"A Spectre is Haunting Europe": The constitutionality of the EAW vs. the principle of non-discrimination based on nationality

Dr. Luisa Marin[1]

Abstract

This paper comments on the Wolzenburg case, in which the Dutch legislation implementing grounds for the refusal of EAW's has been scrutinized for its compliance with the principle of non-discrimination based on nationality. After a reconstruction of the traditional legal setting of extradition, the paper explores the EAW Framework Decision's relevant provisions and their normative context: mutual recognition and mutual trust. It discusses the Opinion of Advocate General Bot and the judgment of the Court (Grand Chamber), which diverge in many respects. My analysis first highlights the limits of current interpretations of the principle of mutual recognition. Secondly, I scrutinize the broad margin of discretion that member states enjoy when implementing a mutual recognition instrument. Finally, the paper draws attention to European citizenship, which is at present nothing but a 'spectre' of the AFSJ, but which has great potential for a sound AFSJ construct, where state powers cannot discriminate against individuals according to their *status personae*.

Introduction: the facts of the case

The current analysis refers to the judgment of the ECJ in the Wolzenburg case,[2] a preliminary reference on the European Arrest Warrant[3] (hereinafter: EAW) and its implementation in the Dutch legal context.[4] The actual provision under analysis is Article 4, paragraph 6, of the Framework Decision (hereinafter: FD), which is a ground for optional non-execution of the EAW.

The underlying legal issues relate to the EAW's removal of a state's faculty/right not to surrender its own nationals, which is linked to EAW rules that nonetheless permit refusal to surrender or surrender against guarantees of a state's nationals and other categories of persons, and their implementation in domestic legal orders. These questions go to the heart of member states' discretion when implementing EU instruments in criminal

[1] University of Twente, Enschede, The Netherlands. I wish to thank Dr. Niamh Nic Shuibhne for helpful comments on an earlier draft of this analysis.
[2] Case C-123/08, *Dominic Wolzenburg*, Judgment of the Court (Grand Chamber) of 6 October 2009, nyr.
[3] Council Framework Decision 2002/584/JHA, [2002] O.J. 190/1.
[4] Law on the surrender of persons of 29 April 2004 (in Dutch: *Overleveringswet*, hereinafter *OLW*), Staatsblad 2004, No. 195.

matters, and can furthermore be strictly related to the provisions of constitutional law; last but not least, this combination of European and domestic rules cuts across the European principle of non-discrimination based on nationality.

The preliminary reference was made by the International Cooperation Chamber of the Amsterdam district court, which is the judicial authority charged with handling the execution of EAWs in The Netherlands. The issuing authority, a German Public Prosecutor, requested the surrender of Mr. Wolzenburg, a German national residing in Venlo, The Netherlands, since June 2005.

Convicted in 2002 and given two suspended custodial sentences for a number of offences committed in 2001, including the importation of marijuana, Mr. Wolzenburg saw the conditional suspension revoked by an order of July 2005. An EAW followed that measure some days later, as well as an SIS alert – an alert in the Schengen Information System. Mr. Wolzenburg was arrested on 1 August 2006 in The Netherlands, on the basis of the SIS alert. Mr. Wolzenburg did not consent to his surrender to German authorities.

The facts for which he must serve a sentence are punishable in The Netherlands but he cannot lose his right to reside there as a result of the German conviction. In September 2006 Mr. Wolzenburg reported to the Dutch Immigration and Naturalization Department to register in The Netherlands as a citizen of the European Union. However, he did not meet the criteria for the grant of a residence permit of indefinite duration in The Netherlands, since he had not yet resided there for a continuous period of five years.

These are the facts underlying the judgment under analysis. Before presenting and analyzing the Opinion of the Advocate General and the Court's judgment, I shall present the legal background, first at the European and then at the domestic level.

The Legal Background: The EAW and nationality (clauses)

The abolition of the nationality clause as a traditional ground for refusal of a request for cooperation in extradition[5] was one of the features of the EAW that was perceived as a revolutionary element, together with the partial removal of a dual criminality requirement

[5] For a reconstruction of this rule, see M. Plachta, European Arrest Warrant: Revolution in Extradition?, in 11 *European Journal of Crime, Criminal Law and Criminal Justice* (2003), p. 178-194; Z. Deen-Racsmány, R. Blekxtoon, The Decline of the Nationality Exception in European Extradition?, in 13 *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 317-363.

for a significant group of crimes.[6] This sign of a breach with the tradition was explained as a consequence of the endorsement of the principle of mutual recognition, the cornerstone of judicial cooperation in criminal matters since the Tampere Programme of 1999.

It is well known[7] that in the extradition system a State could refuse to extradite its own nationals: this provision even had constitutional rank in several European legal systems (e.g. Poland, Cyprus, and to a more limited extent –political offences- also Italy),[8] with very different nuances in terms of whether exceptions to the rule could be accepted or not. Furthermore, it was more generally a common rule in civil law systems. From the perspective of international law, this clause can be found in several extradition treaties. Even the relatively recent Council of Europe's Convention on Extradition of 1957 confirmed the right not to extradite a State's own nationals, while compensating it by requiring that the case be submitted to the competent authorities so proceedings might be taken if considered appropriate, in compliance with the principle '*aut dedere aut judicare*'.

The first attempts to overcome this rule were put in place within the European Union; first, with the Convention Implementing the Schengen Agreement of 1990, and more recently with the EAW. With this latter instrument, the ground for refusal based on the nationality of the requested person has been definitively abandoned. Such a clause has been found to be in profound contrast with the principle of mutual recognition,[9] according to which the level of integration attained by EU Member States should allow a simplified process of recognition and enforcement of a Member State's judicial authority in another legal system. Scholarly analysis has underlined how 'recognition creates

[6] Article 2, paragraph 2 EAW Framework Decision. See Article 2, paragraph 3 for the possibility of expanding this list.

[7] M. Plachta, "Non extradition of nationals: A never-ending story?", 13 *Emory International Law Rev.* (1999), 77.

[8] On Poland see, *ex multis*, L. Marin, 'Il mandato di arresto europeo al vaglio delle corti nazionali: divergenze e convergenze nell'interpretazione di uno strumento transnazionale europeo', in N. Zanon (ed.), *Le Corti dell'integrazione europea e la Corte costituzionale italiana* (Napoli, Edizioni Scientifiche Italiane 2006) p. 217-238; on the Italian case see L. Marin, 'The European Arrest Warrant in the Italian Republic', 4 *Eur. Const. L. Rev.* 251 (2008).

