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The European Arrest Warrant: A Threat to Human Rights?

The theoretical imperfections of the EAW Framework Decision and their implications in practice

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Abstract

In the wake of the 9/11 terrorist attacks the EU adopted the Framework Decision on the European Arrest Warrant in 2002 amid concerns that the previous lengthy extradition procedure was unable to efficiently tackle these serious cross-border crimes that were rising. Regularly being referred to as the 'cornerstone' of judicial cooperation, the EAW is the first and most successful instrument applying the internal market concept of mutual recognition to the field of criminal law. Despite its initial success as a flagship crime-fighting instrument, the EAW is considered highly controversial and has been the target of continuous criticism since its adoption. The subjects of criticism ranging from issues with the removal of the nationality exception and the abolition of double criminality, to concerns about the protection of human rights in the application of the EAW and the underlying principle of mutual trust. This thesis will provide an assessment of the European Arrest Warrant and the practical effect of the instrument on human rights, by presenting and discussing a selected few of the issues and concerns that have been raised in relation to the EAW system thus far.

Keywords: European Arrest Warrant, Human Rights, Rule of Law, Mutual trust, Proportionality

List of abbreviations

AFSJ – Area of Freedom, Security and Justice

CJEU – Court of Justice of the European Union

CoE – Council of Europe

CPT – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

EAW – European Arrest Warrant

ECHR – European Convention of Human Rights

ECtHR – European Court of Human Rights

EIO – European Investigation Order

ESO – European Supervision Order

EU – European Union

NAW – Nordic Arrest Warrant

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

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1. Introduction

1.1 Problem and purpose

Globalisation, the removal of internal borders and the freedom of movement gave a new dimension to international crime – unfortunately facilitating evasion of justice for criminals, who could now move across borders without any issues. As a response to these new difficulties, and the rise of foreign threats such a terrorism, the EU adopted the Framework Decision on the European Arrest Warrant in order to facilitate arrests in cross-border crimes. Having been dubbed the Union's most successful instrument of judicial cooperation in criminal matters, the EAW has been used in many various contexts. For example, it has been used to catch a terrorist involved in the Paris attacks in Belgium, to catch a failed London bomber in Italy, a German serial killer was tracked down in Spain and a gang of armed robbers sought by Italy were arrested in six different Member States.[1]

Despite its growing popularity due to the expedited procedure that arose with the introduction of mutual recognition, this new legal instrument has been controversial since its adoption in 2002. The initial difficulties that the instrument faced were mainly constitutional in nature relating to the surrender of nationals who had previously been protected from extradition; this protection was removed by the new instrument.[2] The concerns eventually turned to the instrument's lack of safeguards and insufficient protection of human rights in favour of crime control after practice had shown a clear tension between the interest of protecting human rights and the interest of a speedy extradition with minimum scrutiny, with the latter usually taking precedence over the former.[3] Thus, essentially favouring the effectiveness of the swift enforcement of criminal decisions, at the expense of the human rights of the individual. Problems attributed to the disproportionate use of the system for minor offences have persisted since its adoption. New threats to the EU such as the rise of illiberal democracies and the current rule of law crisis, have further brought the concerns regarding the instrument into the spotlight.

The aim of this thesis is to provide the reader with a critical assessment of the European Arrest Warrant as a legal instrument in the area of judicial cooperation in criminal matters by presenting and discussing some of the problems that have emerged during the soon to be 20 years of practice. This thesis seeks to increase awareness of the main challenges that the EAW is still facing today,

[1] European Commission, European arrest warrant makes Europe a safer place – factsheet for citizens, 18 September 2019, https://ec.europa.eu/info/sites/default/files/european_arrest_warrant_makes_europe_a_safer_place_-_factsheet_for_citizens.pdf (accessed 26.11.2021).
[2] A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 61.
[3] Ibid., p. 60.

how they affect the human rights of the individual in practice, and their impact on the overall sustainability of the instrument. Doing so will provide a better understanding of not only the benefits of the instruments, but also the current shortcomings. This thesis will focus on 3 selected problem areas, presenting themselves at different stages of the extradition procedure – at the issuing stage, at the executing stage and at the post-execution/non-execution stage: *the issue of proportionality and minimal scrutiny, issues persisting after non-execution* and *the issue of mutual trust*.

1.2 Method and material

This thesis was carried out by means of desk research, employing an interdisciplinary research method as I will not be relying purely on legal doctrine, but also on policy in order to study the effects of the law. I will be focusing on a socio-legal approach in order to paint a picture of the law in action – highlighting the gaps between the legislative goals of the EAW system and how it functions in practice by exploring the effects of the EAW on the individual parties and on the society as a whole. In this thesis I will be relying on both primary and secondary sources. The primary sources include both EU legislation and national legislation, case law from the CJEU, ECtHR and national courts, and official documents from the EU institutions and CoE. The secondary sources will include academic work in the field of European criminal law and the EAW such as books and journal articles, in addition to other materials such as policy reports from well-known NGOs (like Fair Trials, Human Rights Watch and Amnesty), academic blog posts, news articles, and other online resources.

In order to study the effects of a particular law in society, the first step is to describe my understanding of the underpinning law. I will therefore begin by exploring the European Arrest Warrant; what it is and how it was developed. By relying on EU legislation and legislative proposals in addition to literature I will provide a brief presentation on the legislative history of extradition in criminal matters within the EU leading up to the adoption of the Framework Decision on the European Arrest Warrant. Thereto, relying on the Framework Decision itself, I will provide a description of the objective and scope of the EAW instrument and how it operates.

Thereafter I will study the criticism that has been raised in the context of the EAW by looking at the three selected issues individually, providing a general description of the issue with the help of various sources and exploring how the issue presents in practice with the help of practical examples from case law (both national and CJEU). I will then study if and how each of the selected issues have been addressed by the EU institutions by consulting various implementation reports and communications from the European Commission, European Parliament and the Council of the

European Union, in addition to the adoption of soft law approaches and any legislative changes having an effect on the issues.

Each of the selected issues will then have an individual discussion rather than an overall discussion on the criticism as a whole. By drawing on various contributions to the debate I will then provide a deeper analysis of the criticism that has been raised regarding each individual selected issue – elaborating on the current and potential practical implications of the identified weaknesses from a human rights perspective in addition to their effects on the practical application of the instrument in the long run. In addition to the discussions on the individual issues themselves and the implications they bring, I will review the proposals that have been made by both NGOs and scholars alike in order to remedy the individual issue in regards to the application of the EAW, highlighting both the benefits and consequences of each proposal.

1.3 Structure of the thesis

The outline of this thesis is as follows. *Part I* of the thesis will offer the reader an introduction to the European Arrest Warrant: how it came to be, its scope of application and how human rights are addressed in the Framework Decision itself. *Part II-IV* will focus on the 3 selected problem area that have been identified by critics of the Framework Decision: *Part II* will address the problem area of proportionality and minimal scrutiny, *Part III* will address injustices that arise when an EAW has been refused, and *Part IV* will address the greater problem area of mutual trust with a focus on prison conditions amounting to inhuman or degrading treatment and the rule of law crisis raising concerns about judicial independence and the right to a fair trial.

For each identified problem area, the same structure will apply. Each problem area will first be generally introduced and defined on the basis of collected information from various sources, followed by concrete examples on the basis of EAW case law. Next, I will provide an overview of how the problem area has been officially addressed by different EU institutions, which will be followed by a discussion on the current and potential practical implications of the identified problem area, the importance of a remedy and the subsequent consequences that could follow if not remedied. To conclude each specific problem area, I will address the proposals that have been put forward to address the current shortcomings.

Part V will conclude the thesis and offer concluding remarks on what has been discussed in the thesis.

2. What is the European Arrest Warrant

2.1 Background

Cooperation in criminal matters and extradition between states is an issue that Europe has been committed to from the get-go, with the European Convention on Extradition signed in 1957 being the very first treaty establishing cross-border cooperation in criminal matters in Europe.[4] The adoption of the foundation treaty of the European Union in 1992, namely the Maastricht Treaty, institutionalised cooperation in the field of justice and home affairs under the third pillar in Title VI of the TEU and opened up the possibility to further evolve the traditional extradition law.[5] Only a few years after the treaty entered into force, the 1995 Convention on Simplified Extradition Procedures[6] was agreed upon by Member States and complemented by the 1996 Convention relating to Extradition between Member States of the European Union[7] in an effort to enhance judicial cooperation in criminal matters. However, the 1995 Convention never entered into force and the 1996 Convention only recently entered into force to facilitate extradition between EU Member States and Switzerland/Liechtenstein.[8] Following the entry into force of the Treaty of Amsterdam in 1999, the EU has been committed to establish an area of freedom, security and justice (AFSJ) and on the basis of the mandate from the Tampere European Council of 15/16 December 1999, the Commission began working on the project of a European Arrest Warrant.[9]

The Commission had almost completed the draft of the proposal when the 9/11 terrorist attacks occurred in New York and Washington DC.[10] These events led to the proposal being subjected to a fast track adoption procedure and only a week after the attacks, the Commission presented the legislative proposal to the Council and European Parliament.[11] The Framework Decision on the European Arrest Warrant (hereinafter "the Framework") was adopted by the EU on 13 June 2002 and entered into force 1 January 2004. The adoption of the EAW effectively replaced the lengthy

[4] Council of Europe, *European Convention on Extradition*, 13 December 1957, ETS 24.
[5] Maastricht Treaty on the European Union, 29 July 1992, OJ C 191/61, Art. K.3 (2).
[6] Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union, 30 March 1995, OJ C 78/2.
[7] Convention relating to extradition between the Member States of the European Union, 23 October 1996, OJ C 313/12.
[8] Council of the European Union, Notice concerning the entry into force of the 1996 Extradition Convention, 1 October 2019, OJ C 329/02.
[9] Council of the European Union, *Presidency Conclusions, Tampere European Council, 15-16 October 1999*, 16 October 1999.
[10] See Commissioner Vitorino's contribution to the European Parliament Debate on Combating terrorism, 5 September 2001,https://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20010905+ITEM-003+DOC+XML+V0//EN&language=EN&query=INTERV&detail=3-072 (accessed 05.10.2021).
[11] European Commission, "*Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States"*, 25 September 2001, COM(2001) 522 final/2.

and inefficient extradition procedures provided by the European Convention on Extradition which had been in use between Member States since 1960; procedures that no longer could keep up with an EU *sans* internal borders. The Framework establishes a new simplified system for the swift arrest and surrender of people between Member States for the purpose of conducting a criminal prosecution, executing a custodial sentence or a detention order. The main objective of the Framework is to ensure that the open borders and freedom of movement provided by the EU are not exploited by individuals seeking to evade justice.

The fast surrender procedure provided by the Framework is built on the principle of mutual recognition, which was borrowed from the policy area of the internal market where it was originally introduced in the *Cassis de Dijon* case regarding the free movement of goods.[12] In the Framework, this principle requires Member States to recognise the legal decision of a request for surrender made by any judicial authority belonging to another Member State with a minimum of formalities and control.[13] When a warrant has been issued by a Member State, the principle of mutual recognition ensures its validity throughout the entire territory of the EU. The principle of mutual recognition, *in turn*, relies on the principle of mutual trust which is premised on a sufficient degree of trust and confidence in each other's criminal justice systems – a presumption that each Member State's criminal justice system has a standard quality which reflects the common values and objectives set forth in Art. 2 of the TEU.[14] In other words, the principle of mutual trust requires all Member States to presume that every other Member State is respecting and complying with all the principles of human rights protection, fundamental freedoms and the rule of law.

2.2 Scope and function

With the introduction of the European Arrest Warrant, the political and administrative procedure of traditional extradition has been replaced by an exclusively judicial procedure.[15] The EAW is defined as a judicial decision issued by a judicial authority in a Member State with the purpose of requesting an arrest and surrender of a person located in another Member State's territory in order to conduct a criminal prosecution or execute a custodial sentence or detention order.[16] An EAW with the purpose of conducting a criminal prosecution may be issued if the offence in question is punishable, under the issuing Member State's law, with a maximum custodial sentence of at least

[12] A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 42.
[13] Council of the European Union, *Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States*, 13 June 2002, Recital 10.
[14] Rosas and Armati, "*EU Constitutional Law: An Introduction*", 2018, Hart Publishing, p. 180-181**;** Court of Justice, Opinion 2/13 *concerning the compatibility of the Draft Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with the EU Treaties*, 18 December 2014, para. 168 and 191.
[15] Framework Decision on the EAW, Recital 5.
[16] Ibid., Art. 1(1).

one year. Where an EAW has been issued for the purpose of executing a custodial sentence or where a detention order has been made, the sentence imposed on the sought person needs to be a minimum of four months.[17]

The former extradition system operated on the principle of double criminality, meaning that the offence for which the individual was to be surrendered had to constitute an offence in the issuing as well as the executing state.[18] While still operating on the same principle, the Framework has removed the requirement to *verify* double criminality for a list of 32 offences explicitly enumerated in Article 2(2), as long as the offences are punishable by a maximum custodial sentence of at least 3 years in the issuing country; the 32 offences include participation in a criminal organisation, terrorism, trafficking in human beings or drugs, murder, rape and child pornography. The need for verification of double criminality is therefore now solely limited to offences which are not listed in Article 2(2).[19]

When issuing an EAW, the issuing Member State will fill out a form which includes the identity and nationality of the sought person, details about the issuing judicial authority, the nature and legal classification of the offence with a description of the circumstances (time, place and degree of participation) and the penalty which would be imposed.[20] If the location of the sought person is known, the issuing authority can send the EAW directly to the judicial authority in said jurisdiction.[21] However, if the location is unknown the issuing authority can issue an alert for the requested person through the Schengen Information System (SIS), which has the same effect as an Interpol Red Notice meaning that all Member States gain access to information on the person sought by the issuing authority – in essence making it easier to locate the person.[22]

When an arrest has been made, the judicial authority of the arresting Member State has an obligation to execute the EAW and surrender the requested person to the issuing Member State. The executing Member State does have the right to refuse an execution of an EAW; however, the grounds for such a refusal are exhaustively provided by the Framework and are divided into mandatory and optional grounds for non-execution. The mandatory grounds for refusal include instances where the person in question has already been tried for the offence (*ne bis in idem*), is a minor, or when the offence is covered by amnesty in the executing state.[23] Statute of limitations and lack of double criminality are examples of the optional grounds for refusal.[24]

[17] Framework Decision on the EAW, Art 2(1).
[18] See European Convention on Extradition, Art. 2(2).
[19] Framework Decision on the EAW, Art. 2(4).
[20] Ibid., Art. 8 (1).
[21] Ibid., Art. 9(1).
[22] Ibid., Art. 9(2).
[23] Ibid., Art. 3.
[24] Ibid., Art. 4.

2.3 Human Rights in the EAW Framework Decision

While the position of human rights within the EAW system is not clearly provided within the Framework Decision itself, it does explicitly mention fundamental rights on two occasions. It is first mentioned in the preamble where it says that the Framework respects fundamental rights and observes the principles set out in Article 6 of the TEU and the Charter of Fundamental Rights.[25] Then again in Article 1(3) which states that the Framework does have the effect of changing the obligation to respect the fundamental rights and principles set out in Article 6 of the TEU. The Framework should, essentially, be interpreted in light of the fundamental rights and the principles of EU law.

The preamble does however note that nothing in the Framework prohibits a refusal to surrender a person if the warrant is believed to have been issued for the purpose of punishing a person on the basis of their sex, race, religion, nationality, political opinions or sexual orientation.[26] The preamble further advises Member States that no person *should* be surrendered where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment.[27] However, as the preamble is not mandatory and the main body of the Framework does not include the risk of a violation of human rights or fundamental rights as an explicit ground for refusal, it has been left up to the contracting Member States to decide the status of these so called recitals when implementing the Framework.

[25] Framework Decision on the EAW, Recital 12.
[26] Ibid.
[27] Ibid., Recital 13.

3. The 'no questions asked' surrender procedure – *the issue with proportionality and minimal scrutiny of EAW requests*

3.1 Abuse and misuse of the system for other than its intended purposes

Although it was not reflected in the Treaties from the outset, the principle of proportionality has been gradually developed by the Court of Justice (hereinafter 'CJEU' or 'Court') and is now considered one of the general principles of EU law.[28] It was initially introduced in order to safeguard Member States' sovereignty against excessive action from the EU institutions, and later extended to also safeguard individuals from actions taken by Member States.[29] The principle of proportionality can furthermore be found in the Charter of Fundamental Rights (hereinafter 'Charter') where Article 52 states that limitations to exercising the rights and freedoms recognised in the Charter are subject to the principle of proportionality and requires that the restriction is suitable and necessary to achieve a legitimate aim.[30] In the sphere of EU criminal law, Article 49 of the Charter stipulates that penalties must be proportionate to the seriousness of the offence.[31] However, the application of the principle of proportionality in the AFSJ is fragmented and mainly takes place in the context of asylum rather than within the context of judicial cooperation in criminal matters.[32] In the context of the EAW, the Framework Decision does not provide any reference in its text expressing the need to respect the principle of proportionality. The lack of such an express reference to respect the principle of proportionality in the Framework has been widely debated as a cause for concern in regard to the application of the EAW, as it provides an opening for unjustifiable uses conflicting with the intended purpose of the instrument.

Since the implementation of the Framework in 2004, the number of issued warrants have exponentially increased every year and as of 2019, a total of over 200.000 EAWs have been issued since 2005; the overall success rate of an EAW resulting in a surrender is however stuck at about 30

[28] Consolidated version of the Treaty on European Union, OJ C 202/13, 7 June 2016, Article 5 (1) and 5 (4); E. Xanthopoulou, "*Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?"*, p. 59.
[29] See E. Xanthopoulou, "*Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?"*, pp. 59-60.
[30] Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, p. 406, Art. 52(1).
[31] Ibid., p. 405, Art. 49 (3).
[32] M. Fichera and E. Herlin-Karnell, *"The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights?*", 2013, European Public Law, Vol. 19 (4), pp. 771-772.

%.[33] As the EAW instrument has become an ever more frequently used tool with each passing year, the concerns relating to proportionality has proven legitimate and clear themes of misuse and abuse have emerged; the instrument is, far too often, being used for other purposes than it was intended for – namely to tackle serious cross-border crime. The misuse and abuse of the instrument can be divided into: *disproportional warrants issued for minor offences (irrational warrants)*, *warrants issued in poor faith (ill-motivated warrants)*, and *warrants issued for investigation purposes (premature warrants)*.

In the case of irrational warrants, it has been reported that warrants have been issued for such trivial offences as riding a bicycle while drunk,[34] theft of 2 tires,[35] theft of a pair of pants worth €20,[36] theft of a piglet[37] or ten chickens,[38] exceeding a credit card limit and even theft of a dessert from a restaurant where the EAW actually contained a list of the ingredients.[39] This clearly demonstrates that conditions set forth in the Framework, the sanction thresholds, are insufficient as an EAW can be issued for almost every crime that has a severe form meeting the sanctions threshold, despite the offence in question only being of a basic nature unlikely to ever result in said sanction. Taking a look at Poland who is at the top of the list of issued warrants overall and has a particularly large number of warrants issued for minor offences;[40] this high number can most likely be attributed to the fact that the Polish criminal law operates on a strict principle of compulsory prosecution where authorities have an obligation to prosecute every criminal offence no matter how

[33] European Commission, Commission Staff Working Document, *"Statistics on the practical operation of the European arrest warrant – 2019"*, 6 August 2021, SWD (2021)227 final, pp. 40-41.
[34] C. Milmo, *"Polish man held in Wandsworth Prison for two months on European Arrest Warrant seeking extradition for seven-year-old drunk-cycling conviction"*, The Independent UK, 19 December 2012, https://www.independent.co.uk/news/uk/home-news/polish-man-held-in-wandsworth-prison-for-two-months-on-european-arrest-warrant-seeking-extradition-for-sevenyearold-drunkcycling-conviction-8426095.html (accessed 12.10.2012)
[35] Council of the European Union, *"Proposed subject for discussion at the experts' meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 - the proportionality principle"*, 9 July 2007, doc. 10975/07 LIMITE COPEN 98, p. 3.
[36] See *Lupu v. District Court Bucharest Romania* [2015] EWHC 3309 (Admin), 14 October 2015.
[37] Council of the European Union, *"Proposed subject for discussion at the experts' meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 - the proportionality principle"*, 9 July 2007, doc. 10975/07 LIMITE COPEN 98, p. 3.
[38] See *Sandru v Government of Romania* [2009] EWHC 2879 (Admin), 28 October 2009.
[39] A. Hirsch, *"The Julian Assange case: a mockery of extradition?"*, The Guardian UK, 14 December 2010, https://www.theguardian.com/commentisfree/libertycentral/2010/dec/14/julian-assange-european-arrest-warrant (accessed 12.10.2021)**.**
[40] T. Ostropolski, *"The Principle of Proportionality under the European Arrest Warrant - With an Excursus on Poland"*, New Journal of European Criminal Law, Vol. 5 (2), 2014, p. 182**;** A. Hirsch, *"Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests"*, The Guardian UK, 20 October 2008, https://www.theguardian.com/uk/2008/oct/20/immigration-extradition-poland-lithuania-law (accessed 12.10.2021)**;** J. Slack, *"Wanted: Criminals who did not pay for dessert (or how Britain was forced to investigate 2,400 Poles over trivial offences)"*, Daily Mail UK, 23 December 2010, https://www.dailymail.co.uk/news/article-1340959/Wanted-Criminals-did-pay-dessert-Britain-forced-investigate-2-400-Poles-trivial-offences.html (accessed 12.10.2021).

trivial.[41] Furthermore, the sanctions threshold found in the Framework – a maximum sentence of at least one year – provides no sufficient filtering system for these minor offences as all crimes in the Polish Penal Code have a maximum sentence of at least one year. In fact, the most common maximum sentence is 3 years or more – meaning that the higher threshold for the 32 offences that are exempt from the double criminality criterion is also easily fulfilled.[42] Using the case of theft as an example, this offence fulfils the sanctions requirement nearly everywhere in the EU in its basic form which allows issuing judicial authorities to be able to issue an EAW for an otherwise trivial offence, like the theft of a dessert.

In regard to ill-motivated EAWs, these can be warrants that are motivated by anything other than the administration of justice – anything from cases where the underlying 'offence' is not actually criminal in nature but rather a means for political persecution, to "manipulated" or "manufactured" cases. Two recent cases have illustrated the worrying willingness of some Member States to abuse the EAW instrument for political persecution; these are the cases of Catalonian President Carles Puigdemont and German citizen Alexander Adamescu. *Starting with Carles Puigdemont*, he was sought by the Spanish Government in connection with the 2017 Catalan independence referendum and subsequent declaration of independence.[43] The Spanish Government has since been criticised for abusing the system due to the tactical issuances and withdrawals of his EAW based on the likelihood of its success in the Member States he was travelling through. The EAW was initially issued in Belgium, but was quickly withdrawn in order to avoid defeat as there is a discrepancy between Spanish and Belgian law.[44] The Spanish judge then waited until Puigdemont left Belgium to re-activate the warrant, first sending a request to Finland where he was visiting Finnish lawmakers and then in Germany, where he was subsequently arrested on his way back to Belgium.[45] As the Spanish offence of rebellion was copied from Germany's offence of high treason, the Spanish judge was hopeful for a successful surrender – when the German court then refused the surrender for the more serious offence of rebellion, the Spanish judge withdrew the warrant yet

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[41] See T. Ostropolski, *"The Principle of Proportionality under the European Arrest Warrant - With an Excursus on Poland"*, New Journal of European Criminal Law, Vol. 5 (2), 2014, p. 183**;** Poland Code of Criminal Procedure, Act of June 6 1997, Article 10, https://www.legislationline.org/download/id/4172/file/Polish%20CPC%201997_am%202003_en.pdf (accessed 12.10.2021).

[42] See Polish Penal Code, Act of June 6 1997, https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf (accessed 12.10.2021).

[43] S. Jones and D. Boffey, *"European arrest warrant issued for ex-Catalan leader Carles Puigdemont"*, The Guardian, 3 November 2017, https://www.theguardian.com/world/2017/nov/03/european-arrest-warrant-issued-for-ex-catalan-leader-carles-puigdemont (accessed 13.10.2021).

[44] S. Burgen and D. Boffey, *"Spanish judge withdraws arrest warrants for Carles Puigdemont"*, The Guardian, 5 December 2017, https://www.theguardian.com/world/2017/dec/05/spanish-judge-withdraws-arrest-warrants-for-carles-puigdemont (accessed 13.10.2021).

[45] S. Burgen and P. Oltermann, *"Catalan leader Carles Puigdemont held by German police*", The Guardian, 25 March 2018, https://www.theguardian.com/world/2018/mar/25/catalan-leader-carles-puigdemont-held-by-german-police (accessed 13.10.2021).

again.[46] In this case, the 'conflict' is entirely political in nature and not criminal, the use of the EAW is therefore neither appropriate nor proportional. Spain essentially used the EAW instrument as a manipulation to capture and punish Mr. Puigdemont for simply trying to declare Catalan's independence.

