Mutual recognition and the European Arrest Warrant: On a collision course with fundamental rights?

Sampo Salmenoja

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Euroopan Unioni on toiminut aktiivisesti rikosoikeuden alalla jo vuosikymmenien ajan. Etenkin valitusta lähestymistavasta, vastavuoroisesta tunnustamisesta, on tullut tärkeä periaate, joka johtaa edistystä harmonisaation sijaan. Vastavuoroisen tunnustamisen valinta ei aina ollut selkeää, ja muita lähestymistapoja ehdotettiin. Jäsenvaltioiden odotetaan työskentelevän yhdessä vastavuoroisen tunnustamisen kautta oikeusjärjestelmien eroista huolimatta. Jotta vastavuoroinen tunnustaminen toimisi, jäsenvaltioilta odotetaan korkeaa keskinäistä luottamusta.

Yksi onnistuneimmista vastavuoroisen tunnustamisen välineistä rikosasioissa on ollut puitepäätös eurooppalaisesta pidätysmääräyksestä. Tätä lainsäädäntövälinettä käytetään, jotta saadaan täytäntöönpaneva jäsenvaltio luovuttamaan etsitty henkilö määräyksen antaneeseen jäsenvaltioon. Pääasiassa jäsenvaltioiden odotetaan noudattavan keskinäiseen luottamukseen perustuvaa vastavuoroisen tunnustamisen periaatetta, mutta eurooppalaisen pidätysmääräyksen täytäntöönpanon epäämiselle on joitain perusteita.

Erityisesti viime aikoina on noussut esiin kysymyksiä perusoikeuksista ja eurooppalaisesta pidätysmääräyksestä. Tuomioistuin keskusteli aiemmin enemmän eurooppalaisen pidätysmääräyksen täytäntöönpanosta sen tehokkuuden varmistamiseksi, mutta se on nyt omaksunut perusoikeuksia suojelevan asenteen. Tuomioistuin voisi yhä olla aktiivisempi

puolustamaan perusoikeuksien suojaamista.

Tämän opinnäytetyön tarkoituksena on vastata kysymykseen: pystyykö eurooppalainen pidätysmääräys säilyttämään tehokkuutensa keskinäiseen luottamukseen perustuvan vastavuoroisen tunnustamisen tehokkaan soveltamisen ja perusoikeuksien suojaamisen kysymyksissä. Tuomioistuimen on täytynyt sovittaa yhteen eurooppalaisen pidätysmääräyksen luonne ja perusoikeudet, mutta onko se onnistunut?

Asiasanat: tasapaino eurooppalaisen pidätysmääräyksen perusoikeuksien ja tehokkuuden välillä, eurooppalainen pidätysmääräys, eurooppalainen rikosoikeudellinen yhteistyö, vastavuoroinen tunnustaminen, vastavuoroinen luottamus

Abstract

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The European Union has been actively acting in the field of criminal law for decades now. Especially the chosen approach of mutual recognition has become an important principle leading the progress instead of harmonisation. The choice of mutual recognition was not always clear and other approaches were suggested. It is through mutual recognition Member States are expected to work together despite the differences in legal systems. For mutual recognition to work, a high level of mutual trust is expected of the Member States.

One of the most successful tools of mutual recognition in criminal matters has been framework decision on the European Arrest Warrant. This legislative tool is used in order for the executing Member State to relinguish a sough after person to the issuing Member State. Mainly Member States are expected to follow the principle of mutual recognition based on mutual trust, but there are some grounds for refusal to execute the EAW.

There have been, in recent times especially, issues with fundamental rights and the EAW. If the Court was before more about enforcing the EAW in order to assure its effectiveness, it has now taken a more fundamental-rights-friendly stance. Although even in this aspect the Court could have been more active in advocating the protection of fundamental rights.

The aim of this thesis is to answer the question: Is European Arrest Warrant able to hold its

effectiveness in issues concerning effective application of mutual recognition based on mutual trust and the protection of fundamental rights. The Court has had to reconcile between the natures of the EAW and fundamental rights, but has it been successful?

Subject matters: balance between fundamental rights and effectiveness of the EAW, European arrest warrant, European criminal cooperation, mutual recognition, mutual trust

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List of Abbreviations

AFSJ	Area of freedom, security and justice.
AG	Advocate General
CEAS	Common European Asylum System
CFREU	Charter of Fundamental Rights of the European Union
CFWD	Framework decision on confiscation orders
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
EctHR	European Court of Human Rights
EIO	European Investigation Order
ESO	European supervision order
EU	European Union
FFWD	Framework decision on freezing orders
JHA	Justice and Home Affairs
OJ	Official Journal
Para	Paragraph

TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
The Court	Court of Justice of the European Union

1. Introduction

1.1 Background

The subject of this thesis, broadly, is the principle of mutual recognition and the European Arrest Warrant in EU cooperation in criminal matters, and how effective execution of the EAW can cause friction between it and fundamental rights. The reason for delving into this topic is that during the last decades the principle of mutual recognition has gained more momentum in the EU legal order and in the Member States´ own legal orders – especially so during the last 15 years. The EAW is a notable framework decision embodying the principle of mutual recognition.

The principle of mutual recognition has had it´s beginning in the EU internal market area where it embodied itself in the case of Cassis de Dijon, a case in which the Court stated that: ”there is no valid reason why, provided that they have been lawfully provided and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State.”[1] More recently the principle of mutual recognition has been pervading the area of judicial cooperation in criminal matters. Within the European agenda the area of freedom, security and justice is a project of highest concern and judicial cooperation in criminal matters relates to it closely.

As criminal law has traditionally been closely connected to the sovereignty of the state, and could also be considered one the basic elements of a sovereign state, there has been complications along the way of mutual recognition. Mutual recognition assumes possibility of cooperation even if the criminal legal systems of the Member States are dissimilar.[2]

Transferring mutual recognition to the field of criminal law was a revolutionary and new approach, although having been used effectively for a long time in the internal market, because criminal law deals with such issues as deprivation of liberty, contrary to how mutual recognition functions in the internal market.[3] It was in 1997, with the Treaty of Amsterdam, that the remarkable aim of molding the Union into an area of security, justice and freedom came to being. After this, in 1998, the European Council saw the necessity to better the nations legal systems´ ability to work more closely together and set forth a question to Council in which the scope for greater mutual recognition of

[1] Case 120/78, Rewe-Zentral AG (Cassis de Dijon), para 14.
[2] Nuotio 2007, 1104.
[3] Herlin-Karnell 2007, 19.

judicial decisions was asked to be determined. The Council was then to start a process to integrate mutual recognition of decisions and the enforcement of judgements in criminal matters.[4] In 1999, at the European Council meeting in Tampere, taking place at head of government level, the principle of mutual recognition was set as a cornerstone of judicial cooperation in criminal matters. The reason for this was to avoid harmonisation of criminal law and the need for more effective cooperation in criminal matters.[5] Mutual recognition in practice meant the acceptance of national judicial decisions all throughout the Union and that judicial decisions made in one Member State are recognised and executed in other Member States just as the decision made in executing State is recognised elsewhere. Foreign and domestic judicial decisions are equal.[6] The basis for mutual recognition lies in mutual trust. Member States are thought to be able to accept each others judicial decisions because they trust each others criminal systems.

Following the European Council meeting in Tampere many documents concerning policy were implemented and within them the foundation of the policy of mutual recognition was clear. Also a large number of instruments, which related to the former third pillar, for mutual recognition were introduced and adopted. Until the Treaty of Amsterdam the Court had been denied any competence in judicial cooperation in criminal matters. For nearly two decades now the Court has repeatedly addressed the principle of mutual recognition.[7] In first such `third pillar´ judgement *Gözütok and Brügge* the Court referred to the mutual trust between member states and to their mutual trust to their respective criminal justice systems stating that: ”each of the should recognise the criminal law in force in the other Member States even in the event of a different outcome if it´s own national law would be applied.” [8] Policy, legislative law and case law having been subjects to constant developments lead to a remarkable culmination in the Treaty of Lisbon, in which the position of mutual recognition in the EU criminal justice area was firmly cemented to be at the core.[9]

The scope of mutual recognition and which decisions shall be mutually recognised is determined by the framework decisions (directives are used now, since Lisbon Treaty came to effect in 2009); for legal effect national implementing legislation is required. It is also this implementation that defines which national judicial decisions will be encompassed by mutual recognition. Framework decisions tend to have a scope and purpose which causes mutual recognition to vary from one framework

[4] Jannsens 2013, 1.
[5] Presidency conclusions of Tampere European Council 15-16.10.1999, http://www.europarl.europa.eu/summits/tam_en.htm#b, accessed 21.5.2019, sections 33-37.
[6] Mitsilegas 2009, 101.
[7] Jannsens 2013, 2.
[8] Joined Cases C-187/01 and C-385/01, Gözütok and Brügge, para 33.
[9] Articles 67 (3) and 82 TFEU.

decision to another.[10] In this thesis I will go through some of these framework decisions especially concentrating on the European Arrest Warrant (EAW.)[11]

It is through framework decisions that mutual recognition was instrumented, when it was launched in the context of the former third pillar. Directives are used nowadays with the Lisbon Treaty. The goal of these is to approximate the rules on cooperation in criminal matters between the Member States. The idea of mutual recognition is to not have to considerably harmonise Member States´ criminal law, and as such the Member States can hold on to their sovereignty while still increasing the efficiency of their cooperation. As mutual recognition works through predefined framework decisions, or today directives, it is not applicable to all judicial decisions arising from the sphere of criminal law. [12]

The EAW is the first and most likely the most important instrument when it comes to enhancing judicial cooperation between Member States of the EU in criminal matters that are based upon mutual recognition. This has been shown during the 13 years the EAW has been in practice. But at the same time it is also one of the most debatable instruments. Many issues have arisen concerning its interpretation. This concerns the fragile balance between Fundamental Rights and the effectiveness of the EAW in matters of application of mutual recognition that is based on mutual trust.[13]

1.2 Research question and structure of the thesis

This thesis focuses on finding out if mutual recognition based on mutual trust, focusing especially on EAW, can be effectively applied in criminal matters. The main research and subject this thesis looks to answer is: *is European Arrest Warrant able to hold its effectiveness in issues concerning effective application of mutual recognition based on mutual trust and the protection of fundamental rights? The Court has had to reconcile between the natures of the EAW and fundamental rights, but has it been successful?*

The object of this thesis is to, by assessing the development and features of the EAW and the

[10] Fletcher 2008, 112.
[11] Council Framework Decision 2002/584/JHA of 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 2002.
[12] Klip 2009, 337 and Suominen 2011, 4-5.
[13] Marin 2014, 327.

principle of mutual recognition, understand how mutual recognition as a foundation of the EAW causes friction between fundamental rights.

Raising these questions is important, because there has been a vibrant, ongoing discussion on these issues. The Court has had different approach depending on the case, and in the search for balance it has had shifts between favoring mutual recognition and fundamental rights. Considering the question of whether there is balance to be found or not is vital going forward.

The thesis is divided into five main chapters. First is the introduction. Second chapter will concentrate on mutual recognition and its aspects in criminal law. First there will be a brief general section of the general concept of mutual recognition within European Union. Next, the chapter will dissect mutual recognition and go through its composition. Lastly, there will be an outlook on harmonisation and mutual recognition.

Fourth chapter is about the European arrest warrant. First there is an overview on the emergence of the European arrest warrant. This part will give insight into how and why the European arrest warrant came to be one of flagships of the EU´s immediate legal reaction to the 9/11 events. Following this the chapter will delve into the matter of issuing the European arrest warrant. Next, the chapter will go through the task of defining crimes in the European Union, concentrating on the issue of double criminality.

Fifth chapter will be about the clash between mutual recognition and the protection of fundamental rights. The approach in this chapter is done through cases, which give us an idea of the issues with mutual recognition, EAW and the fundamental rights. After the fifth chapter there will be a conclusion.

1.3 Methods and sources

The thesis uses different methods of research. In the beginning, the usage of historical method is necessary, due to the viewpoint being in the how the EAW came into being. European integration in the field of criminal law is in focus. Comparative method is used in order to compare case-law and the different views of scholars on the matters. In analyzing basis for mutual recognition and the EAW, their features, case-law and evaluation, the analytical method is used. A vast number of

sources are subject to this analysis.

The scientific literature, articles and monographs, are most valuable sources for the thesis. A number of these sources are used throughout the thesis.

Going through legislation, official publications and internet databases, has provided much data. As for internet databases, only official ones are used. Depending on the matter not only consolidated versions but original ones as well are used.

The Court has had to solve problems that have risen in relation to the EAW and the principle of mutual recognition. As such, case-law has been accessed. Mostly the case-law of the Court of Justice of the European Union, but also national courts of Member States and the European Court of Human Right are referenced. In addition to the judgements of the Court, references of Advocate Generals for the rulings are viewed.

Official documents of the EU have provided information. These include European Council, the European Parliament, the Council of the European Union and the Commission documents.

Where needed, the law blogs in the internet have been used to supplement information as they often offer a vibrant discussion on the cases of the Court.

2. Mutual recognition and its aspects in EU criminal law

2.1 General concept of mutual recognition within European Union

Mutual recognition as a general concept is a topic that has been widely discussed and many papers have been published relating to it. This thesis concentrates on the criminal matters, so it is not necessary to explore this topic too widely, and because of that only fundamentally relevant issues will be studied in this section.

The principle of mutual recognition, which was mentioned in the Treaty of Rome, was more developed by the Court of Justice of the European Union in the case of Cassis de Dijon, which was a remarkable nudge towards the completion of the single market.[14] The judgement led to a conclusion, that a product lawfully produced and marketed in one Member State must be accepted in another Member State. As such, when it comes to free movement of goods, from mutual recognition follows a presumption that when a product is produced and marketed in one Member State, it should be allowed to be manufactured and sold in another Member State without hindrance.[15] From the case of Cassis de Dijon onwards mutual recognition has been applied to aspects other than free movement of goods; free movement of services being an example. Cassis de Dijon was not only a judicial decision contributing heavily to single market, but also an example of interpretation aimed at integrating market, fending off political stagnation and euro-pessimism.[16]

Mutual recognition principle was added by the Commission that found it hard to harmonise different national regulations to guarantee free movement of goods and services between Member States. To combat this situation the Commission made the decision to implement mutual recognition principle as a tactic to harmonise at the economic level.[17]

According to the European Commission the principle of mutual recognition plays an integral role protecting free movement of goods and services. By using the principle of mutual recognition the problems that come with trying to harmonise national legislation can be avoided. Thus, when it

[14] Case 120-78 , Rewe Zentral AG (Cassis de Dijon).
[15] Ghosh 2014, 190.
[16] Nebbia 2004, 96.
[17] Diez 2015, 34.

comes to economic integration, mutual recognition is a remarkable factor.[18] Due to principle of mutual recognition Member States may not in their territory forbid sale of a product that has been lawfully produced and marketed in another Member State, even if the product in question is produced using different quality or technical specifications from those that are used in its own products. The Member State in which these products from another Member State are being sold at, may waive this rule only in strict situations, where there are overriding requirements. Same rules also apply when it comes to services.[19]

Mutual recognition can be viewed as an intricate set of duties of loyalty affecting the relationships between Member States of the EU.[20] Mutual recognition is a broad concept, regulated by law, that covers several areas, such as: single market, professional qualifications, asylum decisions in the European Asylum System, judicial cooperation in civilian matters and judicial cooperation in criminal matters.[21]

2.2 Composition of mutual recognition as a part of EU criminal law

2.2.1 Mutual trust

In the field of criminal cooperation, the justification of mutual recognition lies in mutual trust. What this means is that Member States trust each others criminal law systems and are willing to accept the outcomes of their decisions. Mutual recognition presupposes mutual trust and such trust is based on Member States` ”shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.”[22]

Mutual trust builds common confidence on the common denominators of a common legal culture. Within Member States` common constitutional traditions, in article 6 TEU and in the ECHR are embedded the common denominators working as building blocks. Behind mutual recognition there is mutual trust garnering value; it does so by safeguarding the fundamental rights and freedoms of

[18] Commission of the European Communities 1999.
[19] Klimek 2016, 5.
[20] Klamert 2014, 22.
[21] Klimek, 2016, 5.
[22] Programme of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, OJ C 12, 2001, 10.

the Member States. Mutual recognition instruments, upon which cooperation is based on, presume a satisfactory level of fundamental rights protection. This is closely connected to the possibility that cooperation is possible between Member States without having to harmonise criminal law. It is said that mutual trust precludes the necessity of having to harmonise underlying rules.[23]

Mutual trust is quite an appealing approach in principle because it allows mutual recognition, which requires very little change at a national level, while making far reaching international cooperation possible. The concept has still been somewhat problematic. The question of whether a sufficient amount of mutual trust exists, is something that arises often. This could be seen for example when EAW was to be implemented. The presupposition that mutual trust simply exist might have been somewhat optimistic. There were debates in Member States around the topic of deficiencies in procedural safeguards in other Member States. Due to there being a lack mutual trust, many Member States failed to implement the EAW in time.[24] Mutual trust is a matter that arises, not only when Union legislation is implemented, but also when one applies the implemented national legislation. Thus, mutual recognition implies that the State which is executing finds the justice system of the requesting state trustworthy.

