ECtHR, *Pirozzi v. Belgium*, no. 21055/11, 17 April 2018, paras 59-62.

[148] ECtHR, *Bivolaru and Moldovan v. France* (n 54) paras 101-103.

[149] In the ECtHR judgment *Romeo Castaño v. Belgium*, the dispute did not concern the execution of an EAW but the refusal to execute an EAW which was challenged on the basis of Article 2 ECHR in its procedural aspect. The risk of violation of Article 3 ECHR resulting from the conditions of detention in the issuing State was nevertheless one of the main arguments put forward by the respondent State to justify the refusal of execution.

[150] The conditions for the application of the presumption of equivalent protection had been firstly established in *Bosphorus* and subsequently confirmed after Opinion 2/13 was delivered by the CJEU. As stated by the ECtHR in *Avotiņš v. Latvia* (n 145), such presumption also applies in the case where mutual recognition mechanisms require to presume that the observance of fundamental rights by another Member State has been sufficient. This is considered to be the case in the context of the EAW. See in this regard ECtHR, *Pirozzi v. Belgium*, no. 21055/11, 17 April 2018, paras 62-66. The Court generally considers that, unless one of the grounds for non-execution apply, the execution of the EAW is mandatory for the executing judicial authority so that the presumption of equivalent protection applies as Member States are considered to have no discretion.

[151] ECtHR (GC), *Bosphorus v. Ireland* (n 145) para165.

[152] In such a case, national courts must let the European Convention's obligation prevail over their EU obligations.

sufficiently solid factual basis, deriving in particular from the ECtHR's own case-law, for the French executing judicial authority to establish the existence of a real risk to the applicant of being exposed to inhuman and degrading treatment on account of his conditions of detention in Romania (for reasons relating in particular to the overcrowding and poor detention conditions). In this regard, the Court states, inter alia, that the recommendation made by the French authorities that the requested person be detained in adequate conditions is not sufficient to rule out such risk.[153] The Court concluded that, in the specific circumstances of this case, the protection of fundamental rights has been manifestly deficient, with the result that the presumption of equivalent protection was rebutted, and the violation of Article 3 ECHR was upheld against France. In contrast, in the case of ***Bivolaru***, the Court considered that the *presumption of equivalent protection* was not rebutted as the applicant had not provided the executing judicial authority with sufficiently detailed or substantiated information to constitute prima facie evidence of a real risk of treatment contrary to Article 3 ECHR in the event of his surrender to the Romanian authorities. Thus, in the view of the Court, the executing judicial authority was not required to request additional information from the Romanian authorities on the applicant's future place of detention for the purpose of identifying the existence of a real risk that he would be subjected to inhuman and degrading treatment on account of his conditions of detention. In these circumstances, the Court concluded that there was no solid factual basis allowing the executing judicial authority to identify the existence of a real risk of a breach of Article 3 of the Convention and to refuse execution of the EAW on that ground.

Some commentators argue that **the position of the CJEU and the ECtHR do not fully converge as to the circumstances in which the presumption of mutual trust can be rebutted**.[154] This is based on the premise that, to date, the CJEU prohibits the executing authorities from assessing whether fundamental rights have been respected by the issuing State save in exceptional circumstances, i.e. where Articles 4 and 47 of the Charter are at stake, whereas the ECtHR opens the review to possible violations of any Convention right in order to prevent a manifest deficiency in the European Convention protection.[155] However, one could consider that the Court has simply not yet had the opportunity to rule on whether 'exceptional circumstances' relating to the protection of fundamental rights can be recognised beyond these two provisions. Such opportunity could be taken by the CJEU in the abovementioned case where it has been called upon to clarify whether the *Aranyosi* judgment can be transposed, by analogy, to the execution of an EAW which may create a serious risk to the health of the person whose surrender is requested.[156] Moreover, **the positions of the two courts appear to be largely convergent when it comes to the test for establishing a real and individual risk that the person requested will suffer inhuman or degrading treatment**, and therefore, for deciding whether or not the surrender should take place.[157] Among the key lessons of the judgement ***Bivolaru and Moldovan v. France***, it can be noted that **the requirements imposed by the ECtHR and the CJEU**

[153] ECtHR, *Bivolaru and Moldovan v. France* (n 54) para 125.

[154] See in this regard, Marguery, T., 'Rebuttal of mutual trust and mutual recognition in criminal matters: is 'exceptional' enough?', *European Papers* (2016) Vol. 1, 960.

[155] *Ibid*.

[156] See Case C-699/21, *E.D.L*. (n 141). In its request for a preliminary ruling, the referring court asks the CJEU to rule not only on the interpretation of Article 4 but also on Articles 3 ('Right to the integrity of the person') and 35 ('Health care') of the Charter.

[157] While taking into account the two-step test developed by the CJEU, the fact remains that in the context of the Convention the Strasbourg judge is mainly concerned with the individual case of the applicant and the specific detention conditions to which he will be subjected.

concerning the quality and the reliability of information requested from the issuing authority seem to largely converge.[158] In the present case, the ECtHR implicitly considers that it is not sufficient for the executing authority to rely solely on the information transmitted by the issuing authority when there is other factual evidence indicating that the detention conditions in which the requested person is likely to be held do not meet European standards. In such circumstances, the executing judicial authorities must assess the information transmitted by their foreign counterpart in the light of other factual elements, derived in particular from the ECtHR's case-law, to rule out any real risk that the person sought is exposed to inhuman and degrading treatment. This appears to be consistent with the interpretation provided by the CJEU in the *ML* case according to which the executing judicial authority must rely on the assurance given by the issuing judicial authority, 'at least if there are no specific indications that the detention conditions in a particular prison center are in breach of Article 4 of the Charter'.[159] The complementary nature of the control exercised by the two European courts is also reflected in the standards against which a risk of violation of Articles 4 of the Charter and 3 ECHR must be assessed. As noted above,[160] **the acquis of the ECtHR is a crucial reference point in the CJEU case-law for determining whether conditions of detention may amount to inhuman and degrading treatment prohibited by Article 4 of the Charter and Article 3 ECHR**. Thus, both the CJEU and the ECtHR have shown a willingness to align their jurisprudence when the issue of prison conditions comes into play in the context of the execution of an EAW. In line with the evolving case-law of the CJEU, the judgment *Bivolaru and Moldovan v. France* seems to suggest that the ECtHR is committed to ensuring that an EAW is not blindly executed to the detriment of the fundamental rights protected by the Convention.

However, it should be noted that the control of the ECtHR is carried out in both directions. Indeed the Court also verifies that a refusal to execute an EAW on grounds relating to detention conditions does not contravene the procedural obligation to cooperate with the issuing State as guaranteed by Article 2 ECHR on the right to life. This balancing exercise was conducted for the first time in the case ***Castaño v. Belgium***,[161] in which the applicants challenged the Belgian authorities' refusal to execute the EAW issued by the Spanish authorities. More specifically, the applicants contended that, because of this refusal, Spanish authorities were prevented from prosecuting the person suspected of involvement in the death of their father and from carrying out an effective investigation on this murder case. In accordance with its case-law on extradition, the Court recognises that a risk that the requested person be subjected to inhuman and degrading treatment on account of the conditions of detention in Spain may constitute a legitimate ground for refusing execution of the EAW under the Convention. The approach of the Belgian authorities not to automatically surrender the person requested was therefore the right one. Nevertheless, given the presence of third-party rights, the finding that such risk exists must have a sufficient factual basis.[162] In the present case, the Court held that the refusal of the Belgian authorities to execute the EAW issued by Spain was lacking a sufficient factual basis in that a detailed and updated examination of the detention conditions in the issuing State was not carried out.[163] It was

[158] For a different view see Julié, W. and Fauvarque, J., 'Bivolaru and Moldovan v. France: a new challenge for mutual trust in the European Union?', 22 June 2021 (n 54)

[159] See in this Section 'Case-law developments in the field'. However, it is true that the CJEU has not (yet) clarified what the executing should do in such circumstances.

[160] See in this Section 'Case-law developments in the field'.

[161] ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019.

[162] *Ibid*., para. 85.

[163] *Ibid*., para. 86.

further noted that the Belgian executing authorities did not seek to identify a real and individualised risk of violation of fundamental rights or any structural shortcomings with regards to conditions of detention in Spain.[164] The Court further argued that Belgian authorities should have used their rights to request additional information on the place and detention conditions so as to determine if there would have been a 'real and concrete risk of a violation of the Convention' in case of surrender. As a result, the Court concluded that by refusing to execute the EAW in dispute, Belgium failed in its obligation to cooperate arising under the procedural limb of Article 2 ECHR. Again, this case-law has been widely interpreted as showing an alignment between the two European courts to mitigate the conflicting obligations of EU Member states towards both Courts.[165] This convergence of approaches between the ECtHR and the CJEU is not only considered beneficial to ensure coherence between the legal systems of the EU and the CoE, but also to avoid messy and inconsistent (non-)application of EU law as a result of conflicting obligations deriving from the two jurisdictions.[166]

The aforementioned decisions of the CJEU and the ECtHR have been extensively commented on by the doctrine given their major implications and the importance of the issues raised.[167] Focusing solely on the case-law of the CJEU, it was particularly emphasised that these few decisions represent a significant development in the Court's jurisprudence relating to the EAW. Indeed, unlike the first EAW judgments where the Court refrained from limiting the duty to execute a EAW,[168] this new series of judgments seems to reflect a better balance struck by the Court between the effectiveness of the EAW mechanism and the no less important need to ensure respect for fundamental rights.[169] These decisions have thus been welcomed by a majority of the doctrine, in that they help defining the limits of the principle of mutual trust by giving substance to the notion of 'exceptional circumstances'. The increasing nuances introduced by the CJEU to the execution of surrender requests is also seen as a positive development to limit the tension with the ECtHR. Not to mention that these decisions have the merit of shedding light on the issue of bad detention conditions affecting many EU Member States. However, the recognition of a new ground to suspend/refuse the surrender of a person in such 'exceptional circumstances' remains strictly limited by the conditions laid down by the CJEU – some of which have raised important questions of interpretation. Related to the previous point, the requirements set by the Court to implement the '*Aranyosi* test' have posed crucial challenges in EAW proceedings and continue

[164] *Ibid*.

[165] See for instance Top, S and De Hert, P., 'Castaño avoids a clash between the ECtHR and the CJEU, but erodes Soering. Thinking human rights transnationally', *New Journal of European Criminal Law* (2021) 12(1), 52-68. Also see Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW', 15207/17 (8 December 2017). In the period following the *Aranyosi* case-law, the EJN Contact Points identified a gap between the requirements arising from the case-law of the CJEU and the ECtHR.

[166] *Ibid*., 65. Also see. Wieczorek, I., 'The implication of Radu at National Level: National Courts' Diversified Response to Conflicting Obligations' in Mitsilegas, V., Di Martino, A. and Mancano, L. (eds.), The European Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis (Hart Publishing, Oxford 2019) 380-381.

[167] For an in-depth reflection on the development of the CJEU case-law on this matter see Weyembergh, A. and Pinelli, L., (n 124).

[168] The CJEU has previously dealt with several cases involving tension between the mutual recognition of EAWs requests and the protection of rights of the person concerned. See Case C-192/12, *Melvin West*, 28 June 2012, ECLI:EU:C:2012:404; Case C-396/11, *Radu*, 29 January 2013, ECLI:EU:C: 2013:39; Case C-399/11, *Melloni*, 26 February 2013, ECLI:EU:C:2013:107.

[169] See Bribosia, E. and Weyembergh, A., 'Arrêt "Aranyosi et Caldararu": imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale", *J.D.E.* (2016) 225-227.

to give rise to important debates at European and national levels as these requirements have proven to be difficult to apply in practice.

2.1.2. Impact of the CJEU case-law on national law and judicial practice

The impact of this case-law on national practice has been closely monitored and well documented by reports from NGOs, academic experts as well as by EU institutions, agencies and networks. In practice, it turned out that the Court's jurisprudence has had an **undeniable effect on EAW proceedings**, leading for instance to EAWs put on hold in respect of certain Member States known for their poor detention conditions.[170] According to empirical research, EAWs continue to be challenged on the grounds of detention conditions, causing delays in proceedings and challenges for executing authorities which are (duly) required to verify conditions in the prisons of the issuing Member State.[171] This trend seems to be further corroborated by the EJN Contact Points, which have identified an increased level of vigilance in State practice following the *Aranyosi* judgment.[172] Beyond this general observation, it is worth highlighting **the varying impact that this case-law had on the practice of national authorities**. As some of the practitioners interviewed pointed out, there is no common approach between Member States in applying the requirements set out by the Court. This diverse picture has been widely reported whether in terms of impact on mutual trust or in terms of the parameters used to assess the real risk of inhuman or degrading treatment resulting from detention conditions in the issuing Member States. Without claiming to be exhaustive, the following paragraphs will shed light on a selection of persistent difficulties resulting from the CJEU case-law as reported by a range of empirical sources. For the sake of clarity, these practical difficulties are classified into several categories corresponding to the different types of problems identified as the most prevalent. As will be seen, these difficulties affect firstly the executing judicial authority, which has the burden of verifying the conditions of detention in the issuing State, but also, and more generally, the spirit of the EAW mechanism itself.

Inconsistencies in the application of the Aranyosi and Căldăraru case-law by national authorities

As pointed out by scholars and experts interviewed, the wide margin of manœuvre left to executing judicial authorities in implementing the criteria set by the Court has led to 'variable geometry'[173] in the application of the *Aranyosi and Căldăraru* case-law.[174] Significant divergences and inconsistencies have been reported on, inter alia, the types of sources on which Member States should rely to substantiate

[170] See Van Ballegooij, W., 'European Arrest Warrant. European Implementation Assessment', Study for the European Parliamentary Research Service, Ex-Post Evaluation Unit, PE 642.839 (June 2020) 53; Also see Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW' (n 165).

[171] Fair Trials, 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (n 122).

[172] Council of the EU, '52nd Plenary Meeting of the European Judicial Network – EJN conclusions on current developments on the application of the EAW', 14400/19, 20 November 2019, p. 12; Council of the EU, '53rd Plenary Meeting of the European Judicial Network – EJN conclusions on current developments on the application of the EAW', 14503/19, 3 December 2019, p. 11; European Judicial Network (EJN) conclusions on 'Current developments on the application of the EAW 2021', EJN/2022/1, p. 4.

[173] See Sellier, E. and Weyembergh, A. (eds.) (n 123) 347 ff.

[174] Marguery, T., 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision', *Maastricht Journal of European and Comparative Law* (2018) Vol. 25, 711.

their assessment, the content of the information requested from the issuing authority, as well as the content of the assurances given.

In the absence of more precise guidelines concerning the types of source that Member States should rely on,[175] it was found that most Member States (for example, Italy, Sweden and the Netherlands) have developed their own tests to assess the existence of a risk *in abstracto* and of a risk *in concreto* of a violation of Article 3 ECHR and Article 4 of the Charter.[176] Empirical research also shows that judicial executing authorities are becoming crucially dependent on the reports produced by the various prison monitoring bodies at European and domestic level when prison conditions are at issue.[177] While prison monitoring bodies exist in all EU Member States, scholars have pointed out that there is no single model or type of inspection and monitoring bodies across Member States. Their powers and the degree of control they can carry out may, to a certain extent, vary from one State to another. Therefore, **the establishment of common standards at EU level, in particular with regard to the guarantees of independence provided by these oversight bodies and the frequency of their prison visits, is particularly welcomed to ensure a consistent level of quality and reliability of the sources produced in this respect**.[178] This comes in addition to the need to help executing judicial authorities in identifying sources from which they can access this type of reports in the different Member States, in an accessible format and language.[179]

Practice has also shown that the assurances required by executing authorities may vary considerably, with surrenders sometimes conditional on assurances that the person requested will not be detained in a specific prison or that she/he will be afforded a minimum cell-space (the Dutch authorities have, for example, suspended several EAW requests from the Belgian authorities on the condition that the person concerned be placed in a single-occupancy cell). As reported by experts interviewed, while in almost every cases, the assurances requested focus on cell-space, some Member States also seek guarantees on other aspects covered by the CPT standards (e.g. contact with the outside world, family ties, etc.). In connection with this last point, it is noted that despite the clarifications provided by the Court in *ML* and *Dorobantu*, some national authorities continue to request guarantees that go beyond the CJEU's requirements. [180] Discrepancies have also been noted in practice as regards the attitude adopted by the executing authorities when the person consents to his/her surrender. In some cases, the executing judicial authorities did not consider it necessary to seek assurances from the issuing State, while in other cases, the fact that the person requested consents to his/her surrender is not regarded as having the effect of setting aside any consideration of the conditions of his/her detention.

Other variations have been noted with regard to the time limit for responding to requests for information and the consequences to be drawn when guarantees are considered insufficient. As a

[175] In its case-law, the CJEU refers inter alia to a set of qualified sources: 'judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the issuing Member State, and also decisions, reports and other documents produced by EU bodies of the Council of Europe or under the aegis of the UN'.

[176] Marguery, T., 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision' (n 174) 711.

[177] Aizpurua, E. and 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* (2020)11(2), 204-226.

[178] *Ibid*., 220. Also see in this study, Section 3 'European standards regulating prison conditions'.

[179] *Ibid*.

[180] European Judicial Network (EJN) conclusions on 'Current developments on the application of the EAW 2021' (n 170) 4.

result of the lack of clear requirements concerning the time limit for answering the request for additional information, it is reported that the deadline is not necessarily the same from one country to another. Linked to the previous point, it should be mentioned that requests for supplementary information on prison conditions can considerably delay the surrender procedure. In several cases, it was reported that the deadlines provided for in Article 17 EAW Framework Decision could not be met.[181] Attention must also be paid to the diverging impact of a decision to refuse or to postpone surrender of the requested person. According to some experts interviewed, not all executing authorities interpret in the same way the requirement laid down by the Court that in cases where the existence of a real and individual risk of inhuman or degrading treatment cannot be discounted within a reasonable time, 'the executing judicial authority must decide whether the surrender procedure should be brought to an end'.[182] In practice, however, it is found that in most proceedings where executing authorities are unsatisfied with the guarantees given by the issuing authority, the procedure is suspended and not abandoned. Moreover, while the CJEU allowed for supervision measures to be attached to the provisional release of the person in order to avoid the risk of flight,[183] it appeared that such measures are not necessarily available in all Member States. As a result, in some countries, the non-execution of EAWs resulted in the unconditional release of the individual detained with the negative side-effect that victims are prevented from obtaining justice and compensation for the crimes committed against them.[184] The aforementioned elements highlight the many variables that need to be taken into account in order to reconcile the protection of the fundamental rights of the person subject to an EAW with the objective of fighting impunity that underpins the EAW mechanism. Overall, the discrepancies highlighted above may appear problematic since this case-law is meant to regulate the operation of mutual recognition in the event of possible future violations of human rights in the context of the EAW. The leeway left to national authorities in implementing the criteria laid down by the Court may also lead to discriminatory situations depending on the more or less strict interpretation that is made of it.

Impact on mutual trust

It is widely reported that the test imposed by the Court in the *Aranyosi* judgment places executing judicial authorities in a delicate position where they must assess detention conditions in other Member States before consenting to surrender the individuals requested by EAWs. As pointed out by scholars, this reflects a shift from the classic paradigm of "judges asking judges" to a system that relies on "judges monitoring judges".[185] The risk that such scrutinising mechanism fuels a feeling of mutual distrust among competent national judicial authorities has been widely highlighted and corroborated by some practitioners. Some of them expressed concerns about possible polarisation, leading to dividing Member States in two categories, namely Member States with good prisons and Member States with bad prisons, with the consequence of a possible phenomenon of prison shopping.[186] **Empirical research nevertheless paints a rather mixed picture, reflecting the varying impact of this case-**

[181] Eurojust College thematic discussion on the EAW and prison conditions, May 2017.

[182] Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* (n 132), para 104.

[183] *Ibid*. 102.

[184] Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW' (n 165).

[185] Sellier, E. and Weyembergh, A. (eds.) (n 123) 360.

[186] Eurojust College thematic discussion on the EAW and prison conditions (n 181).

law on mutual trust between national judicial authorities. While it appears that some Member States authorities (such as in Hungary and Romania) continue to rely on the principle of mutual trust without taking detention conditions into considerations – despite the Court's judgments – some others (such as Germany or the Netherlands)[187] favour a more cautious approach.[188] This could also lead to what some experts have called a polarisation between countries that are 'too trusting' and those that are 'too skeptical'.[189] In general, it is reported that countries that suffer themselves from deficiencies relating to detention conditions are more reluctant to refuse or suspend surrender to other countries as this would seem paradoxical. Moreover, the discussions as regards the stage at which the control by the executing judicial authority should take place highlight the difficulty to ensure that the new obligation placed on their shoulders does not lead to a breach of mutual trust. For instance, on the question of whether the assessment in terms of the requested person's fundamental rights should be done *ex officio* in all cases when doubts arise as to detention conditions, or only if requested by the defendant, some national judges argue that an *ex officio* assessment would be at odds with the concept of mutual trust.[190] In any case, the fact that, in practice, certain national authorities continue to execute EAWs without necessarily taking into account the standards introduced by the *Aranyos*i judgment seems to corroborate the idea that failures in the protection of fundamental rights does not necessarily generate loss of mutual trust.[191]

Assurances

Other important sources of difficulties relate to the assurances that the judicial executing authority must seek from the issuing Member State to discard any real risk of inhuman and degrading treatment. The concerns reported in this regard relate mainly to the difficulty in obtaining sources of information that are sufficiently comprehensive and reliable, in addition to the lack of monitoring mechanisms to check whether such assurances are effectively applied post-surrender.

Practice shows that judicial executing authorities encounter recurrent difficulties in obtaining information on detention conditions from other national authorities, with requests for additional information sometimes left unanswered.[192] This trend seems to be corroborated by the recent statistical data from the Commission, which show a considerable increase in the number of refusals to execute EAWs due to lack of requested additional information.[193] It is also the quality of the information

[187] Some Member States such as the Netherlands classify issuing Member States under different risk categories depending on their detention facilities. See Buisman, S.-S, First Periodic Country Report: The Netherlands', Report prepared in the context of the STREAM project (JUST AG 101007485) 5-7.For Germany See Brodowski, D., 'First Periodic Country Report: Germany', Report prepared in the context of the STREAM project (JUST AG 101007485) 7-9.

[188] See Van Ballegooij, W. (n 170) 53.

[189] Marguery, T., 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision' (n 174) 716.

[190] See Van Ballegooij, W. (n 170) 54.

[191] See in this regard Marguery, T., 'Rebuttal of mutual trust and mutual recognition in criminal matters: is 'exceptional' enough?' (n 154) 949.

[192] See Wahl, T. and Oppers, A., 'European criminal procedural law in Germany: Between tradition and innovation', in Sellier, E. and Weyembergh, A. (eds.) (n 123) 104.

[193] While it is impossible to isolate which is the proportion of execution refused solely because of a lack of information regarding the conditions of detention, it is reported that in 2019, 7 Member States out of 24 recorded 76 refusals to execute

received and their effectivity that matter. In this regard, some academic experts and NGOs have reported a lack of centralised, comprehensive, reliable, contemporaneous sources of information on detention conditions.[194]

At the post-surrender stage, some practitioners involved in EAWs proceedings have also pointed to the fact that guarantees received by the issuing Member State are never checked after surrender.[195] This concern is also shared by the European Parliament which has called the Commission to explore possible measures to ensure a proper follow-up to the assurances provided by the issuing judicial authorities after surrender.[196] In relation to this concern, the role that the ECtHR can play in filling this gap nevertheless seems to be worth considering. Some commentators have thus highlighted the complementary protection that the ECtHR can provide, allowing *a posteriori* control of the detention conditions of the requested person in the event of a transfer to a prison that does not meet the assurances given by the issuing State.[197] Reflections on these issues have also raised questions about the crucial role that defense lawyers can play. However, as put forward by several practitioners, it is far from evident for lawyers to have access to reliable information concerning the detention conditions in another country, especially when they do not have contacts extending to that country.[198] Moreover, notwithstanding the importance of such assurances, it is equally important to address the causes of the problem. Some experts and NGOs have stressed the insufficiency of case-by-case assurances as a durable solution to the persistent problem of prison conditions in the EU, which conversely requires a systematic and regional approach to be resolved.[199]

The practical issues highlighted above are not exhaustive. Apart from the question of the practicability of the two-step test imposed by the *Aranyos*i judgment, it is also its protective effect that is sometimes questioned. In this regard, some experts interviewed consider that the requirements imposed by the Court do not sufficiently take into account the reality of the practice as prisoners are constantly transferred from one prison to another. Such a situation is considered likely to render the second stage of the test ineffective as it would be impossible to identify in which prison the requested person is likely to be detained.

The risk that the CJEU case-law could result in unjustified differences of treatment between national and foreign prisoners has also emerged as an important concern.[200] A discrimination could thus arise where prisoners who are confined to a purely internal situation in a country with poor detention conditions will not enjoy the assurance given by their country to foreign prisoners in the context of an

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an EAW due to a lack of the requested additional information. For comparison, 15 refusals were reported in 2018 and 25 in 2017.

[194] Fair trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU', < https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf > (consulted on 29 December 2022), para. 108.

[195] Discussion on national practices and experiences on detention conditions in the context of EAW's execution, Transnational Training Workshop organised under the framework of the STREAM project, 'Strengthening Trust in the European Criminal Justice Area through Mutual Recognition and the Streamlined Application of the European Arrest Warrant', 12 October 2022.