[9] See, *ex multis*, F. Kostoris Padoa Schioppa (ed.) The Principle of Mutual Recognition in the European Integration Process, Houndmills, 2005; and more recently M. Möstl, Preconditions and Limits of Mutual Recognition, 47 *Common Market Law Review* (2010), 405-436.

extraterritoriality'[10] and that, in the case of mutual recognition in criminal matters, mutual recognition is a tool aimed particularly at providing a simplified or harmonized regulatory framework, with the purpose of ensuring extraterritorial enforcement of a State's judicial measures.[11] Secondly, the nationality clause was also found to contrast sharply with another core principle of the new era based on mutual recognition. Indeed, political promoters of mutual recognition provided it with a (supposedly) stable foundation, the principle of mutual trust or confidence. This trust translates a socio-political premise or value underlying every mutual recognition regime, which works smoothly if the legal environment also predicates loyal cooperation (clauses) among relevant actors.[12] It has been argued that the level of integration attained by EU Member States and the close sharing of social and legal values are such that they no longer allow a typical symptom of distrust[13] – the possibility that a State will refuse to extradite its own nationals – by a State's legal system and institutions vis-à-vis another Member States' legal systems and institutions.

On these premises, the EAW system abolished the ground for refusal based on the nationality of the requested person. This obviously generated legal issues in some countries following the domestic implementation of the EAW,[14] and some of those questions were framed and dealt with in terms of systemic relations between sources of law. This triggered further issues of systemic interactions among legal orders, which were

[10] K. Nicolaidis & G. Shaffer, Managed Mutual Recognition Regimes: Governance without Global Government, *Law and Contemporary Problems*, 2005, volume 68, p. 263 at 267:
'Recognition creates extraterritoriality. (…) But when one examines states' recognition of what the others do, rather than of their respective existence and boundaries, the islands of extraterritoriality are larger and more pervasive. In fact, they cannot be thought of as islands anymore, but more aptly as rivers and streams flowing from one domestic legal landscape to another. While mutual recognition is an expression of the broader category of "extraterritoriality," it is not extraterritoriality of a "unilateralist" (or "imperial") bent, but rather extraterritoriality applied in a consensual or at least bi- or plurilateral, "other-regarding" manner.'

[11] See also A. Di Martino, Principio di territorialità e protezione dei diritti fondamentali nello Spazio di Libertà, Sicurezza e Giustizia. Osservazioni alla luce della giurisprudenza costituzionale di alcuni stati membri sul mandato d'arresto europeo, in R. Calvano (ed.), *Legalità costituzionale e mandato d'arresto europeo*, Jovene, Napoli, 2007, rispettivamente, 69-138, at 102.

[12] G. Majone, Mutual Recognition in Federal Type Systems, EUI Working Paper, SPS n. 93/1, 1993, San Domenico di Fiesole.

[13] M. Plachta, "Non extradition of nationals: A never-ending story?", 13 *Emory International Law Rev.* (1999), 77.

[14] E.g., Poland, Germany, Cyprus, Czech Republic. Cf J. Komárek, 'European Constitutionalism and the European Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', 44 *Common Market Law Review* (2007), 9–40.

eventually resolved by constitutional courts, albeit with different outcomes.[15] The investigation in this article is not directed along those lines, which can be labeled as the macro-level of European constitutional law; here I am interested rather in what I have defined elsewhere as the 'micro-level of European constitutionalism', meaning the exploration of the implications of the daily implementation and enforcement of the EAW for the living, dynamic constitutional dimension of European integration.[16]

But did the EAW really represent the sunset of the nationality clause, or are there living 'remnants'[17] of it? This article continues against the background of the Framework Decision's provisions which afford some relevance to the nationality of the person whose surrender is requested: indeed, the nationality of the requested person still plays a role as a possible ground for optional refusal of an EAW issued for the execution of a sentence. Such a refusal is also extended to other categories of individuals, such as residents or people staying in the territory of the executing State, who may thus enjoy the same protection as that offered to the national of the executing State.[18] Another guarantee applies to EAW's issued for prosecution purposes: the FD allows the requested Member State to subject the surrender of its own nationals for purposes of conducting a prosecution to the condition that he or she is returned to the executing Member State in

[15] See O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', 9 *German Law Journal* (2008), pp. 1313 ff., especially p. 1346 ff. and previously in O. Pollicino, 'Incontri e scontri tra ordinamenti e interazioni tra giudici nella nuova stagione del costituzionalismo europeo: la saga del mandato d'arresto europeo come modello di analisi', 2 *European Journal of Legal Studies* (2008), pp. 220-268.

[16] L. Marin, "Like After a Strange Fall: Constitutional Micro-Fractures and the EAW", in E. Guild & L. Marin (eds.), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen, 2009, p. 229 ff.

[17] Z. Deen-Racsmány, R. Blekxtoon, The Decline of the Nationality Exception in European Extradition?, in 13 *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 335.

[18] Article 4:
"Grounds for optional non-execution of the European arrest warrant
The executing judicial authority may refuse to execute the European arrest warrant:
(…)
6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law;
(…)"

order to serve the sentence or detention order. The same guarantee is extended to residents of the executing Member State.[19]

To conclude this presentation of the European framework, it is here argued that there are some "living remnants" of the nationality clause, a legal principle that reflects a historically and philosophically grounded idea of relations between a state polity and its members, and among states, basically an expression of a Westphalian world-order. Interestingly enough, the European legislation expands the scope of these guarantees to other subjects, *i.e.*, residents and also people staying in the territory of the issuing State. The intent meaning of this is to disconnect the action of state powers from the state-national relation and to afford relevance to other situations, such as (long term) residence and the existence of a (stable) stay in a given country. This seems coherent with the post-Westphalian nature of the world order of which European integration is a part and, even more, to its ambitious attempt to build an Area of Freedom, Security and Justice, which the Lisbon Treaty enshrines as one of the objectives of the integration's process.[20]

The next section examines the implementation of these rules in the Dutch legal system, which is the legal context from which the reference originates.

The Dutch law implementing the EAW and the questions referred to the European Court of Justice

The *OverLeveringsWet* (hereinafter: *OLW*) prohibits the surrender of Dutch nationals for the purposes of execution of a custodial sentence imposed by final judicial decision (Article 6, paragraph 2, *OLW*). Furthermore, a Dutch prosecutor must declare to the issuing judicial authority that The Netherlands is "prepared to take over execution" on the

[19] Article 5:
"Guarantees to be given by the issuing Member State in particular cases:
The execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions:
(…)
3. where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State."
It is not clear why this guarantee does not apply also to persons "staying in" nor whether this omission is the consequence of an explicit choice.

[20] Cf. Article 3, paragraph 2, of the TEU, Lisbon Treaty, in force since the 1st of December of 2009.

basis of the Convention on Transfer of Sentenced Persons or another convention (Article 6(3) *OLW*).[21]

In the hypothetical instance of an EAW issued for the execution of a sentence, domestic legislation provides for the mandatory and automatic refusal of execution of EAW against nationals, as well as a guarantee (such as: "being prepared to take over') to counterbalance the refusal of mutual recognition which has been deemed to be not fully adequate.[22] For completeness another point might be added here: in the hypothetical implementation of Article 5(3) FD against a Dutch national – an EAW for the exercise of a criminal prosecution - The Netherlands would also check for double jeopardy. This can be interpreted as a sign of domestic resistance to the choices made by the EU under the mutual recognition framework.