Alexander Adamescu, on the other hand, became a target of the Romanian government through an EAW in 2016 when he advocated for his father (Dan) who had been charged and convicted of bribery two years prior in a process which revealed a political motive, and made preparations to sue Romania over destroying his business.[47] In order to understand the reason behind the EAW for Alexander, we must first take a look at his father's case. Dan was the owner of Romania's oldest newspaper, Romania Libera, who was printing stories exposing corruption, criticising the government and campaigning for rule of law and democracy – this made some powerful enemies within the Romanian government.[48] As a result, vengeful Prime Minister Victor Ponta – whose administration had been the target of criticism by the newspaper – publicly accused Dan of corruption on national television, which resulted in Dan's arrest two weeks later.[49] Dan's bribery conviction rested entirely on the testimony of one witness who had admitted to embezzling funds from Dan's business, claiming he was acting on behalf of Dan in order to bribe judges – no other evidence was presented to support this claim.[50] The EAW issued for Alexander Adamescu found him accused of the exact same crime as his father and even rested on the exact same so-called "evidence" his father was convicted on.[51] Alexander's father Dan, who was in the midst of serving his sentence, died in January 2017 of sepsis at the age of 68 after repeatedly being denied medical treatment in prison.[52] For fears of suffering the same fate as his father, Alexander has been fighting the execution of the EAW, but his appeals were ultimately dismissed in October of 2020.[53]

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[46] S. Burgen and P. Oltermann, "*Catalan leader Carles Puigdemont held by German police*", The Guardian, 25 March 2018, https://www.theguardian.com/world/2018/mar/25/catalan-leader-carles-puigdemont-held-by-german-police (accessed 13.10.2021)**;** S. Jones and S. Carrell, *"Spanish court drops international warrant for Carles Puigdemont"*, The Guardian, 19 July 2018, https://www.theguardian.com/world/2018/jul/19/spanish-court-drops-international-warrant-puigdemont-catalan (accessed 13.10.2021).

[47] *Adamescu v Bucharest Appeal Court Criminal Division Romania* [2020] EWHC 2709 (Admin), 20 October 2020, para. 37, 39, 40, 46, 50 & 116.

[48] Ibid., para. 115**;** see also Friends of Alexander Adamescu, *"Who Was Dan Adamescu?"*, 24 October 2017, https://www.friendsofalexanderadamescu.org/dan-adamescu/ (accessed 13.10.2021).

[49] *Adamescu v Bucharest Appeal Court Criminal Division Romania,* para. 34 & 35.

[50] Ibid., para. 26-27 & 31**;** see also the reiteration of the witness statements and the basis for conviction in Dan Adamescu's appeal against conviction in: Decizia nr. 234/A/2016, Înalta Curte de Casație și Justiție, Secția Penală, Şedinţa publică din 27 mai 2016, România – wherein Dan is referred to as 'Defendant I' and the key witness as 'Witness II'– (the original conviction judgment cannot be found).

[51] *Adamescu v Bucharest Appeal Court Criminal Division Romania*, para. 116 & 50.

[52] Ibid., para. 53**;** see also Friends of Alexander Adamescu, *"Dan Adamescu's Death"*, 24 October 2017, https://www.friendsofalexanderadamescu.org/dan-adamescus-death/ (accessed 13.10.2021).

[53] *Adamescu v Bucharest Appeal Court Criminal Division Romania,* para. 181.

Lastly, ***regarding premature warrants***, the Framework states that an EAW can be issued for purposes of conducting a criminal prosecution or for the execution of a sentence; essentially, the requested person should be sought to face trial for the criminal charges at the very least. Despite the clear wording in the Framework, EAWs have been issued far too prematurely for the purpose of investigating and questioning the requested person – in order to then decide whether or not to actually charge the person with the offence; this has been illustrated in the case of *Michael Turner and Jason McGoldrick*. The two businessmen were sought by Hungarian authorities through an EAW in 2009 for allegedly defrauding 134 customers of 18,000£ following a failed business venture in Hungary.[54] Being under the impression that they were sought for the purpose of conducting a criminal prosecution, the British court ordered the execution of the EAWs. Following their surrender it was discovered that not only was the case not ready for prosecution, but the two men were actually being held in a former KGB prison under awful conditions without any criminal charges against them while the Hungarian authorities were still in the process of investigating and gathering evidence.[55] After being held in prison for four months and having been questioned by police only once, they were released with no explanation and returned to Britain as the Hungarian authorities continued their investigation.[56] It was not until two years later – after repeated trips to and from Budapest for police interviews – that the case was finally heard by a court, which resulted in a guilty verdict with a fine and a suspended prison sentence of five and seven months.[57]

Common for all of the above-mentioned "categories" however, is that the principle of mutual recognition, upon which the EAW instrument rests, does not allow for the executing authority to review the facts of the case or assess the proportionality of the issued EAW in any of these situations. The principle effectively limits any judicial scrutiny from the executing authority, resulting in the EAW instrument essentially acting as a "no questions asked" extradition procedure.

[54] N. Thorpe, *"British businessmen 'tricked' into Hungary jail"*, The Guardian, 24 January 2010, https://www.theguardian.com/uk/2010/jan/24/michael-turner-jason-mcgoldrick-hungary (accessed 14.10.2021).
[55] Ibid.**;** BBC News, *"Michael Turner's Father Spends Life Savings on Hungary Legal Fees"*, 10 March 2012, https://www.bbc.com/news/uk-england-dorset-17300054 (accessed 14.10.2021).
[56] V. Pop, *"European arrest warrant still 'delivering injustice'"*, EU Observer, 22 July 2010, https://euobserver.com/justice/30527 (accessed 14.10.2021)**;** BBC News, *"Michael Turner's Father Spends Life Savings on Hungary Legal Fees"*, 10 March 2012, https://www.bbc.com/news/uk-england-dorset-17300054 (accessed 14.10.2021).
[57] BBC News, *"Michael Turner's Father Spends Life Savings on Hungary Legal Fees"*, 10 March 2012, https://www.bbc.com/news/uk-england-dorset-17300054 (accessed 14.10.2021)**;** BBC News, *"Michael Turner and Jason McGoldrick Guilty of Hungary Fraud"*, 29 November 2012, https://www.bbc.com/news/uk-england-20543343 (accessed 14.10.2021).

3.2 The need for proportionality and further scrutiny in the EAW

3.2.1 How has this issue been addressed in the EU institutions?

The issue of proportionality in light of the EAW was first addressed by the Portuguese Presidency of the Council during the fourth round of mutual evaluations on the practical application of the European arrest warrant in 2007; where they responded to the concerns that the instrument was being used for minor offences.[58] It was questioned whether surrender pursuant to an EAW was proportionate in these circumstances – suggesting that the principle of proportionality should be applied before determining whether an EAW should be issued.[59] The concerns were then further discussed, at the suggestion of the Presidency, by the Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant).[60] These expert-discussions resulted in the Council publishing a Handbook on how to issue a European arrest warrant in 2008, containing non-binding guidelines in regard to the concrete application on the EAW with the aim of assisting practitioners – building on Member States' manuals and practitioners experiences in the EJN and Eurojust.[61] In regard to the principle of proportionality specifically, the Handbook explained that competent authorities should bear in mind the *"considerations of proportionality by weighing the usefulness of the EAW in the specific case against the measure to be applied and its consequences"*[62]. Further, it set out the evaluations that should be made when issuing an EAW and encouraged practitioners to consider using less intrusive measures when possible.[63]

The Handbook was then revised in 2010 after it was agreed that modifications to the guidelines were needed in order to improve the application of the principle of proportionality.[64] The revisions explain the factors that should be considered before issuing even further and encourages practitioners, yet again, to use less intrusive measures than an EAW when possible.[65] In this revision it is also made clear that such a proportionality assessment should be made by the issuing

[58] Council of the European Union, *"Proposed subject for discussion at the experts' meeting on the application of the Framework Decision on the European arrest warrant on 17 July 2007 - the proportionality principle"*, 9 July 2007, doc. 10975/07 LIMITE COPEN 98, p. 2-3.
[59] Ibid.
[60] Council of the European Union, General Secretariat, "*Outcome of proceedings of Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant) of 17 July 2007*", 23 July 2007, doc. 12053/07 JAI 407, pp. 4-5.
[61] Council of the European Union, *"Final version of the European handbook on how to issue a European Arrest Warrant"*, 18 June 2008, doc. 8216/2/08 REV 2 LIMITE COPEN 70.
[62] Ibid., p. 14.
[63] Ibid., pp.14-15.
[64] Council of the European Union, *"Revised version of the European handbook on how to issue a European Arrest Warrant"*, 17 December 2010, doc. 17195/1/10 REV 1 COPEN 275.
[65] Ibid., pp. 14-15.

authority.[66] Lastly, the Council has agreed to re-examine this issue in the future, on the basis of a Commission report, if these non-legislative measures were unsatisfactory.[67]

In its 2011 report to the European Parliament and the Council on the implementation of the EAW, the Commission also conceded that, despite its successful operation, the EAW instrument was rather imperfect.[68] It especially expressed concerns over the use of EAWs in respect to very minor offences and emphasised the need for a more uniform application of a proportionality check – endorsing the Council's revised Handbook on how to issue a European Arrest Warrant.[69] The Commission then went on to encourage practitioners to use the Handbook as a guideline and urged Member States to take steps in order to ensure that the practitioners use it.[70]

In a 2014 resolution, the European Parliament called on the Member States to respect the principle of proportionality in the application of the EAW instrument by exhausting all alternative mechanisms before issuing an EAW.[71] The Parliament requested that the Commission submit legislative proposals on a proportionality check based on all of the relevant circumstances such as the seriousness of the offence, the trial-readiness of the case and the availability of less intrusive alternatives.[72] It also requested that the Commission submit legislative proposals providing for a standardised consultation procedure allowing the competent authorities in the issuing and executing Member States to exchange information on the assessment of proportionality and the trial-readiness.[73] Lastly, the resolution recommended that executing authorities should be able to consult the issuing authority on the importance of executing the EAW when they have reason to believe that the measure is disproportionate.[74] However, the Commission did not agree with the Parliament on the necessity to submit a legislative proposal in their response to the Parliament resolution – finding it inappropriate to revise the Framework.[75] Stating that the issue of proportionality has already been lifted in the 2011 Commission report[76] and that it is being

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[66] Council of the European Union, *"Revised version of the European handbook on how to issue a European Arrest Warrant"*, 17 December 2010, doc. 17195/1/10 REV 1 COPEN 275, p. 15.
[67] Ibid.
[68] European Commission, *"Report from the Commission to the European Parliament and the Council on the implementations since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final, p. 3.
[69] Ibid., pp. 7-8.
[70] Ibid., p. 8.
[71] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174, p. 4.
[72] Ibid., p. 5.
[73] Ibid.
[74] Ibid., p. 8.
[75] European Commission, "*Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant*", SP(2014) 447, 22 July 2014, p. 1.
[76] European Commission, *"Report from the Commission [...] on the implementations since 2007 [...] on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final.

successfully dealt with through the non-binding Handbook on how to issue a European Arrest Warrant.[77]

The Handbook was last updated by the Commission in 2017, with the introduction to the section on proportionality now reading that an *"EAW should always be proportional to its aim"*[78]. It further advises the issuing judicial authorities to consider the justification of issuing an EAW even when the case exceeds the sanction threshold in Article 2(1) of the Framework.[79] After reiterating the factors that should be taken into account in order to justify the issuing of an EAW and encouraging practitioners to consider using less intrusive measures, it is noted that Member States essentially contribute to the effective operation of the EAW throughout the EU by applying the proportionality check before issuing an EAW.[80]

3.2.2 The consequences of the 'no questions asked' surrender procedure

Although providing a certain level of protection against the most unreasonably disproportionate EAWs for minor offences, there is no question that the sanctions threshold in the Framework is far too insufficient, as practice has shown that it is still possible to issue an EAW for a trivial offence while respecting the established thresholds. While the Commission's statements that the Handbook has successfully helped the number of disproportionate EAWs issued, the non-legally binding nature of it and the lack of expression in regard to proportionality in the Framework has led to concerns continuing to be raised over the consistency of the application and its ability to tackle the problem. The decision to conduct a proportionality check before issuing an EAW is essentially left up to the discretion of each and every Member State's legislation and the practice of their judicial authorities.

In a number of Member States, proportionality checks were included in the laws implementing the EAW, resulting in them carrying out specific proportionality checks before issuing an EAW. These Member States include (but are not limited to) Austria, Belgium, Cyprus, Czech Republic, Finland, Ireland, Luxembourg and Sweden.[81] In the case of Ireland, the proportionality is actually assessed at

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[77] European Commission, "*Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant*", SP(2014) 447, 22 July 2014, pp. 3-4.
[78] See European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 14.
[79] Ibid.
[80] Ibid., pp. 14-15.
[81] M. Sotto Maior, *"The Principle of Proportionality: Alternative Measures to the European Arrest Warrant"*, in N. Keijzer (ed.) & E. van Sliedregt (ed.), *"The European Arrest Warrant in Practice"*, Den Haag, TMC Asser Press/Cambridge University Press, 2009, pp. 221-222. See also Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Austria"*, 24 June 2008, doc. 7024/1/08 REV 1 CRIMORG 41, p. 8 and 34, para. 3.1 and 7.2.1.1**;** Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Belgium"*, 19 March 2007, doc. 16454/2/06 REV 2 CRIMORG 196, pp. 9-10, para. 3.1**;** Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Cyprus"*, 12 December 2007, doc. 14135/2/07 REV 2 CRIMORG 155, pp. 31-32, para. 7.3.1.1**;** Council of the European

several levels – first by the Police Officer at the Extradition Unit when preparing the application, then at the Prosecution authority before forwarding the application to the issuing judicial authority.[82]

However, in some other Member States – usually those who have been identified as issuing irrational warrants and whose criminal justice system operates on compulsory prosecution – the general notion seems to be that the sanction threshold set out in the Framework is the only condition for issuing an EAW.[83] To that extent, an EAW should therefore always be issued whenever the sanction conditions are met, however petty the offence may be considered.[84] In these Member States it is also more likely that the judicial authorities lack the margin of appreciation to assess the proportionality of the EAW measure; a 'vague' criterion such as a proportionality check, lacking legal basis in the Framework, which could provide the possibility to refuse the issuing of an EAW and thereby restrict the principle of compulsory prosecution, would simply not be an option. Despite the strict application of compulsory prosecution and the lack of legal basis in domestic law to assess the proportionality of the measure, some lower courts in Poland have been shown to have the courage to refuse the issuing of an EAW by invoking the general EU principle of proportionality without any support from the highest instance.[85] This shows that the principle of compulsory prosecution is not automatically an obstacle against proportionality. While some Member States might possibly still be reluctant to introduce a proportionality check before issuing an EAW in their domestic legislation, others like Slovakia and Lithuania – whose criminal justice system also operate under the principle of compulsory prosecution[86] – expressly introduced the principle of proportionality in their domestic legislation following the fourth round of evaluations on the practical application of the EAW.[87]

Union,*"Evaluation report on the fourth round of mutual evaluations [...] - Report on the Czech Republic",* 23 January 2009, doc. 15691/2/08 REV 2 CRIMORG 194, p. 40, para. 7.2.2.1**;** Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Finland"*, 16 November 2007, doc. 11787/2/07 REV 2 CRIMORG 125, p. 8, para. 3.1**;** Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Ireland"*, 11 July 2007, doc. 11843/2/06 REV 2 CRIMORG 129, p. 7-9, para. 3.1**;** Förordning (2003:1178) om överlämnande till Sverige enligt en europeisk arresteringsorder, 5 §.

[82] Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Ireland"*, 11 July 2007, doc. 11843/2/06 REV 2 CRIMORG 129, p. 8-9.

[83] M. Sotto Maior, *"The Principle of Proportionality: Alternative Measures to the European Arrest Warrant"*, in N. Keijzer (ed.) & E. van Sliedregt (ed.), *"The European Arrest Warrant in Practice"*, Den Haag, TMC Asser Press/Cambridge University Press, 2009, p. 220.

[84] Ibid., pp. 222-223**;** see also Council of the European Union, *"Evaluation report on the fourth round of mutual evaluations [...] - Report on Hungary"*, 28 February 2008, doc. 15317/2/07 REV 2 CRIMORG 174, p. 30, para. 7.2.1.2.

[85] T. Ostropolski, *"The Principle of Proportionality under the European Arrest Warrant - With an Excursus on Poland"*, New Journal of European Criminal Law, Vol. 5 (2), 2014, pp. 186-187.

[86] See M. Sotto Maior, *"The Principle of Proportionality: Alternative Measures to the European Arrest Warrant"*, in N. Keijzer (ed.) & E. van Sliedregt (ed.), *"The European Arrest Warrant in Practice"*, Den Haag, TMC Asser Press/Cambridge University Press, 2009, p. 223**;** Council of the European Union, "*"Evaluation report on the fourth round of mutual evaluations [...] - Report on Lithuania"*, 14 December 2007, doc. 12399/2/07 REV 2 CRIMORG 134, p. 8 and 32, para. 2.2 and 7.2.1.5.

[87] European Commission, Commission Staff Working Document, *"Accompanying document to the third Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, SEC(2011) 430 final, p. 116 and 151.

The vast differences in the approach in relation to the principle of proportionality in the Member States regarding the EAW further illustrates the diversity in the criminal justice systems and legal traditions throughout the EU. The differences of application are not limited to Member States which subscribe to different prosecutorial systems (compulsory prosecution or opportunistic prosecution), but also Member States that subscribe to the same prosecutorial system. This further demonstrates the need for a more uniform assessment of proportionality, with a clear balancing between the usefulness of the EAW and its consequences for the individual and an evaluation of using less intrusive measures, in order to strengthen legal certainty.

Proportionality and pre-trial detention

Regardless of whether the EAW request is for the purpose of prosecution, or prematurely issued for the purpose of investigation, the lack of a proportionality check before issuing that takes into consideration the trial-readiness of the case or the use of any less intrusive measure becomes increasingly problematic where long periods of pre-trial detention in the issuing Member State is the norm. Throughout the EU it has been reported that pre-trial detention is being overused as a first resort instead of a last resort as intended,[88] contributing to the current prison-overcrowding crisis and in turn worsening the prison conditions (which will be addressed later in this thesis). Pre-trial detention is particularly overused in the case of non-residential individuals, such as those who have been surrendered through an EAW. Non-resident surrendered persons are more likely to be denied bail and remanded into custody pending trial, on the basis of an assumed flight risk simply due to their lack of residence in the prosecuting Member State.[89] This can result in excessive periods of pre-trial detention in Member States where the courts are backlogged, which would not necessarily have been the case for a resident of the prosecuting Member State accused of committing the same offence.

This becomes even worse when the surrendered person is acquitted of the offence after having spent weeks, months or even years in detention awaiting their trial, as was the case for Andrew Symeou

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[88] Fair Trials, *"Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?"*, 28 April 2021, p. 21, https://www.fairtrials.org/sites/default/files/publication_pdf/EAW-ALT_Report.pdf (accessed 25.10.2021)**;** Fair Trials, *"A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU"*, 26 May 2016, p. 1, para. 1 & 4, https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf (accessed 25.10.2021)**;** see also the Green Paper on Detention by the European Commission, 14 June 2011, COM(2011) 327 final, p. 8.

[89] European Commission, *"Report from the Commission [...] on the implementations since 2007 [...] on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final, p. 7**;** L. Mancano, *"Mutual recognition in criminal matters, deprivation of liberty and the principle of proportionality"*, Maastricht Journal of European and Comparative Law, vol. 25 (6), 2019, p. 729**;** Fair Trials, *"Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?"*, 28 April 2021, pp. 28-29, https://www.fairtrials.org/sites/default/files/publication_pdf/EAW-ALT_Report.pdf (accessed 25.10.2021)**;** Fair Trials, *"A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU"*, 26 May 2016, pp. 21-22, para. 64-66, https://www.fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf (accessed 25.10.2021).

who was surrendered to Greece. Andrew was falsely charged with 'manslaughter' in connection with the death of a young man at a nightclub based on witness statements which were obtained through police brutality and intimidation (and later retracted by the witnesses).[90] Upon his surrender, the Greek judicial authorities repeatedly denied him bail on the grounds that he was not a Greek resident and was therefore considered a flight risk, resulting in him spending 11 months in pre-trial detention.[91] He was eventually acquitted of all charges by the court in 2011, four years after he was surrendered.[92] Andrew's ordeal came after the fact that the ECtHR had clarified that the lack of fixed residence itself cannot justify pre-trial detention on the basis of flight risk.[93] Not only do these cases of unjustified pre-trial detention amount to a violation of the right to liberty according to Art. 5 ECHR, but also possible breaches of the right of equality before the law and the prohibition of discrimination based on nationality according to Art. 20 and Art. 21(2) of the Charter. The devastating impact on the individual of these excessive measures due to the lack of a proportionality check taking trial-readiness, pre-trial detention and alternative measures into account is not limited to cases where the surrendered individual is, *in fact*, innocent such as Andrew. The impact is also excessively devastating in cases still in the investigation phase where charges are yet to be filed or when the surrender was executed for a so-called trivial offence, resulting in a prison sentence subceeding the time spent in pre-trial detention.

The use of alternative measures

During the years that the EAW instrument has been active, several other mutual recognition instruments[94] have been introduced, complementing and working parallel to the EAW instrument and in some cases even acting as alternative measures. The *European Investigation Order (EIO),* for example, would act as a less intrusive measure to an EAW when the case was still in the investigation phase – offering the requesting judicial authority the opportunity to question the suspect, gather evidence and more, without having to deprive the individual of his freedom.[95] Had it been in force in 2009, this instrument could have prevented the unfounded detention of Michael Turner and Jason McGoldrick during the Hungarian investigation.

[90] Fair Trials, Case Study: Andrew Symeou, https://www.fairtrials.org/case-study/andrew-symeou (accessed 25.10.2021).
[91] Ibid.
[92] Ibid.
[93] ECtHR, *Sulaoja v Estonia*, App. 55939/00, 15 February 2005, para. 64.
[94] E.g. Council Framework Decision 2008/909/JHA of 27 November 2008 on the mutual recognition of custodial sentences, 5 December 2008, OJ L 327/27**;** Council Framework Decision 2009/829/JHA of 23 October 2009 on a European Supervision Order, 11 November 2009, OJ L 294/20**;** Council Framework Decision 2008/947/JHA of 27 November 2008 on the mutual recognition on probation measures, 16 December 2008, OJ L 337/102**;** Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, 1 May 2014, OJ L 130/1.
[95] See Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, 1 May 2014, OJ L 130, Article 1 and Chapter IV.

In cases where there is likely to be a lengthy pre-trial procedure, often resulting in lengthy pre-trial detention, the *European Supervision Order (ESO)* offers an alternative to the pre-trial detention often imposed by Member States on non-residents deemed a flight risk simply for being non-residents. Instead, a request to the country of residence can be made for the imposition of supervision measures which e.g. would have been imposed on a resident of the prosecuting state awaiting trial for a similar offence.[96] The objective of the instrument is therefore to open up alternatives to pre-trial detention for everybody and ensure that non-residents subject to criminal proceedings are treated in the same manner as residents – in the hopes of reducing the need for non-residents to be held in pre-trial detention.[97] For example, if a resident of the prosecuting state is not usually held in pre-trial detention awaiting trial for theft, but a non-resident is to be remanded in pre-trial detention for the same offence due to concerns that the non-resident will return to their country of residence – then it may be appropriate to request an ESO, enabling the country of residence to undertake the supervision measure. This would have been a less intrusive measure and a potential alternative to the EAW in Andrew Symeou's case.

Unfortunately, practice shows that the EIO and the ESO are still underused compared to the EAW, despite the Handbook urging Member States to use these available alternative instruments when appropriate.[98] Although the EIO has begun to be increasingly used, the ESO is still hardly ever used.[99] While the national transposition deadline of the ESO was December 2012[100] and the EIO's national transposition deadline was May of 2017[101], it has been seen that these transposition deadlines were not fully complied with in every Member State. In regard to the EIO, the national transposition was finalised in the Member States within a year after the deadline, whereas for the ESO – having the earlier transposition deadline of 2012 – the average time of national transposition was 1-4 years after the deadline, with one Member State only just having implemented the ESO Framework in 2020, 8 years after the deadline.[102] It could certainly be argued that these alternative instruments are still considered 'too young' to be fully operational in the Member States when

[96] Fair Trials International, *"A Guide to The European Supervision Order"*, September 2012, pp. 4-5, https://www.fairtrials.org/wp-content/uploads/ESO-guide.pdf (accessed 20.10.2021).
[97] Council Framework Decision 2009/829/JHA of 23 October 2009 on a European Supervision Order, 11 November 2009, OJ L 294/20, Preamble (5) and Art. 2(1) b.
[98] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 19.
[99] See A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 55 and 70.
[100] Council Framework Decision 2009/829/JHA of 23 October 2009 on a European Supervision Order, 11 November 2009, OJ L 294/20, Art. 27(1).
[101] Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, 1 May 2014, OJ L 130/1, Art. 36(1).
[102] See the National transposition measures communicated by the Member States concerning Council Framework Decision 2009/829/JHA of 23 October 2009 on a European Supervision Order, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32009F0829 (accessed 26.10.2021); National transposition measures communicated by the Member States concerning Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32014L0041 (accessed 26.10.2021).

compared with the ingrained practice of the EAW. While it is a valid argument, both of these alternative mutual recognition instruments are modelled after and built on the functioning of the EAW. One could argue that, since the practise of the EAW is so ingrained in the EU and ensures a simple and fast surrender, it would be easier to reach for the simple "tick box" EAW when confronted with investigation needs in a cross-border criminal investigation, rather than using an alternative investigatory means such as the EIO. An EAW certainly does give the issuing Member State more control over the sought person, while both the EIO and ESO limit the exercise of their control.

