



Extending the Proportionality test in EAW case laws: An Examination of Xanthopoulou's Case Study

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Extending the Proportionality test in EAW case laws: An Examination of Xanthopoulou's
Case Study

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Abstract

This research thesis seeks to analyze whether the Court of Justice of the European Union aligns its decision with the proportionality principle per se of Article 52 (1) of the EU Charter of Fundamental Rights in case-laws related to the European Arrest Warrant. While the principle of mutual recognition has been the cornerstone and mechanism of the EAW and non-execution followed a strict interpretation of the mandatory and optional grounds for refusal listed in Article 3 and 4 of the Framework Decision of the EAW in the earlier half of its history, recent jurisprudence of the CJEU suggests that interpretations of this legal instrument has been shifting towards fundamental rights considerations. In her book *Fundamental rights and mutual trust in the area of freedom, security and justice: a role for proportionality*, Ermioni Xanthopoulou proposed utilizing the proportionality test to resolve fundamental right interference in EAW case laws. The author extends the case study in Xanthopoulou's book to examine whether her solution applies to four cases where the requirements of the EAW are apparently lacking, and to evaluate whether her recommendation for the CJEU to apply the proportionality test truly enables fundamental rights to be reconciled when confronted with the principles of mutual recognition and mutual trust. This case study shows Xanthopoulou's solution does help protect fundamental rights, however, the Court has already incorporated proportionality in its judicial reasoning and would have reached the same decision if the proportionality test was strictly applied.

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Chapter I.

Research Problem

The European Arrest Warrant (EAW) is an extradition procedure adopted in the wake of the 2001 9/11 attacks by the Council of the European Union on 13 June 2002.¹ While originally it was created in response to terrorism and adopted by only eight countries --Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the United Kingdom ---the EAW soon became operational in all EU countries and applicable to a wide range of ordinary crimes. When it entered into force in 2004, this procedure has replaced existing lengthy diplomatic channels between countries. Given that Europe abolished its internal borders, the EAW has become an increasingly useful legal instrument in reinforcing and enforcing criminal justice systems of European Union Member States.²

However, because of how widely EAW is used across Europe– through different legislations and legal systems – not all Members States can provide the same standard of protection in fundamental rights while implementing the Framework Decision on the European Arrest Warrant. In the European Commission report published on 2 July 2020, general assessment on EAW shows compliance issues in national implementation

¹ “European Arrest Warrant - Background.” European Commission - European Commission, August 9, 2021. https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/european-arrest-warrant_en#background.

² “Statistics on the Practical Operation of the European Arrest Warrant – 2019.” Europa. European Commission, August 6, 2021. https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swg_2021_227_final_08_2021_en.pdf

particularly on grounds for refusal and non-observation of time limits.³ A few high-profile cases have brought these concerns to the spotlight, highlighting whether the EAW judicial procedure protects innocent people. *Der Spiegel*, Europe's leading news-magazine, discussed whether courts are capable of hearing concerned case in compliance with the right to a fair trial while interviewing Catalan President Carles Puigdemont who was detained for 12 days under the EAW in Germany for calling an independence referendum which was outlawed by the Spanish Constitutional Court.⁴ It appears that, despite the warrant being apparently political, based on the principle of mutual trust and recognition, Germany is obligated to apprehend the six Catalan separatist politicians wanted on rebellion charges and surrender them back to Spain because there are little grounds for non-execution. In 2011, *Deutsche Wells* criticized that these extradition cases under the EAW can hold those facing minor charges in oversea jails for months without the requesting country having to present evidence.⁵ This controversy was brought into the public attention when Julian Assange was wanted in Sweden for sexual assault charges but has barricaded himself in Ecuador's Embassy in London.

I wonder what this means for the ordinary people of the EU and would innocent people requested by the warrant be protected with fundamental rights. I wonder how the European Council address these apparent deficiencies in the policy domain of Area of

³ Christian Wigand, and Guillaume Mercier, eds, "Commission Reports on European Arrest Warrant: 56,000 Persons Surrendered since 2005, Member States Need to Improve Implementation." (European Commission, July 2, 2020). https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1245.

⁴ Helene Zuber, and Mathieu von Rohr, "Former Catalan President Puigdemont 'I Don't Like Being in Exile'." *Der Spiegel*, August 13, 2018. <https://www.spiegel.de/international/europe/former-catalan-president-puigdemont-i-don-t-like-being-in-exile-a-1222545.html>.

⁵ Catherine Drew, "European Arrest Warrant Faces Criticism." *Deutsche Welles*, February 21, 2011. <https://p.dw.com/p/10KFG>.

Freedom, Security, and Justice (AFSJ). I would like to seek answers to the following questions: Do the existing provisions in the Framework Decision sufficiently protect fundamental rights? Do we need a new reform? Is there a solution that amends and help protect fundamental rights? And will that solution/test produce different outcomes if applied by the court?

I will answer these questions by analyzing four case studies, that infringe on Article 8 of the Framework Decision of the European Arrest Warrant, with Ermioni Xanthopoulou's proposed method of reconciling fundamental right interferences with EAW's mechanism of mutual recognition. Xanthopoulou's solution to the fundamental right problem recommends the Court of Justice of the European Union (CJEU) apply a proportionality test under Article 5(4) TEU and Article 52(1) of the Charter to all cases regarding interferences in fundamental rights and mutual trust. In what follows is a brief description of the legal provisions in the Framework Decision of the European Arrest Warrant that relate to the cases that we will examine, an exploration of the key principles that facilitate judicial cooperation and govern the European Arrest Warrant mechanism within the AFSJ, an explanation of the method that I will use to analyze the four case study, and an analysis on four chosen EAW cases that infringe on Article 8 of the Framework Decision. The four cases that I have chosen are Bob-dogi (Case number C-241/15), Ozcelik (Case number C-453/16 PPU), MM (Case number C-414/20), and PI (Case number C-648/20). By extending Xanthopoulou's case study, I will be able to answer whether the existing provisions sufficiently protect fundamental rights and be able to evaluate whether her method can reconcile the apparent problems faced by the European Arrest Warrant.

Chapter II.

Background of the Problem

In order to answer the questions of whether we need a reform of the EAW in the Area of Freedom, Security and Justice (AFSJ), one needs to better understand the definition, legal nature, and threshold of the EAW by examining the written text that establishes their obligation on member states, and as well as conditions validating and limiting an EAW in the Framework Decision. The Framework Decision of the European Arrest Warrant (FD EAW) is the EU legislation that establishes the functioning of the EAW legal instrument.⁶ Article 1 of the FD EAW defines a European Arrest Warrant and obliges member states to execute the warrant. Article 2 and Article 8 of the FD EAW place a series of conditions which a European Arrest Warrant must meet for it to be validly issued. I am particularly interested in the provisions of Article 1, 2, and 8 of the FD EAW because the case-laws I have chosen for this case study pertain to their interpretations. In what follows is a brief description of the definition (Article 1), threshold (Article 2), and requirements (Article 8) for issuing a valid EAW. Then, I will review literature on the cornerstone principles of mutual recognition inherent in Article 1 of the FD EAW and explore how its implementation controversially conflict with fundamental rights, in order to answer the question of reforming the EAW.

⁶ Council Framework Decision 2002/548/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJL 190, 18.7.2002, p.1–20.

Article 1, the Definition of the EAW and Obligation on Member States

The definition of the EAW and its obligation on Member States are stated in Article 1 of the EAW. Article 1(1) of the FD defines the EAW as “a judicial decision issued by a Member State with a view to arrest and surrender by another Member of a requested person, for the purpose of conducting a criminal prosecution, or executing a custodial sentence or detention order.” To understand the legal nature of this instrument, it is important to note that this definition classifies the EAW as a “judicial decision” binding on Member States notwithstanding the fact that different national substantive and procedural law persist. The mechanism unifying national legal systems to accept and recognize judgments of other member states is the cornerstone principle of mutual recognition of court orders among Members, codified in Article 1(2) of the FD EAW. Member States are willing to cooperate and forgo lengthy checks provided that each Member State transpose their national laws to adequately comply with EU law and fundamental rights.⁷ Under Article 1(3) of the FD EAW, Member States are “obligated to respect fundamental rights and fundamental legal principles as enshrined in Article 3 of the Treaty on European Union.”

According to the definition and obligation prescribed in Article 1 of the FD EAW, Member States cannot refuse to execute an EAW unless mandatory and optional grounds for refusal specified in article 3 and 4 of the FD EAW apply. Possible breaches of fundamental rights are not included as one of the grounds for refusal. Although article 1

⁷ Joske Graat, “Setting the Scene: The principle of Mutual Trust” *The European Arrest Warrant and EU Citizenship : EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure*. Cham: Springer International Publishing AG, (2020): 23.

(3) of the FD-EAW did mention member states shall respect fundamental rights, it was not perceived by the CJEU, at least originally, as an additional ground for non-execution but as pure clarification and an indication of adequate legal rules of other member states.⁸ The executing Member State may express doubt and request a preliminary reference to the CJEU for clarification on EU law or for interpretation of evidence of deficiency. Since its adoption, the Court has primarily interpreted these preliminary references in technical-legal terms laid down in the EAW Framework.⁹ The implementation of mutual recognition in the FD EAW implies that Member States must swiftly recognize EAW's without assessing fundamental rights protection in the issuing Member State's criminal justice system.¹⁰ However, there has been modifications lately as a "blind positive acceptance of different national standards," Satzger argues, is not compatible with changing circumstances nor is it fostering conditions for mutual trust.¹¹

⁸ Opinion 2/13 of 18th December 2014, ECLI:EU:C:2014:2454; In the view of a number of legal scholars. Helmut Satzger, "Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant" *European Criminal Law Review* 8, no. 3 (2018): 317–31; Jannemieke Ouwerkerk, "Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant" *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 103–109; Leandro Mancano, "You'll Never Work Alone: A Systemic Assessment of the European Arrest Warrant And Judicial Independence" *Common Market Law Review* 58, no.3 (2021): 683–718.

⁹ Ermioni Xanthopoulou, "Case Study I: European Arrest Warrant Transfers" *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice*. Oxford: Hart Publishing (2020), 117-118; Jannemieke Ouwerkerk, "Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant" *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 104.

¹⁰ Ouwerkerk, "Balancing Mutual Trust," 104-105.

¹¹ Satzger, "Mutual Recognition in Times of Crisis," 330.