Another paragraph of the *OLW*, Article 6(5), concerns persons other than Dutch nationals, whether nationals of a member state or third country nationals. It states that the rules applying to Dutch nationals also apply to foreign nationals in possession of a residence permit of indefinite duration[23] in so far as he/she may be prosecuted in The Netherlands for the offences on which the EAW is based and in so far as he/she can be expected not to forfeit his right of residence in The Netherlands as a result of any sentence or measure which may be imposed on him/her after surrender.

Other provisions regulate the status of foreigners and domestic administrative procedures in order to acquire the entitlement of permanent residence, according to Article 16 of Directive 2004/38.

The hermeneutic result of these provisions implies that the refusal is mandatory and automatic for Dutch nationals. Secondly, there is no strong guarantee concerning the execution of the sentence, whereas the provisions on EAW addressed to non-Dutch

[21] Procedure laid down in Article 11 of the Convention on the Transfer of Sentenced Persons of 11 March 1983. See V. Glerum and K. Rozemond, Surrender of Nationals, in N. Keijzer and E. van Sliedregt (eds.), *The European Arrest Warrant in Practice*, TMC Asser Press, The Hague, 2009, p. 81.

[22] Indeed, the Public Prosecutor's declaration of 'being prepared to take over' has been deemed not strong enough from a legal point of view. See Z. Deen-Racsmány, R. Blekxtoon, The Decline of the Nationality Exception in European Extradition?, in 13 *European Journal of Crime, Criminal Law and Criminal Justice*, 2005, p. 317-363.

[23] The residence permit of indeterminate duration is a domestic measure relating to staying in The Netherlands; it is *de facto* enforced mainly with third country nationals.

nationals should be interpreted as providing for a compulsory but conditional refusal of surrender.

Having presented the Dutch legislative background, we now turn to the questions presented by the Dutch Court in Amsterdam to the ECJ, but not before adding some extra information. In the proceedings against Mr. Wolzenburg, the facts are punishable under Dutch law and he cannot lose his right of residence in The Netherlands as a result of the offences for which he has been sentenced in Germany. Furthermore, Mr. Wolzenburg did not fulfill the requirements for the grant of a residence permit of indefinite duration in The Netherlands, since he had not resided there for a continuous period of 5 years and had not applied for such a permit, which citizens of the EU generally do.

In this framework the *Rechtbank Amsterdam* asked the ECJ, for the purpose of the application of Article 4(6) FD, whether persons "staying in" or "residents" of the executing member state do comprise persons who have the nationality of a member state other than the executing one and are lawfully resident in the executing member state regardless of the duration of that lawful residence (1st question); or, if the duration matters, the ECJ was required to provide some guidelines about its length (2nd question).

Furthermore, the Amsterdam District Court asked for indications of the concept of "lawful residence", namely whether it has to meet specific requirements (question 2b), such as duration; within this context, is it possible for the domestic law to lay down supplementary administrative requirements (a domestic residence permit of indefinite duration) (question 3)?

Once it is established that the rejection of an EAW also falls within the material scope of the EC Treaty (question 4), the point, according to the Amsterdam Court, is to know whether the Dutch OLW (Articles 6(2) and 6(5)) breaches EU law, namely the principle of non-discrimination on the basis of nationality, by not applying to individuals who are not in possession of a Netherlands residence permit of indefinite duration (question 5).

These were the questions submitted to the ECJ and we now turn to the Advocate General's Opinion.

Advocate General's Opinion

Both the Advocate General's Opinion and the Court's judgment are interesting in terms of how they frame the questions for which they seek an answer.

Advocate General Bot frames his analysis around three questions: what it is the required period of residence of the requested person in the executing member state in order that the said person shall be regarded as staying in or resident in that state for the purposes of Article 4(6) of the FD; a second question relates to the residence permit, a supplementary administrative requirement for the application of a ground for non-execution of an EAW; the third one concerns the compatibility of the rules at issue with the principle of non-discrimination on grounds of nationality.

As to the first question, the Advocate General's analysis is conducted along the lines of the criteria provided by the *Kozłowski* judgment,[24] which stated that the residence and the stay must provide connections with the executing member state. For this purpose, an overall assessment should be made of various objective factors characterizing the person's situation, such as length, nature, conditions of his stay, as well as family and economic ties.[25] According to the Advocate General, therefore, the period of residence is one of the factors that must be taken into account,[26] but cannot be the only one, and does not need to be uninterrupted,[27] as requested for example by Article 16 of the Directive 2004/38/EC in order to qualify for a right of permanent residence. Furthermore, the Advocate General Bot states that a member state's requirement for a mandatory period of lawful residence would be in contrast to the FD. Though interesting, this argument is not fully articulated, so the reader can easily be not entirely persuaded by this conclusion.[28]

The next part of the Opinion on Article 4(6) FD and how it should be interpreted articulates a persuasive reasoning. According to the *Kozłowski* judgment,[29] the exception of the principle of mutual recognition, and therefore of the duty to surrender, must be narrowly interpreted. The Advocate General contests the method of interpretation, and argues that that provision must be subject to the traditional method for interpreting EC

[24] Case C-66/08, *Proceedings concerning Szymon Kozłowski*, Judgment of the Court (Grand Chamber) of 17 July 2008. For a comment, see the case note of M. Fichera, 46 *Common Market Law Review* (2009), pp. 241-254.
[25] Opinion, para. 51.
[26] Ibidem, para. 54.
[27] Ibidem, para. 57.
[28] Namely, paragraph 57.
[29] Ibidem, para. 36.

law, according to which, where a concept is not defined in the EC act, nor is referred to domestic law, the concept must be construed in light of the context and the objectives it pursues.[30] This requires that the EAW FD be interpreted in light of its objective, which means that the concepts that determine its application must be assessed in each individual case. It is, in other words, for the executing judicial authority to determine whether a person has connections with a state which appear to make execution of the sentence in that state suitable to facilitate his reintegration into society. According to the Advocate General, therefore, this kind of rule requires the judicial authority to exercise a (discretionary) power to assess the situation under consideration, and is not welcoming of legislation, like the Dutch one, which provides for automatic solutions, namely for nationals, based on a presumption.[31]

The Advocate General refers to reintegration into society as the main goal of modern sanctioning theories and places this target at the centre of his reasoning,[32] the prism through which one looks at the whole issue,[33] also recalling Council of Europe recommendations on prison rules. In some paragraphs, the Advocate General even advances a specific solution for the case under consideration, suggesting that Mr. Wolzenburg should be regarded as resident in The Netherlands, despite the short duration of his residence, because he was working and living there with his wife, i.e. he has family and economic ties with the host country.[34]

The Advocate General's Opinion then moves on to the residence permit of indefinite duration, which is a supplementary administrative requirement for the application of a ground of non-execution of an EAW. Since the right of residence derives from Article 18 EC or from the exercise of a fundamental freedom provided by the treaty, it is not possible to subordinate the application of Article 4(6) FD to the possession of such a permit. It is not permitted under Community law, nor by the EAW FD.