It has been asserted that an obstacle to the use of the ESO as an alternative measure could be a lack of trust in other Member States' ability to effectively enforce the supervision orders.[103] However, this would essentially call into question the entire notion of the *"high level of confidence between Member States"*[104] which the EAW is based on. As all of the mutual recognition instruments assume that Member States can trust each other's criminal justice systems, why is trust a given in regard to the intrusive EAW but is somehow restricted concerning the less intrusive measures? How can it be that the amount of trust placed in an issuing Member State's criminal justice system by an executing authority when executing an EAW, cannot be reciprocated by the issuing authority in regard to the executing Member State's ability to enforce supervision orders on the individual awaiting trial? This reluctance to relinquish control over the person awaiting trial while expecting others to relinquish control in surrender proceedings seems to prove that the presumed trust that the mutual recognition instruments are all built on is not, in fact, entirely as robust as advertised.

Minimum scrutiny in the executing Member State

Under the 'no questions asked' surrender procedure, the issue is not limited to the lack of proportionality check in the issuing Member State; it is also attributed to the lack of proportionality assessment and limited scrutiny into the underlying offence in the executing Member State. The absolute application of the principle of mutual recognition, as it operates in the Framework, does not allow for an evaluation of the proportionality of an EAW in the executing Member State and enforces a very narrow scope of scrutiny. When faced with serious concerns over the proportionality of a received EAW, the executing authority is theoretically limited to enter into communication with the issuing authority over the concerns, however the Commission anticipates that these situations would only arise in exceptional circumstances.[105] The executing authorities are

[103] Fair Trials, *"Protecting fundamental rights in cross-border proceedings: Are alternatives to the European Arrest Warrant a solution?"*, 28 April 2021, p. 7, https://www.fairtrials.org/sites/default/files/publication_pdf/EAW-ALT_Report.pdf (accessed 26.10.2021).
[104] Framework Decision on the EAW, Recital 10.
[105] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 49.

also permitted to request additional information from the issuing authorities when the content of the EAW is unclear, if there is an obvious error in the EAW or even when it is unclear whether the correct person was arrested pursuant to the EAW.[106] Such requests should however be limited to exceptional cases, as experience has shown that these requests cause delays in the execution and results in the time limits being exceeded – thereby undermining the intended efficacy of the instrument.[107] It is nearly impossible for a person to successfully challenge the merits, the motivation, or the proportionality of the EAW in the executing Member State. Executing judges are essentially prevented from acting on any claims raised by the sought person in regard to these challenges; as long as the paperwork is in order, and none of the exhaustive grounds for refusal are found to be applicable, the judge is required to execute the EAW. It does not matter in the eyes of the Framework if the evidence in the case is insubstantial or non-existent, if the offence was insignificant, if the sought person is the victim of mistaken identity or even if the prosecution was manufactured. Unfortunately, it is the sought individual who will suffer the devastating, and sometimes severe, consequences of this issue.

A case specifically highlighting the problem with executing judges being prevented from acting on challenges to the merits of the EAW is the case of Edmond Arapi, who was sought by Italy in 2006 for a murder he could not have committed. Mr. Arapi had been tried and convicted *in absentia* for murdering a man in 2004 – the only problem was that at the time of the murder, Mr. Arapi was actually at his job in the U.K and had not left the U.K between the years of 2000 and 2006.[108] In reality, Mr. Arapi was the victim of a serious case of mistaken identity. However, the district judge's hands were tied and his extradition was ordered despite the challenges to the merits of the EAW, and the concerns that a retrial would not take place (especially seeing as he was facing a sentence of 16 years in prison).[109] It was not until the appeal hearing in the High Court of London that the Italian authorities recognised that they had sought Mr. Arapi in error, and subsequently withdrew the EAW.[110] While narrowly avoiding being imprisoned in Italy, the damage had already been done. Over the course of these proceedings Mr. Arapi had spent not only several weeks in custody, but had also been subjected to strict bail conditions including wearing an electronic tag – amounting to

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[106] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 34
[107] Ibid., p. 34 and 27.
[108] Fair Trials International, "*The European Arrest Warrant - Cases of Injustice*", https://www.fairtrials.org/wp-content/uploads/Annex-2.pdf (accessed 22.10.2021)**;** A. Gabbatt, *"Italy abandons extradition bid after admitting it had got the wrong man"*, The Guardian, 15 June 2010, https://www.theguardian.com/world/2010/jun/15/italy-extradition-wrong-man (accessed 22.10.2021).
[109] Fair Trials International, *"The European Arrest Warrant - Cases of Injustice"*, https://www.fairtrials.org/wp-content/uploads/Annex-2.pdf (accessed 22.10.2021).
[110] A. Gabbatt, *"Italy abandons extradition bid after admitting it had got the wrong man"*, The Guardian, 15 June 2010, https://www.theguardian.com/world/2010/jun/15/italy-extradition-wrong-man (accessed 22.10.2021).

a violation of his right to liberty and freedom from unlawful detention according to Article 5 of the ECHR.[111]

It is sadly not uncommon for flawed investigations in the issuing Member State to result in EAWs being issued against individuals who are later proven to be victims of mistaken identity at the execution hearing in the executing Member State; and all they can resort to is opening a dialogue with the issuing Member State. In fact, in January of 2020, a man faced a similar procedure as Mr. Arapi. Mr. Choudhary was being sought by France in connection with a conviction for fraud and money laundering despite never having set foot in France.[112] The copy of the passport supplied by the French authorities had been doctored and had in fact been reported lost 5 years earlier and cancelled.[113] Moreover, the arrest photographs of the man that they claimed was Mr. Choudhary turned out to be of another person.[114] However, the French authorities kept insisting that he was to be surrendered in order to argue his innocence and it was not until the last minute that they conceded and withdrew the EAW.[115] Unfortunately, not everyone is as "lucky" to narrowly escape surrender.[116] This illustrates how a legally correct EAW and the impossibility to challenge its merits has the ability to disregard the rights and interests of the individual who potentially faces years of disproportionate deprivation of liberty.

Another weakness that can be taken advantage of in relation to the minimal scope for scrutiny in the executing Member State, the abolishment of double criminality for 32 offences and the impossibility to successfully challenge the merits of the EAW, is the possibility of leaving very general descriptions of the circumstances of the offence in the EAW. According to the Framework, the EAW should include a *"description of the circumstances in which the offence was committed"*[117] which includes the time, place and the person's degree of participation. In practice, the executing judicial authority should have enough information to allow it to make a decision on a surrender – enabling an evaluation of whether any of the refusal grounds can be applied.[118] This would theoretically allow for an executing authority to describe the circumstances in very general terms,

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[111] A. Gabbatt, *"Italy abandons extradition bid after admitting it had got the wrong man"*, The Guardian, 15 June 2010, https://www.theguardian.com/world/2010/jun/15/italy-extradition-wrong-man (accessed 22.10.2021).
[112] Doughty Street Chambers, *"Flagrant miscarriage of justice overturned: victim of identity theft finally discharged on appeal in French extradition request"*, 3 November 2020, https://www.doughtystreet.co.uk/news/flagrant-miscarriage-justice-overturned-victim-identity-theft-finally-discharged-appeal-french (accessed 31.10.2021).
[113] Ibid.
[114] Ibid.
[115] Ibid.**;** *Choudhary v Prosecutor At the Creteil TGI, France* [2020] EWHC 2816 (Admin), 26 October 2020.
[116] See e.g. the case of Óscar Sánchez, a victim of identity theft who was surrendered to Italy and spent almost two years in detention based on a faulty police investigation by the Italian authorities before being acquitted following a journalistic investigation by a Spanish newspaper revealing that his identity had been stolen.
[117] Framework Decision on the EAW, Art. 8(1) e.
[118] Ibid., Art. 15(2)**;** European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 27.

by only listing the elementary facts of the act without giving more specific details. Considering that the underlying act can only be scrutinised when the offence is subject to a double criminality check (i.e. not falling under the 32 offences listed in the Framework), the "tick-box" system and possibility to submit general descriptions of the offence could potentially allow a Member State to evade scrutiny for an act that would have otherwise been scrutinised. Acts which would not fall under the 32 offences that are exempt from the double criminality check, could be made to fit into these by simply ticking off one of the listed offences with the closest link to the act committed, accompanied by a general description.

Take the example of the long debated topic of women's reproductive rights, more specifically the act of having an abortion. While this act is legalised and considered a right in many parts of the world, it is still considered an illegal criminal conduct in others, criminalising the women seeking to have one.[119] This anti-choice stance and criminalisation can also be found in some European countries.[120] If a Member State were to be successful in criminalising abortion, disregarding the criticism and repercussions from EU institutions, the act of having an abortion could fit within that Member State's definition of 'murder'. This would allow the Member State to issue an EAW against a woman who had an abortion, marking the tick-box for murder which is exempt from a double criminality check and providing a description of the offence along the lines of "at X time, the requested person murdered her child at this particular place". As the description is undeniably general and questionable, it is most likely that the executing authority would request additional information – however, this is not certain. If the additional information makes it clear that the 'murder' in question is in fact an abortion, it is unclear whether the executing authority is able to disregard the ticked murder-box on the EAW and perform a double criminality check, which would allow a refusal of the EAW if the act of abortion is not considered a crime in the executing Member State. After all, the CJEU has taken the stance that it is the law of the issuing Member State which decides whether the offence is exempt from the double criminality check.[121] This has also been written into the Handbook on how to issue an EAW.[122] While this was an extreme hypothetical

[119] E.g. El Salvador, the Philippines and Nicaragua who do not permit abortion under any circumstances and criminalises the act – carrying a maximum prison sentence of anywhere between 2 and 8 years.
[120] E.g. ***Malta,*** total prohibition and the act of getting one carries a prison sentence of eighteen months to three years, Art. 241(2) of the Malta Criminal Code, https://www.legislationline.org/download/id/9619/file/Malta_CC.pdf (accessed 01.11.2021)**;** ***Andorra***, total prohibition, Art. 108(2) of the Criminal Code of the Principality of Andorra, https://www.legislationline.org/download/id/6357/file/Andorra_CC_2005_fr.pdf (accessed 01.11.2021)**;** ***Liechtenstein***, partial prohibition, Section 96 of the Criminal Code of Liechtenstein, https://www.legislationline.org/download/id/9572/file/LICH_CC_eng.pdf (accessed 01.11.2021).
[121] Court of Justice, Grand Chamber Judgment of 3 May 2007, case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, para. 52-53.
[122] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 18.

example requiring a Member State to act in exceptionally bad faith, the possibility of the EAW to be abused in such an unlikely way is there regardless.

Some final thoughts

Almost 20 years of practice, and the cases presented in this thesis have illustrated that the EAW instrument is not used in the manner it was intended or created for – namely to combat the rise in international organised crime and terrorism. Rather, it has shown to be excessively misused for the prosecution of minor offences or for investigative purposes far too often, without any regards for the impact of the sought person or consideration of less intrusive measures. The insufficient protection against abuse and misuse of the system has led some scholars to assert that the EAW instrument has become a *"victim of its own success"*[123]. The core of this particular problem area is that the safeguards were simultaneously disregarded at both ends of the EAW and not just one. Had a greater scope of scrutiny been applied, or if the double criminality check and the need for a prima facie case as applied by the previous extradition regulation still prevailed – then there would still have been some type of safeguard providing the individual some protection against abuse of the system. Similarly, if the general EU principle of proportionality had been accounted for in the Framework as a 'threshold', then a lack of scrutiny would not have been considered as detrimental as it is today. In the rush job that was the adoption of the Framework, the EU made the mistake of simultaneously removing and neglecting all safeguards.

Having shed a light on the reported misuse and possibility of abuse of the EAW system, it would be unreasonable to argue that these shortcomings do not have any severe implications for the concerned individual regarding their restriction of movement and deprivation of liberty resulting from the arrest and deportation to a foreign country. While everyone who is the subject of an EAW will face these implications, the individuals suffering the most disproportionate impact would be the unprotected victims of mistaken identity or identity theft. Imagine having to be surrendered to a country you might never have visited before, most likely not knowing the language and undoubtedly being subjected to unreasonable and potentially lengthy pre-trial detention due to the sole fact that you are a 'foreigner', simply in order to argue your innocence despite having provided ironclad evidence of your innocence prior to the surrender. These individuals will never be the same again.

The effects of enabling these types of practices through the weaknesses of the Framework are not limited to the devastating impact on the individual concerned – in fact, the disproportionate and potentially abusive practices themselves pose a great threat to the continued application and future

[123] See e.g. K. Weis, *"The European Arrest Warrant – A Victim of Its Own Success?"*, New Journal of European Criminal Law, Vol. 2 (2), 2011.

of the EAW. A continuous use of the instrument for the prosecution of minor crimes places an unnecessary burden on the resources of the executing Member States and a great strain on their police and courts. This systematic exploitation of a shortcoming not only undermines the intended purpose of the Framework but will consequently undermine Member States' confidence in the application of the instrument. This would in turn negatively affect the willingness of cooperation with some or even all Member States and will hinder the efficacy of the system. In fact, the full effectiveness has already been hindered as some Member States have felt inclined to "pick up the slack" of the lack of obligation to perform a proportionality check before issuing an EAW, by conducting their own proportionality check when deciding on the execution of an EAW.[124] This essentially introduces a ground for refusal based on proportionality which neither conforms with the Framework itself nor the principle of mutual recognition.[125] While it does enable these few executing Member States to protect the rights of the individual, this practice as a whole also creates a further uneven application of the Framework and contributes to an even greater level of legal uncertainty in cross-border proceedings.

The EAW as an instrument presupposes that authorities act in good faith, however the reality is that this is not always the case and issuing authorities have been shown to act in bad faith guided by other interests than justice. The current lack of uniform proportionality checks in issuing Member States combined with the exceptionally narrow scope for scrutiny in the executing Member States, enables the possibility of using the EAW as a threat: restricting an individual's right to exercise their freedom of movement, strategically issuing the EAW based on likelihood of success, not having to expressively show the existence of a credible case, or preventing the protection and enforcement of the individual's rights by exploiting the minimal scrutiny, and more. Considering the recent rise in illiberal democracies across Europe seeking to silence independent voices and limit the rights of the individual, the prospect that the EAW system can be exploited or strategically abused in bad faith should be avoided at all costs.

Not only is there already a general agreement among the Member States that a proportionality check is necessary to prevent unreasonable warrants for offences that, although fulfilling the sanctions threshold, cannot justify the measures required through the execution of an EAW.[126] Both the Commission and the Parliament are of the view that it is essential that all Member States apply a

[124] European Commission, *"Report from the Commission [...] on the implementations since 2007 [...] on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final, p. 8**;** UKs implementing legislation introduced a specific proportionality bar for executions of accusation cases, Section 21A Extradition Act 2003**;** Italy, France and Germany have also refused surrenders on the basis of proportionality, https://www.fairtrials.org/sites/default/files/LEAP%20Query%2028%20January%202019%20from%20Georgios%20Pyromallis%20Q1.pdf (accessed 02.11.2021)

[125] European Commission, *"Report from the Commission [...] on the implementations since 2007 [...] on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final, p. 8.

[126] Ibid., p. 7.

proportionality test before issuing an EAW.[127] As practice has shown that the soft-law approach of the Handbook has not been adequate in unifying the application – why is the EU reluctant to make any legislative changes to ensure and unify the proper application of such a test?

3.2.3 What still needs to be done – proposed changes to amend the issue of proportionality and minimal scrutiny

It has clearly been established that a simple tick-box EAW has provided difficulties in practical application of the Framework and the attempts to amend the shortcomings of the EAW in relation to proportionality through recommendations and soft-law rather than legislative means has fallen short on success. There is no doubt that legislative changes are needed in order to come to grips with the issue that is proportionality and reduce the number of unjust EAWs being issued. Various solutions have been proposed in order to amend this particular shortcoming which can be attributed to both the issuing and the executing stage of an EAW – all having varying levels of potential success in amending the issue.

One proposed solution to the issue of proportionality and the EAW being used for minor offences, is to raise the threshold set out in Article 2(1) of the Framework.[128] While this would certainly impact the ability of issuing an EAW for a minor offence, it would most likely also affect offences that are not considered minor. It is undisputed that the Member States have different criminal justice systems and penalties – an offence in one country carrying a sentence of prison, may carry a simple fine in another country. Furthermore, in regard to prison sentences, not all Member States impose the same length of imprisonment for certain offences; using the example of Poland and Sweden, the basic form of the offence theft in Poland carries a maximum penalty of 5 years[129] where the basic form of the offence in Sweden carries a maximum penalty of 2 years[130]. Raising the threshold set out in the Framework in order to combat EAWs issued for minor offences could significantly reduce the scope of the Framework and exclude Member States that impose lower penalties.

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[127] See European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335/1**;** European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174.

[128] S. Carrera, E. Guild and N. Hernanz, *"Europe's most wanted? Recalibrating Trust in the European Arrest Warrant System*", CEPS Paper Liberty and Security in Europe no. 55, March 2013, p. 24.

[129] Polish Penal Code, Act of June 6 1997, Article 278, https://www.legislationline.org/download/id/7354/file/Poland_CC_1997_en.pdf (accessed 05.11.2021).

[130] Brottsbalk (1962:700), 8 kap. 1 §.

Another proposed solution is to introduce a proportionality check in the executing Member State.[131] Considering that the Handbook will still be available and proportionality checks are being made in several Member States prior to issuing, a proportionality check in the executing Member State should be optional and limited to cases where such a check would be justified by exceptional circumstances. The introduction of a proportionality check at the execution stage would most likely also be accompanied by a potential refusal ground based on the outcome of the check. While an exceptional circumstance could arise when the executing authority receives evidence that the sought person is the wrong person such as in the case of Mr. Arapi, the definition of what may be considered an exceptional circumstance is rather subjective and varies greatly from person to person. Such a proportionality check would certainly have the ability to take into consideration any circumstances that are unknown to the issuing authority and thereby provide the individual with protection from an otherwise unreasonable extradition. However, considering the subjectivity of such a proportionality check which would depend on the facts of the case and the subsequent introduction of a new refusal ground which has not previously been foreseen by the Framework, would most likely cause some tension with the principle of mutual recognition. Moreover, having to check the proportionality during the execution stage of an EAW would consequently lengthen the extradition proceedings and cancel out the benefits of the otherwise expedited procedure. Lastly, a proportionality check at such a late stage would be too late to account for any damages that the sought individual has already been subjected to – as they at that stage most likely would have already been subjected to an arrest and even a possible deprivation of liberty.

The prevailing solution, having been proposed in regard to the proportionality issue, is to amend the Framework to include a proportionality check in the issuing Member State before issuing an EAW.[132] Where a proportionality check in the executing Member State would butt heads with the principle of mutual recognition, no such tension would arise if the proportionality check is taken into account by the issuing Member State as they would have a better understanding of what would be necessary in their jurisdiction. A proportionality check before deciding to issue an EAW, would further not entail any impact on the surrender procedure itself. Pre-issuing proportionality checks are already strongly recommended by all of the EU institutions and have been included in later

[131] I. Anagnostopoulos, *"Proportionality Issues in European Arrest Warrant Proceedings – Three Stories from the Field"*, in E. Billis, N. Knust & J. P. Rui (ed.), "*Proportionality in crime control and criminal justice"*, Oxford, Hart Publishing, 2021, p. 354**;** A. Weyembergh, I. Armada & C. Brière, *"Critical Assessment of the Existing European Arrest Warrant Framework Decision"*, Research Paper for DG for Internal Policies of the Union, European Parliament, 2014, EAVA 6/2013, Annex I, p. 37.

[132] I. Anagnostopoulos, *"Proportionality Issues in European Arrest Warrant Proceedings – Three Stories from the Field"*, in E. Billis, N. Knust & J. P. Rui (ed.), "*Proportionality in crime control and criminal justice"*, Oxford, Hart Publishing, 2021, p. 355**;** E. Xanthopoulou, "*Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?"*, p. 118**;** A. Weyembergh, I. Armada & C. Brière, *"Critical Assessment of the Existing European Arrest Warrant Framework Decision"*, Research Paper for DG for Internal Policies of the Union, European Parliament, 2014, EAVA 6/2013, Annex I, p. 35.

mutual recognition instruments such as the EIO[133]. The introduction of a proportionality check in the Framework could simply follow the already agreed upon guidelines established in the Handbook how to issue an EAW. Requiring the issuing Member States to justify the issuing of an EAW by considering the gravity of the offence, the length of the sentence, the trial readiness, the use of less intrusive measures such as the EIO for investigations or the ESO where the individual may be subjected to inappropriate pre-trial detention and weighing the cost and benefits of the execution. Such a legislative amendment would not only remedy the current uneven application of proportionality and reduce the number of unreasonable EAWs being issued, but it would also effectively encourage a more moderate use of the EAW by supporting the use of less intrusive measures – enabling the EAW to be used as the last resort it was intended to be.

Having to consider the less intrusive alternatives would contribute to EAWs being harder to issue prematurely for investigations and would also contribute to reducing any long-term pre-trial detention of non-residents, as it would be difficult to argue that the EAW is proportional if other measures are available. Of course, an argument could be made that inserting a proportionality check could allow individuals to escape justice by having moved to another Member State, however, the offences which would escape justice would most likely be offences that would otherwise have undermined the EAW. The proportionality check would in no way affect the issuing of EAWs for serious offences which the instrument was intended for as these would most often than not be considered proportionate to their aim. Even with a uniform application of a proportionality check before issuing an EAW, the results of the checks conducted in different Member States may still vary but to a much lesser extent.

Specifically, regarding the lack of precision in the EAW request, due to the possibility of leaving general descriptions of the offence and its circumstances, and the lack of judicial scrutiny of the request by the executing authorities, a few proposals could be made to amend this shortcoming presenting itself at the execution stage of an EAW procedure. Such a proposal could be to re-introduce the double criminality requirement for all offences, however, this would entail the "removal" of the 32 offences listed in Article 2 of the Framework. Such a re-introduction and removal of the 32 offences would significantly challenge the objective of a quick and simplified surrender procedure and undermine the mutual recognition which the EAW system is built on rather than rebuild the confidence in each other's criminal justice systems. A consideration could also be made to require the issuing authority to present a prima facie case to the executing authority showcasing sufficient evidence for a trial. While having to showcase that the evidence possessed in

[133] See Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, 1 May 2014, OJ L 130, Art. 6 along with recitals 11, 12 and 26.

sufficient for a trial may be a stretch too far, a smaller requirement to provide more information about the offence and the circumstances surrounding the offence may be of interest. Not only would such a requirement allow executing authorities to feel more at ease when ordering an execution of the EAW, as a more detailed description would show that there is a credible case where an investigation has been thoroughly conducted, it would also limit the need to request additional information which has been known to cause delays. An amendment could also be made in soft-law instruments giving executing authorities a greater discretion to enter into communication with the issuing authority when there are reasonable grounds to believe that the person pursued by the EAW is not the individual who committed the offence – rather, they are a victim of mistaken or stolen identity.

In order to address all of the issues and effects of this particular problem area, meaning accounting for both the lack of proportionality and the lack of scrutiny in the executing Member State, the most successful solution in my view would be the introduction of a mandatory proportionality check in the issuing Member State accompanied by some assisting measures. Considering that the disproportionate application of the instrument has already undermined some Member States' confidence in the system and in other Member States, the most important objective of the solution is to rebuild the confidence in the EAW system and its proper application. This would require changes affecting both ends of the surrender procedure. As the trust between Member States and the confidence in the system has been shaken, it would be helpful if the proportionality check was done on record and included in the issued EAW – making it less likely for executing Member States to question whether a check has actually been made. Of course, some disproportionate, ill-motivated or investigating EAWs may still make their way out into the EU despite the introduction of a mandatory proportionality check. However, the introduction of the provision would allow for the executing authority to seek a preliminary ruling from the CJEU when there is concern that the issuing authority did not properly conduct the proportionality check. The CJEU would then assess whether the proportionality check has been conducted in conformity with the Framework – providing a potential ground for refusal or postponement on a case-by-case basis at the discretion of the CJEU. This would not challenge the principle of mutual recognition in the same way as if the executing authority conducted the proportionality check. Any referrals for preliminary rulings should, however, still only be made in exceptional cases where there are strong concerns that a proportionality has not been properly conducted, neglected or the record looks to be manufactured. Furthermore, seeking a preliminary ruling should not be the first option, rather the Member States should begin by entering into communication with the issuing authority and enquire about the conducted proportionality check, the purpose pursued by the EAW and the stage of the proceedings.

