



UNIVERSIDAD  
DE MÁLAGA

| [uma.es](http://uma.es)

## Human rights in EU cooperation in criminal matters

---

Dr. Alejandro Sánchez Frías

Faculty of Law/ Department of Public International Law and  
EU Law



# 1. Introduction

Genesis of the EU: elimination of physical and legal barriers to the free movement of goods (and later services, workers and capitals) among Member States, INTERNAL MARKET and SCHENGEN.



Unintended consequence: free movement of crime.



Creation of the Area of Freedom, Security and Justice (AFSJ)



Measures reviewed by the CJEU: balance between individual liberties and collective security



## 2. Two tools: mutual recognition and harmonization

### Mutual recognition

Art. 82.1 TFEU: Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States.

Origin: judgment in *Cassis de Dijon* (internal market).

Objective: faster and more efficient cooperation among judicial authorities while, at the same time, maintaining national rules.

Extension of this principle to the AFSJ.



## 2. Two tools: mutual recognition and harmonization

### Harmonization

Bigger differences in substantive criminal law among MS = less trust and recognition



Article 83(1) TFEU: ‘The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, **establish minimum rules concerning the definition of criminal offences and sanctions** in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’.

Cases: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.



## 2. Two tools: mutual recognition and harmonization

- European Arrest Warrant (EAW), the main instrument of mutual recognition: a judicial decision issued by a Member State (issuing State) for the arrest and surrender by another Member State (executing State) of a person wanted for the purpose of criminal proceedings or for the execution of a custodial sentence or detention order.
- Refusal of an EAW? It is not expressly included as a cause in its regulation the protection of the fundamental rights.
- So, can the executing State refuse to grant an EAW for the protection of the rights included in the Charter of Fundamental Rights of the EU (CFREU)?



## 3. Mutual recognition and fundamental rights

### Why is the following presentation important from an international perspective?

- Article 19(2) Charter of Fundamental Rights of the EU: ‘No one may 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’.
- *Petruhhin* (2016) and *BY* cases, human rights protection in extradition (and [Eurojust-EJN Guidelines](#)):
  - Extradition agreements between Member States and third States fall within the competence of Member States, but in the CJEU shows that **Member States must exercise this competence in light of EU law if extradition may affect an EU citizen’s fundamental rights** protected under the Treaties and the Charter of Fundamental Rights of the European Union.
  - The executing State must inform about and prioritize an European Arrest Warrant to the EU Member State of the nationality.
  - To determine the possibility of breach of rights under the Charter, the Member State must undertake a rigorous **verification of the level of protection of human rights in the relevant third State** before deciding whether to grant the extradition request.



## 3. Mutual recognition and fundamental rights

### 3.1 Priority of effectiveness

**Pre-Lisbon case law, before CFREU as primary law, (*Advocaten, Wolzenburg, Leymann, Mantello*)**

The exam of the protection of fundamental rights correspond to the authorities of the issuing State