Article 2, the Threshold and Scope

Article 2 of the FD EAW delineates the scope of the European Arrest Warrant. The criteria for issuing an EAW are stated in Article 2 (1) of the FD EAW: “acts punishable by law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.” It is widely accepted that this threshold is considered low, considering that any crime that could have resulted in a sentence of imprisonment lasting a year or more before the trial for that crime has begun, or a prosecution with a sentence of imprisonment lasting at least four months, covers a wide scope of criminal offences for extradition across the EU.¹² This includes petty crimes, such as shoplifting. Because of this low -threshold, some scholars argued that it should be raised to prevent overloading the executing member state with disproportionate and unnecessary cases.¹³ The extensive use of the EAWs can be quite costly and burdensome for executing states. However, raising the threshold would defeat the aim of the EAW, which is to ensure justice is not evaded-- even if it’s minor offenses--through the freedom of movement across different states. In this paper, I will investigate alternative options, other than raising the threshold, to assess whether this disproportionate number of EAW cases requires reform of the Framework Decision.

In addition to a low threshold contributing to a large scope of the EAW, the rule on double criminality is no longer applicable, as per Article 2(2) of the FD EAW, to

¹² Xanthopoulou, “Case Study I,” 117-118; UK Home Secretary, “A Review of the United Kingdom’s Extradition Arrangements” (2011) 162; Graat, “Setting the Scene,” 23.

¹³ Weyembergh, Armada and Brière, “Annex I: Critical Assessment of the Existing European Arrest Warrant Framework Decision”. In *European added value assessment: the EU arrest warrant*. European Parliament (2016), I-10.

offenses included in the list of 32 areas of serious crime that give rise to surrender. The basic rules of traditional extradition, namely double criminality and specialty rule are abolished under the FD EAW. Double criminality refers to acts that are only extraditable if it constitutes a crime in both the executing and issuing country. Specialty rule prohibits the issuing state from prosecuting the requested person for offenses other than that he was extradited for. For offences other than those covered by paragraph 2, member states are free to impose a verification of double criminality on offences under the laws of the executing member state, whatever the constituting element and however it is described, as per Article 2(4) of the FD EAW. This means that if the offence isn't on the list and they find that the warrant violates fundamental principles of its legal system, member states may opt out of executing an European Arrest Warrant. Consequently, though Member States must transpose the EU legislation of FD EAW into its national legal provisions, they have the option to decide the form of transposition and apply their constitutional principles, provided that they do not compromise the “primacy, unity and effectiveness of EU law.”¹⁴

There was significant debate on this matter of double criminality in the case of *Puigdemont* when Germany decided to reject the admissibility of his EAW for the offense of rebellion.¹⁵ The debate involves how closely should the executing state—in this case Germany—compare the offense to their national laws when the offense is not exactly punishable under a similar offence of their own national laws. The question

¹⁴ CJEU, Case C-42/17, *Taricco II*, judgment of 5 December 2017, para. 47.

¹⁵ Adán Nieto Martín, “The Foundations of Mutual Recognition and the Meaning of Dual Criminality.” *European Criminal Law Review* 8, no.2 (2018): 160–66.

revolves around whether a strong position towards their own understanding of the criminal law contribute in a clear way of enhancing the protection of fundamental rights. Fortunately for Puigdemont, the member states reached an agreement to release the requested person before a request of a preliminary reference to the European Court of Justice. When the case had reached the lower courts, some scholars argue against the German court for interpreting the double criminality requirement with a traditional approach because that interpretation gave sense to the concept of sovereignty and national identity.¹⁶ They questioned whether conducting a minutely detail test of double criminality (*in concreto* test) would comply with the principle of mutual recognition and what is the basis of the limits of the current system of mutual recognition.¹⁷ They argue a strict interpretation of the double criminality rule hinder the progress of Area of Freedom, Security, and Justice (AFSJ) from being a reality.¹⁸ More on the principle of mutual recognition and fundamental rights will be discussed later in this section when we look at Article 1 of the FDEAW, because member states are obligated to execute an EAW.

Article 8, the Requirement

Article 8 of the FDEAW specifies what content of information must be included for the application of an EAW. Article 8(1) of FD EAW indicates a collection of information required to issue the EAW and designates a standard form to be completed by the issuing authority. This first paragraph of Article 8 list an overview of the required

16 Lorena Bachmaier. "European Arrest Warrant, Double Criminality and Mutual Recognition: A Much Debated Case." *European Criminal Law Review* 8, no.2 (2018): 152–59.; Martín, "Foundation," 160–66.

17 Bachmaier, "EAW, Double Criminality and Mutual Recognition," 155; Martin, "Foundation," 164-165.

18 Bachmaier, "EAW, Double Criminality and Mutual Recognition," 158.

information from (a) to (g), and refers to the standard form contained in the Annex section of the FD EAW. It includes information on the identity and nationality of the requested person, evidence of an enforceable judgment, the nature of the offence, penalty imposed, and others. The standard form is attached on the next page to better illustrate the application requirement. Upon the arrest of a requested person, a judge of the executing court would review the arrest warrant to examine whether the claims on the form are legitimate, lawful, and in accordance with their constitutional law and the EU law.¹⁹ But when the respondent makes a legitimate claim and the judge expresses doubt about the decision to issue the warrant, the judge may request a preliminary ruling from the European Court of Justice.²⁰ The requirements in Article 8, in my view, have become more relevant after the ratification of the Lisbon Treaty in 2009, which incorporates the Charter of Fundamental Rights of the EU (CFR) giving it a legally binding status, when information provided in the EAW is susceptible to scrutiny of CFR provisions.²¹

A more contentious requirement among the list is the interpretation of an “enforceable judicial decision” and “evidence of an enforceable judgment,” under Article 8 (1)(c) of the FD EAW.²² This provision is contentious because national courts, in some cases, doubt the efficacy of the decision or judgment issued by an institution other than a court, such as police or public prosecutors working under the executive branch of

¹⁹ T. Papademetriou, & Law Library Of Congress, “European Union: European arrest warrant”. *U. S. G. L. R. D.* Washington, D.C.: The Law Library of Congress, Global Legal Research Directorate (2003). Retrieved from the Library of Congress, <https://www.loc.gov/item/2019670579/>.

²⁰ Mancano, “You’ll Never Work Alone,” 685-686.

²¹ Graat, “Setting the Scene,” 15.

²² Ariadna H Ochnio, “Why Is a Redefinition of the Autonomous Concept of an “Issuing Judicial Authority” in European Arrest Warrant Proceedings Needed.” *European Papers* 5, no.3 (2020): 1305–24.

government.²³ Article 8 (1)(c) of the FD EAW is related to the clause “issuing judicial authority” in Article 6 of the FD EAW, which for simplicity, we will not delve too deeply into. The two articles in the Framework Decision, Articles 6 and 8(1)(c), are related in that it is the authority that makes the decision or judgment.

Another requirement prone to dispute is Article 8 (1)(f) “penalty imposed” because too severe of a punishment for a minor or unpunishable crime would either run against the nation’s fundamental principles or lead to overcriminalization. Some argue that the EAW procedure should be more individual-centered and scrutinized at the initial stage.²⁴ They argue that the initial stage of issuing an arrest warrant may affect due process and effective judicial protection of the individual. I agree with this school of thought, that by assessing the decision to issue an EAW and whether the issuing authority is competent are important factors in providing fundamental rights protection.

²³ Ochnio, “Redefinition of Issuing Judicial Authority Needed,” 1314.; CJEU, Case C-216/18 PPU, *LM*, judgment of 25 July 2018. ECLI:EU:C:2018:586; CJEU, Case C-241/15, *Bob-Dogi*, judgment of 1 June 2016. EU:C:2016:385; CJEU, Case C-453/16 PPU, *Özçelik*, judgement of 10 November 2016. EU:C:2016:860; CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021. ECLI:EU:C:2021:4; CJEU, Case C-648/20 PPU, *PI*, judgment of 10 March 2021. EU:C:2021:187.

²⁴ Ochnio, “Redefinition of Issuing Judicial Authority Needed,” 1305.

The principle of Mutual Recognition

This basic principle of mutual recognition appears regularly in the Judicial Cooperation in Criminal Matters context, especially in the context of the EAW since it is the very first instrument to adopt the mutual recognition principle in criminal law.²⁵ Mutual recognition has been controversial and fiercely discussed mainly because the efficiency of its implementation may conflict with protections of fundamental rights.²⁶ In fact, according to some legal scholars, these concerns regarding fundamental rights and the recent rule of law backsliding in Poland changed the parameters of the EAW's application significantly over the past two decades.²⁷

For instance, Ouwerkerk explained that, prior to the Aranyosi judgment, CJEU did not question the scope of mutual recognition in cases where the issuing of an EAW allegedly violates fundamental rights.²⁸ For the first time, the Court in Aranyosi held that the likelihood of individuals exposed to inhumane or degrading treatment are contingent upon evidence of poor prison conditions after surrender in the issuing state. Since this case law, the Court requires the executing authority to assess whether there are systemic deficiencies and a real risk of inhumane and degrading treatment, in which that there is a

²⁵ Graat, *The European Arrest Warrant and EU Citizenship: EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure* (2020): 22 et seqq; Satzger, *European Criminal Law Review* 8, no. 3 (2018): 317–31.

²⁶ Ouwerkerk, *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 103 et seqq.; Mancano, *Common Market Law Review* 58, no.3 (2021): 688; Satzger, *European Criminal Law Review* 8, no. 3 (2018): 317 et seqq; Frank Zimmermann, “Concerns Regarding the Rule of Law as a Ground for Non-Execution of the European Arrest Warrant: Suggestions for a Reform.” *European Criminal Law Review* 12, no. 1 (2022): 8.

²⁷ Zimmermann, *European Criminal Law Review* 12, no. 1 (2022): 4-24.

²⁸ Ouwerkerk, *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 104-105.

real risk of inhumane treatment would postpone the surrender proceeding until sufficient information on the prison condition has been obtained and rectified.

The Court's judgment in the Aranyosi case has opened a new avenue in EAW cases where extraordinary grounds for non-execution may be raised, which may include deficiencies, violation of fundamental rights, and challenges to the rule of law.²⁹ It was foreseeable that many other cases, after this first seen case in violation of a fundamental right, to cite Article 1(3) FD EAW and Article 4 CFR as an additional ground for non-execution. Ouwerkerk and others argued that the recent interpretations provided by the Court has reached a turning point since then; in the sense that, compared to the earlier years of the EAW which favored the effectiveness objective pursued by the FD, the Court has progressively move towards a stronger emphasis on reconciling deficiencies and fundamental rights.³⁰

Recent jurisprudence and case law of the CJEU regarding the EAW suggest that strictly applying the mutual recognition principle can be problematic when member states do not trust each other.³¹ Satzger describes a period of EU legal crisis, starting in the late 2010's, where Member States' unwillingness to participate in effective transnational prosecution changes the dynamics of mutual recognition. This shared skepticism has sparked the debate on the presumption of mutual trust indicating the whole system of criminal justice in the EU relies on mutual recognition of foreign judicial decisions,

²⁹ Zimmermann, *European Criminal Law Review* 12, no. 1 (2022): 8; Ouwerkerk, *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 104; Mancano, *Common Market Law Review* 58, no.3 (2021): 683–718.

