

# EFFECTIVE AND LEGITIMATE?

## Learning from the Lessons of 10 Years of Practice with the European Arrest Warrant

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### ABSTRACT

*The article examines the European Arrest Warrant (EAW) and the issues which have emerged in its first 10 years of practice. After a first section explaining the choice for the principle of mutual recognition as expression of effectiveness and subsidiarity in judicial cooperation in criminal matters, the article discusses questions such as (ab)uses of the EAW as a mutual legal assistance instrument, the question of petty crimes and the proportionality test, the relation between mutual trust, fundamental rights and judicial review, and, lastly, nationality and residence clauses. It concludes on the importance of addressing these issues in the appropriate legal setting, be it legislative or judicial, with the aim of strengthening the effectiveness and legitimacy of the EAW.*

**Keywords:** effectiveness; European Arrest Warrant; legitimacy; mutual recognition; principle of legality; petty crimes; proportionality; non-discrimination

### 1. INTRODUCTION: FRAMING EFFECTIVENESS IN EUROPEAN CRIMINAL LAW

10 years of practice with the European Arrest Warrant (EAW)<sup>1</sup> have provided materials and debates for a discussion of the instrument, its benefits and its shortcomings. This article aims at presenting and discussing (some of) those issues. It does so in order to explore the question of whether these 10 years of practice have given the legal community and society an *effective and legitimate* instrument, or

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<sup>1</sup> Council Framework Decision of 13 June 2002, OJ [2002] L190/1, 18 July 2002.

whether, without undermining the importance of the EAW, they point to some crucial issues that deserve the attention of the legal community and of political circles.

It is not easy to define effectiveness in relation to the EAW. The genesis and life of the EAW are characterised by different meanings of effectiveness, which is a multi-faceted concept. First, as a policy rationale, effectiveness has played a crucial role in the choice for mutual recognition (MR), the regulatory principle underlying the EAW, as an alternative to harmonisation. Second, effectiveness in judicial cooperation in criminal matters aims at providing law enforcement authorities with instruments supporting their crime fighting mission. Like many other human activities, crime takes now place in a post-national context, and is increasingly organised beyond borders, through transnational networks, whereas until recently, criminal law and criminal procedure were – mainly – a matter of national sovereignty and of international cooperation. With the EAW, effectiveness gives shape to a transnational legal instrument. Third, effectiveness has its own meaning and history in EU law, of paramount importance in shaping EU law as we know it today. Effectiveness in EU law is also known as the principle of *effet utile*, which the Court of Justice of the EU (CJEU or ‘the Court’) has devised in order to: a) secure the correct implementation of EU law into domestic legal orders and b) strengthen the enforcement of EU law against domestic law. The first meaning of effectiveness in EU law relates to recognition and acceptance of a “new legal order”,<sup>2</sup> a legal system of “its own”,<sup>3</sup> and to the systemic interactions between them. The principle of effectiveness refers to domestic courts, requiring them to give adequate effect to EU law, hence making them the first enforcers of EU law.

On the other side, legitimacy takes on a new meaning in the context of the EU as reformed by the Treaty of Lisbon (ToL). Legitimacy is here used as a relational concept, to inquire how much the EAW (and its 10 years of practice) squares with the post-Lisbon EU. The ToL has *de facto* constitutionalised the treaties without the rhetoric of the constitution.<sup>4</sup> At the institutional level, it has fortified the *acquis* of the Treaty of Amsterdam, thanks to the shift from unanimity to qualified majority voting within the Council, and with the European Parliament (EP) structurally involved as co-legislator via the ordinary legislative procedure. As to the protection of rights, the Court now has full jurisdiction, and legal status has been given to the Charter of Fundamental Rights (CFR). Third, the Treaty of Lisbon is important because justice cooperation has been relocated into the realm of the Union system, bearing many implications. For example, now the legal principles of Union law also apply to former Third Pillar instruments. Second, at the end of the transitional period, in December 2014, the Commission will also have the power to start infringement proceedings on

<sup>2</sup> As stated in *Van Gend en Loos*, Case 26/62, judgment of 5 February 1963.

<sup>3</sup> Case 6/64, *Costa v. ENEL*, judgment of 15 July 1964.

<sup>4</sup> A. Rosas and L. Armati, referring to Umberto Eco’s masterpiece, define the Lisbon Treaty as “a rose by any other name” in *EU Constitutional Law: an Introduction*, Hart, Oxford, 2012, p. 1.

the former Third Pillar *acquis*. Third, the adjudication of the CJEU will be crucial in addressing constitutional issues on the development of European criminal law into EU law with a sound constitutional underpinning.<sup>5</sup>

Against this background, my contribution aims to explore the relation between effectiveness and legitimacy through the case of the EAW, showing tensions in its functioning as an instrument of cooperation among judicial authorities.

The outline of the article is as follows: after a first part highlighting the endorsement of the principle of mutual recognition as a cornerstone of judicial cooperation in criminal law, the article moves on to present and discuss some of the issues which have emerged in 10 years of EAW practice and in the adjudication of the CJEU.

In the final part, some proposals to address current shortcomings are put forward, with the aim of strengthening the effectiveness and legitimacy of the EAW, and more generally, of European integration in this domain.<sup>6</sup>

The next section addresses the choice for mutual recognition as an expression of effectiveness and subsidiarity in judicial cooperation in criminal matters.

## 2. EFFECTIVENESS AND SUBSIDIARITY IN COOPERATION: THE CHOICE FOR MUTUAL RECOGNITION

The principle of mutual recognition was endorsed as the cornerstone of judicial cooperation in criminal matters at the Tampere European Council of October 1999. In the aftermath of the entry into force of the Treaty of Amsterdam,<sup>7</sup> which created the Area of Freedom, Security and Justice (AFSJ) by separating and partially relocating the Justice and Home Affairs (JHA) pillar, Heads of State and Government drafted an ambitious multi-annual programme for the policies of the AFSJ, in the attempt to give it a boost, and also perhaps to archive more ambitious, complicated and sensitive harmonisation attempts in the area of justice. One reads that:

“33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities. (...)

<sup>5</sup> See, *mutatis mutandis*, the relevance for data protection of the judgment in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others* [nry].

<sup>6</sup> The reference is to K. Nuotio (ed.), *Europe in Search of Meaning and Purpose*, Helsinki: Forum Juris/ University of Helsinki, 2004.

<sup>7</sup> 1 May 1999.

35. With respect to criminal matters, the European Council (...) considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.”<sup>8</sup>

But what are the benefits of mutual recognition? The commonality of mutual recognition regimes consists of granting extraterritorial effects to a decision which is the product of a given legal order and is deemed to comply with minimal features and standard requirements to be enforced outside its country of origin.<sup>9</sup> However, in the sphere of judicial cooperation in criminal matters, there is one specificity: the enforcement of a judicial decision always requires an action by state authorities which, as in the case of the EAW, affects individual freedom.