No control by the authorities of the executing State

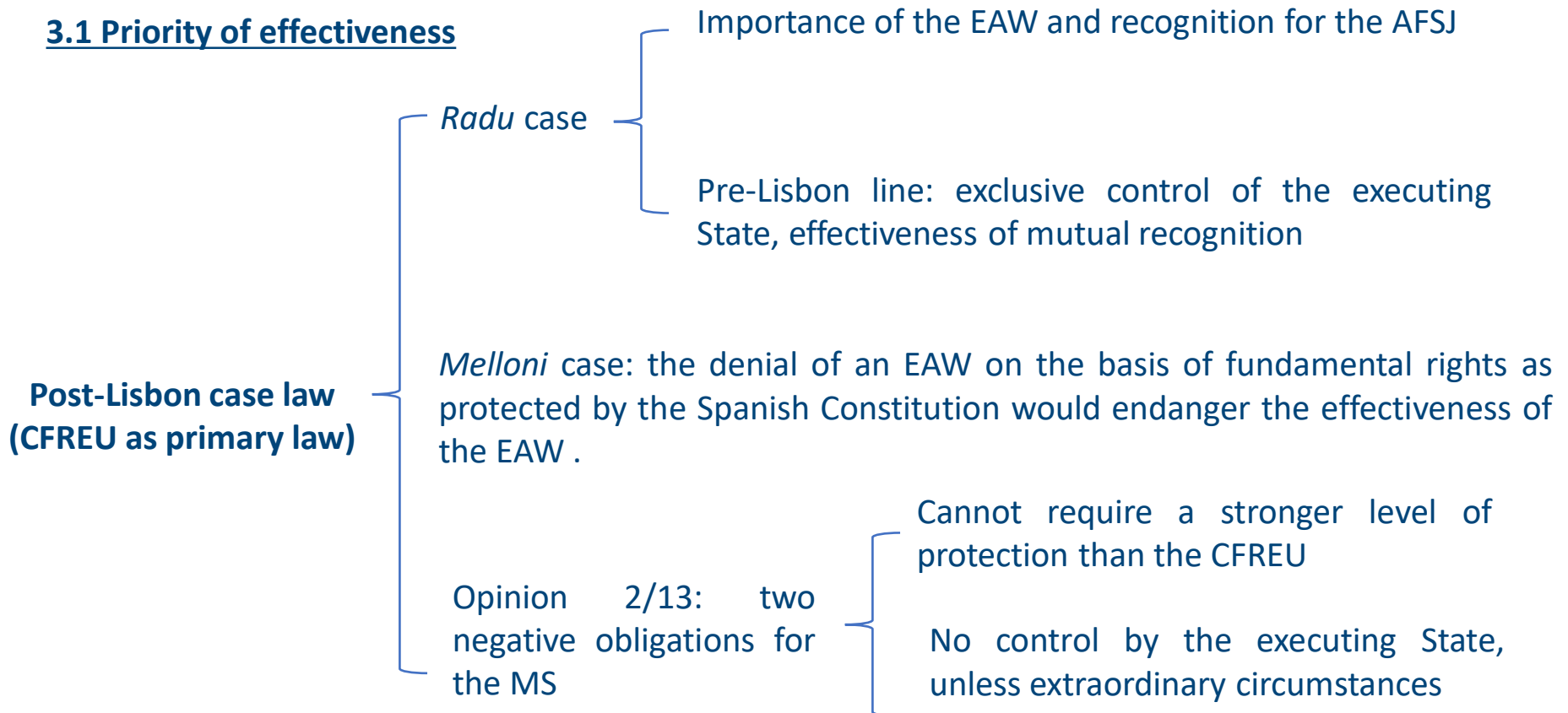


**Absolute presumption of respect of fundamental rights, effectiveness of criminal cooperation**



## 3. Mutual recognition and fundamental rights

### 3.1 Priority of effectiveness







## 3. Mutual recognition and fundamental rights

### 3.2 Derogations based on fundamental rights

**Defense of effectiveness of mutual recognition:** easy in a scenario of general protection



In the past few years, however, **several crises of EU values and fundamental rights**



## 3. Mutual recognition and fundamental rights

### 3.2 Derogations based on fundamental rights

Situations of the Prisons  
in Hungary and Romania

**ECtHR:** convictions for overpopulation, inhuman and degrading treatments

**CJEU:** *Aranyosi*

Reminds that mutual recognition can only be limited in **exceptional circumstances**

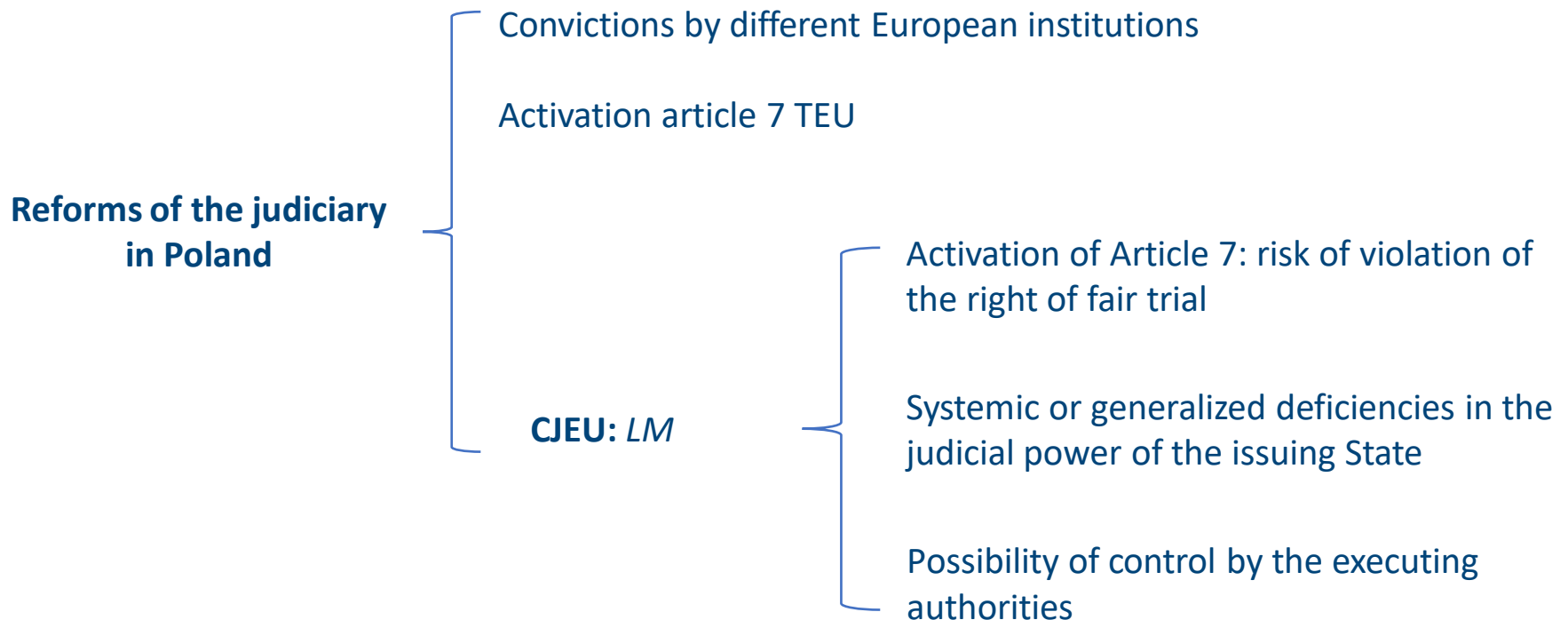
Absolute nature of the prohibition of inhuman or degrading treatments