The assumption of mutual trust has been disputed by several academics. According to these academics, the condition of mutual trust should be considered as problematic in light of the ever increasing removal of intermediate procedures and formalities. The aim of full abolishment of *exequatur*[25] procedure can be used as an example, because it requires a vast amount of mutual trust and it is doubtful whether such confidence towards mutual trust between Member States truly exists. There is also a possibility that the abolition of *exequatur* could have a negative effect on European integration, thus making the Member States prone to enforcing judgements in the domestic legal order.[26]

There are three alternatives for analysing mutual trust. Firstly, it is possible to examine mutual trust from an empirical point of view with the idea of trying to prove its existence. Secondly, it could be found to exist when studying mutual recognition instruments and their use. Thirdly, mutual trust

[23] Suominen 2011, 47.
[24] Alegre 2005, 41.
[25] Exequatur, is a concept specific to the private international law and refers to the decision by a court authorising the enforcement in that country of a judgment, arbitral award, authentic instruments or court settlement given abroad. Abolition of the exequatur procedure between Member States for all judgments in civil and commercial matters is the ultimate objective of the mutual recognition programme adopted by the Commission and the Council in December 2000 .
[26] Ouwerkerk 2011, 41.

could be perceived as an ideological concept existing because there is a belief that it exists.[27]

First, the empirical part. Trust between Member States could be perceived to have existed during the time of traditional cooperation in criminal matters. In the preamble of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters had a reference to trust.[28] In Gözütok and Brügge ECJ stated that:

”there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied”[29]

Mutual trust has been around for some time and as such it is reasonable ground for mutual recognition to be based on this principle. Suffice to say mutual trust is still an abstract principle, to some extent.[30]

Secondly, there are mutual recognition instruments based on mutual trust. For example there are EAW, FFWD, and the CFWD, which all mention that mutual recognition and framework decisions suppose mutual trust between Member States as a basis.[31] ”Perfect trust between the Member States as to the quality and reliability of their political and legal systems”, was said to be necessary in the Commissions proposal for the EAW.[32] It seems as if mutual trust is required as a foundation for these framework decisions.

And lastly there is the ideological approach, which could also be seen as foundations of mutual trust. Mutual trust is understanding each others legal orders, and accepting them, even though there might be to some extent differing views in the legal order of the Member State placing that trust. Comparable protection of personal freedoms and fundamental rights is paramount for the acceptance to work.[33] Because of common legal cultures there can be mutual trust. For examples of common legal culture we can raise the principle of legality, the presumption of innocence, the principle of fair trial and the principle of humanity.[34] Also the common core principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, to name a few,

[27] Suominen 2011, 48
[28] Suominen 2011, 48.
[29] Joined cases C-187/01 and C-385/01 Gözütok and Brügge, Para 33.
[30] Suominen 2011, 49.
[31] Recitals 10 EAW, 4 FFWD and 9 CFWD.
[32] Commissions proposal for the EAW, 23.
[33] Suominen 2011, 50.
[34] Suominen 2011, 50.

are a deeper basis for mutual trust. This trust is made easier to accept by the approximation of national criminal law.[35] There is a need to further and enhance mutual trust between Member States. Essential element in doing this and establishing a stronger mutual trust is an approximation of substantive and procedural criminal law.[36]

An ever bigger need for mutual trust is always required. Because of the impact that mutual recognition could have on the individual citizen, it is obvious that Member States are not that eager to comply with requests coming from other Member States. This is especially the case if a request would imply the mutual recognition of a judicial decision restricting or depriving persons liberty. Due to lacking minimum set of common standards of procedural rights, it is even more the case. The differences between Member States procedural rights and guarantees remain huge, despite the fact that all Member States have joined the ECHR. On top of that, there are many divergences concerning the specific design of criminal proceedings and the division of power in each Member State internally. Criminal law, national sovereignty, political and ideological viewpoints have a close connection, which leads to Member States being frequently convinced that the rules they have are the best rules.[37]

It has been widely argued that to apply mutual recognition to judicial decisions in criminal matters a higher level of trust between the Member States is required than in the case of economic integration.[38] This is due to the somewhat invading nature of mutual recognition. Jurisdiction to enforce has been removed from national territory. Unlike harmonisation, mutual recognition does not require Member States to adapt their national law, but it requires Member States to enforce judicial decisions in its own territory that would not have been in its domestic legal order. A close link between judicial decisions in criminal affairs and fundamental rights and freedoms makes it difficult to accept a decision that would never have been made domestically. The concern is a barrier that is uniquely occurring to such a degree in the field of criminal law.[39]

2.2.2 Opinion 2/13

On December 18th 2014 the Court gave its opinion 2/13 on the compatibility of the EU law and the

[35] Green paper on approximation and mutual recognition, COM (2004) 334 final, 12-13.
[36] Weyembergh 2005, 1575.
[37] Ouwerkerk 2011, 72-73.
[38] Lavenex 2007, 762-779.
[39] Ouwerkerk 2011, 73.

draft agreement designed for allowing accession of EU to the ECHR. The Court decided that the draft agreement was not compatible with EU law. There were quite a few incompatibilities and the decision of the Court made accession nearly impossible. Only the incompatibilities with mutual trust will be looked at here.

The Court stated that: "In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[40]

This created a major obstacle to the accession. The problem arises with the interpretation of the aforementioned paragraph 194. If read narrowly, the paragraph of the opinion would mean that a rule must be developed in order to exempt application of the ECHR between Member States in situations in which mutual recognition instruments are in question. A broader reading of the paragraph could mean that the Court expects non-application of the ECHR when dealing between the EU Member States in cases where their relations are dictated by EU law. In both cases, the situation is problematic.[41]

This opposition reflects on the two different functions the two Courts have. The Court of Justice is not there to decide on individual cases as much as interpret EU law regarding the objectives of the EU, thus allowing Member States to apply this law to individuals while being in compliance with the EU law. The European Court´s role, on the other hand, is to make sure that the applicant´s treatment in a case is handled according to the rules.[42]

2.2.3 Ne bis in idem

Ne bis in idem principle has to presume that there is mutual trust between the EU Member States

[40] Opinion 2/13 of the Court of 18 December 2014, para 194.
[41] Łazowski and Wessel 2015, 191-192.
[42] Jacqué 2016, 17-18.

when it comes to their criminal justice systems. As the Court stated in *Gözütok and Brügge:* "In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied."[43]

The limits of mutual recognition should extend beyond the coercive power of a Member State, in the form of a positive instrument of criminal law which can be used even where defendants are discovered outside the territorial boundaries of that Member State. *Ne bis in idem* denies the right to prosecute an individual for acts that have been subject to final disposal in another Member State.[44] in Turanský the court stated that: "A decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State".[45]

Having been through a development, beginning from being linked to Article 54 of the Schengen convention, *ne bis in idem* principle is at a point where the ECJ considers it to be a general principle of the EU law.[46] In *Gözütok and Brügge*, paragraph 38 and the following case law, ECJ has approached the matter from a viewpoint of whether dual prosecutions are obstacles to freedom of movement.[47] ECJ has given a broad interpretation concerning final disposal. The concept includes plea-bargain settlements,[48] and acquittals for lack of evidence.[49] There are limits to this and the court has seen that where there is no determination on the merits of the case but a prosecution is abandoned in favour of one already in progress in another Member State, that decision does not preclude the other prosecution.[50]

[43] Case C187/01, Gözütok and Brügge, para 33.
[44] Miettinen 2013, 174.
[45] Case C-491/07 Criminal proceeding against Turanský, para 36.
[46] Case C-436/04 Criminal proceedings against Leopold Henri Van Esbroeck, para 40.
[47] Case C-491/07 Criminal proceeding against Turanský ECR I-11039, para 41.
[48] Miettinen 2013, 174. Case C187/01, Gözütok and Brügge.
[49] Miettinen 2013, 174. Case C-150/05, Jean Leon Van Straaten v Staat der Nederlanden and Republiek italie.
[50] Case C-469/03, Miraglia, para 35. Case C-467/04, Criminal proceedings against Giuseppe Francesco Gasparini and Others.

2.2.4 Mutual recognition in criminal matters within EU primary law

Lisbon Treaty, which entered into force in 2009, has changed the foundation parameters of European criminal law. The third pillar is no more and provisions on criminal law are melded into the general part of the EU law. Criminal law holds no longer a special place when compared with the EU general law. [51]

The importance of mutual recognition is highlighted in the Treaty on the Functioning of the European Union. Within it is stated that: ”The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws.”[52] The Commission can make a proposal with which the council of the European Union may adopt measures that put forth the arrangements Member States can use to conduct objective and impartial evaluation of the implementation of the EU policies. When it comes to Area of freedom, security and justice the Member States` authorities partake in full application of mutual recognition.[53]

Also, in the Treaty on Functioning of the European Union it is stated that: ”Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgements and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.”[54]

Mutual recognition is a basic principle in cooperation in criminal matters in The EU, working besides approximation of the laws and regulations.[55] The principle of mutual recognition in judicial cooperation in criminal matters borrowed from concepts that the single market had used to great success. After mixing in some Council of Europe conventions, the strategy had been created.[56] This being said, mutual recognition in EU is a general objective. It has not been introduced as an obligation with direct effect in the Member States.[57]

[51] Suominen 2011, 34.
[52] Article 67(3) of the TFEU.
[53] Article 70 of the TFEU.
[54] Article 82(1) of the TFEU.
[55] Klimek 2016, 11.
[56] Baca 2014, 478.
[57] Klimek 2016, 11.

Also within the Treaty on Functioning of the European Union it is stated that: ”To the extent necessary to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:”[58]

- mutual admissibility of evidence between Member State
- the rights of individuals in criminal procedure
- the rights of victims of crime
- any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament

All legislation coming to the area of freedom, security and justice, including cooperation in criminal mattes, must be adopted through directives, under the standard legislative means. It should be said that establishment of minimum rules does not prevent Member States from upholding or creating a higher level of standard of protection to for individuals.[59] To use some examples: ”The level of protection should never fall below the standards provided by the ECHR or the Charter as interpreted in the case-law of the European Court of Human Rights or the Court of Justice of the European Union”,[60] and ” The level of protection should never fall below the standards provided by the ECHR as interpreted in the case-law of the European Court of Human Rights.[61]

Substantive criminal law is addressed in Article 83(1) TFEU. Within the article it is stated that directives can be adopted in order to establish minimum rules when it comes to the definition of criminal offences and sanctions. Also within the article it is stated that this is applicable in areas ”of particularly serious crimes with a cross-border dimension resulting from the nature of or impact of such offences or from special need to combat them on common basis.” The aforementioned crimes are listed: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug and arms trafficking, corruption, money laundering, organised crime, counterfeiting of means of payment and computer crime. Other areas of crime can be identified as relevant by the

[58] Article 82(2) of the TFEU.
[59] Klimek 2016, 12.
[60] Directive 2010/64/EU.
[61] Directive 2012/13/EU.

unanimous Council adopting a decision.[62]

Furthermore Article 83(2) states: ”If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.”[63]

As such, minimum rules can be established by directives, if to achieve effective implementation in an Union area which falls under harmonisation measures it is necessary to harmonise criminal law. In the concerned area this has an influence on the definition of criminal offences and sanctions. The legislative procedure for the initial harmonisation measure in question and these criminal law directives is the same.[64]

In Article 82(3) and 83(3) there is included an emergency break. In case a Member States thinks that a draft directive might affect its criminal justice systems` fundamental points, it may request that the draft is referred to the European Council. The ordinary legislative procedure is thus suspended. The draft is referred back to the Council, if there is a consensus in the European Council. At least nine Member States can continue the draft process, even if there is a disagreement. At such a time the rules of enhanced cooperation begin to apply. An exception to this is that it does not apply for Article 82(1), in which the main legal basis for mutual recognition resides.[65]

The mutual recognition has been put into the top of the EU law. But it still has not been put forth as an obligation with direct effect in Member States. It is still just a general objective. There is an expectation that it will, in the future, be considered as a basic principle of the domestic procedural criminal laws in the same way *ne bis in idem* and presumption of innocence are. The Treaty on the functioning of European Union has given the mutual recognition in judicial decisions in criminal matters effect and relevance.[66]

There have been similar views among scholars. Mutual recognition has been perceived to be a

[62] Suominen 2011, 35.
[63] Article 83(2) of the TFEU
[64] Suominen 2011, 35-36.
[65] Suominen 2011, 36. See also Klip 2009, 60-61 on enhanced cooperation.
[66] Klimek 2016, 13.

journey leading to unknown destination, where national authorities are in principle required to acknowledge standards rising from other Member States. All this is based on mutual trust and formality is expected to be at minimum.[67] Mutual recognition permeating into the area of international cooperation could also seen as an ambitious and rational approach.[68] Also, for the area of freedom, security and justice mutual recognition of judicial decision could be seen as a key element.[69]

With the adoption of Lisbon Treaty on 2007, the pillar structure was no more, which led to criminal law cooperation, with some limitations set in the Treaty, taking place at a supranational level. Also, unanimity was no longer required for decisions to be made, and because of that it became easier to adopt legislation.[70]

2.2.5 Mutual recognition in criminal matters within EU secondary law

2.2.5.1 Introduction

When considering mutual recognition of judicial decisions in criminal matters, there is a legal order which binds Member States and is also binding upon other areas of EU law. This legal order is created by European Commission, the Council of the European Union and the European Parliament. This legal order is construed mainly by one type of secondary EU law: directives. Framework Decisions are another type of secondary law that is not enacted anymore, not after Lisbon Treaty. Before delving into these two, there are few things to mention. Firstly, framework decisions and directives are instruments Member States have, that do not require ratification in all Member States as is case in Conventions. Secondly, directives and framework decisions are prevalent in many areas of EU law, but this part will concentrate only on mutual recognition in criminal matters.[71]

Mutual recognition instruments have a tendency to share similar features that can be considered general features of mutual recognition. Mutual recognition instruments have an inclination to limit the extent to which requesting Member States can require double criminality. Also, mutual

[67] Mitsilegas 2006, 1281-1282.
[68] Klimek 2016, 13.
[69] Sommermann 2013, 169.
[70] Klip 2009, 15.
[71] Klimek 2016, 14.

recognition instruments try to limit other grounds for refusal which may be invoked. They provide harmonised forms for use in issuing demands for recognition. As a main rule, mutual recognition instruments provide a specific circumstances in which a Member State can or must refuse execution. If a ground for refusal is not within the instrument, it cannot be reliably invoked. Certain fundamental rights are to respected in this matter, and this respect towards them is embedded in the EU legal tradition. This, however, is taken as granted in many instruments of mutual recognition.[72]

2.2.5.2 Case Pupino

The case of *Pupino*[73] has emerged as one of the most discussed cases of the ECJ concerning constitutional law and European criminal law in European dimension.[74]

In the heart of the case there was a reference for a preliminary ruling[75], which concerned the interpretation of the framework decision *on the standing of the victims in criminal proceedings*.[76] The reference for a preliminary ruling was sent by a judge in charge of preliminary enquiries at the Tribunale di Firenze.[77] The matter was about proceedings against Maria Pupino, who was a nursery school teacher accused of injuring her underaged pupils. The question given to the ECJ was about whether this act, that had not been implemented in Italian law, affected the interpretation that was meant to be given to the provisions of the Italian Code of Criminal Procedure on when special procedures could be used for especially vulnerable victims giving evidence. The interpretation before was, in case of relevant provisions, that the special procedures were not available for the victims of the offences charged.[78]

In the *Pupino* case the ECJ had the chance to state its view on the effects of framework decisions in national law in case of lack of implementation. The ECJ stated the following: ”In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so

[72] Miettinen 2013, 175.
[73] Case C-105/03, Criminal proceedings against Maria Pupino.
[74] Klimek 2016, 18.
[75] Reference for a preliminary ruling by the Tribunale di Firenze.
[76] OJ 22.03.2001 L82/1.
[77] Case C-105/03 Criminal proceedings against Maria Pupino.
[78] Klimek 2016, 18.

as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2) (b) EU."[79] The ECJ also stated: "In the light of all the above considerations, the answer to the question must be that Articles 2, 3 and 8(4) of the Framework Decision must be interpreted as meaning that the national court must be able to authorise young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing those children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place. The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision."[80]

Pupino was the first case to break distinctions between the law of the First and the third pillars of the EU. Interpreting the case, however, is no easy task. When using functional interpretation the ECJ in the Pupino case arrived at a conclusion that direct effect is embedded into framework decisions the same way it is to directives of the First Pillar. The ECJ argued for the supremacy of the EU law to be the case, not only in First Pillar, but also in third pillar. Courts of the Member States are expected to adopt a proeuropean interpretation of the constitutional provisions. On the other hand, the ECJ gave the framework decisions all the effectivity it could.[81] National courts were placed at the centre of the action and changes to the enforcement of the third pillar instruments were significant.[82]

When implemented late, incorrectly, or not at all, framework decisions do not have direct effect unlike directives.[83]

2.2.5.3 Case of Advocaten voor de Wereld

Advocaten voor de Wereld was a case in which the ECJ further developed the compatibility of framework decisions. The case concerned one of the first mutual recognition measures: the European arrest warrant.[84]

[79] Case C-105/03 Criminal proceedings against Maria Pupino, para 43.
[80] Case C105/03 Criminal proceedings against Maria Pupino, para 61.
[81] Klimek 2016, 19.
[82] Cano 2008, 60.
[83] Klimek 2016, 19.
[84] Case C-303/05, Advocaten voor de Wereld.