Not really a novelty in the process of European integration, the principle of mutual recognition was first applied in the internal market. Yet one may wonder what the link is between the chocolate trade and securing suspected or convicted people to justice within a transnational law enforcement regime. The appeal of the principle of mutual recognition is that it facilitates *some form* of integration, be it in the domain of trade or of cooperation among judicial authorities, with an allegedly minimal compromise to sovereignty, by avoiding setting out on a demanding path (or one perceived as such) of harmonisation of domestic legislations. As such, mutual recognition seems to reconcile with the principle of subsidiarity, a constitutional cornerstone of a governance regime like the EU. However, as this article demonstrates, this is (only) apparently possible thanks to the regulatory principle of mutual recognition: indeed, as underlined by Poiaras Maduro, with mutual recognition regimes (a) the political questions which are at the origins of the diversity among states’ legislation are not dealt with, and (b) the problems arising therefrom are delegated to the level of

<sup>8</sup> The European Council itself considered extending the principle of mutual recognition to other instruments too. See: “36. The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.”

<sup>9</sup> K. Nicolaidis, ‘Trusting the Poles? Constructing Europe through mutual recognition’ (2007) 14 *Journal of European Public Policy* 682–98.

enforcers.<sup>10</sup> It thus becomes important to reactivate a legislative process on (some of) those issues, if practice so suggests, and when judicial interpretation cannot provide solutions.<sup>11</sup>

However, the experience of the internal market teaches us more. Other variables connected with the functioning of mutual recognition regimes are some degree of functional equivalence<sup>12</sup> among the legislations to be ‘connected’ through recognition, and the principle of mutual trust among actors whose acts shall be the object of mutual recognition.<sup>13</sup> In the context of judicial cooperation in criminal matters, interestingly, the principle of mutual recognition has been introduced without an examination of the ‘functional equivalence’ (often achieved through approximation or harmonisation) of the legal systems; hence the principle of mutual trust has been given a normative, prescriptive – rather than descriptive – meaning in the context of the EAW: judges of different states *should* trust each other, and mutual trust has been employed by the Court to justify and support many of the novelties of the EAW regime. The main crucial difference, however, lies in the fact that in the internal market, mutual recognition has been mostly used to recognise decisions enabling business, trade and movement, thus *de facto* ‘constraining’ the power of state agencies, and conversely empowering private shareholders; with the EAW, this relation is completely reversed.<sup>14</sup> Therefore, in the context of judicial cooperation in criminal matters, mutual recognition benefits, in a first instance, law enforcement actors. It is strictly connected with the nature of the EAW, as a transnational law enforcement mechanism, a procedural milestone in the construction of EU criminal law as a *sui generis*, transnational criminal law.

The analysis will now move on to the discussion of (some of) the issues that have proved to be controversial in 10 years of practice with the EAW.

<sup>10</sup> M. Poiars Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’ (2007) 14(5) *Journal of European Public Policy* 814–25.

<sup>11</sup> M. Poiars Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in *Sovereignty in Transition*, ed. N. Walker (Oxford: Hart Publishing, 2003), 530.

<sup>12</sup> The relation between mutual recognition and functional equivalence has been explored in the context of the internal market. Though discussing these issues goes out of the scope of this paper, according to the seminal literature the principle of functional equivalence is a pre-condition of mutual recognition (Majone, Pelkmans), whereas according to others (Torchia), mutual recognition would be a manifestation of the principle of equivalence. Others (Hatzopoulos) have considered the terms as synonyms. See G. Majone, *Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market*, EUI Working Paper RSC No. 95/1, 1995; G. Majone, *Mutual Recognition in Federal Type Systems*, EUI Working Paper SPS No. 93/1, 1993; J. Pelkmans, *European Integration. Methods and Economic Analysis*, Pearson, 2006, p. 65; L. Torchia, *Il governo delle differenze*, Il Mulino, 2006; V. Hatzopoulos, *Le principe communautaire d’équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Athenes/Brussels, 1999.

<sup>13</sup> L. Marin, *Il principio di mutuo riconoscimento*, Editoriale Scientifica, Napoli, 2006, p. 65–74.

<sup>14</sup> In the market mutual recognition was meant to empower market actors (companies) viz. administrators, whereas in criminal justice cooperation mutual recognition is for law enforcement actors. See S. Lavanex, ‘Mutual recognition and the Monopoly of Force: limits of the single Market Analogy’, 14 *J. of Eur. Pub. Pol.* 773 (2007), 46.

### 3. MUTUAL RECOGNITION AND THE EUROPEAN ARREST WARRANT: DISCOVERING ‘GENETIC DISEASES’ FROM ‘YOUTH DISORDERS’?

As mentioned, some 10 years have passed since the adoption and enforcement of the EAW,<sup>15</sup> one of the instruments adopted in the framework of the EU’s reaction to 9/11, and thus benefiting from the pull-factor deriving from the need to give a sign in the direction of the fight against terrorism. The EAW has replaced extradition in the relations among member states with a smoother and fully judicial procedure of surrender, and it has given a clear time frame to the whole process. It has also partially lifted the double criminality requirement, a classical sovereignty feature of the whole extradition process, together with the nationality clause; the latter is now translated into a ground of refusal, extended also to residents. The political offence exception has been removed.

The first years after EAW’s implementation into domestic legal orders were marked by a phase of constitutional challenges against the EAW.<sup>16</sup> A provision which proved to be an especially sensitive bench-mark has been the partial lifting of the nationality clause, still a constitutional provision of several legal orders.<sup>17</sup> This phase of objection (Germany), constitutional *bricolage* (Cyprus, Poland), but also of dialogue (Belgium) was closed by the *Advocaten voor de Wereld* judgment, through which the CJEU gave the EAW its seal of validity and legitimacy. Its meaning has been to dismiss the phase of protest against the existence of the EAW.

While the mainstreaming literature focuses on the case law of the CJEU,<sup>18</sup> this article takes a different approach, exploring and discussing the problems which have emerged in the actual functioning of the EAW as transposed in member states’ legal orders; the article is based on a broad set of data, spanning from the evaluations of the Commission, the peer reviews of the Council, and research on the practice of judicial authorities.<sup>19</sup> Of course, reference is made to selected case law from the CJEU. The aim of the article is to

<sup>15</sup> The deadline for transposition of the EAW Framework Decision was 31 December 2003.

<sup>16</sup> See E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2006) and E. Guild, L. Marin (eds.), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2009).

<sup>17</sup> The first strand of constitutional challenges (Germany, Cyprus, Poland, Czech Republic) to the EAW originated in these provisions.

<sup>18</sup> S. Peers, ‘The European Arrest Warrant: The Dilemmas of Mutual Recognition, Human Rights and EU Citizenship’, in *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law – La Cour de Justice et la Construction de l’Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence*, Springer, 2013, p. 523–538.

<sup>19</sup> I refer here to an interesting research project which resulted in the publication of “The European Arrest Warrant in Law and in Practice: a Comparative Study for the Consolidation of the European Law-Enforcement Area”, coordinated by C. Gomes, with reports on the implementation of the EAW in Portugal, Spain, the Netherlands, Italy, available at [http://opj.ces.uc.pt/pdf/EAW\\_Final\\_Report\\_Nov\\_2010.pdf](http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf). See also “The Human Rights Implications of UK Extradition Policy”, by the Joint Committee on Human Rights of the House of Lords and of the House of Commons, available at [www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/156.pdf](http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/156.pdf).

assess whether 10 years of practice with the EAW have confirmed the EAW to be the instrument of smooth and effective cooperation it promised to be, or whether they point at some existential dilemmas undermining its functioning. In other words, is the EAW fulfilling its promise to deliver *effective and legitimate* cooperation within the AFSJ?