³⁰ Ouwerkerk, *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 103 et seqq.; Mancano, *Common Market Law Review* 58, no.3 (2021): 683–718.

³¹ Satzger, *European Criminal Law Review* 8, no. 3 (2018): 317–31.

which presupposes mutual trust.³² If his diagnosis of a crisis in the EU system is correct, Satzger argues, CJEU's strict application of the principle of mutual trust and asserting its centrality because the system was created on mutual trust could not possibly save the system. And, trust as a psycho-sociological concept cannot exist no matter how circumstance change, nor ordered upon its subjects.³³ Consequently, the legal and factual situation of member states must be observed continuously to evaluate and justify mutual trust.³⁴

Indeed, the politically explosive LM case introduced an obligation on the executing court to monitor the conditions of EU fundamental rights compliance in cases involving intra-European transfers.³⁵ The LM case follows a reference for a preliminary ruling from the Irish High Court in respects to Autur Celmer who was subjected to three EAWs issued by Polish courts. Mr Celmer is a Polish national arrested in 2017 in Ireland for the offence of trafficking in narcotic drugs. In the High Court of Ireland in March 2018, Mr. Celmer objected to his surrender on the grounds that recent judicial reforms in Poland undermined the possibility of a fair trial. The Irish High Court asks the CJEU whether, in light of the reasoned proposal inviting the Council to determine the basis of

³² Frank Zimmermann, "Concerns Regarding the Rule of Law as a Ground for Non-Execution of the European Arrest Warrant: Suggestions for a Reform." *European Criminal Law Review* 12, no. 1 (2022): 4-24.; Helmut Satzger, "Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant" *European Criminal Law Review* 8, no. 3 (2018): 317–31; Patricia Popelier, Giulia Gentile, and Esther Zimmeren. "Bridging the Gap Between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context." *European Law Journal : Review of European Law in Context* 27, no.1-3 (2021): 167–84.; Mattias Wendel, "Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM." *European Constitutional Law Review* 15, no. 1 (2019): 17–47.

³³ Popelier et al, *European Law Journal: Review of European Law in Context* 27, no.1-3 (2021): 167–84

³⁴ Ibid.

³⁵ CJEU, Case C-216/18 PPU, LM, judgment of 25 July 2018. ECLI:EU:C:2018:586.

article 7(1) TEU regarding the deficiencies in the Polish judicial system, the abstract individualized danger test in Aranyosi's two-tier test needed to be established as well. The Court held the necessity of the two-step-examination stating "the executing judicial authority must also assess...of the essence of [the requested person's] fundamental right to a fair trial, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant."³⁶ But the Court has also pointed out that the independence of judicial authorities was essential to ensure effective judicial protection as it forms part of the essence of fundamental right to a fair trial.³⁷

From the LM case, I can see the Court has slightly taken legal and factual situation into consideration, which is a huge reversal of its initial course. Back in 2014, in Opinion 2/13 on the possibility of an accession of the EU to the ECHR, the Court stresses the principle of mutual trust has fundamental importance in EU law, and each member state shall, "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law."³⁸ However, by 2018 in the LM case the Court made statements that do not presume mutual trust, particularly if there is "a real risk of breach of the fundamental right of the individual concerned to an independent tribunal and, therefore, of his fundamental right to a fair trial as laid down in the second paragraph of Article 47 of the Charter is capable of permitting the executing judicial authority to refrain, by way of

³⁶ Case C-216/18 *LM*, ECLI: EU: C:2018:586, para. 75.

³⁷ Case C-216/18 *LM*, ECLI: EU: C:2018:586, para. 48

³⁸ Opinion 2/13 on the Accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU: C:2014:2454, para. 191.

exception, from giving effect to a European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584.”³⁹ In my view, the Court’s judgment permitting executing authorities to refrain from giving effect to an EAW due to breaches of fundamental right and authorizing executing authorities to scrutinize legal and factual situations to ensure fundamental protection is a huge advancement to EU citizenship and fundamental rights, especially right to a fair trial.

On the other hand, in the LM judgment, the Court’s requirement on assessing general deficiencies of other member states and its impact on the individual is problematic because the approach is multidimensional and complex. Zimmermann finds the approach to consider the rule of law problem in the issuing Member State as an additional circumstance for refusing execution is too superficial because he concurs with Advocate General Campos Sánchez-Bordona’s opinion given in L and P, that soon after the LM decision, every suspect in Poland would face the real risk of an unfair proceeding.⁴⁰ He argues that in a situation where the entire architecture of the judiciary is shattered by a legislative reform, it appears less evident to make the non-execution of an EAW dependent upon the circumstance of individual case. Congruent to Zimmermann’s argument, Wendel indicates three reasons how the Court’s requirement is problematic. Firstly, turning Member States into a supervisory general authority of his/her counterparts could be a problematic endeavor as it implies the responsibility is assigned to Member States in a horizontal dimension instead of a vertical one. This is no means of

³⁹ Case C-216/18 LM, ECLI: EU: C:2018:586, para. 34.

⁴⁰ Zimmermann, *European Criminal Law Review* 12, no. 1 (2022): 11-13; Joined cases C-354/20 PPU and C-412/20 PPU, L and P, opinion of 17 December 2020. ECLI:EU:C:2020:1033, para.45, 50.

determining fundamental rights standards should Member States assist each other in committing violation of human rights. Second, the approach involves a speculative element that the requested person “*might* be treated by the state of destination *in the future*.”⁴¹ Third, these intra-European transfers cases are regularly embedded in constitutionally sensitive contexts, so interpretations are not conducive to producing a standard for fundamental right.

In my opinion, even though it seems as if there is a degree of distrust between national courts and foreign governments, the concerns and criticisms towards the issuing authorities are crucial in cultivating a healthy and fair justice system as the deprivation of liberty of individuals are severe consequences that should not be taken lightly.

Furthermore, the validity and interpretation of this surrender procedure partly relies on the satisfaction of the requirements set in its content and form. Therefore, Article 8 of the FD EAW with provisions about the content and form of the EAW leaves room for rebuttal to refuse an executions, and possibly on grounds in violation of fundamental rights. More protection is provided in Article 8 (2), where it prescribes that warrant must be translated in the official language of the executing state.

As seen in the LM case, to evaluate mutual trust it requires factual context. I believe that it would be helpful to investigate cases pertaining to breaches of Article 8 of the FD EAW, containing the requirements in issuing an EAW. By examining these cases, I will analyze the Court’s reasoning behind cases where the factual and legal situation may be disproportionately adhering to principles that conflict with fundamental rights. I

41 Wendel, *European Constitutional Law Review* 15, no. 1 (2019): 22.

find Xanthopoulos's solution to determining whether EAW cases are proportionate and balanced in her book *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice* a possible way forward. Her case study tries to reconcile fundamental rights interferences when conflicted with mutual recognition principles.

Chapter III.

Research Methodology

Xanthopoulou's Solution to the Fundamental Rights Problem

In *Case Study I: European Arrest Warrant Transfers*, Xanthopoulou discusses the literature involving extensive debates on the incompleteness and imbalances of the extradition procedure in the Area of Freedom, Security, and Justice (AFSJ).⁴² She is particularly concerned that the quick and efficient mechanism of the Framework Decision gave rise to a disproportionate use of the EAW and issues in reconciling fundamental rights with executing an EAW. Although Weyembergh, Armada and Briere argue for fundamental rights to be included in the Framework Decision as specific grounds for refusal to execute an EAW, Xanthopoulos believes it would be a mistake to claim that fundamental rights, without an explicit inclusion, are ignored.⁴³ Contrary to Xanthopoulou, they believe introducing an explicit ground for refusal would increase the visibility of fundamental right and improve legal certainty both for practitioners and for the person concerned. On the other hand, Xanthopoulou stated that several provisions of the FDEAW do sufficiently refer to fundamental rights, namely in the Preamble, recital 10 and Article 1, even though those provisions do not clarify or provide for specific grounds for refusal. Given that the obligation of member states to respect fundamental

⁴² Ermioni Xanthopoulou, "Case Study I: European Arrest Warrant Transfers" *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice*. Oxford: Hart Publishing (2020), 113-4.

⁴³ Weyembergh, Armada and Brière, "Annex I: Critical Assessment of the Existing European Arrest Warrant Framework Decision". In *European added value assessment: the EU arrest warrant*. European Parliament (2016), I-10.

rights is well-established, she contends with the principle of mutual recognition and a high level of confidence between Member States will encompass and sufficiently bridge the gap between two concepts rather than adding specific ground for refusal in the Framework Decision. In her view, a proportionality test by judicial authorities is most appropriate for assessing a risk of breach in fundamental rights.

Proportionality Test

In her chapter, Xanthopoulou suggests conducting a proportionality-based analysis to address the considerations in reconciling fundamental rights interference caused by a surrender procedure.⁴⁴ She believes that the proportionality test applied to case laws should be conducted by both the issuing and the executing authorities because they are prescribed to different prosecutorial principles and legal systems. The proportionality test she uses pertains to the proportionality-based analysis on breaches of fundamental rights per se of Article 52 (1) of the Charter. Article 52, under Title VII General Provisions, defines the reach of the Charter.⁴⁵

Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must **be provided for by law** and **respect the essence of those rights** and freedoms. **Subject to the principle of proportionality**, limitations may be

⁴⁴ Ibid.

⁴⁵ Charter of Fundamental Rights of the European Union (the Charter) [2012] OJ C326/391.

made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Article 52 (1) expresses the limitations and requirements to all Charter rights apart from absolute rights. In his canonical treatises on EU constitutional rights, Robert Alexy explains that there are three elements that make up for the justification of Charter rights.⁴⁶ First, it must be provided for by law. ‘Provided for by law’ is a clause that gives the essential function in the rule of law. It means that law should be interpreted autonomously and forbids arbitrariness in law application. The legality of a law can be reviewed by the ECJ, when there is an interference, to determine whether the law itself is legal and whether the law is in force. Second, it must respect the essence of rights and freedoms. ‘Essence of rights and freedom’ is the concept that stresses the malleability of rights and their social function. It gives considerable degree of discretion to the court to exercise the balancing of interests and ascertain each individual case. And third, it must be proportionate to the objective of the Union and national policy. It is based on the notion of balancing interests, that while recognizing a particular principle would serve as a limitation to another.