In the case an association ”Advocaten voor de Wereld” brought an action before the Belgian arbitration court seeking to annul the Belgian law transposing the provisions of the framework decision on the European arrest warrant and the surrender procedures between Member States. The Belgian court referred to the ECJ a host of questions concerning the validity of the framework decision.[85]

One of the questions was: ”Is the Framework Decision on the European arrest warrant compatible with article 34(2)(b) of the Treaty on the European Union, under which Framework Decisions may be adopted only for the purpose of approximation of the laws and regulations of the Member States.” The referring court was unsure whether the Framework Decision on the European arrest warrant was the appropriate instrument, holding that the European arrest warrant should have been implemented through a convention instead.[86]

The ECJ found that the Article 34 EU does not establish any sort of priority between the different instruments listed in that provision. As such, it cannot be ruled out that the Council may have a choice between the instruments mentioned in order for it to regulate the same subject-matter, subject only to the limits the selected instrument itself provides. It is true that European arrest warrant could have reasonably been a subject of a convention, but it is up to the Council to decide if it wishes to give preference to the legal instrument of the framework decision in a case, such as this, where the conditions of adopting such a measure are met.[87]

This was the case that gave ECJ great chance to make a statement through decision to settle the question of the European arrest warrant. EAW had been a controversial and sensitive matter in which there was structural issues concerning EU, national constitutional limits, and the authority of European and national courts.[88]

The decision was hardly surprising. If the ECJ had leaned towards accepting the position of the plaintiff, the repercussions would have been more dire. If ECJ had declared EAW, which was the first instrument incorporating mutual recognition, as being incompatible with fundamental rights, it would have made further development of judicial cooperation immensely more difficult. However, as stated before, the court did not uphold the position taken by the plaintiff and rather upheld the Framework Decision. The judgement of this case on the EAW is the first of its kind and it allowed

[85] Sorensen 2019, 333-334.
[86] Klimek 2016, 21.
[87] Case C-303/05 Advocaten voor de wereeld, rulings.
[88] Klimek 2016, 21.

this flagship instrument of EU judicial cooperation to truly take root.[89]

2.3 Mutual recognition and harmonisation

Mutual recognition was chosen as the main solution before any harmonisation of criminal law. Due to desire to avoid harmonisation was, at least in 1999, one of the main reasons for choosing mutual recognition as the form of cooperation.[90] In criminal law mutual recognition and harmonisation have been considered as two different approaches, despite the differences they have.[91]

Harmonisation and mutual recognition in criminal matters are often thought to be two alternatives. Individuals opposing harmonisation argue that criminal law can effectively only be dealt with at a national level, as the culture of the nation plays a key role. Due to this, according to the critics, harmonisation is a repressive approach, because it involves applying same level of punishment to all the Member States, despite there being clear differences in qualifying crimes in different legal systems. Once mutual recognition is set, a system that is harmonised at all levels is not the best possible solution in the context of cooperation in criminal matters. Those, on the other hand, who are in support of harmonisation consider it to be a effective way to combat transnational crime. Also, individuals in support of harmonisation believe it to give a better safeguard against violations of human rights. Those who hold this view think that mutual recognition does not allow evaluation of fairness of trial, especially when it comes to evidence gathered abroad.[92]

Mutual recognition differs from harmonisation. First it might seem like the argument is that harmonisation aims to eliminate differences and create a unified system possibly with one judicial court and one system, while on the other hand mutual recognition keeps differences within a system of mutual trust and cooperation. In harmonisation there is a common normative ground to which many subjects agree at the same time. While in mutual recognition there are quite a few normative standards that co-exist and every subject has the right to impose its own standard by requesting another subject to incorporate it into its system.[93]

The problems attached to the principle of mutual recognition can be viewed as a reason for

[89] Geyer, 2008, 151.
[90] Suominen 2011, 51-51.
[91] Nuotio 2004, 172-173.
[92] Fichera 2011, 50.
[93] Fichera 2011, 48-49.

harmonisation. Originally the principle of mutual recognition was adopted with the idea that harmonisation can be avoided, but this system based only on mutual recognition has received criticism. There has been views that mutual recognition actually needs some minimum level of harmonisation as a precondition to work properly.[94]

However, the current justice system of the Union is filled with problems from the viewpoint of harmonisation. Each Member State has its own criminal justice system, and on top of that the Member States and the EU have a shared competence in the area of freedom, security and justice when bringing about legislation in this field. As directives are the most encompassing form which the Union can use in matters of criminal law, directly applicable legislative instruments cannot be used to try to harmonise the systems of the Member States. As such, this brings about a justice system that is based on the cooperation of many different systems. Thus, as long as there are individual jurisdictions in Member States, the need for mutual recognition is greater than that of harmonisation.[95]

Yet another problem rises from trying to define these two terms – harmonisation and mutual recognition – because both seem to be used with different purposes and in different context, and at times without reasonable coherence. Harmonisation is in some cases perceived more as approximation of rules, as it is about bringing different laws of different Member States closer to each other. At times harmonisation only refers to procedural criminal law, and other times to substantive criminal law. To some academics harmonisation does not mean elimination of differences but rather elimination of conflicts between different legal systems. Yet, it is a reasonable belief that some disparities must disappear for a common model of law to function properly. Because all of this, in order to have a better view of harmonisation, we can distinguish different degrees, starting from the lowest, approximation, and moving to the highest, unification.[96]

As a form of cooperation mutual recognition allows the procedural and criminal legal systems of the Member States to function despite there being differences. These differences between Member States are accepted but at the same time they are dismissed as impediments of cooperation.[97] There is a possibility mutual recognition was not widely discussed before the principle was launched. This is because it was applied instead of harmonisation.[98] As Peers put it:

[94] Alegre and Leaf 2004, 201.
[95] Klip 2009, 420.
[96] Fichera 2011, 49.
[97] Klip 2009, 332.
[98] Suominen 2011, 52.

> ”Because the Council has made the error of assuming that the underlying law need not be comparable. The application of the principle as it has developed in the criminal matters is not defensible, and should be reconsidered to align it with the application of the principle in the internal market, which usually requires either at least some basic comparability of underlying national laws before applying mutual recognition pursuant to the EC Treaty free movement rules, or the adoption of EC legislation to ensure that those national laws are sufficiently comparable.”[99]

All in all, when using narrow interpretation, the principle of mutual recognition does not need harmonisation.[100] This being said, harmonisation in some form is recommended and even considered necessary in order to create a base level of trust upon which mutual recognition can be based on. As such, mutual recognition and harmonisation should not be considered as alternatives, but rather viewed as two approaches that compliment each other.[101] For the mutual recognition of foreign decision not to become increasingly difficult, even impossible, it is paramount to have some level of harmonisation.[102] It is reasonable starting point to assume that if a Member State is to accept a foreign decision as if it was a national decision, there must be some prerequisite for the national system to, at the very least, acknowledge such a decision. It would be ridiculous to think that a Member State would acknowledge a foreign judicial decision, with imminent consequences, if it did not know the content of said decision, or even that such a decision exists. For mutual recognition to flourish, it is important to recognise that it is not only the recognition itself that is important, but also the execution matters: recognition must lead to legal consequences.[103]

2.4 Conclusions

Mutual recognition requires another Member State to accept the decision of another Member State, even if that decision has no place in its legal system. This whole acceptance has roots in mutual trust, and would be impossible without it. To give light how important of a principle mutual recognition truly is, it could be defined as a legal principle that is the cornerstone of EU cooperation in criminal matters.

[99] Peers 2004, 5.
[100] Case C-303/05 Advocaten voor de wereld, para 59.
[101] Suominen 2011, 57.
[102] Green paper on approximation and mutual recognition COM (2004) 334 final, 10.
[103] Suominen 2011, 57.

Harmonisation and mutual recognition are by no means simply options to choose from when it comes to cooperation in criminal matters. As is shown, mutual trust requires some level of harmonisation to be possible. And mutual trust in turn is required for mutual recognition to be possible. So it seems that the two, mutual recognition and harmonisation, are in a mutually beneficial relationship. A certain amount of harmonisation is always required in order to set the frame in which mutual recognition works.

Mutual trust between Member States has been highlighted, and the necessity for it has become an impediment when it comes to EU joining the ECHR, as is seen in Opinion 2/13. This has created a lock, preventing EU joining ECHR, to which certain solutions have been suggested. One possibility is exempting application of ECHR between Member States in cases where mutual recognition instruments are in question. Another suggestion would be that ECHR is not applied in cases where the relations between EU Member States are dictated by EU law

3. European Arrest Warrant

3.1 General outlines of the EAW

3.1.1 The birth of the EAW

It should be noted that, at least at the very beginning, the purpose of the drafters of the first documents of the mutual recognition agenda was not clear. In 2000 Programme on mutual recognition, the priority rating 1 was given to mutual recognition of decisions on the freezing of evidence and on mutual recognition of orders to freeze assets. The creation of arrest warrant was given a priority rating 2 and even then it was to be limited only to the most serious of offences that were mentioned in former article 29 TFEU: terrorism, drug trafficking, trafficking in humans and offences against children, trafficking in weapons, corruption and fraud.[104]

Despite there being efforts made in the 80s and 90s, it was the 9/11 attacks in the USA in 2001 that built political pressure to find new means to fight the terrorist threat. The plane attacks against New

[104] Fichera 2011, 70.

York and Washington brought international terrorism to the top of the European political agenda. And although the attacks were made against the USA, it was perceived as an attack against the whole of western world. In the immediate aftermath all European leaders condemned the attacks and gave their support to the USA. The then prime minister of UK, Tony Blair, stated that the fight against terrorism was not one that was waged between the USA and terrorism but rather one that was waged between free world and terrorism. The rise of international terrorism made it a necessity to bring about a new counter-terrorist strategy.[105] This being said, the need for new mechanisms of cooperation had already made the European countries initiate a programme of mutual recognition since the end of 90s.[106]

Due to the 9/11 attacks the European Commission submitted a Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between Member States on 19th of September, 8 days after the attacks occurred.[107] When preparing the proposal, the departments of the European Commission organised a host of interviews in the EU Member States with legal practitioners, judicial officers, lawyers, academics and ministry officials responsible for extradition in nearly all EU Member States. It came to be that there was no reason to distinguish between situations in which extradition is requested at the pre-trial phase and when it is requested for the execution of an enforceable judgement.[108]

On 21st September 2001 the Council gathered to an extraordinary session to analyse what the international situation was following the terrorist attacks in the USA and to put forth the necessary impetus to the actions of the EU. On the matters of enhancing police and judicial cooperation the European Council signified its agreement to introduce the EAW. The decision was in line with the European Councils conclusions in Tampere. The European Council stated that the EAW would supplant the system of extradition between the EU Member States. Also, it was mentioned that the extradition procedures did not reflect on the confidence and integration between the EU Member States. The EAW was to allow wanted persons to be directly handed over from one jurisdiction to another.[109]

During the negotiations in December 2001, the strongest proponent to resist the EAW was Italy.

[105] Casale 2008, 115.
[106] Fichera 2011, 70.
[107] Proposal for a Framework Decision on the European arrest warrant and the surrender procedures between the Member States COM (2001) 522 final.
[108] Klimek 2014, 23.
[109] Conclusions and Plan of action of the Extraordinary European Council Meeting on 21st September 2011, document No. SN 140/1.

Thus, on the 6th and 7th of December 2001 the JHA Council failed to reach an agreement on the EAW. This was due to the opposition from Italy. From then 15 Member States only Italy did not accept the compromise reached by the 14 Member States.[110] An agreement was nearly reached but there was a veto of then Italian Minister of Justice, whose objection was about the number of 32 categories of crimes in the Proposal. Italy wanted to have the list of offences to be reduced from 32 to 6.[111]

On 6th of February 2002 the European Parliament approved the Councils draft without any amendment. The Italian veto was removed due to pressure from the European governments. The Council of the EU adopted the framework decision on 13th of June 2002. As such, the legal basis for the EAW, at the EU level, that was addressed for all the EU Member States, became the Framework decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA.) It was considered to be the flagship of the EU´s immediate legal reaction to the 9/11 events.[112]

The EAW was pushed through as an `emergency legislation` and it has radically changed the nature of cooperation on extradition. It also constitutes as a strong precedent for the application of mutual recognition in criminal matters in the European Union. This can be seen in the Preamble of the Framework Decision that says that the warrant "is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the cornerstone of judicial cooperation.[113]

The EAW is a judicial decision that is issued by a Member State with a purpose of arresting and surrendering of an individual by another Member State for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.[114]

The Framework Decision on the EAW entered into force on 1st of January 2004. The EAW abolished formal extradition that was in place between the EU Member States. It replaced the former formal extradition with a system of surrender between judicial authorities of the EU Member States. Due to this the EU made a significant leap towards its aspiration of becoming an area of freedom, security and justice.[115]

[110] Klimek 2014, 25.
[111] Burgess and Vllaard 2006, 238.
[112] Klimek 2014, 25-26.
[113] Mitsilegas 2009, 120.
[114] Article 1(1) of the Framework Decision on the EAW.
[115] Klimek 2014, 26.

Many governments, however, became wary of the possibility that European Union had acted too hastily. Also, there are some legal scholars that have argued that the creation of the EAW was a step made too soon.[116]

3.1.2 General definition and principles of the EAW

It was on 13 June 2002 that the Council Framework Decision on the European arrest warrant and the surrender of persons was adopted. The EAW, at the time, was treated as the first concrete measure in the field of criminal law when it came to implementing the principle of mutual recognition. For the European Union the EAW was considered to be a cornerstone of judicial cooperation. The EAW was declared to be a success by the European Commission as it allowed faster and simpler mechanism of surrender of requested persons for the purposes of conducting criminal prosecution or executing a detention order or a custodial sentence than the previous traditional system of extraction.

The European Arrest warrant is a judicial decision issued by a Member State of the European Union with a view to the arrest and surrender by another Member State of the European Union of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.[117] The main parts to be considered in it are the issuing state, in which the offence was committed and whose authorities want to arrest a person out of their reach, and the executing state, where the aforementioned individual is thought to be at. The state here refers to a Member State and the Member States judiciary, not the government. The EAW is structured in four chapters consisting of general principles, the surrender procedure, the effects of surrender and final and general provisions.[118]

As far as the general principles go, the first remarkable change was, brought about by mutual trust, the removal of nationality exception. It is not allowed for a Member State to refuse the surrender of a suspected or a convicted person based on nationality. This ban is quite classical in a sense that it can be found in many bilateral or multilateral arrangements. The reason for this is due to civil law

[116] Klimek 2014, 26.
[117] Article 1(1) of the Framework decision on the EAW.
[118] The European Arrest Warrant in Law and in Practice: A Comparative Study for the consolidation of the European Law-Enforcement Area,
http://opj.ces.uc.pt/site/documents/EAW_Final_Report_Nov_2010.pdf, accessed 19.8.2019, 33-34.

countries generally including it in their domestic law as an expression of a State´s sovereignty and as a guarantee of the fundamental rights of the individual.[119]

The nationality exception is not done away completely and nationality is mentioned as an optional ground for refusal of execution. It, however, can be invoked only if certain conditions are fulfilled. It is in Articles 4(6), 5(3) and 25(1) that these possibilities of using nationality as ground for refusal are discussed. In next paragraph I will be looking closer said Articles and continue from there to other general principles.

Article 4(6) states that EAW can be refused in a situation where a national or resident of executing State is wanted for the execution of a custodial sentence or detention order, but only on the condition that the executing State enforces the sentence domestically. Also, in Article 5(3) it is stated that in case the request for the surrender of person, who is a national, is made in order to prosecute in the requesting state, the executing State can make the execution conditional requiring that if sentenced to a custodial sentence the national will be returned to serve his or her sentence in there.[120] Lastly, there is Article 25(1) that concerns conditional transit. According to it, where an EAW has been issued in order to prosecute an individual who is a national or resident of the State of transit, can subject the transit to the condition that the individual, after being heard, is returned there to serve the detention order or custodial sentence.[121]

In Articles 3(2), 4(2), 4(3) and 4(5) the Framework Decision approaches the *ne bis in idem* principle. *Ne bis in idem* is a ground for mandatory non-execution in cases where the judicial authority is informed that the individual against whom the EAW has been issued has been finally judged by a Member State of the same act. This is the case, provided that, where there has been a sentence, the sentence is currently served, it has been passed or it may no longer be executed under the law of the sentencing Member State. Third Member States are included in this wording. Also, optional non-execution is possible in three cases: “a) where the requested person is being prosecuted in the executing Member State for the same act as that on which the EAW is based; b)where the judicial authorities of the executing Member State have decided either not to prosecute for the offence or to halt proceedings, or where a final judgement has been passed upon the requested person in a Member State, in respect of the same acts, which prevent further proceedings; c) where the requested authority is informed that the person has been finally judged by a third Non-Member State in respect for the same acts, provided that, where there has been a sentence, the

[119] Fichera 2011, 79.
[120] Z. Deen-Racsmany and R. Blextoon 2005, 336-337.
[121] Article 25(1) of the Framework Decision on the EAW.

sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country."[122]

Next there is the principle of double criminality. Article 2(2) of the Framework Decision on the EAW states that the issuing Member State cannot refuse from recognising an offence that underlies the EAW on the ground that it is not a crime in domestic legal order if this offence falls under the 32 crimes listed in the Framework Decision. As such, if an EAW is issued concerning one of the crimes on the list, the executing Member State, in principle, is required to surrender the individual who is sought out. Of course all the other terms of the EAW must also be met.[123] A more insightful look at the list of 32 crimes will be done later in this thesis in chapter 4.3.3.