### 3.1. AT THE EDGE OF ABUSE OF LAW AND LIGHT UNDERSTANDING OF RULE OF LAW? THE EAW AS A MUTUAL LEGAL ASSISTANCE INSTRUMENT

In practice, one of the basic elements of the EAW, namely the purpose it was set up for – which is “conducting a criminal prosecution or executing a custodial sentence or detention order”<sup>20</sup> – has proved to become an issue of divergent scholarly and judicial interpretations; interestingly enough, this issue has never made its way to Luxembourg.

The case of Julian Assange illustrates this problem. This EAW case has managed to attract significant media attention, and to some extent it has ‘revitalised’ the debate on the EAW, especially in UK legal and political circles. One of the pleas of Julian Assange’s defence against his surrender to Sweden was that Swedish authorities issued an EAW against Assange even before and without a formal prosecution against him, attention being drawn to the fact that basically the request for Assange’s surrender was motivated by investigation purposes.<sup>21</sup> However, as indicated by the Framework Decision (FD), the EAW can be issued only for purposes of prosecution of a crime or for the execution of a sentence.

This case suggests that the variety of procedural laws of the member states of the EU might complicate the qualification of procedural activities as prosecution, which is necessary in order to activate an EAW.<sup>22</sup> Second, this grey zone of uncertainty on the qualification of prosecution indicates that EAWs could also be issued for purposes not explicitly indicated in the FD; it is here argued that this constitutes if not a breach of the principle of legality, at least an erosion of it, through the deployment of an instrument of cooperation in a case not foreseen by the FD.

Besides the well-known case of Assange, practice has shown up many cases of EAWs used to question a suspect, after several months of incarceration, this suspect then being sent back to the country requested to surrender him or her.<sup>23</sup> The EAW

<sup>20</sup> Article 1(1) FD: “The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.”

<sup>21</sup> High Court of Justice, *Queen’s Bench Division, Assange v. Swedish Prosecution Authorities*, Judgment 2.11.2011, Point 3.

<sup>22</sup> It might well be that linguistic differences might lead to inconsistencies in the application of a EU instrument. The wording of the Swedish version of the EAW includes the term “lagföra” which is broader than only prosecuting. I am grateful to Annika Suominen for her insight on the Swedish text. However, this status of uncertainty due to linguistic and institutional differences might be a source of inconsistencies.

<sup>23</sup> See *Misuse of the European Arrest Warrant*, 16 December 2010, at *The Guardian*, [www.theguardian.com/law/2010/dec/16/european-arrest-warrant-misuse-julian-assange](http://www.theguardian.com/law/2010/dec/16/european-arrest-warrant-misuse-julian-assange) (access 27 June 2014).

being used as (*rectius*: in place of) an instrument of mutual legal assistance (MLA), for its effectiveness, makes it a victim of its own success. The case of Assange is known because of the media and political attention it attracted. The same cannot be said about many other anonymous cases, and, consequently, the issues they raise might go totally unexplored outside practitioners' circles. The same judicial authorities involved with an EAW often do not have an overall view of the whole procedure apart from the phase they are involved in.<sup>24</sup> It is thus important that evaluations of the EAW consider these aspects, also providing reliable data thereon.<sup>25</sup>

Considering that the definition of prosecution within the scope of the EAW is a relevant issue which might affect or have affected a significant number of cases, it would be useful to refer a preliminary question to the CJEU, in order to clarify the dividing line between investigation and prosecution, and consequently, whether a situation should be handled with an MLA instrument or with an EAW. Unfortunately, referring was not an option for the UK court in the Assange case.<sup>26</sup> But the Treaty of Lisbon and the expiry of the 'transitional period' at the end of 2014 should consign these 'grey zones of legality', which arose with the EAW and in the context of the Third Pillar, to history.

The clarification of these questions relates, at one level, to the scope of the EAW and its relations with other instruments; in a different perspective, it affects the respect of the *rule of law* in the implementation of a European framework legislation in a complex web of different criminal procedures. As argued above, some aspects which prove to create difficulties in the interpretation should be clarified by the Court. Failing that, the enforcement of the EAW might undermine the *rule of law* in its transnational dimension.<sup>27</sup> At the same time, the presence of several levels and instances of judicial scrutiny has not clarified this point, as it would have been appropriate to activate a dialogue with the CJEU to clarify the interpretation of the FD.<sup>28</sup> It is therefore crucial to recall that effectiveness as interpreted under the EAW should not undermine the rule of law in judicial cooperation across judicial systems.

<sup>24</sup> *The European Arrest Warrant in Law and in Practice*, p. 241–242.

<sup>25</sup> S. Carrera, E. Guild, N. Hernanz, *Europe Most Wanted? Recalibrating Trust in the European Arrest Warrant System*, CEPS Paper in Liberty and Security, No. 55/2013, at [www.ceps.eu](http://www.ceps.eu).

<sup>26</sup> This seems rather paradoxical, considering that the UK's advocacy, NGOs and media are very active in monitoring the functioning of the EAW.

<sup>27</sup> In this sense, see: *The Human Rights Implications of UK Extradition Policy*, p. 46, quoting "We urge the Government to ensure that other Member States do not use the European Arrest Warrants for purposes of investigation, if necessary by amendment to the Framework Decision." For a slightly different position, see: K. Šugman Stubbs and P. Gorkič, 'Abuse of the European Arrest Warrant system', in N. Keijzer and E. van Sliedregt (eds.), *The European Arrest Warrant in practice*, The Hague: TMC Asser Press, 2009, pp. 259–260, quoting the European Commission's Proposal (COM/2001/522 final) to support their position.

<sup>28</sup> The referral to the Court of Justice, though precluded to UK judges in the pre-Lisbon setting, could have been raised perhaps by the Swedish authorities, or, if not possible as a consequence of procedural aspects, could still be raised by any other European judge faced with a similar situation.

### 3.2. ABOUT CHICKEN AND BICYCLE THEFTS: THE EAW, THE PRINCIPLE OF PROPORTIONALITY AND FUNDAMENTAL RIGHTS

The practice of implementation of the principle of mutual recognition in a context which has not been previously harmonised is showing another “genetic malfunctioning”: indeed, some criminal justice systems follow the principle of mandatory prosecutions, whereas others follow that of discretionary prosecutions. The problem arises from the fact that reports have shown that the EAW is also abundantly used for so-called petty crimes, and this undermines the trust of operators in the EAW system.<sup>29</sup> For example, the UK and the Netherlands have allegedly been overloaded by cases of chicken and bicycle thefts and other minor crimes by the Polish authorities. The examples are numerous, and this is confirmed to be a general issue, affecting the enforcement of the EAW in many countries. The problem of the EAW addressing petty crimes questions the overall functioning of the EAW and the very meaning and purpose of European cooperation in criminal matters: are the right tools employed for the right goals? What kind of criminality is being addressed by the EAWs issued across the EU’s member states? At the same time, this shows that the sanction thresholds,<sup>30</sup> which are in place in the EAW system, are not fully effective. And in spite of the EAW being based on mutual recognition and mutual trust, which should entail acceptance of the diversity of the substantive and procedural criminal laws, yet it proves to be difficult in reality.