The principle of proportionality is a general principle of EU law, having origins from German constitutional law.⁴⁷ The general principle of proportionality is codified in the Treaty of the European Union, under Article 5(4) TEU, which applies to all measures

⁴⁶ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002): 178 et seqq.

⁴⁷ Matthias Klatt and Moritz Meister, “The Structure of the Proportionality Test”, *The Constitutional Structure of Proportionality* (Oxford: online edn, Oxford Academic, 20 Sept. 2012): 7.; Tobias Lock, “Article 52 CFR”, in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (New York, 2019; online edn, Oxford Academic): 2251.

adopted by Member state. The proportionality test requires the court to balance competing interests of all relevant parties; for example, the court must take into account the fundamental rights and freedoms of the right holder, the European Union legal order, seriousness of interference of a right, and objective or goals of a Member State measure. Some conceive it as an ‘arithmetic utilitarian exercise’ that attempts to balance the satisfaction and detriments of the Union, Member States, right holder and third parties involved in the mix.⁴⁸ Alexy’s analysis of the proportionality test requires the adjudicator to apply a four stage test: (i) legitimate aim, whether the measures satisfy ‘an objective of a general interest recognized by the Union’; (ii) suitability, whether the adoption of an interfering measure is rationally connected to the objective; (iii) necessity, whether it is the least restrictive measure available in order to achieve the aim; (iv)balancing, whether the measure adopted balances competing interests (proportionality *stricto sensu*).⁴⁹ Though, generally, there are several slightly different formulations to this principle, I will see that this applied to Xanthopoulou’s proportionality review of case studies. In which, it is in line with the German Federal Constitutional Court.

The practical application of proportionality in the strict sense (proportionality *strico sensu*) is difficult to balance as it calls into question which rights are inalienable and which rights are relative. Proportionality review in fundamental rights cases is not without its critics because it requires the court to assess a fair balance between rights and interests, which poses a danger for courts into making judicial policy instead of fulfilling

⁴⁸ Lock, “Article 52 CFR,” 2253.

⁴⁹ Ibid.

its role as a neutral arbiter. Currently, the European Court is unclear in this regard. The ECJ finds it difficult to determine which essence of rights to be defined as absolute and inalienable, as well as what proportionality should be given to reconciling the protection of different fundamental rights. Despite its difficulties, where there is a potential conflict between primary law and fundamental rights, the Court of Justice often resolves the clashes between legitimate interests of the state and fundamental rights and freedoms of the holder by applying a proportionality test.⁵⁰ To prevent the European courts from making policy-decisions rather than neutral judgments, it is crucial that the Court of Justice of the European Union or national courts justify their ruling with comprehensive reasoning and explore various options available to achieve objectives of the Union and Member state action.

Xanthopoulou's Case Study

In her case study with proportionality-based analysis, Xanthopoulou analysed different affected fundamental rights in individual CJEU case laws on the EAW to assess whether a surrender in that particular case would disproportionately interfere with a right and whether to allow for such surrender. In her proportionality analysis on EAW case-laws, Xanthopoulou, first, conducted the four-stage test of the proportionality analysis; second, examined the CJEU's reasoning in each judgment; and third, referenced relevant EU laws by comparing parallel CJEU's precedence, to each case.⁵¹ The judgment of case

⁵⁰ Lock, "Article 52 CFR," 2253.; E.g. in Case C-362/14, *Schrems*, EU:C:2015:650, para 94 (as regards Article 7 CFR) and para 95 (as regards Article 47 CFR); E.g. in Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, *Kadi*, EU:C:2013:518, para 134.

⁵¹ Xanthopoulou, "Case Study I," 121.

laws were used as examples of how the European Court of Justice reconciled with fundamental rights and protections. These case studies are: *ne bis in idem* (Mantello), the right to defense and fair trial (Radu), the right to appeal (Jeremy F), and the right to review judgments in absentia (Melloni). The results to each case study, despite being processed with the same application of proportionality-based reasoning, were nonetheless quite varied. Some of these proportionality-based case study showed a serious breach of rights to the requested person and revealed the fundamental right to be inalienable. However, a larger number of these fundamental right cases showed execution of an EAW to be unavoidable.

In Mantello, the CJEU was asked to interpret whether the requested person Mr Mantello's EAW was prosecuted in compliance with Article 3(2) FD EAW, under the 'same act' concept, when his previous conviction for drug trafficking is tried with the knowledge of his current subsequent prosecution for participation in a criminal organization.⁵² First and foremost, the CJEU held that the doctrine of *ne bis in idem* must have an autonomous and uniform interpretation throughout the EU. Referring to the Turanský judgment, the CJEU presupposes, in the meaning of *ne bis in idem*, a person sought is deemed to have been 'finally judged' when the issuing authority decides further prosecution is definitively barred.

In her reasoning on Mantello, Xanthopoulou claimed the doctrine of *ne bis in idem* is an absolute principle. Contrary to the judgment, she stated that the doctrine of *ne bis in idem* must be observed as it is enshrined in Article 3(2) of in the FDEAW.

⁵² CJEU, Case C-261/09, *Mantello*, judgment of 16 November 2010. ECLI: EU: C:2018:586, para. 30.

Furthermore, she claimed that respecting the doctrine would enhance mutual trust and mutual recognition considerations rather than jeopardize key principles of the FD EAW because, unlike other fair trial rights, proportionality of penalties is correlated with the rule of law – the principle of *res judicata*.⁵³ Because the principle already constitutes as a ground for refusal in Article 3(2) of FDEAW, she believes an application of the proportionality test would be redundant. An applicant must not be extradited when *ne bis in idem* is breached or risked being breached.

In Radu, the CJEU found, in the dispute in the main proceedings, that the requested person Mr Radu appears to argue that the EAW were issued without his having been heard beforehand, which breaches to Article 47 and 48 of the Charter and Article 6 of the ECHR.⁵⁴ The referring court had asked the CJEU if the executing state may refuse to execute a request on the grounds that they find the national law of the issuing State has incompletely or incorrectly transpose Framework Decision 2002/584 into their national law. The CJEU adopted a procedural position and restated that Member States may only refuse a warrant on grounds provided for in Article 3 and 4. The CJEU replied that the Framework Decision does not contain provisions that provide for non-execution on grounds that the warrant has been issued without the requested person having been heard by the issuing State.

In her reasoning on Radu, Xanthopoulou claimed the infringement of the requested person's defense rights could be remedied, and therefore should not justify for

⁵³ Xanthopoulou, "Case Study I," 122.

⁵⁴ CJEU, Case C-396/11, *Ciprian Vasile Radu*, judgment of 29 January 2013. ECLI:EU:C:2013:39, paras. 29-31.

a refusal to execute.⁵⁵ She found the judgment of the Court in favor of mutual recognition and effectiveness of the FDEAW instrument. Then, Xanthopoulou applied the four-stage proportionality test and discovered the judicial reasoning behind Radu's decision to be unbalanced and one-sided. She claimed the Court "remained true to letter of the EAW instrument and left little room for interpretation" of protection from the Article 1 of the FDEAW and the Charter, to be read in conjunction with Article 6 TEU.⁵⁶ She concluded there is a serious breach of applicant's rights, but with the many directives being adopted to prevent the risk of breach of a fair trial, this breach of defense right could be remedied. She concluded an applicant must be extradited in terms of breaches of defense rights because it is highly possible to be remedied.

In *Jeremy F*, the French Supreme Court raised concerns regarding the right to an effective judicial remedy provided in France's domestic constitution.⁵⁷ The requested person, Mr Jeremy F, consented to his surrender to the UK without waiving his rights to the specialty rule, a provision in the FD which prohibits British officials from adding charges not included in his EAW. If the requested person were surrendered, the French court may have allowed for a different offence of sexual activity with a minor to be added to the charges of his first EAW, which was for the offense of child abduction. The referring court asked whether the FD EAW must be read as precluding Member States from providing for an appeal suspending execution of the decision of the judicial authority. The referring court asked: would giving a ruling that was 'not subject to

⁵⁵ Xanthopoulou, "Case Study I," 131.

⁵⁶ Xanthopoulou, "Case Study I," 124.

⁵⁷ CJEU, Case C-168/13 PPU, *Jeremy F.*, judgment of 30 May 2013. EU:C:2013:358, para. 22.

appeal' infringe the right to an effective judicial remedy and the principle of equality before the courts. The CJEU permitted Member State to provide for an appeal with suspensive effect and has allow Member State a margin of appreciation to give the right of appeal or not, but the CJEU ruled that the time limit of 30 days must be respected.

In her reasoning on *Jeremy F*, Xanthopoulou claimed that the FDEAW does not provide for the right of appeal, nor is the right to appeal universally found in all EU countries. In continental Europe, civil law countries have written the right of appeal into its statutes and constitution, but in common law countries, the right of appeal has only recently been added to the process of prosecution. Xanthopoulou did not apply the four-stage test because the judgment was decided through proportionality-based reasoning. The Court supported a margin of appreciation and granted Member States a greater degree of discretion in the cases pertaining to the right of appeal. She agreed with the CJEU reasoning that an applicant's right to appeal is dependent on the country's constitutional law.⁵⁸

In *Melloni*, the referring court asked the CJEU whether the Charter allows for the surrender of a person convicted in absentia when the surrender be conditional on the conviction being open to review by the issuing judicial authority to avoid adverse effects on the right of defense guaranteed by the executing Member State's constitution. The CJEU ruled that the executing judicial authority can make a surrender conditional on the right to a retrial in situation specified in Article 4a(1) FD EAW. The CJEU stresses that the right of the accused to be present in his trial is an essential component of the right to a

⁵⁸ Xanthopoulou, "Case Study I," 133.

fair trial but it is not absolute, and therefore Article 4a (1) of FD EAW is perfectly in line with the requirements of the EU Charter. Thus, the situation in Melloni and the interpretation of the FD EAW by the CJEU leaves the executing authority Spain no possibility to refuse his surrender.⁵⁹

In her reasoning on Melloni, Xanthopoulou claimed the Court's interpretation, on the right to review a judgment when that judgment is decided *in absentia*, in the preliminary ruling of Melloni is flawed.⁶⁰ When she applied the four-stage proportionality test, she discovered that the Court had set the objective of the FDEAW as a legitimate aim to limit a fundamental right. She claimed that mutual recognition is only a means to an end and does not constitute as an objective of constitutional value but a secondary law. Therefore, the court's reasoning does not fulfill the test of legitimate aim, suitability, necessity, and balancing. She then expanded the discussion on how the case implies on the EU legal order and the principle of legality in EU criminal law.

