# Articles

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## European Arrest Warrants and Minimum Standards for Trials *in absentia* – Blind Trust vs. Transnational Direct Effect?

*Abstract*

The right of the accused person to be present at the trial and defend himself in person forms an essential part of the right to a fair trial. In this regard, the minimum standard enshrined in Art. 6 ECHR has been further developed by the minimum rules on procedural rights established by the EU legislator. According to a recent judgment of the Union's Court of Justice, the Framework Decision on the European Arrest Warrant still allows the executing state to surrender a person convicted in absentia even if the EU minimum standard is not met. This paper will argue that common minimum standards have repercussions on cross-border cooperation based on mutual recognition and may emerge as a ground for refusal.

### *I. Introduction*

The right to be present at the trial is a fundamental right in criminal proceedings. Without being present, the accused person is not able to actively participate in the hearing and to exercise his defence rights. Accordingly, trials *in absentia* have raised serious human rights concerns, and extradition for the purpose of carrying out a sentence resulting from *in absentia* proceedings may be refused because such proceedings do not satisfy the minimum rights of defence.[1] Likewise, the Framework Decision on the European arrest warrant (FD EAW) provided for a refusal ground on trials

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1 See e.g. Art 3 of the second additional protocol to the European Convention on extradition of 17 March 1978 (ETS no. 98).

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*in absentia* (Article 5(1) FD EAW)[2] that has been replaced by Framework Decision 2009/299/JHA on trials *in absentia* (Article 4a FD EAW).[3]

On the other hand, Council and Parliament have established a common minimum standard on the right to be present at the trial by adopting Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.[4] The Directive forms part of the minimum rules on procedural rights that shall strengthen and foster mutual trust between the Member States and, thereby, facilitate mutual recognition of judgments and cooperation in criminal matters (Article 82(2)(b) TFEU). Due to their functional link to the principle of mutual recognition, these minimum rules may have repercussions on the obligation of the executing state to recognise and execute European arrest warrants (Article 1(2) FD EAW) on the one hand and the obligation to respect fundamental rights (Article 1(3) FD EAW) on the other. In particular, the emergence of minimum rules raised the question whether scope and content of a refusal ground (Article 4a FD EAW) had to be interpreted in the light of the common minimum standard (Directive 2016/343/EU).

This issue came up in surrender proceedings before the Higher Regional Court of Hamburg (Germany) which asked the Court of Justice for a preliminary ruling on the normative impact of Directive 2016/343/EU on the execution of European arrest warrants that had been issued for the purpose of enforcement of judgments rendered *in absentia*.[5] This article will discuss the Court's ruling in this case (*TR*) and further elaborate on the repercussions of common minimum standards on cooperation based upon the principle of mutual recognition.

## *II. The Court's Judgment in TR*

The surrender of Mr *TR*, a Romanian citizen, was sought pursuant to two European arrest warrants that had been issued for the purpose of enforcing custodial sentences that had been imposed in his absence. According to the referring court, *TR* had been aware of the criminal proceedings against him, but had absconded in order to escape from justice. In the proceedings leading to his final convictions in appeal proceedings Mr *TR* was represented by lawyers appointed by the court. According to German law, the surrender of a person convicted *in absentia* is permitted if the convicted person had

2 Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 no. L190, 18 July 2002, p. 1.

3 Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 no. L81, 27 March 2009, p. 24.

4 Directive (EU) 2016/343 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 [2016] OJ L65/1.

5 CJEU, Judgment of 17 December 2020, Case C-416/20, *TR*, ECLI:EU:C:2020:1042.

been aware of the criminal proceedings and had been represented by a lawyer (section 83(2) no. 2 German Act on International Cooperation in Criminal Matters – AICCM). However, Mr *TR* objected to his surrender and argued that the judgments rendered *in absentia* violated his right to be present at the trial and the minimum standard established by Directive 2016/343/EU because the Romanian authorities did not give guarantees that the criminal proceedings in question would be reopened.[6] Therefore, the German court stayed the proceedings and requested for a preliminary ruling on whether the provisions of Directive 2016/343/EU were to be interpreted as meaning that the legality of surrender depended on the fulfilment by the issuing state of the conditions laid down in the Directive.

