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PENITENTIARY LAW IN EUROPE: AN OPEN DEBATE

ABSTRACT. *'This article analyzes the contradictions of the European penitentiary systems resulting from the European Union's lack of binding competence over detention matters. Due to the latter, EU Member States continue to apply divergent prison rules, leading to significant disparities in detention conditions. These differences undermine mutual trust and increasingly obstruct the functioning of the European Arrest Warrant (EAW), causing delays and refusals in its execution. The study explores the impact of the Court of Justice's Aranyosi and Căldăraru ruling, which requires national courts to assess the risk of inhuman or degrading treatment before executing an EAW. Although this case law clarifies the relationship between fundamental rights protection and the principle of mutual recognition, it also exposes the limits of a system relying on judicial solutions rather than legislative harmonization. To address these shortcomings, the article supports a broad interpretation of Article 82 TFEU as a legal basis for EU-wide minimum detention standards. It concludes by examining the significance and limits of the Commission Recommendation of 8 December 2022, arguing that stronger and binding EU involvement is necessary to ensure uniform fundamental rights protection and effective judicial cooperation.*

CONTENT. 1. The European double soul in the penitentiary field. – 2. Is there space for a binding European Union? – 2.1. Case law on the matter: the Aranyosi and Căldăraru ruling. – 2.2. Article 82 of the Treaty on the Functioning of the European Union: towards a broad interpretation. – 2.2.1. Rethinking the Union's role. – 2.3. A cautious recognition of the Union's competence in the penitentiary area: Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions.

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1. The European double soul in the penitentiary field

This paper aims to analyze the contribution of Europe to the evolution of the penitentiary system, highlighting how, even today, the lack of recognized EU competence in penitentiary matters exposes it to insurmountable contradictions, as well as to a regulatory system that has been repeatedly highlighted by the European institutions themselves because of its shortcomings. Particular attention will be devoted to the impact of these shortcomings on judicial cooperation in criminal matters, with specific reference to the European arrest warrant.

Against this background, the paper engages with the scholarly debate on possible avenues for overcoming these constraints, focusing in particular on a broad interpretation of Article 82 TFEU. This approach, regarded by some commentators as a viable solution to the absence of explicit competence, is strongly endorsed by the author.

To begin with, a distinction between the different areas of European intervention is required: on the one hand, the Council of Europe has assumed a leading role in the development of common minimum standards in the field of penitentiary law[1] through the introduction of the European Prison Rules[2] and thanks to the active role

[1] The European Court of Human Rights (ECtHR) has played and continues to play a crucial role in the interpretation and application of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), representing an essential point of reference for the protection of detainees' rights. Its rulings have helped establish minimum standards for the protection of human rights, defining the threshold beyond which prisoners' treatment amount to inhuman or degrading treatment, in breach of Article 3 ECHR. Examples include the *Sulejmanovic v Italy* case and *Torreggiani and others v Italy* case, in which the ECtHR identified the standard of 3 sqm of space for each prisoner as the minimum requirement necessary to prevent violation of Article 3 ECHR.

[2] The European Prison Rules constitute a genuine European soft law prison system that aims to harmonize Member States prison policies by promoting the adoption of shared standards and best practices. They date back to February 1987, when the previous Standard Minimum Rules (adopted in January 1973 by the Committee of Ministers of the Council of Europe) were revised and the rules took on the new name of European Prison Rules. Further amendments were made in 2006 through Recommendation R (2006)2 of the Committee of Ministers to Member States on European Prison Rules and, more recently, in 2020 with the aim of adapting the content of the rules to the profound changes that have taken place over time, also in light of the case law of the ECtHR and the standards progressively developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). As amended in 2020, the rules are divided into nine parts and comprise a total of 108 provisions. Each section deals with a specific area, ranging from the fundamental principles that prison administrations are required to follow in the management of prisons, to hygiene, physical conditions of detention facilities, recreational and work activities, healthcare, contact with the outside world, role of prison staff and internal security.
As a soft law instrument, the Rules do not impose binding legal obligations on Member States, but rather serve as guiding principles and reference models that national legal systems can draw on to improve their prison systems. However, despite their original 'weak' legal nature, in recent years the European Prison Rules have acquired increasing

of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);[3] on the other, as mentioned, the European Union still suffers from a competence deficit that prevents it from adopting binding common standards in prison matters.

relevance in the supranational context, gradually becoming rules with substantially greater force than soft law instruments, to the extent that some legal scholars recognize them as having the force than hard law instruments: from a merely indicative instrument to an established parameter of legitimacy. They are frequently referred to as an interpretative parameter in the ECtHR case law. At the same time, the Rules are systematically mentioned in the CPT reports and recommendations, which contribute significantly to strengthening their effectiveness in supranational practice. In this sense, we can speak of a 'hybridization' between soft law and hard law: the absence of formal coerciveness is compensated by growing substantive authority. See Revised Rules and Commentary to Recommendation CM/REC (2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2018 (*European Committee on Crime Problems (CDPC), Council for Penological Co-operation (PC-CP)*); Jim Murdoch, *The treatment of prisoners-European Standards* (Council of Europe Publishing 2006) 34; Giuseppe Capoccia, 'Introduzione' in Dipartimento dell'Amministrazione penitenziaria. Ufficio Studi Ricerche Legislazione e Rapporti Internazionali (ed), *Le Regole Penitenziarie Europee Allegato alla Raccomandazione R(2006)2 adottata dal Comitato dei Ministri del Consiglio d'Europa l'11 gennaio 2006* (Ministero della Giustizia 2007) 7; Patrizio Gonnella, 'La soft law internazionale e la sua cogenza in ambito penitenziario' (2014) 3 *Democrazia e Diritto* 133.