In addition to the recorded proportionality check I would consider requiring a higher level of descriptions of the offences and their circumstances from the on-set showcasing the existence of a credible case – providing the executing authorities with more insight into the case and limiting the delaying requests from executing authorities asking for additional information. While the proportionality check would act as a filter for any irrational, premature and ill-motivated warrants, it provides no protection in the cases of mistaken or stolen identities. Having to provide more information would potentially bring to light any inconsistencies in the case of mistaken identities and any EAWs issued in bad faith. However, such an amendment may still not provide a bulletproof safeguard in cases where the sought person is believed to be a victim of mistaken or stolen identity, as we have seen that issuing Member States have been adamant that the surrender still took place despite being made aware of the serious mistake.[134] Any legislative changes would be considered inappropriate in this regard as well as they would be difficult to formulate, rather it should be left up to the discretion of the CJEU – unfortunately, no case has gotten this far yet as the issuing authorities have conceded to their mistake and withdrawn the EAW before its execution. The requirement to provide further information would also have the effect of acting as a 'scarecrow' for any authorities issuing EAWs in bad faith as it would have the potential of highlighting inconsistencies not found in the recorded proportionality check.

The proposed amendments of introducing a mandatory proportionality check before issuing modelled after the recommendations in the Handbook, which must be recorded and accompanying the EAW, and more detailed descriptions illustrating the credibility of the case in EAWs for prosecution are very likely to help amend this particular problem area. Limiting the misuse and abuse of the instrument, increasing the use of other more appropriate mutual recognition instruments, allowing executing authorities to feel more informed and confident in their orders of executing EAWs and, in turn, rebuilding the confidence of the Member States in the entire system.

[134] See the cases of Mr. Choudhary and Mr. Arapi.

4. The everlasting EAW – *issues persisting after non-execution*

4.1 The need for a removal of unsuccessful EAWs – the cases of Deborah Dark and Jacek Jaskolski

The second issue which will be addressed in this thesis, is the lack of obligation to withdraw unsuccessful EAWs – i.e. EAWs which have been refused execution on reasonable grounds. As of right now, the Framework provides no obligation for judicial authorities to withdraw an EAW – a request can be made to the issuing authority to revoke the EAW and subsequent SIS/Interpol-alert, however the actual decision is solely up to the discretion of the judicial authority in the issuing Member State making it unlikely to be successful.[135] This may result in an EAW being active for years – two cases have highlighted this particular issue, namely the cases of Deborah Dark and Jacek Jaskolski.

In 1988, a 24-year-old ***Deborah Dark*** travelled to Spain with her boyfriend and young daughter in a rented car. Upon her return to the UK through France, the border police found a large amount of marihuana hidden in the flooring of the rental car.[136] She was arrested in France on suspicion of drug related offences in 1989 and acquitted of all charges at the trial the same year, which subsequently led to her returning to the UK. However, unbeknownst to her and her French lawyer, the prosecution had successfully appealed the decision and in 1990 she was convicted and sentenced to six years in prison in her absence.[137] In 2005, 15 years after the trial, the French authorities issued an EAW against Dark for the purpose of serving her sentence. Dark was arrested a total of three times in a three-year period following the EAW. First at gunpoint in Turkey in 2007, then in Spain in 2008 after visiting her father, and at last in the UK in 2009 when returning from Spain.[138]

Even though the courts in both Spain and the UK had refused to execute the EAW due to the substantial amount of time that had passed since the date of the alleged offence, the French authorities refused to remove the EAW resulting in a continued risk of arrest in all other Member States. It was only after the involvement of international organisations such as Fair Trials

[135] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, para. 10.3.
[136] J. Silverman, *"Grandmother spent month in Spanish jail over 20-year-old arrest warrant"*, The Telegraph, 26 July 2009,https://www.telegraph.co.uk./news/worldnews/europe/5906424/Grandmother-spent-month-in-Spanish-jail-over-20-year-old-arrest-warrant.html (accessed 05.10.2021).
[137] Ibid.
[138] Ibid.

International and the public media attention they brought to the case, that the French authorities finally agreed to withdraw the EAW in May of 2010 – 20 years after the trial.[139]

Another case illustrating both the issue with disproportionality and the issue of not recalling an EAW, is the case of ***Jacek Jaskolski***; a disabled former science teacher sought by Poland for theft. In 2000, the Polish citizen made a withdrawal from an ATM which unintentionally took him over the agreed overdraft limit by 11.684 zloty (approximately 3000 €).[140] When he was prevented from complying with the scheduled payment due to his health, the bank began a repossession procedure on Mr. Jaskolski's house in order to collect the debt. The house was sold at an auction and the obtained amount from the sale exceeded the debt; in February of 2004 it was confirmed by the regional Civil Court overseeing the sale that the debt had been repaid in full and the requirement of him compensating the bank was satisfied.[141] In the summer of that same year, Mr. Jaskolski and his family relocated to the UK where he six years later was arrested pursuant to the EAW issued by Polish authorities for going over his overdraft limit – threatening a criminal trial for a debt that had been repaid years earlier.[142] While the UK has refused to extradite him, due to the debt having been repaid and Mr. Jaskolski's fragile health following 3 strokes, the Polish authorities would not remove the EAW.[143]

Practice has shown that EAWs have also stayed in place where the extradition has been refused under one of the mandatory grounds for non-execution laid down in Article 3 of the Framework.[144] In fact, it has been shown that some EAW alerts have remained active even after the sought person has been surrendered and served their sentence in the issuing Member State.[145] It is clear that the principle of mutual recognition is one-sided as Member States are obliged to recognise an EAW and surrender the individuals sought through the EAW, but a decision of non-execution by a Member State is not granted the same recognition as issuing Member States have no obligation to revoke an outstanding EAW. If an individual is able to successfully defend an EAW resulting in a non-execution they may not be subject to further arrests in the same EAW in said Member State, however the still operational EAW allows the issuing Member State to seek their arrest in the

[139] Fair Trials, Case Study on Deborah Dark, https://www.fairtrials.org/case-study/deborah-dark (accessed 05.10.2021)**;** M. Tran, *"France drops Deborah Dark arrest warrant"*, The Guardian, 25 May 2010, https://www.theguardian.com/world/2010/may/25/france-drops-deborah-dark-arrest-warrant (accessed 05.10.2021).
[140] E. Smith, *"Running before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security"*, New Journal of European Criminal Law, Vol. 4 (1–2), p. 85**;** Fair Trials International, Case Archive, Jacek Jaskolski - Poland, archived copy: https://web.archive.org/web/20110205101440/http://www.fairtrials.net/cases/spotlight/jacek_jaskloski/ (accessed 05.10.2021).
[141] Ibid.
[142] E. Smith, *"Running before We Can Walk? Mutual Recognition at the Expense of Fair Trials in Europe's Area of Freedom, Justice and Security"*, New Journal of European Criminal Law, Vol. 4 (1–2), pp. 85-86.
[143] Ibid., p. 86.
[144] Ibid., p. 88.
[145] Ibid.

remaining 25 Member States not including the issuing Member State. Your name would still be on the Europe-wide alert system, leaving you at risk for 'unnecessary' rearrests, unlawful detention and even potential surrender if you were ever to leave the refusing executing Member State – this is particularly intrusive when the refusal was based on reasonable grounds likely to be reapplied in every arresting country. This has the effect of leaving an individual confined to a particular Member State for fears of being arrested until the issuing authorities decide to revoke the EAW which, as we saw in the case of Deborah Dark, can take years. While the result may not be considered a deprivation of liberty in a strict legal sense as they are free to roam about in the refusing Member State, the excessive restriction on the victim's freedom of movement outside of said Member State has a somewhat similar effect – essentially turning them into prisoners without being *actually* incarcerated.

4.2 How has this issue been addressed in the EU and what still needs to be done

As indicated above, the Framework itself provides no provision regulating how long an EAW can be valid nor any provision for withdrawing an unsuccessful EAW. The European Parliament has raised concerns about the lack of a regular review on SIS alerts and the uncertainty of the continued validity of an EAW after refusing its execution.[146] Thereto, it has called for a regular review on non-executed EAWs, considerations of withdrawals where the EAW has been refused on mandatory grounds and for active SIS alerts to be updated with the information of the non-execution of the EAW.[147] However, there does not seem to be any legislative changes on the agenda to provide such provision in the Framework. Information about withdrawing an EAW has been addressed in the latest update of the non-binding Handbook on how to issue a European Arrest Warrant. After highlighting that an EAW and corresponding SIS alert will remain valid until the issuing authority decides to withdraw it, the Commission reiterates that there should always be a legitimate ground for an EAW to exist.[148] It then proceeds to encourage Member States to reconsider whether an EAW should remain active if its execution has been refused – taking into account the likelihood of the refusal ground to be reapplied by other Member States, if maintaining the EAW is still proportionate and if another measure would be more effective than the EAW.[149] In regard to the SIS

[146] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174, p. 3.
[147] Ibid., pp. 6-7**;** European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), P9_TA(2021)0006, p. 13.
[148] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, 6 October 2017, OJ C 335, p. 59.
[149] Ibid., p. 60.

alerts themselves, the SIS II Decision provides that an alert remains active for three years and is automatically deleted thereafter if the issuing authority does not extend its duration.[150]

The different prosecutorial systems applied in Member States also play a role in the context of withdrawing unsuccessful EAWs; this is particularly relevant for Member States who subscribe to the principle of compulsory prosecution – similar as with the issue of proportionality. The likelihood of these Member States reviewing whether an EAW for the purpose of prosecution should remain active following a non-execution or willingly withdrawing the unsuccessful EAW is substantially low. This is again mainly attributed to the fact that such a withdrawal would most likely, as in the case of a proportionality check before issuing, be in conflict with the obligation of the authorities to do everything in their power to prosecute *all* offences. Considering that this particular problem area certainly has a strong relation to the issue of proportionality, there is no doubt that any legislative changes to introduce a mandatory proportionality check before issuing an EAW could have a substantial impact on decreasing the number of outstanding irrational warrants which have been refused execution. An effective proportionality check would most likely have had the effect of the EAW never having been issued in the first place in regard to the aforementioned cases of Deborah and Jacek.

Although, as was discussed in the section on proportionality, a mandatory proportionality check at the issuing stage has the potential to provide a certain level of protection from EAWs being issued where it is neither proportional nor appropriate – some of these cases can still slip through. A requirement to withdraw an EAW directly after a refusal could be introduced, however it has been argued that such a requirement would only be appropriate for refusals on the mandatory non-execution grounds independent of national legislation such as *"ne bis in idem"* found in Art. 3(2) of the Framework.[151] I agree with this argument limiting a direct removal to grounds of who are universal in nature in order to minimise the potentially disproportional evasion of justice, however, I do believe that an introduction of such a differentiating requirement would cause difficulties in application. Instead, a more appropriate measure would be to introduce an obligation in the main body of the Framework to *review* the EAW when an execution has been refused – following the guidelines set out in the Handbook. Calling on the issuing authority to reflect on the seriousness of the offence, the likelihood of the EAW being subjected to similar refusals in the future and whether the impact on the individual's human rights would be proportional when there is such a risk of further non-executions. If there is a chance that a majority of the remaining Member States would

[150] *Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II)*, 7 August 2007, OJ L 205/63, Article 44 (2 & 5).
[151] A. Weyembergh, I. Armada & C. Brière, *"Critical Assessment of the Existing European Arrest Warrant Framework Decision"*, Research Paper for DG for Internal Policies of the Union, European Parliament, 2014, EAVA 6/2013, Annex I, p. 18.

refuse the execution of the same EAW, such as in the case of *"ne bis in idem"*, the likelihood of success would be second to none and maintaining an EAW in such a case would therefore be widely disproportionate to the interest of the individual. As in the case of proportionality, such an introduction into the main body of the Framework provides a stronger "footing" and a greater chance of these safeguards being regarded by all Member States regardless of their prosecutorial system.

As in the case of introducing any "reflective" measure, it would still be possible to take advantage of the fact that there is no obligation to take a certain action by simply deciding against the results of the review. Combatting spiteful issuing authorities in these cases would entail a challenge. The SIS II Decision does provide a time limit on the alert broadcasting the EAW, meaning that the alert would no longer be active after the time limit of 3 years, unless it is extended. While the SIS II Decision does state that the issuing Member State may decide to extend the alert if the individual assessment which should be recorded finds that it would be necessary, it is unclear whether this necessity can be rebutted or if an extension can be denied.[152] It could in theory be possible for a lawyer in the issuing Member State to refer a question to the CJEU for a preliminary ruling on the compatibility with EU law and the Charter of maintaining an EAW and corresponding SIS alert – however, in regard to spiteful issuing Member States, this would be an unlikely move. Considering that the necessity "requirement" for extending an alert is solely based on the purpose for which the alert was issued, the alert could still be considered necessary to its purpose as long as an arrest and surrender of the sought person has not been made. One could possibly argue that as it is recommended that an alert is mainly to be issued when the whereabouts of the sought person is unknown, that the alert "loses" its necessity once a refusal has been made as the location of the individual thus has become known – however, the Framework does allow for the issuing of an alert in any event.[153] Even if an issuing Member State were to be unsuccessful in extending the SIS alert, three years is still an overwhelming time period where the individual's freedom of movement is restricted. Furthermore, the automatic removal of the alert, would not result in the underlying EAW disappearing – the issuing authority could continue to transmit it to any and all Member States you would find yourself in, in fact, they could even issue a new alert if they wished.

It could be proposed that a similar time limit could be introduced on the EAW itself accompanying the "review"-provision in order to combat any potential spiteful issuing authorities. Obligating an issuing authority to withdraw an EAW after a particular time period if an execution has been refused on reasonable EU law grounds. The provision would thus encourage issuing authorities to

[152] See SIS II Decision, Art. 44 (4)
[153] Framework Decision on the EAW, Art. 9 (2).

review the appropriateness of maintaining an EAW after a refusal and provide a time limit on the validity of an *unsuccessful* EAW. This time limit would not be applicable on just any EAW, but only those that have been unsuccessful following a refusal of execution. It would therefore not impact long-standing EAWs where the sought person is still "at large". This kind of strict time limit would potentially require closer supervision by the EU or an independent body, referring questions for preliminary rulings to the CJEU where the time limit is exceeded – something that, unfortunately, might not be entirely possible for the time being. However, it is my belief that the introduction of such a time limit can still be possible and be highly effective without the need of extraordinary supervision, as it does fall on the Member States to follow and respect EU law.

Considering that an executing authority would most likely have a clear interest in knowing whether the EAW they are currently having to decide on has previously been refused in another Member State and on what grounds it would potentially be of interest to somehow add a 'flag' on the EAW and accompanying SIS alert when a refusal has been made. The measure of flagging is already being used in regard to SIS alerts, however the flag in question is only valid in the territory where a refusal has been made to prevent rearrests in their territory and is not visible to other Member States. An amendment could be made in the SIS II Decision to that regard, to make the flag visible in other Member States. I would, however, find it unwise to include the information pertaining to the grounds for refusal in the alert itself as it could influence and prejudice the executing authority. Instead, a simple flag letting the authorities know that the execution of this particular EAW has been refused in another Member State, leaving the information on the previous refusal decision at the disposal of the national SIRENE Bureau that added the flag to which a request from the executing authority can be made to view said information if it wishes to do so.

5. The dangers of assuming all criminal justice systems in the EU are of the same quality – *the issue with mutual trust*

5.1 Inadequate detention conditions throughout the EU

5.1.1 The risk of being subjected to inhuman or degrading treatment

In this day and age, testimonies on inhumane conditions in detention facilities are certainly not unheard of. A number of cases and reports from the European Court of Human Rights (ECtHR) and the European Committee for the Prevention of Torture (CPT) have also shown that prison conditions in other Member States, *de facto*, often fall short of the required quality of standards.[154] It can be anything from issues with small cell spaces and overcrowding to much more serious issues such as medical neglect and physical ill-treatment of prisoners by prison staff; the common denominator being that they can all amount to possible violations of Article 4 of the Charter, and Article 3 of the ECHR. While the level of concern and reported issues may vary, the reports on questionable detention conditions cover Member States from all over Europe.

Overcrowding is likely considered the most reported issue when it comes to prison detentions in the Member States. Although recent reports have shown improvements in a number of Member States, the overall problem persists. The most worrying prison occupancy rates[155] as of 2020 and 2021 come from Romania (124,8 %), France (115,4 %) and even Belgium (109,5 %);[156] with another seven Member States[157] reported to have "milder" cases of overcrowding. During a periodic visit to France the CPT noted that some facilities were overcrowded to a worrying level, with occupancy rates exceeding 200 % resulting in almost 1500 prisoners sleeping on mattresses on the floor at the time of the visit – this is mainly contributed to an uneven distribution of prisoners as other facilities are under-used.[158] For many states the reported issues stop here, however, there are some Member States who have repeatedly been criticised for their persistently poor prison conditions.

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[154] See ECtHR Factsheet – Detention conditions and treatment of prisoners, October 2020 and various CPT Reports from 2015-2020.

[155] The occupancy rates are established based on the official capacity of the prison system and the total prison population in said prison system – e.g. in Romania 124 prisoners are distributed to a prison with the capacity and cell space to only hold 100 prisoners.

[156] See the World Prison Brief database at https://www.prisonstudies.org/map/europe (accessed 12.12.2021).

[157] Greece (108,1 %), Italy (106,8 %), Cyprus (105,3 %), Slovenia (104,2 %), Denmark (103,5 %), Sweden (101,1 %) and Croatia (100,6 %).

[158] European Committee for the Prevention of Torture, *"Rapport au Gouvernement de la République française relatif à la visite du 4 au 18 décembre 2019"*, 24 June 2021, p. 31.

Romania, for example, has regularly been condemned by the ECtHR for its overcrowded prisons and inadequate detention conditions;[159] the latest CPT Report published in 2019 also showed that the conditions fall far below the European standards concerning the treatment of prisoners. While the report commemorated the efforts that had been taken to combat the issue of overcrowding, it noted that it still remained an issue of serious concern – the ECtHR has also witnessed that the decrease stopped in June 2020 and has steadily increased again since then.[160] During their periodic visit to the Romanian prisons in 2018, the CPT received a considerable amount of allegations of physical ill-treatment by prison staff – mainly carried out by masked intervention groups which are based in the visited prisons.[161] This severe physical ill-treatment consisting of punches, kicks, use of batons and even one case of sexual abuse, would usually take place outside the view of CCTV in stairwells and staff offices.[162] The situation at the Galati prison was considered "particularly alarming", as prisoners were afraid to talk about their experiences in fear of retaliation – showcasing a clear climate of fear. The CPT has made an ad hoc visit to the prisons from 10 to 21 of May this year to follow up on the situation, however the report is still under preparation.

The issue of concerns about detention conditions in some Member States specifically in relation to the execution of an EAW was recently brought up by the CJEU in 2016 through the joined cases of Aranyosi and Căldăraru (C-404/15 & C-659/15 PPU), which will be presented below.

5.1.2 The case of Aranyosi & Căldăraru

In the case of Mr. Aranyosi, two EAWs had been issued by Hungarian authorities seeking the requested person for the purpose of criminal prosecution for theft.[163] Mr. Căldăraru, on the other hand, was sought by Romanian authorities for the purpose of executing a prison sentence of one year and eight months imposed for the offence of driving without a license.[164] In both cases, concerns about the detention conditions in the issuing states were raised and the issuing judicial authorities were requested to provide information on the prisons where the requested persons would be detained.[165] None of the issuing authorities could provide the requested information and the executing court, only having access to certain information on the prison conditions from ECtHR

[159] See ECtHR cases *Iacov Stanciu v. Romania*, no. 35972/05, 24 July 2012**;** *Remus Tudor v. Romania*, no. 19779/11, 15 April 2014**;** *Florin Andrei v. Romania*, no. 33228/05, 15 April 2014**;** *Rezmiveș and Others v. Romania*, no. 61467/12, 25 April 2017**;** *Dorneanu v. Romania*, no. 55089/13, 28 November 2017**;** *Varga and Others v. Romania*, no. 66094/14, 14 December 2017**;** *Polgar v Romania*, no. 39412/19, 20 July 2021.
[160] European Committee for the Prevention of Torture, *"Report to the Romanian government on the visit from 7 to 19 February 2018"*, 19 March 2019, p. 33**;** ECtHR, *Polgar v. Romania*, no. 39412/19, 20 July 2021, para 107.
[161] European Committee for the Prevention of Torture, *"Report to the Romanian government on the visit from 7 to 19 February 2018"*, p. 35.
[162] Ibid., pp. 36-37.
[163] Court of Justice, Judgment of 5 April 2016, joined cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru,* para. 29-30.
[164] Ibid., para. 48-51.
[165] Ibid., para. 34 and 56.

case law, proceeded to halt the proceedings and refer two nearly identical questions to the CJEU concerning the interpretation of Articles 1(3), 5 and 6(1) of the Framework.[166]

The Court began by pointing out the fundamental importance of the principles of mutual trust and mutual recognition for the AFSJ, while reiterating its previous case law;[167] emphasising that Member States, *in principle*, are obliged to act on an EAW and can only refuse to execute an EAW on the exhaustive refusal grounds in Articles 3 and 4 of the Framework.[168] The Court then goes on to state that it has recognised that limitations to the aforementioned principles can be made in exceptional circumstances.[169] Emphasising the importance of Article 1(3) of the Framework and the obligation to comply with the EU Charter, the Court notes that the prohibition of inhuman and degrading treatment found in Article 4 of the Charter, corresponding to Article 3 of the ECHR, is of absolute character as it is closely linked to the respect for human dignity.[170] It then goes on to say that if an executing authority is in the possession of evidence demonstrating that there is real risk of inhuman or degrading treatment in the detention facilities of the issuing state, the executing authority is required to assess this risk when deciding the surrender of the sought person by using a two-stage test.[171]

Under the first step, the executing authority must assess whether there are systemic or general deficiencies in the detention conditions of the issuing Member State, which may affect certain groups of people or certain facilities, by relying on updated information from international organisations, reports from NGOs and judgments from the ECtHR.[172] If the existence of a systemic or general deficiency is found, the executing authority must proceed to ascertain whether there are substantial reasons to believe that the sought person will be exposed to such a real risk of inhuman or degrading treatment; this is done by requesting supplementary information regarding the detention conditions of the facility where the sought person will be held from the issuing authority.[173] In light of this information, or lack thereof, if the executing authority finds that there is a real risk that the sought person will be subjected to inhuman or degrading treatment once surrendered, the execution of the EAW must be postponed until the executing authority receives additional information which enables them rule out the existence of this risk.[174] Furthermore, if the

[166] Joined cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, para. 39, 42-43, 46, 56, 59-61 and 63.
[167] Ibid., para. 75-78.
[168] Ibid., para. 79 and 80.
[169] Ibid., para. 82.
[170] Ibid., para. 83-87.
[171] Ibid., para. 88.
[172] Ibid., para. 89-90.
[173] Ibid., para. 92 and 95.
[174] Ibid., para. 98.

risk cannot be ruled out within a reasonable time, the executing authority may decide to bring the procedure to an end.[175]

The Court has essentially accepted an exemption, although limited, from the obligation to immediately recognise and execute an EAW. It is important to note, however, that merely proving the existence of a general or systemic deficiency in the detention system of the issuing Member States is not enough to refuse or postpone the execution of an EAW, there has to be substantial reasons for believing that the sought person will face a real risk of such a violation if surrendered.[176]

5.2 The growing trend of undermining EU core values

5.2.1 The Rule of law backslide – a look at Hungary and Poland

The core values in Article 2 of the TEU, upon which the EU is founded, provide the base for the principles of mutual recognition and mutual trust that the EAW system operates on; the entire system is built on the premise that each and every Member State is respecting democracy and the rule of law (among other things). The unfortunate reality is that the respect for human rights and democracy has seen a decline around the world in the last decade and, sadly, even some EU Member States have followed this path. Recent years have witnessed several Member States actively moving further and further away from the founding core values of the EU set out in Art. 2 of the TEU, with some resorting to direct attacks on values such as democracy and the rule of law. The expression "rule of law backslide" is the most appropriate description of what is currently happening. The EU is essentially in the midst of a devastating rule of law-crisis. Although there is no official definition of rule of law backsliding, some scholars have opted to define it as a process where the newly elected public authorities deliberately implement plans with the goal of systematically weakening and annihilating pluralism and dismantling the liberal democratic state.[177] This is done by not only taking control over the executive and legislative branches of government, but also the media and everything in between. The result is usually a long-term rule of the dominant party, as they make it impossible to have fair elections through their control of all branches.

Candidate countries, i.e. countries who wish to become EU Member States, are filtered for their compliance with the founding core values before they are allowed to accede to the EU – this is e.g. why Turkey has yet to accede to the EU despite commencing the process in 2005. Serious backsliding in the respect for democratic standards and the rule of law, systemic lack of judicial

[175] *Aranyosi and Căldăraru*, para. 104.
[176] See *Aranyosi and Căldăraru,* para. 91.
[177] L. Pech and K.L. Scheppele, "*Illiberalism Within: Rule of Law Backsliding in the EU*", Cambridge Yearbook of European Legal Studies, Vol. 19, 2017, p. 10 and 12.

independence and continued deterioration of human and fundamental rights have led to a standstill in negotiations since 2016.[178] However, the issue becomes rather more difficult when the undermining of the core values emerges after full accession to the EU as there is no mechanism which can expel a Member State once membership has been gained – more commonly referred to as the *"Copenhagen dilemma"*[179]. This dilemma is currently a devastating reality in the cases of Hungary and Poland as neither one of them would qualify for EU membership, had they applied today.