Furthermore, the Advocate General examines the two conditions provided under Dutch law, even though they were not requested by the Amsterdam Court, arguing that the first

[30] Ibidem, para. 62. It is interesting to observe that EU law must follow the same methods of interpretation of EC law.
[31] C. Janssens, Case Note, Case C-123/08, *D. Wolzenburg*, Judgment of the Court (Grand Chamber) of 6 October 2009, nyr, *47 Common Market Law Review* (2010), 831-845.
[32] Ibidem, para. 70.
[33] Ibidem, paras. 60-67.
[34] Ibidem, paras. 68-70 as well as para. 87.

condition provided by Dutch law (it must be possible to prosecute the requested person in The Netherlands) is not compatible with the FD, whereas the second (not losing the right of residence as a consequence of the sentence) is.

The merit of this detailed analysis is that it sets out an overall framework within which European criminal law regulation is interpreted coherently with the whole body of European law, for example by referring to the strict conditions under which someone can be deprived of his/her right of residence. These are the rules to which the situation at issue should be compared.

The third part of the Opinion[35] is the most sensitive, being an in-depth investigation of the principle of non-discrimination on grounds of nationality and the implementation of the EAW. Like the second part, it clearly touches on member states' discretional powers when implementing instruments of EU law in criminal law matters. It seeks to assess national laws, creating a dual track that distinguishes nationals from non-nationals in the operation of the refusal of the EAW, a refusal that is basically mandatory for nationals and optional for non-nationals. The sensitivity of the issue is testified to by the intervention of several Member States, pleading for the legitimacy of their domestic rules.

The reasoning of the Advocate General moves along three lines: in the first place it assesses whether there is an option or obligation to transpose Article 4(6) FD and if so, what margin of discretion member states enjoy; secondly, it examines whether the principle of non-discrimination applies, to conclude determining whether or not the Dutch *OLW* is discriminatory.

As to the first sub-question, the Advocate General concludes that even in the view that the transposition of the rule in question is not obligatory, it is not possible for member states to discriminate on the basis of nationality.[36] This conclusion is based on a sound teleological argumentation of the rule of Article 4(6) FD, *i.e.* centered around its objective: the facilitation of reintegration of the sentenced person into society, as previously recognized by the ECJ in the *Kozłowski* case.[37] This conclusion is strengthened by the framework within which the provision is called upon to operate, the

[35] Ibidem, paras. 92 ff.
[36] Ibidem, paras. 102 and 108.
[37] Ibidem, para. 103.

freedom of movement of persons, which is one of the main, fundamental freedoms, first as a tool for the common market project and lately also a right within the framework of EU citizenship. This systematic reading is confirmed by the opening of borders, as well as other EU instruments, such as Framework Decision 2008/909/JHA, on facilitating the execution of custodial sentences in the State in which execution can better guarantee the chances of reintegration.[38]

A second point concerns whether the principle of non-discrimination applies: the Advocate General argues in the affirmative – it does apply, even if "the duties and the rights which reciprocally link a Member State to each of its own nationals",[39] the content of nationality law, is still a fully reserved competence of member states. The cases *Cowan*[40] and *Garcia Avello*[41] are adduced as examples of a previously consolidated interpretation. Furthermore, this interpretation was also required by (old) Article 47 EU, pursuant to which nothing in the EU should affect the construction of the EC Treaty (in the pre-Lisbon era marked by the pillars), of which the principle of non-discrimination based on the nationality was clearly a part.

The third point considers whether Dutch legislation may possibly constitute discrimination. This clearly goes right to the heart of the problem, viz., the automatic refusal to surrender nationals coupled with another treatment for non-nationals. If the overall picture of the implementation of this provision across member states is complex and wide-ranging, there are nevertheless convergent choices as to the treatment of nationals, since several member states have chosen not to surrender.[42] The reasoning of the Advocate General tackles *in extenso*[43] the absolute impossibility of surrendering nationals, which should be amended into a reading consistent with the FD, requiring a case-by-case assessment by the executing judicial authority, bearing in mind that the objective of the rule in question is the reintegration of the individual into society, which cannot be based merely on the parameter of nationality.[44] Besides this, the general structure and overall objective of the EAW is to radically change the extradition system

[38] Ibidem, para. 107.
[39] Ibidem, para. 109.
[40] Case 186/87, *Cowan v. Trésor public* [1989], ECR-195.
[41] Case C-148/02, *Garcia Avello* [2003], ECR I-11613.
[42] See *infra* footnote under 69.
[43] Ibidem, paras. 121-153.
[44] Ibidem, para. 123.

into a system based on mutual recognition and trust, and this system cannot but also apply to Member States' nationals.[45] On the point concerning the treatment of nationals the Advocate General delivered a rich, detailed analysis, based on the fundamentals of the EU, such as the principle of mutual recognition, the creation of the single market and Union citizenship. In contrast, the Advocate General tackles the different treatment reserved for non-nationals rather rapidly,[46] not really engaging in a well-structured proportionality check, but rather arguing that Dutch legislation was manifestly disproportionate. In my view this analysis omits a point that should be considered, viz., that there is a fundamental difference between a national and a non-national. However, a test on the proportionality of the domestic law should still not allow discriminatory treatments, in my view.

However, a significant part of the analysis was devoted to an examination of the prohibition of the surrender of Dutch nationals, rather than articulating an analysis of the different treatments.

In his conclusions the Advocate General argues therefore that the period of residence must be one of the factors to be assessed in order to decide where she or he can best reintegrate, and therefore cannot be subject to the fulfillment of a supplementary administrative requirement, such as the possession of a residence permit of indefinite duration (1-2). Thirdly, Advocate General Bot concludes also that Dutch legislation, in the sense of a mandatory refusal for nationals and an optional refusal only for those for non-nationals in possession of a residence permit, is precluded by Article 12 EC, read *juncto* with Article 4(6) FD.

Judgment of the ECJ: tackling the problem thoroughly or rather postponing important questions about the individual within the AFSJ?