Under Articles 2(4) and 4(1) of the Framework Decision on the EAW double criminality still remains an optional ground for refusal.[124] Article 2(4) states that for those offences that are not included in the list of 32 crimes, surrender can still be subject to the condition that those acts that are referred to in the EAW "constitute" an offence under the law of the executing Member State. As for the Article 4(1), it states that dual criminality is not applicable in cases in which the law of the requested State does not impose the same type of duty or tax or does not contain rules of the same type regarding taxes, customs and duties and exchange regulations as the law of the State of the issue. This applies in all cases differences exist in where there is punishment in the Member State for attempting or doing said act.[125]

Behind the rule of speciality lies the historic idea that the state which is receiving may exercise its discretion in criminal jurisdiction only within the confines of the agreement upon which the surrender is based on. The conditions of the surrender are approved and checked by the sending state.

The rule of speciality could be summarized: "a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered."[126] The individual who is requested has the right to not be surrendered to a Member State other than specified executing Member State for the purposes of doing a criminal prosecution or executing a custodial sentence for an offence

[122] Fichera 2011, 81-82.
[123] Ouwerkerk 2017, 7 and 18.
[124] Articles 2(4) and 4(1) of the Framework Decision on the EAW.
[125] Fichera 2011, 81.
[126] Article 27(2) of the Framework Decision on the EAW.

that was committed before his or her surrender to the issuing Member State.[127] Some troubles in the interpretation have been caused by the wording of "for an offence...other than that for which he or she was surrendered". The Court of Justice tackled this in the case of Leymann & Pustarov.[128] and stated: "...it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision." Rule of speciality contains a host of exceptions, which will not be examined here.

There is no mention of the rule of reciprocity in the Framework Decision on the EAW. It cannot be found in the core text nor the preamble. As such, rule of reciprocity has been removed from the consideration of the EAW.

In the context of extradition law rule of reciprocity entails a view that States are only willing to extradite persons, if they have reasonable guarantees that the requesting State would act in a same manner if the roles were reversed. The performances do not have to be symmetrical. Extradition conventions are more often than not based on a system of mutual performances and they do not very often contain unilateral obligations. There seems to be an agreement among scholars that the principle stems from the necessities of international politics, rather than that it could be considered a principle of justice.[129]

3.2 Issuing the EAW

3.2.1 Options of issuing the EAW

The EAW is the European procedural instrument when it comes to conducting a criminal

[127] Case C-192/12 PPU, Melvin West, para 41.
[128] Case C388/08 PPU, Leymann and Pustovarov.
[129] Van der Wilt 2005, 71.

prosecution or executing a detention order or a custodial sentence.[130] There are two possible ways of issuing the EAW. An EAW may be issued by a Member State in two different scenarios.

> 1. "A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months."[131]
>
> 2. There are 32 offences that: "if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant."[132]

The first of these two ways can be considered a "standard" way to issue an EAW. The second option can be viewed as "issuing without verification of the double criminality of the offence."

3.2.2 The standard way of issuing the EAW.

When it comes to standard issuing, there are two cases in which EAW can be issued:

- existing offence punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months, or
- a sentence has been passed or a detention order has been made, for sentences of at least 4 months.[133]

In these cases, the executing state has the possibility of imposing the dual criminality requirement. Surrendering the requested individual may be subject to the condition that the offence for which the EAW has been issued is an offence under the law of the executing Member State. In these cases the dual criminality requirement is applied. An act must be both: an offence under the law of the

[130] Article 1(1) of the Framework Decision on the EAW.
[131] Article 2(1) of the Framework Decision on the EAW.
[132] Article 2(2) of the Framework Decision on the EAW.
[133] Article 2(1) of the Framework Decision on the EAW.

executing and issuing states.[134]

3.2.3 Issuing without the verification of double criminality

A key feature within the EAW is the included list of 32 offences for which the requirement of double criminality is abolished. As such, there is a softened double criminality requirement, meaning that when it comes to these 32 offences the double criminality is not considered by the judicial authority of the executing Member State that has the competence to execute the EAW. If an EAW is to be issued without verifying the double criminality of the act, then the next cumulative conditions must be met:

- the offence is on the list of 32 categories of offences referred to in the Framework Decision on the EAW,
- the offence is punishable by a custodial sentence or a detention order in the issuing Member State,
- maximum period of a custodial sentence or a detention order takes at least 3 years,
- the law of the issuing Member State has a definition of the offence.[135]

The list of 32 offences cover the following:[136]

– participation in a criminal organisation;
– terrorism;
– trafficking in human beings;
– sexual exploitation of children and child pornography;
– illicit trafficking in narcotic drugs and psychotropic substances;
– illicit trafficking in weapons, munitions and explosives;
– corruption;
– fraud, including that affecting the financial interests of the EC within the meaning of the Convention on the protection of the European Communities' financial interests11;
– laundering of the proceeds of crime;

[134] Klimek 2014, 96.
[135] Klimek 2014, 97.
[136] Article 2(2) of the Framework Decision on the EAW.

– counterfeiting currency, including of the euro;
– computer-related crime;
– environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
– facilitation of unauthorised entry and residence;
– murder, grievous bodily injury;
– illicit trade in human organs and tissue;
– kidnapping, illegal restraint and hostage-taking;
– racism and xenophobia;
– organised or armed robbery;
– illicit trafficking in cultural goods, including antiques and works of art;
– swindling;
– racketeering and extortion;
– counterfeiting and piracy of products;
– forgery of administrative documents and trafficking therein;
– forgery of means of payment;
– illicit trafficking in hormonal substances and other growth promoters;
– illicit trafficking in nuclear or radioactive materials;
– trafficking in stolen vehicles;
– rape;
– arson;
– crimes within the jurisdiction of the International Criminal Court12;
– unlawful seizure of aircraft/ships; and
– sabotage.

The list of 32 offences may be added other categories of offences by the Council of the EU. The Council will examine if the list should be amended or extended. On the matter of offences not covered on the list, surrender might be conditional and the acts for which the EAW has been issued must constitute an offence according to the law of the executing Member State.[137]

Even if the language of the Framework decision on the EAW states "without verification of the double criminality of the act", there are certain Member States that have adopted laws that require verification.[138]

[137] Klimek 2014, 99.
[138] Murphy 2011, 233.

3.2.4 Transmission of the EAW

Concerning the transmission of the EAW, there are two possibilities that can unfold: either the location of the sought person is known, or it is not known.

If the location of the person is known, the EAW is sent directly to the executing judicial authority.[139] This means that the place of residence of the requested person in the other EU Member State is known to the authority requesting surrender by using the EAW. Suffice to say, all information that concerns executing and judicial authorities of all the Member States is to be found in the internet. It can be found on the European Judicial Network website. Within the site there is a whole section dedicated to the EAW.[140]

A problem might occur for the issuing authority when the location of the person is not known. The issuing authority could face a problem where it does not know what the competent executive authority is. If this happens, it will have to start making requisite enquiries. In this case also, the contact points of the European Judicial Network are a valid line of gathering information.[141] The issuing judicial authority can, if it so wants, ask the transmission to be effected through the secure telecommunications system of the European Judicial Network.[142]

In case it is not known where the requested person is, an alert is issued in the Schengen Information System (SIS). Such an alert is in accordance with CISA and has the same effect as EAW. However, there is a transitional period until the SIS has the capability to transfer all the information that is required in the Framework Decision on the EAW. During this time the alert is equivalent to an EAW pending receipt of the original in due and proper form by the executing judicial authority. If there is no possibility of using SIS, transmission may happen indirectly through Interpol.[143]

In fact, the issuing judicial authority is allowed to forward the EAW by any means that is secure and capable of producing written records. The Executing Member State must be able to check the authenticity of the written record. Problems arising concerning authenticity or the transmission of

[139] Article 9(1) of the Framework Decision on the EAW.
[140] https://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx
[141] Article 10(5) of the Framework Decision on the EAW.
[142] Article 10(1)(2) of the Framework Decision on the EAW.
[143] Fichera 2011, 86.

any information or documents required to fully execute the EAW will be dealt with by direct contacts between the judicial authorities involved. Or, if and when it is appropriate, the central authorities of the Member States can become involved in the matter.[144]

As for the translation of the EAW, it can be perceived as an act of intercultural communication.[145] It is compulsory to translate the warrant into the official language or languages of the requested State. Member States, however, are allowed to deposit a declaration with the General Secretariat of the Council of the EU that they accept translation in one or more official languages of the institutions of the EU.[146]

The form and the content of the EAW are stated in Article 8. To give a more precise list, an EAW must contain:[147]

- the identity and nationality of the requested person;
- the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority;
- evidence of an enforceable judgement, an arrest warrant or any other enforceable judicial decision having the same effect;
- the nature and legal classification of the offence;
- a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person;
- the penalty imposed, if there is a final judgement, or the prescribed scale of penalties for the offence under the law of the issuing Member State;
- and – if possible, other consequences of the offence.

As for the form: the form appended to the Framework Decision on the EAW must be used. The intention behind this was to implement a working tool that can be simply filled in by the issuing judicial authorities and recognised by the executing judicial authorities. The main idea behind this is to allow the flow of information and to avoid expensive and lengthy translations. For the arrest and surrender of a requested person, the form consist the sole base for such an action and should be filled in with care.[148]

[144] Article 10(4)(5) of the Framework Decision on the EAW.
[145] Klimek 2014, 139.
[146] Article 8(2) of the Framework Decision on the EAW.
[147] Fichera 2011, 86.
[148] Klimek 2014, 134-135.

3.2.5 Proportionality test

The EAW should only be used by judicial authorities in cases where the surrender request is in proportion in all circumstances of the case. Also, judicial authorities should apply a proportionality test in a same manner across Member States. Proportionality test can be seen as a check on top of verification to see whether a required threshold is met, and this is based on how appropriate the issuing of the EAW is when considered against the backdrop of the case.[149]

Taking into account the severe consequences executing a EAW has on the requested person´s liberty and the restrictions of free movement, the judicial authorities issuing a EAW should be willing to consider a host of factors in order to determine whether issuing a EAW can be justified in each individual case. Some examples of what could be taken into account are: "the seriousness of the offence (for example, the harm or danger it has caused); the likely penalty imposed if the person is found guilty of the alleged offence (for example, whether it would be a custodial sentence); the likelihood of detention of the person in the issuing Member State after surrender; the interests of the victims of the offence. Also, it is reasonable for issuing authorities to consider if there are other judicial cooperation measures that could be taken instead of issuing a EAW. There are legal instruments on judicial cooperation within the Union that, in many situations, offer a less coercive and more effective approach. [150]

The approach of the Member States has varied and therefore also the application of proportionality test varies. There has been a disproportionate use of the EAW for minor offences or for offences that could have been dealt with less intrusive means. This has led to unwarranted arrests and excessive time spent on pre-trial detention. As such, there has been a disproportionate interference with the burdens on the resources of the Member States and fundamental rights of suspects.[151]

As EAW brought some problems regarding proportionality, especially so when it came to issuing EAWs for minor offences, we should briefly look at the EIO directive in which the issue was addressed. In the EIO there must a proportionality test within the issuing state and not in the

[149] Klimek 2014, 134.
[150] European commission notice: "handbook on how to issue and execute a European arrest warrant", 2017, document No. 6389 final, 19.
[151] European Parliament resolution of 27 February 2014 with recommendation to the Commission on the review of the European Arrest Warrant(2013/2109(INL)), OJ C 285/135.

executing state when it comes to the requested measure. Subsequently, there is no additional proportionality test done in the executing state, and due to that no explicit ground for refusal. If there is disagreement between the parties, a consultation procedure is held, and this can lead to withdrawal of the EIO by the issuing state. Following a disagreement, if the issuing state refuses to withdraw the EIO and it continues to request the execution of the measure, the executing state must make a decision about its recognition and execution by referring on to non-recognition grounds that are listed in the directive. Suffice to say, a disproportionate request could lead to the invocation of a fundamental rights non-recognition ground, provided in Article 11.[152]

3.3. Executing the EAW

3.3.1 Decision to execute the EAW

As the executing judicial authority receives a request for surrender, the first priority is to arrest the requested person.

A person who is arrested this way, for the purpose of the execution of a European arrest warrant, has a right to have an interpreter an a judicial council assist him or her in accordance with the national law of the executing Member State. Also, a requested person who is arrested must be made aware of the EAW and its contents. A requested person must also be made aware of the possibility of consenting to surrender to the issuing judicial authority.[153]

When a requested person is arrested, the executing authority can decide if the requested person should be kept on detention, in accordance with the law of the executing Member State. The requested person can be released at any time based on the law of the executing Member State, as long as a competent authority of the aforementioned Member State makes certain the person does not flee.[154]

As stated before: the requested person must be made aware of the possibility of consenting to surrender. If consent is given before the executing judicial authority, then Article 13 will be

[152] Erbežnik, 2018.
[153] Article 11(1)(2) of the Framework Decision on the EAW.
[154] Article 12 of the Framework Decision on the EAW.

applicable. It is possible to renounce the "speciality rule" at the same time as the consent to surrender is given. It is up to each Member State to adopt measures that show that the consent, and possible renunciation of the "speciality rule", are given in such a away as to make sure that the person in question has been a voluntary participant and in full understanding of the consequences. The consent and, if needed, renunciation, are recorded according to the procedure law of the executing Member State. It is possible to revoke consent. Each Member State may provide the option to revoke consent and, if needed, renunciation at the same time. This revocation will be done in accordance with the rules of the executing Member State. As a general rule such a revocation is not possible, but a Member State which wants to hold on to an exception must inform the General Secretariat of the Council on their decision when the Framework decision is adopted. The time between the date of consent and its revocation will not be considered when establishing time limits for the decision to execute.[155] If this consent to surrender is not put forth by the requested person, there will be a hearing which will follow the law of the executing Member State.[156]

EAW also makes possible conditional surrender and postponed surrender.

In conditional surrender, the executing judicial authority can temporarily surrender the requested person to the issuing Member State provided that the Member State follows the mutual agreement made between the executing and issuing judicial authorities. Such an agreement will be made in writing and the agreed conditions must be followed by all the judicial authorities in the issuing Member State.[157]

As for the postponed surrender, the executing judicial authority may decide to postpone the surrender of the requested person so that she or he can be prosecuted in the executing Member State. This also applies if the requested person has been sentenced and she or he is serving this sentence in the executing Member States territory. The act that the requested person is serving must be other than the one referred to in the EAW.[158]

[155] Article 13(1)(2)(3)(4) of the Framework Decision on the EAW.
[156] Article 14 of the Framework Decision on the EAW.
[157] Article 24(2) of the Framework Decision on the EAW.
[158] Article 24(1) of the Framework Decision on the EAW.

3.3.2 Time limits for the execution and surrender

The surrender phase of the execution of the EAW is subject to strict limits. As the Framework Decision on the EAW states, urgency should be the driving force when dealing with and executing the EAW.[159] The reason for this urgency has two purposes. One of the purposes is that there is a need for a potent cooperation between States, which is why the proceedings must be sped up. This also helps mutual trust as the requesting State will be content due to fast handing over of the sentenced or suspected person. The other purpose is, that a fast surrender guarantees rights of the person who is subject to the EAW, as she or he does not have to go through long-term and exorbitant detention waiting for a decision of the court.[160]

There are rules imposed on time limits by the Framework Decision on the EAW. These time limits can be divided in to having one of the two reasons: time limits for the decision to execute EAW and time limits for a surrender of person.

First there are the time limits for the decision to execute EAW. When the requested person consents to his or her surrender, the decision on the execution of the EAW should be made within 10 days after consent has been given. In other cases, the final decision on the execution of the EAW should be made within 60 days after the arrest of the requested person has been made. In specific cases the European arrest warrant cannot be executed within the time limits mentioned before. In these cases the executing judicial authority will immediately inform the issuing judicial authority and give reasons for the delay. The time limit can be extended in these cases by a further 30 days.[161]

As long as the executing judicial authority has not taken a final decision on the European arrest warrant, it will make sure the material conditions necessary for effective surrender of the person remain fulfilled. If exceptional situation arises and the Member State cannot observe the time limits, it must inform Eurojust and explain the reason for delay. A Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants will inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.[162]

[159] Article 17(1) of the Framework Decision on the EAW.
[160] Fichera 2011, 87.
[161] Article 17(2)(3)(4) of the Framework Decision on the EAW.
[162] Article 17(5)(7) of the Framework Decision on the EAW.

When the requested person enjoys enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits will not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived. The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.[163]

Second, there are time limits for surrender of the person. The surrender of the requested person will be negotiated between the concerned authorities, and it will be done as soon as possible. The surrender of the requested person shall happen no later than 10 days after the final decision on the execution of the EAW.[164]

If the surrender of the requested person is prevented in any way by circumstances beyond the control of any of the Member States, the executing and issuing authorities will contact each other immediately and agree on a new date for the surrender. In this case, the surrender will happen within 10 days of the new agreed date.[165]

The surrender can be postponed in extraordinary cases that relate to serious humanitarian reasons. The example given in the article is: if there are substantial grounds to believe that the operation to surrender would manifestly endanger the requested person´s life or health. Once this delay is no more, the execution of the EAW will commence. The executing judicial authority immediately informs the issuing judicial authority and they agree a new surrender date. After this, the surrender will happen within 10 days of the new agreed date.[166]

It should also be noted that when the time limits expire, if the requested person is still being detained, he or she will be let go.[167]

3.3.3 Grounds for refusal to execute the EAW

Framework Decision on the EAW is based on the principle of mutual recognition. This does not

[163] Article 20(1) of the Framework Decision on the EAW.
[164] Article 23(1)(2) of the Framework Decision on the EAW.
[165] Article 23(3) of the Framework Decision on the EAW.
[166] Article 23(4) of the Framework Decision on the EAW.
[167] Article 23(5) of the Framework Decision on the EAW.

however mean that there is an absolute necessity to execute the issued EAW.