The Court of Justice answered this question in the negative and held that the standard established by Directive 2016/343/EU could not be invoked as a ground for refusal in surrender proceedings because these proceedings were specifically regulated by the Framework Decision on the European arrest warrant and the exhaustive list of refusal grounds, in particular with regard to the execution of judgments rendered *in absentia* (Article 4a FD EAW).[7] According to the Court, it followed from the principle of mutual recognition and the general obligation to execute European arrest warrants that the Member States may refuse to execute such a warrant only in the cases of non-execution listed in Articles 3, 4 and 4a FD EAW. So, if the person to be surrendered (*TR*) were able to invoke Directive 2016/343/EU in order to prevent the execution of a European arrest warrant, this would be tantamount to a circumvention of the system established by the FD EAW and its exhaustive list of grounds for non-execution.[8] The Court's reasoning followed the opinion of the Advocate General who strictly distinguished between the rules and standards in domestic criminal proceedings (Directive 2016/343/EU) and the framework of surrender proceedings and grounds for refusal in particular (Article 4a FD EAW). With regard to the latter, it was not a matter for the executing state to assess whether criminal proceedings in the issuing state were compatible with EU standards.[9] Such review would run counter to the very idea of mutual recognition and mutual trust and, thus, should be limited to exceptional cases where a breach of fundamental rights (Article 47, 48 CFR) were at stake.[10] Where

6 CJEU (fn 5), para. 20; see also Higher Regional Court Hamburg, decision of 4 September 2020 – Ausl 111/19, paras. 33, 78, referring to *Böhm*, Aktuelle Entwicklungen im Auslieferungsrecht Neue Zeitschrift für Strafrecht (NStZ) 2018, p. 197, 201; *Böse*, Neue Standards für Abwesenheitsverfahren in "Fluchtfällen"? Zu den Auswirkungen der Richtlinie 2016/343/EU auf die Auslieferung und Vollstreckungshilfe in der Europäischen Union, Strafverteidiger (StV) 2017, p. 754, 759 f.; *Meyer* in: Ambos/König/Rackow (eds.), Rechtshilferecht in Strafsachen, 2nd edition (Baden-Baden Nomos 2020), Chapter 2 para. 919; for the contrary view see Higher Regional Court Hamburg, ibid., paras. 73 ff.; *Hackner* in: Schomburg/Lagodny, Internationale Rechtshilfe in Strafsachen, 6th edition (München C.H. Beck 2020), § 83 para. 2a.

7 CJEU (fn 5), paras. 45.

8 CJEU (fn 5), paras. 45 ff.

9 Advocate General Tanchev, opinion of 10 December 2020, Case C-416/20 PPU *TR* ECLI:EU:C:2020:1020, paras. 60–61.

10 Ibid. paras. 61, 64–65.

the issuing state had failed to transpose Directive 2016/343/EU into national law, it were rather upon the courts of that state to provide judicial protection against any violation of the minimum standard established by the Directive.[11] Subsequent to the Court's ruling, the German court decided to execute the European arrest warrant and to surrender Mr *TR* to the Romanian authorities.[12]

### *III. Protection of fundamental rights by optional grounds for refusal?*

At first sight, the Court's reasoning appears quite convincing: If Article 4a FD EAW provides for a ground for refusal that relates to convictions *in absentia*, recourse to common minimum standards appears neither necessary nor appropriate. This assumption, however, is based upon the premise that Article 4a FD EAW provides for adequate protection of the defendant's right to be present at the trial.