[196] European Parliament, 'Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States' (P9_TA(2021)0006), para. 38.

[197] See Spielmann, D. and Voyatzis, P. (n 146) 275.

[198] *Ibid.*

[199] Fair Trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU' (n 194) para. 108.

[200] See Van Ballegooij, W. (n 170) 54.

EAW that they will be detained in a 'good' prison.[201] Such difference in treatment may be difficult to justify objectively. Conversely, some practitioners point out that discrimination against foreign detainees is widely observed in purely national situations.

Moreover, the wider impact of the CJEU case-law on the characteristics of the EAW mechanism itself should not be overlooked. In this regard, it was found that the *Aranyosi* case-law has led to more coordination and involvement of the Member States Ministries of Justice in the EAW's proceedings,[202] which might be seen as contrary to the judicialisation of the surrender procedure established under the EAW Framework Decision. [203]

2.1.3. Support provided at EU level to help Member States comply with CJEU case-law

The practical difficulties resulting from the Court's case-law and the negative impact of poor detention conditions on the principles of mutual trust and mutual recognition have been widely echoed in EU institutions and agencies. The Council of the EU underlined the importance of providing practitioners with the necessary support and information to carry out the two-step assessment as set out by the CJEU in the *Aranyosi* case-law and thus invited the Commission to provide practical guidelines in this regard, including on where to find relevant sources for practitioners containing objective, reliable and properly updated information on penitentiary establishments and prison conditions in the Member States.[204]

Over the last years, the Commission has tried to assist Member States competent authorities in complying with the test requirements set by the Court in different ways. To facilitate access to information relevant to the completion of the '*Aranyosi* test', the Commission has asked the FRA to develop a database on prison conditions, which resulted in the setting up of **the 'Criminal Detention Database' in 2019.**[205] This database combines in one place information on detention conditions in all 27 Member States as well as in the United Kingdom. It does not 'rank' countries, but informs – drawing on national, European and international standards, case-law and monitoring reports – about selected core aspects of detention conditions: including cell space, sanitary conditions, access to healthcare and protection against violence.[206] The use of the database is mainly aimed at judges and legal practitioners involved in cross-border cases. While the creation of this tool is generally welcomed by the practitioners interviewed, most of them stress the need to ensure that the information it contains is properly and regularly updated.

Moreover, to help national practitioners to keep track of (the speedy developments of the) CJEU case-law, including on detention conditions, the Commission updated the Handbook on how to

[201] Sellier, E. and Weyembergh, A. (eds.) (n 123) 357.

[202] Sellier, E. and Weyembergh, A. (eds.) (n 123) 41.

[203] Some people interviewed for this study reported problematic cases where the assurances given by the Ministry of Justice were based on legal guarantees which are not applied in practice.

[204] Council conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust' (2018/C 449/02), OJ C 449/6 (13 December 2018) para 19; Council conclusions, 'The European arrest warrant and extradition procedures – current challenges and the way forward', 13214/20, 23 November 2020, paras 18-20.

[205] See the dedicated by on the European Union Agency For Fundamental Rights (FRA) website: < https://fra.europa.eu/en/databases/criminal-detention/> (consulted on 29 October 2022)

[206] *Ibid.*

issue and execute a EAW in 2017.[207] The revised version of the Handbook includes a specific Section on 'Fundamental rights considerations by the executing judicial authority' which provides for detailed guidelines on the steps to be followed to carry out the two-stages assessment required by the Court in the *Aranyosi* judgment.[208] A separate Section was included to provide specific information on the procedure to follow in case of postponement of EAW due to identification of a real risk of inhuman or degrading treatment.[209] As this practical handbook was published in 2017, it does not include additional guidance regarding the clarifications subsequently made by the Court in the *ML* and *Dorobantu* case-law. This lack of regular updates should soon be remedied by a new version of the Handbook, which is currently being prepared.

It is also worth mentioning the support and coordination provided by the EU agencies and networks, in particular through Eurojust and EJN. The difficulties experienced by national judicial authorities with the execution of EAWs due to allegedly inadequate prison conditions in the issuing Member States as well as the impact of the *Aranyosi and and Căldăraru* judgment in national cases have been discussed within the College of Eurojust in 2017.[210] Beyond the various difficulties identified in the context of these discussions these were also an opportunity to reflect on the crucial role that Eurojust can play to assist judicial authorites on these issues. Practice has confirmed the key **operational support** that the Agency is called upon to provide in concrete cases raising issues related to the Court's case-law on EAW and detention issues.[211] As reported by experts interviewed, Eurojust' assistance has often been requested to help executing authorities obtain timely and reliable information from the issuing judicial authority, i.e. in cases where requests for supplementary information are issued but are left unanswered while the need for a response is particularly urgent, or where the information obtained from the issuing authority is not satisfactory. Eurojust thus plays a crucial role in facilitating exchange of information between the competent authorities, including by assisting with linguistic aspects (e.g. for the translation of assurances) and by ensuring that the information obtained is sufficiently accurate and meets the Court's requirements, and more generally in speeding up surrenders, including via level II meetings and/or coordination meetings. In addition to the operational support provided by the Agency, **Eurojust also provides judicial authorities with practical resources** to help them develop EAW practice that is in line with the CJEU case-law. In 2021, Eurojust provided an overview of the case-law of the CJEU on the EAW, including the latest jurisprudential developments regarding the conditions under which it is possible to postpone surrender procedures due to deficient detention conditions.[212] In the view of some practitioners working in the field of judicial cooperation in criminal matters, while difficulties continue to arise in practice, the Court's case-law tends to be increasingly assimilated by practitioners and many countries have found a way to develop practice compliant with the Court's requirements. It is nevertheless noted that the degree of compliance with European case-law on these issues and the degree of knowledge of this case-law may vary from one national court to another, which calls for continued efforts to

[207] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (2017/C 335/01), OJ C 335/1, 6 October 2017.

[208] *Ibid*., see para 5.6.

[209] *Ibid*., see para 5.9.4.

[210] Eurojust College thematic discussion on the EAW and prison conditions (n 181).

[211] Van Ballegooij, W. (n 170) 55.

[212] Eurojust, 'Case-law by the Court of Justice of the European Union on the European Arrest Warrant', March 2021, pp. 43-54. The Eurojust case-law overview contains summaries of the CJEU's judgments categorised according to a set of important keywords that largely reflect the structure of the EAW Framework Decision.

develop and improve the training of magistrates in charge of handling EAW procedures.[213] In this respect, it is worth noting that the differences in the organisation and structure from one court to another may have a significant impact on the level of expertise developed in EAW practice. As reported by experts interviewed, while some jurisdictions have a centralised structure specifically in charge of extradition cases and EAW surrender procedures, other courts have a more decentralised operation and only occasionally deal with EAW requests.

Since 2017, the **European Judicial Network (EJN)** has also played a key role in facilitating the communication between the executing and issuing authorities and assisting them in several cases (e.g. when they cannot contact each other because of language barriers).[214] The practical impact of the CJEU case-law on EAW surrender procedures has been closely followed and regularly discussed within the network. If the development of a new network dedicated to the exchange of information on detention conditions for the EAW procedure has been considered, this option did not find support. Instead, it was recommended that EJN Contact points – that are specialists in detention conditions – are indicated in the EJN website in order to help practitioners find the most suitable contact.[215] As reported by EJN conclusions,[216] on numerous occasions EJN Contact points have provided support in cases where there was a need for assurances, e.g. by providing information on the competent national authority to issue the requested assurances and with the actual transmission of the assurances. Moreover, the EJN website includes a dedicated EAW section which provide an easy access for national practitioners to the most recent developments in the application of the EAW, including relevant practical resources for the issue of detention conditions.

Moreover, **training activities aimed at increasing practitioners' knowledge of the fundamental rights protection standards applicable to the EAW are supported by several professional networks operating at EU level**, such as through the European Judicial Training Network (EJTN)[217] or the Confederation of European Probation (CEP). Mention should also be made of the 'Justice Programme' which has been used to support initiatives dedicated to improving knowledge, notably to help practitioners comply with the growing EU standards applicable to surrender procedures. In this respect, it is worth mentioning the **STREAM project ('Strengthening Trust in the European Criminal Justice Area Through Mutual Recognition and the Streamlined Application of the European Arrest Warrant')[218]** which has been developed under the European Union's Justice Programme fund (2014-2020) in order to contribute to addressing the interpretative doubts and practical challenges that currently hamper mutual recognition on EAWs. In addition to the reflections carried out within this project through various activities such as workshop, seminar, training, etc., the STREAM website offers a repository of EAW case-law analysis as well as country reports which provide a synthetic analysis of

[213] *Ibid.*

[214] Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW' (n 165).

[215] *Ibid.*

[216] Council of the EU, '52nd Plenary Meeting of the European Judicial Network – EJN conclusions on current developments on the application of the EAW' (n 172).

[217] See for instance Online seminar on 'The EAW, pre-trial detention and mutual trust and legal assistance', March 2021,< https://www.ejtn.eu/Catalogue/Catalogue-201911/The-EAW-pre-trial-detention-and-mutual-trust-and-legal-assistance-/> (consulted on 1st November 2022); 'The functioning of the EAW in the EU in practice: improving mutual trust in criminal justice systems', February 2022, < https://www.ejtn.eu/Catalogue/EJTN-funded-activities-2019111/The-functioning-of-the-EAW-in-the-EU-in-practice-improving-trust-in-national-criminal-justice-systems-CR202201/ > (consulted on 1st November)

[218] See < https://stream-eaw.eu/> (consulted on 1st November 2022).

key controversies that emerged in the implementation of the EAW. Various initiatives supported by the EU thus contribute to increase coherence in the use of the EAW by promoting an EU-wide understanding of safeguards applying to the different stages of the surrender proceedings in a post-Lisbon context.

From this overview, one cannot fail to note the many resources and guidances available to help practitioners interpret and apply the Court's case-law. As some professionals have pointed out, it does not therefore seem appropriate to concentrate efforts on developing new resources but rather to ensure that they are regularly updated and made easily accessible to practitioners. While EU support for establishing a more stable information exchange framework between issuing an executing authorities (such as through the development of templates laying down in precise terms the content and scope of information that should be requested from the issuing State) may have seemed desirable to some practitioners[219] and scholars,[220] this has not been considered further. The option of providing templates has been discussed within Eurojust and the EJN network in the years following the Court's decision in *Aranyosi* but it was ultimately considered that it would not be advisable since information requested from the issuing Member State is decided on a case by case basis.[221]

In addition to tools to help practitioners comply with the Court's case-law, the EU is also called upon to provide financial support to help national authorities to tackle the problem of poor detention conditions. In 2017, the European Parliament has called on the EU institutions to support technically and economically, as fas as possible, the improvement of prison systems and conditions, especially in Member States facing serious difficulties.[222] In 2021, the European Parliament reiterated its call on the Commission to fully exploit the possibility of financing the modernisation of detention facilities through EU structural funds,[223] referring in this respect to the 2018 EU Council conclusion on mutual recognition in criminal matters.[224] **While EU financial support is considered as an essential lever to help States tackle the issue of poor material detention conditions, empirical research shows that the financial support mobilised by the EU for this purpose remains too limited**.[225] Some projects funded under the 'Justice Programme' referred to the objective of contributing to the improvement of detention conditions among other broader objectives,[226] but it remains difficult to identify all EU-funded projects contributing directly or indirectly to this objective and it seems a consolidated document containing information for this purpose is lacking.

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[219] See Eurojust College thematic discussion on the EAW and prison conditions (n 181).

[220] Sellier, E. and Weyembergh, A., (n 123) 434.

[221] Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW' (n 165).

[222] European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) para. 67.

[223] European Parliament, 'Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States' (n 196) para 35.

[224] Council conclusions on mutual recognition in criminal matters 'Promoting mutual recognition by enhancing mutual trust' (n 204) para 21. The EU Council, acknowledging that poor detention conditions are detrimental to mutual recognition, invited the Commission to promote making optimal use of the funds under the EU financial programmes in order to strengthen judicial cooperation between Member States and to help them modernize their detention facilities with a view to ultimately improving conditions of detention.

[225] Sellier, E. and Weyembergh, A., (n 123) 435; Weyembergh, A. and Pinelli, L., (n 124) 18.

[226] See for instance < https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/projects-details/43252386/101057013/JUST2027> (consulted on 18 January 2022).

2.2. Detention conditions and the Framework Decision 2008/909/JHA on the transfer of prisoners

That the tensions between mutual recognition, mutual trust and poor conditions of detention have become particularly apparent in the context of the EAW mechanism is not surprising given the significance of this instrument. However, it cannot be excluded that existing gaps with regard to compliance with European detention standards could have knock-on effects on other areas of cooperation beyond the operation of the EAW.[227] The following paragraphs will seek to shed light on the extent to which the issue of detention conditions has an impact on the functioning of the Framework Decision 2008/909/JHA in several respects.

The Framework Decision 2008/909/JHA (also referred to as the 'Framework Decision on the transfer of prisoners')[228] applies the principle of mutual recognition to final decisions imposing custodial sentences and measures involving deprivation of liberty. It replaces the system of prisoner transfers under the pre-existing Convention of the CoE on the Transfer of Sentenced Persons of 1983 by a new faster and simplified transfer procedure characterised by a high degree of automaticity.[229] In a nutshell, the Framework Decision establishes a legal framework for the transfer of sentenced prisoners to the Member State of which they are nationals or where they have their habitual residence, or to another Member State (in specific circumstances), assuming that their social reintegration will be best achieved in a State with which they have close ties. Under this scheme, a Member State (the executing Member State) must recognise and enforce a prison sentence imposed by another EU country (the issuing Member State).

Beyond the deprivation of liberty measures that are facilitated by this instrument, the Framework Decision on the transfer of prisoners shares more than one common feature with the EAW mechanism. Like the Framework Decision on the EAW, the Framework Decision 2008/909 is a mutual recognition instrument relying on a high degree of trust between Member States. In the context of the cross-border transfer of prisoners, this implies that, on the one hand, the issuing country should have confidence in the system in force in the executing State before it decides to forward the judgment, and, on the other hand, that the executing State should, unless there are grounds for refusal, recognise the judgement of the issuing State and enforce the custodial sentence. As with the surrender procedures under the EAW, there are no human rights-based grounds for refusing to recognise the judgment and execute the custodial sentence. Respect for fundamental rights is nevertheless provided for by Article 3(4) of the Framework Decision 2008/909/JHA, which replicates a clause similar to that in Article 1(3) of the Framework Decision on the EAW. As a result, when applying the transfer mechanism established by the Framework Decision 2008/909/JHA, Member States must ensure that the transfer, recognition and execution of the sentence will not compromise the basic fundamental rights of the sentenced person.

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[227] See Sellier, E. and Weyembergh, A. (eds.) (n 123) 361. Also see, European Commission, Green paper 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention' (n 116) 5-6. Back in 2011, the European Commission already expressed its concerns that poor detention conditions could be an impediment to the transfer of prisoners across EU Member States.

[228] 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 327/27, 5 December 2008.

[229] The Framework Decision minimises unnecessary formalities and reiterates two major features of EU mutual recognition instrument in criminal matters: the abolition of the double criminality check in relation to a list of serious offences and the provision of an exhaustive list of optional grounds for denying recognition. Moreover, the consent of the sentenced person and the executing State is no longer required in most of the cases.

While the issue of prison conditions has, for the time being, only been dealt with by the CJEU in the context of the EAW,[230] Article 4 of the Charter equally applies to transfer of prisoners and logically involves ensuring that the sentenced person will not be subjected to detention condition that would constitute inhuman and degrading treatment upon transfer.[231]

However, the principles of mutual recognition and trust operate differently given the inherent difference between the two cooperation procedures under consideration: in the context of the Framework Decision 2008/909/JHA, fundamental rights checks rest primarily with the issuing authority, which has no obligation to transfer the sentence if doubts about detention conditions in the executing State arise. By contrast, in the context of the EAW mechanism, the assessment of the risk of the requested person being exposed to inhuman and degrading detention conditions rests primarily with the executing State, which has a duty to recognise and execute a surrender request. More fundamentally, these two mutual recognition instruments differ significantly in their purpose. While the objective of facilitating the social reintegration of the convicted person is at the heart of the scheme established by Framework Decision 2008/909, the EAW mechanism is primarily aimed at combating cross-border crime and fighting against impunity. Moreover, we will see that the issue of poor detention conditions has a different impact on the functioning of the Framework Decision 2008/909, although there is an operational link between these two instruments in this context.

Overall, it is worth mentioning that, in contrast to the EAW, the Framework Decision 2008/909 led to a very limited body of EU and national case-law and has received more limited attention in the doctrine. The scarcity of empirical research on these issues and the practice of the Framework Decision on the transfer of prisoners lead us to consider three cases where the issue of detention conditions comes into play. In line with some recurrent criticism, the impact that poor conditions may have on the very purpose of the Framework Decision will first be examined, particularly with regard to the risk that its use will be diverted from its initial function of facilitating social rehabilitation. Then, given the widespread concern about the bad conditions of detention in several EU Member States and the visible concrete consequences this has had for the EAW mechanism,[232] the potential correlative impact on the mutual recognition of transfer decisions will be considered. Finally, the question will be examined whether the transfer of the custodial sentence and prisoners could be used as an alternative to prevent the risk of impunity resulting from a refusal to execute an EAW due to inadequate detention conditions.

2.2.1. The social reintegration function of the Framework Decision diverted to serve prison regulation imperatives

The Framework Decision 2008/909/JHA places 'social rehabilitation' at the very core of its rationale, by stating that the enforcement of the sentence in the executing State should enhance the possibility of social rehabilitation.[233] Therefore, cross-border transfers should aim to foster prisoners' chances of social rehabilitation. However, the new transfer mechanism has generated controversy over its possible use for purposes other than its main stated objective, namely the social rehabilitation of sentenced

[230] See in this study Section 2.1. 'Detention conditions and surrender procedures under the Framework Decision on the EAW'

[231] See in this regard Wieczorek, I., 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation', *Maastricht Journal of European and Comparative Law* (2018), 25(6), 660. Also see in this Section 'The risk of violation of fundamental rights due to poor prison conditions in the State of execution of the sentence'.

[232] See in this study Section 2.1. 'Detention conditions and surrender procedures under the Framework Decision on the EAW'

[233] See recital 9; Article 3(1) of the Framework Decision.

persons. Specifically, this instrument has been **suspected of serving hidden managerial ambitions,[234] namely to facilitate the removal of EU unwanted foreign prisoners with the welcome side-effect of reducing prison overcrowding**. This tends to support the idea that considerations related to the regulation of prison population could play an important role in the decision to initiate a transfer.

The limited empirical research on Framework Decision 2008/909/JHA suggests varying trends between Member States in this respect. In some cases, it seems difficult to make clear-cut assumptions on the motivations behind transfer decisions. This is one of the results of a study aimed at comparing legal practices in the execution of sentences within the framework of cross-border cooperation between The Netherlands, Belgium and Germany.[235] From a quantitative perspective, it was found that while the number of EU foreigners imprisoned in these three countries is relatively high, the number of inmates who actually get transferred to their countries of nationality is rather low. It turns out that most transfers from the three countries are conducted between neighboring countries, where formal and informal networks of legal cooperation are traditionally strong. Relevant to this topic, the study found that despite the growing number of EU foreigners in Belgian, Dutch and German prisons, there is little evidence to suggest that a migration control agenda is impacting the transfer system.[236] This conclusion was supported by the qualitative data collected to gain deeper insight into the underlying motives for initiating transfers. While it cannot be ruled out **that certain Member States do instrumentalise the transfer systems to systematically get rid of unwanted migrants or to relief their overcrowded prisons, for the Netherlands, Belgium and Germany, the total number of transfer cases is simply too low to speak of a systematic exploitation of the transfer system**.[237] Overall, considerations concerning the actual place of residence, human rights issues, social rehabilitation and the consent of the sentenced person influence substantially the transfer procedure in these three countries.[238]

There are, however, more obvious examples of instrumentalisation of Directive 2008/909/JHA for the purposes of managing the prison population. **The case of Italy is particularly revealing** of the political ambition to use the newly established regime of cross-border transfers as a lever to tackle the pressing problem of prison overcrowding – an issue which has become even more pressing after the *Torregiani* pilot judgment [239] where the Strasbourg Court urged Italy to take action to address this structural situation. As scholars have pointed out, in Italy, the use of Framework Decision 2008/909/JHA was mainly guided, at least in the first years of application, by the need to reduce pressure on the

[234] See Martufi, A., 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer: A commentary on the aims of Framework Decision 2008/909/JHA', *New Journal of European Criminal Law* (2018) 9(1) 43-61. For a reflection on the criticism of this instrument see Wieczorek, I., 'EU constitutional limits to the Europeanization of punishment: A case study on offenders' rehabilitation' (n 231) 655-671.

[235] Hofmann, R. and Nelen, H., 'Cross-border cooperation in the execution of sentences between the Netherlands, Germany and Belgium: an empirical and comparative legal study on the implementation of EU Framework Decisions 2008/909/JHA and 2008/947/JHA, *Crime, Law and Social Change* (2020) 382-404.

[236] *Ibid*., 398.

[237] *Ibid*., 393.

[238] *Ibid*., 398.

[239] ECtHR, *Torreggiani and Others v. Italy*, nos. 4317/09, 46882/09, 55400/09, 8 January 2013.

domestic prison system.[240] This manifested itself in intense regulatory activity on the part of the Ministry of Justice, instructing national judicial authorities to resort to the Framework Decision to deflate prison overcrowding.[241] In practice, this has resulted in a significant number of transfers to key countries, in particular Romania from where a large proportion of EU foreign inmates detained in Italy originate.[242] While the Italian case is particularly emblematic, the tendency to use this instrument for the purpose of regulating the prison population should not be seen as limited to the case of Italy. In 2011, the European Commission has already identified a general risk that transfers may be used to reduce overcrowding in one Member State, possibly exacerbating overcrowding in another.[243] In connection with this, some scholars have pointed out that the executing State has no particular interest to enforce the custodial sentence imposed by the sentencing State, especially if it means finding space in its already overcrowded prisons combined with an additional workload for its staff.[244] Despite this, the Framework Decision leaves only a limited margin for the executing State to refuse to carry out the foreign sentencing decision.[245]

It follows from the above that the intrumentalisation of the Framework Decision 2008/909/JHA for the purposes of prison management appears problematic in many respects. It can be detrimental to a truly individualised assessment of the prisoner's chance of social rehabilitation - which does not solely depend on the offender's return to a State with which he has close links. This adds to the risk that misuse of this instrument will exacerbate overcrowding problems in the executing State. Although the sentencing State, before deciding to forward the judgment, should be satisfied that the transfer will serve the purpose of facilitating social rehabilitation, **there is no control mechanism over the issuing State's assessment of whether the transfer will in fact serve that purpose**.[246] In this respect, it should be recalled that the detention conditions are considered a relevant element for assessing the prospects of social rehabilitation. As highlighted by several practitioners and experts interviewed, the **material detention conditions prove to be a crucial factor in facilitating the chances of social reintegration**. Conversely, poor detention conditions are likely to affect negatively efforts to prepare for release from prison. Therefore, it would seem logical, even desirable, that the question of detention conditions be taken into account to assess the chances of social reintegration of the convicted person in the executing State, rather than to serve the prison regulation policies of the issuing State. This is especially so as the consent of the sentenced person is no longer required in most cases of transfer

[240] Montaldo, S., 'Framework Decision 2008/909/JHA on the transfer of prisoners in the EU: Advances and challenges in light of the Italian experience', *New Journal of European Criminal Law* (2020) Vol. 11, 69-92.

[241] *Ibid*., 81.

[242] *Ibid*.

[243] European Commission, Green paper 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention' (n 116) 6.

[244] Neveu, S., 'Le transfert interétatique de la peine privative ou restrictive de liberté en droit européen: à la recherche d'un équilibre entre intérêts individuels et collectifs', *Annales de Droit de Louvain* (2016) Vol. 76, 68.

[245] In principle, the executing State shall take the necessary measures for the enforcement of the sentence imposed by the issuing State unless one of the grounds for non-recognition and non-enforcement provided for in Article 9 of the Framework Decision applies. While consultations should take place between the issuing and executing authorities, during which the executing State may express his view on the reasons why the enforcement of the sentence on his territory would not serve the purpose of facilitating the social rehabilitation and successful reintegration of the sentenced person into society, such opinion is not binding on the issuing authority.