In articles 3 and 4 of the Framework Decision on the EAW there are defined grounds upon which the execution of the EAW can be refused by the executing State. Also, there are special provisions on non-execution of the EAW. If compared to the traditional processes of extradition between Member States, the EAW has a limited amount of grounds for a refusal to surrender.[168]

As for the surrender procedure, there are four groups that the grounds for non-execution of the EAW can be divided into.

First there is the mandatory non-execution. There are three cases in which the judicial authority that is executing shall refuse to execute the EAW: "amnesty; the requested person has been finally judged by a Member State in respect of the same acts; and the requested person may not, owing to his or her age, be held criminally responsible for the act(s) on which the EAW is based."[169]

Next there is the optional non-execution. The executing judicial authority can refuse to execute the EAW in case of: the act on which the European arrest warrant is based on does not constitute an offence under the law of the executing Member State, that is to say, the absence of dual criminality; the individual who is subject to the EAW is being prosecuted in the executing Member State for the same act on which the EAW is based on; executing judicial authorities have decided not to prosecute for the offence on which the EAW is based or to halt proceedings, or there is final judgement that has been passed; the criminal prosecution or punishment of the individual is statute-barred; the individual has been finally judged by a third State concerning the same acts; the executing State takes upon itself to execute the sentence or detention order; the lack of jurisdiction.[170]

For the way the title of the Article 4 ('Grounds for optional non-execution of the European arrest warrant') of the Framework Decision on the EAW is written, it seems clear "that it is not the implementation of those grounds by the Member States which is optional but rather the execution of the European arrest warrant, which is thus left to the discretion of the national judicial authorities."[171]

[168] Klimek 2014, 150.
[169] Klimek 2014, 151.
[170] Article 4 of the Framework Decision on the EAW.
[171] Opinion of AG Mengozzi, Case C-42/11 Joao Pedro Lopes Da Silva Jorge, para 31.

Thirdly there is decisions in absentia. Due to the necessity to have clear and common solutions define the grounds for refusal and the discretion left to the executing authority, the Framework Decision 2009/299/JHA was adopted.[172] As for the EAW, as amended by the Framework Decision 2009/299/JHA, the executing judicial authority can refuse to execute the EAW if the person did not appear in person at the trial resulting in the decision.[173]

On top of mandatory and optional grounds of non-execution of the EAW, there are special situations. The Framework Decision on the EAW precludes decisions based on political expediency. Also, in the Framework Decision on the EAW the possibility of infringing human rights has been precluded.[174]

3.4 Defining and categorising crimes in the European Union

3.4.1 Categories of offences in the list of 32 offences

Some of the categories in the list of 32 offences are easy to identify as criminal offences and as such they share common requirements for their commission in the Member States. Other categories on the other hand are more vague. To better approach the matter it is reasonable to divide the crimes into four categories taking into account the title and the elements of the crime.[175]

In the first group are included "the offences with the same title and and containing almost the same elements of crime." These offences can be thought as typical in all Member States. Murder can be given as an example of such an offence. Another example would be kidnapping. In principle there is no problem in the interpretation of these offences.[176]

In the second group are included "the offences with a similar title, however containing the almost same elements of crime." There is a possibility that these are affected by harmonisation at the EU level. Like in the first group, these too can be considered as typical in all Member States. Among

[172] Framework Decision 2009/299/JHA.
[173] Klimek 2014, 164.
[174] Recitals 12 and 13 of the Framework Decision on the EAW.
[175] Klimek 2014, 100.
[176] Klimek 2014, 100.

these offences are for example: human trafficking, drug trafficking, money laundering, computer crime, cyber crime, high tech crime and virtual crime. Like in the first group there is in principle no problem in the interpretation of these offences.[177]

Within the third group belong offences that have identical title however containing different elements of crime. Examples of these are rape and fraud. And in the fourth group there are unknown offences for some EU Member States. Pursuant to the principle *nullum crimen sine lege*[178], a domestic law is not applicable or it is silent.[179]

3.4.2 Crimes not subject to harmonisation

There are crimes that have not been harmonised in the list of 32 offences, and to this group belong, for example, the following: theft, organised or armed robbery, arson, "trafficking offences" except the ones related to drugs. With most of these crimes there are no real definitional problems, but some issues could rise concerning two groups of offences: Murder and rape, and the other being "special" group that includes xenophobia and racism, extortion and racketeering, sabotage and trafficking in stolen vehicles and swindling. The latter has erected some obstacles to a functioning EAW.[180]

As murder and rape are considered to be crimes against the person, they have some features that change depending on the legal system in which they are perceived. In most cases this does not pose a huge problem.

In case of murder, the first difference to be pointed out is that most legal systems have at least two forms of homicide. The act is distinguished between these forms of homicide. How systems categorize the acts changes depending on the system. The penalties also differ considerably depending on the system. Another difference is in the fact that certain acts are not fitted under the definition of murder by some States. Abortion and euthanasia are examples of such acts. The question of whether these acts should be criminalised by States or not is topical and pervades many extra-legal fields. These matters were approached and discussed by the drafters of the EAW, but the

[177] Klimek 2014, 100-101.
[178] No crime without law.
[179] Klimek 2014, 101.
[180] Fichera 2011, 97-98.

problems still persist.[181] If a doctor performs euthanasia in a State where it is legal, should he or she be surrendered by that State in case an EAW is issued?

Suffice to say, as far as these types of acts are concerned, the effectiveness of the EAW should be questioned. This is not only due to the legal matters, but also because the issues are important in a societal context as a whole.

The second example was rape. How different States define rape has varied a lot during the years. This reflects the changing attitudes and policies. If a distinction is to be drawn, it could be done between consent-based and force-based definitions. The difference, in practical terms, lies in required evidence. This uncertainty surrounding the definition of rape is enforced at an international level, where the issue is only raised in connection with war crimes, genocide or crimes against humanity.[182]

The trend, however, in European countries seems to be towards consent-based definitions. This view is enhanced by the ECtHR in MC v. Bulgaria. In the case the court found that States have a positive duty to consider all non-consensual sexual acts as crimes. Even if there is no physical resistance by the victim, or there is no proof of such resistance.[183]

3.5 Conclusions

There seems to be no question that the EAW is a very important instrument for cooperation in criminal matters within the union. Prosecuting and convicting criminal has been made easier. When looking from the perspective of how effective the EAW is, it is quite clear the situation is much better than when traditional forms of extraction were used.

Dual criminality and problems arising from the partial removal of it is interesting. It seems that there was a haste to push the EAW forward thus leaving certain elements and differences of national legal systems aside. A fight against terrorism seems to be the issue that led the EU to bring about the EAW in such a fast manner. That is why many of the crimes from which dual criminality is removed are related to terrorism and organized crime.

[181] Fichera 2011, 98-101.
[182] Fichera 2011, 102-105.
[183] ECtHR MC v. Bulgaria, Application number 39272/98, 2003, para 166.

4. Issues with fundamental rights and the EAW

4.1 Introduction

The European Commission and the European Council have been active bringing up the necessity to ensure human- and fundamental rights when implementing the EAW. They have done so ever since EAW became part of the mutual recognition agenda.[184]

Even if the obligations brought about by the Framework Decision on the EAW concern Member States mostly on procedural aspects, that is not indicative of a failure of the legislature to consider fundamental and human rights when enacting the Framework decision.[185]

Even if the necessity of the protection of the fundamental rights is recognised and followed by most courts, the amount of consideration given is thought to be not enough by many academics and practitioners. There is a warning in the preamble that the implementation of the EAW may be suspended if there is a persistent and serious breach of Article 6(1).[186] The aforementioned Article refers to the Charter of Fundamental Rights and the rights the Charter contains. The rights which are mentioned in the Charter, as long as they are the same as rights included in ECHR, are assumed to have the same meaning and scope as them.[187]

Despite the fact that the Charter of Fundamental Rights presents a wider array of protected rights than any other document, they are invariably based on other documents that came before. Many rights are included from the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe.[188]

As for the EAW itself, an argument is made by the Court of Justice in the case C-168/13 of *Jeremy F*: The entire surrender procedure between Member States is carried out under judicial supervision. From that it can be deduced the provisions of the Framework Decision already provide a procedure

[184] Communication from the Commission: Towards an Area of Freedom, Security and Justice, COM (1998)459 final, Brussels, 14 July 1989.
[185.] Opinion of AG Sharpston. Case C-396/11 Radu, para 36
[186] Fichera 2017, 424.
[187] Article 52 of the Charter.
[188] Klimek 2014, 60.

that is in line with the requirements of Article 47 of the EU Charter.[189]

The preamble to the Framework Decision on the EAW does not however have binding value and it does not devote much thought on the fundamental rights. Also, the preamble has two fundamental rights safeguards: "First, the Framework Decision should be interpreted in the sense that refusal of surrender is always permitted when it can be proved that an EAW has been issued for the purpose of prosecuting or punishing an individual on discriminatory grounds. Second, removal, expulsion or extradition of an individual to a state where he may be subject to the death penalty, torture or other inhuman and degrading treatment or punishment should be forbidden.[190]

The surrender proceeding is by no means perfect and this observation has been done by many different entities: EU Member States, European and national parliamentarians, groups from civil society and individual citizens have all in their way brought up the effect EAW especially has on fundamental rights.[191]

4.2 Interlacing fundamental rights provisions

When considering the actual application of the EAW, it is natural to refer to the jurisprudence of the ECtHR as far as extradition law goes. European countries have had their approach shaped by the ECtHR not only within the borders of Europe, but also towards third countries. *Soering* is probably the most influential case in this area. The carrying idea in *Soering* decision is that if and when a subject is surrendered to a State where he or she might be subjected to torture or inhumane treatment, the responsibility of the surrendering State would be engaged under Article 3 ECHR. Also, Soering brings up, the responsibility of the State could also be engaged under Article 6 ECHR, which deals with flagrant denial of the right to a fair trial.[192]

When it comes to the EAW specifically, international human rights provisions are not the only normative source that should be considered. EU law has its important role to play.

The Framework Decision on the EAW sets out many obligations to the executing State. To bring up

[189] Case C-168/13 Jeremy F v Premier Ministre, paras 46 and 47.
[190] Fichera 2017, 424.
[191] Klimek 2014, 61.
[192] Soering V UK 11 EHRR 439, App no 14038/88, 1989.

some: “the obligation to refuse surrender in some specific cases; the converse obligation to surrender without checking double criminality (again in some specific cases); and procedural obligations applying in the surrender stages.” First, Articles 3 and 4 of the Framework Decision on the EAW contain a list of grounds which, when relevant, lead the executing state in a situation where it must or it may deny surrender. These grounds correspond to the ones often found in extradition treaties. Secondly, the requirement of double criminality is a feature of the EAW that stands out. This has been discussed more thoroughly in chapter 4.4 of this paper. Thirdly, the person who is requested has a right to be heard by a judicial entity, following the law of the executing state. This has also been discussed more thoroughly in chapter 4.4 of this chapter.[193]

The EAW could be seen as an interesting multi-level interaction between many different sources, such as: provisions of the ECHR, the Charter, TEU/TFEU and national law. The interaction between the ECHR and the Charter is quite relevant when considering the potential accession of the EU to the ECHR. Although, when compared with the ECHR, the Charter could have added value.[194]

4.3 Changing approach of the Court of Justice

4.3.1 Age of Enforcement

4.3.1.1 Case Radu

First, it is paramount we look at 2 cases that differentiate between the different ages of the Court of Justice when it comes to the EAW: *Radu* and *Melloni*

On 29th January 2013, the Court delivered its judgement in the Radu case. The Court was asked to interpret the Framework Decision on the EAW in light of the Charter and the ECHR. This judgement was expected to open a more human rights-positive interpretation of the EAW. But this was not to be.[195]

[193] Fichera 2017, 425.
[194] Fichera, 2017, 426.
[195] Xanthopoulou, Ermioni: Radu judgment: A lost opportunity and a story of how the mutual trust obsession shelved human rights,

Radu was about EAWs against a Romanian national who stated that his defence rights had been violated. The national court asked about the issue of deprivation of liberty of the requested person, as part of the procedure which leads to the execution of the EAW. Because this constitutes as an interference of right to liberty and security of a person, the Court was asked whether this was actually necessary and proportionate to fulfill the objective of a democratic society. Also, the national court inquired if the execution of the EAW can be refused in cases where it leads to infringements of Articles 5 and 6 of the ECHR or Articles 6, 48 and 52 CFREU. An issue was also raised concerning the interpretation of the EAW in light of the Article 6 TEU and the Treaty of Lisbon and if the ECHR and the Charter form a part of the primary law. [196]

On the matter of the Charter and the ECHR being part of the primary law, the Advocate General Sharpston made a claim that the rights emanating from the Charter constitute part of the primary law and the rights emanating from the ECHR constitute general principles of EU law.[197]

The Advocate General, in this case, brought up the ECtHR, which espoused an approach that the surrender can be refused, but only in case of a flagrant denial of the right to fair trial in the requested country, or where a potential breach is established beyond reasonable doubt. The Advocate General thought the concept of "flagrant" to be somewhat vague. In her suggestion the execution of the EAW could be refused on fundamental rights grounds, but this could only be done when the deficiencies in the trial process are so fundamental as to destroy its fairness. Also, breaches that are remediable do not constitute as a right to refuse transfer of the requested person to the Member State where these rights are at a risk. [198]

The Advocate General was of the opinion that the deprivation of liberty and forcible surrender of the requested person constitutes an infringement with the requested person´s right to liberty for the purposes of Article 5 of the Convention and Article 6 of the Charter. Detention, as such, should not be arbitrary. For the detention to not be arbitrary, it should be carried out in good faith.[199]

The Court, in its decision, stated that the EAW was brought about so as to simplify extradition and that it was based on mutual recognition. The states are expected to have mutual trust and because of

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https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=416#.XVwbKvIzZ0w, accessed 30.8.2019.
[196] Case C-396/11 Radu.
[197] Opinion of AG Sharpston, case C-396/11 Radu, paras 44-45.
[198] Mancano 2018, 215-216.
[199] Opinion of AG Sharpston, case C396/11 Radu, para 62.

that an EAW request should be followed.[200] The Court seemed to accept that the Charter is considered primary law, but it also exclaimed that the upholding of rights in Articles 47 and 48 of the Charter does not necessitate the executing authority to be allowed to refuse the EAW.[201]

The Court, in a sense, remained loyal to the instrument and its aspirations when it comes to grounds for refusal. It did not leave much room for interpretation. It argued that if the requested person is to be heard by the issuing authorities, it could endanger the very system of surrender and prevent the area of freedom, security and justice taking place. This is so because the arrest warrant must have certain element of surprise, especially to stop the requested person from escaping.[202]

As for the matter of person´s liberty following the process of arrest being too much in interference with the right to liberty and security, the Court simply stated that it is related to the debate on defence rights. The matter, according to the Court, did not require any special attention.[203]

The ruling did not follow the Advocate General´s recommendation. On top of that the Court contradicted itself on its previous ruling in the *N.S* case, where it stated: "In the light of those factors, the answer to the questions referred is that European Union law precludes the application of a conclusive presumption that the Member State which Article 3(1) of Regulation No 343/2003 indicates as responsible observes the fundamental rights of the European Union."[204] In Radu, the Court based their requirement of Member States to have mutual trust on this conclusive presumption.

The Court´s statement, that if the requested person was to be heard by the issuing authority the whole system would falter, is interesting. The system is based on an idea that the requested person is surprised before he or she can escape. This, I think, goes to some extent against the principle of presumption of innocence found in the Article 48 of the Charter and 6(2) ECHR.

It seems that the judgement of the Court was somewhat bland. The Court was probably reluctant to challenge the foundation of the EAW, namely the principle of mutual recognition and the principle of mutual trust. Also, the court might have been considering how dire and vast the effects of a more human-rights friendly decision could be.

[200] Case C-296/11 Radu, paras 33-35.
[201] Case C-396/11 Radu, para 39.
[202] Case C-396/11 Radu, para 40.
[203] Case C396/11 Radu, para 30
[204] Joined cases C-411/10 and C-493/10 N.S, para 105.

4.3.1.2 Case Melloni

Melloni case was about a Spanish citizen who had been convicted in absentia in Italy. Italy issued a EAW demanding that Spain surrenders Melloni. The first question posed before the Court was whether Article 4a(1)(a) and (b) prevented the executing judicial authority from making the requested person subject to the possibility for the individual who is concerned to apply for a retrial in the issuing Member State. Concerning this matter, the Advocate General found that the aforementioned Articles allowed the judge to deny the execution, if the judgement was done in absentia as it was in this case. Also, in those same rules there are exceptions, which make it so that the execution cannot be refused. In this case Melloni belonged to one of those exceptions, which was in Article 4a(1)(b).[205]

The second question was about whether the interpretation of Article 4a(1) of the Framework Decision on the EAW was in conformity with Articles 47 and 48 CFREU. The Court referred to the ECtHR´s case law and stressed that, even if the right of the accused to be present at his or her trial is an important part of the right to a fair trial, that right is by no means absolute.[206] The accused may be represented by a lawyer. If he or she so wills, the right to attend the trial can be waived altogether. If this decision made is by his or her own free and unequivocal choice, he or she is not entitled to a retrial. As such, the Advocate General stated that Article 4a(1) is fully consistent with that case law. The Advocate General also said that this strikes a balance between fundamental rights protection and facilitation of legal cooperation in criminal matters, and diverging levels of national protection are not possible due to the consensus Member States share on the text of the Framework Decision on the EAW.[207]

Third, and the most crucial question, asked from the Court: is there any leeway for the executing State to grant more extensive fundamental rights to the individual than the ones already afforded by EU law, based on Article 53 of the EU Charter.[208] Article 53 of the EU Charter says: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental

[205] Mancano 2018, 216.
[206] Case C-399/11, Melloni, para 49.
[207] Mancano 2018, 216.
[208] Case C-399/11, Melloni.