In contrast to Directive 2016/343/EU, Framework Decision 2009/299/JHA was not designed to harmonise national legislation on trials *in absentia*, but to redefine the grounds for non-recognition of a European arrest warrant and other cooperation instruments (recitals (4), (6) and (14) Framework Decision 2009/299/JHA). In close orientation to the case-law of the European Court of Human Rights, the Framework Decision was based on the principle that judgments rendered *in absentia* could be recognized if the accused had unequivocally waived his right to be present at the trial (recitals (1), (8) Framework Decision 2009/299/JHA). A waiver of the right to a hearing cannot only be derived from the deliberate absence of the accused who received official information of the scheduled date and place of the trial and the consequences of his failure to appear in court (Article 4a(1)(a) FD EAW), but from a mandate to a defence counsel as well (Article 4a(1)(b) FD EAW). In this case, the accused must be aware of the scheduled trial when giving the mandate to a defence counsel to defend him at the trial. In addition, the waiver requires that the defence counsel actually defends the accused person at the trial. The latter requirement shall ensure that the accused person can actually exercise his defence rights, albeit in an indirect manner. If, however, the aforementioned conditions for a waiver are not met and the accused has been convicted *in absentia,* the executing Member State may subject surrender to the condition that the convicted person is afforded with the right to a retrial, or an appeal, in which he has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined. To that end, the convicted person must be served with the judgment and expressly be informed about the right to retrial or appeal and the time frame applicable to the request for a retrial or an appeal (Article 4a(1)(d) and (2) FD EAW). Again, the right to a new trial can be subject to a waiver, either by the explicit statement of the accused person not to challenge the judgment rendered *in absentia* or by not lodging a request for retrial or appeal within the applicable time-frame (Article 4a(1)(c) FD EAW).

11 CJEU (fn 5), para. 55.
12 Higher Regional Court Hamburg, decision of 30 December 2020 – Ausl 111/19.

Nevertheless, Article 4a FD EAW merely defines an optional ground for non-execution of a European arrest warrant. So, it does not establish a minimum, but a maximum standard on the conditions for surrender on the basis of a European arrest warrant: The executing state must not insist upon a higher standard to be applied. Since Article 4a FD EAW contains a specific and exhaustive provision on the non-execution of European arrest warrants that are based upon judgments *in absentia*, the executing state may not rely on higher standards derived from the national constitution (*Melloni*).[13] Moreover, instead of establishing a common minimum standard, Article 4a FD EAW leaves it up to the executing state to apply a lower threshold: The executing authority "may" refuse to execute European arrest warrants that do not comply with the requirements set out in Article 4a FD EAW, but it "may" as well decide to execute such warrants. Member States may implement Article 4a FD EAW as a mandatory ground for refusal and/or limit its scope, too. Accordingly, the German law implementing Framework Decision 2009/299/JHA established a mandatory ground for refusal for convictions *in absentia* (section 83(1) no. 3 AICCM), but expressly permitted the execution of a European arrest warrant if the convicted person, being aware of the proceedings against him, and in which a lawyer participated, has prevented a summons in person through absconding (section 83(2) no. 2 AICCM). The latter provision is based upon the case-law of the European Court of Human Rights on Article 6 ECHR[14] and the corresponding case-law of the German Constitutional Court[15] according to which an accused who is aware of the criminal proceedings against him and seeks to evade justice forfeits his right to participate in the hearing and, thus, may be tried and convicted *in absentia.* The decision of the German legislator to limit the scope of the ground for refusal concerning convictions *in absentia* was based on the reasoning not to subject surrender within the Union to stricter conditions than extradition to third states.[16]

So, the implementation of Article 4a FD EAW into German law transformed an optional ground for refusal into a mandatory one whose scope is partially governed by national (German) law: The executing authority must refuse to execute a European arrest warrant if the requirements of the ground for refusal are met; otherwise, the executing authority must surrender the person sought by the issuing state. The latter applies in particular to European arrest warrants for the purpose of executing judgments rendered *in absentia* against defendants seeking to escape from justice (section 83(2) no. 2 AICCM). Accordingly, the decision of the German court to surrender *TR*

13 CJEU, judgment of 26 February 2013, Case C-399/11 *Melloni* ECLI:EU:C:2013:107 paras. 63–64.

14 ECtHR, judgment of 14 June 2001, App no. 20491/92, *Medenica v Switzerland* paras. 55 ff.; judgment of 10 November 2004, App no. 56581/00 *Sejdovic v Italy* paras. 97, 102; judgment of 2 October 2008, App no. 72001/01 *Atanasova v Bulgaria* para. 52.