[246] See Article 4(2) of the Framework Decision. Also see Pleic, M., 'Challenges in cross-border transfer of prisoners: EU framework and Croatian perspective' in *EU and Comparative Law Issues and Challenges Series* (ECLIC) (2018) Vol. 2, 380.

under the Framework Decision.[247] Interestingly, it appears that the links between the sentenced person and the State of execution is not the most important factor for the sentenced person when assessing the benefit of transferring the enforcement of the sentence to the executing Member State. Indeed, it is generally reported that his/her chances of being released from prison earlier, in addition to the detention conditions in the executing State, are two important factors for the sentenced person.[248] But, even in the few cases where the sentenced person is given the opportunity to state his/her opinion under the Framework Decision 2008/909/JHA, his/her capacity to give a solid and well-founded opinion as to the suitability of his/her transfer in terms of prison conditions is seriously in doubt.[249] These elements, combined with the quasi-unilateral nature of the transfer decision, have led some commentators to conclude that the transfer procedure has been designed to serve the interests of the State rather than those of the individual affected by the transfer.[250]

In light of the above, it seems regrettable that the Framework Decision does not include prison conditions among the non-exhaustive list of relevant elements that should be taken into account by the issuing State to ensure that the transfer will serve the purpose of facilitating the social rehabilitation of the sentenced person.[251] On the other hand, the Framework Decision seems to give decisive weight to the person's links with the executing State, such as family, linguistic, cultural and social links. The inclusion of a reference to detention conditions appears all the more desirable as State practice seems to diverge in this respect. **While some Member States consider the detention conditions in the executing State as a relevant element to assess the prospects of social rehabilitation,[252] some others downplay this element, or sometimes simply lack the adequate tools and resources to take it into account**.[253] In order to enable the sentencing authorities to properly assess the material conditions of detention in the (potential) executing State, it is therefore necessary to equip them with adequate resources and tools.

2.2.2. The risk of violation of fundamental rights due to poor prison conditions in the State of execution of the sentence

As recently recognised by the CJEU in the context of the EAW, a surrender exposing a person deprived of liberty to poor detention conditions in another Member State may trigger a violation of Article 4 of the Charter (prohibition of inhuman or degrading treatment). Fundamental rights issues may also arise in the context of the transfer mechanism established by the Framework Decision 2008/909, which involves the execution of a custodial sentence in another Member State. As previously mentioned, the Framework Decision 2008/909 is a mutual recognition instrument based on a high level of mutual trust

[247] See Article 4.1.a) and b); Article 6.2. a), b) and c) of the Framework Decision 2008/909/JHA.

[248] Neveu, S. (n 244) 73-74.

[249] See Martufi, A. (n 234) 53-54. Empirical research reports that the whole transfer procedure is characterised by a lack of information as to how the sentence will be implemented in the executing State as well as regards the material conditions of detention in its prison facilities.

[250] See Mitsilegas, V., 'The Third Wave of Third Pillar Law', *European Law Review* (2009) 541-545. Also see Neveu, S. (n 244)

[251] See recital 9 of the Framework Decision.

[252] See Sellier, E. and Weyembergh, A. (eds.) (n 123) 361.

[253] See Vermeulen, G. and al., *Cross-border execution of judgments involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures*, Institute for International Research on Criminal Policy, Ghent University, Maklu (2011) 54-55.

between Member States. As a result, the issuing country should have confidence in the system in force in the executing State before it transfers a prisoner or a sentence. It enjoys a wide margin of discretion in the decision whether or not to initiate a transfer. Mutual trust plays a lesser role when it comes to the obligation to recognise the sentence. This does not mean that the executing State is not responsible for acceptable detention facilities, but the Framework Decision does not contain any grounds for refusal based on the detention conditions.

However, as seen previously, the bad detention conditions in some EU Member States have recently led the CJEU to recognise that mutual trust is not absolute and that it must be set aside in certain exceptional circumstances (i.e. where it would entail a real and individual risk of torture or inhuman and degrading treatment).[254] Although limited to the EAW case, the impact of this case-law on other cooperation mechanisms requiring a high degree of mutual trust between Member States cannot be excluded. Moreover, considering the absolute nature of Article 4 of the Charter which equally applies to transfer of prisoners, the sentencing State should normally ensure that the sentenced person will not be subjected to detention conditions that would constitute inhuman and degrading treatment in the State of destination before forwarding the judgment.[255] However, **practice shows that considerations relating to the material conditions of detention to which the sentenced person will be subjected is too rarely taken into account in the decision to issue a request for transfer**. This observation predates the limits to the principle of mutual trust recently set by the CJEU in the context of the EAW. According to the results of a survey carried out in 2011, although practitioners identified evidence of inhuman and degrading treatment as important, there was no clear consensus as to whether or not this evidence should be decisive within the transfer decision making process.[256] The finding that insufficient attention is paid to detention conditions in the context of the Framework Decision 2008/909/JHA is still valid today.[257] The Italian case confirms that neither the judicial authorities involved – both as issuer and receiver – nor the Ministry of Justice takes fundamental rights checks seriously when dealing with the transfer of prisoner.[258] No information is requested or provided concerning the detention facility to which the transferee will be sent and the conditions therein, including important factors such as the possibility to follow social rehabilitation programmes while serving the sentence.[259] As noted by scholars, this is even more paradoxical if one considers that this mechanism should facilitate the offender's social reinsertion, rather than avoiding impunity and ensuring effective combating of crime, as it is for the EAW.[260] By contrast, some few cases show that the acute nature of detention condition issues is not without consequences on the Framework Decision 2008/909. For example, recent reports about deteriorating prison conditions in Belgium, issued by the CPT, have led Dutch and German authorities to re-evaluate prisoner transfers to their neighbour.[261]

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[254] See in this study Section 2.1. 'Detention conditions and surrender procedures under the Framework Decision on the EAW'

[255] In this sense, see Commission notice, 'Handbook on the transfer of sentenced persons and custodial sentences in the European Union', OJ L 403/2, 29 November 2019.

[256] See Vermeulen, G. and al., (n 253) 69.

[257] See Marguery, T. 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision' (n 174) 713.

[258] Montaldo, S., 'Framework Decision 2008/909/JHA on the transfer of prisoners in the EU: Advances and challenges in light of the Italian experience' (n 240) 86.

[259] *Ibid.*

[260] *Ibid.*

[261] Hofmann, R. and Nelen, H., (n 235) 398.

In general, the lack of attention paid to the detention conditions in the transfer proceedings is seen as **a significant gap between the EAW and the cross-border transfer of prisoners**. Most empirical research on these issues agrees that the test established by the CJEU in ***Aranyosi and Căldăraru*** **is not easily transferrable to the transfer of prisoners situation** since it was designed to guide the control exercised by domestic courts on the execution of EAWs.[262] This is mainly due to the inherent difference between the two cooperation procedures under consideration. The mechanism set by Framework Decision 2008/909/JHA reverses the roles of the issuing and executing Member States: while doubts about prison conditions can arise in both cooperation frameworks, in the context of the transfer of prisoners, the issuing State enjoys a wide margin of discretion in the choice whether or not to transfer the sentence, whereas in the EAW context the executing State is, in principle, obliged to execute the surrender request. Moreover, the *Aranyosi* test places obligations on the judicial authorities that cannot be easily reiterated in the transfer of prisoner proceedings where non-judicial authorities can be involved.[263] In this regard, the absence of judicial supervision over the transfer procedure raises important concerns with regard to the protection of fundamental rights afforded to the sentenced person. It was found in several cases that offenders do not have the right to object the transfer and they do not enjoy any judicial remedy against it.[264] It was further noted that it may be difficult, perhaps even impossible for the defense to challenge a transfer decision even if reliable and updated information exists concerning deficiencies in detention condition in the executing State.[265] If the *Aranyosi* test cannot be replicated as such for transfer procedures, the Framework Decision nevertheless requires the authorities involved to cooperate in a way that respects fundamental rights.

2.2.3. The Framework Decision 2008/909/JHA: an effective alternative to reconcile the fight against impunity with the protection of fundamental rights?

The practical impact of the *Aranyosi* jurisprudence has given rise to important discussions to address the risk of impunity that may arise from the non-execution of EAW requests. In this respect, the Framework Decision 2008/909/JHA appeared to be one of the potential alternatives that could be used in these circumstances. Before exploring this avenue, it is useful to recall the operational link that exist between these two instruments.

The Framework Decision on the transfer of prisoners may, in specific circumstances, serve as an alternative to the execution of a surrender request issued for the purpose of executing a custodial sentence. Such a possibility applies in particular in cases where the person subject to an EAW has close ties with the executing State. Article 25 of the Framework Decision on the Transfer of Prisoners in conjunction with Article 4(6) of the Framework Decision on the EAW allows a Member State to refuse to surrender a person under a EAW where the requested person is staying in, or is a national or a resident of that Member State. The same Article 25 in conjunction with Article 5(3) of the

[262] See Marguery, T., 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision' (n 174) 713-714. Also see Montaldo, S., 'Framework Decision 2008/909/JHA on the transfer of prisoners in the EU: Advances and challenges in light of the Italian experience' (n 240) 84-85.

[263] See the list of competent authorities regarding Framework Decision 2008/909/JHA on Transfer of prisoners (EUROPRIS), < https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/1540> (consulted on 1st December 2022).

[264] See Marguery, T., 'Towards the end of mutual trust? Prison condition in the context of the European Arrest Warrant and the transfer of prisoners Framework decision' (n 174) 713-714.

[265] *Ibid.*

Framework Decision on the EAW allows a Member State to make the surrender request subject to the condition that the person concerned, after being heard, has to be returned to the executing Member State with which this person has close ties. In other words, **a Member State may refuse to surrender a requested person to another Member State and decide to enforce the custodial sentence itself in accordance with the provisions of the Framework Decision 2008/909/JHA.**[266] The connection thus established between these two cooperation mechanisms is considered to have several advantages in cases of refusal to execute an EAW, including in exceptional circumstances where the person requested faces a real risk of being subjected to inhuman and degrading detention conditions in the issuing Member State. In such cases, resorting to the possibility of transferring the execution of the sentence or the detention order to the executing State, on the basis of the Framework Decision 2008/909/JHA, has already been considered and used as an alternative in practice.[267]

In terms of benefit to the persons concerned, this alternative gives them the possibility to serve the sentence in a country with which they have close ties without being first surrendered to the issuing State under an EAW and, *a fortiori*, without running a real risk of having their fundamental rights violated after being surrendered. This seems to be consistent with the objective of social rehabilitation pursued under the Framework Decision 2008/909. In terms of public security benefits, the alternative use of the transfer procedure has the advantage of mitigating the risk of impunity resulting from the non-execution of an EAW. Indeed, in accordance with the requirements laid down by the CJEU in *Aranyosi and Căldăraru*,[268] if the existence of the risk of inhuman or degrading treatment cannot be discounted within a reasonable time, the executing authority must decide whether the surrender procedure should be ended. As said previously, while it appears that in most cases where that risk cannot be discounted EAW procedures are postponed and not abandoned, there were several cases reported where national courts refused to execute EAWs and released the persons requested, thus creating tensions between the objective of combating impunity and the protection of fundamental rights.[269]

However, the possibility of using the transfer procedure under Framework Decision 2008/909 as an alternative to the execution of an EAW is restricted to specific circumstances, i.e. where the EAW had been issued for execution pursposes and the person concerned has closer ties with the intended EAW executing State. This might not necessarily be the case in all situations where an EAW is refused on the grounds of detention conditions. One may reasonably assume that in cases in which an EAW has been issued for the purpose of executing a sentence, the convicted person must have links with the issuing

[266] The CJEU clarified that any refusal to execute an EAW under Article 4(6) of the Framework Decision 2002/584 presupposes an actual undertaking on the part of the executing Member State to execute the custodial sentence imposed on the requested person, even though, in any event, the mere fact that that Member State declare itself 'willing' to execute the sentence could not be regarded as justifying such a refusal. This implies that any refusal to execute an EAW under Article 4(6) of the Framework Decision 2002/584 must be preceded by the executing judicial authority's examination of whether it is actually possible to enforce the sentence in accordance with its domestic law implementing the Framework Decision. See Case C-579/15, *Poplawski*, 29 June 2017, ECLI:EU:C:2017:503, para. 22.

[267] Council of the European Union, '52nd Plenary Meeting of the European Judicial Network – EJN Conclusions on current developments on the application of the EAW' (n 172). It is reported that in some cases where the assurances given by the issuing Member State could not be regarded as satisfying, Member States resorted to the possibility of transferring the execution of the sentence to the executing State, on the basis of Framework Decision 2008/909/JHA.

[268] See in this study sub-section 2.1.1.

[269] Council of the EU, 'Extracts from Conclusions of Plenary meetings of the EJN concerning case-law on the EAW' (n 165) 9.

State itself.[270] This may explain why, despite the fact that this possibility received increased attention after the *Aranyosi* judgment, its use seems to be limited in practice.[271] In any case, whether the Framework Decision 2008/909 could effectively be used as an alternative in situations where prison conditions bar the execution of EAWs deserves further investigation, given the scarcity of data available. Moreover, as some empirical research points out, the relationship between the different EU mutual recognition instruments is far from clear for practitioners.[272] As recommended by scholars, guidance and support tools for practitioners on the relationship and interactions between the various mutual recognition instruments available should be further developped.[273] This comes in addition to other practical challenges reported in the implementation of the Framework Decision 2008/909/JHA linked to, *inter alia*, the calculation of the sentence, the adaptation of alternative sanctions, the determination of the habitual residence, consent, etc.[274] But these are outside the scope of the present study.

The current lack of alternatives *vis-à-vis* EAWs issued for prosecution: the way forward

As illustrated above, Framework Decision 2008/909/JHA may not always be an available alternative to the EAW, especially when the latter has been issued for the purposes of prosecution.

Against this background, a recent relevant initiative **has been launched by the European Commission** with a view to adopting **common rules allowing for the cross-border transfer of proceedings**.[275] In certain circumstances, such transfer may represent a viable alternative to the EAW. Indeed, **amongst the problems addressed by the initiative, the Commission expressly mentioned the necessity to contrast the impunity of transnational crimes in cases where the execution of an EAW has been refused on grounds of inhumane or degrading detention conditions**.[276] In particular, where the (intended) executing State would not have the jurisdiction to investigate and prosecute the crime, or the capacity to do so due to lack of evidence, that Member State should nonetheless deny the surrender of the person concerned in compliance with its fundamental rights obligations under Article 4 of the Charter, as illustrated above. In such cases the (cross-border) crime would remain unpunished. Hence, the new initiative aims to provide for the possibility to transfer the proceedings to the executing/refusing Member State, and to give the latter jurisdiction over the

[270] Outwerkerk, J., 'Are Alternatives to the European Arrest Warrant Underused? The case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area', *European Journal of crime, criminal law and criminal justice* (2021) 97.

[271] *Ibid.*

[272] See Fair Trials, Report on 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (n 122). In this regard, it must be noted that the relationship between the Framework Decision 2002/584 on the EAW and the Framework Decision 2008/909 on the transfer of prisoners has recently given rise to a request for preliminary ruling. See the pending Case C-179/22, *AR*, submitted to the CJEU on 20 May 2022.

[273] See Sellier, E. and Weyembergh, A. (eds.) (n 123) 434.

[274] *Ibid.*, 58.

[275] European Commission, 'Call for evidence for an impact assessment – Ares(2021)7026778 (16 November 2021) < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13097-Effective-justice-common-conditions-for-transferring-criminal-proceedings-between-EU-countries_en >

[276] *Ibid.*

offence, thereby allowing for a more effective balance between the protection of fundamental rights and the fight against impunity.

3. EUROPEAN STANDARDS REGULATING PRISON CONDITIONS

Standards for the treatment of persons deprived of their liberty have been developed both at the European and international levels. Although this Section focuses on European standards governing various important aspects of life in detention, some international standards will nevertheless also be taken into account insofar as they create important obligations for EU Member States. The following developments are intended to shed light on the multiple standards that intertwine in the penitentiary field, on their main sources, on how they influence each other and on their ability to influence national legal systems in order to strengthen the protection of detainees.

Given the considerable authority of the CoE on these matters, an overview of the scope of its standard-setting action covering a wide range of detention-related aspects will first be presented. This first sub-section will provide a review of the many non-binding standards adopted by the Committee of Ministers of the CoE. The role of the CPT as a key player in setting standards to prevent the risk of inhuman or degrading treatment in prison will then be highlighted. This will be followed by an examination of the complementary role of the ECtHR which contributes to establishing important criteria for assessing the compatibility of the conditions of detention with the fundamental rights protected by the Convention (3.1.). As the possible adoption of minimum standards at EU level is receiving increased attention, the analysis will provide a synthesis of the discussions held in this regard while examining recent initiatives taken in this area (3.2.). Finally, we will address the standards for establishing effective monitoring mechanisms over places of deprivation of liberty (3.3.). The following discussion does not claim to be an exhaustive analysis of the standards produced by each of the relevant European actors/bodies examined in this Section. The aim is to provide a representative view of the key role played by these actors in ensuring that conditions of detention meet minimum standards while identifying certain shortcomings that need to be addressed.

3.1. CoE standards

3.1.1. CoE recommendations and guidelines

Many standards concerning the treatment of persons deprived of their liberty have been developed within the framework of the CoE, mainly in the form of guidelines and recommendations.

Among the most important are the European Prison Rules[277] adopted by the Committee of Ministers of the CoE in 1987 and amended in 2006 to take into account important developments in the penal field in Europe. These contain a set of recommendations on various aspects relating to the treatment of people in prison (e.g. allocation and accommodation, hygiene, nutrition, contact with the outside world, health, etc.) but also on organisational aspects such as prison staff, prison management or inspection and monitoring. The European Prison Rules are intended to serve as benchmarks for ensuring that European penitentiary systems meet minimum necessary standards on various aspects of detention, including on basic safeguards that should be provided to prisoners. They are considered as the expression of a European political consensus that is supposed to guide legislative reforms in the

[277] Recommendation Rec(2006)2 of the Committee of Ministers to member States on the European Prison Rules.

prison field. These rules have no binding force as such, but they have acquired a significant authority at EU and national levels;[278] many political and legislative texts refer to them, while the CPT and the ECtHR regularly take them into account to support their conclusions.[279] Despite their status as a reference standard, empirical research shows that many of the recommendations of the European Prison Rules are not widely respected in the EU Member States examined.[280] In this regard, it seems that even when Member States provide for rules in line with these standards, their actual implementation varies in practice.[281]

In addition, the Committee of Ministers of the CoE has adopted numerous recommendations on various specific aspects of the prison field and related penal issues. Without claiming to be exhaustive, some of the most relevant ones include the CoE Probation Rules[282] which are intended to guide the establishment and proper functioning of probation agencies. Aspects related to management of prisons and prison staff have also given rise to a set of recommendations, including the Recommendation on the European Code of Ethics for Prison Staff[283] and the Guidelines regarding recruitment, selection, education, training and professional development of prison and probation staff.[284] In addition, there are a range of CoE guidelines that apply to specific categories of prisoners such as the Recommendation concerning foreign prisoners[285] or the European rules for juvenile offenders subject to sanctions or measures,[286] which includes standards applicable to the deprivation of liberty of juveniles. More recently, the challenges in managing prisoners categorized as radicalised have led to the adoption of Guidelines for prison and probation services regarding radicalisation and violent extremism[287] which come in addition to the CoE Handbook for Prison and Probation Services regarding radicalisation and violent extremism.[288] Various recommendations were also adopted on

[278] See Summary of the replies given to the questionnaire regarding the implementation of the most recent Council of Europe standards related to the treatment of offenders while in custody as well as in the community (17 October 2011). This document shows, among other things, that a significant number of States have undertaken legislative reforms on the basis of the European Prison Rules and more than the majority of States parties reported having transposed these non-binding rules into their national law.

[279] See Van Zyl Smit, D. and Snacken, S., (n 5) 371-376.

[280] See Maculan, A., Ronco, D. and Vianello, F. (n 9); Raffaelli, R., Briefing on 'Prison conditions in the Member States: selected European standards and best practices', European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 583.113 (2017) 7. Also see European Union Agency for Fundamental Rights (FRA), 'Criminal detention conditions in the European Union: rules and reality' (n 10).

[281] See European Union Agency for Fundamental Rights (FRA), 'Criminal detention conditions in the European Union: rules and reality' (n 10).

[282] Recommendation CM/Rec(2010) 1 of the Committee of Ministers to member States on the Council of Europe Probation Rules.

[283] Recommendation CM/Rec(2015) 5 on the European Code of Ethics for Prison Staff.

[284] Guidelines regarding recruitment, selection, education, training and professional development of prison and probation staff, CM(2019)111-add, 10 July 2019.

[285] Recommendation CM/Rec(2012) 12 of the Committee of Ministers to member states concerning foreign prisoners.

[286] Recommendation CM/Rec(2008) 11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures.

[287] Guidelines for prison and probation services regarding radicalisation and violent extremism, adopted by the Committee of Ministers on 2 March 2016.

[288] Council of Europe Handbook for prison and probation services regarding radicalisation and violent extremism, CM(2017) 21-add.

pressing issues that affect the penitentiary system of many EU Member States, such as prison overcrowding and prison population inflation[289] and the ethical and organisational aspects of health care in prison.[290] This list is not exhaustive; many other related aspects covering, inter alia, the use of remand in custody[291] and alternative measures to the execution of a custodial sentence[292] have been regulated at the CoE level.[293]

3.1.2. CPT standards

In addition to the many recommendations of the Committee of Ministers, the CPT has, over time, developed very detailed standards concerning various aspects of detention conditions, as well as good practices that are meant to prevent the risk of detainees being subjected to inhuman or degrading treatment.[294] Unlike the ECtHR, whose work is carried out on the basis of complaints, the CPT works in a preventive and proactive manner. It is a specialised independent monitoring body of the CoE composed of members from different sectors – e.g. lawyers, doctors and psychiatrists, criminologists, experts in human rights and penitentiary matters – thus favouring a multidisciplinary approach. Not being bound by the Court's case-law, the CPT has developed its own standards based on a wider range of human rights instruments and scientific knowledge provided by its members and experts working with the CPT, as well as based on its own findings on the ground.[295] As experts have pointed out, this has resulted in the development of stricter standards,[296] which are more penologically consistent and more grounded in the reality of deprivation of liberty than the necessarily casuistic case-law of the ECtHR.[297] The standards and good practices developed by the CPT in the penitentiary area address a variety of issues faced by many Member States of the EU, such as living space per prisoner in prison establishments,[298] remand detention, health-care services in prisons or combating prison

[289] Recommendation Rec(99) 2 of the Committee of Ministers to member states concerning prison overcrowding and prison population inflation.

[290] Recommendation Rec(98) 7 of the Committee of Ministers to member states concerning the ethical and organizational aspects of health care in prison.

[291] See Recommendation Rec(2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.

[292] See for instance Recommendation Rec(79) 14 concerning the application of the European Convention on the supervision of conditionally sentenced or conditionally released offenders.

[293] For a comprehensive overview of all relevant recommendations adopted within the framework of the CoE see the dedicated page on the CoE website: < https://www.coe.int/en/web/prison/conventions-recommendations> (consulted on 28 December 2022).

[294] Raffaelli, R., (n 280) 3.

[295] Snacken, S., 'Les structures européennes de contrôle des administrations pénitentiaires. Le rôle et l'impact du Conseil de l'Europe et du Comité de Prévention de la Torture', *Déviance et Société*, Médecine & Hygiène, Vol. 38 (2014) 407.

[296] See for instance European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 'Living space per prisoner in prison establishments: CPT standards', CPT/Inf (2015) 44. These standards are meant to be a bare minimum. In the same report, the CPT encourages States parties to apply higher/desirable standards, in particular when constructing new prisons.

[297] Snacken, S., (n. 295).

[298] See in this study Section '1.2. Prison overcrowding'.

overcrowding – just to name the most pressing ones.[299] While the CPT's standards have no directly binding authority, it is reported that the CPT's visit reports and thematic standards have a considerable influence on the case-law of the Court[300] and have served as a driving force for jurisprudential reversals on key issues.[301]

As reported by experts, there are many reciprocal influences between the recommendations developed at CoE level, the CPT's work and the case-law of the ECtHR in the penitentiary area.[302] For example, some recommendations dealing with specific issues such as conditional release have been adopted under the influence of CPT's reports and the Court's case-law on prison overcrowding.[303] In the same way, the European Prison Rules are used as reference in many ECtHR's judgments and CPT reports dealing with prison issues.[304] **If the majority of the norms applicable in the penitentiary field consist of soft law instruments, and are therefore without binding force, these are regularly elevated to the status of quasi-binding instruments through the Court's case-law. Indeed, the ECtHR has long referred to the standards set by the CPT, and, more generally, to the various guidelines adopted at CoE level to support its reasoning when deciding cases concerning prison conditions.[305] This has the effect of considerably strengthening the authority of soft law norms in the penitentiary field.[306]**

3.1.3. ECtHR case-law

The ECtHR plays a key role in establishing criteria for determining whether the contested conditions of detention in a given case can be considered compatible with the fundamental rights protected under the Convention. Although the ECHR was not drafted specifically for prisoners, the Court has gradually built up a body of case-law that protects the rights of persons deprived of their liberty. The Court held several times that 'the Convention cannot stop at the prison gate',[307] thus establishing the principle of the penetration of Convention rights in places of deprivation of liberty, i. e. the principle that prisoners continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention.[308]

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[299] For a comprehensive overview of the standards and good practices developed by the CPT in the prison area see the dedicated page on the CoE website < https://www.coe.int/en/web/cpt/standards> (consulted on 28 December 2022).

[300] See 22nd General report of the CP, CPT/Inf (2012) 25, para. 23. It is noted that the Committee's visit reports or standards have been cited in close to 350 of the Court's judgments.

[301] Snacken, S., (n 295) 407.

[302] *Ibid*. 408-409.

[303] *Ibid*. 409.

[304] *Ibid*. For a recent example of how the European Prison Rules have been taken into account in the Court's judgments dealing with prison issues see ECtHR [GC], *Vinters and others v. United Kingdom*, nos. 66069/09, 130/10 and 3896/10, 9 July 2013, pt. 115.