A first remark over the judgment is its distance from the Advocate General's Opinion. The judgment followed a radically different path, eventually reaching results that diverge greatly from the Advocate General's Opinion. This is the more interesting since both

[45] Ibidem, paras. 126-132.
[46] Ibidem, paras. 153-159.

texts place Article 12 EC at the centre of the discourse. The judgment considered Article 12 EC as a point of departure.[47]

The question dealt with first by the ECJ is indeed the one concerning the scope of Article 12 EC, namely whether a national of a Member State lawfully resident in another EU state is entitled to rely on Article 12 EC against the Dutch legislation implementing the EAW. On this point, the Court's answer is affirmative, as it was already stated in the *Pupino* case.[48] The underlying issue, in the pre-Lisbon scenario, was the separation between pillars, and the fact that Article 12 EC and the legal basis of the EAW Framework Decision (Article 29 old TEU) were rooted in two different pillars. The rationale of the Court's answer seems to lie in the protection of Community law and the Community *acquis*, more than in the existence of a common legal framework of reference, which has been theorized within the doctrine as the principle of unity across the pillars.[49] The Court reasoned that a framework decision cannot infringe the freedom of movement granted to every EU citizen. Therefore, there is a need to subject a framework decision to a review of legality in the light of Community law. Following on from this, a national of a Member State lawfully resident in another Member State is entitled to rely on the principle of non-discrimination on the grounds of nationality, also against legislation implementing the EAW and laying down the conditions for refusal of the execution of the EAW.

The second question dealt with by the Court (paras. 48 ff.) relates to the Dutch legislation requiring the possession of a residence permit of indefinite duration as a domestic requirement for the operation of the refusal ground within Article 4(6) of the Framework Decision. This was qualified by the Court of Justice as a supplementary administrative

[47] Court's Judgment, paras. 42 ff.

[48] Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005], ECR I-5285.

[49] Cf. Opinion of Advocate General Poiares Maduro in the case C-160/03, *Eurojust*, [2005], ECR I-2077. For a doctrinal reference see A. von Bogdandy, The legal case for unity: The European Union as a single organization with a single legal system, 36 *Common Market Law Review*, 1999, 887-910. The reasoning of the ECJ (paras. 44-45) recalls case law involving litigation across pillars, namely between first and second pillars, and the first and third pillars. On the first point, cf. the recent *ECOWAS* case, Case C-91/05, *Commission* v. *Council* ("ECOWAS" or "Small Arms and Light Weapons"), [2008], ECR *I-03651*. For a comment, see C. Hillion & R.A. Wessel, Competence Distribution in EU External Relations after ECOWAS: Clarification or Continued Fuzziness?, 46 *Common Market Law Review* (2009), 551-586. On the second stream of conflicts mentioned, see case C-176/03, *Commission v. Council* (protection of the environment through criminal law) [2005], ECR I-7879; case C-440/05, *Commission v Council* (ship source pollution) [2007], ECR 1-9097.

requirement and, given the developments of the Community law *acquis* on EU citizenship, namely *Martìnez Sala*, cannot be considered as being in compliance with the operation of the EAW. Once again, the Court bases its position on the Community *acquis*, this time the citizenship *acquis* which foresees a right of permanent residence after a period of five years' lawful residence in a Member State,[50] in order to declare that a domestic requirement cannot be a precondition for the application of an optional ground of refusal for Article 4 (6) of the FD.

With the third question answered by the ECJ matters become complicated, as it concerns in substance the difference in treatment between nationals and non-nationals and its compatibility with Article 12 EC. In particular it focuses on non-nationals lawfully residing in The Netherlands for a continuous period of five years, because this requirement is brought under domestic law. The ECJ does not assess the situation of non-nationals residing for less than 5 years in The Netherlands, nor does it tackle whether the treatment reserved to Dutch nationals is compatible with EU law. There is, however, another subtle difference which is never really central and explicit in the EJC's reasoning, in contrast to the Opinion of the Advocate General,[51] which framed the Dutch legislation as providing for a 'mandatory' refusal for nationals and 'optional' refusal for non nationals. Interestingly, the ECJ does not frame the treatment reserved to non-nationals as an optional ground for refusal, but rather as a conditional refusal.[52] It is uncontested, however, that the refusal of surrender for Dutch nationals is merely based on the nationality and is mandatory, i.e. the court has no discretion in the matter.[53]

Perhaps some supplementary explanation of the Dutch law may be useful in understanding this point. The Dutch legislation (*OLW*) at Article 6(5) states that mandatory refusal shall also apply to non-nationals, if two conditions are met:[54] lawful residence for five years, and if the person in question would not lose the right of residence as an effect of criminal proceedings. Thus, in both cases (nationals and non-nationals), the judge *must* refuse to execute the surrender of the person requested. The

[50] Directive 2004/38/EC, Article 16(1) and 19, as well as case C-85/96, *Martìnez Sala* [1998], ECR I-2691, quoted at paras. 49-50.
[51] Opinion, paras. 118-157.
[52] Cf. Court's Judgment, paras. 54 and 64.
[53] Ibidem, para. 70.
[54] Ibidem, paras. 19-25.

difference is that, in the case of nationals, the refusal is automatic; but for non-nationals the refusal must be *subject to the two conditions* mentioned above. It is therefore difficult to argue for manifest discrimination, though there is a clear difference in treatment that will eventually lead the Dutch judge to block the surrender of Dutch nationals and to surrender non-nationals more easily. I argue that this is close to covert discrimination.[55]

On this point the ECJ takes the position that there is a "different treatment",[56] and therefore performs a proportionality test, reaching the conclusion that it is objectively justified,[57] and proportionate and legitimate[58] in the sense that it does not go beyond what is necessary to attain the objective of ensuring that requested persons who are nationals of another member states achieve a degree of actual integration in the member state of execution.[59]

A last point of the reasoning answers the first and second questions[60] and tackles the part of the Dutch OLW that establishes a term of 5 years for the duration of the residence for the purposes of the application of Article 4(6) EAW FD. The ECJ does not find this to be in contrast with Article 12 EC, as this provision is "based on the exercise by the Member State concerned of the discretion conferred on it by Article 4(6)" FD. The ECJ further frames this requirement in the perspective of the *Kozłowski* judgment, where it laid down that the concept of "resident" must be interpreted uniformly, referring to an autonomous concept of EU law,[61] and that the executing judge had to conduct an overall assessment,[62] in which a "single factor" (…) "cannot, in principle, have a conclusive effect of itself".[63]

The merit of this last point is to put the current judgment within the perspective of the previous decision. In the Wolzenburg case the Dutch legislature made a choice, which the ECJ scrutinized in consideration of member states' margin of discretion, whereas in the previous *Kozłowski* case the German parliament did not choose to specify further which

[55] For an analysis of the Italian case see L. Marin, "Like After a Strange Fall: Constitutional Micro-Fractures and the EAW. Some Lessons of European Constitutional Law Suggested by the Italian Case", in E. Guild & L. Marin (eds.), *Still not resolved? Constitutional Challenges to the European Arrest Warrant*, Nijmegen, Wolf Legal Publishers, 2009, pp. 229-245.
[56] Court's Judgment, para. 64.
[57] Ibidem, paras. 64-68.
[58] Ibidem, para. 69.
[59] Ibidem, paras. 69-73.
[60] Ibidem, paras. 75-78.
[61] Cf. Judgment in *Kozłowski*, cit., para. 43.
[62] Ibidem, para. 49.
[63] Cf. Judgment in *Wolzenburg*, cit., para. 76.

residents must be considered within the scope of Article 4(6), so the ECJ gave guidelines. While this relation with the exercise of discretion by the legislator can explain the different extent of the ECJ' scrutiny, it does nevertheless give the reader cause for some disappointment in that it fails to tackle thoroughly the compatibility of treatment reserved to Dutch nationals with the prohibition of discrimination on nationality and the reintegration into society and other regulatory principles, such as mutual recognition.