15 German Constitutional Court ("Bundesverfassungsgericht") Neue Juristische Wochenschrift (NJW) 1987, p. 830; NJW 1991, p. 1411; Neue Zeitschrift für Strafrecht Rechtsprechungs-Report (NStZ-RR) 2004, p. 308, 309.

16 See the explanatory memorandum to the amendment proposed by the German "Bundesrat", Document of the Parliament ("Bundestags-Drucksache"), no. 16/1024, p. 23, 25.

was entirely based on this provision limiting the scope of the refusal ground on trials *in absentia*,[17] and it did not matter whether or not the conditions according to Article 4a FD EAW were met.

The Court's reasoning does not address the legal and procedural framework of surrender proceedings in Germany, but is apparently based upon the premise that the referring court (as executing judicial authority) decides upon whether or not to have recourse to the optional ground for refusal under Article 4a FD EAW. According to the Court, the German court must ascertain whether the conditions under Article 4a FD EAW are met. If this is the case and the ground for refusal applies, the referring court, in exercising its discretion, may take into account other circumstances that enable it to satisfy itself that the surrender of the person concerned does not entail a breach of his rights of defence, and surrender that person to the issuing Member State.[18] In Germany, however, the executing authority does not enjoy such discretion; instead, the German legislator has exercised the margin of discretion under Article 4a FD EAW and established a mandatory ground for refusal with a limited scope. As far as these limitations apply, the executing authority must execute the European arrest warrant irrespective of whether or not the standards under Article 4a FD EAW are met.

The implementation of Article 4a FD EAW illustrates that an optional ground for refusal is *per se* inappropriate to establish a minimum standard of protection because it lies within the executing Member State's discretion whether and to what extent to protect persons convicted *in absentia* against the enforcement of the sentence imposed: Member States "may" provide such protection, but Article 4a FD EAW does not entail an obligation to do so.

### *IV. The obligation to respect fundamental rights*

The fact that Article 4a FD EAW does not establish a binding minimum standard of protection does not mean that the executing state is not bound by international and European human rights standards and the Charter of Fundamental Rights (CFR) in particular (Article 51(1) CFR). Article 1(3) FD EAW expressly states that the obligation to recognise and execute European arrest warrants shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles. As the Court of Justice has stated in *Aranyosi*, the latter obligation bars the execution of a European arrest warrant if surrender would result in the requested person suffering inhuman or degrading treatment (Article 4 CFR).[19] The obligation to execute a European arrest warrant is suspended if the executing authority has established systemic deficiencies of the detention conditions prevailing in the issuing

17 Higher Regional Court (fn 11), pp. 13 ff.
18 CJEU (fn 5), paras. 50 ff.
19 CJEU (Grand Chamber), judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 (*Aranyosi* and *Căldăraru*), para. 88.

Member State (general assessment) and that, due to these deficiencies, the person to be surrendered will be exposed to a real risk of inhuman or degrading treatment (individual assessment).[20] In *LM,* the Court has extended this approach to the right of access to an independent and impartial tribunal (Article 47(2) CFR).[21] Even though the Court did not expressly construe an additional ground for refusal, but a ground to postpone respectively terminate surrender proceedings[22], the executing Member State's obligation to respect fundamental rights was given priority over the obligation to execute the European arrest warrant (Article 1(2) FD EAW), and thereby establishes a mandatory standard of protection that is not left to the discretion of the executing authority.

Likewise, the obligation to respect human rights and the right to a fair trial (Article 47(2) CFR) imposes a limitation to the obligation to execute European arrest warrant based upon a conviction *in absentia.* According to the Advocate General in *TR*, this limitation should only apply where the judgment rendered in the issuing state had been in breach with fundamental rights enshrined in Article 47, 48 CFR whereas mere non-compliance with the common standard under Directive 2016/343/EU did not justify ending the surrender procedure.[23] On this premise, the obligation to respect fundamental rights (Article 1(3) FD EAW) must be determined on the basis of the case-law on the right to be present at the trial (Article 47(2) CFR, Article 6(1) ECHR) according to which persons absconding from justice have forfeited their right to be present at the trial.[24] As a consequence, the human rights clause could not be invoked as a mandatory standard of protection that suspends the obligation to execute the European arrest warrant against *TR.*