[305] See Arroyo, J., '*La soft law* dans le domaine des droits fondamentaux (octobre 2016 – octobre 2017)', in Ailincai, A. (dir.), *Revue trimestrielle des droits de l'homme* (2018) 417-419.

[306] See Tulkens, F. and Van Drooghenbroeck, S., 'Le *soft law* des droits de l'homme est-il vraiment si soft? – Les développements de la pratique interpretative récente de la Cour européenne des droits de l'homme', *in Liber Amicorum Michel Mahieu*, Larcier, Bruxelles (2008) 505 and ff.

[307] See ECtHR, *Klibisz v. Poland*, no. 2235/02, 4 October 2016, pt. 354.

[308] See ECtHR [GC], *Hirst v. United Kingdom*, no. 74025/01, 6 October 2005, pt. 70.

Through a dynamic interpretation of Article 3 of the Convention, the Court has imposed a positive obligation on States to ensure that a person is detained in conditions which are compatible with respect for his human dignity.[309] This is regardless of the financial or logistical difficulties that States may face.[310] As the case-law of the ECtHR shows, many issues, including some of the most crucial to life in detention (such as health, hygiene, cell-space, violence in prison, etc.) raise problems of compatibility with Article 3 of the Convention[311] which, like Article 2, is an absolute right whose requirements allow no exception.[312] According to the Court, violations of Article 3 may arise not only by positive acts of ill-treatment and violence by State authorities over prisoners, but also through the imposition of degrading detention conditions, or through lack of action in the face of allegations of ill-treatment between prisoners.[313]

The Court has had occasions to clarify the requirements of the Convention in relation to various aspects of life in detention (beyond the question of material conditions). Among the many areas subject to the penetration of European standards, some are gaining increasing importance in the Court's case-law because of the acute and persistent problems that occur therein. These areas include health in prison, which is given significant attention due to the chronic problem of lack of access to health care in detention in several Member States, and, more recently, due to the Covid health crisis which exacerbated these problems. With regard to the right to health in prison, the Court recognized in its judgment Kudla v. Poland that there is a positive obligation under Article 3 ECHR by which 'the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity […] and that, given the practical demands of imprisonments, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance'.[314] The content and scope of this obligation have subsequently been clarified in relation to a wide variety of prisoner situations, such as 'Medical assistance for prisoners with a physical illness'; 'Treatment of disabled prisoners'; 'Treatment of elderly and sick prisoners'; 'Treatment of mentally-ill prisoners'; 'Treatment of prisoners with drug addiction', etc.[315] The Court's case-law has also developed in the field of other more specific health-related issues such as 'Hunger strikes in detention'.[316] More recently, in the context of the Covid-19 health crisis, the ECtHR has been seized of a number of cases (still pending) where applicants complain about the lack of protective measures against the propagation of the Covid-19 virus in their detention facilities.[317]

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[309] ECtHR [GC], *Kudla v. Poland*, no. 30210/96, 26 October 2000, pt. 94.

[310] See ECtHR, *Neshkov and others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/1327 January 2015, pt. 229.

[311] While the ECtHR case-law on detention conditions has mostly developed on the basis of Article 3 ECHR, some issues raised before the Court have been examined on the basis of other provisions (e.g. Article 2 on the right to life, Article 5 on the right to liberty and security, Article 8 on the Right to respect for private and family life or Article 13 on the right to an effective remedy).

[312] See Tulkens, F., 'Les prisons en Europe. Les développements récents de la jurisprudence de la Cour européenne des droits de l'homme", Déviance et Société, Médecine & Hygiène, Vol. 38 (2014) 425-448.

[313] See Raffaelli, R. (n 280) 3.

[314] ECtHR [GC], *Kudla v. Poland*, no. 30210/96, 26 October 2000, pt. 94.

[315] For an overview of the Court's case-law on these issues see European Court of Human Rights, Factsheet – Prisoners' health-related rights, February 2022.

[316] European Court of Human Rights, Factsheet – Hunger strikes in detention, December 2022.

[317] European Court of Human Rights, Factsheet – Covid-19 health crisis, October 2022.

Still on the subject of the right to health in prison, the issue of mental health is another concern that generates important jurisprudential developments due to a large number of applications invoking the lack of appropriate medical care for prisoners with mental illnesses (e.g. prisoners with suicidal tendencies).[318] The ECtHR has held on many occasions that the detention of a person who is ill may raise issues under Article 3 ECHR and that the lack of appropriate medical care may amount to treatment contrary to that provision.[319] As stated by the Court, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has to take into account in particular their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment.[320] Mental health issues in detention have gained increased importance in some Member States, such as in Belgium where the structural deficiencies specific to the Belgian psychiatric detention system have resulted in repeated convictions by the ECtHR.[321] Mental health issues have also implications for judicial cooperation in criminal matters. As discussed in other parts of the study, the question whether the risk of suicide linked to the possible incarceration of the person to be surrendered can justify the non-execution of an EAW has recently been raised before the CJEU.[322] It is therefore likely that the standards developed by the ECtHR on mental health issues will continue to serve as guidance at both national and EU levels.

In addition to issues related to health in prison, the Court has set benchmarks on a range of crucial aspects relating to material conditions of detention. These include the issue of minimum cell space – which is considered as an important criterion to be taken into account for determining whether detention conditions amount to inhuman or degrading treatment within the meaning of Article 3 ECHR.[323] As seen in the previous Sections of this study, the standards set by the ECtHR on cell space serve as a reference point both at national level and in the EU legal order.[324] They are particularly useful in a context where problems of prison overcrowding persist and generate numerous court cases, in addition to creating a climate of mistrust with negative repercussions on judicial cooperation in criminal matters. The standards for assessing the compatibility of a detainee's minimum personal space with Article 3 ECHR have been further clarified and harmonised in the landmark judgment *Muršić v. Croatia*[325], whereby the Grand chamber considered that when a detainee has less than 3 m2 of floor space in multi-occupancy accommodation, there is a strong presumption that the conditions of detention constitute degrading treatment in breach of Article 3 ECHR ('strong presumption test'). Such

[318] European Court of Human Rights, Factsheet – Detention and mental health, January 2022.

[319] ECtHR, *Slawomir v. Poland*, no. 28300/06, 20 January 2009, pt. 87.

[320] *Ibid*, para 88. According to the European judge, there are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant.

[321] See pilot judgment ECtHR, *W.D. v. Belgium*, no. 73548/14, 6 September 2016. For an in-depth analysis of this decision see Colette-Basecqz, N. and Nederlandt, O., 'L'arrêt pilote W.D. c. Belgique sonne-t-il le glas de la détention des internés dans les annexes psychiatriques des prisons?' (obs. Sous Cour eur.dr.h., arrêt *W.D. c. Belgique*, 6 Septembre 2016), *Revue trimestrielle des droits de l'homme*, (2018) Vol. 18, 213-239.

[322] See in this study Section 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'. See in particular request for preliminary ruling submitted to the CJEU on 22 November 2021, Case C-699/21, *E.D.L.*; Opinion of Advocate general Campos Sánchez-Bordona delivered on 1st December 2022, Case C-699/21.

[323] See in this study Section '1.2. Prison overcrowding'.

[324] See in this study Section 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'.

[325] See ECtHR (GC), *Muršić v. Croatia*, no. 7334/13, 20 October 2016, paras 76; 105; 126.

a presumption can only be rebutted if there are a series of mitigating factors compensating for the low allocation of personal space. When space insufficiency is less severe (between 3 and 4 m2) and where overcrowding is not so significant as to raise a problem in itself under Article 3 ECHR, the Strasbourg court takes into account other factors in assessing the conformity of a given situation with Article 3 ECHR. In other words, the Court does not give a precise and invariable measure of the personal space that should be afforded to each detainee under the Convention and gives weight to factors other than the surface of a cell (e.g. the duration of detention, the possibilities for outdoor exercise, etc.). Moreover, while the Court remains attentive to the standards developed by the CPT with a view to ensuring complementarity, this does not prevent it from deviating from the standards of minimum living space in detention advocated by the CPT (4 m2 of living space in a multiple-occupancy cell).[326] This has led some commentators to interpret the above-mentioned judgment *Muršić v. Croatia* as a worrying step backwards in the case-law of the ECtHR on prison matters.[327]

Another issue to which the ECtHR is particularly attentive is the obligation on States parties to provide for an effective remedy against infringements of Article 3 ECHR resulting, inter alia, from prison conditions. A significant and recent example in this regard is the ECtHR judgment in ***J.M.B. and others v. France***, which dealt with alleged violations of Articles 3 and 13 ECHR. The structural problems identified by the Court as giving rise to the violation of Article 3 have already been highlighted *supra*.[328] As for Article 13, the applicants grounded their complaint on the ineffectiveness of the remedy provided by the French legislation *vis-à-vis* the inhumane and degrading detention conditions they had been suffering from. After recalling its settled case-law, the ECtHR held that the *recours au juge du référé-liberté* does not constitute a remedy which is effective in practice.[329] In particular, the ruling highlighted how an apparently "solid theoretical legal framework" may be deprived of any concrete effects if the prison administration encounters too many difficulties in implementing that judge's decisions, which are thereby rendered ineffective.[330]

With regard to the EU legal order, the right to lodge requests and complaints is one of the issues touched upon by the Commission in last December's Recommendation on pre-trial detention and material detention conditions.[331] In particular, Member States are urged to "facilitate effective access to a procedure enabling detainees to officially challenge aspects of their life in detention", especially through "confidential requests and complaints about their treatment, through both internal and external complaint mechanisms".[332] Particular attention is devoted to the diligence, promptness and independence of the authority treating such claims, be it a judicial or an administrative authority.[333]

Furthermore, NGOs and practitioners have put the need for effective remedies in the detention field in connection with broader, more structural aspects of national legal frameworks which are of utmost

[326] *Ibid.*, para 113.

[327] Tulkens, F., 'Cellule collective et espace personnel. Un arrêt en trompe-l'oeil' (obs. Sous Cour eur. Dr. H., Gde Ch., arrêt *Muršić c. Croatie*, 20 octobre 2016), *Revue trimestrielle des droits de l'homme* (2017) 989-1004.

[328] See Section 1.2.3. 'Empirical evidence showing the persistence of the problem'.

[329] ECtHR, *J.M.B. and Others v. France*, no. 9671/15 and al., 30 January 2020, paras 207-208; 212-221.

[330] *Ibid.*, paras 219-220.

[331] See Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (n 8).

[332] *Ibid.*, para. 62.

[333] *Ibid.*, para. 63.

importance in the EU. In this sense, in respect of pre-trial detention, Fair Trials has pointed out that the obligation to provide effective remedies features amongst rule of law guarantees.[334] Indeed, in a system governed by the rule of law, decisions by the various actors involved in law-enforcement shall be subject to strict judicial scrutiny, in order to avoid disproportionate restrictions to fundamental rights. **As a consequence, the frequent overreliance on pre-trial detention may been deemed a symptom of the failure of existing remedies, thus problematic from a rule of law perspective.**[335] In this context, the Fair Trials solicited the Commission to include in its Rule of Law Report an evaluation of the suitability of national judicial systems in that respect.

Against this backdrop, **it should nonetheless be borne in mind that remedies cannot be considered as the sole, nor even the main, tool for the reduction of prison overcrowding or for improvement of detention conditions**.[336] In the frame of the EU-funded project PrisonCivilAct,[337] the European Prison Litigation Network (EPLN) has observed that the procedural solution of an effective remedy against degrading prison conditions has the intrinsic limit of pointing at the effects of the problem in individual cases, without removing its structural rootcauses. In addition, inmates face constant difficulties accessing proper defence, and are dependent on the prison administration and subject to possible retaliation. Such barriers specific to the prison environment hamper their access to judicial remedies, thereby rendering the latter inherently ineffective. Additionally, it is important to underline that even *in abstracto* not all remedies related to detention are intended to deal with material detention conditions. In this regard, a criticism affecting the Belgian system particularly emerged from the interviews with practitioners. Since October 2020, a *Commission des plaintes* has been established in all Belgian prison premises.[338] This independent body is intended to be more accessible for inmates, potentially strengthening their right to an effective remedy against decisions issued by the prison administration. Nonetheless, only specific individual decisions may be impugned before the *Commission des plaintes*, while prisoners who want to file complaints concerning the effects of general degrading conditions may only resort to ordinary - and for them far less accessible - jurisdictions. This legislation is a clear example of how the availability of a remedy does not necessarily result in an effective protection of inmates *vis-à-vis* a generalised lack of decent prison conditions.

The few examples cited above are far from exhaustive.[339] They are, nevertheless, representative of the crucial role of the ECtHR in ensuring the protection of fundamental rights in the closed environment of the prison. It is worth mentioning that while most European standards on conditions of detention are

[334] See the report Fair Trials, 'Pre-trial detention rates and the rule of law in Europe' (2021) < https://www.fairtrials.org/articles/publications/pre-trial-detention-rates-and-the-rule-of-law-in-europe/ >

[335] *Ibid.*

[336] In a similar vein, the CJEU held in *ML* that the existence of legal remedies in the issuing Member States is not sufficient on its own to rule out a real risk of inhuman and degrading treatment in EAW cases (*supra* 2.1.1.).

[337] The objective of the project is to enhance NGO's capacity to impact on prison and penal policies at domestic and European leval and to resolve structural problems of prison systems in the continent.

[338] For a synthetic overview, see Scouflaire, S., 'Les Commissions des plaintes et les Commissions d'appel auprès des établissements pénitentiaires' (2021) < https://www.justice-en-ligne.be/Les-Commissions-des-plaintes-et >

[339] The Court has had occasion to clarify the requirements of the Convention in relation to various other aspects of prison conditions such as 'Hygienic condition of cell', 'Ill treatment by cellmates', 'Ill-treatment by prison officers', 'Juveniles in detention', 'Repeated transfer', 'Solitary confinement', 'Strip searches of prisoners', 'Video surveillance of a cell', 'Migrants in detention' just to name the main ones. See European Court of Human Rights, Factsheet – Detention conditions and treatment of prisoners, December 2021; European Court of Human Rights, Factsheet – Migrants in detention, June 2022.

non-binding, the ECtHR's judgments have binding force.[340] This implies an obligation for the respondent State to take individual and/or, if appropriate, general measures in its domestic legal order to put an end to the violation found by the Court and to redress its effects. Even if States have, in principle, a margin of discretion as to the means to remedy the violations found by the Court, this freedom shall be exercised under the control of the Committee of Ministers which is responsible for supervising the execution of judgments delivered by the Court. **In its latest annual report for the year 2021 on the supervision of the execution of judgments and decisions of the ECtHR, the Committee of Ministers notes that cases concerning poor conditions of detention and medical care (including the need for effective remedies) represented again one of the highest percentages of leading cases under enhanced supervision by the Committee of Ministers (8%).[341] The 2021 report from the Department for the execution of judgments of the ECtHR shows that ECtHR decisions finding a violation of Convention rights due to poor conditions of detention have had a significant impact on the development of national law.[342]** This is evidenced by the various reforms reported by States to bring their national law into line with the Court's judgments issued against them, whether to address the problem of prison overcrowding or to improve other aspects of detention conditions (e.g. hygiene) and to improve access to care for prisoners.[343] Moreover, the new pilot judgments procedure has been used in several cases where the Court identified structural problems affecting detention conditions, and has had a significant impact on the prison system of some EU Member States. For example, it was under the pressure of the ruling *Torregiani and Others v. Italy*[344] that the Italian State enacted a number of legislative measures aimed at resolving the structural problem of overcrowding in prisons, including by increasing the use of alternatives to imprisonment in addition to organizational measures aimed at improving living conditions in prison. Despite the efforts reported by the Committee of Ministers regarding the measures taken by States to remedy certain violations resulting from poor conditions of detention, these efforts must nevertheless still be intensified in a number of cases.[345] For instance, as regards the group of cases *Vasilescu v. Belgium*,[346] the Committee noted with concern that, despite progress, many remand centres remain very overcrowded and exhorted authorities to urgently put in place any solution 'to better distribute the

[340] Under Article 46§1 of the Convention, the contracting States have undertaken to comply with the judgments of the ECtHR in cases to which they are parties.

[341] 15th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (2021)19; 25-28; 62.

[342] Department for the execution of judgments of the European Court of Human Rights (DG1), Thematic factsheet on Conditions of detention (June 2021). This report sets out examples of measures adopted and reported by States in the context of the execution of the European Court's judgments with a view to preventing and eradicating torture and other forms of ill-treatment of detainees in accordance with Article 2 of the European Convention. Also see Anagnostou, D. and Skleparis, D., 'Human Rights in European Prisons: Can the Implementation of Strasbourg Court judgments Influence Penitentiary Reform Domestically?' in Daems, T. and Robert, L. (eds.), *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems*, 1st ed., Palgrave Macmillian (2017).

[343] Department for the execution of judgments of the European Court of Human Rights (DG1), Thematic factsheet on Conditions of detention (n 342).

[344] ECtHR, *Torreggiani and Others v. Italy*, nos. 4317/09, 46882/09, 55400/09, 8 January 2013.

[345] 15th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (n 341) 25-27.

[346] ECtHR, *Vasilescu v. Belgium*, no. 64682/12, 25 November 2014.

detainees, regardless of their detention regime'.[347] The measures taken at national level in response to ECtHR judgments identifying structural problems are also closely monitored by some NGOs. In the aforementioned project called 'PrisonCivilAct', the EPLN has started to assess the impact of the pilot and quasi-pilot judgments on penal and prison policy in seven EU Member States with recurrent problems of prison overcrowding. One of the main lessons learned at this stage is that while the Court's judgments have a concrete impact in the States concerned, these latter tend to favour measures that address the manifestations of the problem rather than its root causes through long-term penal policy measures. As emphasized by the EPLN, the measures taken to improve the exercise of domestic remedies for detainees are only one tool for influencing local reforms and criminal policy directions. They do not replace work on the causes of the increase in prison population, whether it be the scope of prison sentences, the scale of penalties in legislation and judicial practices.

3.2. The lack of EU (binding) standards?

At present, there are no harmonisation measures establishing minimum standards for detention conditions at EU level. Although matters of detention are the responsibility of Member States, in addition to the fact that many standards on prison conditions exist through the CoE and the ECtHR, the EU also has a role to play in this field insofar as poor detention conditions conflict with its values and with the core principles underlying judicial cooperation in criminal matters. The possibility and desirability for the EU to take action in the area of detention, including through the adoption of minimum standards, has long been part of inter-institutional discussions on how to make the principle of mutual recognition more effective.[348] This issue has received renewed attention following the recent case-law of the CJEU[349] which has brought to light that one of the most pressing problems among Member States concerns the differences between detention material conditions. This has led to an increased awareness of the need to strengthen mutual trust in the area of detention, in particular through measures promoting greater convergence in the application of EU-wide minimum standards of detention.

The European Parliament has been very active on calling for EU action to ensure respect for and protection of the fundamental rights of prisoners, including through the adoption of common European standards and rules of detention in all Member States.[350] This call was recently reiterated in 2020, after noting an alarming lack of compliance with European and international standards on

[347] 15th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (n 341) 25.

[348] See for example European Parliament, Resolution on the situation as regards fundamental rights in the European Union' (P5_TA(2003)0376) para. 22; European Parliament recommendation with a proposal for a European Parliament recommendation to the Council on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union (P5_TA(2003) 0484), para. 23; European Council, 'The Stockholm programme – an open and secure serving and protecting citizens', OJ C 115/1 (4 may 2010), para. 3.2.6.; European Parliament, 'Resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council 'An area of freedom, security and justice serving the citizen – Stockholm programme'' (P7_TA(2009) 0090, para. 112; European Commission, Green paper 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention' (n 116).

[349] See in this study Section 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'.

[350] European Parliament, 'Resolution of 15 December 2011 on detention conditions in the EU' (P7_TA(2011)0585, paras 1 and 4; European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) para. 57.

detention,[351] and in 2021 in a resolution on the EAW.[352] In the latter, the European Parliament expressed its concerns that the absence of minimum standards on prison conditions and pre-trial detention at EU level, coupled with other factors, in particular the lack of minimum requirements to limit the use of pre-trial detention as a measure of last resort and the lack of consideration for the possibility of using alternative measures can lead to unjustified and excessive periods of pre-trial detention.[353] The Commission was therefore called 'to achieve EU minimum standards, particularly on criminal procedural safeguards and on prison and detention conditions, as well as to strengthen the information tools for national executing authorities on the conditions of pre-trial detention and imprisonment in each Member State'.[354] Calls for EU legislative intervention have also been made by different members of the CJEU,[355] including by Advocate General Pitruzella who recently urged the EU legislature to 'address the question of harmonisation, however minimal, of detention conditions and pre-trial detention as it is ultimately the European area of criminal justice that is under threat.'[356] In his view, 'There can be judicial cooperation in criminal matters only if mutual trust between Member States is strengthened and that trust cannot be soundly established if such contrasting standards are applied by Member States, especially in respect of pre-trial detention (…)'.[357]

On **6 February 2023**, the EP **Committee on Civil Liberties, Justice and Home Affairs (LIBE) adopted an opinion**, to the attention of the Committee on Constitutional Affairs, which is drawing up a report on **'Proposals of the European Parliament for the amendment of the Treaties'**. The LIBE Committee, in **paragraph 27** of its opinion, **'calls for the introduction of a Union competence in Article 82 TFEU to establish minimum standards for pre-trial detention and custody conditions**'.

The acuteness of detention issues has recently prompted a response from the European Commission. On 2 October 2019, the new European Commissioner for Justice, Didier Reynders, committed to 'look into how prison conditions in the EU could be improved and explore the idea of establishing minimum standards for pre-trial detention in order to strengthen trust'.[358] This was followed in September 2021 by the publication of a Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention.[359] The purpose of this non-paper was to identify relevant aspects on material detention conditions and procedural rights in pre-trial detention where more convergence between Member States is needed to strengthen judicial cooperation in criminal

[351] European Parliament, 'Resolution of 26 November 2020 on the situation of Fundamental Rights in the European Union – Annual Report for the years 2018-2019' (P9_TA(2020)0328) para. 55.

[352] European Parliament, 'Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States' (n 196).

[353] *Ibid*. para. 37.

[354] *Ibid*.

[355] See Opinion of Advocate General Bot delivered on 3 March 2016, Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* (n 132) paras 181-182.

[356] Opinion of Advocate general Pitruzzella delivered on 19 November 2019, Case C-653/19 PPU, *Spetsializirana prokuratura*, ECLI:EU:C:2019:983, para. 22.

[357] *Ibid*.

[358] European Parliament, 'Commitments made at the hearing of Didier Reynders, Commissioner-designate Justice, PE 621.923, October 2019.

[359] Council of the European Union, 'Non-paper from the Commission services on detention conditions and procedural rights in pre-trial detention' (n 29).

matters.[360] As can be seen from the annex of the non-paper, the minimum standards identified as relevant are essentially based on existing standards established at CoE level (e.g. cell-space, access to health care, etc.). This initiative stems from the observation that there are significant divergences in the prison systems of the Member States and in the degree of implementation of existing international and European standards in the prison area, with negative consequences on the proper functioning of judicial cooperation in criminal matters.[361] The lack of EU rules on material detention conditions is also perceived as problematic by the Commission in view of the fact that the CJEU is increasingly being asked to clarify the requirements in this area. While the CJEU refers extensively to the ECtHR case-law when interpreting the requirements of Article 4 of the Charter in EAW cases challenged on the grounds of detention conditions, the Commission notes that 'there are limits to the Court developing case-law in this area, as the setting of EU minimum standards falls within the remit of the EU legislator.'[362]

Discussions on which aspects of material detention conditions and procedural rights in pre-trial detention deserve priority attention in order to enhance mutual trust have also been held during the JHA Council of 7-8 October 2021.[363] Areas identified by Ministers as requiring enhanced minimum standards as a matter of priority included overcrowding, medical and psychological assistance, and sanitary and hygiene measures[364], and thus converge to a large extent with those identified by the Commission in its non-paper. In line with the Commission's ambitions, it was considered that there was no need for additional legal instruments on minimum standards at EU level as such standards are already set out in various international fora. Instead, the focus should be on a more effective application of existing standards, e.g. those laid down in the CoE.[365] Moreover, a number of ministers suggested that further action should be taken at EU level to facilitate the sharing of best practices, training and funding for the improvement of material detention conditions.[366]

This has resulted in the adoption of the **Commission Recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions**,[367] which mainly consist of a consolidation of existing standards that are

[360] The non-paper provides in annex a preliminary overview of the most relevant minimum standards for detention conditions and procedural rights in pre-trial detention which should be adhered to by the EU Member States; for the reference to the Non-paper, see *supra* (n 29).

[361] The variable application of the CoE standards is further corroborated by empirical research. See See Maculan, A., Ronco, D. and Vianello, F. (n 9). Also see European Union Agency for Fundamental Rights (FRA), 'Criminal detention conditions in the European Union: rules and reality' (n 10).

[362] *Ibid*. 4. Also see Opinion of Advocate general Campos Sánchez-Bordona delivered on 30 April 2019, Case C-128/18 PPU, *Dorobantu* (n 28) paras 72-73. 'At present there are no provisions regulating the conditions of detention in the European Union and it does not fall to the Court to establish figure-bases requirements as to the amount of personal space to be made available to a prisoner, even if these take the form of a minimum standard. That task does not fall within the remit of the Court, but within that of the legislature'.

[363] Council of the European Union, Outcome of the 3816th Council meeting Justice and Home Affairs, Brussels (7-8 October 2021) 4.