Test by executing authority: real and general risk (i) that can affect the individual (ii)



## 3. Mutual recognition and fundamental rights

### 3.2 Derogations based on fundamental rights

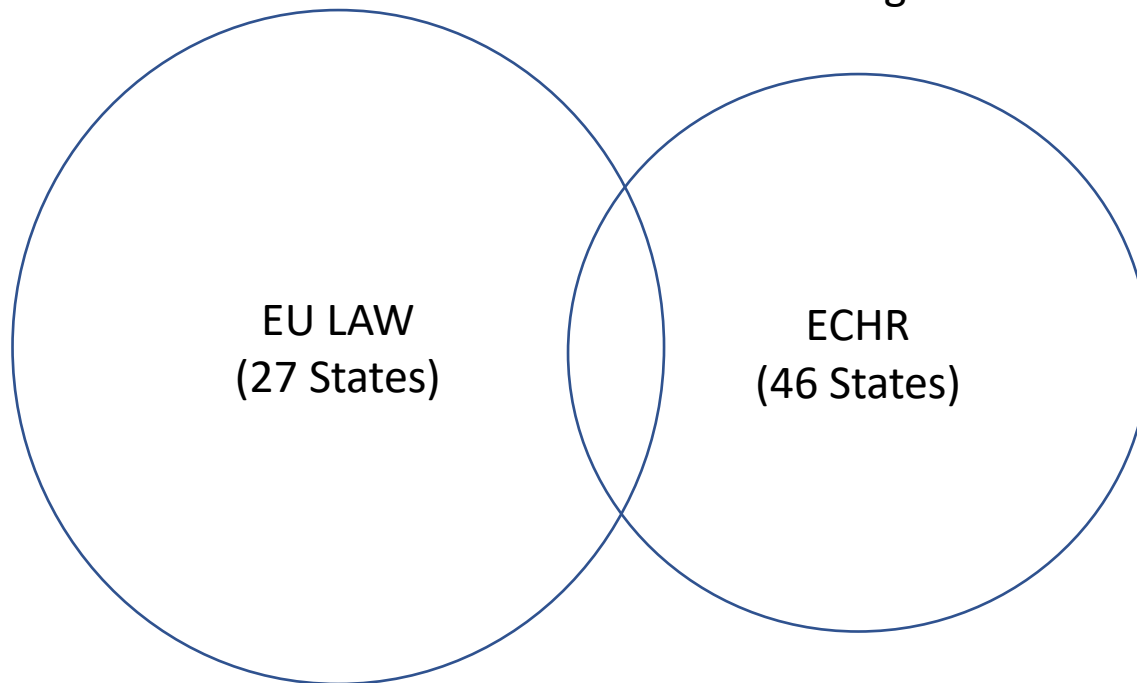




## 4. The ECtHR and EU cooperation in criminal matters

Court of Justice of the EU

European Court of Human  
Rights





## 4. The ECtHR and EU cooperation in criminal matters

- Non-automatic recognition of the Euro warrant to the detriment of fundamental rights (*Pirozzi v. Belgium, Avotiņš v. Latvia*), despite of the *Bosphorus* presumption of compatibility of EU law with the ECtHR.
- Two-step examination of the refusal of cooperation: adequacy of the response, legitimacy of the grounds.
- Need to weight other rights when examining the case (*Güzelyurtlu*, extradition case):

‘In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention’s special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice’.