### *V. Shaping human rights standards by EU legislation*

The strict distinction, however, between the fundamental right enshrined in Article 47(2) CFR on the one hand and the common minimum standard established by Directive 2016/343/EU on the other can hardly be reconciled with the Directive's objective to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning the right to be present at the trial (recital (9) Directive 2016/343/EU). The Directive expressly refers to the right to a fair trial (Article 47(2) CFR, Article 6(1) ECHR) and the case-law of the European Court of Human Rights (recitals (1), (41) Directive 2016/343/EU). Building upon the fundamental right to a fair trial, the Directive does not confine itself to codifying the *status quo*, but establishes common minimum rules that go beyond the fundamental rights guarantees enshrined in Article 47(2) CFR and Article 6 ECHR and their interpretation by the European courts. These minimum rules guarantee the right of the accused person to

20 Ibid., para. 91 ff.
21 CJEU (Grand Chamber), judgment of 25 July 2018, Case C-216/18 PPU (*LM*), para. 60 ff.
22 CJEU (Grand Chamber), judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 (*Aranyosi* and *Căldăraru*), paras. 98, 104.
23 AG Tanchev, paras. 64–65; see also *Hackner* (fn 6), para. 2a.
24 See the references in fn 14.

be present at the trial (Article 8(1) Directive 2016/343/EU) and strictly limit the conditions for trials *in absentia*: A trial must not be held in the absence of the accused person unless he has been informed of the trial and the consequences of non-appearance and waived his right either by non-appearance (Article 8(2)(a) Directive 2016/343/EU) or by the decision to mandate a lawyer to represent him at the trial (Article 8(2)(b) Directive 2016/343/EU). If these conditions were not met, the person convicted in his absence has the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the judgment being reversed (Article 9 Directive 2016/343/EU). Articles 8 and 9 of Directive 2016/343/EU establish a binding standard and entail an unconditional and sufficiently precise obligation upon Member States to ensure that the accused person is provided with the right to be present at the trial (Article 8(1) Directive 2016/343/EU) or to a new trial (Article 9 Directive 2016/343/EU) unless the conditions for a free and unconditional waiver are met. Since the date for the transposition of the Directive has expired on 1 April 2018, the aforementioned provisions have direct effect and can be invoked by the accused person if the sentencing state failed to comply with its obligation to transpose the Directive correctly.[25] Thereby, Directive 2016/343/EU reflects a common understanding of scope and content of the right to be present at the trial that applies throughout the Union and, thus, might also gain a transnational dimension in cross-border cooperation.

The Advocate General, however, argued that Directive 2016/343/EU entailed obligations upon the Member State where the trial *in absentia* took place (sentencing state) whereas Article 4a FD EAW was addressed to any other Member States competent for the execution of a European arrest warrant based upon a judgment rendered in the sentencing state. Thus, the scope of Directive 2016/343/EU was limited to establishing minimum standards in the trial state, but did not extend to surrender proceedings in the executing state.[26] According to the Advocate General and the referring German court, this interpretation of the Directive was supported by the fact that the Council had not transposed the text of Article 4a FD EAW into the minimum rules under the Directive 2016/343/EU, but had insisted upon an autonomous wording that reflected the different regulatory aims of the Framework Decision and the Directive (mutual recognition and establishing minimum rules).[27]

Notwithstanding the different regulatory context, the regulatory aims of both legislative measures are inextricably linked to each other: According to Article 82(2)(b) TFEU, Parliament and Council may establish minimum rules on the rights of individuals in criminal procedure in order to facilitate mutual recognition of judgments and cooperation in criminal matters. Accordingly, minimum rules on the right to be present at the trial aim at strengthening mutual trust of Member States in each other's

25 See also Court para. 55; see also with regard to the direct effect of Directives: CJEU, Case 148/78, *Ratti*, 1979 [ECR] 1629 paras. 18 ff.