[3] As Cassese observed, the creation of the CPT constitutes a 'step of extraordinary importance' because for the first time a group of experts from outside the state concerned was allowed to exercise oversight and formulate an opinion on places of deprivation of liberty, spaces in which state authority has traditionally reached its most intense expression. The establishment of the Committee thus marks a significant milestone in the gradual process of transparency and public accountability that began with the Enlightenment in the second half of the eighteenth century: through the CPT, public scrutiny was extended beyond the trial phase to the execution of sentences. This development entails a profound limitation of state sovereignty in an area that had long been shielded from any form of external supervision, replacing exclusive national control with a framework of cooperation. In this sense, we can speak of a process of 'internationalization' of human rights protection, whereby a supranational body is entrusted with the authority, although not binding, to conduct independent scrutiny of detainees' treatment. This shift is particularly significant given the historical reluctance of states to accept external control in the field of fundamental rights.
Against this background the CPT has, through its inspection activities, progressively developed a body of standards governing the treatment of persons deprived of their liberty. These non-binding standards, which are regularly updated, are widely regarded as considerably more detailed and operational than the European Prison Rules. See Antonio Cassese, 'A new approach to human rights. The European Convention for the Prevention of Torture' (1989) 83 (1) *American Journal of International Law* 128; Antonio Cassese, *Umano-Disumano. Commissariati e prigioni nell'Europa di oggi* (Laterza 1994) 5; Murdoch, (2006), 45; Mauro Palma, 'Dignità e diritti delle persone private della libertà all'alba del nuovo millennio' (2008) 3 Italianieuropei <https://www.italianieuropei.it/it/la-rivista/archivio-dellarivista/item/588-dignità-e-diritti-delle-persone-private-della-libertà-allalba-del-nuovo-millennio.html> accessed 5 January 2026.

2. *Is there space for a binding European Union?*

As mentioned, the Council of Europe has developed useful instruments for the protection of fundamental rights in prison detention. These tools, which are nonbinding in nature, have played a fundamental role in the development of European penitentiary systems. However, it is important to remember that these instruments pertain to the geographical space of the Council of Europe.

Moving to the internal front of the European Union, the following paragraphs will seek to show how the failure to recognize Union competence in prison matters and, consequently, the lack of legally binding instruments, leaves States a wide margin of freedom in adopting standards and rules in this area making. Hence, a highly heterogeneous prison landscape can be witnessed: prison conditions vary across different States.

The consequences are many: on the one hand, a marked unevenness in terms of the rules of treatment which differ among Member States, making a real and actual comparison of the data difficult; on the other, and in continuity with this issue, a discrepancy in the data regarding overcrowding and prison conditions, which vary considerably among Member States.

The latest data from the European Space I project, dating back to January 31, 2024, clearly show this gap. Data on overcrowding range from countries with a low level of concentration of prisoners such as Luxembourg with 62 prisoners per 100 places rising in Latvia to 67 and in Lithuania to 68, to countries exceeding the maximum capacity provided for prisons. Among the latter are Croatia with a percentage of 110%, Italy with 118%, France with 124% and Slovenia with 134%.[4] Nevertheless, as already clarified, the data are based on the domestic regulations of individual countries, each of which defines the overcrowding index according to its own criteria. This reliance on divergent parameters makes meaningful comparison particularly difficult. In its Resolution of 5 October 2017, the European Parliament affirmed that 'Member States calculate prison capacity and, therefore, overcrowding rates in accordance with spatial parameters that differ radically from one Member State to another, making it difficult, if not impossible, to make Union-wide comparisons'.[5]

[4] Marcelo F. Aebi and Edoardo Cocco, 'Prisons and Prisoners in Europe 2024: Key findings of the Space I survey' (2025) 3 Series UNILCRIM 1 <https://wp.unil.ch/space/files/2025/07/250715_keyfindings-space-i_prisons-europe-2024_full.pdf> accessed 5 January 2026.

[5] European Parliament Resolution (2017)/0385 of 5 October 2017 on prison systems and conditions of detention

Significant disparities also emerge from data on the ratio between the number of prisoners and prison staff. In Serbia and in Poland the ratio is one officer for every 2.7 and 2.6 inmates respectively, in Italy there is one officer for every 1.4 inmates. By contrast, other countries show a high availability of staff: Luxembourg, Netherlands and Norway have more than one prison employee per detainee.[6]

Divergences in the available data also concern the protection of detainees' fundamental rights under the European Prison Rules. According to these rules, detainees should have access to sanitary facilities at all times and, as far as possible, in conditions that ensure privacy. In some countries, however, sanitary facilities are located outside the cells or do not assure any possibility of privacy. For instance, as evidenced by the CPT reports, both Cyprus[7] and Bulgaria[8] have failed to meet the standards set for sanitary facilities.

Furthermore, among EU Member States there are considerable differences in the number of hours detainees are allowed to spend outside their cells.[9] Some countries, such as Poland,[10] grant prisoners no more than one hour of outdoor exercise per day,[11] whereas others allow three or four hours. In Italy, for example, detainees are entitled to

(2015/2062(INI)) [2018] OJ C346/14; Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023).

[6] See n 4.

[7] Council of Europe, *Report to the Government of Cyprus on the visit to Cyprus carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 17 May 2023* (CPT Strasbourg 2024) 16.

[8] Council of Europe, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 1 to 13 October 2021* (CPT Strasbourg 2022) 26 ff.

[9] Rule n. 25.2 of the European Prison Rules states: 'This regime shall allow all prisoners to spend as many hours a day outside their cells as are necessary for an adequate level of human and social interaction'. See Revised Rules and Commentary to Recommendation CM/REC (2006)2 of the Committee of Ministers to Member States on the European Prison Rules 2018 (*European Committee on Crime Problems (CDPC), Council for Penological Co-operation (PC-CP)*) 25.

[10] Council of Europe, *Report to the Polish Government on the visit to Poland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 11 to 22 May 2017* (CPT Strasbourg 2018) 34.

[11] As stated by the European Prison Observatory the Council of Europe has stressed that it is 'unacceptable to keep prisoners in their cells for 23 hours a day'. See Marie Crétenot, 'Dalle prassi nazionali alle linee di guida europee: iniziative interessanti nella gestione penitenziaria' (Antigone Edizioni 2013) 10.

four hours per day outside their cells. Cyprus stands out in a positive sense, as in its prisons detainees spend most of the day outside their cells.[12]

Profound divergences are also evident in the field of pre-trial detention. National legislation determines the maximum duration of pre-trial detention, ranging from limits of less than one year (as in Denmark and Germany), to a maximum of five years (as in Italy and Romania), and extending to countries where no maximum limit exists at all (such as the Netherlands and Cyprus).[13]

This lack of uniformity in detention conditions among EU Member States increasingly constitutes a concrete obstacle to the functioning of the principle of mutual trust, which underpins the execution of the European Arrest Warrant (EAW). As a result of these divergences, recent years have witnessed the development of derogatory practices in judicial cooperation instruments, later endorsed by the Court of Justice of the European Union, which has found itself compelled to fill legislative gaps, particularly with regard to the interpretation of the Framework Decision on the European Arrest Warrant. As will be explored in greater depth, the core issue lies in the complex coordination between the principles of mutual recognition and mutual trust[14] on the one hand, and compliance with Article 3 of the European Convention on Human Rights (ECHR) and the corresponding Article 4 of the Charter of Fundamental Rights of the European Union (CFR), on the other.