The suggested solution lies in a proportionality test to be carried out before issuing an EAW, by the issuing judge. There might be many approaches to this problem, and one is political. Between the UK and Poland, for example, bilateral consultations have taken place. This suggests that the functioning of a mutual recognition instrument does not exclude political issues, or that some issues arising therefrom could be tackled at a political level. The British-Polish example is a good example of governmental level involved in the process. However, some questions arise here: first, considering that the EAW has transformed extradition into a fully judicial procedure, is this governmental level still compatible with the EAW system and European cooperation?<sup>31</sup> Secondly, is this a bilateral issue or does it relate to the EAW system more broadly? Considering that the objections raised by the UK have been shared by several states, and lacking any intervention by the European legislator, who is nevertheless aware of the problem,<sup>32</sup>

<sup>29</sup> I deem it informative that a study focusing on the practice of the EAW in four countries (Italy, the Netherlands, Portugal, Spain) indicates this as being a main issue, affecting trust, in all of them. See *The European Arrest Warrant in Law and in Practice*, p. 102 on Italy, p. 276 on the Netherlands, p. 322 ff for Portugal, p. 499 on Spain.

<sup>30</sup> See Article 2, paragraph 1, of the FD on the EAW.

<sup>31</sup> I owe this reflection to one of the journal’s anonymous reviewers.

<sup>32</sup> Council document of 28 May 2010, n. 8436/2/10 REV 2, COPEN 95, note from Presidency to Coreper/Council, “Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant, during the Spanish Presidency of the Council of the European Union – Draft Council Conclusions”, hereinafter: COPEN 95.

the practice is advocating a proportionality test.<sup>33</sup> This test should be carried out by the issuing authority before issuing a warrant, and the advantage of this option would be to preserve the philosophy behind the EAW as it is now, which rests upon the principle of mutual recognition, paradoxically interpreted (in the AFSJ) as requiring minimal controls by the executing authority.<sup>34</sup> Among the possible solutions, UK legal circles have advanced the proposal that the lack of a proportionality test may be remedied where extradition is found to be a disproportionate interference with qualified Convention rights, such as family life.<sup>35</sup> As I have argued elsewhere, an EAW soundly embedded into legal guarantees and procedural rights cannot do without a minimal threshold of controls by the executing judge.<sup>36</sup>

It is here argued, however, that not all the issues arising from 10 years of practice with the EAW can be solved through judicial interpretations. It is important that complex legal questions, expressions of policy choices, be brought to the attention of the European legislature, as it might be wise to amend the FD on the EAW, besides granting some interim solutions by way of fostering uniform practices through the Handbook. This would be to the benefit of the rule of law and the uniform application of EU law, and would avoid free-riding in the interpretation of an EU instrument.<sup>37</sup> Last but not least, since the use of the EAW for petty crimes undermines the trust of operators in the system, this problem should be given the appropriate attention.

The bottom line of the proportionality test is that the EAW is a tool for transnational cooperation that infringes upon individual freedom. Even if the FD partially removes double criminality for some crimes and leaves penalty thresholds for the generality of crimes, one should not forget that the treaties refer to serious cross-border crimes.<sup>38</sup> In this proposal, the most surprising aspect of the lack of a proportionality test is the solution practiced by the Council, *i.e.*, amending the Handbook on the EAW, which is

<sup>33</sup> *The Human Rights Implications of UK Extradition Policy*, p. 41. See W. van Ballegooij, 'The European Arrest Warrants: between the Free Movement of Judicial Decisions, Proportionality and the Rule of Law', in E. Guild & L. Marin (eds.), *Still Not Resolved? Constitutional Issues of the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2009).

<sup>34</sup> As I have argued elsewhere, this is one of the possible interpretations of the principle of mutual recognition. See 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): 473–492. See also V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', *Yearbook of European Law*, Vol. 31, 2012, 319–372.

<sup>35</sup> *The Human Rights Implications of UK Extradition Policy*, p. 42, quoting the Law Society response to the Home Office Extradition Review, p. 5.

<sup>36</sup> L. Marin, 'The European Arrest Warrant and Domestic Legal Orders'.

<sup>37</sup> M. Poiares Maduro, 'So close and yet so far', and M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003), 530.

<sup>38</sup> Though Article 82, 1, letter a) TFEU refers to "ensuring recognition throughout the Union of all forms of judgments and judicial decisions", Article 82, 2 TFEU refers to "criminal matters having a cross-border dimension."

a soft law instrument. In the words of the Commission, “the amended Handbook sets out the factors to be assessed when issuing an EAW” and “it will provide a basis for some consistency in the manner in which a proportionality check is applied.”<sup>39</sup> Furthermore, “the Commission endorses this approach and urges Member States to take positive steps to ensure that practitioners use the amended Handbook (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.”<sup>40</sup>

It is to be regretted that the Council has decided to by-pass the European Parliament, and avoid discussion on political choices, and that the Commission has endorsed this approach. Amending the Handbook is not an appropriate political forum for such choices. It would have been a sign of political maturity to rethink some of the provisions of the EAW in light of the lessons practice has taught.

In another Council document, we read:

“It is clear that the FD on the EAW does not include any obligation for an issuing MS to conduct a proportionality check and that the legislation of the MSs plays a key role in that respect. Notwithstanding that, considering the severe consequences of the execution of an EAW with regard to restrictions on personal freedom and the free movement of the requested person, the competent authorities should, before deciding to issue a warrant consider proportionality by assessing a number of important factors. In particular these will include an assessment of the seriousness of the offence, (...) the possibility of the suspect being detained, and the likely penalty imposed if the person sought is found guilty of the alleged offence. Other factors also include ensuring effective protection of the public and taking into account the interests of the victims of the offence.”<sup>41</sup>

This sounds like a clear reform of the FD, aiming at introducing a structured proportionality check, not written into the FD. If the FD does not contain such a scrutiny, why should national judges carry this out?

The explanation can be found in the document itself:<sup>42</sup>

“For some recommendations, there is a need to consider legislative action (*omissis*). In either case, the ordinary legislative procedure, involving co-decision with the European Parliament, would be applicable. Although this would be an effective way of bringing about a change in the working of the EAW, it would imply a mayor challenge that would not be fully justified at this moment.”

Reading between the lines, it seems that the Council is worried that pursuing the road of legislative reform, which would be needed for some recommendations, might turn into a failure. It is therefore clear that amending the EAW Handbook is an actual

<sup>39</sup> COM(2011)175, p. 8.

<sup>40</sup> *Ibid.*

<sup>41</sup> COPEN 95, p. 3.

<sup>42</sup> COPEN 95, p. 3.

shortcut, which might lead to some improvements while avoiding the involvement of the EP in politically sensitive issues. This is a sign of everything but loyal cooperation between Brussels institutions and also not really a symptom of respect for democracy and rule of law at the EU level.<sup>43</sup>

In this case too, one should be aware that effectiveness in cooperation among judicial authorities should not be achieved at the price of undermining the principles of the rule of law and of representative democracy within the young constitutional system of the EU.