26 AG Tanchev, paras. 58 ff.

27 Ibid. 62 ff., referring to Council Document 12955/14 of 9 September 2014, p. 2 ff.; see also Higher Regional Court Hamburg (fn 6), para. 75.

criminal justice systems (recital (10) Directive 2016/343/EU). The minimum rules shall enhance cross-border cooperation between Member States and, thus, have an auxiliary function for the implementation of the principle of mutual recognition. Mutual trust, however, requires more than the commitment to respect human rights and common minimum standards, but crucially depends upon the willingness and capacity to live up to this commitment and the obligations resulting from EU legislation. If a Member State fails to fulfil its obligations to implement the common minimum standards, the mere existence of the corresponding obligation under EU law (Article 288(3) TFEU) will not provide a sufficient basis for trust in that Member State's criminal justice system, but require the executing authority to have blind trust in the issuing state's compliance with the common standards established by EU legislation. If such legislation provides for a higher level of protection than international human rights standards (the ECHR and the corresponding case-law), this common minimum standard necessarily has repercussions on the level of protection in transnational proceedings: The commitment to the strengthening of fundamental rights and the right to a fair trial in particular (recital (9) Directive 2016/343/EU) implies an obligation of Member States to insist on these common standards to be respected by other Member States in cross-border cooperation rather than to confine themselves to maintaining international human rights standards. It would be hardly conceivable to consider compliance of the issuing Member State with common minimum rules as a matter of discretion.

On the other hand, the effective functioning of the system established by the European arrest warrant is based upon the premise that mutual recognition is the rule and non-recognition (refusal) the exception. An interpretation of common minimum rules established by Directive 2016/343/EU as part of the European *ordre public* and potential ground for refusal would stand in sharp contrast to this premise and might result in the emergence of a variety of additional grounds for refusal originating from the directives on minimum rules on procedural rights of the defendant in criminal proceedings. As the Advocate General pointed out in *TR*, it would overstrain the capacity of the executing authority in surrender proceedings to examine whether the criminal justice system of the issuing Member State fully complied with every aspect of the common minimum standard established by the directives on procedural rights: Review in surrender proceedings therefore necessarily remained limited to selective examination that focuses on serious violations of individual rights qualifying as breaches with fundamental rights.[28] The decision not to execute the European arrest warrant may protect the requested person from a trial not compatible with common minimum standards, but may also result in impunity of the offender who is not surrendered to the issuing Member State. By "selective" examination, the executing state does not only save its own resources, but also takes into account the issuing Member State's interest in prosecuting the offender and the common interest in the effective functioning of cross-border cooperation. A distinction based upon the gravity of human rights violations can also be derived from the case-law of the European Court of Human

28 AG Tanchev, para. 61, 65; see also Higher Regional Court Hamburg (fn 6), para. 74.

Rights according to which extradition to a third state is considered to be in breach with Article 6 ECHR if the requested person faces the risk of a flagrant denial of justice whereas proceedings "merely" incompatible with the safeguards enshrined in Article 6 ECHR do not in themselves render extradition inadmissible.[29] Thereby, the Court acknowledges that the requesting (third) state is not bound by the guarantees set out in the ECHR, but may nevertheless have a legitimate interest in the enforcement of its criminal law. However, as far as cooperation within the Union is concerned, the ECHR, the CFR and the common minimum standard established by EU legislation are legally binding upon all Member States. The interest in effective transnational law enforcement, thus, cannot justify lower standards of protection; it may, nevertheless, determine the division of tasks and responsibilities between the issuing and the executing Member States and, thereby, limit the scope of judicial protection by the executing Member State.

### *VI. Gap in judicial protection in the issuing Member State*

The principle of mutual recognition is mainly based upon a strict division of tasks and responsibilities between the issuing and the executing Member States. In its essence, mutual trust means that it is a matter for the issuing state to ensure that criminal proceedings against the person to be surrendered are conducted in conformity with the right to a fair trial and the corresponding procedural guarantees. If these are violated in the course of criminal proceedings, the accused (or convicted) person must be provided with an effective legal remedy (Article 47(1) CFR).[30] This applies in particular to the right to be present at the trial (Article 10 Directive 2016/343/EU), and it is upon the sentencing state to grant the remedy against a judgment rendered *in absentia*, i.e. a retrial (Article 9 Directive 2016/343/EU).[31] As the provisions of Directive 2016/343/EU have direct effect, the accused person may even rely on these provisions in order to assert his right to be present at the trial.[32] So, the availability of effective judicial protection against violations of the right to a fair trial is the linchpin of the principle of mutual recognition.