The execution of the European Arrest Warrant is in fact increasingly delayed or postponed on grounds related to the protection of detainees' fundamental rights. As early as 2022, when the Commission reported in the so-called non-paper the number of cases involving delays or refusals in the execution of EAWs, these amounted to 300. As stated therein, 'available statistics on the EAW demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, in particular based on inadequate material conditions of detention'.[14] These data reflect the increase in refusals following the 2016

[12] See n 7.

[13] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 3. For further information on the principle of mutual recognition as a prerequisite for judicial cooperation see Anna Iermano, 'La cooperazione giudiziaria e di polizia in materia penale' (2025) <https://www.slsg.unisa.it/osservatorio/coop.penale/coop.penale#:~:text=82%20del%20TFUE%20co nsente%20di,diritti%20delle%20vittime%20della%20criminalità> accessed 10 January 2026. See also Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and Comparative Law 704.

[14] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 13.

Aranyosi and Căldăraru judgment, from 21 cases prior to that decision to 81[15] cases[16] thereafter.

Against this backdrop, both the European Parliament and the European Prison Observatory[17] have repeatedly called on the Commission to adopt rules on detention recognising its competence in this field. In light of these repeated calls, on 8 December 2022 the Commission adopted the Recommendation on minimum standards for detention to be applied within the Union, thereby taking a first, albeit cautious, step towards acknowledging competence in this area. This development is the outcome of a long and gradual process, shaped by judgments of the Court of Justice, which opted for a compromise solution, partially departing from its previous strict approach.[18] Among these rulings, the *Aranyosi and Căldăraru* judgment is emblematic: it played a key role in clarifying – albeit through a solution that appears transitional – the relationship between the execution of the EAW and prohibition of inhuman or degrading treatment.

Nevertheless, it must be emphasised that the current framework remains neither fully clear nor fully effective. As a result, the question of recognising EU competence in the penitentiary field has attracted renewed attention. Such competence would enable the Union to foster adherence to the EAW by reducing legislative and practical divergences – an outcome that would otherwise hardly be achieved over a very long period of time.

[15] *Ibidem*.

[16] Among the cases cited is the refusal by the Westminster Magistrates' Court in London to comply with the Palermo Public Prosecutor's Office's request for the extradition of Domenico Randacodore, a fugitive wanted since 1994 and sentenced to seven years' imprisonment (for criminal association of a mafia type, extortion and other serious crimes) relying on a prior ruling of the High Court of Justice in *Hayle Abdi Badre*. In line with the *Torreggiani v Italy* ruling, the Court found a risk of inhuman and degrading treatment in Italian prisons and, having regard to the 'structural nature of the violation found in the *Torreggiani* case', reversed the burden of proof requiring Italy to demonstrate that detention conditions would comply with Article 3 ECHR. See Adriano Martufi, 'Sovraffollamento carcerario e mutuo riconoscimento delle decisioni giudiziarie: le alternative al carcere nel diritto dell'Unione europea' (2015) 3 Diritto Penale Contemporaneo 38.

[17] The European Prison Observatory is a EU-funded project coordinated by the Antigone Association that analyses national prison systems and alternatives to detention, assessing them against international human rights standards and promoting best practices in line with CPT standards.

[18] The Court presumably deemed necessary such compromise in light of the positions taken by the ECtHR and the German constitutional court, increasingly focused on the protection of rights, which it 'prioritizes' over EU law.

2.1. Case law on the matter: the Aranyosi and Căldăraru ruling

The growing attention to the difficult coordination between respect for human rights in detention conditions and the effectiveness of judicial cooperation between Member States has resulted in the *Aranyosi and Căldăraru* judgment of the Court of Justice of April 5, 2016, which combines cases C-404/15 and C-659/15 PPU, preliminary rulings on the interpretation of Article 1(3) and Articles 5 and 6(1) of the Framework Decision on the European Arrest Warrant.

First, it is worth briefly clarifying the scope of this instrument. The EAW is governed by the Framework Decision 584/2002 and is based on the principle of mutual recognition of judicial decisions and measures, which in turn is based on mutual trust between States. In principle, the latter not only requires that no higher standard of rights than those shared by the Union be demanded among States, but also precludes verification of compliance with those rights in practice, on the basis of a presumption of compliance.[19]

For the purposes of this discussion and within the scope of the EAW, the principle of mutual recognition may be departed from only in the circumstances expressively provided for in the Framework Decision, which lists the mandatory grounds for nonexecution in Article 3 and the optional grounds for refusal in Article 4. Article 5, then, provides that in certain circumstances the executing State may subject the surrender of the person concerned to the conditions set out in that article.

It should be noted, however, that these grounds do not include any explicit reference to the risk of human rights violations as a reason for refusing to execute the EAW. Still, the Framework Decision acknowledges the importance of protecting fundamental rights. On the one hand, Article 1(3) clarifies that 'this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'; on the other, recital 10 provides that the implementation of the EAW 'may be suspended only in the event of a serious and persistent breach by a Member State of the principles set out in Article 6(1)[20] of the Treaty on European Union, determined by the Council pursuant to Article 7(1) of the said Treaty with the consequences set out in Article 7(2) thereof'.[21]

[19] Case 128/18 *Dorobantu* [2019] ECR I-, para 46.

[20] Article 6(1) TEU: 'The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties'.

[21] Framework Decision on EAW [2002] L 190.