Freedoms, and by the Member States" constitutions."[209] From this stems the question if Article 53 EU Charter allows Member States to go further than the rights that are granted by the EU law if their constitutions demand that they do. Also if they are required to, when their constitutions so demand, to give priority to national law.

The Court did not hesitate in its answer: interpretation like that would undermine the effectiveness of EU law and be in violation with the primacy of EU law. If Spain, in this case, would be allowed to follow the requirements of its national constitution, persons who are sentenced in absentia could not be surrendered, unless the issuing State is offering a retrial. Whenever EU harmonises the fundamental rights in one area in an exhaustive way, the Member States lose the right to demand higher standards of procedural safeguards, even if this demand has its basis in the national constitution. The decision EU makes in these cases relies on the necessity to find a level of fundamental rights protection, which does not impede the effectiveness of EU law and mutual cooperation any more than necessary.[210]

It was submitted that the decision of the Court in Melloni did not close all possibilities for Member States to apply higher fundamental rights standards in cases where Union law and the Charter are applicable.[211] The Advocate General gave his opinion on the matter and made a helpful distinction between situations in which there is a common definition of the degree of protection decided at an European level to be given to a certain right and situations in which this has not occurred.[212] In the latter of the aforementioned situations, the Advocate General states that: "On the other hand, in the second case, the Member States have more room for manoeuvre in applying, within the scope of European Union law, the level of protection for fundamental rights which they wish to guarantee within the national legal order, provided that that level of protection may be reconciled with the proper implementation of European Union law and does not infringe other fundamental rights protected under European Union law."[213] There is no more of discussion on the matter in the Advocate General´s opinion, as this case did not fall within the scope of this situation. Even then, the possibility that a situation in which Member States had more leeway on deciding how to implement Union law could be covered. The Court did not accept nor did it reject the Advocate General´s approach.[214]

[209] Article 53 of the Charter.
[210] Franssen: Melloni as a wake-up call – setting limits to higher national standards of fundamental rights´ protection. https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/#Footnote1, accessed 5.9.2019.
[211] Maartje 2013, 582.
[212] Opinion of AG Bot, case C-399/11, Melloni, paras 124,128.
[213] Opinion of AG Bot, Case C-399/11, Melloni, para 127.
[214] Maartje 2013, 582.

Considering the context of the ending of last paragraph, Article 4(2) TEU should be brought up. It states that the Union is expected to respect its Member States identities that are inherent in their fundamental structures, constitutional and political. The Spanish *Tribunal Constitucional* did not rely on this provision in its reference order. The judgement also does not mention Article 4(2) TEU. As for the Spanish constitutional case law on the right to fair trial being part of the country´s national identity, the question was brought up during the hearing and then rebutted by the Spanish agent before the Court.[215]The matter was also brought up by the Advocate General, who stated that there is a possibility for Member States to challenge the validity of Union secondary law based on Article 4(2). The Advocate General, however, did not think that the constitutional identity of Spain was at stake in the present case.[216]

These two judgements, *Radu* and *Melloni*, are generally seen as the pinnacles of the Court´s approach to the Framework Decision on the EAW relying mostly on enforcement purposes. The need to balance between fundamental rights and the need for surrender was left in the background and little heed was paid to this question. In these cases the Court´s approach was one where law enforcement was clearly more highlighted than individual rights. After these rulings, which could be seen as a sort of turning point, the Court has shifted its focus more towards individual rights.[217]

It seems that, considering the Court´s shifting interest towards individual rights, this case might have been a part of a sort of wake-up call, which turned the tide. But then again, when considering the concern the Court had at the time to uphold primacy and uniformity of EU law, the result itself is not that surprising.

4.3.2 Towards a more individual-rights-emphasizing age

4.3.2.1 Case Jeremy F

Not long after the *Melloni* case, the court was tasked to rule on the possibility for a Member State to provide for an appeal against the resolution to execute an EAW and the possible consequences for

[215] Maartje 2013, 583.
[216] Opinion of AG Bot, Case C-399/11, Melloni, paras 138-145.
[217] Mancano 2018, 217.

not complying with the time-limits for the recognition of the EAW as set by the Framework Decision.[218]

In *Jeremy F* the Court was tasked with the question if Articles 27(4) and 28(3)(c) would prevent Member States from allowing an appeal with suspensive effects against a resolution to execute an EAW, or a resolution that would give consent to an extension of the warrant or to an onward surrender to a Member State that is different than the one that issued the EAW.[219]

At its approach, the court considered Article 17. Article 17 is about general time-limits and procedure when deciding to execute the EAW. The possibility of even having a right to appeal follows from the expression, implicitly but necessarily, "final decision". This expression can be found in Article 17(2) (3) and (5) of the Framework Decision. As there are no explicit contrary provisions, the Member States can introduce an appeal with suspensive effects against decisions that have relation to an EAW. Also, Article 17 sets in place time-limits for the execution and decision on the EAW. Any appeals with suspensive effects introduced against decisions that have relation to an EAW cannot disregard these limits.[220]

Next the Court approached the question about the Articles 27(4) and 28(3)(c). These Articles deal with prosecution for other offences and onward surrender. There are time-limits set for the decision that is to be made by the executing judge. These Articles come into place instead of Article 17 when the person has already been surrendered. The executing judge already has certain amount of information which gives him or her the possibility of making an informed decision. The aforementioned "final decision" is not mentioned in Articles 27(4) or 28(3)(c). Even if this was the case, the Court found that nothing in the Framework Decision prevented the executing judge from allowing an appeal.[221]

To bolster its case, the Court brought up Article 1(3) of the Framework Decision on the EAW, which states that fundamental rights must remain as they are when it comes to context of EAW procedures.[222]

The Court also stated that it would go against the logic of the Framework Decision on the EAW to allow longer periods for adoption of a final decision under Articles 27(4) and 28(3)(c) than are

[218] Mancano 2018, 217.
[219] Case C-168/13 PPU, Jeremy F.
[220] Case C-168/13 PPU, Jeremy F, paras 54 and 64.
[221] Mancano 2018, 217-218.
[222] Case C-168/13 PPU, Jeremy F, para 40.

allowed in Article 17. As the objective is to accelerate surrender procedures, it would be redundant to make a difference between Article 17 and Articles 27(4) and 28(3)(c).[223]

As was brought up in *Melloni,* it has been argued that in cases where EU law has not been harmonized the constitutional standards will become more applicable.

The ruling of the case *Jeremy F* has been considered as an instance where such an approach was taken. In the case *of Jeremy F*, the Court concluded that the Framework Decision on the EAW, amended by the Framework Decision on judgements *in absentia*, did not prevent Member States from introducing appeals with suspensive effect. Appeals made in such way were still expected to comply with the time limits set out in the Framework Decision on the EAW. The Court stated that the fact that there is no provision concerning the possibility of bringing an appeal with suspensive effect against a decision to execute the EAW is not an indication that the Framework Decision on the EAW prevents the Member State from making such an appeal or requires them to do so.[224]

Jeremy F, however, should be separated from *Melloni*. In Melloni the question was about the possibility of using fundamental rights as grounds to refuse a mutual recognition request. *Jeremy F*, on the other hand, did not pose a fundamental challenge on the mutual recognition system. The question, rather, in Jeremy F was a sort of meta-question, which concerned the specific procedural rules that applied in the process of the execution of the Warrant. And even in this case, the Member States are left with limited discretion when it comes to the matter of protecting fundamental rights. The discretion is restricted by the deadlines that the mutual recognition instruments set; the aim of the instruments is to achieve a wanted speed that is linked to the perceived efficiency of the system.[225]

What are essentially intergovernmental choices gain an undue weight because of the Courts deferential approach. The Court´s emphasis on upholding the validity of harmonized EU secondary law over primary constitutional law on human rights, on the national level and also on the EU level, is a dire challenge on fundamental rights protection.[226]

The case Jeremy F, despite not being a huge step towards more fundamental rights friendly approach, does still open the door for a more individual-rights centered judgements. As shown there

[223] Case C-168/13 PPU, Jeremy F, para 73.
[224] Case C-168/13 PPU, Jeremy F, paras 38,74.
[225] Mitsilegas 2019, 398.
[226] Mitsilgeas 2019, 398.

are problems with the interpretation that might be drawn from Jeremy F that in cases where the EU law has not been harmonized the national constitutional standards become more applicable. Speed and efficiency of the EAW as a mutual recognition instrument is paramount. Still, the fact that Jeremy F has been considered such a case in which constitutional standards are given value still holds merit and should not be disregarded.

4.3.2.2 Case Lanigan

In *Lanigan* the issue was about time-limits in Article 17 approached in light of Article 15. The question raised, and presented to the Court, was: What are the effects in case a Member State fails to abide by those limits? If a time limit is exceeded, does it form a right to the individual who is released?[227]

The Court found that nothing in the Framework Decision on the EAW prevents the judge, who is executing, from holding the person in custody even if the time-limits dictated in Article 17 have expired.[228] The Court stated that the delays, no matter how serious, would only have the effect of postponing the execution of the EAW as Member States could issue a second EAW if they wanted. This view is espoused in paragraph 37 of the judgement: "Therefore, in the light, first, of the central function of the obligation to execute the European arrest warrant in the system put in place by the Framework Decision and, second, of the absence of any explicit indication therein as to a limitation of the temporal validity of that obligation, the rule set out in Article 15(1) of the Framework Decision cannot be interpreted as meaning that, once the time-limits stipulated in Article 17 of the Framework Decision have expired, the executing judicial authority is no longer able to adopt the decision on the execution of the European arrest warrant or that the executing Member State is no longer required to carry out the execution procedure in that regard."[229]

On the matter of rights of Lanigan upon the expiration of the time-limits, the Court ruled that even when Article 23(5) of the Framework Decision states that the executing State will release the individual if he or she is not surrendered within those time-limits that follow the decision to execute the EAW, such forcing language was not found in Articles 15 and 17 of the Framework Decision. As such, there was no necessity to release Lanigan even when the execution of the EAW had been

[227] Case C-237/15 PPU, Lanigan.
[228] Mancano 2018, 218.
[229] Case C-237/15 PPU, Lanigan, para 37.

delayed.[230]

The Court justified the decision that there was no necessity to release Lanigan in paragraph 51 of the judgement. In the aforementioned paragraph the Court relies on Article 26(1) of the Framework Decision. According to the Court: "[T]he issuing Member State is to deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in that State, thereby ensuring that all periods of detention, even those resulting from possibly being held in custody after the time-limits stipulated in Article 17 of the Framework Decision have expired, will duly be taken into account if a custodial sentence is executed in the issuing Member State."[231]

Even so, the Court also stated that the Article 1(3) of the Framework decision on the EAW must be seen adjacent and in compliance with the Charter, especially Articles 6 and 52 of it. The executing judge should hold the individual who is concerned in detention only the time that execution procedures are carried out with due diligence and the duration of these procedures is not any longer than necessary. This being so, because any limitations to liberty should be carried out with principle of proportionality in mind.[232]

The most remarkable aspect of the ruling, in my opinion, is that the Court seems to give consideration to ECHR´s decisions in *Quinn v France* and *Gallardo Sanchez v Italy*. The cases were concerned with right to liberty. Based on these cases the Court stated that the amount of time person spends in detention could only be as much as it takes time to carry out the procedure for the execution of the European arrest warrant in a sufficiently diligent manner and as long as the duration of the custody is not excessive.[233]

The fact still remains that because there was no repercussion deemed in case Article 17 of the EAW time-limits were not followed, the whole Article 17 of the EAW has simply been a guideline without any power to back it up.

[230] Case C237/15 PPU, Lanigan, paras 46-48.
[231] Case C237/15 PPU, Lanigan, para 51.
[232] Case C-237/15 PPU, Lanigan, paras 53, 55 and 58.
[233] Case C237/15 PPU, Lanigan, paras 57, 58.

4.3.2.3 Joined cases Aranyosi and Căldăraru

The Court continued towards a more fundamental rights oriented approach, still keeping the original intent of the EAW in mind. In *Aranyosi and Căldăraru* the Court had a more balanced approach than before. In the case Court had to deal with a question of a possible refusal to execute the EAW due to there being a risk of inhumane treatment in the issuing Members States, in this case Romania and Hungary, because of their poor detention conditions.[234]

The Higher Regional Court of Bremen referred two cases, *Aranyosi* and *Căldăraru*, that were nearly identical to the CJEU. The referrals were done under Article 267 TFEU and they were concerned about the interpretation of Articles 1(3), 5 and 6(1) of the Framework Decision on the EAW.[235]

First there are the facts of the cases. An EAW was issued for Mr. Aranyosi by the Hungarian District Court of Miskolc for the surrender of the individual to the Hungarian judicial authorities for the purposes of prosecution. As for Mr. Căldăraru, the Romanian Court of the First Instance of Făgăraș issued an EAW for the purposes of executing a prison sentence for driving without a license. The defendants were arrested in Bremen and neither of them consented to the surrender. The conditions of the detention in some of the Hungarian and Romanian prisons concerned the General Prosecutor of Bremen. The General Prosecutor of Bremen asked for some reassurance from the issuing judicial authorities that the facilities in which the requested persons would be held in were sufficient. The Hungarian Court stated that the question was irrelevant as Hungarian court system had other enforcement measures other than deprivation of liberty. The Romanian Court had not yet decided on the detention facility for Mr. Căldăraru.[236]

The defendants, Aranyosi and Căldăraru, asked that surrender be rejected as there was no possibility to check the conditions in prisons, taking into account that the national courts did not specify the prisons in which the requested persons would be held. The General Prosecutor of Bremen, meanwhile, asked that the request to surrender the requested persons was to be declared legal by the German court.[237]

[234] Joined cases C404/15 and C-659/15 PPU, Aranyosi and Caldararu, para 74.
[235] Gáspár-Szilágyi 2016, 2-3.
[236] Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru.
[237] Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 37-39 and 56.

The Higher Regional Court of Bremen considered the requests of Hungary and Romania to be in compliance with the formal conditions set in German implementing measure of the Framework Decision on the EAW. The criminal offences the requested persons were suspected of were punishable by both the issuing Member States and German Law. The German court stated also that the surrender might be declared illegal if it went against Article 73 of the German Implementing Law. According to the aforementioned law judicial surrender cannot go against the imperative principles of the German legal order and the principles set in Article 6 TEU.[238] The information that was given to the German court made it think that there was a chance that the requested persons might be subjected to detention conditions that were in violation of Article 3 ECHR and the general principles of EU law preserved in Article 6 TEU.[239]

The German court was unable to decide, in both Aranyosi and Căldăraru, whether surrender to Hungary and Romania respectively was allowed or not based on Article 1(3) of the Framework Decision on the EAW.[240] The first question the Higher Regional Court of Bremen referred was: "Is Article 1(3) of the Framework Decision to be interpreted as meaning that a request for surrender for the purposes of prosecution is inadmissible where there are strong indications that detention conditions in the issuing Member State infringe the fundamental rights of the person concerned and the fundamental legal principles as enshrined in Article 6 TEU, or is it to be interpreted as meaning that, in such circumstances, the executing Member State can or must make the decision on the admissibility of the request for surrender conditional upon assurances that detention conditions are compliant? To that end, can or must the executing Member State lay down specific minimum requirements applicable to the detention conditions in respect of which an assurance is sought?" The second question referred was: "Are Articles 5 and 6(1) of the Framework Decision to be interpreted as meaning that the issuing judicial authority is also entitled to give assurances that detention conditions are compliant, or do assurances in this regard remain subject to the domestic rules of competence in the issuing Member State?"[241]

The Advocate General´s opinion is looked at next. The Advocate General Bot begun his quite a long opinion by stating that the preliminary reference requires the Court to balance the fundamental rights of the person to be surrendered against the EU´s goal to create an AFSJ.[242]

[238] Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 23, 42 and 57-59.
[239] Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 40-42, 61-62.
[240] Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 45, 62.
[241] Joined cases C404/15 and C-659/ PPU, Aranyosi and Căldăraru, para 46.
[242] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 3-4.