Analysis: "A Spectre is Hauting Europe". The constitutionality of the EAW vs. the principle of non-discrimination based on nationality

This paper discusses the recent *Wolzenburg* case, also with reference to a previous judgment delivered in the *Kozłowski* case, which tackled similar questions, focusing on the notions of residents and of staying (in a country).[64]

If the first case *Kozłowski* should be placed against the background of the *BundesVerfassungsGericht* judgment of July 2005 declaring the domestic law on the EAW unconstitutional and the subsequent need not to create a constitutional conflict with the second German law implementing the EAW.[65] The Wolzenburg case by contrast arises from a more neutral context, as the Dutch legal actors are traditionally not in the front line of those who contest European integration.[66] It is here suggested that in both cases the ECJ took an approach of self-restraint, avoiding going beyond the strictly necessary response, and avoiding tackling the question of whether the automatic refusal based on nationality for nationals is or is not in breach of the principle of non-discrimination.[67] The general attitude of the ECJ seems to be dominated by prudence and

[64] Ibidem, paras. 30 ff. Case C-66/08, *Proceedings concerning Szymon Kozłowski*, Judgment of the Court (Grand Chamber) of 17 July 2008. For a comment, see the case note of M. Fichera, 46 *Common Market Law Review* (2009), pp. 241-254.

[65] F. Geyer, A Second Chance for the EAW in Germany. The 'System of Surrender' after the Constitutional Court's Judgment of July 2005, in E. Guild & L. Marin (eds.), *Still not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen, 2009, p. 195-208.

[66] Cf M. Claes & B. de Witte, `Report on the Netherlands', in A.-M. Slaughter, A. Stone Sweet, J.H.H. Weiler (eds.), The European Court and National Courts - Doctrine and Jurisprudence. Legal Change in its Social Context, Oxford, Hart Publishing, 1998, 171-194.

[67] I argue this thesis, bearing the following in mind: in *Kozłowski*, the ECJ answered one of the two questions referred to it, and in *Wolzenburg* the ECJ limited its analysis to the OLW as far as it concerned non-nationals, and did not consider whether the discipline covering the situation of Dutch nationals was in

self-restraint while adjudicating over (fundamental principles and) the EAW, namely for the tensions it creates between European and domestic legislatures and systems.[68]

Nevertheless, the judgment under consideration is interesting because the question tackled in this case presents common aspects with other member states' legislation.[69] It is thus important that the case law of the ECJ be analysed also within the perspective of the dialogue between the ECJ and domestic interlocutors, such as higher and constitutional courts,[70] in order to understand how the ECJ can better contribute to the emergence of European law: in this specific case, what is concerned is the harmonious construction of a European Area of Freedom, Security and Justice, [71] where cooperation among state actors is bound and limited by guarantees and rights for individuals, whether they are a member state's nationals or non-nationals. Furthermore, it is worthwhile observing and monitoring this dialogue, in order to track the emergence of a European legal culture based on shared values.[72]

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line with EU law, as the ECJ did in Kozlowski. This position was not shared by Advocate General Bot, who in both Opinions also tackled the treatment of nationals. This is symptomatic of a problematic issue.

[68] O. Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', 9 *German Law Journal* (2008), pp. 1313 ff., namely p. 1346 ff.; J. Komárek, 'European Constitutionalism and the Arrest Warrant: in Search of the Limits of "Contrapunctual Principles"', 44 *C.M.L. Rev.* (2007), 9–40.

[69] According to European Commission Staff Working Document [SEC(2005) 267, of 23.2.2005, pp 10-11, connected to COM (2005)63], 7 member states have transposed into their legal system the ground of refusal of Article 4(6) as mandatory, whereas for 11 it is still an optional ground for refusal. However, several member states (among them Greece, Cyprus, Sweden, Belgium, France and Poland) differentiate the treatment of nationals from non-nationals. It worth adding that the report did not take account of the Italian EAW implementing act because it is still undergoing approval, and more generally, relied on the information transmitted by member states, which might have compromised the quality and completeness of the report. Cf. also E. Guild & L. Marin, Still Not Resolved? Constitutional Challenges to the European Arrest Warrant: A look at challenges ahead after the lessons learned from the past, in E. Guild & L. Marin (eds.), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen, 2009, pp. 1-10, at 9.

[70] G. Martinico & F. Fontanelli, "The Hidden Dialogue: When Judicial Competitors Collaborate", *Global Jurist* (2008), available at: http://works.bepress.com/giuseppe_martinico/1, e F. Fontanelli, G. Martinico, P. Carrozza (eds.), Shaping Rule of Law Through Dialogue; International and Supranational Experiences, Europa Law Publishing, 2009; A. Torres Pérez, Euroorden y conflictos constitucionales. A propòsito de la STC 199/2009, ??????????????ASK TO BRUNO DE WITTE).

[71] K. Lenaerts, The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice, *59 International Comparative Law Quarterly* (2010), pp. 255-301.

[72] L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case", *Maastricht Journal of European and Comparative Law*, 2008, pp. 473-492, at 484.

So far, the German and the Dutch legislation has come under the scrutiny of the ECJ. At domestic level, it is worth mentioning that the Italian Constitutional Court recently declared the correspondent provision of the Italian law implementing the EAW[73] in breach of the Constitution, namely Article 11 and 117(1) Constitution, which could be considered the Italian Constitution's "European clauses".[74] Therefore it is all the more important that the ECJ can appear as an uncontested point of reference, the "pole star" for domestic courts in the construction of an Area of FSJ, one of the core objectives of the European integration process.[75]

The present analysis focuses first on the position of the individual within the AFSJ, through the prism of the interaction between mutual recognition and other interests deserving legal protection, such as reintegration into society, translated into the FD as a ground for refusal; secondly I discuss the legal and political ambiguities underpinning the legal paradigm of the individual within the AFSJ, finally pointing at the hidden *leitmotiv* of this analysis, European citizenship, which in the early post-Lisbon era is nothing but a "spectre" haunting Europe.

While this judgment of the European Court of Justice could be shared as to his final assessment, it is however worth developing some considerations on the main parts of the reasoning. I argue here that, overall, the Dutch legislation is not especially objectionable since it provides for refusal of surrender both for nationals and non-nationals who have demonstrated a stable connection – which connection is relevant has been decided by the legislator - with the Kingdom of The Netherlands.[76] But even if I share the final outcome of the ECJ's judgment, I suggest that its reasoning is not fully crystallised in the

[73] Article 18(1) letter r) of Act 22 April 2005, No. 69.