The interpretation of Article 1(3) has given rise to doubts among Member States and their courts, resulting in divergent interpretations and, consequently, different regulatory implementations.[22] In particular, it was unclear whether it should be interpreted as an implicit reason for non-execution or just as a confirmation of the obligations arising from the Treaties, the violation of which triggers the procedure described in Article 7 TEU.[23]

These doubts were addressed in the *Aranyosi and Căldăraru* judgment which, as mentioned above, resolved two preliminary questions raised in two different cases in a single ruling. The first case concerned Mr. Aranyosi, a Hungarian citizen for whom two European arrest warrants had been issued for the purpose of criminal prosecution by the Hungarian authorities before the Bremen Court.[24]

The Hanseatic Court of Appeal in Bremen found that there was evidence to suggest that, if the warrant were executed, the defendant could be subjected to conditions of detention contrary to Article 3 ECHR and Article 6 TEU. In particular, the Court referred to the ECtHR case law, which had condemned prison overcrowding in Hungary, further corroborated by the CPT reports on visits carried out between 2009 and 2013, which revealed a high rate of overcrowding.[25]

However, being unable to reach a decision on the basis of that information, the judge referred two questions to the Court of Justice for a preliminary ruling:

Is Article 1(3) of the Framework Decision to be interpreted as meaning that a request for surrender for the purposes of prosecution is inadmissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the admissibility of the request for surrender conditional upon assurances that detention conditions are

[22] Some Member States have introduced an additional EAW non-execution ground based on the risk of violation of the person concerned fundamental rights. Among these is England whose Extradition Act 2003 provides in Section 21 that the judge is always required to verify the extradition compatibility with the rights protected by the ECHR and that, in the event of incompatibility the judge must order the release of the person concerned. See Extradition Act 2003 s 21.

[23] Wouter Van Ballegooij and Petra Bard, 'Mutual Recognition and Individual Rights: Did the Court Get it Right?' (2016) 7 (4) *New Journal of European Criminal Law* 440.

[24] The charges related to two burglaries. See Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru [2016] ECR I-, paras 30-31.

[25] *Ibidem* paras 42-44.

compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?; are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?[26]

The same preliminary questions arose in the *Căldăraru* case. The person concerned was a Romanian citizen against whom an EAW had been issued for the enforcement of a final judgment, in which case the individual had not consented to surrender.[27] Consequently, in the light of a risk of flight in relation to surrender to the Romanian authorities, an arrest warrant was issued for the purposes of extradition.

In its ruling the Court of Justice introduces the so-called 'double check' mechanism, acknowledging that the execution of the EAW is subject to the essential limitation of compliance with Article 3 ECHR and Article 4 CFR.

Firstly, recalling the Opinion 2/13 (para 191)[28] and Article 1(3) of the Framework Decision, the Court acknowledges the possibility to derogate from the principle of mutual recognition and mutual trust, clarifying that limitations to these mechanisms are admissible 'in exceptional circumstances'.

Secondly, it reaffirms the absolute nature of Article 4 CFR, which prohibits inhuman or degrading treatment or punishment. This absolute nature is further confirmed in Article 3 ECHR that does not allow for any exceptions.

Hence, the Court's logical conclusion was that the execution of the EAW can never lead to inhuman or degrading treatment.[29] Accordingly, although the principle of mutual trust is upheld in abstract terms, it is nonetheless subject to concrete verification, thus guaranteeing that fundamental rights are effectively protected in each individual case.[30]

Having these fundamental principles been established, the Court introduces a

[26] *Ibidem* para 46.

[27] *Ibidem* paras 48-50. He had been condemned to one year and eight months' imprisonment for driving without a license.

[28] The paragraph affirms that the principle of mutual trust requires 'to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.

[29] See n 25 paras 81-88.

[30] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 708.

system based on the so-called 'two-step test'.[31] First, the executing judicial authority must rely on 'information that is objective, reliable, specific and properly updated on the detention conditions prevailing in the issuing Member State and that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention'.[32] Nevertheless, this abstract assessment is not sufficient in order to halt the EAW mechanism, as it does not automatically imply that the person will be subjected to inhuman or degrading treatment. Consequently, the Court requires a further step: where there is a proven risk of inhuman or degrading treatment, the judicial authority is required to verify in a concrete and precise manner 'whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State'.[33] To this end, the executing judicial authority may request further information from the issuing State, setting a deadline for receipt in accordance with Article 15(2) of the Framework Decision.

If, following this double check, a genuine risk of inhuman or degrading treatment is identified, the execution must be postponed but not definitively barred.[34]

It should be noted that the Court, called upon to resolve the interpretative uncertainties surrounding the Framework Decision, appears to have adopted a compromise solution, refraining from explicitly introducing an autonomous ground for non-execution not previously codified, while affirming the primacy and non-derogability of fundamental rights, as enshrined in the aforementioned articles, over the principle of mutual recognition.[35] In this sense, the Court has introduced a ground for 'postponement of the execution of the EAW', which, according to some legal scholars, can be

[31] Marta Bargis, 'Mandato di arresto europeo e diritti fondamentali: recenti itinerari "virtuosi" della Corte di giustizia tra compromessi e nodi irrisolti' (2017) 2 *Diritto penale contemporaneo* 34.

[32] These elements are ascertained on the basis of authoritative sources (ECtHR and national courts' rulings, CPT and UN reports). The ECtHR requires not only the absence of inhuman treatment, but also recurring positive conditions of detention that guarantee dignity, health and well-being of prisoners. See *Torreggiani e altri c. Italia* (2013); Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECR I-, paras 89-90.

[33] See n 25 paras 91-92.

[34] *Ibidem* paras 98-103.

[35] It seems to be an innovative turning point, as the Court of Justice appears to have changed its approach by scaling back the scope and 'intangibility' of the principle of mutual recognition. In the past indeed, the Court had 'prioritized' the principles of recognition and mutual trust, as seen in the judgments *Radu* and *Melloni*. See Case C-396/11 *Radu* [2013] ECR I-; Case C-399/11 *Melloni* [2013] ECR I-. See also Antonella Massaro, 'Mandato d'arresto europeo e rifiuto facoltativo di consegna del cittadino di un Paese terzo: l'ordinanza n. 217 del 2021 della Corte costituzionale' (2021) 3 *Nomos* 10 ff.

considered a 'disguised ground for refusal'.[36] In practice, in fact, the postponement of execution often turns into non-execution: this is referred to as a *de facto* ground for refusal.[37] Indeed, it would be arduous for the executing State to improve its detention conditions within a limited period for the purposes of EAW execution, especially considering that this is often a matter of structural and systemic inadequacy.