[364] *Ibid*.

[365] *Ibid*.

[366] *Ibid*.

[367] Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (n 8).

considered relevant for judicial cooperation in criminal matters.[368] This Recommendation sets out a number of key guiding principles that should be taken into account by Member States in relation both to the procedural rights of persons subject to pre-trial detention and to material detention conditions. As indicated by the Commission, Member States remain free to set higher standards than those provided for in this recommendation, but such higher standards should not constitute an obstacle to the mutual recognition of judicial decisions. This clarification appears to be consistent with the CJEU case-law on EAW and detention issues and is also useful in view of the tendency of some executing authorities to ask for guarantees that go beyond the CJEU requirements.[369] Areas covered by this Recommendation include a wide range of aspects related to the procedural rights of persons subject to pre-trial detention and to material conditions of detention which extend beyond those initially considered by the Commission in its non-paper.[370] This initiative represents a step forward in that it clarifies and consolidates in a single document a series of minimum requirements relevant in the context of judicial cooperation in criminal matters – thus alleviating the problem of the scattering of existing standards. This Recommendation has also the merit of clarifying certain key concepts subject to variable meaning at EU level, such as 'pre-trial detention'[371] – whose definition is in line with that of the CoE instruments. However, its concrete effect remains difficult to gauge. As this Recommendation is non-binding, its implementation will depend on the level of voluntary compliance by the Member States.

Some would have liked to see legislative action on these issues, particularly in view of the fact that existing non-binding standards and ECtHR judgments are not sufficiently respected (as evidenced by various prison oversight bodies and NGO's). One of the main advantages of legislative action at EU level, compared with ECtHR case-law and CoE norms, is indeed the possibility to secure a higher degree of enforcement through a wide range of tools. The added value of an EU legislative intervention for the purposes of establishing minimum standards for detention conditions seems widely supported in the literature and beyond.[372] However, whether the EU has the capacity do so, and if so to what extent, seems more open to discussion. Few research has examined whether certain treaty provisions, in particular Article 82(2)(b) TFEU, can be used as a legal basis for regulating relevant aspects of detention.[373] It is worth mentioning that Article 82(2)(b) only admits harmonisation of national law on

[368] For a detailed analysis of this Recommendation see Ramat, M., 'The Commission Recommendation on procedural rights of persons held in pre-trial detention and on material detention conditions. A true step forward?', BlogDUE, < https://www.aisdue.eu/marta-ramat-the-commission-recommendation-on-procedural-rights-of-persons-held-in-pre-trial-detention-and-on-material-detention-conditions-a-true-step-forward/> (consulted on 11 February 2023).

[369] See in this study Section 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'. As far as the Court's case-law is concerned, see, as a landmark case, Case C-399/11, *Melloni*, ECLI:EU:C:2013:107: the Court clarified that, although fundamental rights breaches may pose some obstacles to mutual recognition, this possibility only refers to the level of protection afforded by EU law, not to higher national standards.

[370] For instance, the section dealing with minimum standards for material detention conditions include various guidelines covering specific needs, e.g. specific measures to address radicalisation in prisons, in addition to the new inclusion of minimum standards on monitoring aspects.

[371] See in this regard Martufi, A. and Peristeridou, C., 'Pre-trial detention and EU law: collecting fragments of harmonisation within the existing legal framework', *European Papers* (2020) Vol. 5,1479 ff.

[372] See Sellier, E. and Weyembergh, A. (eds.) (n 123) 439.

[373] See Wieczorek, I., 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)(b) TFEU) fit for Purpose?', *European Journal on Criminal Policy and research* (2022) 465-481. This article illustrates the limits of Article 82(2)(b) TFEU as a legal basis for the harmonisation of detention rules by reference to the area of material detention conditions and compensation for unjust detention; Coventry, T., 'Pretrial detention: Assessing European Union Competence under Article

individual rights if three requirements are fulfilled: (1) that it is necessary to facilitate mutual recognition; (2) it must be confined to individual rights in the field of criminal procedure and (3) it must concern scenarios having a cross-border dimension. While there is no doubt that the adoption of minimum standards for detention condition will contribute to strengthening mutual recognition, the second condition, which requires that such initiative be restricted to 'the right of individuals in criminal procedure', is more ambiguous and subject to debate. As pointed out by some commentators, it is unclear what the expression 'criminal procedure' refers to, and in particular if it can extend to standards pertaining to material conditions.[374] Even if this were the case, it would raise further questions about the extent of the period of detention covered under this notion. While some consider that the notion of 'criminal procedure' referred to in Article 82(2)(b) should receive an autonomous interpretation and can be interpreted as covering both the pre-trial and post-trial detention phase,[375] others point out that legislative practice seems to exclude the post-trial execution phase from the scope of harmonisation work.[376] If this latter hypothesis were to be confirmed, this would mean that harmonisation could only extend to pre-trial detention. As some comentators have pointed out, Article 352 TFEU (so-called 'flexibility clause) could be considered as a potential alternative legal basis, although its use implies a cumbersome procedure requiring unanimity within the Council.[377] Beyond considerations of the legal challenges, such a legislative initiative would also face political challenges in view of the Member States lack of political willingness to progress on this front.[378] It is worth recalling that during the negotiations on the Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, Member States were strongly opposed to the idea that the Directive should apply to the post-conviction phase. Various Member States considered that 'the right of individuals in criminal procedure' as referred to in Art. 82(2)(b) TFEU means that the EU has no power to adopt legislation that would be applicable to the execution phase.[379] As recommended by some scholars, **if such EU legislative option were to be considered, its added value should therefore be objectively and clearly substantiated in the new context marked by the CJEU's case-law, including by clear reliable and updated statistics showing the impact of non-action in the field.**[380]

Problems regarding the scope and effectiveness of the Procedural rights Directives

For the sake of completeness, alongside the lack of binding standards directly regulating material detention conditions, the ineffectiveness and restrictive scope of EU rules on procedural rights are worth briefly mentioning.

82(2) TFEU', *New Journal of European Criminal Law* (2017) Vol. 8(1), 43-63. Also see Mancano, L., 'Storming the Bastille: detention conditions, the right to liberty and the case for approximation in EU law', *Common Market Law Review* (2019) Vol. 56, 87.

[374] Wieczorek, I. (n 373).

[375] Mancano, L., *The European Union and Deprivation of Liberty. A Legislative and Judicial analysis from the perspective of the Individual*, Hart Publishing (2019) 138.

[376] Wieczorek, I. (n 373). Also see Soo, A., 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures', *ERA Forum* (2020) Vol. 20, 334.

[377] See Weyembergh, A. and Pinelli, L., (n 124) 25 ff.

[378] *Ibid.*, 22.

[379] See Soo, A. (n 376) 333.

[380] *Ibid.*

Indeed, in the wake of the 2009 Roadmap on procedural rights,[381] various directives have been enacted by the EU legislature with a view to strengthening the protection of procedural rights of suspects and accused. Such instruments lay down common minimum rules concerning the rights to interpretation and translation,[382] to information,[383] to access a lawyer,[384] to legal aid,[385] and to be presumed innocent and stand trial.[386] As regards the interplay between such instruments and detention, a distinction should be drawn between two macro-phases, namely before and after the final sentence.

The latter, i.e. **the phase in which the sentence is executed**, **falls outside the directives' scope *ratione temporis***. Indeed, the directives at issue cease to apply at the end of the trial, intended as the moment of "the final determination of the question whether [the person has] committed the offence".[387] As for the presumption of innocence, it is inevitable to exclude it once criminal liability has been finally established. Still, such an inherent incompatibility with a finding of guilt does not hold true for all the other procedural rights. On the contrary, these latter guarantees would be of utmost importance in proceedings dealing with the execution of the sentence, including the access to alternative measures or to conditional release, as well as in prison disciplinary procedures. This is apparent when considering that the narrow temporal scope of the procedural right directives has so far permitted several malpractices across Member States. A clear example concerns the rights to translation and interpretation. A study carried out by the European Prison Litigation Network (EPLN) has shed light on the practice of not providing professional interpreters in prisons, thereby forcing foreign detainees to resort to fellow inmates or prison staff in crucial situations such as to defend themselves during prison disciplinary proceedings.[388] The lack of translations of prison facilities' rules is another frequent shortcoming.[389] In this respect, the Belgian case is illustrative. As explained above,[390] a *Commission des plaintes* has been operating in Belgian prisons since 2020, with a view to enabling detainees to bring claims against individual decisions issued against them by the prison administration. Nonetheless, the brochure distributed to prisoners to explain the practical details of the *Commission*'s

[381] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (n 115).

[382] 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 280/1, 26 October 2010.

[383] 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 142/1, 1 June 2012.

[384] 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 294/1, 6 November 2013.

[385] 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 297/1, 4 November 2016.

[386] 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 65/1, 11 March 2016.

[387] See Article 1(2) of Directive 2010/64/EU; Article 2(1) of Directive 2012/13/EU; Article 2(1) of Directive 2013/48/EU; Article 2(1) of Directive (EU) 2016/1919; and Article 2 of Directive (EU) 2016/343.

[388] European Prison Litigation Network, 'Bringing Justice Into Prison: For a Common European Approach. White Paper on Access to Justice for Pre-Trial Detainees (June 2019) < http://www.prisonlitigation.org/eupretrialrights/ > 39-40.

[389] *Ibid.*

[390] See Section 3.1.3. 'ECtHR standards'.

functioning in accessible terms is only available in seven languages (including French and Dutch).[391] As a consequence, most EU citizens detained in Belgium will not have access to such information in their own native language.

As regards the pre-trial or trial phase in which the procedural rights directives apply, a series of shortcomings do not allow them to effectively protect suspect and accused persons against malpractices. First, the vagueness of their provisions leaves a wide margin of manoeuvre to national authorities (e.g. unclear wording of 'documents […] which are essential to challenging effectively […] the lawfulness of the arrest or detention' under Article 7 of the Directive 2012/13 on the right to information). Second, these procedural rights directives lack a 'context-sensitive approach' taking into account the fact that the prison environment makes it more difficult for prisoners to exercise their rights.[392] Thirdly, a too minimalistic approach to the harmonisation of procedural rights prevents an ambitious interpretation of the provisions of the aforementioned directives.

In this respect, **Directive 2016/343 on the presumption of innocence**[393] **is an illustrative example**. Indeed, as is clear from its title, the Directive aims at the "strengthening of *certain aspects* of the presumption of innocence" (emphasis added), and **such a restrictive approach is inevitably reflected by the relevant CJEU case-law**. A significant example is the ruling in *Spetsializirana prokuratura* (often indicated as *DK*)[394]. In this case, the referring court had asked whether Article 6 of the Directive and Article 47 of the Charter preclude a national legislation imposing on the suspect the burden of proving that new circumstances would allow his or her release. Based on a literal interpretation of the wording of Article 6, the CJEU ruled that the Directive only imposes the allocation of the burden of proof on prosecution in proceedings *on the merits* of the accusation, i.e. those aimed at establishing the guilt of the indicted person. Conversely, such rule does not apply to pre-trial procedures, so that national legislators are not bound by the Directive in that regard and are free to reverse the burden of proof by putting it on the defendant.[395] It is worth noting the premiss of the CJEU's reasoning, namely that the Directive is not intended to regulate the guarantees deriving from the presumption of innocence in a complete or exhaustive manner.[396] The judgment at hand has been criticised for being too formalistic, a wasted opportunity to extend the Directive on the presumption of innocence to a core aspect of pre-trial detention decisions, which fails to align EU law with ECtHR judgments handed down in analogue cases.[397] Nonetheless, the same commentators admit that such an expansion would have been a "brave" one, and that the advocated braver judgment would have had a "transformative effect", while the CJEU preferred to "[uphold] the status quo".[398] In sum, the CJEU might probably have engaged in a more creative interpretation of EU law. Still, the gaps it decided not

[391] As can be seen on the webste of the *Conseil Central de Surveillance Pénitentiaire*: < https://ccsp.belgium.be/droit-de-plainte/ >

[392] Martufi, A. and Peristeridou, C. (n 371) 1485; 1492.

[393] 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 (n 386).

[394] Case C-653/19 PPU, *Spetsializirana prokuratura*, 28 November 2019,ECLI:EU:C:2019:1024.

[395] *Ibid.*, paras 25-33.

[396] *Ibid.*, para. 28.

[397] For a detailed critical analysis of the judgment, see Martufi, A. and Peristeridou, C., 'Pilate washing his hands. The CJEU on pre-trial detention' (2019) < http://eulawanalysis.blogspot.com/2019/12/pilate-washing-his-hands-cjeu-on-pre.html >

[398] *Ibid.*

to fill had been left, initially, by the European legislator. Therefore, such judgment demonstrate how the narrow scope of a legislative instrument may prevent the Court from providing a protective interpretation thereof.

With regards to the allocation of the burden of proof, the recent Commission Recommendation may represent a little step forward. Indeed, this instrument urges Member States to provide that the competent public authority, and not the suspect or accused person, shall bear the burden of proof as to the necessity of pre-trial detention.[399] Still, it is difficult to foresee whether and to what extent such a non-binding recommendation may influence the future national or CJEU jurisprudence.

Futhermore, among the many issues for which there is a clear need for more effective standards is the difficulty in recognizing the detainee as a potential victim. Based on research carried out in six Member States, the NGO Fair Trials has found that migrant detainees and pre-trial detainees face many obstacles in asserting their rights when subjected to physical violence, whether by prison staff or fellow prisoners. [400] These obstacles are said to be due in particular to the reluctance to recognise the detainee as a potential victim, to the tendency to normalise acts of violence in detention, or to the vulnerable situation in which the detainees find themselves making it *de facto* very difficult for them to exercise their rights as victims. It is worth noting that this vulnerability is exacerbated in the case of foreigners, who do not speak the national languages and/or do not have local support networks.[401] As a result, the recurring problem of violence in detention is too often under-reported even though it constitutes a major threat to physical integrity in prison. These findings should therefore be taken into account when considering possible EU legislative intervention to strengthen the procedural rights of pre-trial detainees.

3.3. Control mechanisms

Prison monitoring bodies play a major role in effectively and independently monitoring living conditions in prisons with a view to ensuring the protection of detainees against inhuman or degrading treatment and, ultimately, to recommending improvements. Their role is all the more important as the closed world of the prison remains far from the public gaze. At the European level, this function is performed by the previously mentioned CPT whose main task is to prevent ill-treatment of persons deprived of their liberty in Europe. To this end, the CPT carries out periodic visits (usually once every four years) in addition to 'ad hoc' visits in order to assess how persons deprived of their liberty are treated.[402] After each visit, the CPT sends a detailed (publicly available) report to the State concerned, which includes the CPT's findings, and its recommendations, comments and requests for information. It then requests a detailed response to the issues raised in its report with a view to establishing a

[399] Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (n 8) para. 15.

[400] Fair Trials, 'Rights behind bars. Access to justice for victims of violent crime suffered in pre-trial or immigration detention' (n 12).

[401] *Ibid.* 55.

[402] See the dedicated page on the Council of Europe website < https://www.coe.int/en/web/cpt/about-the-cpt> (consulted on 26 December 2022).

constructive dialogue with the States concerned.[403] All 27 Member States and the United Kingdom are parties to the Council of Europe's Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and are therefore subject to control by the CPT.[404]

Prison monitoring is also carried out through bodies set up at national level – as required by several European and International instruments. While there is currently no obligation under EU law for a Member State to have a prison inspection and monitoring body,[405] the CoE European Prison Rules recommend that States have in place such monitoring mechanism by providing, inter alia, that 'The conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public'.[406] Similar requirements are also provided for by several international human rights treaties such as the United Nations' Optional Protocol to the Convention Against Torture (OPCAT)[407] which requires State Parties to set up prison oversight bodies referred to as 'National Preventive Mechanisms' ('NPMs'). According to Article 3 of the Protocol, 'Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism)'. This implies that NPMs shall be granted a minimum of powers which are listed in Articles 19 and 20 of the OPCAT to enable them to fulfill their mandate effectively (e.g. effective access to information and access to all places of detention). Indeed, as pointed out by several experts, to be effective, monitoring requires legally guaranteed access to prisons, prisoners, and documents; resources, both financial and human; expert and independent members; and a methodology that guarantees the adequacy, legitimacy, efficiency, and hence credibility of its findings.[408]

To date, it is reported that most EU countries have ratified the OPCAT (with the exception of Ireland, Belgium and Slovakia).[409] Moreover, most EU countries in which the Optional Protocol had been signed have designated a NPM in accordance with the OPCAT obligations, except Belgium.[410] Although reforms of the Belgian prison monitoring system have been initiated to this end, these are still not sufficient to meet the minimum requirements of the OPCAT.[411] This does not mean that there are no

[403] *Ibid*.

[404] Raffaelli, R. (n 280) 2.

[405] In the case *Dorobantu*, the CJEU, however, indicated that the presence of national or international mechanisms for monitoring prisons in a State is an important factor which an executing judicial authority may take into account when deciding on whether or not the surrender should take place. See Case C-128/18, *Dorobantu*, 15 October 2019 (n 28) para. 80.

[406] See Recommendations 93.1 and 93.2 of the Recommendation Rec (2006)2 of the Committee of Ministers to member States on the European Prison Rules.

[407] Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002.

[408] Snacken, S. and Kiefer, N., 'Oversight of international imprisonment: the Committee for the Prevention of Torture' in Róisín Mulgrew and Denis Abels (eds.), *Research Handbook on the International Penal System* (Edward Elgar, Cheltenham, 2016) 322-355.

[409] See Status of ratification of the OPCAT by country, < https://indicators.ohchr.org/> (consulted on 26 December 2022).

[410] See Aizpurua, E. and Rogan, M. (n 177) 212.

[411] See Nederlandt, O. and Lambert, M., 'La réforme du Conseil central de surveillance pénitentiaire et des commissions de surveillance des prisons: entre attentes décues et raisons d'espérer?', e-legal, 2019 < http://e-legal.ulb.be/volume-n02/le-controle-des-lieux-de-privation-de-liberte-onu-conseil-de-l-europe-et-belgique-le-cas-des-prisons/la-reforme-du-conseil-central-de-surveillance-penitentiaire-et-des-commissions-de-surveillance-des-prisons-entre-attentes-decues-et-raisons-d-esperer> (consulted on 27 December 2022).

bodies responsible for independent monitoring of prisons and the treatment of prisoners in Belgium,[412] but the legislative framework still needs to evolve to allow the establishment of a proper NPM that meets the requirements of the OPCAT. Following the recent CPT's request for information on the progress made in this respect,[413] the Belgian government responded that discussions on the model of the future NPM are ongoing (with an agreement planned in 2024).[414] The steps taken in this regard are also closely followed by the CoE Committee of Ministers which, in its last 2021 Annual report, urged Belgian authorities to rapidly create a NPM.[415]

Despite the absence of an EU legal instrument requiring Member States to establish domestic-level prison inspection and monitoring bodies, the EU institutions actively promote compliance with supranational instruments containing such requirement. In its resolution of 15 December 2011 on detention conditions in the EU, the European Parliament has called on Member States and accession countries to sign and ratify OPCAT while encouraging the EU itself to do likewise, as part of its policy vis-à-vis third countries.[416] This call was reiterated in the EU Council 2019 guidelines on EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment.[417] Going a step further, the CoE and the EU established together the European NPM forum project aiming to support the dialogue and to promote the sharing of good practices between NPMs of EU countries, but also with other relevant supranational bodies.[418] In addition to facilitating the sharing of knowledge, this initiative aims at contributing to the harmonisation of detention standards, improving the effectiveness of detention monitoring and, in the long run, improving the detention conditions in the region through combined national and international action.[419] More recently, the European Commission recommended that Member States should facilitate regular inspections by an independent authority to assess whether detention facilities are administered in accordance with the requirements of national and international law.[420] Echoing one of the recommendations made by the European Parliament in 2017,[421] Member States are called upon to grant unhindered access to detention facilities to the CPT as well as to national parliamentarians and to grant similar access to

[412] The 'Conseil Central de Surveillance Pénitentiaire' (CCSP) and the 'Commissions des surveillances' are the main bodies responsible for independent monitoring of prisons.

[413] Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 2 au 9 novembre 2021, Inf (2022) 29.

[414] Réponse du Gouvernement de la Belgique au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à la visite effectuée en Belgique du 2 au 9 novembre 2021, Inf (2022) 23.

[415] 15th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (n 341) 25.

[416] European Parliament, 'Resolution of 15 December 2011 on detention conditions in the EU (P7_TA(2011)0585), para. 14; also see European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) para. 11. In 2017, the European Parliament suggested that Member States should establish inspectorates for detention premises which could build on the work of independent bodies in evaluating prison conditions.

[417] Council of the EU, Guidelines on EU policy towards third countries on torture and others cruel, inhuman or degrading treatment or punishment – 2019 revision of the guidelines, 12107/19 (2019) para. 2.3.

[418] See < https://www.coe.int/en/web/national-implementation/european-npm-forum-phase-2- > (consulted on 6 January 2023).

[419] *Ibid*.

[420] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) paras 79-81.

[421] European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) para. 58

members of the European Parliament.[422] In addition, the Commission encourages Member States to consider organising regular visits to detention facilities, and other detention centres for judges, prosecutors and defence lawyers as part of their judicial training.[423]

While all Member States have a prison monitoring mechanism in place (although not in the form of an NPM for some), the great diversity of existing prison monitoring models has attracted the attention of scholars given the important role these oversight bodies are expected to play.[424] Indeed, the sources of information produced by these actors are often taken into account by the ECtHR to substantiate violations of Article 3 ECHR.[425] In the context of EAW procedures, empirical research shows that executing judicial authorities are increasingly relying on reports by prison inspection and monitoring bodies when making assessment of the prison conditions in a Member State.[426] In this regard, the position of the two European courts largely converges on the requirement that executing authorities must seek objective, reliable and up-to-date information about prison conditions in EAW cases when an issue about compliance of those conditions with fundamental rights arises.[427] Prison monitoring bodies are therefore considered to have become increasingly important sources of information when prison conditions are at issue in the EAW process. While knowledge about how these actors operate is still limited, recent research into monitoring practices in the EU and the United Kingdom have sought to highlight a number of discrepancies, some of which appear problematic in terms of their potential practical impact.[428] For example, some significant variations have been found in the frequency of visits by these prison oversight bodies, which may have an impact on the accuracy of the information provided in their activity reports - which may in turn result in a varying degree of accuracy in the information provided in their activity report.[429] In addition, while most Member States having NPMs in place indicate that their independence from prison and State authorities is guaranteed in the legislation, it is nevertheless considered worrying that two Member States do not provide such a legal guarantee.[430] It is all the more so as, while the OPCAT does not prescribe any specific structure for the setting up of an NPM, State Parties are required to guarantee their functional independence as well as the independence of their personnel.[431] Other divergences were noted concerning, among other

[422] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) paras 79-80.

[423] *Ibid*. para. 81.

[424] See Aizpurua, E. and Rogan, M. (n 177).

[425] See for examples ECtHR (GC), *Muršić v. Croatia*, no. 7334/13, 20 October 2016, para. 128; ECtHR, *J.M.B. and Others v. France*, no. 9671/15 and al., 30 January 2020, paras 258 ff.

[426] *Ibid*., 221 ff. Also see in this study Section 2 'Impact of poor detention conditions on mutual trust and mutual recognition instruments'.

[427] See Joined Cases C-404/15 and C-659/15, *Aranyosi and Căldăraru* (n 132) para 89. As required by the CJEU, to assess the existence of a real risk of inhuman or degrading treatment resulting from the conditions of detention in the issuing Member State, 'the executing judicial authority must, initially, rely on information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State (…)'. Also see ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, 9 July 2019, paras 85-86. The ECtHR held that the refusal of the Belgian authorities to execute the EAW issued by Spain was lacking a sufficient factual basis in that a detailed and updated examination of the detention condition in the issuing State was not carried out.

[428] Aizpurua, E. and Rogan, M. (n 177).

[429] *Ibid*., 216; 220.

[430] *Ibid*.

[431] See Article 18§1 of the OPCAT.

things, the regularity of the training received by domestic prison monitoring bodies. The format of reports produced by these actors is also reported to be quite variable across Member States,[432] which may raise difficulties for authorities unfamiliar with the practice of monitoring bodies in other States (especially when, as is the case in some Member States, multiple bodies are responsible for reporting on the conditions of detention). On the basis of these findings, scholars call for a reflection on the added value of legislative action at EU level to ensure that EU prison inspection and oversight bodies act comparably and also meet international human rights standards[433] - especially considering the fact that the information produced by prison monitoring bodies are increasingly being used as sources of evidence in EAW cases.