In another perspective, the solution of the conundrum on the proportionality test and the considerations given to fundamental rights issues in the enforcement of the EAW might become relevant once again, also in light of the accession of the EU to the ECHR system. I argue this for at least two reasons: a) the enforcement of EU acts should bear systemic guarantees in order to make sure that they do not breach human rights;<sup>44</sup> b) the accession of the EU to the ECHR will have the effect of bringing the two systems 'closer', and will also have implications for the case law of the Strasbourg and Luxembourg courts. For example, in the context of asylum law, the ECtHR has condemned Belgium and Greece for enforcing the Dublin II Regulation in an automatic manner; it stated that automatic presumptions among member states cannot lead to breaches of HR, and the Court of Justice has considered this judgment in its case-law.<sup>45</sup> This dynamic could take place also in the context of the EAW, and the fact that the Court has recently backed up the FD in *Radu*<sup>46</sup> should not mislead. To clarify: in *Radu* the Court rejected questions on the compatibility of the EAW with the right to be heard before a court, stating that EAW does not require the requested person to be heard before the issuing of the EAW. It justified its position also by consolidating its interpretation of the principle of mutual trust, as facilitating and speeding up cooperation.<sup>47</sup> However, the judgment *Radu* demonstrates that when questions are framed in a way that challenge the validity or that could radically undermine the functioning of the EAW system, the Court will defend it; *Radu* should be read in the perspective of *Advocaten voor de Wereld*. Hopefully the future will bring new questions, less radically framed and less oriented on challenging the

<sup>43</sup> Another approach taken by the Council to tackle other issues which proved to be problematic in the practice of the enforcement of the FD is to suggest amendments to states' implementing laws. This is the case of surrender for accessory offences. The absence of any rule in the FD has caused difficulties and MS should then endeavour to take action at national level. Also here, the Council does not wish to engage in another reform of the EAW FD.

<sup>44</sup> Article 1(3), FD on the EAW. See my *Il principio di mutuo riconoscimento nello spazio penale europeo*, Editoriale Scientifica, Napoli, 2006, also for the thesis that if a mutual recognition instrument breaches fundamental rights, recognition and execution should not be enforced.

<sup>45</sup> See on this point, *M.S.S. v. Belgium and Greece* of the ECtHR, and *N.S. and M.E.* cases of the EUCJ. These cases represent an area where the *Bosphorus* doctrine of the ECtHR has found area where the presumption of equivalence could not be granted.

<sup>46</sup> Case C-396/11, *Radu*, Judgment of the Court (Grand Chamber) of 29 January 2013, not yet reported.

<sup>47</sup> *Radu*, para. 33.

validity of the FD, and with the potential of consolidating the EAW in the context of the Treaty of Lisbon.

In conclusion, a reform of the EAW FD with the aim of introducing a proportionality test, currently alien to the FD, might therefore improve and secure systemic interactions between the EU and the ECHR. The above mentioned ‘distortions’ in the use of the EAW undermine the whole mutual recognition system, and question too the mutual trust among actors.

### 3.3. A SWORD WITHOUT A SHIELD? THE RELATION BETWEEN MUTUAL RECOGNITION, MUTUAL TRUST AND FUNDAMENTAL RIGHTS

Another issue to be considered is the relation between mutual recognition and mutual trust, on the one hand, and fundamental and defence rights, on the other. In the text of the FD on the EAW, the principle of mutual recognition is the vector enabling a system of quasi-automatic enforcement of judicial decisions on the surrender of persons, having a high impact on personal freedom, with little judicial scrutiny. This is possible because of the alleged existence of mutual trust among Member States’ legal orders and institutions.

The issue of the balance between enforcement, i.e., execution of surrender, and guarantees is a source of continuous litigation.<sup>48</sup> This is also a sign of a structural or genetic misconception, a question whose relevance and urgency make it a candidate also for solution through interpretation. Among the actors who should play a role here we have the CJEU and domestic constitutional and higher courts.

One could start by observing that in the context of criminal justice systems, with little approximation among substantive legislations and a high impact and interference with personal freedoms, the principle of MR has been enforced as requiring a narrow scope for judicial review. According to the CJEU, this scrutiny should focus only on the grounds for refusal listed in the FD, as those grounds constitute the harmonised possibility for limiting the mutual recognition, as recently reiterated in the *Radu* case.<sup>49</sup> In another case – *Wolzenburg* – the Court has articulated its reasoning framing mutual recognition as a goal in itself, and therefore, clauses of domestic laws somehow restricting the scope of refusal grounds, were valued as contributing to ensuring the ultimate goal, the enforcement of another state’s judgment.<sup>50</sup>

<sup>48</sup> See, *inter alia*, the recent case law of the CJEU on this, for example, case C-396/11, *Radu*, Judgment of the Court (Grand Chamber) of 29 January 2013, not yet reported. See also case C-399/11, *Melloni*, Judgment of the Court (Grand Chamber) of 26 February 2013, not yet reported.

<sup>49</sup> *Radu*, para. 36.

<sup>50</sup> See *Wolzenburg*. Recently this case law has been further developed in another case, *Da Silva Jorge*, which has had the merit of declare the French implementing law on this aspect clearly in breach of the principle of non-discrimination based on nationality.

Also in the evaluations of EAW's implementation of the Commission and in the peer reviews of the Council, while proportionality is recognised as an emergency and a major shortcoming of the EAW system, there is a clear refusal to accept some forms of control, even on proportionality, in the hands of executing authorities. When there is a reference to a proportionality check, it is implicit that we deal with the issuing authority.<sup>51</sup> Overall, there is a narrow interpretation of the scope of the judicial scrutiny of the executing authority, a control which should be formal.

This does entail a *de facto* deprivation of a full judicial scrutiny from executing judges, especially sensitive and problematic in the context of surrender in view of a prosecution. As such, I would like to stress that this is not the only way to enforce a MR regime, and it is certainly not the most suitable in an area where the potential impact on freedoms is high. It might be the most effective option in a context where substantive laws have not been pre-harmonised, but it undermines the rule of law, which requires judicial scrutiny on measures limiting fundamental freedoms. This represents a problem for the legitimacy of the EAW.

There is some ambiguity at the EU level on the awareness of this shortcoming and its consequences. It is here argued that the Commission is holding on this issue a rather ambiguous position. On the one hand, it recognises in the roadmap on procedural rights that there is a need to adopt measures in order to ensure that FR and freedoms are protected.<sup>52</sup> On the other hand, in its evaluations, the Commission criticises MSs for having implemented the FD in a manner which is in contrast with the FD, for, often, introducing FR provisions, and, sometimes, exceptions to MR.<sup>53</sup>

Since the EAW has reshaped extradition in the relations between Member States' authorities, one should refer to the words of Dugard and van den Wyngaert, who wrote:

“The enforcement of international law is better served by an extradition law that expressly accommodates the interests of human rights than by one that fails to acknowledge the extent to which human rights law has reshaped this branch of international cooperation.”<sup>54</sup>

Accommodating the interests of fundamental rights is done through provisions guaranteeing them, in the FD and in implementing legislations, and with judges monitoring their respect.

<sup>51</sup> See SEC(2011)430 final, throughout the whole document. See also Council document 16 march 2010, No. 7361/10, COPEN 59, “Follow-up to the recommendations in the final report on the fourth round of mutual evaluations, concerning the European arrest warrant, during the Spanish Presidency of the Council of the European Union”, p. 5: “There seems to be broad (albeit not unanimous) agreement that proportionality checks should not be carried out by executing authorities.” See also COPEN 95, p. 3. And Council document. 8302/4/09. See also the proportionality clause in the Swedish legislation; cf. A. E. Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters*, Intersentia, 2011 p. 88.