Some considerations arise.

First, in light of a Framework Decision that many scholars have regarded as unclear and open to interpretation, the ruling analysed has clarified several interpretative issues, reshaping the relationship between the principle of mutual recognition and fundamental rights.

Nevertheless, it is not immune from criticism. The operational criteria established by the Court have raised practical concerns, as they appear vague and complex to apply, at least until further clarification by the Court itself.[38] In particular, requiring judicial authorities to assess, on a case-by-case basis and according to general parameters, whether the execution of the warrant should be suspended exposes the system to the risk of divergent interpretations and, consequently, inconsistent application. This situation may have negative repercussions for the principle of legal certainty with the risk of exacerbating the already significant differences among Member States in the management of criminal enforcement and detention conditions, thereby generating substantial inequalities between individuals subject to similar procedures.

Moreover, the introduction of a double test mechanism inevitably leads to longer proceedings and entails a significant expenditure of resources. In judicial contexts already marked by structural delays, this additional burden risks undermining compliance with the principle of reasonable duration of proceedings.

Finally, a confusion of roles cannot be ignored. Urged to fill the legislative and structural gaps in the basic framework, the Court has delegated to the Member States the practical application of criteria whose boundaries are unclear. At the same time, the EU legislator has refrained from defining common standards and uniform parameters necessary to govern *ex ante* the balance between effective judicial cooperation and the protection of fundamental rights. The result is a fragmented protection, entrusted to

[36] See n (32) 39 ff.

[37] Francesca Graziani, 'Le "nostre prigioni" a cinque anni dalla sentenza Torreggiani' (2018) 2 Foroeuropa <www.foroeuropa.it> accessed 10 January 2026.

[38] Further clarifications were given by the Court in the Cases C-220/18 *Generalstaatsanwaltschaft* [2018] ECR I- and C 128/18 *Dorobantu* [2019] ECR I-.

hetero-integration through case law and the responsibility of individual Member States in specific cases, which does not guarantee effectiveness and uniformity in the long term.

Centralized regulation at EU level would be desirable instead. Among scholars, Bargis shares this view emphasizing that 'the issue of the real risk of inhuman or degrading treatment, addressed in *Aranyosi and Căldăraru* in the context of the EAW, obviously needs to be resolved in a general manner at EU level, in order to avoid (...) inequalities that would otherwise arise between persons detained under the EAW procedure and "ordinary" prisoners'.[39]

Hence, the solution proposed by the Court of Justice appears unsuitable as a definitive solution. Acknowledging the protection of human rights as a constraint on the execution of arrest warrants, without the concomitant establishment of binding minimum standards regarding detention conditions – achieved through a process of harmonization – risks engendering outcomes contrary to those intended by the Union. Such a scenario may precipitate the systematic non-execution of warrants, thereby undermining the efficacy of the instrument itself and exposing the system as inherently contradictory and structurally constrained. On the one hand, this system proclaims the absolute prohibition of inhuman or degrading treatment; on the other, it lacks effective and uniform mechanisms capable of preventing detention conditions that compel judicial authorities to suspend the execution of the warrant.

It is not surprising that, following the ruling in question, Member States, concerned about disregarding the Court's principle, have adopted a cautious approach increasingly refraining from executing the EAW. As mentioned, data from the European Commission's 2023 report on the functioning of the EAW show that refusals to execute warrants have grown exponentially. In 2023 there have been 1054 refusals to execute warrants for various reasons in 26 different Member States, an increase from the 1034 of 2021, 879 of 2018, and even more so from the 719 of 2016.[40] This trend not only affects the equal treatment of the individuals concerned, but also undermines the effectiveness of judicial cooperation and, ultimately, mutual trust between States which presupposes the effective sharing of the values referred to in Article 2 TEU. If this prerequisite is not met, mutual recognition is also undermined.[41] It follows that it would

[39] See n (32) 58.

[40] Commission, 'Statistics on the practical operation of the European arrest warrant-2023' COM (2025) 431 final.

[41] Case 128/18 *Dorobantu* [2019] ECR I-, para 45; see also Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 707.

be appropriate for the Union to acknowledge its own competence in the field of penitentiary law, a solution that would spare the Court the demanding task of filling the gaps with possible repercussions on the principle of legal certainty in a rather sensitive area.[42]

2.2. Article 82 of the Treaty on the Functioning of the European Union: towards a broad interpretation

As discussed, the Treaties do not confer explicit competence on the European Union in matters of detention: there is no explicit legal basis for such power. Nevertheless, the practical difficulties that have arisen in the implementation of judicial cooperation makes it urgent to debate the potential broad interpretation of the existing provisions. In recent years, both in terms of legislation and case law, there has been a development that seems to pave the way for a more incisive role for the Union. In particular, on several occasions, the European Parliament has expressed interest in the Commission playing an active role in the area of detention.

Already in its resolution of February 27, 2014 'with recommendations to the Commission on the review of the EAW', the Parliament had emphasized the close connection between detention conditions and the execution of the EAW,[43] calling on the Commission to assess 'the legal and financial means available at Union level to improve detention standards, including legislative proposals on conditions of pre-trial detention'.[44] Subsequently, in its resolution of October 5, 2017 'on prison systems and detention conditions', the Parliament took an even more explicit position, urging the Union bodies to adopt 'the necessary measures within their sphere of competence to ensure respect for and protection of the fundamental rights of prisoners, in particular vulnerable persons, minors, persons suffering from mental illness, persons with disabil-

[42] This opinion is supported by some authors in doctrine, albeit within different assumptions and boundaries. Among these, see Luca Lionello, 'Nuovi sviluppi per il test *Aranyosi e Căldăraru* ed il rapporto tra giurisdizioni: il caso *Dorobantu*' (2020) 1 *Eurojus* 120 ff.

[43] The European Parliament reiterates this concept in its Resolution of October 5, 2017, affirming that 'prison conditions are a determining factor in the application of the principle of mutual recognition of judgments in the area of freedom, security, and justice of the European Union, as stated by the Court of Justice in the *Aranyosi and Căldăraru* cases' and recalling 'the fundamental importance of the principle of mutual recognition of judgments enshrined in the Treaty on European Union'. See European Parliament Resolution (2017)/0385 of 5 October 2017 on prison systems and conditions of detention (2015/2062(INI)) [2018] OJ C346/14.