However, the division of tasks and responsibilities between the issuing and the executing Member State is not mutually exclusive. As the Court's case-law (*Aranyosi* and *LM*) illustrates, the primary responsibility of the issuing Member States does not relieve the executing Member State from its obligation to protect the requested person from human rights violations in the issuing Member State. The obligation to

29 ECtHR, judgment of 7 July 1989, Appl. no. 14038/88, *Soering v. United Kingdom* para. 113; ECtHR, judgment of 17 January 2012, Appl. no. 8139/09, *Othman (Abu Qatada) v. United Kingdom* paras. 258 ff.

30 CJEU, judgment of 30 May 2013, Case C-168/13, *Jeremy F* ECLI:EU:C:2013:358 para. 50; CJEU (Grand Chamber), judgment of 5 April 2016, Joined Cases C-404/15 and C-659/15 (*Aranyosi* and *Căldăraru*), para. 103.

31 AG Tanchev, para. 58; Higher Regional Court Hamburg (fn 6), para. 76.

32 Higher Regional Court Hamburg (fn 6), para. 76; see also CJEU (fn 5), para. 55.

respect fundamental rights is a common and shared responsibility of both states that includes a residual competence of the executing state to protect the defendant's right to a fair trial. Recourse to this residual competence, however, must be limited to cases where effective judicial protection is not available in the issuing Member State. In this particular case, the accused person will be otherwise deprived of the right to judicial protection: Where judicial review of the decision of the issuing authority is, at least in principle, exclusively assigned to the issuing Member State, the executing Member state must ensure that the person concerned can challenge that decision before a court of the issuing state. If the issuing Member State does not comply with the minimum guarantees of judicial protection and does not provide for effective legal remedies, there is no longer a valid basis for mutual trust and mutual recognition.[33]

Due to their residual function, it is not a matter for the courts of the executing Member State to examine whether the criminal justice system of the issuing Member State fully complies with every aspect of the common minimum standard established by the directives on procedural rights.[34] Instead, it is first and foremost the responsibility of the issuing Member State and its courts to ensure that criminal proceedings are conducted in conformity with EU standards. However, where judicial protection by the courts of the issuing Member State is not available at all or where the available legal remedies do not provide effective protection, the courts of the executing Member State will have to exercise their residual competence. If particularly serious human rights violations are at stake (inhuman or degrading detention conditions, Article 4 CFR), recourse to legal remedies in the issuing Member State will not protect the surrendered person from being subject to inhuman and degrading treatment immediately after surrender and, thus, not satisfy the requirements of effective judicial protection (*Aranyosi*).[35] There is, however, no reason to limit the residual competence of the executing Member State to particularly serious human rights violations: If there is a manifest lack of judicial protection in the issuing Member State that deprives the defendant of his right to an effective legal remedy, the reasoning of *Aranyosi* and *LM* should apply accordingly to procedural rights and safeguards established by the EU legislator.

In *TR*, the aforementioned conditions were clearly met: The conviction of Mr *TR* had resulted from *in absentia* proceedings before the appellate court in which he had neither received official information of the scheduled date and place of the trial nor been represented by a lawyer mandated by him (Article 8(2) Directive 2016/343/EU), and Mr *TR* had not been afforded with the right to a re-trial (Article 9 Directive 2016/343/EU) either. In particular, the issuing authority stated that the convictions could not be reviewed under the Romanian Code of Criminal Procedure and, therefore, refused to give a guarantee that the criminal proceedings against *TR* would be

33 See, with regard to the European Investigation Order, opinion of Advocate General Bobek of 29 April 2021, Case C-852/19, Gavanozov II, ECLI:EU:C:2021:346, paras. 78 ff.
34 See the concerns raised by AG Tanchev, para. 65.
35 See also *Aranyosi* (fn 30), para. 103.

reopened.[36] As the issuing Member State did not provide for any legal remedy, the convicted person was deprived of his right to effective judicial review of a judgment in breach with his right to be present at the trial. This manifest lack of judicial protection triggers the residual competence of the executing Member State and its obligation to respect and protect fundamental rights such as the guarantee of a fair trial.