In contrast to judgements rendered by a court, monitoring bodies usually have no directly binding authority. National agencies (NGOs, ombudspersons, NPMs) report to the national parliament or to the minister of justice, who remain responsible for policy making and reform. In this regard, the CPT has increasingly claimed that the principle of cooperation between States parties to the Convention and the Committee[434] requires that decisive action be taken by national authorities to implement the CPT's recommendations.[435] With regards to NPMs, Article 22 of the OPCAT similarly provides that 'The competent authorities of the State Party concerned shall examine the recommendations of the national preventive mechanism and enter into a dialogue with it on possible implementation measures'. The analysis of national government responses to CPT reports, however, shows a large variation in reactions — positive, partial, interrogative, corrective, negative, reticent, studying, and powerless.[436] The effects of monitoring can take varying forms, as the work of the CPT illustrates. As reported by experts, sometimes the impact of the CPT can be direct and immediate (e.g. when an individual problem is resolved on the spot).[437] More often, the impact of the CPT's monitoring becomes apparent only after a short or longer term, for example when legislation is revised or institutions are replaced.[438] The effect of monitoring may then not always easily be distinguished from the effects of criticisms or initiatives of other actors, including local NGOs, prisoner litigation, or prison researchers.[439] It is nevertheless noted that the CPT's visit reports and standards are cited in an increasing number of judgments delivered by the ECtHR, which in turns gives considerable authority to the work and recommendations issued by the Committee.[440] As regard the potential policy impact of domestic prison monitoring bodies operating at EU level, recent empirical research shows that the reports produced by NPMs and oversight bodies are presented to, and discussed by, national legislative assemblies in most Member States (with few exceptions).[441]

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[432] Aizpurua, E. and Rogan, M. (n 177) 220-221.

[433] *Ibid*., 225.

[434] See Article 3 of the European Convention for the prevention of torture and inhuman or degrading treatment or punishment, European Treaty Series No. 126, CPT/Inf/C (2002) 1.

[435] See 24th General report of the CPT, CPT/Inf (2015) 1, para. 74.

[436] See Daems, T. and Robert, L. (eds.), *Europe in Prisons: Assessing the Impact of European Institutions on National Prison Systems*, 1st ed., Palgrave Macmillian (2017).

[437] Snacken, S., 'Les structures européennes de contrôle des administrations pénitentiaires. Le rôle et l'impact du Conseil de l'Europe et du Comité de Prévention de la Torture' (n 295) 416.

[438] *Ibid*.

[439] *Ibid*.

[440] *Ibid*., 407-408.

[441] Aizpurua, E. and Rogan, M. (n 177) 216.

4. THE IMPORTANCE OF CONSIDERING ALTERNATIVES TO DETENTION

When reflecting on potential solutions to address the problem of poor prison conditions and its correlative negative impact on judicial cooperation in criminal matters, the development of alternative measures to detention emerges as a key lever. Tackling persistent problems, such as prison overcrowding, in the long-term indeed requires a broader reflection on the criminal justice system, so that the prison sentence is no longer considered the reference sentence. It is interesting to note that the Covid-19 crisis has been a driving force for initiatives in this direction, leading some Member States to make greater use of alternatives to detention, and even to try new experiments to increase the flow of people leaving prison.[442]

Altough Member States have primary competence in the area of criminal sanctions, the EU is not completely silent on this issue. In its 2019 conclusions on alternative measures to detention,[443] the EU Council stressed that while detention is a necessary tool in criminal sanctions sytems, there is a broad consensus that it should be used as a last resort (*ultima ratio*).[444] Representatives of Member States also agree on the need to strengthen the use of alternatives to detention at both pre-trial and post-trial stage, underlining the many benefits of these measures. In addition to their benefits in terms of social rehabilitation and reduction of recidivism, the EU Council considers alternative measures as having wider positive effects on certain pressing problems identified at EU level, i.e. prison overcrowding, poor prison conditions, prison radicalisation and obstacles encountered in mutual recognition in criminal matters.[445]

Beyond political declarations in soft law texts, there are several instruments of mutual recognition facilitating the execution of alternative measures to detention in cross-border cases, applicable at different stages of criminal proceedings. These include the Council Framework Decision 2009/829, the objectives of which include promoting, where appropriate, the use of non-custodial measures as an alternative to provisional detention. At the post-sentence stage, mention should be made of the Framework Decision 2008/947 which facilitates the recognition of final decisions imposing non-custodial sentences across the Union to allow the cross-border enforcement of probation measures or alternative sanctions. In addition, Member States have a range of alternatives to issuing an EAW, allowing them to use less instrusive measures in cases which do not require a custodial measure. All these elements attest to the relevance of analysing the issue of alternative measures in a cross-border context.

Since the penal policies of the Member States have a direct impact on the flow of incarceration, it is worth noting, first of all, the wide variety of cultures and legal practices that coexist at EU level (4.1.).

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[442] See Rodrigues, A.-M., 'The impact of the COVID-19 pandemic on non-custodial sanctions and measures. Summary report of a comparative study in Member States of the European Union' (2022). Also see in this study sub-section 1.2.4 'Exchanges of experiences between Member States on how to tackle the problem of prison overcrowding: the example of the French initiative for 'prison regulation'.

[443] Council conclusions on alternative measures to detention: the use of non-custodial sanctions and measures in the field of criminal justice, OJ C422/9 (16 December 2019).

[444] *Ibid*. para. 4.

[445] *Ibid*. para. 11.

This will be followed by an examination of the use of alternatives to custodial measures in cross-border cases, looking more closely at the instruments available to avoid unnecessary custodial measure (4.2.). This section thus intends to complete the analysis of the many issues related to detention highlighted above, by examining the potential levers put forward to reduce the use of custodial sentence.

4.1. Divergent criminal systems and practices between EU Member States: main differences

Based on the little empirical research conducted in this area, the following developments will highlight some of the salient divergences between Member States as regards both alternatives to pre-trial and post-trial detention, while seeking to identify good practices and possible hurdles to their use.

4.1.1. Main discrepancies and obstacles to the use of alternatives to pre-trial detention

Alternative measures to pre-trial detention are of particular interest when one considers that the persistent problem of prison overcrowding, with all its attendant challenges, can be ascribed to a large extent to the high proportion of remand prisoners (i.e. prisoners who are detained by court order and are still awaiting their trial or have not been convicted by a final judgment) among the overall prison population.[446] Not to mention that, in some countries, standards regulating important aspects of detention conditions (e.g. sanitary facilities and health care) do not apply to pre-trial facilities, placing *de facto* remand prisoners in conditions of detention less favourable than prisoners in post-trial facilities.[447] The practice of excessive use[448] of pre-trial detention has long attracted the attention of CoE bodies[449] and EU institutional actors, leading to repeated calls on Member States to use it only as a measure of last resort. [450] This latter principle was recently reiterated by the European Commission, which also recommended that Member States make use, when possible, of alternative measures to pre-trial detention.[451]

As evidenced by recent empirical research carried out in nine Member States, alongside widely divergent pre-trial detention systems, **the types of alternatives to detention available at national**

[446] See Recommendation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on 'Remand detention', CPT/Inf(2017)5 part. See also European Commission, 'Call for evidence for an initiative', Ares(2022)2202649, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13173-Pre-trial-detention-EU-recommendation-on-rights-and-conditions_en >

[447] See European Union Agency for Fundamental Rights (FRA), 'Criminal detention conditions in the European Union: rules and reality' (n 10) 25; 32. See Also see European Prison Observatory, 'Prisons in Europe. 2019 report on European prisons and penitentiary systems' (n 9) 10-11.

[448] For the purpose of this study, the terms 'excessive use of' or 'overuse' of pre-trial detention shall be understood as meaning a use not limited to a measure of last resort.

[449] Council of Europe Commissioner for Human Rights, 'Excessive use of pre-trial detention runs against human rights', 2011 < https://www.coe.int/en/web/commissioner/-/excessive-use-of-pre-trial-detention-runs-against-human-righ-1> (consulted on 15 January 2023).

[450] See European Commission, Green paper 'Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention', (n 116) para 4; European Parliament, 'Resolution of 5 October 2017 on prison systems and conditions' (n 19) paras L; 13-15.

[451] Commission recommendation of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions (n 8) para. 14.

level, as well as the rules governing their use differ considerably across the Member States covered.[452] Salient differences were found from both a quantitative and qualitative point of view, i.e. some national laws provide for the possibility of using a greater number and more diverse range of alternatives to pre-trial detention than others.[453] Moreover, while some alternative measures such as electronic monitoring or house arrest are provided for in the law of several Member States, they are barely used in practice or even not categorised as such in some EU countries. As reported by Fair Trials, in Lithuania, Greece, and the Czech Republic, electronic monitoring has been introduced but is not widely used, and in Italy electronic monitoring and house arrest are considered forms of pre-trial detention rather than alternatives to it.[454] This last element is indicative of the lack of uniform classification of alternative measures to detention across the EU, which in turn makes it difficult to draw accurate comparisons between Member States. **Overall, the Council of Europe Annual Penal Statistics for 2021 show that non-custodial sanctions and measures are seldom used as an alternative to pre-trial detention; only 14% of the probation population on 31 January 2021 corresponds to persons placed under supervision before trial in the 19 probation agencies which provided data on this item.**[455]

As regards the decision-making procedure underlying the use of alternatives to pre-trial detention, **a closer examination of the national law of certain Member States reveals that it is sometimes drafted in a way which does not properly restrict the use of pre-trial detention as a measure of last resort**. For example, in Romania, the duty to consider alternatives before imposing pre-trial detention is not explicitly stated in the Criminal Procedure Code.[456] In France, the criterion for remand in custody based on the exceptional and persistent disturbance of public order caused by the seriousness of the offence ('trouble exceptionnel et persistant à l'ordre public provoqué par la gravité de l'infraction') is often criticised for its lack of precision.[457] In Spain, preventive detention may be ordered without any previous risk assessment by a judge on risks of flight and/or re-offending, and it is often used as a form of coercion to force the accused's cooperation.[458] In addition, some EU-wide empirical research has highlighted worrying trends in judicial practice of using pre-trial detention as a leverage to induce defendants to waive their right to a trial. This trend raises considerable concerns in terms of the right to a fair trial.[459] Attention should therefore be paid to the risk that an insufficiently

[452] Sellier, E. and Weyembergh, A. (eds.) (n 123) 332.

[453] *Ibid*. As a notable example, various alternatives provided under French law, such as a prohibition to drive a vehicle and not to engage in certain professional or social activities, or to undergo medical examination or even hospitalisation, *inter alia* with the aim of detoxification, are not provided under the Spanish criminal code. Conversely, Spanish law foresees alternatives to detention that do not feature under the French criminal code of procedure, such as expulsion of aliens and the possibility to serve preventive detention in a detoxification centre.

[454] See Fair Trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU' (n 194) para. 77.

[455] Marcelo F. A., and Y.Z., Hashimoto, Council of Europe Annual Penal Statistics, SPACE II - 2021, Persons under the supervision of probation agencies, PC-CP (2021) 12.

[456] Fair Trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU' (n 194) para. 77.

[457] Nord-Wagner, M., 'La détention provisoire: un équilibre renforcé?', *AJ Pénal* (2007) 113. Also see Fair Trials International, 'Pre-trial detention in France', Communiqué issued after the meeting of the local expert group (13 June 2013), < https://www.fairtrials.org/app/uploads/2022/01/Fair_Trials_International_France_PTD_Communique%CC%81_EN.pdf> (consulted on 15 February 2023).

[458] Sellier, E. and Weyembergh, A. (eds.) (n 123).

[459] A recent report from Fair Trials has shown, more generally, that the increased reliance on trial waiver systems to resolve criminal cases is undermining the right to a fair trial across Europe. See Fair Trials, 'Efficiency over justice: Insights into trial

supervised use of pre-trial detention may lead to malpractices. In some other countries like Poland, legislation is found to be formulated in a way that discourages the creative use of alternatives to detention.[460] **Beyond the legal limits that may explain the under-use of alternatives to pre-trial detention, a series of other obstacles have been identified, including, among others, practical challenges (e.g. in some States, the defendant must bear the cost of the electronic monitoring and such device is not always available).**[461] **The lack of faith of judicial actors in alternatives is also identified among the factors explaining the insufficient consideration of alternative measures, which in turn results in a lack of substantiated motivation for the need to resort to pre-trial detention as a measure of last resort.**[462]

While the excessive use of pre-trial detention (to the detriment of alternative measures) is a worrying trend corroborated by several empirical research,[463] it is worth noting the divergent practices between Member States, some of which have been identified as good practice. **Some comparative studies indeed reveal how differences in legal cultures between States (i.e. common law v. civil law) significantly influence the perception and use of pre-trial detention.** According to the findings of the FRA, in England and Wales, every defendant has prima facie a right to bail, which must be granted unless statutory grounds for withholding it are satisfied.[464] In Ireland, bail, rather than detention, is reported to be the 'default position' in pre-trial criminal investigations.[465] **The role of legal culture has thus been identified by some scholars as a 'protective factor against high rates of pre-trial detention'.**[466] Taking the emblematic case of Ireland as an example of good practice, Rogan argues that some unique features of the Irish criminal justice system, including an active role for defence lawyers and a shared set of understandings between prosecution and defense practitioners, helps keep pre-trial detention rates low. In her view, more attention needs to be given to the role of legal culture in efforts both to understand and tackle high rates of pre-trial detention.[467] In contrast, in Member States with a civil law tradition, pre-trial detention is perceived as a measure of first resort rather than the exception.[468] In some of these countries, the prosecutors have been found to play a leading role in the decision to use pre-trial detention and it turns out that judges often comply with their request.[469]

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waiver systems in Europe' (December 2021), < https://www.fairtrials.org/articles/publications/efficiency-over-justice/> (consulted on 15 February 2023)

[460] Fair Trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU' (n 194) para. 78.

[461] *Ibid*. para. 80.

[462] *Ibid*. paras 81-83.

[463] *Ibid*. Also see Kamber, K., 'Overuse of pre-trial detention and overcrowding in European prisons' (10 October 2019), <https://biblio.ugent.be/publication/8650694 > (consulted on 15 February 2023)

[464] European Union Agency for Fundamental Rights (FRA), 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (n 65) 64. It is further reported that bail is granted in approximately two-thirds of initial pre-trial hearings, which includes serious offences, although it was found that bail conditions were breached in 40% of cases reviewed.

[465] *Ibid*.

[466] Rogan, M., 'Examining the Role of Legal Culture as a Protective Factor Against High Rates of Pre-trial Detention: the Case of Ireland', *European Journal on Criminal Policy and Research* (2022) 425-433.

[467] *Ibid*.

[468] European Union Agency for Fundamental Rights (FRA), 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (n 65) 64.

[469] *Ibid*.

To effectively reduce the use of pre-trial detention or unconditional bail in these countries, it is therefore considered crucial to convince prosecutors to request alternatives.[470]

4.1.2. Main discrepancies and obstacles to the use of alternatives to post-trial detention

As with alternatives to pre-trial detention, there is a wide variety of non-custodial sanctions and measures applying at post-trial stage across the EU. This fragmented picture has been exemplified by a recent large-scale comparative study carried out in 22 Member States as part of an ongoing project promoting non-discriminatory alternatives to imprisonment across Europe funded by the European Union (JUST-JCOO-AG-2020).[471] It shows that **a wide range of non-custodial sanctions are available in the EU Member States, including fines, suspended sentences, community service, electronic monitoring or probation, although these are applied and monitored differently from country to country**. While these measures exist in most States, albeit under a different classification, significant variations are reported in the way these non-custodial sanctions can be imposed in the Member States covered (e.g. as reference or main sanctions, as replacement sanctions, as part of a sentence of probation or even as a form of implementation of the sentence). Other notable discrepancies include, among others, the modalities of application of non-custodial measures or the legal requirements for their imposition (which are generally based on the length of the main sentence of imprisonment legally applicable or concretely imposed or on the category of offence).[472] In connection with this latter element, the maximum period of imprisonment that allows replacement of the main sentence by a non-custodial sentence differs considerably among Member States, ranging from 8 months (Finland) to 20 years (Belgium).[473] There is also a wide variety of conditions imposed on probation sentences, in the same way as the eligibility criteria for non-custodial measures differ significantly from country to country.

With regard to the practical and effective application of non-custodial sanctions and measures, the study finds, as a general trend, that **non-custodial sanctions are much more widely used than (unconditional) imprisonment, with the exception of Bulgaria**. The data collected from the surveyed countries **also reveals that among the non-custodial sentences available at EU level, suspended sentences and fines are the most frequently applied. In some cases, the under-use of alternative measures can be explained by the legal conditions governing their use.** For instance, probation and community service, are reported as being more frequently used in jurisdictions where it is provided for as a main/reference sanction.[474] In Italy, the very marginal role played by community

[470] *Ibid*, 64-66.

[471] Rodrigues, A.-M, and al., 'Non-custodial sanctions and measures in the Member States of the European Union. Comparative report', Institute for legal research of the University of Coimbra (November 2022). The creation of this project was guided by the abovementioned Council conclusions on alternative measures to detention and aims to contribute to the knowledge on and the promotion of the use of alternative sentences within the EU. The results of this study focus only on non-custodial criminal sanctions (i.e. alternative sanctions imposed post-trial stage) and are based on national reports provided by experts from the Member States covered.

[472] *Ibid*. Also see European Union Agency for Fundamental Rights (FRA), 'Criminal detention and alternatives: fundamental rights aspects in EU cross-border transfers' (n 65) 67 ff.

[473] Rodrigues, A.-M, and al., (n 471) 5.

[474] *Ibid*. 51- 52.

service is partially explained by the fact that its application is subject to the request of the person sentenced who may prefer other penalties.[475] **In some other countries, the under-use of relatively new alternative measures, namely electronic monitoring, is attributed to material and logistical obstacles similar to those identified as limiting its use as an alternative to pre-trial detention**.[476] This is particularly the case in Belgium, where the relatively high cost of technological equipment and the equally high need for supervision associated to electronic monitoring is identified as a factor hindering its use. Similar difficulties have been noted in Italy where the lack of monitoring equipment appeared as one of the main barriers to the wider application of home detention with electronic monitoring, aimed at reducing the prison population during the Covid-19 pandemic.[477] Empirical data also show significant variations in the use of conditional release among EU Member States, which is less commonly applied in some countries for various reasons. These reasons include, *inter alia*, a decrease in application for early release or imposition of stricter rules for granting release on parole.[478]

This large-scale study on 'Non-custodial sanctions and measures in the Member States of the European Union' provides an enlightening view of the various practices that coexist at EU level with regard to non-custodial sanctions, and, therefore greatly contribute to improving knowledge in an area which is still under explored. Attention is nevertheless drawn to the limitations of such comparative work – an element that is also emphasised in most empirical research dealing with these issues. **The lack of data available on the criminal justice system in general or specifically on non-custodial sanctions and measures is indeed reported to be an important obstacle to assessing their effective use in practice**.[479] In addition to the lack of publicly available data on the use of alternative sanctions, statistical reports point out to the varying methods through which data are collected which do not allow for truly reliable comparisons between States.[480] As a number of studies have shown, it is equally important to use rigorous comparative methods in order to avoid producing an overly simplified typology of certain national penal models.[481] The lack of available and standardised statistical data on non-custodial sanctions is prejudicial not only for providing an accurate view of the situation at EU level, but also for developing penal policies based on accurate, objective and up-to-date data attesting the actual use and effectiveness of alternative measures.

While generally deemed to be more effective in attaining the purpose of social reintegration of the person concerned, in practice far more doubts arise as to the actual aptness of non-custodial sanctions to lowering recidivism rates and reducing the use of imprisonment.[482] **Several empirical studies indeed reveal that there is not necessarily a correlation between the growing use of alternative measures and the reduction in the number of prisoners**.[483] One reason for this is that the precise

[475] *Ibid*. 53.

[476] See Sub-section 4.1.1. 'Main discrepancies and obstacles to the use of alternatives to pre-trial detention'.

[477] Rodrigues, A.-M, and al., (n 471) 54.

[478] *Ibid*. 57-58.

[479] *Ibid*. 58-59.

[480] See Marcelo F. A., and Y.Z., Hashimoto, Council of Europe Annual Penal Statistics, SPACE II - 2021, Persons under the supervision of probation agencies (n 455) 5.

[481] Crewe, B., and al., 'Nordic penal exceptionalism: A comparative, empirical analysis', *The British Journal of Criminology* (2022) 1-19.

[482] Rodrigues, A.-M, and al., (n 471) 69 ff.

[483] European Prison Observatory, 'Alternatives to imprisonment in Europe: A handbook of good practices' (2016) 18.

relationship between the use of alternatives and prisoner number is complex and the many factors at play are hard to disentangle. Sometimes the lack of reliable and sufficient data simply does not allow such a correlation to be supported. Conversely, the statistical and qualitative data available point to the fact that **the increasing use of alternative measures is rarely accompanied by a corresponding fall in the number of prisoners and can even have the opposite effect**.[484] The so-called 'net widening effect' (corresponding to the risk of extending social control over individuals as a result of the expansion of alternative measures) has been identified as one of the causes of this negative trend. The electronic bracelet is one of the alternative measures widely regarded by practitioners as having the effect in practice of widening the criminal net (by expanding the number of people subject to penal supervision) rather than reducing the use of incarceration. Other penal trends characterised by the introduction of new criminal offences, the extension of the length of certain prison sentences, or the implementation of a zero-tolerance policy towards breaches to comply with community sanctions or suspended sentences are also identified as generating an increase in the number of prisoners in some States, despite the wide use of alternative sanctions.[485]

The legislative reforms initiated in some Member States nevertheless point to positive developments. As an example, the French penal system has recently undergone a major reform to restrict the use of very short-term sentences, while promoting alternative sentences for prison terms less than 6 months or 1 year as well as *ab initio* sentence adjustments.[486] The changes introduced by this legislation are aimed at combating prison overcrowding as a secondary objective and are widely perceived as introducing a positive paradigm shift. This was recently acknowledged by the French commission of inquiry into the dysfunctions of the French prison policy which nevertheless notes that the effects of this reform are still insufficiently visible and effective.[487] This can be explained by the time needed for judicial practitioners to get acquainted with these new measures, but also by the resulting increased complexity in the penal sanction system and by the persistence of legislative trends that go in the opposite direction of the desired changes (e.g. creation of new criminal offences and trend towards an increase in correctional sentences of imprisonment and their duration).[488]Thus, while it is still too early to assess the long-term effects of this reform, ensuring the overall coherence of penal policy appears essential in order to avoid counterproductive results.

The above considerations seem to indicate that, although an essential lever for reducing the use of imprisonment, alternative measures are not sufficient on their own to tackle the problem of poor conditions of detention (due in particular to the problem of prison overcrowding). In order to produce effective results, alternative measures must be accompanied by coherent penal policies, taking into consideration all the relevant criminal law measures that have an impact on the flow of imprisonment. Although criminal sanctions are the primary responsibility of Member States, it is equally important that the EU ensure the coherence of its own policies as these have a direct impact on national criminal law measures. Despite a discourse in favour of the development

[484] *Ibid*.

[485] *Ibid*. 18-19.

[486] Loi n°2019-222 du 23 mars 2019 de programmation 2018-2022 et de réforme pour la justice, JORF n°0071 of 24 March 2019.

[487] See Rapport n°4906 fait au nom de la Commission d'enquête visant à identifier les dysfonctionnements et manquements de la politique pénitentiaire française (12 January 2022) 209-217.

[488] *Ibid*. 215-217.

of alternative sentences, including for certain types of crimes considered among the most serious,[489] the harmonisation of criminal legislation at EU level shows that the custodial sentences remain the reference sanction in many cases.

After examining the main features of alternatives to detention hampering their use in purely domestic situations, as well as some possible good practices, the use of such measures in cross-border cases will be briefly addressed hereunder.

4.2. The underuse of alternatives to custodial measures in cross-border cases

4.2.1. State of play

It is commonly recognised that foreign suspects, accused and convicted persons frequently suffer from significant underuse of alternative measures, mostly when they are not even residents of the trial Member State. As a consequence, **the overuse of custodial measures and sanctions frequently leads to proceedings under the EAW mechanism**, seeking the individual concerned who has returned to his or her Member State of nationality and/or residence before being handed down a pre-trial detention order or a prison sentence.

The problem at hand is particularly notorious with regard to the pre-trial phase. Indeed, it is common ground amongst scholars that **the *over*use of remand in custody pending trial is accompanied by a *discriminatory* use thereof**: indeed, foreigners tend to be remanded in custody also in circumstances where a national would be subject to less restrictive precautionary measures.[490] Such two-tier approach stems, in essence, from the **generalised perception of foreigners, mostly if not steadily resident, as being *per se* more likely to flee justice**.[491] It is important to note that **such practice is in blatant contrast with the relevant European standards**. Indeed, first, the Committee of Ministers of the Council of Europe recommends that "[t]he fact that the person concerned is not a national of, or has no other links with, the state where the offence is supposed to have been committed shall not in itself be sufficient to conclude that there is a risk of flight".[492] Most importantly, in the EU legal framework the same principle has been reiterated by the recent Commission Recommendation.[493]

As regards sentencing practices, a recent study carried out in the Netherlands has demonstrated that having been detained pre- or pending trial significantly increases the likelihood of being handed down

[489] Council conclusions on enhancing the criminal justice response to radicalisation leading to terrorism and violent extremism, Document 14419/15 (n 80).

[490] *Inter alia*: Jurka, R. and Zentelyte, I., 'European supervision order is it the ballast for law enforcement or the way out of the deadlock', *Journal of Eastern-European Criminal Law*, Vol. 1 (2017) 33; Montaldo, S., 'Special Focus on Pre-trial Detention and Its Alternatives Under EU Law: An Introduction'. *European Papers*, (2020) Vol. 5(3), 1574.

[491] *Inter alia*: Faraldo Cabana, P., 'Protecting Victims' Rights Through the European Supervision Order?', *European Papers*, (2020) Vol. 5(3), 1452.

[492] Recommendation Rec(2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (n 289), rule 9[2].