[44] European Parliament Resolution (2014)/0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) [2017] OJ C285/18.

ities, and women, including the adoption of common European standards for detention in all Member States',[45] a point of view which, by not referring exclusively to pre-trial detention, would seem to include the enforcement of sentences.[46] The call for the adoption of minimum European standards was then reiterated by the European Parliament in a resolution of 26 November 2020, in which the Parliament 'calls on the Commission to adopt common EU standards on prison conditions in order to protect prisoners' rights and promote detention standards in the EU'.[47] The same warning was reiterated in the 20 of January 2021 resolution on the EAW, in which the Parliament 'calls on the Commission to achieve EU minimum standards, in particular with regard to criminal procedural safeguards and prison and detention conditions, as well as to strengthen the information tools for national enforcement authorities on pretrial detention and detention conditions in each Member State', expressing concern that the lack of harmonization on maximum pre-trial detention periods could lead to long and unjustified periods spent in such detention.[48]

The case law of the Court of Justice has also moved in the same direction. In the *Aranyosi and Căldăraru* judgment, the Court clarified that the executing State must ensure compliance with Article 4 CFR in relation to detention conditions in the issuing State, without making any distinction between pre-trial detention and the enforcement of a sentence.[49]

Finally, the Commission showed significant openness with its Recommendation of December 8, 2022, which sets out minimum standards in the field of detention.

In this context, a broad interpretation of the Union's competence may be based on four different legal grounds: Article 82(1)(d) of the Treaty on the Functioning of the European Union (TFEU), Article 82(2)(b) or (d) and Article 352 TFEU.

Article 82(1) affirms that judicial cooperation between States 'should be based

[45] See n 44.

[46] Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023) 271.

[47] European Parliament Resolution (2020)/0328 of 26 November 2020 on the situation of Fundamental Rights in the European Union – Annual Report for the years 2018-2019 (2019/2199(INI)) [2021] OJ C425/12, para 55.

[48] European Parliament Resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)) [2021] OJ C456/2, para 37.

[49] See n (47) 270.

on the principle of mutual recognition of judgments and judicial decisions'.[50] The latter is a key instrument in the functioning of the EAW,[51] the aim of which is to ensure the enforcement of sentences even in cross-border cases.[52] This principle is based on mutual trust between Member States, which requires them to assume that each other will comply with EU law and fundamental rights of individuals within the area of freedom, security, and justice.[53] Consequently, the latter 'can only be achieved if respect for the fundamental rights of suspects and accused persons and procedural rights in criminal proceedings are guaranteed throughout the Union'.[54]

Letter d) of the first paragraph authorizes the Parliament and the Council to adopt measures aimed to 'facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions'.[55] In this sense, a broad interpretation would allow the 'enforcement of decisions' to encompass the definition of the methods of enforcement of judgments. This, in turn, would extend to the regulation of detention conditions, which constitute an integral component of the enforcement of sentences.[56]

In order to facilitate the functioning of the principle of mutual recognition, the second paragraph of the same article authorizes the Union to adopt minimum standards. The entire paragraph is reproduced below:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions

[50] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, pt III, art 82.

[51] According to Article 1(2) of the Framework Decision on the EAW: 'Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision'. See Framework Decision on EAW [2002] L 190.

[52] Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 *Maastricht Journal of European and Comparative Law* 705.

[53] Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECR I-, para 78.

[54] European Parliament Resolution (2014)/0174 of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) [2017] OJ C285/18.

[55] See n 51.

[56] On the same opinion see Giuseppe Chiodo, 'Europa e regimi detentivi speciali' (2020) *Giurisprudenza Penale* 1.

> and systems of the Member States.
> They shall concern:
> (a) mutual admissibility of evidence between Member States;
> (b) the rights of individuals in criminal procedure;
> (c) the rights of victims of crime;
> (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.
> Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.[57]

As can be read, letter b) refers to the rights of individuals in criminal proceedings. It is uncontested doctrine that this provision encompasses pre-trial detention, as this phase is intrinsically linked to the protection of the rights of the accused prior to the delivery of the final judgment. More controversial, however, is the question of whether the enforcement phase of a custodial sentence may be also included, since it is not traditionally regarded as a part of criminal proceedings *stricto sensu*.[58]

According to some legal scholars, a broad interpretation of the term 'criminal proceedings' should be adopted, extending its scope to the post-conviction phase and, consequently, to the enforcement of the sentence.[59]

A teleological interpretation grounded in the *effet utile* principle,[60] would appear

[57] See n 51.

[58] See n (47) 270. In particular, as emphasized by the author Susanna Marietti, the Union's competence regarding detention is a matter of debate, as there is no explicit confirmation of such competence in the Treaties. However, according to Marietti, 'there are strong arguments for interpreting EU protections in a broad manner to cover the entire detention process'.

[59] For a contrary opinion according to which the term 'criminal proceedings' could not include the post- trial phase and therefore Article 82(2)(b) does not serve as a suitable basis for harmonizing the detention rules among Member States see Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)(b) TFEU) fit for Purpose?' (2022) *European Journal on Criminal Policy and Research* 475 ff.

[60] About the use of the teleological criterion and the principle of effectiveness by the Court of Justice with the purpose of extending Union's powers see Ivan Ingravallo, *L'effetto utile nell'interpretazione del diritto dell'Unione europea* (Cacucci Editore 2017). The text discusses the tendency of the Court of Justice to use the teleological criterion, often in combination with its 'variant' of the principle of effectiveness. According to Ingravallo, 'the reason for the preference of the Luxembourg judges for this criterion can be attributed to the particular nature of the European Union, designed to evolve and promote progressive integration', so that it 'opposes a static interpretation and, on the contrary, requires a dynamic and evolutionary interpretation'.

to support a broad interpretation of the provision, thereby transcending the rigid distinction between preventive detention and detention *stricto sensu*. If the rationale underlying the provision empowering the Union to adopt minimum standards is indeed to facilitate the application of the principle of mutual recognition, it follows that a purely literal interpretation risks undermining the full effectiveness of the rule, potentially depriving it of its practical impact. Empirical experience shows that the fragmentation of detention conditions affects the operation of mutual recognition and constitutes a tangible obstacle to judicial cooperation, in some cases even leading to the suspension of the EAW execution.

