# The European arrest warrant under the European Convention on Human Rights: A matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility

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Contents



**Abstract**

The landmark judgment in the case of *Bivolaru and Moldovan v. France*, which concerned the execution of a European arrest warrant, provides a good illustration of the effects of the Convention liability of EU Member States for their implementation of EU law. These effects touch on such notions as cooperation, trust, complementarity, autonomy and responsibility. The two European courts have been cooperating towards some convergence of the standards applicable to the handling of EAWs. The Bosphorus presumption and its application in *Bivolaru and Moldovan* show the amount of trust placed by the Strasbourg Court in the EU protection of fundamental rights in this area. To the extent that their standards of protection coincide, the Luxembourg and Strasbourg jurisdictions are complementary. However, the two protection systems remain autonomous, notably as regards the methodology applied to fundamental rights. Ultimately, the EU Member States engage their Convention responsibility for the execution by their domestic courts of any EAWs.

**Keywords:** European Convention on Human Rights, EU law, EU-Charter of Fundamental Rights, European Arrest Warrant, Bosphorus Presumption

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One may perhaps wonder about the association in the title of this paper between the European arrest warrant (EAW) and the European Convention on Human Rights (the Convention), given that, as an EU legal institution, the EAW is also covered by the autonomy of EU law vis-à-vis the Convention and for this reason would appear not to be subject to any Convention standards. This reaction, however, loses sight of the fact that any EAW always needs to be executed by an EU Member State which by definition is also a Contracting State to the Convention.

It is indeed the case that EU Member States remain liable under the Convention for any acts performed under EU law, such as the execution of an EAW. This is a direct consequence of the principle according to which the responsibility of the Contracting States to the Convention extends to their entire jurisdiction within the meaning of Article 1 of the Convention.[1] In respect of the EU Member States, this also includes EU law as part of their respective domestic legal systems.[2] Thus, the creation of the EU[3] did not remove the responsibility of the Member States under the Convention for their application of EU law. Rather, since the Member States did not withdraw from the Convention when creating or joining the EU and, consequently, remain bound by it, they also remain under a Convention obligation to apply EU law in a manner which is compatible with that same Convention. As the European Court of Human Rights (ECtHR) stated in *Bosphorus v. Ireland*, EU Member States are considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.[4] By contrast, the EU itself having its own legal personality,[5] it is not subject to the Convention as long as it does not formally accede to it.

The recent landmark judgment by the ECtHR in the case of *Bivolaru and Moldovan v. France*[6] aptly illustrates the effects of that reality on the execution of EAWs.[7] These effects can be divided up into five different categories, touching respectively on such notions as cooperation, trust, complementarity, autonomy and responsibility. They will be addressed below, after a short summary of the findings of the ECtHR.

The case concerned the applicants' surrender by France to the Romanian authorities under EAWs issued for the purpose of the execution of their prison sentences. In respect of Mr Moldovan, the ECtHR found a violation of Article 3 of the Convention (prohibition of ill-treatment) on the ground that by surrendering the appli-

1 ECtHR, 24833/94, *Matthews v. the United Kingdom*, 18/2/1999, § 29; ECtHR, 45036/98, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland* ("*Bosphorus v. Ireland*"), 30/6/2005, § 153.

2 See e. g. ECtHR, 17862/91, *Cantoni v. France,* 15/11/1996, § 30.

3 The reference to the EU here includes all its predecessor organisations.

4 *Bosphorus v. Ireland*, fn. 1, § 154.

5 Art. 47 TEU.

6 ECtHR, 40324/16 and 12623/17, *Bivolaru and Moldovan v. France*, 25/3/2021. On this judgment, see *Julié/Fauvarque*, Bivolaru and Moldovan v. France: A New Challenge for Mutual Trust in the European Union?, https://strasbourgobservers.com/2021/06/22/bivolaru-and-moldovan-v-france-a-new-challenge-for-mutual-trust-in-the-european-union (1/8/2021).