Before the main question the Advocate General Bot brought up some preliminary observations about the risks and difficulties that transposing the principles developed in CEAS to system particularly specific to the EAW would bring about. In *N.S and others* the Court stated that a Member State is not obligated to transfer an asylum seeker to the Member State processing him or her in cases where there are systemic deficiencies in the asylum process and where the reception conditions might possibly expose the asylum seeker to such inhuman or degrading treatment as is enshrined in Article 4 of the EU Charter of Fundamental Rights.[243]

The Advocate General was of the opinion that an analogy between the N.S and others and the joined cases discussed here was not possible. First, the relevant part of the N.S and other is the principle under which no one can be removed, expelled or extradited to a State where that person could be sentenced to a death penalty, torture, degrading or inhuman treatment. This principle comes from Article 19(2) EU Charter and Article 3 ECHR. Textual analysis of the Recital 13 of the preamble of the Framework Decision to the EAW shows that this principle was left out from the Framework Decision on the EAW. Second, CEAS and EAW aim towards different objectives, have different levels of harmonization and are structured differently, although they both contribute towards AFSJ.[244]

This approach, of differentiating between CEAS and the Framework Decision on the EAW, seems to not give enough attention to the importance of the Treaty of Lisbon when it comes to creating the AFSJ. There is truth to the fact that the area of asylum is more harmonized than the area of criminal cooperation and most of the older secondary EU law instruments concerning criminal cooperation are lacking focus on fundamental rights. Even so, they are both part of an overarching integrated policy area, AFSJ, and they share common objectives and principles. The molding of AFSJ must take fundamental rights into account and the principle of mutual recognition is the foundation of civil cooperation, criminal cooperation and asylum policy.[245] The principle of mutual recognition is a constitutional principle that pervades the AFSJ. The principle of mutual recognition is based on mutual trust.[246]

As the Advocate General starts to look for balance he begins by considering if Article 1(3) of the

[243] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 5, 41
[244] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 45-48, 49-54.
[245] Gáspár-Szilágyi 2016, 9-10.
[246] Lenaerts: 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', Fourth Annual Sir Jeremey Level Lecture, Oxford 2015, 29.
https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf, accessed 3.1.2020.

Framework Decision on the EAW constitutes as a refusal of an EAW. The Advocate General rejects this possibility for three reasons.[247] First, to consider Article 1(3) of the Framework Decision on the EAW as grounds for non-execution would be against the intention of the wording of the Article, which does not convey a non-execution ground but rather it conveys the principle of mutual trust. That is why Article 1(3) is merely a reminder that the Member States should respect fundamental rights.[248] Second, an interpretation that would allow a whole new non-execution ground to be created goes against EU legislator´s intent of forging a surrender system in which there are exhaustively enumerated grounds for non-recognition. As such, in addition to the grounds given in Articles 3, 4 and 4a of the Framework Decision on the EAW, the surrender can be suspended or removal, expulsion or extradition can be prohibited only if there are exceptional situations mentioned and described in Recitals (10) and (13).[249] Third, if Article (3) of the Framework Decision on the EAW would give grounds for non-execution would wound mutual trust and would render the principle of mutual recognition useless.[250] The Advocate General also cited the *Melloni* case as a reminder that mutual trust and the principle of mutual recognition are of such priority that they can make the Member States lower their higher standards of fundamental rights protection in cases where these principles could be in danger.[251]

One more practical argument against the Article 1(3) of the Framework Decision on the EAW containing grounds for non-execution, that was not listed in the three arguments mentioned before, was brought up by the Advocate General. Due to overcrowding of prisons, the acceptance of Article 1(3) of the Framework Decision on the EAW containing grounds for non-execution would halt the working of the EAW, because there would be so many cases where executing Member States would refuse surrendering requested person due to conditions in issuing Member States prisons.[252] Nevertheless, the executing authority must take into account, after it has exchanged information with the issuing authority, if the requested person would be forced into detention in which the conditions are disproportionate.[253]

The Advocate General seems to tip the balance in favor of the principles of mutual recognition and mutual trust at the cost of protection of fundamental rights of the requested person. Fundamental rights have become quintessential to the EU´s constitutional order. This has been taken into account

[247] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, para 69.
[248] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 72-78.
[249] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 79-93.
[250] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, para 122.
[251] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, para 117-119.
[252] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 122-131.
[253] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, para 134.

by the Court. For example, in case *N.S and others*, the Court brought to an end to the negative mutual recognition in the asylum area, barring some exceptional circumstances. The Advocate General seems to muddy the waters between hierarchically superior fundamental rights that are part of EU primary law and at the epicenter of EU values, and, on the other hand, a secondary legislation adopted in different times.[254]

Curious is also the decision of the Advocate General to bring up *Melloni* as an example of how the principle of mutual recognition can overshadow higher standard of fundamental rights protection in Member States. The situation is different. In *Melloni* the question was about how the supremacy of EU law, manifested in the form of mutual recognition, overcame national constitutional standards. In the case at hand the German Court and the German implementing legislation also brought up human rights standards in Article 6 TEU. As such, the question is about the EU standards of fundamental rights protection which stand at an equal ground hierarchically, if not a bit higher, than the principle of mutual recognition.[255]

Article 1(3) of the Framework Decision on the EAW does not constitute a ground for non-execution, but an alternative to the creation of the AFSJ and the protection of the fundamental rights can be found. The Advocate General Bot considers the Union principle of proportionality a solution. According to the principle of proportionality, the judicial authority is required to individualize the punishment. This individualization of punishment encompasses the idea that when an individual is sentenced to a custodial sentence, the judge must take into account the surrounding circumstances in which the sentence is to be executed and the possible weight of the circumstances. The circumstances of detention is one of the circumstances the judge should take into account.[256]

The issuing judicial authority is at first obliged to ensure that the detention of the surrendered person and the condition thereof is proportional. The executing judicial authority is a safety net, in case the issuing judicial authority is unable to fulfill its obligation. If the executing judicial authority, after looking at all the available information, determines that the detention in the issuing Member State is not sufficient, it must consider if in the individual case the surrendered person would be subjected to disproportionally grave detention conditions.[257]

It is reasonable to wonder if the fact that the Advocate General brought up proportionality might

[254] Gáspár-Szilágyi 2016, 11.
[255] Gáspár-Szilágyi 2016, 11-12.
[256] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 137-142.
[257] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 8, 150-164, 173, and 167.

raise more issues than it solves. It is also reasonable to question whether this discussion about proportionality actually brings any answers to the questions posed by the German court. The Court, after all, decided not to take a stance on this complicated debate.[258]

The Advocate General´s opinion ends with an appeal to the Court that it would act as a sort of human rights court. A critique is also applied to both the Member States and the institution of EU because they have not been effective enough in ensuring proper application of EU detention standards across the Union.[259]

The Court was reliant on the Article 1(3), which states that the Framework Decision on the EAW does not cause the Member States to have to alter their obligation to respect fundamental rights. Article 1(3) demands that Article 4 CFREU be followed, and in there is a prohibition of inhumane and degrading treatment. The decision on the surrender can only be done when there is sufficient information excluding the possibility of inhumane treatment. This possible risk must be checked and, in reasonable time, discounted. If this cannot be done, the executing judge has to decide whether to bring the surrender procedure to an end or not.[260]

The Court came up with a two-step test. In the first step the executing authority is expected to rely on accurate, reliable, objective and duly updated information on the detention conditions in the issuing Member State, which provides it with facts about the systemic or general failures, or touch upon certain groups of people, or certain detention facilities. In the second step the executing authority must make certain that in the specific case the requested person is in reality facing such a real risk of inhuman or degrading treatment.[261] In light of this, the executing authority is required to request the judicial authority in the issuing Member State to provide more information on the detention conditions of the facility in which the requested person is to be held. This request is done under Article 15(2) of the Framework Decision on the EAW.[262]

The judgement gives light to a view that the requirement to expect another Member State to give sufficient fundamental rights protection is not, as the older case law would suggest, unconditional. The result of this judgement is that the executing Member State´s judicial authorities are not always required to execute arrest warrant in case the exhaustively enumerated non-execution grounds stated in Articles 3, 4 and 4a do not apply. This conclusion that the presumption of mutual trust is not

[258] Gáspár-Szilágyi 2016, 12.
[259] Opinion of AG Bot, Joined cases C404/15 and C659/PPU Aranyosi and Căldăraru, paras 175-181.
[260] Mancano 2018, 218-219.
[261] Joined cases C404/15 and C-659/ PPU, Aranyosi and Căldăraru, paras 89, 92-94.
[262] Joined cases C404/15 and C-659/ PPU, Aranyosi and Căldăraru, paras 95-96.

inviolable is remarkable considering the Court´s previous case law on the matter. There is no doubt that in its previous case law the Court had favored an effective surrender of requested persons based on the principles of mutual recognition and mutual trust.[263]

At the same time, the individual who is concerned should be kept in custody only the time that is necessary. The duration of the detention should not be excessive, as is stated in Article 52(1) of the charter outlining the requirement of proportionality.[264]

The Court ruled that a Member State may postpone execution of an arrest warrant in case it has solid, objective and up-to-date information showing that the issuing Member State has not implemented a sufficient level of fundamental rights protection that is set out in the Framework Decision on the EAW. The Court also stated that the executing Member State can only do so in exceptional circumstances, because of the importance of mutual trust. This ruling shows that mutual trust is not to be confused with blind trust. Even if this is the fact, the principle of mutual trust, after all, defines the whole EU legal structure. As such, any limitation to the principle of mutual trust may not give rise to mistrust between Member States, because that would lead to the fragmentation of the AFSJ. Limitations to the principle are to be such that they rather work by aiming to fix the trust in the future than aim to destroy it. This is the reason the Court decided to postpone the execution instead of denying it from the outset.[265]

There are some questions on how this postponement operates. First, does the postponement apply to all fundamental rights? The answer is not straightforward. Before anything it is necessary to know if it applies to both EU and national standards of fundamental rights protection. The judgement reveals that the Court was more preoccupied with fundamental rights standards at EU level. Due to this the newly brought up ground for postponement is only relevant when EU standards of fundamental rights protection are in question and not those of the Member States. Following this, the relevant question can be raised: Does this exception cover other fundamental rights covered by the Charter or does it only apply to Article 4 of the Charter. In the judgement the Court seemed to indicate that the exception only applies to Article 4 of the Charter. Even then, national courts should be able to postpone the execution of the EAW if there is a real risk that other fundamental rights might be breached in the issuing Member State. Second question is about the burden of proof. On the matter of burden of proof, the Court was not very clear and the responsibility seems to be shared by the requested person, the executing authority and the issuing authority in the different stages of

[263] Bovend´Eerdt 2016, 117.
[264] Joined cases C404/15 and C-659/ PPU, Aranyosi and Căldăraru, para 101.
[265] Lenaerts, 2017, 821-822.

the process. Then, the third question is about what happens when the executing authority decides to postpone the surrender? In such a case, according to the Court, Eurojust will be informed and as is decided in *Lanigan*, the requested person cannot be detained for too long. Yet it is only possible to postpone the execution, not abandon it. This could possibly mean that the ground of postponement could turn into ground of refusal if the conditions of detention in the issuing Member State cannot be changed in an allotted time.[266]

There is a large difference between the conclusion given by the Court and what the Advocate General offered. The Court, in its decision, gave the executing judicial authority power to assess how fundamental rights are practiced in the issuing Member States and, in certain cases, defer surrender of the requested person. This is at odds with mutual trust that is based on the presumption that other Member States provide adequate fundamental rights protection. The Advocate General, on the other hand, in his opinion wanted to leave mutual trust intact and have the issuing judicial authority conduct a proportionality test. Overall, the Court decided to make mutual trust more nuanced as it had done before in its asylum case law and opted for an interpretation that would allow fundamental rights violations to constitute as an exception to this trust.[267]

The question remains if the Court managed to create a proper balance in this case. There were three options the Court could choose from. First, the Court could have put fundamental rights higher on hierarchy than mutual trust and mutual recognition. This would mean that in cases where conflict exists between the various principles, fundamental rights prevail and the EAW would not be executed. This, however, would go against the Framework Decision on the EAW which does not include fundamental rights in its grounds of refusal. Second, the Court could have chosen to continue the way it had before in its case law and balance the two values, and still end up favoring the effectiveness of mutual recognition at the cost of fundamental rights of the individual. Third, instead of the aforementioned options the Court founds a balance between the two competing values. Firstly, the Court decided to protect the principle of mutual recognition and mutual trust by refraining from introducing a new ground of refusal into the text of the Framework Decision on the EAW. Instead of ground of refusal the Court came up with less drastic ground of postponement. Secondly, the Court ended up protecting fundamental rights of the defendants. 'Systemic deficiencies' test was loosened and supplements for the test were created where it was considered if a real risk existed that the requested person´s rights under Article 4 of the EU charter would be

[266] Gáspár-Szilágyi 2016, 15-16.
[267] Bovend´Eerdt 2016, 117-118.

infringed.[268]

The ground of postponing the decision on the execution of EAW was a need development in the search for balance between fundamental rights and the principles of mutual trust and mutual recognition. The Court seems to have found a way to protect the core of the EAW while still giving fundamental rights the value they should have. The fundamental rights protecting the requested person are bolstered. The executing authority is expected, as the Court stressed, to check if there truly is a risk for the requested person to end up being subjected to inhuman or degrading treatment in the detention facilities of the issuing Member State. There are still questions that the case leaves unanswered, but this case is still a remarkable step.

4.3.2.4 Case JZ

In case JZ, the issue at hand was the interpretation of deprivation of liberty. As deprivation of liberty is of paramount importance in Framework Decision on the EAW, the case has a great impact on how the EAW mechanism is implemented.[269]

The Court was preoccupied with the term detention as defined in Article 26 of the Framework Decision on the EAW. According to the aforementioned Article: "The issuing Member State shall deduct all periods of detention arising from the execution of a European arrest warrant from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed."[270]

In the case JZ asked for reduction of sentence imposed on him by Poland, based on the time he spent under electronic monitoring by the executing Member State, United Kingdom of Great Britain and Northern Ireland. The electronic monitoring was in conjunction with curfew. The question referring court asked, was if the concept of detention mentioned in Article 26 of the Framework Decision on the EAW covers measures used by the executing Member State. The measures used being electronic monitoring of the place where the individual whom the arrest warrant concerns lives, in conjunction with curfew, as mentioned before. Article 26 of the Framework Decision on the EAW was to be interpreted together with Articles 6 and 49 of CFREU. Within Articles 6 and 49 of

[268] Gáspár-Szilágyi 2016, 13-14.
[269] Mancano 2018,219.
[270] Article 26 of the Framework Decision on the EAW.

CFREU are defined liberty and the principle of proportionality.[271]

The Court stated that deprivation of liberty does not necessarily need to constitute imprisonment. As such, imprisonment should not be the only thing taken into account, when considering what constitutes as detention. All the measures imposed on the person, which considering their type, duration, effect and manner of the implementation of the measures, deprive individual of liberty in a manner that is reminiscent to imprisonment, could be interpreted as "detention" within the meaning of Article 26(1) of Framework Decision on the EAW.[272]

The Court found that even if the measures JZ was subjected to were restricting his liberty, they could not be considered deprivation of liberty. This being said, in so far as Article 26(1) of the Framework Decision on the EAW is concerned, it only imposes "a minimum level of protection of the fundamental rights of the person subject to the European arrest warrant". An interpretation, that would prevent the judicial authority of the Member State that issued the arrest warrant from being able to reduce, on the basis of domestic law, the time the individual had his liberty restrained from the sentence, is not something that can be done.[273]

4.3.2.5 Case Dworzecki

Dworzecki case was about an important piece of the Framework Decision on the EAW, the indirect summons. The question was about the interpretation of the term. Preliminary ruling was mostly concerned about the interpretation of the Article 4a(1)(a)(i), which was added to the Framework Decision on the EAW by Framework Decision 2009/299. This provision concerns cases where the execution of an EAW cannot be refused when issued after a trial *in absentia*. "That is so when, inter alia, the person in due time, and in accordance with further procedural requirements defined in the law of the issuing state: was summoned in person and thereby informed of the scheduled date and place of the trial; or, by other means, actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that s/he was aware of the trial."[274]

[271] Case C-294/16 PPU, JZ, paras 2 and 42.
[272] Case C-294/16 PPU, JZ, para 47.
[273] Case 294/16 PPU, JZ, paras 55 and 57.
[274] Mancano 2108, 220.

In case of Dworzecki, the summons was not given to the person concerned, not directly anyway. The summons was given to an adult who resided in the same address as Mr Dworzecki. This adult took it upon him- or herself to pass the summons. It is impossible to determine from the EAW if, and when, the summons was actually passed on to Mr Dworzecki.[275]

The question firstly posed before the Court was if the following expressions constitute autonomous concepts of EU law and must be interpreted uniformly throughout European Union: "Summoned in person" and "by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial". The Court held that this, indeed, was the case.[276]

The Court concluded that the objective of the provision was to ensure a high level of individual protection. This was done by balancing respect of the rights of defence of the individual concerned and the need to execute the EAW.[277]

The Court, once again, brought up that the right for the individual to appear on trial is not absolute. This right can be waived. This being said, the individual has to have the possibility of preparing his or her defence. The conditions provided for in Article 4a(1)(a)(i) were not satisfied in this case concerning Mr Dworzecki, according to the Court. This being so, even when the Court acknowledged that Framework Decision 2009/299 is not meant to have harmonizing effect on national legislation on the subject matter.[278]

4.3.2.6 Case Bob-Dogi

The Bob-Dogi case was about the interpretation of Article 8(1)(c). In this provision it is stated that the EAW must have some information that relates to evidence of enforceable judgement, an arrest warrant or any other enforceable judicial decision having the same effect.[279]

The Court was posed a question if the arrest warrant mentioned in Article 8(1)(c) referred to a national arrest warrant. The Court stated that everywhere in the Framework Decision "European

[275] Case C-108/16 PPU, Dworzecki.
[276] Case C-108/16 PPU, Dworzecki, para 32.
[277] Mancano 2018, 221.
[278] Case C-108/16 PPU, Dworzecki, paras 49 and 50.
[279] Article 8(1)(c) of the Framework Decision on the EAW.