The systematic deconstruction of the rule of law in ***Hungary*** began when Viktor Orbán and his political party, Fidesz, won the election in 2010. Using its majority in the parliament, the party has made major changes to the country's legal framework that weakens legal checks on its authority, interfere with media freedom and further undermines the protection of human rights.[180] The judicial independence has been compromised in many ways through a series of legal and constitutional changes. First the administration of the Hungarian courts was centralised under the president of the National Judiciary Office (NJO) who was elected by the parliament, and the implemented laws gave said president extensive power over the court system – e.g. power to recruit and appoint senior judges, transfer cases from one court to another and even judges without their consent.[181] The parliament then passed the Transitional Act in November 2011 that lowered the age limits for retirement from 70 to 62 years which had immediate effect as of 1 January 2012, forcing 274 judges to retire who's positions were then to be filled by government-loyal lawyers; they were then reinstated a year later after international criticism, but in lower positions.[182] The introduction of new laws[183] which furthers the undermining of the rule of law has continued throughout the years and Hungary is being described as a "Mafia state"[184] as it continues to float between democracy and autocracy.

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[178] European Commission, Commission Staff Working Document, *"Turkey 2020 Report"*, 6 October 2020, SWD(2020) 355 final, pp. 5-7.
[179] See Vice-President of the European Commission and EU Justice Commissioner Viviane Reding's speech at the General Affairs Council in Luxembourg on 22 April 2013, *"Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism"*, SPEECH/13/348.
[180] Human Rights Watch, *"Wrong Direction on Rights: Assessing the Impact of Hungary's New Constitution and Laws"*, 16 May 2013, p. 1 & 6, https://www.hrw.org/sites/default/files/reports/hungary0513_ForUpload.pdf (accessed 26.11.2021).
[181] Ibid., p. 8.
[182] Ibid., pp. 12-13.
[183] Such as the 2018 law creating a separate administrative court for the handling of cases related to basic human rights with judges appointed by the government-loyal NJO President and the recent anti-LGBTQI+ law banning discussions about gender and sexual identity implemented in the summer of 2021.
[184] B. Magyar, *"The EU's Mafia State"*, 21 June 2017, Project Syndicate, https://www.project-syndicate.org/commentary/orban-hungary-mafia-state-by-balint-magyar-2017-06. (accessed 27.09.2021).

The situation in ***Poland*** is especially concerning. After winning the 2015 election, the right-wing Law and Justice Party (PiS) embarked on a path which in many aspects mirrors the initiatives taken in Hungary; introducing legislative measures interfering with judicial independence and the administration of justice, the independence of the media, freedom of expression and more. It began by re-organising the Constitutional Tribunal, giving the newly appointed pro-government judges the power to veto in key decisions by increasing the number of judges required to reach a decision and allowing the parliament, the President or the Ministry of Justice the power to dismiss the tribunal's judges – in order to limit the eventual pushback.[185] Having taken control of the Constitutional Tribunal, the government moved to reconstruct the National Council of the Judiciary (NCJ), the body responsible for overseeing the courts and appointing judges, by allowing the government rather than the fellow judges to appoint the 15 judicial members.[186] A few months later, 15 pro-government judicial members were appointed to the NCJ giving the pro-government members a majority. At the same time as they were reconstructing the NCJ, the government also undertook a Supreme Court reform. This reform lowered the retirement age to 65 years, effectively forcing the retirement of almost 40 % of the supreme court judges; it also created two new chambers composed solely of judges appointed by the new NCJ – the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs.[187]

In February of 2020, the parliament adopted a new law whose provisions prevent Polish judges from questioning the legitimacy of judicial appointments or government reforms, from complying with judgments from the CJEU and even from referring questions for a preliminary hearing – essentially acting as a "muzzle" law.[188] Any judges or prosecutors speaking up against the problematic reforms, questioning the appointment of neo-judges or implementing CJEU judgments will, and have already been, subjected to public shaming, smear campaigns and ultimately arbitrary

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[185] Human Rights Watch, *"Eroding Check and Balances: Rule of Law and Human Rights Under Attack in Poland"*, 24 October 2017, p. 11, https://www.hrw.org/sites/default/files/report_pdf/poland1017_web.pdf (accessed 26.11.2021)**;** Amnesty International, *"Poland: Free Courts, Free People - Judges Standing for their Independence"*, July 2019, p. 9, https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR3704182019ENGLISH.pdf (accessed 26.11.2021).

[186] European Commission, Commission Staff Working Document, *"2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 30 September 2020, SWD(2020) 320 final, p. 4**;** Venice Commission, Opinion No. 904/2017, 11 December 2017, CDL-AD(2017)031, pp. 6-7**;** Venice Commission, Opinion No. 977/2020, 16 January 2020, CDL-AD(2020)017, p. 3.

[187] Human Rights Watch, *"Eroding Check and Balances: Rule of Law and Human Rights Under Attack in Poland"*, 24 October 2017, p. 16, https://www.hrw.org/sites/default/files/report_pdf/poland1017_web.pdf (accessed 26.11.2021)**;** Amnesty International, *"Poland: Free Courts, Free People - Judges Standing for their Independence"*, July 2019, pp. 23 and 27, https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR3704182019ENGLISH.pdf (accessed 26.11.2021)**;** Commission Staff Working Document, *"2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 30 September 2020, SWD(2020) 320 final, p. 5**;** Venice Commission, Opinion No. 904/2017, 11 December 2017, CDL-AD(2017)031, p. 9 and 11**;** Venice Commission, Opinion No. 977/2020, 16 January 2020, CDL-AD(2020)017, pp. 3-4.

[188] Commission Staff Working Document, *"2020 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 30 September 2020, SWD(2020) 320 final, pp. 6-8**;** Commission Staff Working Document, *"2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 20 July 2021, SWD(2021) 722 final, pp. 10-11**;** Venice Commission, Opinion No. 977/2020, 16 January 2020, CDL-AD(2020)017, pp. 9-10.

disciplinary proceedings from the Disciplinary Chamber which could lead to unlawful dismissals.[189] Instead, the new Chamber of Extraordinary Control and Public Affairs, composed solely by PiS loyalist judges, holds the sole power to decide on issues concerning judicial independence.[190]

As a result of all the judiciary reforms, the PiS government now has the power to interfere not only with the structure of the entire justice system through the PiS-loyal NCJ appointing the judges, but also the judicial output through the threat of disciplinary proceedings; all the while having a politically compromised Constitutional Tribunal protecting them from any objections questioning the compliance with the Constitution. The most recent attacks on the rule of law have come in the form of two rulings from the politically compromised Constitutional Tribunal. In a summer decision of this year, the Tribunal ruled that the interim measures issued by the CJEU[191] to suspend the application of the provisions providing the jurisdiction of the Disciplinary Chamber and to refrain from referring cases to the Disciplinary Chamber, were incompatible with the Polish Constitution and therefore not binding.[192] In its most recent decision on 8 October 2021 it ruled that two core articles (Article 1 and 19) of the TEU were incompatible with the Polish Constitution – essentially, declaring that CJEU rulings on judicial independence were unconstitutional and allowing Poland's courts to ignore such rulings by the CJEU.[193]

While there is no mechanism to expel a rogue Member State, there is a possibility to suspend the rights of a rogue Member State. Both Hungary and Poland are currently subjects of Article 7(1)

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[189] Commission Staff Working Document, *"2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 20 July 2021, SWD(2021) 722 final, p. 10; Amnesty International, *"Poland: Free Courts, Free People - Judges Standing for their Independence"*, July 2019, pp. 11-18, https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR3704182019ENGLISH.pdf (accessed 26.11.2021).
See also M. Jałoszewski, *"Judges under fire: 43 judges already targeted by disciplinary officer and prosecutors"*, 10 January 2020,https://ruleoflaw.pl/judges-under-fire-43-judges-already-targeted-by-disciplinary-officer-and-prosecutors/ (accessed 06.10.2021)**;** M. Jałoszewski, *"Ziobro breached the CJEU judgment and suspended Judge Synakiewicz for applying EU law"*, 10 September 2021, https://ruleoflaw.pl/ziobro-breached-the-cjeu-judgment-and-suspended-judge-synakiewicz-for-applying-eu-law/ (accessed 06.10.2021)**;** M. Jałoszewski, *"Judge Piotr Gąciarek was suspended by Ziobro's nominee for implementing EU law"*, 14 September 2021, https://ruleoflaw.pl/judge-piotr-gaciarek-was-suspended-by-ziobros-nominee-for-implementing-eu-law/ (accessed 06.10.2021)**;** M. Jałoszewski, *"Judge Niklas-Bibik suspended for applying EU law and for asking preliminary questions to the CJEU"*, 30 October 2021, https://ruleoflaw.pl/judge-niklas-bibik-suspended-for-applying-eu-law-and-for-asking-preliminary-questions-to-the-cjeu/ (accessed 23.11.2021)**;** M. Jałoszewski, "*Judge Rutkiewicz of Elbląg suspended for applying EU law. Against the CJEU order"*, 9 November 2021, https://ruleoflaw.pl/judge-rutkiewicz-of-elblag-suspended-for-applying-eu-law-against-the-cjeu-order/ (accessed 23.11.2021).

[190] Commission Staff Working Document, *"2021 Rule of Law Report: Country Chapter on the rule of law situation in Poland"*, 20 July 2021, SWD(2021) 722 final, p. 11.

[191] Order of the Court (Grand Chamber) of 8 April 2020, case C-791/19 R, *European Commission v Republic of Poland*.

[192] A. Wójcik, *"Constitutional Tribunal ruled: CJEU interim orders do not apply in Poland"*, 16 July 2021, https://ruleoflaw.pl/constitutional-tribunal-ruled-cjeu-interim-orders-do-not-apply-in-poland/ (accessed 14.11.2021)**;** L. Gall, *"Poland Undermines Justice at Home and across Europe"*, Human Rights Watch, 16 July 2021, https://www.hrw.org/news/2021/07/16/poland-undermines-justice-home-and-across-europe (accessed 12.10.2021)**;** Wyrok Trybunału Konstytucyjnego z dnia 14 lipca 2021 r. sygn. akt P 7/20 (OTK ZU A/2021, poz. 49).

[193] J. Jaraczewski, *"Gazing into the Abyss: The K 3/21 decision of the Polish Constitutional Tribunal",* VerfBlog, 12 October 2021, https://verfassungsblog.de/gazing-into-the-abyss/ (accessed 20.10.2021)**;** Wyrok Trybunału Konstytucyjnego z dnia 7 października 2021 r. sygn. akt K 3/21 (Dz.U. 2021 poz. 1852).

TEU proceedings before the Council in order to determine the existence of a clear risk of a breach, referred to the Council in 2018 and 2017 by the Parliament and the Commission respectively.[194] Even if such a clear risk is found, the Council unfortunately faces a challenge in moving forward with the sanction of suspending the rights of the troubled Member States under Article 7(3) TEU. The triggering of the sanctions can only be done after determining a serious and persistent breach which requires a unanimous vote according to Article 7(2) TEU. Not only have both of the problematic Member States committed themselves to veto any vote calling for sanctions against each other.[195] Several other Member States are unlikely to support any sanctions against Hungary and Poland, such as Bulgaria and Romania that are currently undergoing rule of law monitoring themselves and the two remaining countries from the Visegráad Group[196], Czech Republic and Slovakia – with a few others having explicitly expressed their lack of support.[197]

5.2.2 The case of Artur Celmer (LM)

A recent case questioning the execution of an EAW in light of concerns about the rule of law in the issuing Member State relating to judicial independence – in regard to the continuous attacks on the independence of the judiciary by the PiS government in Poland – and raising concerns regarding the right to a fair trial, is the case of Artur Celmer (also known as LM in the judgment). Between the years of 2012 and 2013 three separate EAWs were issued against Mr. Celmer by Polish authorities, with the purpose of conducting criminal prosecutions, for trafficking in drugs.[198] Following his arrest in Ireland, he objected to his surrender citing that he would be exposed to a 'real risk of a flagrant denial of justice' if surrendered due to the recent politically motivated judiciary reforms in the Polish court system which would deny him his right to a fair trial (Art. 6 of the ECHR and Art.

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[194] European Parliament, *"Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL))"*, 23 December 2019, OJ C 433/66**;** European Commission, *"Proposal for a COUNCIL DECISION on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law",* 20 December 2017, COM (2017) 0835 final.

[195] K.L Scheppele, "*Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision",* VerfBlog*,* 28 July 2018,https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/ (accessed 27.11.2021).

[196] A cultural and political alliance of four Central European countries namely Czech Republic, Hungary, Poland and Slovakia, see more at https://www.visegradgroup.eu/about/about-the-visegrad-group (accessed 04.12.2021).

[197] See S. Overton, *"The EU and the rule of law"*, UK in a changing Europe, 3 July 2021, https://ukandeu.ac.uk/explainers/eu-and-the-rule-of-law/ (accessed 01.12.2021)**;** S. Zsiros , *"Croatian EU presidency: 'we don't believe in sanctions on Hungary and Poland'"*, Euronews, 20 January 2020, https://www.euronews.com/2020/01/20/croatian-eu-presidency-we-don-t-believe-in-sanctions-on-hungary-and-poland (accessed 01.12.2021)**;** A. Brzozowski and B. Gerdžiūnas, *"VILNIUS/WARSAW – Lithuania's PM backs Warsaw in rule of law dispute with Brussels"*, EURACTIV, 18 September 2020, https://www.euractiv.com/section/politics/short_news/vilnius-warsaw-lithuanias-pm-backs-warsaw-in-rule-of-law-dispute-with-brussels/ (accessed 01.12.2021)**;** EURACTIV, *"Slovenia PM backs Hungary, Poland in EU rule of law row"*, 18 November 2020, https://www.euractiv.com/section/all/news/slovenia-pm-backs-hungary-poland-in-eu-rule-of-law-row/ (accessed 01.12.2021).

[198] Court of Justice, judgment of 25 July 2018, case C-216/18 PPU, *LM*, para. 14.

47 of the Charter).[199] His arguments relied mainly on the Commission's reasoned proposal of 20 December 2017 triggering Article 7(1) TEU proceedings against Poland, which noted the concerns relating to the lack of independent constitutional review and the threat to the independence of the judiciary.[200] The Irish High Court proceeded to call on the CJEU for a preliminary ruling on whether deficiencies concerning the respect for the rule of law in the issuing Member State could lead to a suspension of the execution of an EAW.

After re-affirming and emphasising the importance of mutual trust and mutual recognition, the Court came to the conclusion that the two-tier test developed in *Aranyosi and Căldăraru* can be applied to cases where concerns are raised in relation to a denial of the right to a fair trial upon surrender. When faced with such a concern, the executing court must first assess to what extent the deficiencies in the issuing state are liable to impact the right to a fair trial by looking at objective, reliable and updated material on the operation of the issuing Member State's justice system; a reasoned proposal on the basis of Article 7(1) TEU is considered to be of great relevance for the purposes of such an assessment.[201] During this assessment the executing court should look both at external and internal factors. External factors are related to the court's autonomy, that there is no outside pressure liable to influence the independence of the judges and their decisions – such outside pressure could be e.g. political control, either directly or through the misuse of disciplinary regimes in order to control the content of judicial decisions.[202] The internal factors are linked to impartiality, that the court is objective and lacks any 'personal' interest in the outcome of the proceedings.[203] If the deficiencies are found liable to impact the right to a fair trial, the executing court must proceed to assess whether the deficiency is likely to affect the requested person, based on his or her personal situation and the nature of the offence, by requesting supplementary information from the issuing authority necessary to determine the individual risk.[204]

The Court concluded that if the executing court finds that the requested person runs a real risk of suffering a breach of his or her right to a fair trial if surrendered to the issuing Member State due to the extent of the deficiencies in the justice system and the circumstances in his or her case, it must refrain from executing the EAW.[205]

[199] Case C-216/18 PPU, *LM*, para. 15-16.
[200] Ibid., para. 17-18.
[201] Ibid., para. 61 and 74.
[202] Ibid., para. 63 and 67.
[203] Ibid., para. 65.
[204] Ibid., para. 68 and 75-77.
[205] Ibid., para. 79.

5.3 Questioning the premise of mutual trust in this day and age – the need for further human rights safeguards

5.3.1 How have human rights safeguards in the EAW been addressed by the EU since 2001?

As mentioned in the introduction of the Framework, respect for human rights is only vaguely expressed and no actual human rights safeguards had made their way into the text despite the Commission contemplating human rights violations as a bar against surrender in their explanatory memorandum to the initial proposal for a framework.[206] Instead, mentions of human rights are mostly limited to the preamble which is not legally required to be implemented in the Member States implementing legislation. This has resulted in differing interpretations of the rights mentioned in the preamble and varying implementations. Some Member States have deemed it unnecessary to transpose these rights in their national extradition legislation due to the fact that other Member States have adopted the ECHR or that they maintain that the preamble is too general for such a transposition. Other Member States have interpreted the preamble as authorising any enactment of these rights when implementing the EAW into their national extradition legislation and have gone on to either partly or completely transposing the preamble. Some Member States have taken it as far as including an additional explicit human rights refusal ground in their implementing legislation as a result of their interpretation of the preamble, despite the absence of a corresponding ground for non-execution in the Framework.[207]

The Commission has found the introduction of such grounds of non-execution disturbing as they went beyond the ones provided for in the Framework and were in that regard, *de facto*, violating EU law.[208] Stating in their 2005 implementation report and the 2006 revised report that *"the Council did not intend to make the general condition of respect for fundamental rights an explicit ground for*

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[206] European Commission's commentary on Art. 26 in the explanatory memorandum to the *"Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States"*, COM(2001)522 final, pp. 15-16.

[207] European Commission, Commission Staff Working Document, *"Annex to the Report from the Commission [...] on the European arrest warrant and the surrender procedures between Member States"*, 23 February 2005, SEC(2005) 267, p. 8**;** European Commission, Commission Staff Working Document, *"Annex to the Report from the Commission [...] on the European arrest warrant and the surrender procedures between Member States"*, 11 July 2007, SEC(2007) 979, pp. 8-10.
See e.g. Lovbekendtgørelse nr 833 af 25/08/2005 om udlevering af lovovertrædere som ændret ved lov nr 117 af 11/02/2020 om udlevering til og fra Danmark (udleveringsloven), § 6 stk. 2 **;** Extradition Act 2003, Section 21 A **;** Lag (2003:1156) om överlämnande från Sverige enligt en europeisk arresteringsorder, 4 § p. 2 **;** Overleveringswet, Staatsblad 2004/195, Artikel 11 **;** Art. 4(5), Loi du 19 Décembre 2003 relative au mandat d'arrêt européen, M.S. 22 Décembre 2003, p. 60075.

[208] European Commission, *"Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 23 February 2005, COM(2005) 63 final, p. 5.

refusal in the event of infringement"[209]. At the same time, the Commission stated that a judicial authority is always entitled to refuse the execution of an EAW if it finds that the proceedings have been vitiated due to an infringement of Article 6 of the TEU – although only in exceptional situations.[210] This adds to the confusion of the importance of fundamental rights in the EAW system, as the Commission criticises the introduction of additional refusal grounds in the implementing legislation while also allowing judicial authorities to refuse execution when fundamental rights have been violated. Leading to a contrasting and inconsistent system, insufficient in ensuring the protection of the sought individuals. The same concern about the introduction of additional refusal grounds by Member States was reiterated in the Commission's 2007 implementation report.[211] In addition to the concerns regarding the introduction of additional refusal grounds in Member States, concerns were also lifted regarding the vague provisions in the Framework regarding the suspect's procedural rights and the varying level of national protection in regard to these rights.[212]

The year of 2009 became the year where focus was directed at strengthening the procedural safeguards in criminal proceedings. Starting in February 2009, the Council adopted Framework Decision 2009/299/JHA which amended the EAW Framework along with two additional Framework Decisions in order to enhance the procedural rights of the individual subject to criminal proceedings, facilitate judicial cooperation in criminal matters and improve mutual recognition of judicial decisions between Member States. This amendment of the EAW Framework inserted a clear and common optional ground for non-execution in situations where the executing authority has received an EAW concerning the execution of a custodial sentence arising from a decision rendered in absentia. The new Article 4a of the EAW Framework now allows for a refusal if the individual has been convicted in his absence unless a retrial takes place, with a few accompanying exceptions where a refusal cannot be made – e.g. if he had been summoned in due time or was aware of the trial taking place. Later in the year, the Swedish Presidency launched the Stockholm Programme and the Roadmap on Strengthening Procedural Rights in Criminal Proceedings in order

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[209] European Commission, *"Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 23 February 2005, COM(2005) 63 final, p. 6**;** European Commission, *"Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version)"*, 24 January 2006, COM(2006) 8 final, p. 6.

[210] Ibid.

[211] European Commission, *"Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 11 July 2007, COM(2007) 407 final, pp. 8-9.

[212] European Commission, *"Report from the Commission [...] on the European arrest warrant and the surrender procedures between Member States"*, 23 February 2005, COM(2005) 63 final, p. 6 **;** European Commission, *"Report from the Commission [...] on the European arrest warrant and the surrender procedures between Member States (revised version)"*, 24 January 2006, COM(2006) 8 final, p. 6.

to establish minimum procedural standards for suspects and accused persons in criminal proceedings.[213]

In a report from 2011 the Commission further acknowledges the concerns of some Member States that while all Member States are subject to the standards of the ECHR, there is doubt surrounding the standards and whether or not they are similar across the EU.[214] Citing that simply expecting Member States to adhere to the ECHR standards *"has not proved to be an effective means of ensuring that signatories comply with the Convention's standards"*[215] and concluding that the protection of fundamental rights and freedoms should be further ensured by adopting and implementing the measures set forth in the Roadmap.[216]

Between 2010 and 2016 six different Directives relating to procedural safeguards were adopted on a step-by-step basis pursuant to the priority measures identified in the Roadmap. These Directives have established minimum procedural standards for suspects in criminal proceedings in relation to: their right to interpretation and translation[217], the right to information[218], the right of access to a lawyer and communication with third parties upon arrest[219], the presumption of innocence and the right to be present at trial[220], procedural safeguards for child defendants[221], and legal aid for suspects and requested persons in EAW proceedings[222]. A green paper on the application of EU criminal justice legislation in the field of detention was also presented by the Commission pursuant to the Roadmap.[223]

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[213] Council of the European Union, *"The Stockholm Programme – An open and secure Europe serving and protecting the citizens"*, 2 December 2009, doc. 17024/09 CO EUR-PREP 3 JAI 896 POLGEN 229**;** Council of the European union, *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings set the basis for six directives*, 4 December 2009, OJ C 295.
[214] European Commission, *"Report from the Commission [...] on the implementations since 2007[...] on the European arrest warrant and the surrender procedures between Member States"*, 11 April 2011, COM (2011) 175 final, p. 6.
[215] Ibid.
[216] Ibid., p. 9.
[217] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, 26 October 2010, OJ L 280.
[218] Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, 1 June 2012, OJ L 142.
[219] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, 6 November 2013, OJ L 294.
[220] Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, 11 March 2016, OJ L 65.
[221] Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, 21 May 2016, OJ L 132.
[222] Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, 4 November 2016, OJ L 297.
[223] European Commission, *"Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention"*, 14 June 2011, COM(2011) 327 final.