7 Previous judgments, notably in the cases of *Stapleton v. Ireland* (dec.; 4/5/2010, 56588/07), *Pirozzi v. Belgium* (17/4/2018, 21055/11) and *Romeo Castaño v. Belgium* (9/7/2019, 8351/17) already dealt with EAWs under the Convention but less comprehensively.

cant to the Romanian authorities, the French courts had not drawn the right conclusions from the information obtained. That information had indeed provided a sufficiently solid factual basis for refusing the execution of the EAW in question, because of a real and individual risk that the applicant would be subjected to treatment contrary to Article 3 on account of his conditions of detention in Romania. By contrast, in respect of Mr Bivolaru the ECtHR found no violation of Article 3, mainly because the description of conditions of detention in Romanian prisons provided by the applicant to the domestic courts in support of his request not to execute the EAW had not been sufficiently detailed or substantiated to constitute *prima facie* evidence of a real risk of treatment contrary to Article 3 in the event of his surrender to the Romanian authorities.

### A. Cooperation

A first feature of the current legal situation being revealed by *Bivolaru and Moldovan* is a certain level of "cooperation" between the two European courts in assessing the impact of the prohibition of ill-treatment – which is enshrined, with the same meaning and scope, in Articles 3 of the Convention and 4 of the Charter of Fundamental Rights of the EU (EU-Charter) – on the execution of a EAW. With complaints being raised about the prison conditions expecting the applicants in the event of their transfer to Romania, this prohibition was indeed at the centre of the ECtHR's reasoning. A little earlier, the same issue had also been dealt with by the Court of Justice of the European Union (CJEU) in cases such as *Aranyosi and Căldăraru*[8] and *Dorobantu*[9], in which the CJEU to a significant extent had drawn on the Strasbourg case-law relating to Article 3 of the Convention.

In response, the ECtHR in *Bivolaru and Moldovan* stressed the convergence of the Strasbourg and Luxembourg jurisprudence in this field. At the same time, however, it delineated the scope of this convergence by indicating that it covered only the assessment of the *individual risks* incurred by an applicant and not the methodology used by the CJEU in applying Article 4 of the EU-Charter, notably the mandatory identification of a *systemic or generalized deficiency* as a preliminary to the finding of any shortcomings at the level of the individual concerned.[10]

It remains to be seen whether the same level of "cooperation" and convergence will be reached in respect of other fundamental rights with an impact on mutual recognition mechanisms such as the EAW. Those rights include the right to an effective remedy and a fair trial before an independent and impartial tribunal (Art. 6 of the Convention and 47 of the EU-Charter), which comes into play in the context of EAWs requiring the surrender of persons to States where the independence of the

8 CJEU, C-404/15, *Aranyosi and Căldăraru,* ECLI:EU:C:2016:198.
9 CJEU, C-128/18, *Dorobantu*, ECLI:EU:C:2019:857.
10 § 114. On this issue, see also point 4 ("Autonomy") below.

judiciary is being questioned.[11] Or the right to respect for private and family life (Art. 8 of the Convention and 7 of the EU-Charter), which has a bearing on the handling of cross-border child abductions under the Brussels IIbis Regulation.[12]

### B. Trust

Another feature of the current legal situation being revealed by *Bivolaru and Moldovan* is a kind of mutual trust emerging between the two European courts in some areas. While, on the part of the CJEU, this trust would appear to manifest itself in an increased reliance on Convention notions and standards,[13] the ECtHR went a step further, for the sake of facilitating European integration, by lowering some of its own standards in consideration of the level of protection ensured under EU law. In this context, one should mention, first and foremost, the presumption of equivalent protection instituted by the ECtHR in *Bosphorus v. Ireland*,[14] which is a clear expression of trust in the capacity of the EU legal system and the CJEU to achieve a general level of protection of fundamental rights at least equivalent to that of the Convention. As a result, departures from the Convention which do not amount to "manifest deficiencies" can under this doctrine be tolerated in individual cases.[15]