A broad interpretation would enable the harmonization of detention standards across the Member States, ensuring a uniform level of fundamental rights protection within the Union and thereby preventing mutual recognition from being compromised by the risk of violations of Article 3 ECHR.

Moreover, this would not be an unprecedented approach, as the Union's competences have, in other contexts and under different circumstances, been interpreted expansively so as to encompass areas not expressly provided for in the Treaties.[61] In legal theory, this interpretative approach is shared by several scholars, including Marguery, who argues that the rights of individuals involved in criminal proceedings cannot be dissociated from the conditions of their detention. According to Marguery: 'conditions of detention may affect sentenced persons as well as persons on remand, thus the rights of persons in a criminal procedure'.[62] From this perspective, including detention within the scope of letter b) is consistent with the rationale of the provision and with the overall evolution of EU law, increasingly oriented towards the effective protection of fundamental rights.

Harmonizing detention standards would be consistent with the rationale of Article 82, and necessary in light of the Court of Justice case law, particularly *Aranyosi and Căldăraru*, which made the execution of the warrant conditional on respect for fundamental rights. As previously emphasized, in the absence of EU intervention, the system risks a paradox: Member States may be required to suspend or refuse the EAW execution due to detention conditions contrary to Article 3 ECHR and Article 4 CFR, while the Union lacks explicit competence to adopt binding rules to address those deficiencies.

[61] See, *inter alia*, the *Segi* case, in which the Court of Justice adopted an expansive interpretation of the Treaties in the field of criminal law, thereby extending its jurisdiction in the context of preliminary ruling proceedings. See Case C-355/04 P *Segi and Others v Council* [2007] ECR I-.

[62] See n (53) 716 ff.

The EAW system would therefore appear to be inextricably contradictory.

Some scholars argue that an additional legal basis for empowering the Union to adopt minimum standards on detention conditions may be found in Article 82(2)(d) TFEU,[63] which allows legislative intervention in relation to 'any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament'.[64] However, the procedure established is particularly burdensome as it requires, first, the prior and unanimous identification by the Council of the specific area of intervention and, second, the approval of the European Parliament. This procedural complexity substantially limits the practical utility of Article 82(2)(d), thereby rendering an alternative interpretation based on letter (b) of the same article preferable.

Finally, part of the doctrine identifies a possible basis in Article 352 TFEU,[65] which confers on the Union a general legislative power where, in the absence of specific legal bases, action is necessary to achieve the objectives set out in the Treaties. However, this route appears difficult to pursue too, given the need for unanimity in the Council and the consent of the Parliament.[66]

2.2.1. Rethinking the Union's role

The objection to such an expansion of the Union's powers might be grounded in the risk of excessive intrusion in states' sovereignty, given that the prison system has traditionally fallen within the exclusive competence of national authorities. This argument rests on the premise that prisons have historically functioned as a core expression of state sovereignty and as an instrument of state control. Under the traditional concept of sovereignty, the internal organization of prisons – including pretrial detention and the enforcement of criminal sentences *stricto sensu* – constitutes an exclusive prerogative of the state, one that is particularly resistant to transfer to a supranational level.

Yet, experience in recent years shows that this argument is gradually losing force

[63] Chiodo shares this view. While he places greater emphasis on a broad interpretation of letter b) of article, he also considers letter d) to be a suitable legal basis for extending the Union's competence in the area of detention. See n (57) 190.

[64] See n 51.

[65] This is a hypothesis considered by Marguery in Tony Marguery, 'Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions' (2019) 25 Maastricht Journal of European and Comparative Law 717.

[66] *Ibidem*.

and risks degenerating into a form of ideological, rather than substantive, resistance. First, considerable progress has been achieved in the field of judicial cooperation, particularly through the principle of mutual recognition. If limitations on sovereignty are accepted in pursuit of this common objective, it becomes difficult to justify why a minimum harmonization of detention conditions – necessary to ensure the effective functioning of that mechanism – should be regarded as intolerable.

Furthermore, the activities of existing supranational bodies reveal that intrusions into national prison systems are not only feasible but already constitute an established reality. Consider, for example, the work of the Committee for the Prevention of Torture which for years has been visiting prisons and issuing recommendations about detention conditions. Such oversight, even if not binding, appears markedly intrusive with respect to state sovereignty, involving a degree of penetration arguably far greater than that which would result from the adoption, at EU level, of common minimum standards for detention. Indeed, if the 'invasion of sovereignty' by the CPT is 'concrete' and 'tangible', is it timely to introduce standards which, though binding, would constrain sovereignty at a regulatory and 'abstract' level?

Such a development would inevitably imply a reconfiguration of the Union's role and thus a readjustment of its legal and institutional position. However, in the author's opinion, that would not be an arbitrary evolution, but rather one consistent with the gradual evolution of the Union's functions. Although created to promote peace and prosperity in Europe, the Union has long focused on ensuring and promoting human rights respect. It is surprising that a particularly sensitive and problematic area such as the penitentiary system – where fundamental rights violations are frequent – has yet to be incorporated into the Union's sphere of competence.

From a broader perspective, the supra-nationalization of prison regulation would represent, on one side, a natural development of the Union legal and institutional evolution, on the other, it would be crucial in order to strengthen the fundamental rights protection. On the contrary, the exclusive national administration of prisons subjects the protection of fundamental rights to the shifting tides of domestic political debate, a debate often shaped by populist and security-driven narratives that consider prisons as emblems of state authority rather than as institutions dedicated to the reintegration of individuals.

In the absence of common standards, the risk is not merely the erosion of international cooperation, but also the politicization of prison conditions, which may become arenas of political confrontation. This dynamic fosters fragmented and inconsistent legislative responses, ultimately undermining stability in the protection of

the rights of persons deprived of their liberty. Notably, this risk has already materialized in part.

Harmonizing prison standards would, on the one hand, ensure stricter control over the respect for fundamental rights in prisons and, on the other, make the instruments of judicial cooperation work in practice, increasing the confidence of European citizens in the Union's ability to guarantee human dignity in the most sensitive contexts, such as the deprivation of personal liberty.