By her individual assessments of case laws, Xanthopoulou demonstrated the applicability of the proportionality test in surrender case laws and confirmed that even though mutual trust is a central principle in the surrender procedure, it can be rebutted when the risk of violating a fundamental right proved to so serious and detrimental to the core of a right that placing mutual trust above fundamental right would be inordinate. The analysis she carried out, by applying proportionality-based reasoning to balance the objectives of judicial cooperation with the protection of fundamental rights, showed the application of proportionality does not necessarily promote fundamental rights or benefit

⁵⁹ CJEU, Case C-399/11, *Melloni*, judgment of 26 February 2013. EU:C:2013:107.

⁶⁰ Xanthopoulou, "Case Study I," 137.

requested persons holding those rights. Rather, she illustrated *how* these key principles of mutual trust and mutual recognition are justified through the lens of proportionality by determining *when* these principles should be recognized relative to fundamental right considerations. Drawing the lines of these principles in terms of proportionality in all cases of breach in relative fundamental rights defines the scope of mutual trust and reveals the general applicability of proportionality-based reasoning. By doing so, the case study clarified the essential role of the key principles facilitating judicial cooperation and governing the European Arrest Warrant mechanism within the AFSJ.

Moreover, Xanthopoulou's case study showed that the proportionality test is not applicable to absolute rights. Absolute rights are non-derogable human rights that does not permit interference under any circumstances. In determining whether a right is absolute or not, Xanthopoulou examined if there were any possible justifications that provide for its violation. She explored the structural construction behind a right, for example, whether the right is enshrined in the FD EAW, the Charter and the Schengen Agreement. She has also checked if the right is universally provided in the national constitutions of all EU countries. Among the four case laws on the EAW that she studied, only *ne bis in idem* was considered as an absolute right. Her case study consistently rolled out the limits of proportionality-based reasoning and the scope of mutual trust to the benefit of relative fundamental right protection. The notion of absolute rights has been an implicit guiding theme throughout her case study.

At the heart of her argument, Xanthopoulou proposes that a proportionality-based assessment should be conducted in all fundamental right infringement cases where an interference by the key principles of its cooperation mechanisms pose a risk to

fundamental rights. She argues the proportionality test could enhance the implementation of CJEU reasoning to these hard cases because the proportionality test outlines how the role of these key principle play in respects to other considerations such as fundamental rights, procedural rights, and national constitutions. As the CJEU develops EU criminal justice in AFSJ matters, she suggests competent national authorities implementing EU cooperation mechanisms to incorporate proportionality-based analysis in their decisions.

I find that this method in assessing the interference of rights has successfully addressed the very topical questions on the lack of clear definitions given to EU criminal offences and on the much needed autonomous and uniform interpretations to the theory of rights or the scope of rights.⁶¹ Along with other critics of her book, I find that her investigation seems to provide added value to the vast literature of the theoretical and practical implementation of these principles deep-rooted in the European Arrest Warrant mechanism by offering a way to reflect on the restrictions on fundamental rights.

Since Xanthopoulou has only applied the analysis on a handful of fundamental rights and protection in question, I can extend her analysis on other breaches of rights in EAW case laws.

The proportionality analysis could be applied and tested on cases concerning the validity of an EAW when its content and form does not adequately satisfy the guidelines and provisions in Article 8 of the FDEAW.

⁶¹ Leandro Mancano, “Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?” *Common Market Law Review* 58 no.3 (2021): 953; Céline Cocq, “Book Review: Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?” *New Journal of European Criminal Law* 11 no.4 (2020): 524-529.

Methods

In this thesis, I will conduct a case study on four recent case-laws related to the EAW. They are Bob-dogi, Ozcelik, MM, and PI. I chose these cases because the referring court in the case laws stayed the proceeding for a request of a preliminary reference to the CJEU on questions pertaining to content and requirement of the EAW, cited in Article 8 of the FD EAW. As mentioned earlier, Article 8 is related to procedural law. I will extend Xanthopoulou's method of analysing case-law to determine whether her proportionality test applies to cases other the few affected rights that she has mention and to see if it would apply to EAW cases where procedural safeguards are lacking.

Chapter IV.

Case Analyses

Bob-dogi

The case in question was brought forward when a lorry driver from Romania crashed at high-speed into a moped rider and causing him serious injuries in November 2013 in Hungary. At the time, the Hungarian Law has been implementing a “simplified procedure” for cases where the requested person is already outside the territory of Hungary. The simplified procedure does not require a national arrest warrant in issuing an EAW, and in this case, no separate national arrest warrant was issued. On 2 April 2015, Mr. Bob-dogi was arrested in Romania for the offence of “causing serious bodily harm” committed in Hungary on an EAW.⁶² On the same day, Mr. Bob-dogi was released on bail after being placed in detention and appeared before the Appellate Court of Cluj, Romania. The Romanian court observed the absence of a national arrest warrant may render the EAW invalid as it is not compatible with Article 8(1)(c) which stipulates ‘evidence of an enforceable judgment, an arrest warrant or any other enforceable decision having the same effect.’⁶³ The referring court of Romania asked the CJEU two questions. Firstly, what purpose does the expression “evidence of an enforceable judgment...” refer to in the application of Article 8 (1)(c) of FD EAW, and would that reference mean it must be understood as a national arrest warrant in accordance with the procedural rules of the issuing Member State, therefore distinct from an EAW? Second,

⁶² CJEU, Case C-241/15, *Bob-Dogi*, judgment of 1 June 2016. EU:C:2016:385, para. 10.

⁶³ CJEU, Case C-241/15, *Bob-Dogi*, judgment of 1 June 2016. EU:C:2016:385, para. 15.

without a national arrest warrant separate from the EAW, does that imply a non-execution?

The CJEU interpreted the expression “evidence of an [...] enforceable judicial decision” must mean a separate national judicial decision on which the European Arrest Warrant is based. The CJEU differentiated the ‘judicial decision’ to issue an EAW, where it acts as the definition of an EAW under article 1 (1) FD EAW, from the requirement of “evidence of enforceable judicial decision” under Article 8 (1)(c) of the FD EAW.⁶⁴ The CJEU reasoned if the simplified procedure of Hungary implies that an European Arrest warrant is sufficient to refer to itself, and therefore to understand the term ‘enforceable judicial decision’ in a generic sense, it will deprive the requirement laid down in Article 8 (1)(c) of the FD EAW of any independent scope and practical effect, as well as, the effect of the content and objective pursued by the Framework Decision. The CJEU noted that thus not entailing a national judicial decision, such as a national arrest warrant, as a basis for the European Arrest Warrant may interfere with mutual recognition because the benefit of procedural safeguards and fundamental rights can not be ensured by the judicial authority of issuing Member State in accordance with applicable provisions of national laws. The CJEU held that a dual level of protection for procedural rights and fundamental rights must be enjoyed by the requested person. The first level of protection relates to the decision when the national arrest warrant is adopted, and national laws are applied. The second level of protection is provided when the European Arrest Warrant is issued.

⁶⁴ CJEU, Case C-241/15, *Bob-Dogi*, judgment of 1 June 2016. EU:C:2016:385, para. 44.

Regarding the second question, the CJEU stressed that the executing judicial authority may refuse an EAW only in cases where the obligatory and optional grounds laid down in article 3 and article 4 and article 4a exist. However, given that the requirements laid down in article 8 (1) (c) of the FD EAW are not satisfied, in principle, the executing judicial authority may refuse to give effect to that warrant.

Using the four-stage proportionality test to analyze the judgment of the Court, I may evaluate whether the case was proportionate in satisfying the interest of the Union and the protection of the person's fundamental rights. First, I consider that the EAW issued against Mr Bob-dogi has a legitimate aim. Since Mr Bob-dogi has allegedly committed an offence under Hungarian Law for "serious bodily harm," the arrest warrant was a legitimate instrument to bring the respondent to the Hungarian court for trial, according to Article 25 of Law No CL XXX, on "Cooperation between the Member States of the European Union in criminal law matter" published in the Hungarian Law Journal 2012/160. It states that "Where it is necessary to commence criminal proceedings in respect of a suspected person, the court shall issue immediately a European arrest warrant with a view to that person's arrest and surrender in any Member State of the European Union, provided that this is warranted by the seriousness of the offence ..."

According to this provision of Hungarian law, the vehicle accident satisfies a legitimate aim for an arrest because the injuries may have been severe enough to be considered a criminal offense. Under the Hungarian civil code, it was pertinent to arrest the person responsible for this crime. To the moped rider who suffered multiple fractures, the offence was serious enough to commence criminal proceedings, therefore the person's arrest was warranted. Secondly, since Mr Bob-dogi had already left the country, the

Hungarian court would have to apply an instrument to reach him internationally. The EAW would be suitable legal instrument for the court to utilize.

Nevertheless, considering the third test of necessity, the arrest and pre-trial detention of the requested person is not necessary for a vehicle accident. In my opinion, the Romanian court's order to release Bob-dogi immediately was appropriate because vehicle accidents are commonplace occurrences. Most road traffic accidents are civil cases where the parties involved sue each other for damages. While accidents do occur, the use of a vehicle on roads is substantially regulated by an extensive department of the government. If every vehicle collision renders an arrest and detention, it would too excessive on the rights of freedom and liberty of an individual. It does not appear necessary for an arrest and detention because there is no indication that Mr Bob-dogi was fleeing justice nor intentional in injuring the moped rider. All things considered, the judicial decision to issue the EAW and judgment held by the CJEU, in my view, is considerably balanced. What stands out about this vehicle accident, consequently this case, is the fact that the moped rider Mr Kotona may have been in a near-fatal critical condition when his small vehicle, a moped, was crushed by Mr. Bob-dogi's substantially large vehicle, a lorry. Because of the significant injuries sustained by Mr Katona and in accordance with Hungary's criminal code, the judicial decision to issue an EAW to arrest is justified. Although I argue that a vehicle accident does not necessitate an arrest warrant and detention of an individual, it is possible that Mr Bob-dogi, knowing the size of his vehicle in comparison, may have absconded the criminal proceedings. As stated in the judgment of Radu, the Court explained that it is intended in the EAW to contain an element of surprise to prevent the fugitives from evading justice. I would argue that Mr.

Bob-dogi's fair trial rights were not infringed but, in agreement of the court's reasoning that the requirement of a domestic national arrest warrant was not fulfilled. This may have affected the requested person's time and readiness to prepare his defense.

Considering the legality on Bob-dogi's EAW, the requirement of a separate enforceable judgment has never been included as a ground for refusal. The principle of mutual recognition and mutual trust take a central position in the judicial reasoning of EAW cases and the Member State receiving an EAW are obligated to arrest and surrender the requested person with limited formalities. On the surface, it appears that Mr. Bob-dogi does not have a case for refusing detention and surrender because of the limited grounds for refusal of the FDEAW and the absence of a separate domestic warrant appears to entail a lack of formality or technicality that could be remedied rather than a breach of rights. Although fair trial rights and fundamental rights are not explicitly inserted as a ground for refusal in the FDEAW, they are sufficiently respected and incorporated into the constitutional and institutional framework of EU criminal justice. Whether the preconditions for effective judicial protection was provided for Mr. Bob-dogi is crucial when examining the weight given to fundamental rights and proportionality.