It can also be seen as an expression of trust that in *Bivolaru and Moldovan* the ECtHR decided to apply that presumption in the first place, even though the factual assessment to be carried out by the French courts, entailing as it did an anticipation of the prison conditions expecting the two applicants in the event of their transfer to Romania, left those courts with some discretionary power. Such power should normally preclude the application of the *Bosphorus* presumption.[16] Yet, the ECtHR decided to nonetheless apply it, considering that the clear legal framework defined by the CJEU in this field provided a sufficient basis to that effect.[17] Thus, in contrast with the approach adopted in *M.S.S.*[18] and *Ilias and Ahmed*[19], the ECtHR in *Bivo-*

11 As in CJEU, joined cases C-354/20 PPU and C-412/20 PPU, *Openbaar Ministerie,* ECLI:EU:C:2020:1033; on this judgment, see also points 3 ("Complementarity") and 4 ("Autonomy") below. To date, *Stapleton v. Ireland* (cited above) is the only Strasbourg case in which an applicant invoked Article 6 of the Convention to challenge his surrender pursuant to an EAW which was issued with a view to proceedings in the issuing State, in which a risk of a "flagrant denial of justice" was alleged to exist. However, the circumstances of this case were rather different from those prevailing in *Openbaar Ministerie*.

12 See footnote 37 below.

13 In addition to *Aranyosi and Căldăraru* (fn. 8)) and *Dorobantu* (fn. 9), see e. g., in the area of freedom of religion, CJEU, C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, ECLI:EU:C:2020:1031, §§ 56–59, 67 and 77.

14 *Bosphorus v. Ireland*, fn. 1.

15 *Bosphorus v. Ireland,* fn. 1, § 156. Thus, the "manifest deficiency" test represents a lower standard of protection, applicable only when the Bosphorus presumption comes into play (see *Bivolaru and Moldovan v. France*, fn. 6, § 116).

16 *Bosphorus v. Ireland*, fn. 1, § 157.

17 *Bivolaru and Moldovan*, fn. 6, § 114.

18 ECtHR, 30696/09, *M.S.S. v. Belgium and Greece*, 21/1/2011, § 340.

19 ECtHR, 47287/15, *Ilias and Ahmed v. Hungary*, 21/11/2019, §§ 96–97.

*laru and Moldovan* for the first time limited the scope of the domestic discretionary power precluding the application of the *Bosphorus* presumption to the legal aspects involved, as opposed to any factual assessments to be made by domestic courts in this connection.

### C. Complementarity

*Bivolaru and Moldovan* also reveals the existence of some complementarity between the Luxembourg and Strasbourg jurisdictions. In the field of the EAW, as indeed in many other legal areas, the role of the CJEU is confined to interpreting EU law by way of preliminary rulings. In this context, it has no competence to carry out an *ex-post* control over the application of EU law in a given case at domestic level. That said, the effects of preliminary rulings by the CJEU extend to all courts of the EU Member States,[20] which can be taken to fully and faithfully implement them.

The fact remains, though, that preliminary rulings alone cannot guarantee a proper protection of fundamental rights on the ground in each and every case. They can only set the standards and give indications as to how fundamental rights are to be interpreted and applied under EU law. It is therefore not unusual for the CJEU to refrain from applying itself the criteria it has identified as relevant and to leave it to the referring domestic court to figure out how they play out in the case at hand. A recent example of this approach can be found in the case of *Openbaar Ministerie*, in which the CJEU left it to the referring Dutch court to figure out whether the circumstances prevailing in Poland regarding the independence of the judiciary were such as to justify, in light of the criteria defined by the CJEU, a refusal to execute an EAW.[21]

By contrast, the ECtHR is in a position – and has the duty – to carry out such an *ex-post* control of respect for human rights, this being in fact its core business. It is the result of the combined effect of the right of individual petition[22] and the duty for an applicant to exhaust all domestic remedies before submitting his/her application to the ECtHR.[23] As explained above, the fact that a domestic judgment under scrutiny in Strasbourg was given by a court applying EU law does not alter that reality.