<sup>52</sup> COM(2011)175.

<sup>53</sup> COM(2009)262.

<sup>54</sup> J. Dugard, C. van den Wyngaert, ‘Reconciling Extradition with Human Rights’, *The American Journal of International Law*, 1998, p. 187, at 188.

This counts even more within the EU, with its own legally binding Charter of FR, and with all its MSs being Contracting Parties of the ECHR. The same EU will be soon formally joining the ECHR. The long-term effects of these constitutional changes are to make FR even more central in the judicial discourse.<sup>55</sup>

If the EAW FD had provided for a transnational system of guarantees on the respect of fundamental rights and judicial review before surrender, alongside the enforcement based on mutual recognition, this would have better served the purpose of judicial cooperation in criminal matters than the current one, as suggested by Dugard and van den Wyngaert. The choice made at European level, to streamline the procedure and to simplify guarantees too, bears some consequences: MSs have taken different approaches in the enforcement of FR, inspired by national laws, and thus it should not be surprising if this has resulted in some divergence in the implementation of the FD. Domestic laws indeed have implemented provisions on guarantees in a very divergent manner; some states adding guarantees and situations of refusal or conditional surrender,<sup>56</sup> others copy-pasting the FD.<sup>57</sup>

Some comments collected at the level of practitioners, i.e. judges dealing with the EAW in their daily practice, lament that there are “too many guarantees or too few guarantees”:<sup>58</sup> so in the opinion of an Italian judge. This confirms a scenario of extreme divergence in the laws implementing the EAW, which results in itself in a breach of the European principle of equality and non-discrimination, as a result of hurried law-making.

In the Netherlands for example courts have taken a rather restrictive approach to fundamental rights in the judicial review of an EAW. Though judges have the responsibility to test surrender against the ECHR, the principle of mutual trust however, suggests that the executing state is not required to start investigations on the human rights guarantees in the issuing State. The principle of mutual trust creates a presumption of compliance with fundamental rights obligations for the members of the EU. Only when there are serious reasons to believe that surrender would imply a denial of human rights, then the judge has to examine the allegations. The Dutch Supreme Court, the *Hoge Raad*, aligned its case law to the (jurisprudence of the) ECtHR, according to which the executing country is not obliged to examine the risk of denial of human rights, and perhaps, refuse extradition.<sup>59</sup> European integration has shifted the responsibility from the requested State to the issuing State. This implies that the requested State is no longer obliged to check the requesting State for respect

<sup>55</sup> See, for example, *Digital Rights Ireland*.

<sup>56</sup> Italy provides an example of this trend, also nurtured by some political resistance against the instrument itself. See L. Marin, ‘The European Arrest warrant in the Italian Republic’, 4 *Eur. Const. L. Rev.* 251 (2008).

<sup>57</sup> See ‘The EAW in Spain’, p. 586, in *The European Arrest Warrant in Law and in Practice*.

<sup>58</sup> ‘The EAW in Italy’, p. 241, in *The European Arrest Warrant in Law and in Practice*.

<sup>59</sup> Supreme Court of the Netherlands, NJ 2008: 44.

of human rights, if that State is party to the ECHR.<sup>60</sup> Recently, and in the enforcement of the Dublin Regulation, this approach has been questioned,<sup>61</sup> in the case one of the states in question is known to have systemic HR violations. The same approach might also be extended to other fields of EU transnational cooperation.<sup>62</sup>

Ten years of experience with the EAW should provide a good moment to reopen the debate on the issue, to learn from the enforcement problems and to look for solutions, if necessary, by amending the legislation.

The FD on trials *in absentia*<sup>63</sup>, which will not be analysed or commented on here, provides an example of how the emergence of a problem in the practice of the functioning of a mutual recognition regime should lead to a legislative intervention aimed at providing a solution to a problem.

More recently the European legislator has identified the law enforcement dimension of the EAW and succeeded in adopting legislation counterbalancing it. I refer, for example, to the Directive on the right to interpretation and translation in criminal proceedings,<sup>64</sup> to the Directive on information in criminal proceedings, adopted in 2012, which aims at providing minimum standards on information,<sup>65</sup> and to the Directive on the right to access to a lawyer in criminal proceedings.<sup>66</sup> While one cannot deny that these are steps in the right direction of counterbalancing the law enforcement or repressive dimension of the AFSJ, their scope and impact remain to be assessed in practice. The EAW FD itself has had little concern for guarantees.

In this direction, the CJEU confirms its approach of support and consolidation of the EAW, rejecting any ‘political’ attack against it or against the foundation of the system. This approach was initiated with *Advocaten voor de Wereld*, and lately, consolidated in *Radu* and *Melloni*. In both these judgments, the Court answered

<sup>60</sup> See ‘The EAW in the Netherlands’, p. 257–259, in *The European Arrest Warrant in Law and in Practice*, and N. Rozemond, ‘De geldigheid van het Kaderbesluit betreffende het Europees aanhoudingsbevel en de legaliteit van de regeling van de lijstfeiten’, 2008 *NTER*, (10), pp. 285–291.

<sup>61</sup> See *M.S.S. v. Belgium and Greece*. The CJEU adapted to this approach in *N.S. and M.E.*

<sup>62</sup> This has not been done yet by the CJEU in the context of the EAW. However, some British courts have applied this reasoning in some EAW between UK and Italy. See the case *BADRE v. Court of Florence* (Italy), [2014] EWHC 614 (Admin) (11 March 2014) at [www.bailii.org/ew/cases/EWHC/Admin/2014/614.html](http://www.bailii.org/ew/cases/EWHC/Admin/2014/614.html) and the case of Domenico Rancadore decided by the Westminster Magistrate Court, at [www.bbc.com/news/uk-england-26612261](http://www.bbc.com/news/uk-england-26612261).

<sup>63</sup> Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81/24 [2009].

<sup>64</sup> Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the rights to interpretation and translation in criminal proceedings (OJ L 280, 26.10.2010, p. 1).

<sup>65</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ L 142/1.

<sup>66</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294/1.

preliminary rulings on the compatibility of the FD with fundamental rights, as recognised in the Charter and in the ECHR, and, in *Melloni*, in the particular interpretation given by the Spanish constitution (and the Spanish constitutional court). In both cases the questions could have led to a radical undermining of the functioning of the EAW. In *Radu*, the Court decided to focus on the question on whether the EAW requires the requested person to be heard by the issuing authority before surrender, and avoided exploring the web of issues raised by the referring court and explored by Advocate General Sharpston in her Opinion.<sup>67</sup> In *Melloni*, the Court stated that respect for fundamental rights within the functioning of the EAW cannot lead to the acceptance of a particularistic interpretation, that of the Spanish *Tribunal Constitucional*, of the right to fair trial for judgments *in absentia*, requiring a new trial also in the case of someone fleeing justice and represented by lawyers of his or her own choice in all the degrees of proceedings leading to the EAW.

Looking at more recent legislation in the area of judicial cooperation in criminal matters, one has to stress that the Directive on the European Investigation Order (EIO) represents a landmark revolution on this point, if one considers that Article 10 formalised in a refusal ground a FR clause, echoing a debate which took place on the EAW.