Because Mr. Bob-dogi was arrested on an EAW without a prior separate national warrant or judicial decision, he was not heard by the issuing judicial authority before his arrest nor was he notified of the charges against him until he was found, detained, and surrendered. Mr. Bob-dogi's defense rights may have been infringed, in the sense, similarly to the case of Radu. In Radu, the defendant argued EAW proceedings were carried out without his knowledge, and in effect, diminished the preparedness for his

defense in court. When Mr Radu was arrested, he “found himself in a situation where it was completely impossible to defend himself.” The CJEU held the issuance of an EAW without hearing the requested person by the issuing judicial authority admissible, explaining that an arrest warrant comprises of “a certain element of surprise to prevent the requested person from taking flight.” If Mr. Bob-dogi had not been subpoenaed nor notified of the charges against him before his arrest, he would have been knowing and learning his rights that can help him identify certain actions he could have taken to protect himself at the instance that he was sitting and waiting in detention. It may be possible that Mr Bob-dogi was not aware of the serious injuries inflicted upon the moped rider from his driving. This seems to be quite unnecessary for a requested person who did not intend to get involved in a car accident. Mr Bob-dogi would have had the right to a lawyer, however, the absence of an enforceable judicial decision suggests missing documentation and facts a defense lawyer could have utilize right away to vindicate his client. As such, Mr Bob-dogi’s defense rights may be compromised.

According to Article 5 of the European Convention of Human Rights, the severe consequences of arresting and taking a requested person’s liberty should be proportionate to his crime. It should be noted that an European Arrest Warrant that allows the detention of a requested person should not be taken lightly. The immediate release of the defendant by the Romanian Court was appropriate because not only was the EAW’s content and form raising doubts on its validity but also an arrest warrant for the type of crime he committed is considerably excessive. There is no indication that Mr Bob-dogi intended to flee and evade justice. The Hungarian court may have alternative ways to notify the defendant that Bob-dogi has allegedly committed offense and must stand trial.

Ozcelik.

A highly contested interpretation of EU law in EAW proceedings is the determination of an “issuing judicial authority.” Questions on the concept of a judicial authority is frequently encountered in EAW proceedings because the principle of separation of powers from the executive is broad in scope and instrumental to an independent judiciary.⁶⁵ An independent judiciary is closely related to procedural and fundamental rights, which I will explain later.

The CJEU first took position on the meaning and the necessary qualities of a “judicial authority” on 10 November 2016 in the set of cases: Poltorak, Kovalkovas, and Özçelik.⁶⁶ The next wave of cases concerning the interpretation of “issuing judicial authority” was in 2019 on the joint case of OG and PI, which interprets the involvement of the executive branch namely the police and public prosecutors.⁶⁷ Afterwards, the CJEU made significant changes regarding what constitutes a “judicial authority” in a string of cases stemming different member states whose defendant are associated in a triad: XD, ZB, JR and YC. Not all of these cases are relevant to the European Arrest Warrant. Among these cases, Ozcelik, PI, XD, ZB, JR and YC are cases relevant to the EAW. For this section in testing the proportionality analysis, I will focus on Özçelik court ruling and whether a proportionality analysis would fit.

⁶⁵ Alessandro Rosano. “If You Are a Judicial Authority and You Know It, Raise Your Hands – Case Note on C-452/16 PPU, Poltorak, C-453/16 PPU, Özçelik, C-477/16 PPU, Kovalkovas.” *European Criminal Law Review* 7, no.1 (2017): 89–98.; Ilze Tralmaka, “Upholding Fundamental Rights in National Arrest Warrant Proceedings in Practice: a Need for Third Level of Judicial Protection?” *European Journal on Criminal Policy and Research* 28, no. 3 (2022): 451–64.

⁶⁶ Rosano, “Case Note on Poltorak, Ozcelik, Kovalkovas,” 91 et seqq.

⁶⁷ Tralmaka, “Upholding Fundamental Rights,” 451-64.

In the case of Özçelik, the referring court Rechtbank Amsterdam requested a preliminary ruling for an interpretation of “judicial authority.” The Dutch court raised three questions: a) what is the criteria for determining a “judicial authority” of the issuing Member State; b) to give an autonomous and uniform interpretation of that term within the meaning of Article 8(1)(c) the Framework Decision; and c) whether a confirmation from a public prosecutor on an arrest warrant previously issued by the Police Department constitute a ‘judicial decision.’⁶⁸

After Turkish national Mr Halil Ibrahim Ozcelik, Rechtbank Amsterdam reviewed his EAW and found, in the section containing the details of which the judicial decision of his arrest is made, that it was based on a previous national arrest warrant ‘Arrest warrant No 19060/9302014’ issued by the Police Department of Akja signed off by a prosecutor in Akja on 14 June 2016. The Dutch court made a request for information on 8 July 2016 to the issuing judicial authority of Hungary about the role of the Public Prosecutor’s Office in Akja, particularly about the separation of power from the executive branch of government and to see what legal effects an arrest warrant confirmed by a prosecutor that was previously issued by the police department has. The Hungarian authorities replied that their Public Prosecutor’s Office is independent of the executive because their prosecutors have powers that could amend or revoke an enforceable decision, such as an arrest warrant, taken by the police acting as an investigating authority if that decision is contrary to the law. Moreover, the member of the public prosecutor’s office may represent the public prosecutor’s office and testify at the criminal

⁶⁸ CJEU, Case C-453/16 PPU, Özçelik, judgement of 10 November 2016. EU:C:2016:860.

proceedings of cases he had confirmed. In light of the accrued information, the referring Dutch court was not convinced and expressed doubts on the classification and meaning of a “judicial decision” within Article 8 (1) of the Framework Decision to the CJEU.

The CJEU interpreted the term “judicial decision” in Article 8(1)(c) of the FD EAW to cover decisions made by the public prosecutor’s office. The CJEU clarified, referencing the previous case-law of *Bob-dogi*, that this provision must mean an “enforceable judicial decision” that is distinct from the decision in issuing an EAW. The CJEU reasoned that, despite the national arrest warrant was issued by the police and not a judicial authority, it was later validated by a public prosecutor so hence the public prosecutor would be considered as the issuer of the arrest warrant. Regarding an autonomous and uniform interpretation of the term ‘judicial authority’, the CJEU pointed out, in the context of Article 6(1) thereof and with reference to previous case-law of *Poltorak*, the term must be interpreted as referring to the member state authorities that administer criminal justice excluding police services. The CJEU held the confirmation by the Public prosecutor’s office is legal and consistent with the goals of the Framework Decision.

On the contrary, seeing it from a proportionality perspective, the Dutch court’s concern is much more than semantics. It is important to clarify the precise meaning of “judicial authority” because only a competent judicial authority can offer sufficient judicial protection.⁶⁹ The protection of procedural and fundamental rights of a requested

⁶⁹ Michael Findeisen ed., “Police Service Is Not a Judicial Authority Within the Meaning of the FD EAW” *The European Criminal Law Association ‘Forum 2016/4.’* Max-Planck Institut: EuCrim (2017): 15. https://eucrim.eu/media/issue/pdf/eucrim_issue_2016-04.pdf#page=15

person rest upon a system that can competently give guarantees to fair trials and other fundamental rights.⁷⁰ The notion of a judiciary is one that holds the beacon of justice. Police services and political bodies cannot plausibly give the same standard of a guarantee. Individuals may possibly be exposed to the risk of decision subjected to external directions or instructions. Therefore, it is important to bestow the meaning of a judicial authority and judicial decision to a court or institution separate from the powers of the executive.

Through this lens, in my view, a proportionality analysis is not entirely applicable in *Ozcelik*. Considering a breach of procedural rights and the lens of a proportionality analysis, the referring court could have asked questions pertaining to individual guarantees and whether the executing judicial authority could refuse execution when certain fair trial rights are infringed in the future. If the questions asked were inclined towards effective judicial protection rather than the legality of the FDEAW and the legitimacy of the issuing authority, the CJEU would have had a different reasoning. From *Bob-dogi*, the EAW provides a dual level of protection: the first level provides judicial protection from the national judiciary; the second level involves protection of judicial review and preconditions in issuing the EAW. The referring court could have asked questions on the second level of protection, which would resulted in a more balanced reasoning from the CJEU. Unfortunately, I could not give an individual assessment when the facts of the crime, the possible length of time serve in custody, and previous convictions. The nature and the type of crime was not disclosed in the case-law.

⁷⁰ Anne-Peter van der Mei, “The European Arrest Warrant System: Recent Developments in the Case Law of the Court of Justice.” *Maastricht Journal of European and Comparative Law* 24, no. 6 (2017): 885-6.

MM

In the case of MM (C-414/20), the referring court in Bulgaria asked the CJEU to decide on the legal effects of a potentially invalid EAW, where the national order on which the EAW is based does not produce equivalent legal effects of arrest and of placing the accused in pre-trial detention but as a mean to notify the accused that he is under investigation. The public prosecutor in Bulgaria had issued an EAW based on a reference to a police order to put MM under investigation.

On August 8th 2019, MM was accused of participating in a criminal drug-trafficking organization with 41 other persons in a wanted-persons notice by a police investigator. On the next day, the public prosecutor of that investigating body had put MM under investigation by issuing another order to notify MM of the charges against him. The type of order placing MM under investigation on August 9th 2019 was meant to solely notify the person of the charges against him, so that the accused may have the possibility of defending himself by providing evidence against those accusations.⁷¹ Since MM absconded with 16 other persons, the order placing MM under investigation was served only to his court-appointed defense lawyer. On January 16 2020, the public prosecutor issued an European Arrest Warrant against MM, referencing the police order of August 9th 2019 as a legal basis. The problem arises with MM's criminal proceedings when the public prosecutor referenced the police order placing MM under investigation, that has no legal effect of arrest and detention, as a legal basis for an EAW. Making amends to the missing judicial decision that orders the arrest of the requested person in an

⁷¹ CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 12, 23.

EAW, on April 16th 2020, the public prosecutor made a request to the Bulgarian court for a pre-trial detention court order. The referring court rejected the request at the public hearing on the ground that, under national law, it was not possible to order such detention in the absence of the accused person. MM was arrested in Spain and consented to his surrender to the Bulgarian judicial authorities. On the same day of his surrender, the public prosecutor, for the second time, requested for MM to be placed in pre-trial detention. Following a hearing the next day of surrender, MM appeared before the court and was ordered by the referring court to be placed in pre-trial detention. MM appeals to this decision, arguing that the EAW is unlawful and seeks to review the decision placing him on pre-trial detention.