[74] See *Corte Costituzionale*, judgment No. 227 of 2010 (www.giurcost.it). For an analysis of the Italian legislation and of the case law of the *Corte di Cassazione* on corresponding provisions, see my L. Marin "Like After a Strange Fall: Constitutional Micro-Fractures and the EAW", in E. Guild & L. Marin (eds.), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen, 2009, p. 229 ff., p. 241.

[75] Article 3, paragraph 2, TEU (Lisbon Treaty).

[76] In the Dutch *Overleveringswet* (hereafter *OLW*) Article 6(1) implements Article 5(3) FD and the following paragraphs 6(2) and 6(3) concern Article 4(6) FD: Article 6(5) provides the same treatment for non-Dutch nationals. Therefore there is no reason to consider different treatment or discrimination regarding this category. Article 6(5) OLW states that Article 6(1)-6(4) *'is eveneens van toepassing'*, which means 'applies also' to foreign nationals with a residence permit.

perspective of the legal position of the individual within the AFSJ, namely with reference to the relation between the protection of rights and the principle of mutual recognition.

Indeed, in its reasoning[77] the Court recalls that mutual recognition is the cornerstone of the new system, replacing extradition among Member States. According to this principle, "Member States are in principle obliged to *act upon* an EAW",[78] which, according to the further reasoning of the ECJ, seems to imply that surrender is the rule and refusal is the exception.[79] I argue that the ECJ espouses a vision of mutual recognition in its quasi-automatic dimension;[80] in other words, the principle should imply an automatic mechanism of recognition and therefore automatic execution of measures of other Member States.[81] The ECJ goes further, stating that the grounds of non-execution are only those listed in the Framework Decision as mandatory or optional.[82] The consequence of this is that the possibilities to stop the principle from functioning are only those listed at the European level, which apparently leads to no acceptance of (further) domestic mandatory requirements. This introduces into the system a strong element of centralization for exceptions to mutual recognition in the criminal justice sphere, which is precisely an area – criminal law cooperation – where there should be room for (the recognition of) very fundamental domestic values, since they might affect the relation between individuals and state powers. This constitutes a fundamental difference from the principle of mutual recognition as embraced in the internal market.[83] The European "rule of reason" for mutual recognition in criminal matters is therefore not dynamic, but rather static and 'fully codified' at European level. Furthermore, I argue this shows a confusion between objectives and instruments: the principle of mutual recognition is *an* instrument and not *the* objective itself, which is the harmonious construction of an AFSJ.

[77] Ibidem, paras. 56-ff.
[78] Ibidem, para. 57, mine Italic.
[79] See in particular paragraph 56 of the judgment.
[80] L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case", *Maastricht Journal of European and Comparative Law*, 2008, pp. 473-492, at 482.
[81] On the difficulties that confront this interpretation, see V. Mitsilegas, The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice?, *34 European Law Review* (2009), 523-560, at 547.
[82] Paragraph 57.
[83] M. Poiares Maduro, We the Court: the European Court of Justice and the European Economic Constitution: a Critical Reading of Article 30 of the EC Treaty, OUP, Oxford, 1998.

The Court of Justice pushes this line of reasoning further, stating that a national legislature which "chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender (…) to the advantage of an AFSJ".[84]

In other words, limiting the grounds for refusal means facilitating surrender and therefore reinforcing mutual recognition.[85] This reasoning is carried to its consequences in the balancing of the different interests underlying the grounds for refusal and the logic of mutual recognition,[86] which is of "limiting (…) the situations in which it is possible to refuse to surrender a person (…)".[87] Consistently, this reasoning shows that the main purpose of the EAW is to permit the maximum extent of mutual recognition, allowing as much as possible the execution of foreign authorities' measures. This should be to the advantage of the AFSJ, says the ECJ. However, one may question whether the meaning of the AFSJ is as a space within which judicial decisions can circulate freely; mutual recognition cannot imply a 'liberalization' or 'deregulation' of domestic justice systems. In spite of the potentiality of mutual recognition has as a regulatory principle, one might possibly exercise some caution before transferring the same logic of the market to the realm of (criminal) justice administration,[88] as we are clearly dealing with a (public) service, the administration of justice; but we are also dealing, in Max Weber's terms, with the authorized violence of the state toward the individual.[89]

Reasoning further on Articles 4(6) and 5(3) FD, the ECJ states that the reintegration into society "while important, cannot prevent the Member States, when implementing that Framework Decision, from limiting, in a manner consistent with the essential rule (…) [of mutual recognition] the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6)".[90]

[84] Ibidem, para. 58.
[85] Ibidem, paras. 58-59.
[86] Ibidem, paras. 60-62.
[87] Paragraph 62 of the judgment.
[88] S. Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', 14 *Journal of European Public Policy* (2007), p. 773.
[89] E Guild, Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice, *European Law Journal*, 2004, pp 218-234.
[90] Paragraph 62 of the judgment.

Is it worth mentioning that the interpretation chosen by the Court contrasts with the Advocate General's Opinion in the same case. Furthermore, the very recent Opinion of Advocate General Cruz Villalón in a preliminary reference from the Belgian *Cour Constitutionelle*,[91] besides supporting the thesis argued here, offers a valuable contribution to a more balanced and sound foundation for the AFSJ, recalling that if mutual recognition strengthens the AFSJ, the protection of fundamental rights must be considered as a *prius*, a precondition that makes the existence of such an area legitimate.[92] Coherently with this radically different premise, the execution of a sentence in a country with which the convicted person has personal connections is a guarantee provided by Article 8 of the European Convention of Human Rights, and strengthens as well the chances of social reintegration – the "ultimate goal" of criminal law according to modern theories of punishment, as enshrined in some European constitutions.[93]

The EJC's reasoning in *Wolzenburg* can even seem embarrassing if one were to conceive that it deals with domestic rules implying some 'resurrection' of the nationality clause, which is not a *naïf*, vintage operation, but rather a direct "shot" to the heart of the principle of mutual recognition, part of the domestic political response to the potentially uncontrolled power of mutual recognition.

A second question that needs to be discussed is whether the principle of non-discrimination based on nationality is infringed by the Dutch legislation requiring a period of five years' residence for non-nationals, whereas Dutch nationals are not surrendered merely on the basis of their nationality.[94]

The principle of non-discrimination on the basis of nationality is the translation of the equality principle into the context of European integration, a process aimed at achieving an "ever closer union" among states. It therefore requires that "comparable situations

[91] Opinion of Advocate General P. Cruz Villalón, case C-306/09, *I.B. v. Conseil des Ministres*, delivered on 6 July 2010.
[92] *Ibidem*, para. 43. See also L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case", *Maastricht Journal of European and Comparative Law*, 2008, pp. 473-492, at 481.
[93] See Article 27 of the Italian Constitution.
[94] Court's judgment, para. 64.

must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified".[95]

While stating that a difference in treatment must be objectively justified,[96] the Court implicitly recognizes that the situation of a Dutch national and a non-Dutch national constitute comparable situations: that of two hypothetical persons facing public powers. The rest of the reasoning seems to legitimate the automatic refusal for Dutch nationals and the conditional one for non-nationals on the grounds of the abuse of right,[97] which, curiously, is assessed and discussed only with respect to non-nationals. If Mr. Wolzenburg were a Dutchman living in Aachen, working and living there with family, and, under the threat of an EAW, had decided to travel to Venlo, his surrender would have been refused, according to Dutch law. It is not clear why the criterion of nationality does not here generate a connection, which is actually an abuse of right, perpetrated by a Dutch national. Situations like these should not be possible within the AFSJ.