[493] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) para. 20.

a prison sentence instead of a non-custodial one.[494] The survey was conducted by combining both quantitative data and interviews with practitioners. The Authors' conclusion is that, along with other factors, the discriminatory practices concerning remand in custody contribute to the **higher rate of foreigners receiving a prison sentence, as compared to the nationals of the trial State**.[495]

It is important to consider that, both in the pre- and in the post-trial phase, **foreign prisoners suffer, as such, from harsher conditions** than national ones. Indeed, not only are they eradicated from their family and community, which are probably in the inmate's own State, but they may face linguistic barriers (unless they are foreigners who have nonetheless been living for a certain amount of time in the trial State). [496]

Moreover, in the EU-law perspective, the excessive recourse to detention described above is particularly problematic, as the foreign suspect, accused or convict may be an *EU citizen* who does not ordinarily reside in the trial Member State and is not a national thereof. Thus, **the higher probability of being imprisoned when facing a trial in another Member State represents an obstacle to the exercise of the freedom of movement guaranteed by Article 21 TFEU**.[497]

Against this backdrop, it is important to consider that **the EU legal order provides competent authorities with a broad array of instruments, based on the principle of mutual recognition** and deriving from the Mutual Recognition Programme of 2001.[498] Many of them are – ***lato* or *stricto sensu* - alternative and complementary to the EAW, and less intrusive for the individual concerned**. As a consequence, **a more frequent recourse to such different measures, in lieu of the EAW, would allow for an effective fight to cross-border crime without unnecessary deprivation of liberty of the individuals involved**.

This latter approach is promoted by the European Commission, albeit by means of a soft-law instrument. Indeed, **the 2017 Handbook on the issuance of EAWs**[499] **encourages all competent authorities to avail themselves of alternative, less restrictive measures wherever possible**.[500]

To this purpose, the Commission recalls at the outset the importance of carefully assessing the proportionality of initiating EAW surrender proceedings in each case.[501] Indeed, the EAW Framework decision sets two penalty thresholds under which an EAW cannot be issued: the offence concerned shall be "punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or

[494] Wermink, H., Light, M.T. and Krubnik, A. P., 'Pretrial Detention and Incarceration Decisions for Foreign Nationals: a Mixed-Methods Approach'. *European Journal on Criminal Policy and Research*, (2022) Vol. 28, 373-375.

[495] *Ibid.*

[496] The shortcomings affecting the right to translation and interpretation have been addressed *supra* in Section 3.2. 'the lack of EU (binding) standards?'

[497] Generally speaking, criminal procedural rules that, *de iure* or *de facto*, put foreigners at a disadvantage are generally perceived as hampering the exercise of free movement rights: Öberg, J., 'Subsidiarity and EU Procedural Criminal Law', *European Criminal Law Review*, (2015) Vol. 5(1), 29-31.

[498] Council of the European Union, 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters', OJ C 12/10, 15 January 2001.

[499] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207).

[500] *Ibid*., para. 2.4.

[501] *Ibid.*

a detention order has been made, [the sentence or order shall be] of at least four months".[502] Nonetheless, besides such a general and abstract requirement, **the Framework Decision does not impose any further evaluation of the actual proportionality of each EAW, in light of the circumstances of each concrete case**. **Such lack of a mandatory proportionality test in the Framework Decision, along with the absence thereof in national judicial practice, is recognised among the causes for the excessive use of the EAW to the detriment of alternative instruments**.[503]

To provide concrete examples of **disproportion**, the latter **may refer to the petty nature of the offence**, such as when EAWs were issued *vis à vis* the theft of a Christmas tree,[504] in minor drunk-driving cases,[505] or for the theft of shrubs and mobiles whose overall value was four-hundred euros.[506] In a more procedural sense, the **non-trial readiness of the case is seen as a form of disproportion** in common-law legal orders, as well. This is, in the EU, the case of Ireland, where the Supreme Court has repeatedly considered that surrender should be refused if it merely aims at carrying out investigations and no decision on prosecution has been taken (yet) in the issuing Member State.[507]

In this framework, the Commission suggests evaluating the proportionality of each EAW by taking account of the other various options offered by the EU legal order. In this sense, the Commission recalls the possibility of: seeking the voluntary participation of the person to the trial; using the European Investigation Order to collect evidence abroad or interview the suspect;[508] imposing non-custodial pre-trial measures and having them supervised in the suspect's Member State of lawful and ordinary residence;[509] issuing a financial penalty and having that sanction enforced abroad, instead of opting for detention on mere grounds of non-nationality or non-residence;[510] having probation measures or alternative sanctions supervised in the residence Member State of the offender.[511]

Nonetheless, in spite of the Commission's solicitation, a generalised underuse of such alternatives to the EAW is widely reported, by both scholars and practitioners.

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[502] Article 2(1), EAW Framework Decision.

[503] Fair Trials, 'Blog: Why are alternatives to the European Arrest Warrant not being used?' < https://www.fairtrials.org/articles/news/blog-why-are-alternatives-european-arrest-warrant-not-being-used/ > 39-45.

[504] *Ibid*., 39.

[505] *Ibid*.

[506] Ryan, A., 'The Interplay Between the European Supervision Order and the European Arrest Warrant', *European Papers*, (2020) Vol. 5(3), 1538.

[507] In this respect, see Weyembergh, A., Armada, I. and Brière, C., (n 119) 39.

[508] 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 130/1, 1 May 2014.

[509] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, OJ L 294/20, 11 November 2009.

[510] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76/16, 22 March 2005.

[511] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337/102, 16 December 2008.

Against this backdrop, the **present Section** aims at **briefly illustrating the aforementioned instruments**. For the sake of clarity, the aforementioned alternatives to the EAW will be divided into two categories: those that would lead the suspect, accused or convict completely free, and those that still entail some restriction to their liberty (but not a complete deprivation). In both cases, **the available instruments will be briefly described, and then the main causes for their underuse will be briefly illustrated by referring to relevant scholarship and empirical studies**.

4.2.2. Options that do not entail any restriction on the liberty of the person concerned

While foreigners are generally detained both pre- or pending trial and after conviction, in both phases the EU legal order would provide for options which do not impinge on personal liberty but may be - subject to a case-by-case evaluation – equally effective in ensuring the due course of justice (pre- and pending trial) and the social reintegration of the offender (after conviction).

Starting from the **pre-trial phase**, it is important to consider that one of the main corollaries of the right to liberty and the presumption of innocence is that **the suspect or accused shall wait for the trial in unconditional liberty wherever possible**.[512] This rule is also indirectly reflected in the recent Commission Recommendation, according to which decisions imposing alternative measures, and not only those remanding the person in custody, shall be "duly reasoned and justified".[513] As a consequence, options that leave the person concerned completely free should be, where possible, preferred not only to pre-trial detention (enforced through the EAW), but also to the imposition and supervision abroad of non-custodial precautionary measures under the ESO mechanism.[514]

In this respect, **two main alternatives are available**.

The former would consist of **merely contacting the suspect or accused in order to seek his or her voluntary participation to the criminal proceedings**. Clearly enough, an operational problem may arise **if the person's location is unknown** to the competent authority. The reference here is not to cases where there are reasons to believe that the person has absconded on purpose, but to circumstances in which the person's address is unknown simply because he or she ordinarily resides out of the trial State. In such cases, the competent authority may be tempted to have the person searched by an EAW, issued in the form of an alert entered in the Schengen Information System (SIS alert),[515] under Article 9(2)-(3), EAW Framework Decision. Still, this practice entails that when the person is found he or she risks being detained at least until surrender, for the mere reason that his or her

[512] Ruggeri, S., 'Personal Liberty in Europe. A comparative analysis of pre-trial precautionary measures in criminal proceedings', S. Ruggeri (ed.), *Liberty and security in Europe: a comparative analysis of pre-trial precautionary measures in criminal proceedings*, (Universitätsverlag, Osnabrück, 2012) 210; Fair Trials, 'Blog: Why are alternatives to the European Arrest Warrant not being used?' (n 503).

[513] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) para. 22.

[514] The latter will be described *infra*, 4.2.3.

[515] A brief overview of the SIS is available at < https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-information-system_en >. See the Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, OJ L 312/56, 7 December 2018 (SIS Regulation).

address was unknown.[516] Conversely, **the Commission recommends** using a different, less intrusive type of **SIS alert**,[517] namely the one **for "persons summoned or persons sought to be summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted"**.[518]By such means, the person can be located and then summoned for questioning, other evidence-gathering acts for which his or her presence is required, or to stand trial.

In the same circumstances, another option would be having **evidence gathered in the Member State where the suspect or accused currently is**, without even needing him or her to temporarily move to the trial State.[519] Such a system of mutual recognition of evidence is established by **Directive 2014/41/EU on the European Investigation Order (EIO Directive)**.[520] In its core features, the EIO is designed as any other EU mutual recognition instrument. The competent authority in the issuing Member State duly fills in a standard form, i.e. the one set out in Annex A to the Directive,[521] and forwards it to the competent authority in the executing Member State. Unless one of the exhaustively listed grounds for refusal applies, the executing authority is under an obligation to recognise the EIO without any additional formality (within 30 days after receipt), and to execute the requested investigative measure "as if [it] had been ordered by an authority of the executing State" (at most 90 days after the decision to recognise).[522] To ensure admissibility of the evidence in the trial State, the executing authority shall as a rule "comply with the formalities and procedures expressly indicated by the issuing authority".[523] Concerning its scope, the EIO applies in principle to any investigative measure. A number of them shall be made available in the executing Member State's legislation, such as the collection of information which is already in the possession of the executing authority or of other judicial or police authorities in the executing Member State, the questioning of suspects, accused persons, victims, experts and witnesses.[524] As for other measures, should they not exist in the executing State's law or not be available in similar cases, an alternative measure shall be guaranteed wherever possible.[525]

Against this backdrop, **the European Commission particularly suggests having recourse to the EIO in two cases**. First, **the issuing authority may question the suspect or accused via videoconference**

[516] Article 12, EAW Framework Decision.

[517] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), para. 2.5.

[518] Article 34(1)(b), SIS Regulation.

[519] In this sense, Sellier, E. and Weyembergh, A., (n 123) 322.

[520] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (n 508).

[521] Articles 5 and 6, EIO Directive.

[522] Article 9(1), EIO Directive.

[523] Article 9(2), EIO Directive.

[524] Article 10(2), EIO Directive.

[525] Article 10(1), EIO Directive.

or other similar means.[526] **Alternatively**, it can have the **person questioned by the executing authority, which will then provide the issuing one with a written transcript** of the hearing.[527]

Clearly enough, such options are not completely flawless. With particular regard to video-questioning, it might render the defendant's participation less effective, as both the person and his or her counsel are not fully aware of the events in the courtroom and are less able to perceive the behaviour and feelings of the other persons involved.[528] In this sense, **when the main trial hearing is at stake, participating remotely might turn out detrimental to the accused**.[529]

Although bearing this *caveat* in mind, the recourse to EIO remains **a viable alternative to the EAW in the investigation phase**. In particular, **some judicial authorities would seek the suspect and then remand him or her in custody merely in order to secure his or her future availability as a source of information**.[530] **In this sense, the EIO provides them with an alternative system**, facilitating the collection of information when the individual concerned is abroad.

As far as final sentences are concerned, the European Commission's Handbook encourages competent authorties to have wider recourse to the **mutual recognition of financial penalties, as provided in Framework Decision 2005/214/JHA**.[531] In a nutshell, this instrument allows the authority issuing a final decision which imposes a financial penalty on a natural (or even legal) person to seek the enforcement of that penalty abroad. In particular, that authority may forward the decision and the form set out in the Framework Decision's Annex to the competent authority in another Member State, namely the one where the person "has property or income [or] is normally resident".[532] As a rule, the executing authority shall recognise and execute the foreign sentence forthwith,[533] thereby enforcing the penalty according to the executing Member State's rules and procedures.[534]

In some Member States, where a convict does not pay for the sanction and does not have resources available in that State to execute the sentence coercively, **the financial penalty is converted into a prison sentence**. If the sentenced person is located abroad, the following step is issuing an EAW to seek his or her surrender. In such cases, **the Commission recommends trying to seek the enforcement of the financial penalty abroad prior to converting the sentence and issuing the EAW**.[535]

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[526] Article 24, EIO Directive; see also Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), Example 1 in para. 2.5.1.

[527] Article 13(1), EIO Directive; see also Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), Example 2 in para. 2.5.1.

[528] Sellier, E. and Weyembergh, A. (eds.) (n 123) 22.

[529] *Ibid.*

[530] This is quite a common practice in continental EU Member States: Ryan, A., (n 506) 1541. See also what a practitioner reported in Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and Framework Decision 947/2008* (2019) (retrievable at https://www.ejn-crimjust.europa.eu/ejn/NewsDetail/EN/661) 7.

[531] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (n 510).

[532] Article 4(1), Framework Decision 2005/214/JHA.

[533] Article 6, Framework Decision 2005/214/JHA.

[534] Article 9(1), Framework Decision 2005/214/JHA.

[535] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), para. 2.5.5.

In broader terms, **some judges tend to prefer prison sentences to financial ones *vis à vis* non residents, simply on grounds that such persons do not reside in the trial State**.[536] In such cases the person will be sought by issuing an EAW in order to enforce the sentence. In this sense, **the Framework Decision on mutual recognition of financial penalties would offer an alternative option** which is less intrusive for the convicted person and avoids the initiation of EAW proceedings which entail a burden on the competent authorities as well.

4.2.3. Options that entail some restrictions on the liberty of the person concerned: the mutual recognition of pre- and post-trial non-custodial measures and sanctions

The instruments outlined above do not apply to all cases. Indeed, **in the pre-trial phase** a *periculum libertatis* may exist, so that imposing **a precautionary measure may be necessary**. **As regards the final sentence**, the imposition of **a financial penalty may not be available for the offence concerned, or it may not be deemed effective in the specific case**. Nonetheless, remanding the person in custody or handing down a prison sentence may not be necessary, mostly if it entails triggering the EAW mechanism to seek the person abroad. In this sense, **Framework Decisions 2009/829/JHA (ESO Framework Decision)**[537] **and 2008/947/JHA (PAS Framework Decision)**[538] **allow the authorities to impose alternative pre- or post-trial measures and to seek their supervision in the Member State where – as a rule - the individual concerned has his or her lawful and ordinary residence**.[539] In the ESO framework, the express consent of the person is always necessary,[540] while in the PAS Framework Decision the consent is required in the sense of the person's having retuned or being willing to return to his or her Member State.[541] In addition both Framework Decisions also allow the transfer of the measures to a different Member State, upon the suspect's or convict's request and provided that the host Member State's authorities consent to the transfer.[542]

Clearly enough, **the underlying rationale of both Framework Decisions is the resocialisation of the individual concened**. More precisely, serving a probation measure or alternative sanction in the Member State where the person has its own familiar and professional environment is "a means to maximise his or her opportunities for a fruitful reinsertion into society after the sentence has been served".[543] In the pre-trial phase, it has been observed that the concept of rehabilitation may be in

[536] Wermink, H., Light, M. T. and Krubnik, A. P., (n 494) 374.

[537] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (n 509).

[538] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (n 511).

[539] Article 9, ESO Framework Decision and Article 5, PAS Framework Decision.

[540] Article 9(1), ESO Framework Decision.

[541] Article 5(1), PAS Framework Decision.

[542] Article 9(2)-(4), ESO Framework Decision and Article 5(2)-(4), PAS Framework Decision.

[543] Montaldo, S., 'Intersections among EU judicial cooperation instruments and the quest for an advanced and consistent European judicial space: The case of the transfer and surrender of convicts in the EU', *New Journal of European Criminal Law*, (2022) Vol. 13(3), 258. See also Recital 8 and Article 1, PAS Framework Decision.

contrast with the presumption of innocence, so that the aim of the ESO Framework Decision would be to avoid the de-socialisaton of the suspect or accused.[544]

As already mentioned, **the European Commission mentioned the two instruments at hand amongst the possible alternatives to resorting to the EAW**.[545]

For the sake of clarity, **it may be useful to mention the two examples provided in the Commission's EAW Handbook**.

Concerning the ESO, it may apply in cases such as the following: "[the suspect] lives and works in Member State B. [He or she] is temporarily staying in Member State A where [he or she] is being investigated for fraud. The judicial authority in A knows where [he or she] resides in B and considers that the risk of absconding trial is low. Instead of holding [that suspect] in pre-trial detention in A, the judicial authority in A can issue an order obliging [him or her] to report regularly to the police authority in B. In order to allow [the person] to return and stay in B until the trial takes place in A, the competent authority in A can, with [his or her] consent, issue a ESO to have the obligation to report recognised and enforced in B".[546]

As for the PAS Framework Decision, it can be used in circumstances such as: "[a person] is a national of Member State A, but is on holiday in Member State B. [He or she] is convicted of an offence in B and sentenced to carry out community service instead of a custodial sentence. [The convicted person] can return to A, whereupon the authorities in A are obliged to recognise the community service order and supervise [his or her] completion of it".[547]

Once a non-custodial pre-trial measure or final sanction has already been chosen, the issuance of an EAW would no longer be an option. Still, the ESO and PAS Framework Decisions can be considered alternative to the EAW Framework Decision in the sense that, where the person has no ties with the trial Member State and is not even present in that State, the only alternative to leaving them unconditionally free would be to impose a custodial precautionary measure.[548] Similarly, after the final conviction, where the person has no particular links with the Member State sentencing him or her, the authority may feel probation measures or alternative are *de facto* unavailable. In bith case, a custodial measure would be followed by an EAW seeking the surrender of the person. Therefore, the existence of these two Framework Decisions should *a priori* avoid the unnecessary imposition of pre-trial detention or prison penalties, which then result in the issuance of an EAW.

Nonetheless, both Framework Decisions have suffered from a steady lack of attention first by national legislatures and, once transposed, by the competent national authorities.

As can be inferred from the information collected by the Secrateriat of the Council concerning the implementation of the two instruments under analysis, only four Member States implemented the ESO

[544] Neira-Pena, A. M., ' The Reasons Behind the Failure of the European Supervision Order: the Defeat of Liberty *Versus* Security', *European Papers*, (2020) Vol. 5(3), 1497.

[545] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), paras 2.5.3. and 2.5.4.

[546] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), para. 2.5.3.

[547] Commission Notice, 'Handbook on how to issue and execute a European arrest warrant' (n 207), para. 2.5.4.

[548] Recital 3, ESO Framework Decision.

Framework Decision on time.[549] Regarding the PAS Framework Decision, information on some Member States is missing, but at least twenty-one of them surely transposed it after the deadline prescribed.[550]

Furthermore, the underuse of the (national provisions implementing the) two Framework Decisions at hand by national judicial authorities is widely reported. By way of example, at the beginning of 2019, the PAS Framework Decision (who should have been transposed in national laws by 6 December 2011) had been applied thirty-one times by Italian authorities, fourteen times by Romanian ones and even fewer times in Spain.[551] Apparently, the instrument is more widely used in the Netherlands, where sixty-two requests had been received 270 issued as of 2017.[552] The ESO seemingly receives even less attention. According to some statistics, up to 2019 Spain had issued fifteen ESOs and received five, while Italy had opened nine ESO proceedings (but the available data do not draw a distinction between issued and received ones), Romania counted three ESOs issued and eleven received[553] and Dutch authorities had issued eighteen ESOs and received sixteen.[554]

Overall, these data arguably reflect the tendency to a higher use of alternatives in the post-trial phase as compared to the pre-trial one, as was highlighted above in respect of purely domestic cases.

In this context, **the root causes for such widespread underuse have been investigated both in theoretical terms and through empirical on-field research**, and will be briefly summarised hereunder.

To a certain extent, **some reasons are to be found in the very structure of the Framework Decisions**. Indeed, both contain a number of optional clauses, leading to difference between the implementing laws on important aspects.[555]

A first example in this regard concerns the **scope of the two Framework Decisions in question**. Indeed, Article 8 ESO Framework Decision and Article 4 PAS Framework Decision oblige Member States to render certain measures available, so that their authorities shall recognise and supervise them (unless any of the grounds for refusal applies). Still, **both provisions also enshrine a list of purely optional measures**, and Member States had to notify the General Secretariat of the Council about which of them they would recognise. In the implementation of both Framework Decisions, only a great minority of national laws unconditionally allow for the execution of this latter category of measures, and some others recognise only a few of them.[556] Clearly enough, each time a Member State imposes

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[549] General Secretariat of the Council, 'Implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention' (17 June 2021).

[550] General Secretariat of the Council, 'Implementation of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions' (17 June 2021).

[551] Montaldo, S., 'The cross-border enforcement of probation measures and alternative sanctions in the EU: The poor application of Framework Decision 2008/947/JHA', < https://eulawenforcement.com/?p=7353 >

[552] Durnescu, I., 'Framework Decisions 2008/947 and 2009/829: State of Play and Challenges', *ERA Forum*, (2017) Vol. 18, 362.

[553] Neira-Pena, A. M., (n 544) 1498-1499.

[554] Durnescu, I., 'Framework Decisions 2008/947 and 2009/829: State of Play and Challenges', (n 552) 362.

[555] With particular regard to the PAS Framework Decision, see Montaldo, S., 'Intersections among EU judicial cooperation instruments and the quest for an advanced and consistent European judicial space: The case of the transfer and surrender of convicts in the EU', (n 543) 262.

[556] General Secretariat of the Council, implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on

one of such measures or penalties on a person who should be transferred to a Member State that will not recognise it, the relevant Framework Decision cannot apply. Moreover, it is important to note that neiher the ESO Framework Decision nor the PAS Framework Decision aim at harmonising alternatives to detention. Therefore, also **concerning compulsory measures, the the two instruments describe them in broad, indicative terms**. Hence, **it is reported that the actual functioning of each measure in the various national legislations may as well be so different as to *de facto* prevent or seriously obstacle mutual recognition**.[557]

The vagueness of the scope of the PAS Framework Decision has already been brought to the attention of the CJEU in case *A.P.*.[558] The case at hand concerned the request, by Latvian authorities to Estonian ones, to recognise and execute a judgment imposing a prison sentence suspended on the sole condition of the person's not committing any intentional offences.[559] Such an obligation is not a measure expressly listed in Article 4(1) PAS Framework Decision, and the Estonian implementation law does not allow for the recognition of mesures falling out of the scope of said Article 4(1). Therefore, this situation led the Estonian Supreme Court to query whether the national authorities were under an obligation to execute that suspended sentence.[560] The CJEU answered the question in the affirmative. Indeed, it noted at the outset that no obligation or instruction imposed on a natural person is in principle excluded from the scope of the Framework Decision, pursuant to its Article 2(7).[561] Furthermore, it considered that an obligation to refrain from further offences does in fact fall within the scope of Article 4(1), namely as an "instruction relating to behaviour" under (d) thereof, an interpretation which is also borne out by the context and aims of the provision.[562] Hence, **this judgment demonstrates the key role that the CJEU can – and should – play in better defining the precise scope of the Framework Decision and fostering the application of the instrument**. In this sense, **if the CJEU adopts a promotional approach, the breadth of the definitions laid down in the Framework Decision may even turn out to favour its application**. Clearly enough, the actual possibility for the CJEU to play such a role depends on whether the competent authorities will seize it by preliminary rulings, instead of directly refusing recognition where a mesure is not *prima facie* within the instrument's scope.

Another **common issue relates to the forwarding of the measures to a Member State other than the one where the person lawfully and ordinarily resides**. As already mentioned, **in such circumstances the consent of the State in question is required**. Also in this case, Article 9 ESO Framework Decision and Article 5 PAS Framework Decision provide that Member States may notify whether and under which conditions they would accept to supervise a non-custodial measure *vis à vis* a person who is not a resident in that State. In both cases, most Member States subordinate the consent

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supervision measures as an alternative to provisional detention (n 512); General Secretariat of the Council, implementation of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (n 550).

[557] Regarding the PAS Framework Decision, in this sense Montaldo, S., 'The cross-border enforcement of probation measures and alternative sanctions in the EU: The poor application of Framework Decision 2008/947/JHA' (n 551).

[558] Case C-2/19, *A.P.*, 26 March 2020, ECLI:EU:C:2020:237.

[559] *Ibid.*, para. 18.

[560] *Ibid.*, paras 21; 30.

[561] *Ibid.*, paras 36-37.

[562] *Ibid.*, paras 42-55.

to various conditions, mainly related to the presence of personal and economic ties to the State, and some do not even allow for transfer in such cases at all.[563]At least **with regard to the PAS Framework Decision, the need for such consent has been reported by practitioners as sometimes being an obstacle to the good functioning of the instrument**.[564]

While some optional clauses are similar in both Framework Decisions, both instruments have more specific ones. Also these latter can create risks or complexity which lead practitioners to opt for solutions which are perceived as safer.