Article 10 states indeed that:

“(1) [...] recognition or execution of a European Investigation Order may be refused in the executing State where:  
[...]  
there are substantial grounds for believing that the execution of the investigative measure contained in the EIO would be incompatible with the executing member state’s obligations in accordance with Article 6 of TEU and the Charter of Fundamental Rights of the European Union [...]”

The problem of defence rights within the surrender procedure is and remains a weak point in the EAW system. First, it has received limited attention in the FD, and is not adequately developed. Second, this has resulted in a very divergent interpretation at MS level, which is not very surprising after all. With a significant delay the EU has passed legislation on defence rights, but their effectiveness in addressing the imbalance detected so far remains to be seen in practice.

#### 3.4. EUROPEAN CITIZENSHIP AND NATIONALITY CLAUSES: REVERSED PRIORITIES BETWEEN INSTRUMENTS AND GOALS?

Together with the removal of the nationality clause as a classical exception to extradition, the FD on the EAW accords some relevance to nationality and residence statuses as ground for refusal of the execution of an EAW. This can be explained with

<sup>67</sup> *Radu*, para. 20; paras. 36–43.

the context of European integration, i.e., freedoms of movement, the Schengen *acquis* and European citizenship: the EU legislator has thus correctly faced the questions of how to consider (long-term) residents and the relations one might have built up in a country different from that of one's nationality, together with the principle of non-discrimination on the basis of nationality, a cornerstone of European integration.

In this case too, the CJEU has been confronted with questions concerning the variegated panorama of implementing legislations. The European case law has tackled this issue in three judgments, *Kozłowski*, *Wolzenburg* and *Da Silva Jorge*,<sup>68</sup> which have the merit of bringing coherence into this context, of placing boundaries to MSs' resistance to surrendering nationals and to granting this type of protection – it is indeed about a protection clause – to non-nationals too.

I will summarise the main points of this case law,<sup>69</sup> focusing on the most recent judgment, *Da Silva Jorge*, where the Court stated that a MS cannot limit refusal of mutual recognition to their own nationals by automatically and absolutely excluding the nationals of other MS who are staying or resident in the territory of the MS of execution irrespective of their connections with that MS.<sup>70</sup>

Though MSs might reinforce mutual recognition by limiting situations in which the executing authority may refuse to surrender (*Wolzenburg*), with *Da Silva Jorge* the Court went further, recognising that MSs cannot automatically exclude nationals of other MSs irrespective of their connections with the executing state. Considering that French law, interpreting the refusal ground only to the benefit of French nationals, was not an isolated case, the latter clarification will be beneficial for other legislations.<sup>71</sup> For the French and other European courts confronted with similar legislations, the CJEU has indicated consistent interpretation as the solution to be followed, taking into consideration the whole body of domestic law, as stated in *Pupino*, *Pfeiffer* and *Dominguez*, with a view to ensuring the effectiveness of the FD and achieving an outcome consistent with the objective.<sup>72</sup>

<sup>68</sup> Case C-66/08, *Proceedings concerning Szymon Kozłowski* (hereinafter '*Kozłowski*'), Judgment of the Court (Grand Chamber) of 17 July 2008. For a comment of the latter, see the case note of M. Fichera, 'Case C-66/08, Proceedings concerning Szymon Kozłowski', *Common Market Law Review* 46 (2009): 241–254. Case C-123/08, *Dominic Wolzenburg* (hereinafter '*Wolzenburg*'), Judgment of the Court (Grand Chamber) of 6 October 2009; Case C-42/11, *Lopes Da Silva Jorge*, Judgment of the Court (Grand Chamber) of 5 September 2012.

<sup>69</sup> Some of the ideas expressed here are a development of L. Marin, "A Spectre Is Haunting Europe": European Citizenship in the Area of Freedom, Security, and Justice. Some Reflections on the Principles of Non-Discrimination (on the Basis of Nationality), Mutual Recognition, and Mutual Trust Originating from the European Arrest Warrant', *European Public Law* 17, No. 4 (2011), pp. 705–728.

<sup>70</sup> Case C-42/11, *Lopes Da Silva Jorge*, para. 50.

<sup>71</sup> I have discussed the Italian case in 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 and L. Marin (eds.), *Still not resolved? Constitutional Challenges to the European Arrest Warrant*, Nijmegen, Wolf Legal Publishers, 2009, pp. 229–245.

<sup>72</sup> Case C-42/11, *Lopes Da Silva Jorge*, para. 53 ff.

If an MS decides to lay down conditions to limit the category of residents, as in the case of the Dutch implementing legislation,<sup>73</sup> this is legitimate according to the Court, as it should benefit mutual recognition (sic!). However, additional administrative requirements are not in line with EU law.<sup>74</sup> Whereas if the MS's legislation (Germany) does not specify how to interpret the concept of "residents" and "stayers", it is for the judge to interpret an EU concept according to objective criteria such as lengths of residence, ties with hosting country, criteria taken from the case law on citizenship and social benefits and students' grants.<sup>75</sup>

One of the rationales underlying this case law is that it should belong to the assessment of a judge to decide whether a non-national has to serve the sentence in his or her country of nationality or in the one where he or she has decided to live. According to modern criminal law, since Beccaria, one of the purposes of punishment is social rehabilitation and reintegration into society.<sup>76</sup> This is one cornerstone of punishment in the modern state, and should also be given a crucial weight in the reasoning of the CJEU. However, the Court often gets entrapped in the 'net' of absolute application of EU law, which seems to be served by automatic and total mutual recognition, and does not give enough weight to other principles of criminal law and justice. In *Wolzenburg*, the principle of social rehabilitation and reintegration into society was given a marginal role.<sup>77</sup> In *Da Silva Jorge* the Court of Justice somehow maintained the same approach, but by reasoning on the full effectiveness of EU law it managed to correct the most discriminatory aspects of the French legislation, thus indirectly opening a door for the enforcement of the principle of social rehabilitation, a task of the national judge.

This point possibly raises some concerns on the legal reasoning of the CJEU, which seems still very much on the defensive toward the principle of mutual recognition. While it can be understood that in the first years after its adoption the Court decided to defend the instrument,<sup>78</sup> one cannot forget that the reasoning of the CJEU is not paying adequate attention to the role of the individual and to the function of criminal proceedings and punishment: in the context of the EAW the purpose is not mutual recognition of a judgment itself, but is the prosecution of a person or the enforcement of a sentence, governed by the principle of social reintegration into society, among other principles. This is the first paradigm which has to be considered in a transnational context such as that of the EAW. In case law, the logical order of motivations is often reversed: mutual recognition and EU law instruments for law enforcement have the primary place; then comes social rehabilitation.

<sup>73</sup> See Law on the surrender of persons of 29 April 2004 (in Dutch: *Overleveringswet [OLW]*), *Staatsblad* 2004, No. 195, Article 6(5).

<sup>74</sup> *Wolzenburg*, para. 48.

<sup>75</sup> *Kozłowski*, paras. 49–51.

<sup>76</sup> *Lopes Da Silva Jorge*, para. 32; *Wolzenburg*, para. 62, 67; *Kozłowski*, para. 45.

<sup>77</sup> See L. Marin, 'A Spectre Is Haunting Europe'.

<sup>78</sup> Case C-303/05, *Advocaten voor de Wereld*, judgment (Grand Chamber) of 3 May 2012.