The combined effect of the circumstances described above is a certain amount of complementarity in the sense that standards regarding the protection of fundamental rights which have been set by the CJEU by way of preliminary rulings can, insofar as they match Convention standards, become part of the scrutiny by the ECtHR

20 CJEU, C-188/95, *Fantask and Others v. Industriministeriet*, ECLI:EU:C:1997:580, §§ 36–37.

21 CJEU, *Openbaar Ministerie*, fn. 11, §§ 52-56, 66-69. A similar approach is being followed in CJEU, joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Forumul Judecătorilor Din România*, ECLI:EU:C:2021:393.

22 Art. 34 of the Convention.

23 Art. 35 § 1 of the Convention.

as to their impact in any given case. Of course, the ECtHR has only the competence to verify compliance with the Convention, not with EU law. To the extent, however, that the respective standards of protection in Luxembourg and Strasbourg coincide, the Strasbourg scrutiny can be seen as an indirect but useful complement to the Luxembourg interpretation exercise, the former reinforcing the effect of the latter.

In view of day-to-day realities, such an *ex post* control can hardly be considered superfluous, a finding which is also illustrated by *Bivolaru and Moldovan*. The French courts called on to examine the EAW issued in respect of Mr Moldovan can indeed be taken to have applied the Luxembourg case-law relating to these matters to the best of their ability. Yet the result of their assessment under EU law turned out in Strasbourg to nonetheless amount to a "manifest deficiency", in breach of Article 3 of the Convention, even though the key EU provision relied on by the French courts, Article 4 of the EU-Charter, has the same meaning and scope as Article 3 of the Convention, as was also confirmed by the CJEU in *Aranyosi and Căldăraru*[24]. The ECtHR held that in respect of Mr Moldovan, the French Court of cassation had not drawn the proper legal conclusions from the available factual elements regarding the detention conditions expecting Mr Moldovan in the event of his transfer to Romania. In the ECtHR's opinion, these conditions were not compatible with the minimum standards flowing from its case-law on Article 3.[25]

Another illustration of this form of complementarity can be found in the CJEU rulings in *LH*[26] and *FMS and Others*[27], on the one hand, and the ECtHR judgments in the cases of *Ilias and Ahmed v. Hungary*[28] and *R.R. and Others v. Hungary*[29], on the other, which all concern the treatment of asylum-seekers in the Röszke transit zone.[30]

### D. Autonomy

That said, the Convention and the EU protection systems each remain autonomous. This is another feature of their interaction being illustrated by *Bivolaru and Moldovan.* It poses the challenge of maintaining consistency between the fundamental

24 Explanations relating to Art. 4 of the EU-Charter and *Aranyosi and Căldăraru*, fn. 8, § 86.

25 ECtHR, 7334/13, *Muršić v. Croatia*, 20/10/2016. Interestingly, this case-law had already been relied on by the CJEU in *Dorobantu* (fn. 9) which also concerned the execution of a EAW involving Romania.

26 CJEU, C-564/18, *Bevándorlási és Menekültügyi Hivatal (Tompa)* ("*LH*"), ECLI:EU:C:2020:218.

27 CJEU, joined cases C-924/19 PPU and C-925/19 PPU, *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (« *FMS and Others* »), ECLI:EU:C:2020:367.

28 ECtHR, *Ilias and Ahmed v. Hungary*, fn. 19.

29 ECtHR, 36037/17, *R.R. and Others v. Hungary*, 2/3/2021.

30 See *Callewaert*, Journal de droit européen 2020, pp. 315–316.

rights protected by the respective systems, in terms of the substance of the rights but also – and perhaps more importantly – of the methodology applied to them.