The CJEU clarified that the dual level of protection established in *Bob-dogi* refers to a separate national order other than the judicial decision to issue the EAW.⁷² The CJEU emphasized that an EAW must be based on “an arrest warrant or any other enforceable judicial decision having the same effect” in accordance with Article 8 (1) (c) FD EAW.⁷³ Thus, the CJEU regarded MM’s EAW to be invalid since it does not appear that the EAW has the legal effect of arrest of that person.⁷⁴ Moreover, the CJEU pointed out that once the requested person has been surrendered to the issuing member state, the EAW has exhausted its legal effect, and it does not serve as a basis as an order for detention for the accused.⁷⁵ Finally, CJEU held that it is for the referring court to lay down the consequences of an invalid EAW.⁷⁶

⁷² CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 51.

⁷³ CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 53 and 56.

⁷⁴ CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 56.

⁷⁵ CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 77.

⁷⁶ CJEU, Case C-414/20 PPU, *MM*, judgment of 13 January 2021 ECLI:EU:C:2021:4, para. 81.

Considering the proportionality test, I believe --for the purpose of containing drug trafficking organizations, which is included in one of the 32 categories of offences, listed as “illicit trafficking in narcotic drugs and psychotropic substances” in Article 2 (2) of the FD EAW --the judicial decision to issue an EAW for arresting and surrendering MM to the Bulgarian court satisfies a legitimate aim. Drug traffickers often rely on networks created by organized crime to move illicit substance at a distance to another country.⁷⁷ And, because the crime spans across different countries, it is difficult to collect evidence for such a crime and catch these individuals responsible for trafficking narcotics. Notwithstanding, the criminal procedures of policing organized crime in Member States may differ as they operate under different legal systems. Therefore, I believe that although the judicial decision of the EAW lacked legitimacy, due to the fact that the national order on which the EAW was based does not have the legal effect of an arrest and detention, and to the fact that the absence of a national arrest warrant as a legal basis rules out dual level of protection established by the case of Bob-dogi (C-241/15), the EAW as a measure adopted to meet the ‘objective of a general interest recognized by the Union’ adequately satisfies the aim of the legal instrument of FD EAW.

On the other hand, the EAW issued against MM does not satisfy the suitability consideration of the proportionality test. Despite satisfy the objectives set out in the FD EAW and thus having a legitimate aim for an EAW, it would be counterintuitive to issue an arrest warrant without satisfying its requirements to render it valid and legitimate. Consequently, I argue the adoption of such EAW, one that does not meet its requirement

⁷⁷ Adam Edwards et al, “Controlling Drug Trafficking in Central Europe.” In *Transnational Organised Crime*. United States: Taylor & Francis Group(2003): p.31.

and ultimately render as invalid as a measure to achieve the general interest of solving crime, is not rationally connected to the objective nor capable of contributing to its legitimate aim.

Considering on whether the EAW was a necessary measure to achieve the aim of the FD, I believe that there was not a less restrictive measure to bring MM before the Bulgarian court for criminal proceedings on drug trafficking. Evidently, the public prosecutor had requested for a pre-trial detention two times, with the first request being rejected at a public hearing because under national law such an order was not possible when the accused is not present at the court. MM was placed in pre-trial detention only after he appeared before the referring court and was heard at the hearing in Bulgaria. In my view, after examining the criminal procedural laws of this case, it appears that there was no alternative measure in moving a criminal proceeding forward other than issuing an EAW for an arrest of a suspect outside the territory of Bulgaria. Accordingly, the necessity of an EAW to arrest MM, despite the content requirements entail in Article 8(1)(c) of FD EAW are not satisfactory, is the most efficient means to achieve the aim of solving drug trafficking, particularly for targeting organized crime.

Finally, the stage of balancing involves optimizing the satisfaction and detriment of the public interest, which is the efficiency of the EAW mechanism, and of the competing right, which is the fundamental right of a fair trial. MM argues that his EAW is invalid because it does not satisfy the requirement set out in Article 8 (1)(c) of the FDEAW that it should be based on “an arrest warrant or enforceable judicial decision having the same effect.” It can be argued that because he was not notified of the charges against him with the order of August 9th 2019, where only his court-appointed defense

lawyer has read, he was not provided with the possibility to defend himself with evidence backing his innocence. I find it unusual that MM had consented to his surrender in Spain fairly quick if he objected to a pre-trial detention in Bulgaria. It is this reason that I would weigh the intensity of the interference of his rights higher than the efficiency of the EAW mechanism. He may have consented to his surrender without knowing that he would be placed in detention because his EAW only specified that he is under investigation and would be brought before a court for a hearing. He may have consented because he believed that his right of defense would have been protected by the EU, especially if he believes that he is innocent. Of course, this is only speculation on his knowledge of the charges against him and on the interaction that happened when he was arrested in Spain. On the other hand, it is in the public's interest to be able to control drug trafficking and organized crime within Europe. It is paramount that the efficiency of the EAW mechanism is not hindered when police needed to capture and target these organized group in a time sensitive manner. As a result, I conclude that the EAW should be ruled as invalid and MM should be released immediately. After all, the public prosecutor could issue another arrest warrant for the persons involved in the drug trafficking organization when they have gathered all the required evidence. Or, if the criminal procedure in Bulgaria is not compatible with the EAW, then they could amend their laws and policies to better facilitate policing.

Judicial review of PI

In PI (C-648/20), the respondent disputes the warrant to his arrest on the premise that it lacked judicial review. Without overview of the court, he believes that his rights to

effective judicial protection, such as those provided under Article 1(3) and Article 8 (1)(c) of the Framework Decision, have been compromised.⁷⁸

PI committed theft in Bulgaria on December 8th 2019 and was subject to an European Arrest Warrant issued by a Bulgarian public prosecutor for criminal prosecution on January 28 2020. This European arrest warrant is based on a detention order, adopted under Article 64(2) of the NPK, and is also issued by the same prosecutor of Svishtov Regional Prosecutor's Office as the detention order. Under Bulgarian law, a public prosecutor may adopt a detention order to detain a suspect for a maximum period of 72 hours, upon which this detention order may serve as a basis to issue a EAW. According to Bulgarian legislation, neither the issuance of an European arrest warrant nor a national arrest warrant --here which was a detention order --requires participation of a court in the issuing Member State; a court is only involved after the surrender of a requested person where the person concerned or his legal representative has the right to make representation against his continued detention. Because neither the European Arrest warrant nor the enforceable judicial decision on which it was based has been reviewed by the court prior to his surrender, in the main proceedings, PI argues that the Bulgarian criminal procedural system does not ensure requirements inherent in effective judicial protection to be met nor does it ensure the dual level of protection for persons subject to an EAW recognized in previous case-laws, particularly OG and PI (508/18 and C-82/19), PF (C-509/18), Bob-dogi (C-241/15), and MM (C-414/20).

⁷⁸ CJEU, Case C-648/20 PPU, *PI*, judgment of 10 March 2021. EU:C:2021:187.

The referring court, the Westminster Magistrates' Court (UK), who was called on to execute said EAW, expressed doubts whether an EAW, that is not founded on a decision of a court nor could it be challenged before a court, satisfies the requirement of dual level of protection established in previous CJEU rulings. The Westminster Magistrates' Court stayed the proceeding for a preliminary ruling to ask the CJEU if effective judicial protection is afforded to a person subjected to an EAW, where both the EAW and national arrest warrant are issued by a public prosecutor, where the national arrest warrant is only valid for a maximum of 72 hours for the purpose of bringing requested person before a court, and where on surrender the court's sole matter is to decide whether to release or continue his detention.

The Court of Justice ruled such a procedure, in handling EAWs, does not satisfy the requirements of Framework Decision. The CJEU argued, although the Bulgarian prosecutor can be classified as an "issuing judicial authority" --- because it executes its responsibilities independently and it participates in the administration of criminal justice - -- the Bulgarian procedure can not be considered sufficient in effective judicial protection. The CJEU reasoned that the "effectiveness and proper functioning of a simplified system for surrender established by the Framework Decision [depends] on compliance with certain requirements laid down by that framework decision and [established] case-law of the Court." In CJEU's standpoint, an effective judicial protection presupposes the benefits of procedural and fundamental rights are safeguarded following a judicial review that deems the type of decision appropriate for adoption. In this case-law, a judicial review of a prosecutor's decision to issue an EAW takes place only after the surrender of the requested person.

For the crime *PI* committed, the offence of theft fulfils the requirement of acts punishable by law with a custodial sentence for a maximum period of 12 months, everywhere in Europe. And, according to the principle of legality or the objective of the FDEAW, his extradition is necessary and in agreement with the instrument to prevent criminals taking flight within a borderless Europe. Considering the seriousness of the offense, in my view, the first stage of the proportionality-analysis is settled and undoubtedly the issuing judicial authority is proportionate in issuing an EAW.

However, the Bulgarian procedure for surrender appears to disproportionately interfere with procedural rights of a requested person. It is important to note that speedy judicial cooperation may have jeopardized judicial protection, such as the right to an effective remedy and to a fair trial under Article 47 of the Charter. While Member States are allowed to maintain their legislative and procedural autonomy, the CJEU emphasized that national rules must not frustrate the requirements laid out in the framework decision.

Chapter V.

Discussion

After reviewing four cases pertaining to infringements of Article 8 of the FD EAW, my results show a similar pattern to Xanthopoulou's findings. Both case studies showed smaller flaws in the judicial reasoning of the CJEU. My case analysis provided a slight alternate take on the application of the proportionality test by focusing on the gravity of the offence and nature of the right, rather than focusing on legality. While Xanthopoulou concluded that the opinions of the CJEU were based on a wrong premise and should be corrected, my results in my case analysis show that with the proportionality test applied, it does help identify smaller flaws in the reasoning, but the European Court of Justice would have reached the same decision.

On aggregate, my case analysis show the CJEU's reasoning aligns with the principle of proportionality. Apart from *Ozcelik*, the CJEU has ruled that an EAW is invalid when the requirements to issue an EAW are not fulfilled. *Ozcelik* was different from the other case laws because it did not provide information on the facts of the crime and the offence of the requested person. The judgment of *Ozcelik* has only written that the requested person has "two offences committed in Hungary"--nothing more was revealed. As a result, it was impossible to do a thorough proportionality test without being able to assess the gravity of the offence and severity of the infringement on fundamental rights.