This is clearly a complex objective that will encounter resistance, but it is necessary in order to ensure uniformity and consistency in the protection of fundamental rights.

2.3. A cautious recognition of the Union's competence in the penitentiary area: Commission Recommendation (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention condition

The developments outlined above have led the Commission to take encouraging steps forward over time. This section highlights the main developments in this regard, which, although still limited and tentative, have important symbolic implications. Firstly, on December 2, 2022, the Commission adopted the so-called EU non-paper, which emphasized how the marked differences in detention conditions between EU Member States significantly hampered judicial cooperation highlighting how, in particular:

> divergences regarding important aspects of detention have adversely impacted the functioning of the EAW. Delays and suspensions of executions have become more common and a practice of seeking assurances from the requesting judicial authorities has arisen. Available statistics on the EAW demonstrate that, since 2016, Member States have refused or delayed execution on grounds related to a real risk of breach of fundamental rights in close to 300 cases, in particular based on inadequate material conditions of detention.[67]

This was the context for the Recommendation of December 8, 2022 'on the procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions', which represents the natural outcome of the process outlined above. It provides an overview of minimum standards in the field of detention,

[67] Council of the European Union, 'Document 15292/22 COPEN 413 JAI 1562' (Brussels, 2022) 13.

to be interpreted, as highlighted by the Commission itself, in the light of the more detailed standards of the Council of Europe as well as the ECJ and the ECtHR case law.

The Recommendation's aim is to facilitate the proper functioning of the EAW.[68] In particular, in recital 18 of the recommendation, the Commission seems to openly recognize the need for harmonization of minimum standards[69] applicable to national detention systems as an essential prerequisite for effective judicial cooperation.[70] To this end, the Commission has expressed its intention 'to consolidate and build on those minimum standards established within the framework of the Council of Europe as well as the case law of the Court of Justice and of the European Court of Human Rights. To this end, it is necessary to provide an overview of selected minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention and material conditions of detention in key priority areas for judicial cooperation in criminal matters between Member States'.[71]

In the Recommendation the Commission reiterates the exceptional nature of pre-trial detention, emphasizing that this measure is used excessively in Member States. It therefore calls for periodic reviews to assess whether the conditions justifying its use continue to exist.

The Commission then focuses on some basic fundamental principles that should guide the management of detention, including the need to guarantee each prisoner a minimum individual space of at least 6 sqm in single cells and 4 sqm in shared cells, with a strong presumption of a violation of Article 3 ECHR if the space available is less than 3 square meters.[72] Further essential standards refer to health, hygiene, work, contact with the outside world and, in particular, the social reintegration of prisoners to be achieved through individualized measures, by guaranteeing access to reeducation programs.[73]

This Recommendation represents a significant development, as it appears to pave the way for a broad interpretation of Article 82 TFEU, aimed at harmonizing de-

[68] See European Commission Recommendation 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions [2023] OJ L86/44.

[69] Ibid. These standards should cover different fields including accommodation, hygiene and health, work and education, healthcare, prevention of violence and ill-treatment. Similarly, they should cover the protection of the rights of vulnerable individuals such as women, minors, persons with disabilities, LGBTIQ persons and foreign nationals.

[70] *Ibidem*.

[71] *Ibidem*.

[72] *Ibidem*.

[73] *Ibidem*.

tention rules across Member States.

Nevertheless, it cannot be overlooked that the Commission has once again adopted a cautious approach, confining itself to adopting a non-binding instrument and thus avoiding more decisive legislative action.

This caution may be attributed at least in part to the Council of the European Union reluctance: unlike the European Parliament which has long been calling for action by the Commission, the Council has shown opposition to any expansion of the Union's powers in this area. In particular, the minutes of the Justice and Home Affairs meeting of 7 October, 2021 (12574/21) clearly reflect the Council's resistance to that extension: 'Ministers consider that no further legal instruments on minimum standards at EU level are necessary, as such standards are already defined in various international fora', referring in particular to the European Prison Rules. Still, as discussed, existing data show a clear gap between Member States in terms of prison conditions.[74]

Despite this negative response from the Council, the Commission had expressed its intention to adopt the above-mentioned Recommendation.[75]

The choice to rely on a non-binding instrument has not escaped scrutiny, prompting the question whether, had the Council given a favorable opinion, the Commission might have proceeded to adopt a binding legislative instrument. Such an outcome has been regarded by some as preferable, particularly in view of the persistent shortcomings in the implementation of existing soft law standards across Member States.[76]

Finally, it is worth mentioning the opinion adopted in February 2023 by the European Parliament's Committee on Civil Liberties, Justice, and Home Affairs (LIBE), addressed to the Committee on Constitutional Affairs, which was tasked with drafting a report on the 'European Parliament's proposals for amending the Treaties'. In the opinion, the LIBE Committee explicitly emphasizes the need to grant the Union, on the basis of Article 82 TFEU, specific competence for the adoption of minimum standards on pre-trial detention and detention conditions. In particular, it 'calls for the introduction of a Union competence in Article 82 TFEU to establish minimum standards for

[74] Susanna Marietti, 'La detenzione in Europa e la mancanza di standard vincolanti' in Marta Caredda and others (eds), *Linee evolutive nella dimensione costituzionale. Atti della II Spring school del Centro di Ricerca "Diritto penitenziario e costituzione- European Penological Center*" (Editoriale Scientifica 2023) 273.

[75] Ibid. The Commission announced this intention in response to a parliamentary question submitted by four MEPs at the instigation of the European Prison Observatory.

[76] Policy Department for Citizens' Rights and Constitutional Affairs (European Parliament), *Prisons and detention conditions in the EU* (Brussels 2023) 72.

pre-trial detention and custody conditions, and for minimum standards on the admissibility of evidence, in full respect of the right to a fair trial in criminal proceedings'.[77]

It therefore remains to be seen how the Commission will position itself in response to these recent developments, and whether the emerging signals of openness will ultimately lead to a definitive consolidation of the Union's competence in the field of prison matters.

[77] Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Constitutional Affairs of 10 February 2023 Proposals of the European Parliament for the Amendment of the Treaties (2022/2051(INL)) [2023] para 27.