A first example in this sense concerns the **ESO Framework Decision**, namely **Article 21(3)** thereof, **read in conjunction with Article 15(1)(h) and (3)**. In essence, Article 21(1) and (2) provide that, if a person is being supervised in a certain executing Member State and the issuing one hands down a decision remanding that person in detention, the individual concerned shall be surrendered pursuant to the EAW Framework Decision. This rule is particularly useful in the event of a breach of the non-custodial/supervision measures imposed. Indeed, in some legal orders such an infringement is followed by the remand in custody of the suspect. Under Article 18(1)(c) of the ESO Framework Decision, the issuance of the remand decision rests within the remit of the authorities in the issuing Member State, while the person concerned is in a different Member State (the one executing the ESO) and will have to be sought by an EAW. As a rule, in these circumstances an EAW can be issued regardless of the threshold set in Article 2(1) of the EAW Framework Decision, i.e. also if the alleged offence is punishable by a custodial sentence whose statutory maximum is lower than twelve months. Nonetheless, Article 21(3) allows Member States to notify that they will apply that threshold, and the majority of them availed themselves of this possibility.[565] Therefore, under Article 15(1)(h) and (3) of the ESO Framework Decision, when the authorities of such States receive an ESO request, they shall inform the issuing authority that they will not be able to surrender the person if he or she breaches the supervision measures. To avoid such risk, the latter authority may withdraw the ESO certificate if the ESO request refers to an alleged offence non fulfilling the penalty requirement. The same problem may arise for those Member States that have an *ad hoc* offence consisting of the breach of a supervision measure, if that offence does not fulfil the penalty threshold.[566] Therefore, **the option envisaged in Article 21(3) is deemed a significant deterrent to the use of the ESO, also in consideration of the fact that non-custodial measures are often issued *vis-à-vis* the least serious offences which may not meet the penalty requirement** of a statutory maximum of at least twelve months.[567]

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[563] General Secretariat of the Council, implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (n 549); General Secretariat of the Council, implementation of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (n 550).

[564] Fair Trials, 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (n 122) 58.

[565] General Secretariat of the Council, implementation of Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (n 549).

[566] In this sense, Ryan, A., (n 506) 1534-1536.

[567] Rafaraci, T. 'The application of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention', in Ruggeri, S. (ed.) *Liberty and Security in Europe: a comparative analysis of pre-trial precautionary measures in criminal proceedings* (Universitätsverlag, Osnabrück, 2012) 69.

As regards the **PAS Framework Decision**, an optional clause reported to represent a serious burden on competent authorities is that enshrined in **Article 14(3)**. Contrary to the ESO system, the PAS Framework Decision provides in Article 14(1) and (2) that, as a rule, all decisions subsequent to transfer shall rest with the competent authority in the executing State. Nonetheless, Article 14(3) allows Member States to notify that they will, as executing State, relinquish the competence to revoke the suspension of the sentence or the conditional release, and/or to impose a custodial sanction, in certain specified cases or category of cases. The majority of Member States decided to opt for such a possibility.[568] Therefore, in the event that the convict does not comply with the obligations attached to his or her probation measure or alternative sanction, the competence to take subsequent decisions will revert back to the issuing authority. **Scholars have pointed at the option under Article 14(3) PAS Framework Decision as a source of "remarkable burdens and […] procedural disincentives" to the use of the instrument**.[569] **This theoretical concern is borne out by what practitioners reported**, namely that difficulties transferring competence back in such cases are amongst the burdens and complexities characterising this Framework Decision's functioning.[570]

More broadly, a cause for the lack of application of the two Framework Decisions at hand lays in the fact that **both instruments lay down optional mutual recognition systems**. Indeed, neither these Framework Decisions nor other EU law instruments or provisions expressly oblige a pre-trial or sentencing judge to consider the transfer of the person under a non-cusotdial measure or sanction wherever possible, and to state reasons as to why it was deemed inappropriate in each concrete case. Thus, **such a purely optional nature does not properly tackle the generalised tendency to prefer detention over alternatives** (also in domestic cases).[571]

In this sense, **the recent Recommendation by the European Commission does not apparently seek to take a step forward**. Firstly, the Recommendation does not reproduce rule 2[2] of the CoE recommendation, whereby "[w]herever practicable, alternative measures shall be applied in the state where a suspected offender is normally resident if this is not the state in which the offence was allegedly committed"[572] (which is the idea underlying the ESO Framework Decision). Moreover, on one hand the Recommendation does specify that, in general, alternative measures to pre-trial detention shall be applied wherever possible.[573] Still, in so doing, the Commission did not recommend that when the suspect or accused is a non-resident the ESO system be specifically considered and deemed ineffective before remanding the person concerned in pre-trial detention. This is all the more striking considering that, in response to the Call for evidence issued in preparation for the Recommendation,

[568] General Secretariat of the Council, implementation of Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (n 550).

[569] Montaldo, S., 'Intersections among EU judicial cooperation instruments and the quest for an advanced and consistent European judicial space: The case of the transfer and surrender of convicts in the EU', (n 543) 263.

[570] Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and Framework Decision 947/2008*, (n 552) 11.

[571] With regard to the ESO, in this sense Min, B., 'The European Supervision Order for transfer of defendants: why hasn't it worked?' < https://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/ >

[572] Recommendation Rec(2006) 13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (n 289) rule 2[2].

[573] Commission recommendation of 8 december 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material conditions (n 8) para. 14.

the importance of reinforcing the ESO Framework Decision had been specifically emphasised. In particular, it had even been suggested that issuing an ESO should be mandatory – wherever applicable – for authorities of Member States facing serious prison overcrowding issues.[574] Hence, a recommendation at least expressly suggesting to take it into account could have been an appropriate starting point.

Therefore, the Recommendation seems to confirm that promoting the ESO is not a true priority for the Commission, as had already been noted by scholars.[575]

Some **further causes** are to be found, more generally, **in the intrinsic nature of this type of measures and sanctions**. In particular, **precautionary measures are characterised by a short duration and need to be continuously adapted** to the advancement of investigations. On the other hand, **probation and alternative sanctions shall follow the re-education progress** of the sentenced person.

In this respect, **the constant coordination and dialogue required by both Framework Decisions may dissuade** the competent authorities from using these two instruments **in order to avoid additional workload**.[576] **More broadly**,these two mutual recognition instruments are said to have set up (useful but still) **too complicated and time-consuming systems**.[577] Moreover, with particular regard to the PAS Framework Decision, practitioners reported **difficulties obtaining prompt and reliable information about the actual convict's resocialisation prospects, and lack of shared objective standards to assess the rehabilitation**.[578]

Against this background, some **broader, cultural factors also feature amongst the main causes for the underuse of alternative measures in cross-borde proceedings**.

In this respect, one of the problems is **the widespread unawareness of the ESO and PAS Framework Decisions'** – and also EIO Directive's - **functioning or even existence**. Such a *lacuna* is commonly highlighted by scholars, and concerns **not only judges and prosecutors, but also defence lawyers**.[579] This finding is demonstrated by on-field research. Indeed, practitioners generally admit their need for further training, possibly centered on the sharing of best practices or case-studies, and on the functioning of the relevant aspects and authorities of other Member States.[580] A recent report further

[574] European Prison Litigation Network, 'Policy Paper Addressed to the European Commission in the Context of a Call for Evidence "Pre-trial detention – EU recommendation on rights and conditions"' (April 2022) < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13173-Pre-trial-detention-EU-recommendation-on-rights-and-conditions/F3248272_en >

[575] Soo, A., (n 376) 337.

[576] With regard to the ESO, in this sense Neira-Pena, (n 544) 1505-1506.

[577] Fair Trials, 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (n 122) 57; Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and Framework Decision 947/2008*, (n 552) 7; 9.

[578] Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and FRamework Decision 947/2008*, (n 552) 10-12.

[579] See *inter alia* Quattrocolo, S., 'The European Supervision Order: the Need for a New Culture of Combating Impunity', in Marin, L. and Montaldo, S. (eds.), *The Fight Against Impunity in EU law*, (Hart Publishing, Oxford, 2020) 166-167; Durnescu, I., (n 552) 362; Neira-Pena, (n 544) 1505; Montaldo, S., 'The cross-border enforcement of probation measures and alternative sanctions in the EU: The poor application of Framework Decision 2008/947/JHA' (n 557).

[580] Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and Framework Decision 947/2008*, (n 552) 8; 12-13.

highlighted how such lack of knowledge is even more serious for defendants having to rely on state-funded lawyers, who may not even be specialised in criminal law (and *a fortiori* know almost nothing about EU criminal law and mutual recognition).[581]

Finally, **a more systemic problem is the lack of reciprocal trust between the competent authorities**. Indeed, the two instruments under analysis entail relinquishing control over a suspect or convict, and completely relying on a foreign authority to carry out its supervision tasks properly. Still, such particularly high degree of mutual trust does not exist (yet),[582] **also due to the scarce knowledge of each other's legal frameworks, operational practices and actual abilities**.[583] In that regard, some practitioners underlined that the (few) transfers occurred under either Framework Decision have taken place between authorities which, also for geographic reasons, are more used to cooperating with each other and who share their legal traditions.[584]

5. POLICY RECOMMENDATIONS

1. <u>Better protect the fundamental rights of detainees and develop long-term reforms to address the root causes of poor prison conditions</u>

Despite pressure from the ECtHR, but also alarming findings by European and national monitoring bodies, the long-standing problem of poor detention conditions persists and detainees continue to be exposed to multiple fundamental rights violations, in particular under Article 3 ECHR and Article 4 of the Charter.

As the CPT firmly states, building new prisons will not provide a lasting solution to the persistent problem of overcrowding.[585] In a similar way, some experts and NGOs have stressed the insufficiency of case-by-case assurances as a durable solution in the cross-border context.[586] **It is indeed crucially important to address the root causes of the problem of poor detention conditions through a comprehensive/holistic approach that takes into account all relevant criminal justice measures that have a decisive influence on the flow of incarceration and involves all relevant actors**. In order to make progress on this front and bring out innovative solutions, the EU could consider, in partnership with the CoE and the representatives of the Member States, encouraging long-term reflections on these issues. In this regard, an instrument that could foster structural reforms, in dialogue with the European institutions, is the yearly Commission's Rule of Law Report. [587] Indeed, several NGOs

[581] Fair Trials, 'Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?' (n 122) 49.

[582] *Ibid*., 37-39.

[583] *Ibid*.

[584] Durnescu, I., *PONT Project. Training Gap Analysis on Framework Decision 829/2009 and Framework Decision 947/2008*, (n 552) 12.

[585] CPT, 'Combating prison overcrowding', CPT/Inf(2022) 5- part, para. 104.

[586] Fair trials, 'A Measure of last resort? The practice of pre-trial detention decision making in the EU' (n 194).

[587] See for instance Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions. 2022 Rule of Law Report. The rule of law situation in the European Union, COM(2022) 500 final (2022).

have identified a nexus between the ineffectiveness of remedies in the field of detention and broader rule of law concerns, which deserves closer attention.[588]

Because the closed environment of detention is often shielded from the public eye and the detainee finds himself in a particularly vulnerable situation, it is crucial to take into account the many barriers specific to the prison environment, which make it more difficult for prisoners to exercise their rights, and even more so when it comes to foreign prisoners. Major shortcomings continue to be identified in this regard and a number of empirical studies show that insufficient account is taken of the obstacles faced by prisoners, whether in terms of access to information about their rights, access to a lawyer or access to legal aid (which are preconditions for exercising the right to an effective remedy). This is even more of an issue for foreign prisoners. Several shortcomings are also identified with regard to the possibility for detainees to exercise their rights as victims and to be recognised as such. This is particularly the case of detainees who experience physical violence – a problem that, although common, remains under-reported and unadequately addressed. These findings should therefore be taken into account when considering possible EU legislative intervention to strengthen the procedural rights of detainees (see Recommendation n°2).

Moreover, the detention regimes applicable to certain categories of detainees, considered to be the most dangerous, have been found to raise significant fundamental rights concerns. This is particularly the case of the category of detainees labelled as 'radicalised' who are subjected to more restrictive conditions of detention in some Member States. As stressed by the TERR Committee of the European Parliament, such specific regime applicable to certain groups of detainees must respect the same human rights and international obligations as those granted to any inmate. In order to examine these (relatively new) concerns more closely, further field research could be carried out, in particular on the situation of prisoners under specific detention regimes.

2. Pondering the added value of adopting EU minimum standards through a legislative instrument

As highlighted throughout this study, existing standards at CoE level, including the various non-binding recommendations of the Committee of Ministers and the CPT, as well as standards deriving from binding judgments of the ECtHR, are insufficiently respected in practice. This observation is not new and logically calls for a reaction from the EU insofar as the poor detention conditions conflict with its values and with the core principles underlying judicial cooperation in criminal matters. **The recent Commission's Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions' is a step forward, as it is the first EU instruments (although non-binding) setting common minimum standards in the two areas concerned**. It is mainly intended as a consolidation of the various existing international and European standards and has the merit of compiling in a single document a series of minimum requirements relevant in the context of judicial cooperation in criminal matters. To this extent, it contributes to increasing the accessibility of these essential standards for practitioners in the field. **However, its concrete impact remains difficult to gauge and only time will tell if the recommendation leads to a more efficient and more convergent application of the aforementioned standards**. As this

[588] Fair Trials, 'Pre-trial detention rates and the rule of law in Europe' (n 44); European Prison Litigation Network, 'Bringing Justice Into Prison: For a Common European Approach. White Paper on Access to Justice for Pre-Trial Detainees (n 388) 66.

recommendation is non-binding, its implementation will largely depend on the level of voluntary compliance by Member States, which has so far proved to be insufficient.

Legislative action at EU level seems desirable and justified for several reasons. One of the main advantages of legislative action at EU level, compared to ECtHR case-law and CoE standards, is the possibility of ensuring a higher degree of application thanks to a wide range of tools. Such an option could also be justified given the specificities of the EU legal order. Indeed, to operate effectively, the principle of mutual recognition requires a high level of trust between judicial authorities, including with regard to compliance with minimum standards of detention conditions. Given the varying degree of implementation of these standards, it is reasonable to assume that the strengthening of mutual trust could be further achieved by EU legislation harmonising minimum standards in the area of detention. This would also contribute to correcting possible discrimination resulting from the application of differentiated standards to cross-border and domestic situations. Furthermore, legislative action at EU level could address some problematic divergences and ensure greater coherence in the application of relevant minimum standards for judicial cooperation; indeed executing authorities sometimes refer to the preventive standards of the CPT, sometimes to the absolute minimum standards set by the ECtHR when seeking additional safeguards regarding cell-space in EAW cases. Moreover, as the study has shown, some gaps still need to be filled to ensure that EU prison inspection and oversight bodies act comparably and meet international human rights standards – particularly in view of the fact that information produced by prison oversight bodies is increasingly used as sources of evidence in EAW cases. The development of common standards regarding their powers and the degree of control these bodies can exercise, their independence, the regularity of the training they receive, and the frequency of their prison visits is particularly welcome to ensure an equivalent level of quality and reliability of the sources provided by these actors. While the recent Recommendation adopted by the Commission contains some minimum requirements for prison monitoring mechanisms under the sub-section 'Inspections and monitoring', these do not address all the above-mentioned elements and are worded in terms that leave great leeway for States to implement them. It is worth noting that EU legislative action is perceived positively by some members of the CPT, who would welcome the possibility of ensuring a more effective implementation of certain OPCAT obligations as well as to give binding force to standards produced by the CPT in the area of detention conditions.[589] In addition to strengthening the effectiveness of existing standards, the adoption of binding minimum standards at EU level could also help to strengthen the protection of detainees' rights on crucial issues that are insufficiently covered by the CoE standards. In the context of the consultation that preceded the adoption of the Commission's Recommendation, the European Prison Litigation Network (EPLN) underlined the added value of adopting EU standards to improve prisoners' procedural rights, in particular legal aid and access to legal information, including access to an interpreter – issues which are largely ignored by the CoE standards.[590] In this context, it would be important to bear in mind that the interplay between existing EU Directives on procedural rights and detention is a complicated one. First, they do not apply after the final conviction, to proceedings concerning the sole execution of the sentence or the access to alternatives to detention. Secondly, they reflect a minimalistic approach: the margin of manoeuvre enjoyed by Member States in their implementation renders them also ineffective in contrasting

[589] See Van Ballegooij, W. (n 170) 57.

[590] European Prison Litigation Network (EPLN), 'Policy Paper addressed to the European Commission in the context of a call for evidence on 'Pre-trial detention – EU recommendation on rights and conditions", April 2022 < https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13173-Pre-trial-detention-EU-recommendation-on-rights-and-conditions/F3248272_en> (consulted on 3 February 2023).

malpractices relating to pre-trial detention. In this sense, new more detailed EU legislation, aiming at a higher harmonisation of Member States' legal orders, would clearly be advisable, also considering the limits inherent in the interpretative role of the Court.

If such EU legislative action were to be considered, it would be advisable to seek a complementarity with existing standards adopted at CoE level and thus avoid the risk of double standards. Moreover, given the reluctance of Member States to take binding initiatives in this area, the added value of EU legislative action would need to be substantiated objectively and straightforwardly, including by corroborating it with reliable, clear and up-to-date statistics showing the impact of inaction in the field and the need for EU financial support.

3. Develop common indicators to measure prison overcrowding and improve data accessibility on alternatives to custodial sentences

The use of common indicators is essential to provide an accurate picture of detention conditions in the EU. Although there is available data to reflect the scale of some of the pressing issues affecting EU countries, the lack of common measurement indicators is pointed out as a recurrent shortcoming which does not allow for accurate cross-national comparison. **This shortcoming has been highlighted in particular regarding the phenomenon of prison overcrowding**[591] **which, although widely reported, is measured according to divergent methods for calculating the density of the prison population and the rates of prison overcrowding**. Despite long-standing calls by CoE and national prison monitoring bodies to remedy this shortcoming, the lack of common criteria to measure and assess prison overcrowding still appears to be a limitation to the production of reliable data on these issues. **In order to ensure greater reliability and comparability of the data produced by States, guidelines could be considered to help national authorities adopt a more uniform method for calculating prison capacity, taking due account of the standards of the CPT and the ECtHR ('totality of conditions' test) regarding minimum cell-space**.

The lack of available data regarding the use and practical implementation of non-custodial measures, in addition to the different methods of collecting such data, is also identified as a recurring hurdle to conducting comparative research on these issues. Insofar as they are advocated as an important, albeit not sufficient, lever for regulating incarceration flows, a clear vision of the practice of alternative measures to detention is just as important for assessing their effectiveness as for developing penal policies based on reliable quantitative and qualitative data. Member States should be encouraged to produce regular statistical reports on the use of alternatives to custodial measures and sanctions which are publicly available and based, as far as possible, on standardised data to allow comparability.

4. Ensuring that the resources available to practitioners to comply with the case-law of the CJEU are sufficient and regularly updated

As this study shows, many practical tools are available to national authorities to help them interpret and apply the case-law of the CJEU (e.g. the Commission's handbook on EAW, Eurojust report on EAW case-law, FRA criminal detention database, etc.). According to some practitioners interviewed, **it does not therefore seem appropriate to concentrate efforts on the development of new resources but**

[591] See in this study Section 1.

rather to ensure that those that already exist are regularly updated and made easily accessible to practitioners. **This is all the more important since the positions of the two European courts largely converge on the requirement that executing authorities must seek objective, reliable and up-to-date information about prison conditions when an issue about compliance with fundamental rights arises in EAW cases**. In this regard, the study found that several resources developed for this purpose, namely the FRA criminal detention database and the Commission's handbook, although welcomed as positive developments by practitioners, should be updated on a more regularly basis. **In addition, given the complementarity of the ECtHR's case-law on EAW issues related to detention conditions, consideration should be given to the prospect of referring more systematically to the requirements of the ECtHR in the many existing guides and other practical resources dedicated to the case-law of the CJEU**. A comprehensive overview of the relevant case-law in this area has recently been provided by the EJN website which includes easy access to relevant case-law from the CJEU and the ECtHR in a dedicated EAW section.

While some experts assert that the CJEU's case-law tends to be increasingly assimilated by practitioners and that many countries develop practices compliant with the Court's requirements, some difficulties continue to arise in practice. Among the outstanding issues reported by practitioners, it is worth mentioning the question as to whether the assessment of the executing authority should be done *ex officio* in all cases when doubts arise as to detention conditions or only if requested by the defendant; the propensity of some national authorities to request guarantees that go beyond the CJEU's requirements with the effect of delaying surrender procedures; or the lack of mechanisms to ensure a proper follow-up to the assurances provided by the issuing judicial authorities after surrender. Thus, **in addition to the support provided by Eurojust and EJN to facilitate the exchange of information between issuing and executing authorities in concrete EAW cases**, it seems that further efforts should be made to help practitioners address these practical challenges that hamper mutual recognition of EAWs.

5. <u>Continue efforts to develop training and other awareness-raising activities, and improve knowledge about the relationship between the various mutual recognition instruments</u>

In several respects, the study revealed divergent approaches to the attention paid to detention conditions in the implementation of certain mutual recognition instruments. This is particularly the case with the application of the EAW, where some authorities continue to give priority to mutual trust without taking into account detention conditions, despite the judgments of the CJEU. This is also the case of Framework Decision 2008/909 on the transfer of prisoners, which, although remaining outside the scope of the *Aranyosi* jurisprudence, must be implemented in compliance with Article 4 of the Charter and logically involves ensuring that the sentenced person will not be subjected to detention conditions that would constitute inhuman and degrading treatment upon transfer. **However, empirical research shows that considerations relating to the material conditions of detention to which the sentenced person will be subjected are too rarely taken into account in the decision to issue a request for transfer**. **In addition, States practices differ on the question of whether the detention conditions should be taken into account as a relevant element in assessing the prospects of the sentenced person's social rehabilitation– the latter being a core objective of the Framework Decision 2008/909**. Given that Framework Decision 2008/909 has generated a very limited body of EU and national case-law and has received limited attention in the doctrine, it would be advisable to raise awareness among practitioners on how considerations relating to conditions of detention should be taken into account in the transfer procedure. **Apart from mutual recognition**

instruments involving a deprivation of liberty measure, the study revealed a general lack of awareness of several mutual recognition instruments that could be used as alternatives to the EAW to avoid an unnecessary measure of deprivation of liberty, i.e. the Framework Decision 2009/829/JHA (on the European Supervision Order), the Framework Decision 2008/947/JHA (on probation measures and alternative sanctions) and the Directive on the European investigation order (EIO). Lack of awareness of these instruments is broadly acknowledged by scholars, and affects not only judges and prosecutors, but also defence lawyers. In this respect, practitioners generally admit their need for further training, possibly focused on the sharing of best practices or case studies.

In addition to continuing efforts to improve the training of practitioners on the above instruments, and to raise awareness on how detention condition considerations should come into play for each of them, it is also necessary to develop resources and tools to improve knowledge about the relationship and interactions between these various mutual recognition instruments. In this respect, the study found that the varying degree of awareness of the above-mentioned instruments and the different practices regarding their use can be explained, to some extent, by the differences in legal cultures between Member States (e.g. common law vs. civil law) as well as by the different organisation of their jurisdictions (e.g. centralised vs. decentralised structure in charge of EAW surrender procedures). This should feed into reflections on improving the exchange of good practices to foster mutual trust among justice professionals in cross-border proceedings and to sensitise national authorities to judicial systems and practices different from their own. One option to consider could be to further promote exchanges and study visits through the European Judicial Training Network (EJTN) Exchange Programme platform,[592] with a financial support from the EU.

6. <u>Improve the financial support provided by the EU</u>

EU financial support is widely promoted by EU institutions and scholars as an essential lever to help States tackle the issue of poor material detention conditions. As seen in several parts of the study and confirmed during interviews, the financial resources allocated to the prison service vary significantly from country to country – some of these resources have even decreased in some States affected by the economic crisis. However, recent empirical research shows that the financial support mobilised by the EU for this purpose remains too limited. As a notable example, in 2015, in response to a call from 12 Member States for EU financial support to renovate existing prisons, the Commission mapped out possibilities for funding through the use of structural funds which only provides a partial answer to detention condition issues. Since then, it does not appear that any specific initiatives have been taken to improve the EU's financial support on these issues. Some projects funded under the 'Justice Programme' referred to the objective of contributing to the improvement of detention conditions among other broader objectives, but it remains difficult to identify all EU-funded projects contributing directly or indirectly to this objective and it seems that a consolidated document containing information for this purpose is lacking.

[592] https://ejtn.eu/activity/exchanges/

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ANNEX – LIST OF INTERVIEWS

18 October 2022

Prof. Damien Scalia, Faculty of law, Université Libre de Bruxelles (ULB)

22 Ocotber 2022

Prof. Olivia Nederlandt, Faculty of law, Université Saint-Louis, Bruxelles

9 November 2022

Prof. Sonja Snacken, Professor of Criminology, Penology and Sociology of law, Vrije Universiteit Brussel (VUB)

11 November 2022

Nicolas Cohen, Lawyer in criminal law, Brussels Bar

24 November 2022

Round table at the Central Council for Prison Surveillance (Conseil Central de Surveillance Pénitentiaire), Brussels, with Dominique Simmonot, French General Controller of Places of Deprivation of Liberty (Contrôleur général des lieux de privation de liberté – CGLPL)

21 December 2022

Vânia Costa Ramos, Defence lawyer, Lisbon, Member of the European criminal bar association

23 December 2022

Magdalena Bozieru, Counselor for European Affairs Division for International Judicial Cooperation in Criminal Matters Ministry of Justice of Romania, EJN Contact Point

11 January 2023

Christine Janssens, Judicial cooperation advisor, Eurojust

31 January 2023

Béranger Dominici, Project manager, European Prison Litigation Network (EPLN)

Huges de Suremain, Legal coordinator, European Prison Litigation Network (EPLN)

Leandro Mancano, Lecturer in EU law, Edinburgh Law School

14 February 2023

Laure Baudrihaye-Gérard, Legal Director (Europe), Fair Trials, President of the Commission des plaintes, Prison of Saint-Gilles (Brussels)

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