In the years following the work on introducing procedural safeguards, the European Parliament adopted a Resolution on the review of the European Arrest Warrant where it took a critical approach to the EAW.[224] In this resolution the Parliament highlighted the importance of respect for fundamental rights, pointed out the gaps in the EAW Framework and called on the Commission to include a mandatory ground for non-execution in relation to fundamental rights.[225] However, in its response to the Parliament, the Commission found it inappropriate to revise the Framework in such a way.[226] This standpoint was based on the ongoing improvements being undertaken through the Roadmap and the subsequent adoption of Directives providing minimum procedural standards. It was the Commission's view that the step-by-step approach envisaged in the Roadmap would be a more tangible solution than re-opening the Framework to introduce a refusal ground on the basis of fundamental rights which would have to be considered in every case and subsequently have the potential to undermine the principle of mutual recognition and efficiency of the procedure.[227]

Another important change affecting the EAW was the adoption of the Lisbon Treaty in 2007, which abolished the pillar structure agreed at Maastricht and relocated the regulations on judicial cooperation to Title V of the TFEU under the heading Area of Freedom, Security and Justice.[228] This treaty empowered the European Commission to initiate infringement proceedings against Member States when they fail to comply with its provisions.[229] It further extended the CJEU's jurisdiction, allowing them to conduct the infringement procedures initiated by the Commission and issue preliminary rulings in relation to the interpretation of the former third pillar instruments such as the EAW.[230] The Lisbon Treaty further had a significant effect on fundamental rights in the EU as it awarded the Charter for Fundamental Rights its legal status as primary EU law, making it legally binding in every Member State and required the EU to accede to the ECHR.[231]

While the judicial control by the CJEU and the enforcement of the powers given to the Commission in regard to the former third pillar instruments were limited under the five year transitional period, these limitations were lifted in 2014 and CJEU now has full judicial control.[232] With this limitation

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[224] European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174.
[225] Ibid., p. 5.
[226] European Commission, "*Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant*", SP(2014) 447, 22 July 2014, p. 1.
[227] Ibid., p. 3.
[228] A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 36.
[229] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202/47, 7 June 2016, Article 258**;** E. Xanthopoulou, "*Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?"*, p. 108**;** A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 37.
[230] A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p. 37.
[231] Consolidated version of the Treaty on European Union, OJ C 202/13, 7 June 2016, Article 6(1) and 6(3)**;** A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, pp. 39-40.
[232] Protocol (no. 36) on transitional provisions, attached to the Treaty on the Functioning of the European Union (TFEU), 9 May 2008, OJ C 115/325, Article 10.

lifted, it was not long before the CJEU would be asked to examine the operation of EAW Framework in light of the legally binding Charter and the number of requests for preliminary rulings on this matter has steadily increased throughout the years.[233] The CJEU has, in these preliminary rulings, had the habit of giving priority to the presumption of trust and the effective operation of the mutual recognition instrument over the protection of fundamental rights.[234] The CJEU's rigid and uncompromising position on ensuring the effective operation of the Framework and protecting the presumption of mutual trust was also at the forefront of its controversial Opinion[235] regarding the draft agreement on EU's accession to the ECHR, where the Court almost turned the presumption of trust into an obligation.[236] It was not until recently that the CJEU shifted its rigid position and began accepting exceptions to the principle of mutual recognition and mutual trust on the basis of fundamental rights. This was done for the first time in the landmark case of *Aranyosi and Căldăraru* where the CJEU allowed an execution of an EAW to be postponed if there is a real risk of inhuman or degrading treatment due to the prison conditions in the issuing Member State. Thereby, allowing a deferral on the grounds of an absolute fundamental right and favouring the safeguarding of human rights over the efficient operation of mutual recognition. This judgment proved to only be the beginning as the CJEU went even further in the case of *LM* where it allowed for a refusal on the grounds of a non-absolute fundamental right when there is a real risk that the sought person would suffer a breach of the right to a fair trial.

Following the landmark ruling in Aranyosi *& Căldăraru*, the Commission included a section on fundamental rights considerations in their Handbook on how to issue an EAW. They stated that Article 1(3), when read together with recitals 12 and 13 of the Framework Decision, clarify that fundamental rights should be respected in the context of the EAW and proceeded to list the procedural steps of the *Aranyosi and Căldăraru* test to be followed by the executing authorities.[237] Hence, exceptions can be made on fundamental rights grounds under Article 1(3) but only with a successful *Aranyosi and Căldăraru* test.

The European Parliament has previously called on the Commission, in a 2011 resolution, to develop and implement minimum standards for detention conditions similar to what was done in regard to

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[233] European Commission *"Report from the Commission [...] on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States"*, 2 July 2020, COM(2020) 270 final, p. 3.
[234] See Court of Justice, Judgment of 29 January 2013, case C-396/11, *Radu* **;** Court of Justice, Judgment of 26 February 2013, case C-399/11, *Melloni*.
[235] Court of Justice, Opinion 2/13 *concerning the compatibility of the Draft Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with the EU Treaties*, 18 December 2014.
[236] Ibid., para. 194.
[237] European Commission, Commission Notice, *"Handbook on how to issue and execute a European arrest warrant"*, OJ C 335, 6 October 2017, p. 33.

the procedural standards.[238] This call was further reiterated in its latest resolution, accompanied by renewed calls for the Member States to respect their obligations related to human dignity, democracy, the rule of law and human rights.[239]

5.3.2 When mutual trust is no longer genuine – the emergence of trust issues

The basis for the efficient and smooth operation of the EAW instrument is the principle of mutual recognition, however it is essentially the principle behind the principle that is the one calling the shots within this system. Without the presumption of mutual trust, or confidence as it is described in the Framework, the quasi-automatic operation introduced by the principle of mutual recognition could never have taken place. This presumption of trust in each other's criminal justice system is based on the assumption that all Member States respect and enforce fundamental rights and the core values of the EU since they are all signatories to the ECHR and are legally bound to adhere with the values and rights listed in the TEU. As indicated in Sections 5.1 and 5.2, practice has shown that this assumption is not only no longer reliable, but in fact delusively false and potentially dangerous. Accession to the ECHR is no guarantee in itself that human rights are observed or respected, nor is the legally binding Charter such a guarantee, and it is inappropriate to place such a large amount of trust in a Member State's compliance with human rights obligations merely on the basis that it is a Member State.

In the context of EAW proceedings, several different human and fundamental rights are at stake. The rights that are most likely to be breached through the application of the EAW system are: the absolute right not to be subjected to torture and inhuman or degrading treatment (Art. 3 ECHR, Art. 4 of the Charter), the right to liberty (Art. 5 ECHR, Art. 6 of the Charter), the right to a fair trial (Art. 6 ECHR, Art. 47 of the Charter), the right to not be punished without law (Art. 7 ECHR, Art. 49 of the Charter), the right to family and private life (Art. 8 ECHR, Art. 7 of the Charter) and the right to an effective remedy (Art. 13 ECHR, Art. 47 of the Charter).[240] Nearly every single Member State has been found to have breached at least one of these particular human and fundamental rights throughout the years by the ECtHR – even in the last five years.[241] The lack of a concrete safeguard

[238] European Parliament resolution of 15 December 2011 on detention conditions in the EU (2011/2897(RSP)), P7_TA(2011)0585, p. 5, para. 4.
[239] See European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), P9_TA(2021)0006, pp. 13-15, para. 31, 33 and 37
[240] A. Weyembergh, I. Armada & C. Brière, *"Critical Assessment of the Existing European Arrest Warrant Framework Decision"*, Research Paper for DG for Internal Policies of the Union, European Parliament, 2014, EAVA 6/2013, Annex I, p. 8.
[241] ECtHR, Statistical Report, *"Violations by Article and by State 1959-2020"*, https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State 2015"*, https://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State - 2016"*,

in the Framework itself has proven to be a challenge in regard to the protection of fundamental rights in EAW proceedings and it is clear that neither the Framework nor its application is perfect.

While the Roadmap and its adopted Directives on minimum procedural standards certainly has improved the respect for the right to a fair trial and strengthened the position of suspects in both criminal proceedings and EAW proceedings throughout the EU,[242] some concerns still remain in light of the current rule of law crisis. Furthermore, the Roadmap is still incomplete as legislation on pre-trial detention and vulnerable suspects (other than children) are yet to be adopted. In regard to pre-trial detention, safeguarding the prohibition of inhuman or degrading treatment becomes especially important in light of the documented overuse of pre-trial detention and the long periods of detainment this can entail throughout the EU. This excessive use of pre-trial detention further fuels the current prison overcrowding crisis that the EU is facing, which in turn worsens prison conditions for surrendered individuals, amounting to inhuman or degrading treatment. One particular NGO has even gone as far as stating that the increase and overuse of pre-trial detention is a sign of the rule of law being undermined in a briefing to the European Commission.[243] Arguing that, since the deprivation of liberty while awaiting a judgment on guilt or innocence is one of the harshest decisions that can be taken and is therefore subject to limitations, any unnecessary placement in pre-trial detention could be attributed to the mechanism in place to protect individuals from excessive use of state power not being respected.[244]

During the COVID-19 pandemic, the situation in prisons became significantly worse as any pre-trial detention was prolonged due to court closures.[245] Overcrowding further contributed to the spread of the virus within prison walls putting the prisoners' health even more at risk, resulting in the facilities being placed on lockdown limiting the prisoners' contact with the outside world in order to contain the spread to the facilities.[246] In light of the overcrowding crisis which degrades prison conditions on multiple levels and the excessive use of pre-trial detention which contributes to

https://www.echr.coe.int/Documents/Stats_violation_2016_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State - 2017"*, https://www.echr.coe.int/Documents/Stats_violation_2017_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State 2018"*, https://www.echr.coe.int/Documents/Stats_violation_2018_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State - 2019"*, https://www.echr.coe.int/Documents/Stats_violation_2019_ENG.pdf (accessed 17.11.2021)**;** ECtHR, Statistical Report, *"Violations by Article and by State 2020"*, https://www.echr.coe.int/Documents/Stats_violation_2020_ENG.pdf (accessed 17.11.2021).

[242] See e.g. Fair Trials, *"Beyond surrender: Putting human rights at the heart of the European Arrest Warrant"*, June 2018, p. 24, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021).

[243] Fair Trials, *"Pre-Trial Detention Rates and the Rule of Law in the European Union: Briefing to the European Commission"*, April 2021, p. 3, https://www.fairtrials.org/sites/default/files/publication_pdf/Pre-Trial%20Detention%20Rates%20and%20the%20Rule%20of%20Law.pdf (accessed 17.11.2021).

[244] Ibid.

[245] J. Russell, *"Covid-19 in Europe's prisons - and the response"*, 18 May 2020, EU Observer, https://euobserver.com/opinion/148385 (accessed 15.11.2021).

[246] Ibid.

the overcrowding of European prisons, it can most certainly be argued that this will have a significant impact on Member States' willingness to cooperate and surrender individuals pursuant to an EAW. This essentially leads to the undermining of the mutual trust presumed to exist between Member States, and further, threatening to undermine the confidence in the legality and functioning of the EAW system as a whole.

Since the Lisbon Treaty's entry into force, the tension between the EAW and fundamental rights has increased, with the debate in recent years focusing on the interpretation of the concept that is mutual trust and whether or not this entails blind trust. Historically, the CJEU has been known to give mutual trust precedence over human rights concerns regardless of the poor record of human rights protection in the issuing Member State. Certainly, the CJEU's interpretation of the principle of mutual trust in its early case law and controversial Opinion 2/13 – which enforced the trust presumption to the point of nearly obliging Member States to trust – would paint mutual trust as being equivalent to blind trust.[247] This could have led to many authorities being under the impression that they would need to turn a blind eye to potential violations in order to ensure the smooth running of the mutual recognition instrument. It is worth mentioning that the Opinion did permit Member States to investigate whether fundamental rights were being observed in another Member State in *exceptional circumstances*.[248] However, what the CJEU considered to be 'exceptional circumstances' and what they would entail for the people involved was not clarified until two years later, in the 2016 judgment of *Aranyosi and Căldăraru*.

This case truly became a remarkable turning point in the CJEU's approach to the EAW Framework compared to earlier case law, as it clearly illustrated that mutual trust is neither blind nor unconditional (although rebuttals are still limited to exceptional circumstances). Rather, it held that Member States *need* to conduct enquiries prior to deciding on the execution of an EAW when fundamental rights concerns have been raised, allowing a deferral from the principle of mutual trust. The CJEU heavily relied on Art. 1(3) of the Framework in their argumentation, which states that the Framework does not have the effect of modifying Member States' obligation to respect fundamental rights. The later *LM* case reiterated this new stance and extended the two-tier test to cover situations relating to the non-absolute right to a fair trial and, in doing so, opened up the possibility of extending the test even further to other fundamental rights concerns such as the right to family life in instances where the sought person has children that are solely dependent on them. Overall, the new approach shows the willingness of the CJEU to reach a better balance between the conflicting

[247] See Court of Justice, Opinion 2/13 *concerning the compatibility of the Draft Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms with the EU Treaties*, 18 December 2014, para. 194.
[248] Ibid., para. 192.

interests: the enforcement of the fast-surrender procedure and the protection of fundamental human rights.

Effects of the two-tier test

The judgments and their subsequent fundamental rights safeguards, as ground-breaking as they were, did not come without their own practical challenges. Not only does the individualised two-tier test create hurdles for the executing court by obliging them to engage in dialogue with the issuing state to gather supplementary information, the criteria that were set by the CJEU were also incredibly high-achieving.[249] The judgments introduced an incredibly high threshold for the test to be satisfied, calling into question whether an objection to execution on fundamental rights grounds would ever be successful in concrete EAW proceedings. Despite evidence of the issuing state having a generally poor record of compliance with human rights or suffering from general and systematic deficiencies – casting doubt on their trustworthiness – the presumption remains that the Member State is complying with the rule of law and respects fundamental rights (unless there is clear proof suggesting otherwise within that specific case). In order to successfully invoke fundamental rights as a ground for refusal there needs to be strong evidence showcasing that the sought individual themself will, *in fact*, risk suffering a breach of their fundamental rights and convince the executing authority that the information provided by the issuing authority is inaccurate or cannot be trusted. Further, the probability of success in the individual assessment highly depends on the particular fundamental right that is being raised as obtaining sufficient evidence proves more difficult in some cases than others.

Providing sufficient evidence in relation to prison conditions is fairly simple as the ECtHR has provided some guidelines on what may be considered to amount to inhuman treatment and prison conditions are regularly reported on by the CPT, making it easy to illustrate the condition in the specific detention facility. Assessing whether someone will suffer a breach of their right to a fair trial, on the other hand, is a far more complex exercise. It is usually unproblematic to illustrate systemic deficiencies such as the undermining of judicial independence, however demonstrating that these systemic deficiencies are liable to affect the procedure or outcome in the specific case is an impossible task as it depends on subjective factors that cannot be anticipated. One cannot reliably show exactly which judges are independent and which are not. Additionally, when independent judges have been shown to be punished for this independence, even an otherwise independent judge could be inclined to go against their better judgment so as to avoid arbitrary disciplinary proceedings. The burden of proof in the individual assessment rests, all too often, with

[249] See e.g. A. Willems, *"The Principle of Mutual Trust in EU Criminal Law"*, 2021, Hart Publishing, p.102 **;** P. Bárd & W. van Ballegooij, *"Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM"*, New Journal of European Criminal Law, 2018, Vol. 9(3), p. 360.

the sought person whose resources at their disposal are most likely very limited. This makes it nearly impossible to stop the execution of an EAW on this ground, resulting in people being extradited despite serious systemic deficiencies and ending up having their rights violated.

Furthermore, the new approach led by these judgments introduced and clarified the use of assurances, requiring executing authorities to place a significant amount of trust in assurances made by the issuing authority.[250] This system of assurances was developed to give additional protection to sought persons by essentially requiring the issuing authority to make promises to the executing authority to not breach any fundamental rights, in order to continue EAW surrenders to countries which have well known deficiencies in regard to human rights protection.[251] The content of these assurances can be anything from the conditions of the detention facility where the person will be held, to the medical care they will receive if the individual is in need of a specific treatment, that a re-trial will be granted and held, or any other promises relevant to the case at hand. The introduction of this reliance means that, even if a person is successful in illustrating that there is a real risk that they will suffer a breach of their fundamental rights if surrendered, an issuing authority can simply provide an assurance that this will not be the case. The executing authority must then rely on the assurances they have been given by the issuing authority, which could be taken as having to take these assurances at face value and accept them in spite of the systemic deficiencies – at least in the absence of any contradicting indications.[252] This leaves open the possibility to provide information that is not fully accurate without it raising any suspicion, resulting in a surrender based on these assurances despite the executing authority's initial and valid concerns.

In practice, this has led to a situation where issuing authorities have given assurances that they are unable to uphold, or worse, never intended to keep. In fact, it has been shown that the information provided by issuing authorities is more often smoke and mirrors than fact, with it being neither accurate nor sincere, and that the assurances are often not being abided by after the surrender. The most prominent case highlighting the practice of not abiding by the assurances (either due to inability or on purpose), is the case of Daniel Rusu who faced surrender to Romania to serve a four year prison sentence for alcohol smuggling and tax evasion.[253] Considering the poor record of Romania's prison conditions,[254] the executing authority requested additional information and

[250] See *Aranyosi and Căldăraru,* para. 103**;** *LM*, para. 79**;** Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*, para. 112.
[251] E. Barley, "*Not worth the paper they're written on: The unreliability of assurances in extradition cases*", 7 October 2020, Due Process EAW, p. 5, http://dueprocess.org.uk/wp-content/uploads/2020/10/Not-worth-the-paper-they%E2%80%99re-written-on.pdf (accessed 15.11.2021).
[252] See e.g. Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*, para. 112.
[253] Timis County Court (Romania) v. Daniel Nicolae Rusu, Westminster Magistrates' Court, 11 August 2016, https://www.fairtrials.org/sites/default/files/caselaw_pdf/Rusu%20judgement.pdf (accessed 15.11.2021).
[254] See Section 5.1.

received assurances from the issuing authority that Daniel would not be put in a prison where he would suffer inhuman or degrading treatment. However, Daniel's lawyer submitted written statements from 11 different people who had been surrendered to Romania following similar assurances who had not been respected post-surrender, one of which testified in court describing the inhumane conditions they lived in.[255] The court ruled that the assurances could not be trusted and refused Daniel's surrender. Following this judgment, surrenders from the UK to Romania were halted until the Romanian authorities presented information regarding the introduction of a prison building programme which would resolve the problems in Romanian prisons.[256] This information turned out to be false however, as it was revealed in October of 2016 that Romania's Minister of Justice had knowingly lied to the ECtHR when she claimed that the Romanian government had pledged one billion euros to the construction of seven new prisons in order to address human rights concerns.[257] After being shortly halted, surrenders from the UK to Romania based on similar assurances were taking place again in November 2016 despite Romania having admitted to breaking previous assurances given to executing authorities.[258] In one case, the UK court mandated that testimonies of broken assurances had to be provided in person (in court or via video-link) and refused to allow any written testimonies to that effect.[259] As a result of Romanian authorities denying prisoners access to such facilities for this purpose, providing testimonies regarding broken assurances in Romania has proved extremely difficult.[260] In regard to Romania's plans to remedy the poor prison conditions and overcrowding, building work will not begin until next year with an estimated completion in 2024.[261] Thus, any person surrendered to Romania prior to this still faces a substantial risk of having their human rights violated unless they successfully challenge the execution of the EAW on human rights grounds pursuant to the two-tier test.

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[255] Timis County Court (Romania) v. Daniel Nicolae Rusu, Westminster Magistrates' Court, 11 August 2016, pp. 7-8, https://www.fairtrials.org/sites/default/files/caselaw_pdf/Rusu%20judgement.pdf (accessed 15.11.2021).
[256] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 30, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021).
[257] Ibid.**;** A. Harastasanu, *"Romania's Minister of Justice admits to lying to the European Court of Human Rights"*, Global Risk Insights, 21 October 2016, https://globalriskinsights.com/2016/10/romanias-justice-minister-lies-to-court/ (accessed 18.11.2021)**;** E. Barley, *"End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately"*, Due Process, October 2018, p. 13, http://dueprocess.org.uk/wp-content/uploads/2018/10/Why-the-UK-must-halt-extraditions-to-Romania.pdf (accessed 18.11.2021).
[258] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 30, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021)**;** D. Clark, "*A Warranted Response: Brexit, human rights and the European Arrest Warrant*", The Fabian Society, November 2018, p.16, https://fabians.org.uk/wp-content/uploads/2018/11/Fabian-Society-A-Warranted-Response-WEB-FINAL.pdf (accessed 18.11.2021).
[259] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 30, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021).
[260] Ibid.
[261] E. Barley, *"End 'trust, but not verify': Why the UK must halt extraditions to Romania immediately"*, Due Process, October 2018, p. 14, http://dueprocess.org.uk/wp-content/uploads/2018/10/Why-the-UK-must-halt-extraditions-to-Romania.pdf (accessed 18.11.2021).

Another example of false assurances can be made regarding the medical care that the surrendered person would receive following their surrender, such as the case of Jacek Sobol. Jacek was sought by Poland to serve a sentence for a minor drink driving offence, but was in need of ongoing treatment to a badly damaged leg following a work accident.[262] During the extradition proceedings, the Polish authorities assured the executing authority that he would receive the appropriate medical treatment while serving his sentence in Poland, and his surrender was ordered by the executing court in the UK. During his stay in prison he never received this promised medical treatment. In fact, when he complained about his injury he was first seen by a doctor whose breath smelled of alcohol who said they did not have the money to provide the care needed, and was later sent to a dentist for his knee injury.[263] By the time he was released and returned to the UK, his injury had gotten much worse to the point of needing a knee replacement surgery.[264]

Issuing Member States have also been shown to double down on assurances made to the executing authorities prior to surrender in the area of a fair trial. This was for example done in the case of Dan Ponea, who was tried and convicted *in absentia* for fraud related to the sale of his used car and subsequently sought by the Romanian authorities to serve his sentence.[265] At the extradition hearing it was claimed that Dan was present at the trial despite him having been given no notification of it taking place. Dan's surrender was eventually ordered on the basis that the Romanian authorities had assured the executing authorities that he would be granted a retrial upon surrender. Following his surrender, this promise was rescinded and the retrial was denied which resulted in Dan instead being sent directly to prison.[266]

The insistence on acquiring additional information from the issuing authority and opening a dialogue between the two authorities presupposes that the issuing authority will admit to its shortcomings. Especially in the current rule of law crisis and systemic undermining of the independence of the judiciary in some EU Member States, wouldn't a compromised court affect the reliability of the supplementary information they provide to aid executing courts in making a decision regarding the execution of the EAW? Surely, it is highly unlikely that a compromised court would openly admit to their lack of independence as this could ruin their own reputation and their chances of getting EAWs executed. This begs the question of how much trust you can put in the

[262] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 20, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021).
[263] Ibid. **;** *Beyond Surrender*, [online video], Fair Trials, 30 July 2018, https://www.youtube.com/watch?v=5mU-fDfDOb8 (accessed 17.11.2021).
[264] Ibid.
[265] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 16, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021).
[266] Ibid.

information and assurances provided by the judicial authority of a Member State whose judiciary is politically compromised and where judicial independence is essentially gone.

The ECtHR, whose case law is far more developed than the CJEU, has provided some guidance pertaining to safeguards in the use of assurances stating that they are not alone *"sufficient to ensure adequate protection"*[267] and that there is an obligation to examine whether they provide a sufficient guarantee of protection in their practical application.[268] However, considering that there is no monitoring mechanism in the context of surrenders pursuant to EAWs and that the executing authority has no visibility of what happens to the person post-surrender, it is difficult to ensure that these assurances are being complied with in practice.[269] To that end, heavily relying on assurances from the issuing authority that the sought person will not suffer a breach of their fundamental right pursuant to the principle of mutual trust becomes problematic. In the absence of clear indications that the assurances are false, e.g. that the conditions in the particular detention facility have been shown to violate Article 3 ECHR, the issuing authority is essentially being given the benefit of a doubt despite their systemic deficiencies. This benefit of a doubt and the lack of monitoring means that there is nothing stopping a Member State from simply relocating the surrendered individual to another facility than the promised one after the surrender. In addition, not abiding by the assurances given to the executing authority did not entail any real consequences for the issuing authority for a long time seeing as courts have been shown to move forward with surrenders on the basis of these assurances despite the issuing Member States having been shown to not abide by them. However, this practice of moving forward with surrenders on the basis of assurances that have been proven to be broken in the past may decrease following the recent judgment in *Bivolaru and Moldovan v. France*.[270] In this case, France was found to have breached Art. 3 ECHR when they ordered the surrender of Mr. Moldovan pursuant to an EAW on the basis of general information about the detention conditions and generic assurances provided by the Romanian authorities, despite Mr. Moldovan having produced weighty and detailed evidence confirming a real-risk of ill-treatment.[271]

Looking at the situation from the individual's point of view, whenever the issuing authority provides assurances and the individual is unable to successfully argue the real risk of violation that they will suffer if surrendered, a surrender will most likely take place often resulting in their human rights being violated post-surrender. In these circumstances, the only hope of redress is having the case

[267] ECtHR, *Othman (Abu Qatada) v. The United Kingdom*, App. no. 8139/09, 17 January 2012, para. 187.
[268] Ibid.
[269] See European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), P9_TA(2021)0006, p. 15, para. 38.
[270] ECtHR, *Bivolaru and Moldovan v. France*, App. no.40324/16 and 12623/17, 25 March 2021.
[271] ECtHR, Press release - Chamber Judgments, *"Judgment Bivolaru and Moldovan v. France - conditions for application of the presumption of equivalent protection in disputes concerning execution of a European arrest warrant"*, 25 March 2021, p. 5, https://hudoc.echr.coe.int/eng-press?i=003-6977075-9393953 (accessed 05.12.2021).

heard by the ECtHR; however this possibility of a future remedy serves as cold comfort as it can take years before the case is heard due to the court's backlog of cases and, by that time, the damage has been done. A future remedy after-the-fact falls short of providing any relief for the individual and rather adds salt to injury when the violation could have been prevented.