Arrest Warrant" is used with the exception of Article 8(1)(c), which would indicate it means another arrest warrant, other than EAW. The Court argued that it would be more consistent with fundamental rights protection, if a prior judicial decision is required.[280]

When the EAW does not state if there is a national arrest warrant, the executing judge must, in accordance with Article 15(2) of the Framework Decision on the EAW, request that the issuing judge supplies all necessary information to supplement the EAW. If the executing judge deems that the EAW has been issued without a prior national warrant, that judge is required to consider the warrant not valid and refuse to give it effect.[281]

4.3.2.7 Case LM

The fundamental rights questions are being posed to the Court to the point of them bringing pressure. The principles of mutual recognition and mutual trust are tested. *LM* is one of the latest of these cases.

The issue concerned in the case was whether *LM*, a crime suspect, was to be surrendered from Ireland to Poland when there was serious doubts on the side of executing judicial authority that the suspect might not receive a fair trial in the issuing State. The doubts arose from the lack of independence of the judiciary which was a result of changes to the Polish judicial system.

The set of laws that was adopted 2015-2018 in Poland has been considered commonly by many external and internal institutions as something that does "enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the law".[282]

This case comes after and is in the same vein as the *Aranyosi and Căldăraru* case. The case questions mutual trust between Member States, upon which the procedures concerning surrender in the Framework Decision on the EAW are based. The *Aranyosi and Căldăraru* case first set the exceptions for surrender on grounds of human rights. In LM the legal issue was about if and to what extent *Aranyosi and Căldăraru* case should be followed.

[280] Mancano 2018, 221.
[281] Case C-241/15, Bob-Dogi, paras 64-66.
[282] Opinion No. 904 / 2017 of the Venice Commission, CDL-AD(2017)031, 26.

The *LM* case, in more detail, was about a man who was accused of drug trafficking and who had fled to Ireland. The Polish Court issued an EAW for Mr LM in order to conduct a criminal prosecution. The Irish High Court, which pondered the surrender of Mr LM to Poland, was not certain of the ability of the Polish courts to ensure fair trial. The Irish High Court relied mostly on Commissions´s reasoned proposal, which was submitted to the Council under Article 7(1) TEU, to try and state an indubitable risk of a serious breach on Polands part when it came to the rule of law.[283]

The Irish High Court made a preliminary reference to the Court in which it asked, if an issuing Member State can be refused by the executing Member State from executing the EAW in case there is evidence of systemic breaches to judicial independence.[284] The Court decided to hold on to its approach brought about in an earlier decision *Aranyosi and Căldăraru.* This approach aimed at limiting any exceptions to principles of mutual recognition and mutual trust. Also, the Court said that the individual situation of the person who is sought after by the EAW should be considered. It should be considered if he or she is running a risk of undergoing an unfair trial in the issuing Member State.[285]

Some observers were hoping that the Court would go forth and assess the state of judicial independence in Poland. An argument was that the Court should go beyond case law and perceive the case as a problem of rule of law. The judicial operators should have independent responsibility to stop the surrender proceedings if it would violate the rights of the wanted person due to there being a lack of judicial independence in the issuing state. Also, the balancing of different EU constitutional principles bringing forth political pressure should be handled by democratically elected institutions. Judicial cooperation should be stopped by the executing judicial authorities in case doubt arises concerning the rule of law in the issuing Member State. The measure should be held in place until the matter is handled according to the procedure set out in Article 7 TEU or the DFR pact initiated by the European Parliament.[286]

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[283] European Commission ´Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, COM(2017) 835 final.
[284] Case C-216/18 PPU, LM, paras 22-23.
[285] Krajewski, Michal: Who is Afraid of the European Council? The Court of Justice´s Cautious Approach to the Independence of Domestic Judges. ECJ, Case C216/18 PPU: The Minister for Justice and Equality v LM, https://cadmus.eui.eu/bitstream/handle/1814/60447/KRAJEWSKI-european-council.pdf?sequence=2&isAllowed=y, accessed 15.9.2019, 1.
[286] Ballegooij, Wouter van, Bárd, Petra: The CJEU in the Celmer case: one Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU. In: Verfassungsblog, https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/, accessed 10.9.2019.

In his opinion AG Tanchev stated that in case Article 47 of the Charter is breached, it could justify the postponement of surrender. This was only possible in case of flagrant denial of justice.[287] The Court, following the overall lines of the aforementioned opinion, stated that a breach of judicial independence was something that could authorise an exception to the execution of an EAW. The Court, however, did not agree with the term "flagrant denial of justice". Instead they opted for the term "a real risk of breach".[288] The proposal of the AG has had some criticism levied towards it for imposing an impossibly high burden of proof on the applicant. It has also been criticised for wholly ignoring the idea of mutual trust in a high level protection of fundamental rights within EU.[289]

The Court decided not to assess the judicial independence in Poland. Also, it bypassed the assessment that was proposed by the referring judge. In this assessment the referring judge stated that the legislative changes made in Poland have been so damaging to the rule of law that there has been a breach of common value of the rule of law in Poland. The assessments brought up in the questions of the referring judge were not reformulated by the Court. The court simply affirmed that an adequate test with which to identify unfair trials should be two-pronged. First, the executing courts should be able to find systemic and generalised deficiencies liable to affect the judiciary in the issuing Member State. The standards that are derived from Article 47 of the Charter bind the executing Courts.[290] Secondly, the executing court must make an assessment of whether there are substantial grounds to believe that the individual concerned faces the risk of an unfair trial in the issuing Member State.[291]

The Court found highly relevant if the deficiencies in the system affected those courts that had the jurisdiction over the requested individual´s case, after he or she was surrendered. To make sure the individualised risk existed, the court should ask for "supplementary information" or any "objective material" from the issuing court under Article 15(2) of the Framework Decision.[292]

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[287] Opinion of AG Tanchev 2018, Case C-216/18 PPU, LM.
[288] See opinion of AG Tanchev 2018, Case C-216/18 PPU, LM, paras 72 and 76. See also Case C-216/18 PPU, LM, paras 36 ,47 and 68 for example.
[289] Krajewski, Michal: Who is Afraid of the European Council? The Court of Justice´s Cautious Approach to the Independence of Domestic Judges. ECJ, Case C216/18 PPU: The Minister for Justice and Equality v LM, https://cadmus.eui.eu/bitstream/handle/1814/60447/KRAJEWSKI-european-council.pdf?sequence=2&isAllowed=y, accessed 15.9.2019, 3.
[290] Krajewski, Michal: Who is Afraid of the European Council? The Court of Justice´s Cautious Approach to the Independence of Domestic Judges. ECJ, Case C216/18 PPU: The Minister for Justice and Equality v LM, https://cadmus.eui.eu/bitstream/handle/1814/60447/KRAJEWSKI-european-council.pdf?sequence=2&isAllowed=y, accessed 15.9.2019, 3-4.
[291] Case C-216/18 PPU, LM, para 25.
[292] Case C-216/18 PPU, LM, paras 74 and 76-77.

The referring judge asked what kind of "supplementary information" or any "objective material" was viable. The court did not give a specific answer to this question. Also, the referring judge indicated, that in this case, concerning Poland, the legal regime that is thought to be controversial applied to all rank-and-file judges, thus rendering the concrete prong redundant.[293]

One remarkable aspect is how the Court decided to uphold the concrete prong. From the Court´s reasoning it can be seen that the preservation of mutual recognition is valued highly. Also, the Court drew a line between its own competence and the competence of the European Council. The interpretation suggested by AG Tanchev to juxtapose Articles 7(2) TEU, 19(1) TEU and 47 of the Charter seem to have been followed by the Court. The AG, in his opinion, stated that the Court was responsible for fair trials in individual cases and the European Council on the other hand handled the domestic judicial systems with the rule of law.[294] The burden this imposes on domestic courts will be looked at at the next chapter.

4.4 Burdens of domestic courts

Domestic courts are required to find a balance between the EAW and its effectiveness and the protection of fundamental rights. Principle of mutual recognition requires automaticity which is restrained by the protection of individual´s fundamental rights.[295]

Next, I will go through three scenarios that are defined by the alleged breach of fundamental rights. I will mostly concentrate on the third, which concentrates on the potential violation of the fundamental right or rights by the authorities in issuing Member State.

First, a problem arises when an EAW is deemed to contain a breach of fundamental rights. This will question whether the EAW is valid or not. This validity can only be assessed by referring to the Charter, as ECHR and national constitutions do not count as direct parameters when checking

[293] Krajewski, Michal: Who is Afraid of the European Council? The Court of Justice´s Cautious Approach to the Independence of Domestic Judges. ECJ, Case C216/18 PPU: The Minister for Justice and Equality v LM, https://cadmus.eui.eu/bitstream/handle/1814/60447/KRAJEWSKI-european-council.pdf?sequence=2&isAllowed=y, accessed 15.9.2019, 4.

[294] Krajewski, Michal: Who is Afraid of the European Council? The Court of Justice´s Cautious Approach to the Independence of Domestic Judges. ECJ, Case C216/18 PPU: The Minister for Justice and Equality v LM, https://cadmus.eui.eu/bitstream/handle/1814/60447/KRAJEWSKI-european-council.pdf?sequence=2&isAllowed=y, accessed 15.9.2019, 4. See also opinion of AG Tanchev, Case C-216/18 PPU, LM, paras 38-45.

[295] Pérez, 2018, 214.

whether EU law is valid or not. To validate the incompatibility of the Framework Decision with fundamental rights with, the domestic courts need to make a preliminary reference to the Court. Only in few cases, such as *Advocaten* and *Melloni*, has the validity of the Framework Decision been directly challenged. The preliminary reference is a good way to have judicial dialogue between the constitutional courts and Court.[296]

Secondly, a breach of fundamental rights might come to light in the legislation implementing the Framework Decision in the Member State. The important factor is, how much there exists margin for implementation. Domestic courts that are in charge of executing the EAW could doubt how compatible the implementing legislation is with fundamental rights that are enshrined in the Constitution, the Charter or the Convention. If this is the case, in order to continue, the Court should take into account how wide of a margin is left to the States and the potential divergence in the interpretation of the fundamental rights that are applicable within the framework of the respective system for the judicial review of legislation. If there is no discretion left for domestic authorities, and the statute that is implemented reproduces the same terms and wording of the Framework Decision, then the point of interest of review should be Framework Decision through preliminary reference to the Court. If there is margin for discretion, then the possible breach of Constitutional or Charter rights can be resolved directly by domestic courts.[297]

Thirdly, there are situations where the breach of fundamental rights might happen in midst of process when executing or issuing an EAW. These infringements on fundamental rights could be done by the authorities of issuing or executing Member State. The most complex situations considering EAW arise when the possible infringements on fundamental rights have occurred in the process before the EAW was issued, or when the infringement might happen as a result of surrender of the requested individual to another Member State. And herein lies the problem. To what extent are the domestic courts allowed to condemn the issuing authorities for not complying with the fundamental rights, and thereby refuse the execution of an EAW?[298]

To better grasp the problem posed before the domestic courts, it is better to return to the case *LM* due to its recency and importance.

The Court, in case *LM*, stated that the national court is responsible of determining whether to execute an EAW or not even if Article 7 procedure is pending. The decision to refuse to execute an

[296] Pérez, 2018, 193-195.
[297] Pérez, 2018, 202-203.
[298] Pérez, 2018, 204.

EAW must follow the two-step test introduced in *Aranyosi and Căldăraru.*[299]

In the first step, the executing court has to look at reliable, specific and properly updated material relating to how the justice system in the issuing Member State operates. Then, the executing court has to determine if there is a real risk of breach of the fair trial rights of the person who is concerned, also the potential lack of independence of the courts must be looked at.[300] As for he judicial independence, the Court relied heavily on the case *Associação Sindical dos Juízes Portugueses* and stated that impartiality and judicial independence are paramount for the right to a fair trial.[301]

If the first step of the test is satisfactory, then the executing judiciary has to properly assess if there are substantial grounds to think that the requested individual will run a real risk of being a subject to a breach of the right to a fair trial.[302]

The national court, the Irish High Court, on November 2018 gave its final decision. An appeal was made before the Supreme Court that held the decision of the High Court. The decision of the High Court was: "This Court has been concerned only with whether the relevant threshold preventing surrender has been reached, in accordance with the principles laid down by the Court of Justice of the European Union. That threshold, which is a high one under the law of extradition/surrender, has not been reached on the evidence before this Court."[303]

As for the application test, the High Court stated that an individualized assessment must be done. And for the breach of a fair trial rights to be violated, other aspects of the right to a fair trial must be at risk at being violated, even if in very particular situations the lack of independence and impartiality might amount to a breach of a fair trial rights. The assessment then continues and is mostly concerned with the Deputy Minister of Justice who claimed the requested person was a dangerous criminal when it came to the requested person´s presumption of innocence. However, those comments were not seen as significant when it came to determining whether the responder is the one who committed those acts or not.[304]

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[299] Ballegooij, Wouter van, Bárd, Petra: The CJEU in the Celmer case: one Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU. In: Verfassungsblog, https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/, accessed 10.9.2019.
[300] Case C-216/18 PPU, LM, para 61.
[301] Case C-216/18 PPU, LM, paras 64-67.
[302] Case C-216/18 PPU, LM, para 68.
[303] The Minister for Justice and Equality -v- Celmer No.5, [2018] IEHC 639, para 124.
[304] The Minister for Justice and Equality -v- Celmer No.5, [2018] IEHC 639, paras 98, 100 and 114.

There are risks in the approach the Court has taken. The Court´s idea that the EAW procedures as a whole can only be suspended by completing the procedures in the Article 7(2) and 7(3) vis-à-vis the issuing Member State might result in placing too much burden on national courts. If these national courts are unable to take on that responsibility, it will result in impunity of Member States violating the rule of law, and also the proliferation of violations of rights of individuals. Also, the test brought about in *Aranyosi and Căldăraru* could be applied by some judicial authorities, but not by others, thus leading to fragmented EU law and discrimination of EU citizens.[305] Only time will truly tell, and it is possible the result of this case is a one step forward two step backwards situation.

5. Conclusions

Judicial assistance, traditional cooperation, has traditionally been governed by international instruments between sovereign states. From the 1950s, from when the multilateral agreements organized by the Council of Europe concerning criminal matters were prevalent in many forms of cooperation in criminal matters, we have come to this day.

The cooperation in criminal matters has become a long way. Mutual recognition is not a new concept and it is not only applicable to EU law. But mutual recognition in criminal law is quite different from the other forms of mutual recognition. Also, it is quite hard to try and differentiate mutual recognition from the goals of AFSJ and harmonization. Especially with ASFJ there are some tensions that affect the success of the EAW. The problems that arise are many and nuanced. The terms and what AFSJ represents bring about problems. Mutual trust, as seen in this thesis, is to some extent under duress.

Mutual recognition in itself is a form of cooperation which demands that the standards of another Member State are accepted within the limiting factor of predefined instruments. This can lead to a situation where the lowest common denominator is the norm. This is combatted with increasing mutual trust and having human right preconditions.[306] Also, this obligation to accept the standards of another Member State is not absolute and can in certain situations be refused. In this light the

[305] Ballegooij, Wouter van, Bárd, Petra: The CJEU in the Celmer case: one Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU. In: Verfassungsblog, https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/, accessed 10.9.2019.
[306] Suominen 2011, 67.

mechanisms made for mutual recognition, EAW being one of them, have been effective tools to allow the principle of mutual recognition to flourish. The EAW has been the flagship to usher the principle of mutual recognition forward as it requires a wide array of recognition for arrest warrants.

As a whole the EAW is progress compared to what was. The line between judicial authorities in different Member States and suppressing political hurdles have been a key factor as far as minimizing the formalities goes. But the EAW was maybe pushed out too fast. Most problems seem to have a relation to the fundamental rights and the issue with defence of a requested individual suffering from the effectiveness of the EAW. Instead of the hasty process, with which terrorism and organized crime was meant to be fought, used to concoct the EAW, more things like EU constitutional law and criminal law should have been taken into account.

In criminal cooperation there are principles concerning extradition that should have been taken into account more when making the EAW. Principles like nationality, speciality rule and dual criminality should have been accompanied with human rights elements.

The national courts are bearing the burden of mutual recognition in many ways. The principle of mutual recognition cannot be the only factor in criminal matters and there should be more harmonization so that the legal systems of Member States become more approachable to national courts, and in a wider sense more recognizable altogether. One of the more striking issues is how different the penalties and offences are in different Member States.

The national courts, when thinking if they should execute the EAW, are assumed to do so case by case basis. This will affect them by increasing their workload. The two-step test brought about by the decision in *Aranyosi and Căldăraru* is somewhat burdensome to national courts.

The non-execution, in my opinion, should be perceived as a serious threat and the EU should be looking to identify the core of the problems and find solutions. A reasoned set of limits when it comes to rule of should be a priority to the EU. Also what happens when you cross the set limit should be defined. Maybe these should have been already set in *Aranyosi and Căldăraru,* but I am hopeful for the future decisions. Case LM can be seen as an important milestone when it comes to the protection of fundamental rights in light of the effectivity of mutual recognition.

All in all mutual trust is necessary in order to EAW actually work. The principle of mutual trust, sadly, is still somewhat shaky due to the differences in legal systems and criminal proceedings of

Member States. In some Member States the protection of fundamental rights is seemingly not at the required level. Thus, the EAW being automatic will do more harm than good and affect mutual trust poorly. Even if the non-execution of the EAW in some cases might in the short run seem like it is an affront to the principle of mutual trust, in the end it could quite possibly end up forging a stronger bond of mutual trust by ensuring high level of protection.