The present author is persuaded that this implementing rule is not beneficial even for Dutch nationals. The automatic and mandatory refusal does not permit the executing authority to assess whether a Dutch national can better reintegrate into society in The Netherlands (because of nationality), or elsewhere in Europe, where he/she may have other ties.[98] The choice made by the legislator precludes any discretion for assessment by the judge,[99] who might be better equipped to conduct an overall assessment based on more than one criterion.

To summarize, then, it is regrettable that the ECJ did not more carefully scrutinize the compliance with the European fundamental principles and values (non-discrimination and reintegration into society) and with the EAW FD (based on mutual recognition) of

[95] Ibidem, para. 63.
[96] Ibidem, para. 64.
[97] Ibidem, para. 65, when the ECJ accepts the Dutch government's thesis of "inventiveness of arguments put forward by those persons in order to prove (…) a connection to Netherlands society".
[98] V. Glerum and K. Rozemond, Surrender of Nationals, in N. Keijzer and E. van Sliedregt (eds.), The European Arrest Warrant in Practice, TMC Asser Press, The Hague, 2009, p. 83.
[99] Dutch legislation has therefore implemented a mutual recognition instrument, the EAW, as a tool which does not require active mutual recognition. I have criticized this aspect elsewhere: see also L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case", *Maastricht Journal of European and Comparative Law*, 2008, pp. 473-492, at 489. See also D. Curtin, European Legal Integration: Paradise Lost?, in D. Curtin at al. (eds.), *European Integration and Law*, Intersentia 2006, 1-54, referring to Armstrong's analysis of the internal market.

the Dutch law, carrying automatic and compulsory refusal only for Dutch nationals.[100] Considering that there might be other MS' legislations with similar problems, the contribution of the ECJ to the emergence of a political issue underpinning the functioning of a mutual recognition instrument is all the more important[101] in the newly established European settings.[102]

In another perspective, one could wonder the meaning of European citizenship read *juncto* the principle of non-discrimination based on nationality within the AFSJ.[103] Right now, European citizenship as the basic paradigm for the condition of the individual confronted within the AFSJ with a member state's public power seems to be a specter haunting Europe.[104] This reader's gut impression is that the ECJ of the *Wolzenburg* judgment "killed the spirit" of the *Grzelczyk* judgment, by not stating that:

"*(31) Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.*

(32) A citizen of the EU, lawfully resident in the territory of a host Member State, can rely on Article 6 of the Treaty in all situations which fall within the scope ratione materiae of Community law.

(33) Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member State, as conferred by Article 8a of the Treaty (see Case C-274/96 Bickel and Franz [1998] ECR I-7637, paragraphs 15 and 16)".

[100] For a different position, see M. Möstl, Preconditions and Limits of Mutual Recognition, 47 *Common Market Law Review*, 2010, 405-436, where he argues that situations of different treatment such as the current one cannot be dealt with by the ECJ *rebus sic stantibus*, but rather require legislative intervention via harmonization.

[101] See M. Poiares Maduro, 'So Close and Yet So Far: the Paradoxes of Mutual Recognition', 14 *Journal of European Public Policy* (2007), 814 ff., at 823.

[102] Cf. especially Articles 67 and 82 (but also 81) of the TFEU.

[103] See R. White, Free Movement, Equal Treatment, and Citizenship of the Union, 54 *International and Comparative Law Quarterly*, 2005, 885-905.

[104] K. Marx & F. Engels, The Communist Manifesto (*Das Manifest der Kommunistischen Partei*), London, 1848.

Why should such situations not include those involving the pursuit of judicial cooperation among state authorities proceeding against member states' nationals who have exercised their right to move and reside freely in another member state? I am convinced that the answer should be that such situations should indeed be included.

The present author welcomes the Treaty of Lisbon and the changes it has introduced into the system, namely the legally binding status of the Charter of Fundamental Rights and the reform of the decision making rules in this area, which should be able to produce higher quality legislation,[105] putting an end to the intergovernmental decision making era. After roughly two decades of separation across pillars, Lisbon draws everything "under one roof", and this will not be without consequences. It is to be hoped that in the future the ECJ will be able to attune its case law on the (former) "third pillar" legislation to the principles and values that have inspired its activity so far, stating that the basic legal paradigm for the individual within the AFSJ is European citizenship. In this way, the Court could act as "a guarantor of individual rights vis à vis national regulators", to use Eleanor Spaventa's formulation,[106] subjecting an increasing number of domestic rules to a proportionality assessment, especially because such rules are meant to implement European law. By doing so, it will also indicate clear parameters to domestic courts.

In a post-national Europe, engaged in the construction of an AFSJ, the European citizen who is not a national of the executing state should not be *homo sacer*[107] in Agamben's words, in the sense that he/she can be discriminated against in comparison to the state's own nationals. If this were to be accepted, then the AFSJ would seem to be a space of deregulated enforcement of member states' repressive instruments where the basic

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[105] See Opinion of Advocate General P. Cruz Villalón, case C-306/09, *I.B. v. Conseil des Ministres*, delivered on 6 July 2010, para. 46, which states:
"De même, les arguments qui viennent d'être exposés démontrent avec force que l'omission expresse dans la décision-cadre de la possibilité de subordonner à conditions l'exécution d'un mandat aux fins d'exécution d'une peine dans des circonstances comme celles de l'espèce *ne reflète pas une décision législative expresse, fruit d'une volonté politique claire et précise. J'estime qu'il s'agit plutôt, au contraire, d'un silence résultant d'une technique de réglementation défaillante, dont la solution peut et doit être recherchée dans l'interprétation*, sans qu'il soit nécessaire de créer un nouveau motif de non-exécution."
See also L. Marin, "The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: the Italian Case", *Maastricht Journal of European and Comparative Law*, 2008, pp. 473-492, at 481, 484, 490.

[106] E. Spaventa, From Gebhard to Carpenter: towards a (non-)economic European Constitution, *41 Common Market Law Review* (2004), 743-773, at 766.

[107] G. Agamben, *Homo Sacer*, Einaudi, Torino, 2005.

paradigm for the protection of the individual would be his or her nationality, a variant of the Mediaeval *status personae*.