The reception of the rulings

The reception of the judgments in *Aranyosi and Căldăraru* and *LM* has been varied to say the least, however, it has been made clear that these two judgments are only the beginning of a long journey. The immediate response to *Aranyosi and Căldăraru* was overwhelmingly positive as the judgment provided some much needed developments to the interplay between the conflicting interests in the EAW system through the attempt to reconcile the principles of mutual trust and recognition with the protection of human rights and mend the bitterness caused by their previous approach.[272] Despite the overall positive response, it also raised a lot of questions in regard to the scope of application, the information that needed to be provided and what happens when the procedure is brought to an end.[273]

These questions have partially been answered by the CJEU in the later preliminary rulings of *ML*[274] (sometimes referred to as Aranyosi III) and *Dorobantu*[275], in which they reaffirmed and clarified the two-tier test developed in *Aranyosi*. In the *ML* judgment concerning the detention conditions in Hungary, which was handed down on the same day as the *LM* judgment, the CJEU tried to clarify the scope of the individual assessment. In addition to reiterating the reliance on assurances made by the issuing authority, the Court set out the extent to which the executing could require additional information pertaining to specific prison conditions, limiting the review of prison conditions to the detention facilities in which the issuing authority specifies that the person is likely to be held.[276] Further, operating as a complement to the ECtHR, the Court specified that the mere existence of a legal remedy in the issuing Member State cannot alone rule out a real risk that the person subject to the EAW will suffer inhuman or degrading treatment.[277] In the later *Dorobantu* judgment, the CJEU

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[272] See e.g. L. Mancano, *"A New Hope? The Court of Justice Restores the Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System"*, in C. Brière & A. Weyembergh (ed.), *"The Needed Balances in EU Criminal Law: Past, Present and Future"*, Hart Studies in European Criminal Law: Volume 5, Oxford, Hart Publishing, 2018, pp. 285–312**;** S. Gáspár-Szilágyi, *"Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant"*, European Journal of Crime, Criminal Law and Criminal Justice, vol 24 (2-3), 2016, pp. 197-219.

[273] S. Gáspár-Szilágyi, *"Joined Cases Aranyosi and Căldăraru: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant"*, European Journal of Crime, Criminal Law and Criminal Justice, vol 24 (2-3), 2016, p. 197**;** M. Rogan, *"What Constitutes Evidence of Poor Prison Conditions after Aranyosi and Căldăraru? Examining the Role of Inspection and Monitoring Bodies in European Arrest Warrant Decision-Making"*, New Journal of European Criminal Law, Vol. 10(3), 2019, p. 210**;** see also Court of Justice, Order of the Court of 15 November 2017, case C-496/16, *Aranyosi II*.

[274] Court of Justice, Judgment of 25 July 2018, Case C-220/18 PPU, *ML*.

[275] Court of Justice, Judgment of 15 October 2019, Case C-128/18, *Dumitru-Tudor Dorobantu*.

[276] Case C-220/18 PPU, *ML*, para. 112 and 117.

[277] Ibid., para. 117.

further clarified that the executing authority must assess all relevant physical aspects of the detention and provided an even more detailed explanation of what criteria are important for the individual assessment. Accepting the minimum standards of detention conditions set by the ECtHR, the CJEU specifies that the executing authority must take into account the criteria laid down in ECtHR case-law when determining whether there is a real risk that the person concerned will be subjected to inhuman or degrading treatment.[278]

In contrast, the immediate reception of the *LM* judgement by academics was rather mixed.[279] While it is considered a landmark case due to the widening of the mutual trust exception found in *Aranyosi and Căldăraru*, many scholars were of the opinion that the CJEU missed the mark and fell short of their expectations. The first wave of criticism concentrated on the missed opportunity for the Court to clearly address the challenges to the independence of the Polish judiciary introduced through the judicial reforms in substance, whereas the second took issue with the application of an individual test that requires a case-by-case assessment.[280] The revisited two-tier test applied in the *LM* case was recently reaffirmed by the CJEU when the District Court of Amsterdam requested a preliminary ruling, asking whether an executing authority can presume that a person runs a real risk of his fundamental right to a fair trial being violated without carrying out the individual assessment of the test.[281] In essence, this was an attempt to remove the second step of the two-tier test applied in *LM*, which would then allow an automatic refusal when systemic deficiencies relating to the independence of the judiciary are found – similar to what some scholars have advocated for.[282] The CJEU reiterated that only Member States, acting through the Council, have the power to allow such an automatic ban on executions through the suspension of mutual trust pursuant to a formal decision

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[278] Case C-128/18, *Dumitru-Tudor Dorobantu*, para. 77.

[279] See e.g. the contributions to the Verfassungsblog debate "The CJEU's Deficiencies Judgment", www.verfassungsblog.de/category/themen/after-celmer/.

[280] See e.g. P. Bárd and W. van Ballegooij, *"Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM"*, New Journal of European Criminal Law, 2018, Vol. 9(3), pp-360-361**;** M. Krajewski, *"Who Is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges: ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM*", European Constitutional Law Review, 2018, Vol. 14 (4), pp. 792-813**;** K. L. Scheppele, *"Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) "Celmer" Decision", VerfBlog,* 28 July 2018, https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/ (accessed 20.11.2021)**;** L. Pech and P. Wachowiec, "*1095 Days Later: From Bad to Worse Regarding the Rule of Law in Poland (Part II)*", *VerfBlog,* 17 January 2019, https://verfassungsblog.de/1095-days-later-from-bad-to-worse-regarding-the-rule-of-law-in-poland-part-ii/ (accessed 19.11.2021)**;** M. Wendel, *"Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM"*, European Constitutional Law Review, 2019, Vol. 15 (1), pp. 31-32**;** A. Frąckowiak-Adamska, *"Drawing Red Lines With No (Significant) Bite – Why an Individual Test Is Not Appropriate in the LM Case"*, VerfBlog, 30 July 2018, https://verfassungsblog.de/drawing-red-lines-with-no-significant-bite-why-an-individual-test-is-not-appropriate-in-the-lm-case/ (accessed 20.11.2021).

[281] Court of Justice, Judgment of 17 December 2020, joined Cases C-354/20 PPU and C-412/20 PPU, *L/P*.

[282] See P. Bárd and W. van Ballegooij, *"Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM"*, New Journal of European Criminal Law, 2018, Vol. 9(3), pp-360-361.

under Art. 7 TEU.[283] It then went on to say that allowing an automatic refusal in such a case will *"entail a high risk of impunity for persons who attempt to flee from justice"*[284], as it would create a safe haven in all other Member States where criminals, in this case from Poland, could in theory avoid any criminal responsibility. The interpretation of the Amsterdam court was not accepted by the CJEU who ruled against the removal of the individual assessment so as to not pre-empt a decision by the Council.[285]

The question as to what becomes of the sought person once the execution of the EAW has been postponed, refused or the proceedings have otherwise come to an end on the basis of fundamental rights concerns – initially raised following the judgment of *Aranyosi and Căldăraru* – is still outstanding.[286] It has been established in Section 4 that the EAW itself is most likely to remain active and that the person would risk being re-arrested if they were to leave the Member State that ordered the non-execution, but what does the refusal entail for the criminal responsibility of the person? In the case that the EAW was issued for the purpose of serving a sentence it could be possible to request that the sentence be served in the executing Member State pursuant to the Framework Decision on the transfer of sentenced persons and custodial sentences[287], so as the individual does not avoid criminal responsibility. In regard to EAWs issued for prosecution, ensuring that the person does not avoid criminal responsibility simply due to a surrender not being possible would require that the issuing Member State makes a request to transfer the criminal proceedings to the executing Member States in accordance with the European Convention on the Transfer of Proceedings in Criminal Matters[288], as the executing Member State is unlikely to have any jurisdiction over the case. In the case that none of these options are possible, what other option are there than to set the person free? This reality would then beg the question as to whether the category of the offence and its severity plays a role in the decision making process of determining if the fundamental rights concerns are a hindrance to the surrender. The reality of a person avoiding criminal responsibility, while unfortunate, would be far easier to accept in smaller cases of theft than in cases of murder, human trafficking and terrorism.

In national courts, it has been shown that the judgments have resulted in several Member States taking a more robust approach to the execution of EAWs by requesting additional information more often and putting surrenders on hold until the executing authorities are satisfied with the provided

[283] Joined Cases C‑354/20 PPU and C‑412/20 PPU, *L/P*, para. 57-58.
[284] Ibid., para. 64.
[285] Ibid., para. 69.
[286] Council of the European Union, *"The way forward in the field of mutual recognition"*, 11 February 2019, doc. 6286/19 LIMITE JAI 119, p. 3**;** L. Mancano, *"You'll never work alone: A systemic assessment of the European Arrest Warrant and Judicial Independence"*, Common Market Law Review, Vol. 58 (3), 2021, p. 707.
[287] Council of the European Union, *Framework Decision 2008/909/JHA of 27 November 2008 on the mutual recognition of custodial sentences*, 5 December 2008, OJ L 327/27.
[288] Council of Europe, *European Convention on the Transfer of Proceedings in Criminal Matters*, 15 May 1972, ETS 73.

information.[289] In fact, it has been reported by the European Commission that the number of non-executions due to fundamental rights concerns in the year of 2017 alone was 109, with the yearly number dropping to around 80 the following years – with Germany accounting for the vast majority of these refusals.[290] Following the increased interference with the independence of the judiciary in Poland through the adoption of the so called "muzzle law" silencing and disciplining judges voicing concerns, executing authorities across the EU have been shown to become increasingly cautious in regard to surrendering people to Poland.[291] In fact, in the time that they were waiting for the CJEU's preliminary ruling in *L/P*, the Netherlands went as far as issuing a temporary suspension on all EAWs from Poland.[292] While the CJEU answered in the negative in *L/P*, requests for preliminary rulings from national courts in both Ireland and the Netherlands are currently pending before the CJEU asking similar questions in an effort to get the CJEU to revise the two-tier test.[293] Even courts of non-Member States such as Norway – who recently gained access to a simplified extradition procedure through the Surrender Agreement[294] which mirrors the provisions of the EAW Framework following its entry into force in 2019[295] – have been seen to go further than the CJEU has dared to and limit the second part of the *LM* test following the adoption of the "muzzle law" in Poland.[296] While not completely discarding the two-tier test, the district court of Vestfold argued that the second part of the test should be adapted depending on the severity of

[289] Fair Trials, "*Beyond surrender: Putting human rights at the heart of the European Arrest Warrant*", June 2018, p. 28, https://www.fairtrials.org/sites/default/files/publication_pdf/FT_beyond-surrender_B5_web_spreads.pdf (accessed 18.11.2021); M. Szuleka, *"Doubts over Polish courts' independence are undermining European Arrest Warrant system"*, Notes From Poland, 2 November 2020, https://notesfrompoland.com/2020/11/02/doubts-over-polish-courts-independence-are-undermining-european-arrest-warrant-system/ (accessed 27.11.2021).

[290] European Commission, Commission Staff Working Document, *"Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017"*, 28 August 2019, SWD(2019) 318 final, p. 36; European Commission, Commission Staff Working Document, *"Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018",* 2 July 2020, SWD(2020) 127 final, p. 21; European Commission, Commission Staff Working Document, *"Statistics on the practical operation of the European arrest warrant – 2019"*, 6 August 2021, SWD(2021) 227 final, p. 22.

[291] See e.g. Rechtbank Amsterdam, uitspraak van 4 October 2018, ECLI:NL:RBAMS:2018:7032; Oberlandesgericht Karlsruhe, beschluss vom 17 February 2020, Ausl 301 AR 156/19; Corte di Cassazione, Sezione VI penale, Sentenza 21 maggio 2020, n. 15924; Oberlandesgericht Karlsruhe, beschluss vom 27 November 2020, Ausl 301 AR 104/19; Rechtbank Amsterdam, uitspraak van 10 februari 2021, ECLI:NL:RBAMS:2021:420.

[292] Statement from the International Legal Assistance Chamber (IRK) of the Amsterdam District Court, 3 September 2020,https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/IRK-legt-alle-overleveringen-naar-Polen-voorlopig-stil.aspx (accessed 21.11.2021).

[293] Request for a preliminary ruling, case C-480/21, *Minister for Justice and Equality v WO & JL*, 3 August 2021; Request for a preliminary ruling, case C-563/21 PPU, *Openbaar Ministerie v Y,* 14 September 2021.

[294] *Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway - Declarations*, OJ L 292, 21 October 2006, p. 2–19.

[295] Council of the European Union, *Notice concerning the entry into force of the Surrender Agreement between the European Union, Iceland and Norway*, SN/3935/2019/INIT, OJ L 230/1, 6 September 2019.

[296] E. Holmøyvik, *"No Surrender to Poland: A Norwegian court suggests surrender to Poland under the EAW should be suspended in general",* VerfBlog, 02 November 2021, https://verfassungsblog.de/no-surrender-to-poland/ (accessed 21.11.2021).

the general risk – in essence, the greater the general risk for a breach is, the less concrete evidence should be required in the specific case.[297]

The rise of non-executions and suspensions due to fundamental rights concerns in relation to the rule of law crisis and the poor detention conditions throughout Europe, coupled with the increased willingness to forgo the individual assessment in the *LM*-test in EAW proceedings dealing with judicial independence, displays a growing lack of trust. Foregoing the individual assessment, either through a judgment from the CJEU or through practice in a single Member State, will have implications for every Member State in the EU. The suspension in the application of the EAW Framework towards one Member State, which would be the immediate effect of the CJEU removing the individual assessment, can easily be achieved even without a judgment. If one single Member State were to indefinitely suspend the execution of EAWs from another, this decision would be bound to influence other Member States to do the same – especially if the target of the suspension has been proven to disregard EU values. This will not only have the equivalent effect of suspending the trust towards the particular Member State – something only the Council is allowed to do – it will essentially undermine the functioning of the EAW instrument and pose a great threat to its future operation. Furthermore, if the majority of Member States are said to not trust one of the other Member States, it would negatively affect the trust in the EU as a whole – especially if the EU has had the opportunity to act against the Member State deemed untrustworthy prior to this.

The current rule of law crisis and the questionable human rights record in several Member States has resulted in everybody becoming more vocal about their doubts regarding the limits of mutual trust.[298] It is clear from the case law that has followed the *LM* decision, that the trust in regard to Poland and its judiciary has been severely weakened and that some Member States are actively trying to get out of cooperating with them in regard to the EAW; it is almost as if they are single-handedly trying to "punish" Poland for their actions in the absence of the Council being able to do so. The long-standing overcrowding crisis, continuous deterioration of prison conditions and use of false assurances is likely to have a similar negative effect on a Member State's trustworthiness which will eventually affect the willingness of others to trust and cooperate.

Why is mutual trust an issue?

The main issue with having the operation of the intrusive EAW instrument relying on mutual trust is that this trust was simply imposed on the Member States without any prior investigation into

[297] E. Holmøyvik, *"No Surrender to Poland: A Norwegian court suggests surrender to Poland under the EAW should be suspended in general",* VerfBlog*,* 02 November 2021, https://verfassungsblog.de/no-surrender-to-poland/ (accessed 21.11.2021)**;** Vestfold tingrett, 27 Oktober 2021, TVES-2021-144871.

[298] A. Łazowski, *"The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldararu"*, Croatian Yearbook of European Law and Policy, Vol. 14 (1), 31 December 2018, p. 3.

whether there was any sound basis for this level of trust. Instead, the existence of trust was presumed and taken for granted on the basis of the mere assumption that certain values were being complied with due to the accession to the EU, and that fundamental human rights were being respected due to the ratification of the ECHR and later the Charter. Such a concept of presumed trust essentially relies solely on a leap of faith, skipping the important step of gaining trust and becoming trustworthy. Only in a world where everyone is *de facto* trustworthy, can presumed trust exist. Within the EAW system especially, trust has long been treated as a legal obligation, unfortunately tipping the scales of justice in favour of the Member States whose criminal justice system and human rights standards are the least satisfactory. In reality, trust is not something that can be presumed simply on the grounds that someone has generally accepted that there are rules that should be followed, otherwise parents with small children would not have to teach their children not to get into a car with a stranger offering them candy. Rather, trust is something that needs to be built and earned through evidence, practices and continuous effort. Furthermore, trust in itself is extremely fragile: even when it has been earned it is not absolute but can be lost in a single second and, once the trust has been lost, it is extremely difficult to rebuild and will, more often than not, never be restored to the way it once was.

Other extradition agreements have been found to operate successfully on the basis of mutual trust, such as the Nordic Arrest Warrant ('NAW') which was signed by the Nordic countries in 2005.[299] Despite the NAW reflecting a higher level of mutual trust than the EAW– as it completely abolishes the double criminality requirement, reduces the penalty threshold and simplifies the rules of speciality and accessory surrender – no criticism has been raised thus far.[300] The reason for this would be that all of their criminal justice systems are of the same quality with equivalent standards. Furthermore, Nordic countries have a long history of close cooperation which has resulted in a mutual trust that is concrete and genuine as it has developed over the course of decades.[301] While the EU has not had this same opportunity for developing the level of trust needed for the EAW to function smoothly, this example proves the point that it is not the concept of mutual trust in itself that is the problem within the EAW, but rather that this trust was not properly developed to bear the weight of the EAW instrument.

It could certainly be said that for an instrument that was based on the objective of providing citizens with a high level of protection in an area of freedom, security and justice, the protection of citizens' rights within the EAW is absurd. Looking back, it is easy to say that the EU could have given

[299] *Convention on surrender for criminal offences between the Nordic countries*, 15 December 2005 .
[300] K. Tolttila, *"The Nordic Arrest Warrant: What Makes for Even Higher Mutual Trust?"*, New Journal of European Criminal Law, Vol. 2 (4), 2011, p. 369.
[301] Ibid., pp. 376-377.

fundamental human rights a stronger position in the Framework than the principle of mutual trust, and given the former precedence whenever conflict arises. This would have prevented today's dilemma and would be more in line with the ECtHR's take on mutual trust since they have been found reluctant to recognise mutual trust as having any 'supremacy' over fundamental rights.[302] However, one needs to remember that the Framework Decision was adopted in the aftermath of 9/11, at a time when there was strong unity between all countries and a common threat. Furthermore, at the time of adoption there were only 15 Member States, which all appeared to converge around the shared democratic norms set out by the EU and with no indication of this stance changing in the future. The external pressure following the terrorist attack, the inability to foresee any threats within the EU area and the hope, essentially, that no Member State would go against EU law, may certainly explain why the safeguards set out in the initial proposal were considered unnecessary and subsequently disregarded in the final text.

Time has unfortunately shown that this original stance and subsequent hope was dangerously naïve. The trust that existed in 2002 between the 15 Member States is no longer as robust and genuine in the current EU of 27 Member States. While the trust may only have cracked towards some Member States, it is close to being completely shattered towards others such as Poland, who not only continue to strategically undermine the rule of law and core EU values, but invalidate any CJEU rulings that denounce their judiciary reforms. A sensitive area such as criminal law, where individuals suffer the ultimate consequence, resting on a basis of mutual trust requires that the trust is concrete, genuine, maintained and supported by sincere cooperation. Only when all Member States actively participate in upholding the shared founding values can the mutual trust be considered concrete enough to smoothly operate within the mutual recognition instruments as intended. Overcoming the current challenges that the EU is facing requires the development of a genuine trust between the Member States and their judicial systems.

The act of building a solid basis of trust is a time-consuming commitment that involves taking risks and requires action from every party involved, from the EU to the Member States themselves. Member States need to consistently demonstrate their trustworthiness, and the EU needs to effectively enforce the protection of human rights and the rule of law – ensuring that Member States are being held accountable whenever they fail to meet their obligations.

It is common knowledge that accountability is a big part of building trust. If a Member State, who is found to be in the wrong, acknowledges the mistake and accepts the consequences, it demonstrates a willingness to learn and prevent such mistakes from happening again. Greater accountability that

[302] See e.g. ECtHR, *Avotiņš v. Latvia*, App. no. 17502/07, 23 May 2016**;** T. Marguery, *"Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters",* European Papers, Vol. 1 (3), 2016, pp. 944- 945.

is encouraged, properly enforced and followed up on, will lead to a strengthening of trust despite the Member State having failed to perform in the past. Rebuilding trust by improving accountability does require action being taken in regard to enforcement, which can be done at both EU and Member State level. The tools at the disposal of the EU are infringement proceedings initiated by the Commission according to Art 258 TFEU, the Commission's Rule of Law Framework (also known as the pre-Article 7 procedure)[303], the Council's annual rule of law dialogue[304] and the 'nuclear option' of measures taken pursuant to the Article 7 TEU procedure. As we have seen that the EU has proven itself to be rather ineffective in holding Member States accountable for systemically undermining EU values due to weak enforcement mechanisms and poor reaction times which have contributed to the trust situation being as it is today, we may have to rely on the Member States to defend the EU values.

Considering that every Member State is one individual part of a bigger organism, it would make sense to collectively share the responsibility of ensuring that each individual part of the system functions as needed in order for the organism to persist. The tools available to the Member States within the EU treaties are limited to the underutilised Article 259 TFEU.[305] This provision, having a similar wording as Article 258 TFEU, allows for one Member State to bring proceedings against another Member State before the CJEU when it considers that the latter has failed to fulfil its obligations under the Treaties. In fact, some scholars believe that the bringing of such an infringement action by several states collectively is closer than we may think.[306] Outside of the Treaties, Member States could issue coordinated bilateral sanctions against the rogue Member State as was done in the case of Austria in 2000 which would essentially bypass the Article 7 TEU sanctions (although, such action was ultimately proven unsuccessful).[307] Member States could also resort to self-help by simply denying judicial cooperation with the rogue Member State (which is

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[303] European Commission, *"Communication from the Commission to the European Parliament and the Council - A new EU framework to strengthen the rule of law"*, 19 March 2014, COM(2014) 158 final/2.

[304] Council of the European Union, Press Release No. 16936/14 PRESSE 652 PR CO 74, 3362nd Council meeting, General Affairs, 16 December 2014, pp. 20-21.

[305] D. Kochenov, *"Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool"*, Hague Journal on the Rule of Law, Vol. 7, 2015, pp. 155-156**;** K.L. Scheppele, D. Vladimirovich Kochenov and B. Grabowska-Moroz, *"EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union"*, Yearbook of European Law, Vol. 39 (1), 2020, p. 100.

[306] K.L. Scheppele, D. Vladimirovich Kochenov and B. Grabowska-Moroz, *"EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union"*, Yearbook of European Law, Vol. 39 (1), 2020, pp. 98-99.

[307] A. von Bogdandy, *"Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States"*, Common Market Law Review, Vol. 57 (3), 2020, p. 711**;** K.L. Scheppele and L. Pech, *"Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?"*, VerfBlog, 9 March 2018, https://verfassungsblog.de/didnt-the-eu-learn-that-these-rule-of-law-interventions-dont-work/ (accessed 03.12.2021).

essentially blocked by the Treaties).[308] This approach can already slowly be seen to take shape through the national courts' willingness to limit the current two-tier test developed by the CJEU. Such action is however unwanted from the perspective of retaining the EU as it will essentially signal distrust in the institutions and the union itself.[309] Any action that operates with the view to develop or restore trust should always be preferred over actions that have the effect of destroying what little trust there is left.

It has been proven by the success of the NAW that mutual trust *"is more likely to occur if legal systems are comparable to or easily understood by others"*[310]. To this end, the EU has already taken some much needed legislative steps with the aim of generating trust within the context of judicial cooperation in criminal matters through the adoption of common minimum standards pursuant to the Roadmap on Criminal Procedural Rights. Essentially seeking to guarantee a sufficient standard of quality which in theory would allow Member States to place a greater level of trust in each other's criminal justice systems – after all, it would be easier to trust another Member State when you know that they comply with the same minimum standards. However, in order for them to be effective in their aim of generating and enhancing trust, the Directives need to be implemented and enforced in practice. Unfortunately, reports have shown that the transposition and implementation of the relevant provisions concerning the EAW in the Directives adopted pursuant to the Roadmap have been inadequate to date.[311]

Furthermore, steps are yet to be taken in order to negate the violations of fundamental rights due to the deterioration of detention conditions and the overuse of pre-trial detention which still present significant obstacles to mutual trust. While the responsibility for improving detention conditions does lie with the individual Member State, the EU has the ability to generate a certain degree of mutual trust relating to detention conditions. The best option for the EU in the long run would be to establish minimum standards on prison conditions – similar to what was done in regard to criminal procedural rights – guaranteeing adequate treatment of individuals in custody both pre- and post-trial. Such a measure would not only aid in the practical application of the EAW, but would also significantly improve and help build mutual trust. These minimum standards could also be

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[308] A. von Bogdandy, *"Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States"*, Common Market Law Review, Vol. 57 (3), 2020, p. 711**;** L. Pech, K.L. Scheppele and W. Sadurski, "*Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland",* VerfBlog*,* 28 September 2020, https://verfassungsblog.de/before-its-too-late/ (accessed 03.12.2021).

[309] L. Pech, K.L. Scheppele and W. Sadurski, "*Before It's Too Late: Open Letter to the President of the European Commission regarding the Rule of Law Breakdown in Poland",* VerfBlog*,* 28 September 2020, https://verfassungsblog.de/before-its-too-late/ (accessed 03.12.2021).

[310] C. Rijken, *"Re-Balancing Security and Justice: Protection of Fundamental Rights in Police and Judicial Cooperation in Criminal Matters"*, Common Market Law Review, Vol. 47 (5), 2010, p. 1473.