## 4. The ECtHR and EU cooperation in criminal matters

**Denial of EAW in a Spanish case regarding terrorism (Romeo Castaño)**

Defense: risk of inhuman or degrading treatments in the prisons of the issuing State

**ECTHR**

Denial to Spain by Belgian authorities: two old reports of the European Committee for the Prevention of Torture and the UN Human Rights Committee on solitary confinement.

Procedural limb article 2 ECHR: obligation to cooperate in criminal matters.

Conviction of Belgium: lack of proof regarding a real and individualized risk of violation of fundamental rights



## 5. Bivolaru and Moldovan: first violation for compliance with an EAW

### Facts of the case (Moldovan)

- 06/2015: Romanian court condemns Ms. Moldovan to 7.5 years in prison for human trafficking.
- 04/2016: issuance of EAW to France.
- 06/2016: arrest of Ms. Moldovan. She alleges the situation of prisons and the Aranyosi jurisprudence.
- 06/2016: due to previous ECtHR judgments and a recent report by the European Committee for the Prevention of Torture, the French investigating court considers that there are "objective and reliable elements" on violations, and requests information from the Romanian authorities (Dorobantu jurisprudence).
- 06/2016: Romanian report on detention conditions.



## 5. Bivolaru and Moldovan: first violation for compliance with an EAW

### Facts of the case (Moldovan)

- 06/2016: report from Romania on detention conditions in Gherla prison: cell size (2-3m<sup>2</sup>), leisure, access to doctor, hygiene....
- Ms. Moldovan's allegations: the ECtHR has already condemned for prison overcrowding in that prison.
- 07/2016: the investigating court accepts the EAW without appreciating risks of violation of 4 ECHR.
- Appeal in cassation: cell space including furniture, insufficient.
- Supreme court: **confirms the EAW.**
- 08/2016: Ms. Moldovan is **handed over to the Romanian authorities.**





## 5. Bivolaru and Moldovan: first violation for compliance with an EAW

### Facts of the case (Bivolaru)

- 1990: Mr. Bivolaru becomes the leader of a spiritual yoga movement in Romania.
- 2004: criminal proceedings initiated for sexual harassment and corruption of minors.
- 2005: escape to Sweden and request for political asylum.
- 04/2005: request for extradition by the Romanian authorities.
- 11/2005: granted political refugee status and extradition denied.
- 2013: condemned *in absentia* to 6 years imprisonment in Romania. Issuance of an EAW.



## 5. Bivolaru and Moldovan: first violation for compliance with an EAW

### Application to the Moldovan case

- The French courts had to apply *Aranyosi* on Article 4 CFREU, which grants equivalent protection to that of Article 3 ECHR.
- The French courts had no margin of appreciation, so the presumption of respect / equivalent protection was applicable (*Bosphorus doctrine*).
- However, revocation of the presumption: The facts of the case and the previous case law against Romania, and in particular the **stereotypical description of the living conditions and the small size of the cell provided by the Romanian authorities, pointed to a strong presumption of violation** of Article 3 ECHR.
- Infringement of Article 3 ECH.



## 5. Bivolaru and Moldovan: first violation for compliance with an EAW

### Application to the Bivolaru case

-Despite the refugee status, the information received by the French authorities does not show that there is currently a real risk of persecution for religious reasons.

-Solid factual basis for considering a real risk of being subjected to inhuman or degrading treatment in Romanian prisons? Too general arguments of the plaintiff before the French courts, without specifying specific aspects of the 2015 CPT report.

-No violation of 3 ECHR.



## 6. Final comments

- Current situation: various crises endangering a European identity based on common values and a high level of protection of fundamental rights.
- Tipping of the balance of the freedom-security binomial towards security, both in the MS and in the European institutions.
- Evolution of the jurisprudence of the CJEU:
  - Dialogue with the ECtHR.
  - Change of mentality: from "effectiveness of European criminal law" (result), to "efficiency of European criminal law" (means).
  - Mutual trust should not be confused with "blind trust".
- Relevance of these compulsory new line of case law for European member states when deciding on a request of extradition with third States.



UNIVERSIDAD  
DE MÁLAGA

| [uma.es](http://uma.es)

**THANK YOU VERY MUCH FOR YOUR ATTENTION**