In terms of their substance, the clear intention of the drafters of the EU-Charter was to ensure such a consistency. They did so by inserting into the EU-Charter an Article 52(3) which establishes the Convention as the minimum protection level under EU law but at the same time allows the latter to exceed the Convention level.[31] In simple terms, Article 52(3) provides that under EU law the Convention level can be raised but not reduced. On this basis, a fair amount of consistency has indeed been achieved, there being only very few examples of EU protection standards which are lower than those applied under the Convention, in terms of the substance of the rights concerned. One of them can be found in the field of the *non bis in idem* principle.[32]

That said, one can only regret that when it comes to such essential rights and principles as the rule of law and the independence of the judiciary, which the two systems clearly have in common, recent Luxembourg case-law is unnecessarily creating a false appearance of autonomy in this field by scarcely referring to the existing Strasbourg case-law on these matters.[33] This is in stark contrast with the Strasbourg approach recently followed in *Reczkowicz v. Poland* which, as in *A.K. and Others*[34] but from the perspective of an individual applicant, concerned the independence of the newly created Disciplinary Chamber of the Polish Supreme Court.[35] In its judgment the ECtHR abundantly referred to relevant Luxembourg case-law as well as to many other international sources, thereby testifying that the weight and impact of these rights can only benefit from being presented as what they really are, i. e. common pillars of the European legal culture on which there is widespread consensus.

The methodology applied to fundamental rights, however, is a more delicate issue. It has indeed become clear that the consistency required by Article 52(3) of the EU-Charter is not only about the *substance* of fundamental rights. Rather, it should also encompass the *methodology* applied to them, which covers such aspects as the tests and the criteria to be used when assessing compliance with the rights concerned, the courts competent to apply them or indeed the burden of proof to be discharged. While the substance of fundamental rights is about *who* or *what* they pro-

31 See *Callewaert*, CMLR 2018/6, pp. 1692 et seq.

32 See CJEU, C-129/14 PPU, *Spasic*, ECLI:EU:C:2014:586, ruling that Art. 54 of the Convention Implementing the Schengen Agreement, which makes the application of the *ne bis in idem* principle subject to the condition that, upon conviction and sentencing, the penalty imposed "has been enforced" or is "actually in the process of being enforced", is compatible with Art. 50 of the Charter. This is in contrast with ECtHR, 14939/03, *Sergey Zolotukhin v. Russia*, 10/2/2009, § 110.

33 See e.g. CJEU, C-619/18, *Commission v. Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531; CJEU, C-824/18, *A.B. and Others (Appointment of Judges at the Supreme Court)*, ECLI:EU:C:2021:153. On this line of case-law, see *Benoît-Rohmer*, Europe des Droits & Libertés 2020/1, pp. 136–151.

34 CJEU, joined cases C-585/18, C-624/18 and C-625/18, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ECLI:EU:C:2019:982.

35 ECtHR, 43447/19, *Reczkowicz v. Poland*, 22/7/2021.

tect, their methodology is about *how* they protect, i. e. about their effects in a given legal system and their interaction with other rights and interests.

In this respect perhaps more than in any other, differences between the Strasbourg and the Luxembourg jurisprudence can be noted, with consequences which should not be played down. This is because identical rights applied according to different methodologies can produce very different levels of protection from the point of view of the individual. Illustrations to that effect can be found in cases raising issues about whether an individual or a collective benchmark should be applied under Article 4 of the EU-Charter in the context of the Dublin Regulation.[36] Or about whether the courts of a Member State to which a child was abducted can be allowed under the Brussels IIbis Regulation to refuse the forced return of that child to the Member State where he/she was habitually resident immediately before removal, when this is clearly in the child's best interest.[37]

The *Bivolaru and Moldovan* case provides a further illustration of the significant impact of the methodology on the effects of fundamental rights, in that it indirectly also deals with the "two-step" methodology ordered by the CJEU to be applied when assessing whether fundamental rights invoked by an applicant, such as the prohibition of ill-treatment or the right to a fair trial before an independent court, preclude this person's surrender pursuant to a EAW. In the recent case of *Openbaar Ministerie,* which concerned an objection to the execution of a EAW based on the right to a fair trial before an independent court, the CJEU described this methodology as follows:

> The possibility of refusing to execute a European arrest warrant on the basis of Article 1(3) of Framework Decision 2002/584, as interpreted in that judgment, presupposes a two-step examination. In the context of a first step, the executing judicial authority of the European arrest warrant in question must determine whether there is objective, reliable, specific and properly updated material indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as concerns the independence of the issuing Member State's judiciary... In the context of a second step, that authority must determine, specifically and precisely, to what extent those deficiencies are liable to have an impact at the level of the courts of that Member State which have jurisdiction over the proceedings to which the requested person will be subject and whether, having regard to his or her personal situation, to the nature of the offence for which he or she is being prosecuted and the factual context in which that arrest warrant was issued, and in the light of any information provided by that Member State pursuant to Article 15(2) of Framework Decision 2002/584, there are substantial grounds

36 Compare CJEU, joined cases C-411/10 and C-493/10, *N.S and Others*, ECLI:EU:C:2011:865, § 86 with CEDH, 29217/12, *Tarakhel v. Switzerland*, 4/11/2014, § 104.

37 Compare CJEU, C-403/09 PPU, *Deticek*, ECLI:EU:C:2009:810 and CJEU, C-211/10 PPU, *Povse*, ECLI:EU:C:2010:400 with ECtHR, 49450/17, *O.C.I. and Others c. Romania*, 21/5/2019.

> for believing that that person will run such a risk if he or she is surrendered to that Member State ...[38]

In combining a general with an individual test, this "two-step" methodology seems the result of some efforts by the CJEU in trying to reconcile the Luxembourg system-oriented approach, flowing from the mutual recognition logic, with the Strasbourg person-oriented approach, flowing from an individual justice logic. It can however mean lesser protection for the individual, in two different respects. First, from a substantive point of view, because some shortcomings in the protection of an individual do not necessarily need to be of a systemic or general nature but can be linked to particular circumstances of his/her personal biography. Secondly, from a procedural perspective, because adducing evidence of systemic deficiencies represents a heavy and complex burden of proof for an individual.

By contrast, in *Bivolaru and Moldovan* the ECtHR takes note of the Luxembourg "two-step" methodology but focuses straight away on the individual risks incurred by the two applicants, thereby sticking to its own – more protective – one-step-approach.[39] While the latter does not prevent the ECtHR from having regard to the general situation prevailing in a country, it does not make evidence on this score a pre-condition to any findings regarding the individual circumstances of the person concerned and the risks incurred in the event of his/her surrender.

Thus, in respect of Mr Moldovan the ECtHR, for the first time in its case-law, found a "manifest deficiency" resulting in a violation of Article 3 because the French courts had surrendered him, even though they had before them sufficient factual elements indicating that he would be exposed to a serious risk of ill-treatment by reason of the detention conditions in the prison in which he would be detained after his transfer. These factual elements only concerned the personal situation of Mr Moldovan, as opposed to any systemic or generalised deficiencies. At no point in the judgment did the ECtHR inquire about the systemic or generalised nature of any deficiencies in the Romanian prison system, contrary to the French courts which were bound by EU law to apply the "two-step" examination. Thus, regardless of the methodology imposed by EU law at domestic level, what matters in Strasbourg is an outcome which is compatible with the Convention, as qualified or not by the Bosphorus presumption, as the case may be.

## E. Responsibility

The bottom line of all above considerations is that ultimately the EU Member States engage their Convention responsibility for the execution by their domestic courts of any EAWs. It therefore falls to these courts to ensure compliance of this execution with the Convention obligations.[40] Given, however, that the same domestic courts must also comply with EU law when executing an EAW, their task in fact

38 CJEU, *Openbaar Ministerie*, fn. 11, §§ 53–55.
39 ECtHR, *Bivolaru and Moldovan*, fn. 6, § 114.
40 Ibid., § 103.

boils down to combining Convention and EU law in every single case, it being understood that any scrutiny by the ECtHR will be confined to compliance with the Convention, not with EU law, the ECtHR having no competence in respect of the latter.

This can however mean, in practical terms, that domestic courts may engage a Member State's Convention liability for not refusing to execute a EAW where a real and individual risk of ill-treatment in the event of the surrender of a person has been duly established without there being evidence, as required by EU law, of a link between that individual risk and any systemic or generalised deficiencies.

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