[311] W. van Ballegooij, *"European Arrest Warrant: Implementation Assessment"*, European Parliamentary Research Service, May 2020, p. 41.

extended to cover the use of pre-trial detention so that it remains a measure of last resort, thereby restricting overuse and limiting any further overcrowding in European prisons.

Until the time has come where there is a common standard of quality throughout the EU providing a sound and genuine basis for mutual trust, and the respect for fundamental rights and EU values is no longer based on a mere presumption, the sufficient protection of fundamental human rights needs to be ensured within the context of the EAW through additional safeguards.

5.3.3 How to amend the issue of mutual trust in the application of the EAW moving forward – reviewing proposed changes

As has previously been mentioned in this thesis, there is only a limited number of refusal grounds for a Member States to base a non-execution on, but none relating to a person's fundamental human rights. The absence of such a bar for execution can easily be chalked up to the fact that the Charter of Fundamental Rights was not legally binding at the time of the adoption of the Framework and the EU itself as an institution had not acceded to the ECHR. This assumption is evidenced by the later mutual recognition instrument EIO, which provides a clearer stance on the protection of fundamental rights not only in the preamble, but also in the main body of the text. The preamble acknowledges that an execution should be refused if there are substantial grounds for believing that an execution would result in a breach of a fundamental right.[312] Furthermore, contrary to the EAW Framework, the main body of the EIO Directive provides a fundamental rights-based refusal ground allowing executing authorities to refuse an execution if the measure would be incompatible with the obligations in Article 6 of the TEU and the Charter.[313]

Considering that one of the main consistent controversies surrounding the EAW has been the absence of a refusal ground based on fundamental rights, it should come as no surprise that one of the proposed amendments to this issue has been to revise the Framework and introduce such a fundamental rights refusal ground – be it optional or mandatory.[314] While the CJEU has essentially created a *de facto* fundamental rights ground for postponement and non-execution in the landmark cases of *Aranyosi and Căldăraru* and *LM*, compensating for the lack of an explicit ground for refusal, some still believe that the case-by-case assessment is insufficient and that a refusal ground

[312] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1 May 2014, Recital 19.
[313] Ibid., Article 11 (1)(f).
[314] See e.g. A. Willems, "*The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*", German Law Journal, 2019, vol. 20(4), p. 471**;** European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), P7_TA(2014)0174, p. 5**;** M. Mackarel, *"Human Rights as a Barrier to Surrender"*, in N. Keijzer (ed.) & E. van Sliedregt (ed.), *"The European Arrest Warrant in Practice"*, Den Haag, TMC Asser Press/Cambridge University Press, 2009, p. 155.

should still be added in the Framework.[315] Considering that the obligation to respect fundamental rights is uncontroversial and generally accepted by all Member States regardless of whether they actually comply with it; introducing such a provision in the Framework would therefore not be difficult in theory. The formulation of the provision could follow the one provided in the EIO Directive, which would broaden the scope of the fundamental rights bar beyond inhuman treatment and the right to a fair trial.[316] Another option would be a more elaborate formulation as in the refusal ground introduced for trials *in absentia* in Article 4a; explicitly setting out the requirements in the *Aranyosi and Căldăraru* and *LM* two-tier test and limiting the scope of the bar. A balanced formulation is of main importance when introducing such a ground for refusal so as to not impair the principle of mutual recognition and protect the clause from any abuse.[317]

The introduction of an explicit fundamental rights refusal ground in the Framework, would most certainly increase legal certainty as it would provide a more uniform and consistent application of fundamental rights safeguards. In addition, while the risk of abusing such a clause is never zero, the practice of Member States who added a fundamental rights refusal ground in their implementing legislation demonstrates that the use of the refusal ground remains in exceptional circumstances and that no abuses had been identified in 2013.[318] However, as stated by the Commission in their response to the Parliament's 2014 resolution[319], introducing an additional refusal ground would also entail additional checking in every single case, which would lengthen the proceedings and undermine the efficiency of the expedited procedure. Furthermore, while a fundamental rights clause may not have been abused in the year of 2013, the situation has changed radically in the following years and it is unclear if the introduction of a fundamental rights refusal ground would be safe from abuse now.

A suggested alternative to a new refusal ground in the Framework is to introduce an option to temporarily freeze judicial cooperation between two Member States when there are doubts about the respect for the rule of law in the issuing state, an act which would postpone all the EAWs from

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[315] Fair Trials, "*Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings"*, 2021, p. 14 & 17, https://www.fairtrials.org/sites/default/files/publication_pdf/EAW_Policy%20Paper_FINAL.pdf (accessed 23.11.2021)**;** I. Anagnostopoulos, *"Proportionality Issues in European Arrest Warrant Proceedings – Three Stories from the Field"*, in E. Billis, N. Knust & J. P. Rui (ed.), "*Proportionality in crime control and criminal justice"*, Oxford, Hart Publishing, 2021, p. 356.

[316] I. Anagnostopoulos, *"Proportionality Issues in European Arrest Warrant Proceedings – Three Stories from the Field"*, in E. Billis, N. Knust & J. P. Rui (ed.), "*Proportionality in crime control and criminal justice"*, Oxford, Hart Publishing, 2021, pp. 356-357.

[317] M. Del Monte, "*European Added Value Assessment: European Added Value of Revising the European Arrest Warrant"*, European Parliamentary Research Service, European Parliament, 2014, EAVA 6/2013, p. 16.

[318] A. Weyembergh, I. Armada & C. Brière, *"Critical Assessment of the Existing European Arrest Warrant Framework Decision"*, Research Paper for DG for Internal Policies of the Union, European Parliament, 2014, EAVA 6/2013, Annex I, p. 11.

[319] European Commission, "*Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant*", SP(2014) 447, 22 July 2014, p. 3.

the issuing state in the executing state requesting the freeze.[320] This freezing measure would then stay in place until the situation has either improved or the Council moves to suspend the mutual trust towards that Member State through the sanctions in Article 7(2) TEU.

The Commission did initially provide for a very similar safeguard in their proposal, allowing Member States to suspend the application of the Framework in the event of a serious and persistent breach of fundamental human rights through a declaration to the Council and Commission.[321] This unilateral suspension would only be temporary and would cease to have effect if an Article 7 procedure was not initiated within six months.[322] In addition, in order to ensure that suspects did not escape criminal responsibility while this suspension is under, Member States would be required to take all necessary measures to establish jurisdiction over the offence listed in the EAW.[323] This shows an incredible willingness to provide a fundamental right protection, however this provision never made it into the adopted Framework. From the explanatory memorandum on the proposal it reads that the suspension would only be applied during the transnational period pending the decision on the application of Article 7 [324]– it is unclear whether this is attributed to the identification of a breach (Art. 7(1) TEU) or to the sanctions (Art. 7(3) TEU).

As we have seen in the examples of Hungary and Poland, moving from the identification phase to the employment of sanctions has proven a very challenging task and the triggering of the procedure has seemed to do nothing to stop the situation from deteriorating further in the Member States. Lifting the unilateral suspension at the first identification stage therefore seems to be too early, providing the 'troubled' Member State a window for surrenders that would put EU citizens at risk especially due to the hard-to-reach threshold of the *LM*-test. It could be beneficial to introduce such a measure in a more limited and reviewable manner – e.g. a specific time period, where the suspension is reviewed at the end of the period and a decision can be made to either prolong and renew the period if the poor situation has not improved or lift the suspension if it has. Depending on the length of the period, a possibility to request an earlier review should also be awarded to the 'troubled' Member State in the case that they have made active changes and improved the situation before the period is coming to an end.

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[320] P. Bard and W. van Ballegooij, "*Judicial independence as a precondition for mutual trust? The CJEU in Minister for Justice and Equality v. LM*", New Journal of European Criminal Law, 2018, Vol. 9(3), p. 362.
[321] European Commission, *"Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States"*, 25 September 2001, COM(2001)522 final/2, p. 46, Article 49 (1).
[322] Ibid.
[323] Ibid., Article 49 (2).
[324] European Commission's commentary on Art. 49 in the explanatory memorandum to the *"Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States"*, COM(2001)522 final/2, p. 23.

The freezing mechanism would act as an accountability measure, which is an important part of maintaining trust allowing Member States to act quickly when another Member States has made a mistake and essentially holding them accountable for their actions limiting cooperation until they fix their mistake. This approach essentially entails a bottom-up version of the general suspension provided by the Council through the Article 7 procedure, by suspending the application of the EAW – which would intrude on the Council's exclusive power and challenge the entire foundation of the EU. Even if the freezing mechanism was not a unilateral decision but rather a request from one individual Member State, there is a great risk that the request for freezing will not solely be made by that single Member State. However, given how challenging the Article 7 procedure has been and how likely it is for one troubled Member State to avoid repercussions when they are being protected by another troubled Member State due to the unanimous vote requirement – the freezing mechanism, either by unilateral or individual request, could therefore present itself as a workaround to the current difficulties being had with Article 7.

Lastly, it has been proposed to establish a post-surrender monitoring mechanism for assurances made by issuing Member States to ensure that they are abided by post-surrender.[325] It has previously been mentioned that following a surrender, the executing Member State has no visibility of the conditions that the person actually faced and has no way of ensuring that the assurances made by the issuing authorities are being kept. This has led to many people having their rights violated post-surrender despite assurances of the opposite having been made in order to secure the surrender, with the only redress being a lengthy process at the ECtHR. Setting up a specialised monitoring body that focuses on ensuring that assurances are being abided by to the best of their capabilities would, at the very least, provide a sense of relief for the executing authority who must rely on the assurances. This type of monitoring system could operate on communication with the surrendered individual themself through periodic reporting – written or spoken – on the realities following the surrender and whether the assurances have been broken. The use of periodic reporting would mean that any inconsistencies could be taken up immediately, rather than 5 years later in the ECtHR.

However, in order to provide immediate relief for the individual, the monitoring body would need to have some acting powers to hold the issuing Member State accountable – simply being informed of broken assurances makes no real difference. This power could be to either suspend the execution of EAWs in regard to that country, which would intrude on the Council's exclusive power, or to issue a warning to all Member States serving as a caution that certain assurances are not being abided by in that particular Member State. This official warning should of course be preceded by a

[325] Fair Trials, *"Reinforcing procedural safeguards and fundamental rights in European Arrest Warrant ('EAW') proceedings"*, 2021, p. 26, https://www.fairtrials.org/sites/default/files/publication_pdf/EAW_Policy%20Paper_FINAL.pdf (accessed 23.11.2021).

number of direct warnings to the issuing Member State itself, to rectify the situation and abide by the assurance within a set time limit or face consequences. The time limit should be neither too short, so as the issuing Member State has a possibility to act, nor too long as it would prolong the violation of the person's rights.

If the issuing Member State is unwilling to make the necessary changes, the official warning issued to the Member States would, *at the very least*, result in mass-postponements. This can be attributed to the fact that any execution ordered on the basis of this certain assurance while being aware that it is not abided by would make the executing Member State responsible for any violations occurring post-surrender as established in *Bivolaru and Moldovan v. France*.

The warning would then stay in place until the broken assurance has been corrected – the prisoner is moved to the promised facilities, a retrial has been given, the promised medical care is administered and so forth. The information received by the surrendered person should of course be verified so as to avoid issuing warnings for false claims, in addition the severity and number of broken assurances would need to be taken into account to ensure that the measure is proportionate to the aim – one single person having a cm less cell space than promised cannot justify the use of this measure. This solution would impose a greater level of accountability on the issuing Member States and ensure that assurances are being abided by – limiting the use of false assurances by providing a greater chance for individuals to rebut assurances that are otherwise taken at face value which will in turn aid in strengthening the trust between Member States. While this solution would function well in the case of assurances made regarding detention conditions and promises of retrials, the problem still remains in relation to the difficulty to assess assurances and whether they are being in relation to the fairness of a trial – resulting in an unequal application.

While my viewpoint has previously been that an explicit refusal ground in the main body of the Framework was needed in order to properly safeguard the fundamental human rights of an individual facing surrender, I have changed my tune while writing this thesis. I reckon that since the rulings in the CJEU create a *de facto* refusal ground, this negates the need of an explicit ground for non-execution in the Framework. Granted the two-tier test and its application is far from perfect and needs to be developed further, which would also have been the case if you were to introduce a new general refusal ground in the Framework, it has great potential. The problem therefore no longer lies with the lack of a refusal ground, but rather the effective application of said refusal ground. As previously mentioned, the high threshold and heavy reliance on assurances are the current flaws in the *de facto* refusal ground that need to be addressed in order to provide a sufficient level of accountability, protection and certainty until a genuine mutual trust exists between Member States in the area of EU criminal law.

I find no issue with issuing authorities providing assurances and a subsequent reliance on them as long as they are given in good faith. If they are given in good faith and the issuing Member State is doing their absolute best to abide by them post-surrender, then the assurances serve as a way for the issuing authority and Member State to prove their trustworthiness and improve mutual trust towards them. As this has not always been the case, there is a need for assurances to be ensured and having a monitoring mechanism in place for surrenders ordered on the basis of assurances with the ability to issue an EU-wide caution whenever a certain type of assurance is intentionally or carelessly broken by a Member State would provide such insurance. It should be noted that Member States can miscalculate and realise that they are unable to abide by the assurances that they have given, and being penalised for having good intentions should be avoided in these cases as it will not benefit anyone. In such an unfortunate situation, issuing Member States should be encouraged to reach out and ask for help on how to best overcome the shortcoming – this open willingness to remedy their mistake yet again increases their trustworthiness and builds trust. As already mentioned, a system issuing cautions when issuing Member States systemically fail to abide by their assurances would also serve as an aid for individuals challenging assurances who would otherwise have needed to track down these broken assurances on their own.

In regard to the difficulties in meeting the high threshold set by the CJEU in the landmark cases, especially when challenging a surrender on rule of law and fair trials concerns, this requires the CJEU to elaborate on the assessment criteria as it has done in the case of inhuman and degrading treatment. If unable to clearly elaborate on concrete criteria, a revised approach dependent on the severity of the systemic and generalised deficiencies similar to the approach taken by the Vestfold court could potentially alleviate this high burden and lower the threshold enough without completely disregarding the principle of mutual recognition and trust. The greater the severity of the systemic deficiencies in the judiciary, the greater the risk that it will affect the right to a fair trial regardless of the surrendered individual. This approach will still need to be approved and developed by the CJEU in order to ensure the most uniform application of it – therefore, national courts should continue to refer questions for preliminary rulings that could result in such an approach. I still hold that the two-tier test is the best way to go and that, wherever it is possible, the individual assessment should be done to its full extent, however I believe that whenever there are substantial difficulties in performing the individual assessment, then the severity of the systemic deficiencies could provide an indication on the general likelihood of it affecting the surrendered individual.

6. Concluding remarks

The European Arrest Warrant has become one of the most important tools in the fight against serious cross-border crime and is considered a key feature of internal security in the EU. To date, the EAW is the most used mutual recognition instrument and is generally regarded as a successful innovation. The instrument has certainly achieved its main objective of speeding up and facilitating the extradition procedure as the instrument has resulted in a higher level of automaticity in judicial cooperation in criminal matters, significantly reducing the duration of surrender procedure between EU Member States. This facilitated process has ensured that the open borders are not exploited and that victims of crimes see justice done on a reliable basis. However, the adoption of the EAW was a rush job, a legislative reaction to the 9/11 terrorist attacks, which resulted in a somewhat patchy framework lacking legal certainty in practice and sufficient protection of individuals' human rights.

The pressure to create a system that was simplified, fast and efficient has come at the expense of the rights of individuals. The EAW system is built on the flawed assumption that Member States can have complete faith that the instrument will only be used when appropriate and that an individual's fundamental human rights will be respected post-surrender. Nearly 20 years of practice has shown that the EAW is often not used in the manner it was created for and that the instrument has been used to violate basic human rights such as the right to liberty, the presumption of innocence, the right to a fair trial and the right to not be subjected to inhuman or degrading treatment. As a result, the EAW's efficacy is currently being threatened by human rights concerns, its misuse and the potential for abuse.

Proportionality, minimal scrutiny and non-recognition of non-executions

Despite the EAW being designed to primarily tackle serious cross-border crimes, the system is regularly being used to prosecute minor crimes without any consideration of whether the measure is appropriate, and for investigation purposes such as questioning and evidence gathering despite the existence of less coercive alternative instruments. The absence of an explicit proportionality requirement in the Framework has resulted in incoherent implementation throughout the EU. Furthermore, the minimal scrutiny awarded to the executing authorities have illustrated that individuals have faced extraditions pursuant to EAWs even when there is clear evidence of them being the victim of mistaken or stolen identity and narrowly avoiding surrender. Additionally, there is currently a possibility to exploit the minimal scrutiny in bad faith, driven by other interests than justice and target specific groups of people for 'questionable crimes' such as having an abortion or criticising the government, which is especially dangerous in the current political climate. The EAW currently has no safeguards in place to protect individuals from severe abuse of the instrument.

Moreover, the human rights implications of these disproportionate or abusive EAWs do not always end after an execution or non-execution, rather can persist for years as there is no obligation to withdraw an EAW or its accompanying alert. Especially in regards to non-executions, these judicial decisions do not fall within the principle of mutual recognition and are therefore often not respected by the issuing authorities. The lack of mutual recognition of non-executions and the lack of obligation to withdraw an EAW result in individuals either facing multiple arrests and hearings in other Member States when enjoying their freedom of movement, or being confined to one Member State so as to not risk rearrest – each having a significant effect on the freedom of movement and life of the individual.

In the instances where EAWs are issued prematurely, individuals surrendered pursuant to an EAW are likely to spend lengthy and disproportionate periods of time in pre-trial detention due to their status of non-residents branding them as a flight risk. This overuse of pre-trial detention increases the risk of them being subjected to inhuman or degrading treatment as a result of the well documented poor prison conditions found throughout the EU.

Mutual trust – detention conditions and rule of law backslide

In addition, people are regularly being surrendered to Member States despite serious human rights concerns – such as violations to the right to liberty and discrimination as a result of the overuse of pre-trial detention regarding non-residents, the right to not be subjected to inhuman or degrading treatment caused by the poor prison conditions throughout the EU, and the right to an independent tribunal and a fair trial caused by the current rule of law crisis.

Detention conditions are particularly relevant in the context of the EAW as they have a direct link to the efficient application of the EAW instrument. It is well documented that there are systemic deficiencies in prison conditions throughout the EU, this has led to executing authorities being reluctant to execute an EAW when the issuing Member State is known to have questionable prison conditions. It can thus be said that poor prison conditions, whether on their own or due to overcrowding, have the effect of undermining mutual trust and mutual recognition and hinder the efficient application of the EAW. Without proper mutual trust in the area of detention the EAW instrument is unlikely to ever work properly. While the CJEU has developed a test in order to safeguard individuals from suffering inhuman or degrading treatment due to poor prison conditions in the context of the EAW, the application is inconsistent, complex and does not ensure that the individual's rights are protected post-surrender. Unless the current problems are properly addressed and further efforts are made to improve detention conditions throughout the EU in addition to encouraging the use of alternatives to detention, the EU will never be able to generate the necessary basis of trust. This trust can for example be generated through the adoption of minimum standards

in relation to detention conditions – however until then, all assurances made by issuing authorities need to be properly monitored post-surrender so as to ensure that they are abided by.

The Rule of Law is one of the main building blocks of democracy and is essential for the functioning of the EU, the protection of fundamental rights and for mutual trust – if not properly protected in all Member States, the very foundation of the EU is damaged. Countries around the globe are currently facing a democratic recession.[326] Even the EU is currently facing a great democratic challenge due to the rise of governments that openly reject democratic core values, inching closer to an authoritarian rule, weakening the democratic building blocks such as the rule of law – as is the case in Hungary and Poland. These recent developments within the walls of the EU have had a noticeable impact on judicial cooperation among Member States within the context of criminal law, heavily affecting the Member States' trust and hindering the efficient application of the EAW. Considering that the undermining of the rule of law in Hungary and Poland may only be part of a broader worldwide trend, there is far more at stake in the EU than the rule of law in these two particular Member States and the rule of law cannot be guaranteed as a structural matter. Now that at least two Member States have gone rogue and the EU is failing to successfully address the deterioration in these two Member States, there is nothing stopping others from following suit and this constitutional exceptionalism becoming the new normal. Member States that are undergoing rule of law monitoring, such as Romania and Bulgaria, may be inspired to ignore the recommendations as they see that Poland and Hungary are not suffering any real consequences, but rather continue to enjoy the benefits of the EU.

In order for the EAW to function in spite of these new developments the CJEU needs to elaborate on their case law in the context of the EAW when there are rule of law concerns, and the EU needs to ensure the respect of the rule of law and act against the rogue states – suspending mutual trust towards them so as to avoid a bottom-up approach and a collapse of the EU as an organisation.

Looking to the future

The challenges that the EAW is currently facing do not have their roots in the EAW system itself, but rather in the Member States' inability or unwillingness to respect and comply with the general EU principle of proportionality, EU values, and human rights equally throughout the EU. There is no denying that some Member States were in reality not ready to be a part of the EAW yet as their criminal justice systems fail to live up to the ECHR standards presumed by the EU. However, by extending the reach of the Member States' inadequate criminal justice systems beyond their own borders and residents, the EAW enabled the misuse and abuse of the system by failing to provide

[326] For an overview of the democratic recession in different regions see the report *"Freedom in the World 2020: A Leaderless Struggle for Democracy"* by Freedom House, https://freedomhouse.org/report/freedom-world/2020/leaderless-struggle-democracy (accessed 14.12.2021).

sufficient safeguards. While the problem with the lack of safeguards preventing abuse and protecting the human rights of the individual has a limited impact in a perfect world, it is consequently made worse by issuing Member States that are failing to protect the basic human rights of individuals – making the EAW system part of the bigger problem. Additionally, the EAW system fails to keep up with the current changes that the EU is facing and still operates with a view of the world that no longer exists. As the world changes, the system needs to change with the world in order to be able to meet and negate the new threats and requirements needed in order to ensure a continuous efficient application.

In the beginning of the year, the European Parliament adopted a resolution in which they sought to extend the list of 32 offences set out in the EAW, including two broadly defined offences: *"offences involving the use of [...] a serious threat against public order of the Member State"*[327] and *"crimes against the constitutional integrity of the Member State committed by using violence"*[328]. These vague and broad offences would give significant discretion to issuing authorities, and create an even greater opening for Member States to utilise the EAW for political persecution as any political activism could essentially qualify as any of these two offences. As we have seen governments across the world increasingly criminalise and undermine activists, this extension of offences without the appropriate human and fundamental rights safeguards would essentially create an unsafe environment for political activism within the EU. Considering that there is already an established practice of authoritarian regimes abusing the Interpol red notice for political persecutions abroad,[329] further deterioration of democratic standards within the EU could see the EAW be abused in the very same way if these new offences were added without any safeguards.

Each of the selected challenges discussed in this thesis have not only an impact on the human rights of individuals, but affect the overall long-term sustainability of the EAW instrument to varying degrees – with the more pressing challenges calling for immediate attention as they threaten the very foundation of the EU. In order for the legitimacy of an instrument based on a high level of confidence amongst Member States (such as the EAW system) to persist in the long-term future, the EU needs to strengthen the overall system by remedying the weaknesses and recalibrating the trust not only between the Member States, but also in the system itself and its practical application. This would avoid any further abuse and cases of injustices, provide a more unified application, and ensure the sustainability of the EAW – which is especially desirable as the greater mobility of

[327] European Parliament resolution of 20 January 2021 on the implementation of the European Arrest Warrant and the surrender procedures between Member States (2019/2207(INI)), P9_TA(2021)0006, p. 11, para. 14.
[328] Ibid.
[329] See e.g. Fair Trials, *"Strengthening respect for human rights, strengthening INTERPOL"*, November 2013, https://www.fairtrials.org/sites/default/files/publication_pdf/Strengthening-respect-for-human-rights-strengthening-INTERPOL5.pdf (accessed 14.12.2021).

people in the EU and accession of new Member States will only lead to an increase in the number of EAWs being issued in the future.

Final thoughts

It cannot be denied that the EAW is an overall successful instrument to tackle serious cross-border crime, it has brought clear benefits such as speed and simplicity. Nevertheless, it is an incredibly intrusive instrument that effectively limits the rights and freedoms of the individual without providing a counterbalancing protective dimension, resulting in too many human rights violations and cases of injustice. Justice cannot be done at all costs; an efficient extradition system will recognise the need for criminals to face justice but strike a balance with the human rights of the accused and the overwhelming effects that a surrender would have on the individual.

The current weaknesses in the system – which are made worse by the inconsistent respect of human rights and EU values in Member States – already pose a very real threat to the human rights of individuals, mutual trust and the efficacy of the EAW. If left unattended they will threaten not only the sustainability and future of the EAW system itself, but the application of mutual recognition in the field of judicial cooperation in criminal matters and in the worst case, the functioning of the EU as a whole.

An efficient system of extradition is important for any society and necessary, not least in a Europe of open borders where the freedom of movement is not limited to honest citizens, however not at the expense of basic human rights – an instrument that violates these basic rights fails to deliver a fair and just extradition system.

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