As the CJEU is the ‘supreme court’ of the European legal order, its role is not only to defend the EU’s legislation, but also the treaties and the values they build upon. *Da Silva Jorge* seems to represent a step in the right direction of a value-based European Union and society, since the principle of non-discrimination on the basis of nationality is a core value of the EU as a polity and legal order. After all, mutual recognition is an instrument for cooperation: mutual recognition (together with mutual trust) should not be considered as an absolute value, as a goal per se. In criminal law, the EU should espouse a vision of “relative mutual recognition”, as the lesson of the internal market has taught us that “managed mutual recognition regimes” are working better than other regulatory options.<sup>79</sup> This case law too demonstrates that effectiveness of EU law is important to granting the enforcement of EU law, but the Court should demonstrate that it is sensitive to the specificities of the context in question, i.e. criminal justice (cooperation), in its reasoning, in order not to undermine the legitimacy of the EAW.

In a context as sensitive as that of criminal justice, it does not seem wise to enforce mutual recognition without considering FR, in law and in practice. This trend needs to be changed as the ECtHR is increasingly ready to assess the adequateness of HR standards in prisons, not only through Article 6 but also through Article 3 ECHR.<sup>80</sup>

#### 4. CONCLUSIONS AND PROPOSALS

For the Commission, the EAW is a “success story” for its enforcement and effectiveness:<sup>81</sup> it is employed and executed throughout the EU on a large scale.<sup>82</sup> The EAW has definitively succeeded in streamlining and speeding up extradition among EU states. Based on mutual recognition, the EAW is the symbol and the consequence of a choice for effectiveness and subsidiarity, enabling forms of cooperation while avoiding the more demanding and politically sensitive harmonisation of domestic criminal systems. However, as amply demonstrated by the experience of the internal market, mutual recognition presupposes, and, eventually, entails some forms of harmonisation: it *presupposes* harmonisation, as MR regimes work smoothly in contexts where there is some convergence among legal orders; MR *entails* harmonisation, as MR regimes eventually require harmonisation as correction of divergences which might prove to become obstacles, externalities, to the functioning of the MR regimes themselves. In any case, it is common for the practical functioning of MR regimes to reveal political and legal issues that should be dealt with at the

<sup>79</sup> K. Nicolaïdis, ‘Trusting the Poles?’

<sup>80</sup> COM(2011)175, p. 7. See, for example, the situation of Italian prisons and its impact on the EAW, as reflected by the *BADRE* and *RANCADORE* cases (above n. 62).

<sup>81</sup> COM(2009)262, page 3.

<sup>82</sup> According to the Commission, in the period 2005–2009, 54689 EAW have been issued, and 11630 EAW have been executed. See COM(2011)175, p. 3.

appropriate legal (and political) fora. The EAW, the flagship mutual recognition instrument in judicial cooperation in criminal matters, is no exception to this.

10 years of experience with the EAW have shown, besides the merits, also several shortcomings in its functioning, and this paper has dealt with some of them, in the perspective of the relation between effectiveness and legitimacy. It is argued that though they might appear as ‘youth disorders’, they are actual ‘genetic diseases’, consequences of the choice for mutual recognition, and of its implementation. The first problem discussed relates to EAWs issued as an alternative, or even a shortcut, to the resort to a (more appropriate) mutual legal assistance instrument. I have argued that this represents an infringement of the rule of law principle, and that the CJEU should be given the chance to clarify this point. Secondly, as recognised by the Commission and the Council, the use of EAWs for petty crimes undermines confidence in the application of the EAW.<sup>83</sup> I would add that it questions the legitimacy of the EAW as an instrument of judicial cooperation among judicial authorities. However, like the first issue mentioned, far from being a youth disease, this seems to be the epiphany of a genetic disorder, caused by the choice for mutual recognition in a context where criminal systems bear persistent differences and are not working according to pre-harmonised principles, substantive and procedural rules.

To obviate this problem, a scrutiny based on proportionality, before issuing a warrant, has been proposed, in line with mutual recognition enforced as requiring minimum controls by the executing judge. This is especially important in legal systems where there is no mandatory prosecution, and administration of justice, more in general, is carried out assessing costs and benefits. The Council and the Commission believe that they can do maintenance on the EAW by amending the Handbook related to the EAW. Is this to be interpreted as a disguised recast of the FD through soft law? For a lawyer, this sounds like a farewell to the rule of law, on the one hand; on the other, it seems to exclude the European Parliament from the discussion of important legal and political questions, compromising the prerogatives attributed to it by the treaties. Hence, the resolution of the European Parliament asking the Commission to present a legislative initiative to reform the EAW on the points mentioned deserves support.<sup>84</sup>

Other issues relate to the power of the EAW instrument, not adequately counter-balanced by safeguards and rights, possibilities of challenging detention. As it has been stated by a magistrate, the EAW has been operating as “a sword without a shield”. The European legislator is in the process of remedying that, having passed legislation aimed at strengthening the safeguards in cross-border cases. I have also suggested that mutual recognition should not be interpreted as excluding a proper scrutiny by the executing judge. On the contrary, enforcing EAW with safeguards should be

<sup>83</sup> COM(2011)175, p. 3.

<sup>84</sup> European Parliament Resolution of 27 February 2014 with recommendation to the Commission on the review of the European Arrest Warrant (2013/2109 (INL)), at [www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0174&language=EN](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0174&language=EN) (access 27 June 2014).

possible by devising a judicial scrutiny which goes beyond a “ticking boxes exercise”, to quote the expression used by a Dutch judge.<sup>85</sup> This is needed in order to serve important public goods, and judicial scrutiny on measures affecting the *habeas corpus* is a constitutional guarantee.

A last issue discussed is the metamorphosis of the nationality clause into a nationality and residence clause, in line with the EU’s *acquis* on free movement. I have suggested that there should be more courage in making the reasons of the individual more central, and that reintegration into society should become the main paradigm guiding the choice of a judge in that context. This might require that punishments should be enforced across the EU with a spirit of solidarity, perhaps because Mr. Da Silva has a life, relations, perhaps a family in France so that France, and not Portugal, might be the country to serve the punishment.

To sum up, while it cannot be denied that the EAW is a success, one should consider that the EAW is a strong weapon, an instrument which eventually limits individual freedom without the counter-balance of a protective dimension. It is definitely effective because it speeds up cooperation, but does speed automatically entail good justice? The practice of the EAW has revealed strong and weak points. Therefore, it might be good to reopen a political discussion on persistent frictions, in order to reactivate a democratic debate on it, if and when needed.<sup>86</sup> There should be more courage in making the reasons of fundamental rights clear, as they are the only possible underlying basis of values needed for backing up harmonisation or unification in criminal law.<sup>87</sup>

Hence the EAW looks like a work-in-progress building site, as a *sagrada familia* of European criminal law. It is an example of experimental governance, where “learning by doing” and also remedying mistakes are to be central. The article has demonstrated that several issues remain to be solved and therefore, the way ahead for the EAW to become a *truly* effective *and* legitimate mutual recognition instrument, is still long.

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<sup>85</sup> *The EAW in Law and in Practice*.

<sup>86</sup> See the case of the FD 2009/299/JHA.

<sup>87</sup> K. Nuotio, *European Criminal Law Under the Developing Constitutional Setting*, p. 320, quoting Delmas Marty, 2002.