Admittedly, this understanding of the division of tasks and responsibilities between the issuing and the executing Member State gives more weight to the residual function of the courts in the executing Member State and, thereby, might interfere with the primary responsibility of the issuing Member State which lies at the core of the principle of mutual recognition. These concerns are addressed by the requirement of a manifest lack of judicial protection that emphasizes the recourse to the residual competence should be limited to exceptional cases.

But even if the aforementioned approach is rejected for being incompatible with the principle of mutual recognition and a strict division of tasks and responsibilities between the issuing and the executing Member State where the competence of the latter is limited to the exhaustive list of grounds for refusal (Articles 3 ff. FD EAW), it cannot be denied that Article 4a FD EAW expressly provides for a refusal ground concerning the enforcement of judgments *in absentia*. Thus, reference to the standard established by Directive 2016/343/EU will not have the effect of extending the list of grounds for refusal nor their scope of application, but merely refer to the division of tasks and responsibilities between the issuing and the executing Member State as foreseen by the legislative framework of the European arrest warrant according to which the executing Member State "may" assess whether or not the common standards for convictions *in absentia* are met. Thus, reference to Directive 2016/343/EU will not extend the competence of the executing authority, but merely transform an optional ground for refusal ("may") into a mandatory one ("must"). When the Council adopted Framework Decision 2009/299/JHA, it did not establish a common minimum standard and left it to the discretion of the executing Member State whether or not to insist upon the standard set out in Article 4a FD EAW. Directive 2016/343/EU has established such a common minimum standard that is binding upon all Member States. Maintaining the merely optional ground for refusal (Article 4a FD EAW) raises inevitably the question for whatever reason the executing Member State shall still have discretion on whether or not to surrender a person for the purpose of the enforcement of a judgment rendered in breach with EU law. Since Articles 8 and 9 of Directive 2016/343/EU have direct effect and can be invoked by the accused person in criminal proceedings, the convicted person may rely on these provisions in surrender proceedings, too. In other words, the aforementioned provisions have direct effect vis-à-vis the executing state ("transnational" direct effect).

36 CJEU (fn 5), para. 17.

## VII. Conclusion

The right to be present at the trial is a core element of the right to a fair trial. By their nature, trials *in absentia* are a serious threat to this right. Even though individual rights can be waived by the holder of the right, legal standards must ensure that the waiver constitutes a knowing and informed relinquishment of the right that is based upon the free will of the defendant. In this regard, Directive 2016/343/EU is a significant step forward because it clearly defines the conditions for a waiver of the right to be present at the trial and does not retain further exceptions for defendants seeking to escape from justice.

The normative impact of this common minimum standard is not limited to the national criminal justice systems of the trial state, but also extends to transnational criminal law enforcement in the Union. As a consequence, surrender within the Union might be subject to stricter conditions than extradition to third states where national legislation and extradition treaties still refer to Article 6 ECHR and the case-law on accused persons absconding from justice.[37] This effect, however, does not reflect a lesser degree of trust, but the expectations raised by the Member States' commitment to a higher standard of protection established by the directives on procedural rights of the defendant. These standards do not entail an obligation of the executing Member State to assess whether the issuing Member State's criminal justice system fully complies with the new minimum standard. According to the division of tasks and responsibilities between both states, it will remain within the primary responsibility of the issuing Member State to ensure that criminal proceedings are conducted in conformity with EU law. Mutual trust, however, is neither blind nor without limits. The road map and the development of minimum standards for procedural safeguards have always been driven by the intention to establish mutual trust as a common basis for cooperation in criminal matters. If these standards should be more than empty phrases and mere lip service, a clear violation of these standards must have consequences for transnational criminal law enforcement. Therefore, a Member State insisting on compliance with the European standards cannot be regarded as hampering the smooth functioning of cooperation in criminal matters, but contributes to the strengthening of mutual trust in the Area of Freedom, Security and Justice.

37 See the concerns raised by the Higher Regional Court Hamburg (fn 6), para. 77.