In contrast, the CJEU's reasoning in *Bob-dogi* was appropriate and well-adapted for the proportionality test. It provided all the information of the crime to be analyzed. With the proportionality test applied, the *Bob-dogi* case showed that although the absence

of a separate enforceable judgment apart from the EAW itself has never been a ground for refusal, the court's reasoning appears to consider whether the missing national arrest warrant would mean that it does not satisfy the requirements of the FD EAW and thus infringe on fair trial rights. It shows that the CJEU reasoning do weight-in --other than just the grounds of refusal in article 3 and 4-- on circumstances and rights of the requested person.

All my case analysis point to the fact that the judgments already incorporated the balancing act of the proportionality test into the CJEU's reasoning: by assessing the legal basis for issuing an EAW and the legal effects it has on the requested person. The referring court has also posed question to the CJEU on individual guarantees and refusal of execution when the requirements are not satisfied. It appears that, despite fundamental rights not being explicitly written into the FD EAW as grounds for refusal, fundamental rights are implied when the executing authority questions the protection and safeguards on behalf of the requested person.

My case study illustrates that it is true the provisions in the Framework Decision, in some degree, do provide fundamental right protection. Whether it sufficiently bring in fundamental rights is subjective and still up for debate among scholars and judges. One may argue that this inconclusive answer may generate inconsistency in the CJEU rulings and needed reform. However, with its mechanism of mutual recognition so closely tied to the entire operation of criminal law in the AFSJ, a new reform to dismantle dependency on mutual trust and mutual recognition in favor of fundamental right protection would completely eliminate the efficient system of extradition within the EU. Thus, the proportionality test could provide insight on how severe fundamental rights are infringed

and whether the CJEU has added fundamental rights considerations into its rulings. It is an useful tool to highlight the flaws in CJEU reasoning.

While I do validate Xanthopoulou's method for exploring possible remediability in conflicts between fundamental rights and principles of mutual recognition, I find that she is mistaken in her argument to say that CJEU does not incorporate proportionality in its reasoning. My case analysis show that the CJEU does take fundamental rights considerations into account, for example, by defining the terms within the Framework, such as the meaning of "judicial decision" and "issuing authority". The CJEU has implicitly ruled in favor of fundamental rights when it require the referring court to stage the two-prong test of Aranyosi. The proportionality test can help us identify the smaller flaws of the CJEU reasoning but based on Framework Decision that relies on mutual recognition to operate, the CJEU would have reached the same decision.

Chapter VI.

Conclusion

By extending Xanthopoulos' case-study by following her use of the four-stage proportionality test, I was able to see the proportionality-based analyses indeed better inform us and provide insight of fundamental rights interference in cases other than the few affected rights that she has examined.

Although the proportionality test can better inform us whether the CJEU's judgment is proportionate in its reasoning in regards to reconciling fundamental rights, my case study has suggested that the CJEU does follow the principle of proportionality. In Xanthopoulou's case study, she has argued that the proportionality test could help the executing judicial authority consider preliminary references to the CJEU and it will be useful in reconciling hard cases. However, my case study show that the CJEU though the proportionality test was not explicitly used in the judgments, Attorney General's reasoning has already incorporated the principle of proportionality. In fact, in the cases that I have analyzed suggested that a proportionality test would have resulted in a similar ruling and reasoning of the court.

Appendix 1.

Figure 1. Official Form of the European Arrest Warrant.

EUROPEAN ARREST WARRANT (10)

This warrant has been issued by a competent judicial authority. I request that the person mentioned below be arrested and surrendered for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

(a) Information regarding the identity of the requested person:

Name:

Forename(s):

Maiden name, where applicable:

Aliases, where applicable:

Sex:

Nationality:

Date of birth:

Place of birth:

Residence and/or known address:

Language(s) which the requested person understands (if known):

.....

Distinctive marks/description of the requested person:

.....

Photo and fingerprints of the requested person, if they are available and can be transmitted, or contact details of the person to be contacted in order to obtain such information or a DNA profile (where this evidence can be supplied but has not been included)

(b) Decision on which the warrant is based:

1. Arrest warrant or judicial decision having the same effect:

Type:

2. Enforceable judgement:

.....

Reference:

(c) Indications on the length of the sentence:

1. Maximum length of the custodial sentence or detention order which may be imposed for the offence(s):

.....
.....

2. Length of the custodial sentence or detention order imposed:

.....

Remaining sentence to be served:

.....
.....

(d) Decision rendered in absentia and:

— the person concerned has been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia,

or

— the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia but has the following legal guarantees after surrender (such guarantees can be given in advance)

Specify the legal guarantees

.....
.....
.....

(e) Offences:

This warrant relates to in total: offences.

Description of the circumstances in which the offence(s) was (were) committed, including the time, place and degree of participation in the offence(s) by the requested person:

.....
.....
.....

Nature and legal classification of the offence(s) and the applicable statutory provision/code:

.....
.....
.....
.....

I. If applicable, tick one or more of the following offences punishable in the issuing Member State by a custodial sentence or detention order of a maximum of at least 3 years as defined by the laws of the issuing Member State:

- participation in a criminal organisation;
- terrorism;
- trafficking in human beings;
- sexual exploitation of children and child pornography;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit trafficking in weapons, munitions and explosives;
- corruption;
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of European Communities' financial interests;
- laundering of the proceeds of crime;
- counterfeiting of currency, including the euro;
- computer-related crime;
- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- facilitation of unauthorised entry and residence;
- murder, grievous bodily injury;
- illicit trade in human organs and tissue;
- kidnapping, illegal restraint and hostage-taking;
- racism and xenophobia;
- organised or armed robbery;
- illicit trafficking in cultural goods, including antiques and works of art;
- swindling;
- racketeering and extortion;
- counterfeiting and piracy of products;
- forgery of administrative documents and trafficking therein;
- forgery of means of payment;
- illicit trafficking in hormonal substances and other growth promoters;
- illicit trafficking in nuclear or radioactive materials;
- trafficking in stolen vehicles;
- rape;
- arson;
- crimes within the jurisdiction of the International Criminal Court;
- unlawful seizure of aircraft/ships;
- sabotage.

II. Full descriptions of offence(s) not covered by section I above:

.....
.....

(f) Other circumstances relevant to the case (optional information):

(NB: This could cover remarks on extraterritoriality, interruption of periods of time limitation and other consequences of the offence)

.....

.....

(g) This warrant pertains also to the seizure and handing over of property which may be required as evidence:

This warrant pertains also to the seizure and handing over of property acquired by the requested person as a result of the offence:

Description of the property (and location) (if known):

.....

.....

.....

(h) The offence(s) on the basis of which this warrant has been issued is(are) punishable by/has(have) led to a custodial life sentence or lifetime detention order:

- the legal system of the issuing Member State allows for a review of the penalty or measure imposed — on request or at least after 20 years — aiming at a non-execution of such penalty or measure,

and/or

- the legal system of the issuing Member State allows for the application of measures of clemency to which the person is entitled under the law or practice of the issuing Member State, aiming at non-execution of such penalty or measure.

(i) The judicial authority which issued the warrant:

Official name:

Name of its representative ⁽¹⁾:

.....

Post held (title/grade):

.....

File reference:

Address:

.....

Tel: (country code) (area/city code) (...)

Fax: (country code) (area/city code) (...)

E-mail:

Contact details of the person to contact to make necessary practical arrangements for the surrender:

.....

⁽¹⁾ In the different language versions a reference to the 'holder' of the judicial authority will be included.

Where a central authority has been made responsible for the transmission and administrative reception of European arrest warrants:

Name of the central authority:

.....

Contact person, if applicable (title/grade and name):

.....

Address:

.....

Tel: (country code) (area/city code) (...)

Fax: (country code) (area/city code) (...)

E-mail:

Signature of the issuing judicial authority and/or its representative:

.....

Name:

Post held (title/grade):

Date:

Official stamp (if available)

Source: European Judicial Network, <https://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties/EN/390>

Bibliography

- Bachmaier, Lorena. “European Arrest Warrant, Double Criminality and Mutual Recognition: A Much Debated Case.” *European Criminal Law Review* 8, no.2 (2018): 152–59. <https://doi.org/10.5771/2193-5505-2018-2-152> .
- Edwards, Adam and Peter Gill, ed. “Controlling Drug Trafficking in Central Europe.” In *Transnational Organised Crime*. Routledge, 2003. <https://doi.org/10.4324/9780203633854-18>.
- Findeisen, Michael. “Police Service Is Not a Judicial Authority Within the Meaning of the FD EAW” The European Criminal Law Association‘ Forum 2016/4.” Max-Plank Institut: EuCrim (2017): 15. https://eucrim.eu/media/issue/pdf/eucrim_issue_2016-04.pdf#page=15
- Graat, Joske. *The European Arrest Warrant and EU Citizenship : EU Citizenship in Relation to Foreseeability Problems in the Surrender Procedure*. Cham, Switzerland: Springer, 2022.
- Klatt, Matthias, and Moritz Meister. *The Constitutional Structure of Proportionality*. Oxford: Oxford Academic, 2012. <https://doi.org/10.1093/acprof:oso/9780199662463.001.0001>.
- Lock, Tobias. “Article 52 CFR”, in Kellerbauer, M, Manuel, et al. (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. New York: Oxford Academic, 2019. <https://doi.org/10.1093/oso/9780198794561.001.0001>.
- Mancano, Leandro. “You’ll Never Work Alone: A Systemic Assessment Of The European Arrest Warrant And Judicial Independence.” *Common Market Law Review* 58 (3): 683–718, 2021. <https://doi.org/10.54648/COLA2021047>.
- Martín, Adán Nieto. “The Foundations of Mutual Recognition and the Meaning of Dual Criminality.” *European Criminal Law Review* 8, no.2 (2018): 160–66. <https://doi.org/10.5771/2193-5505-2018-2-160> .
- Ochnio, Ariadna H. “Why Is a Redefinition of the Autonomous Concept of an “Issuing Judicial Authority” in European Arrest Warrant Proceedings Needed.” *European Papers* 5, no.3 (2020): 1305–24. <https://doi.org/10.15166/2499-8249/427> .
- Opinion 2/13 of 18th December 2014, ECLI:EU:C:2014:2454.
- Ouwerkerk, Jannemieke. “Balancing Mutual Trust and Fundamental Rights Protection in the Context of the European Arrest Warrant.” *European Journal of Crime, Criminal Law, and Criminal Justice* 26, no.2 (2018): 103–9. <https://doi.org/10.1163/15718174-02602002>.

- Papademetriou, T. & Law Library Of Congress, U. S. G. L. R. D. *European Union: European arrest warrant*. Washington, D.C.: The Law Library of Congress, Global Legal Research Directorate, 2003. Retrieved from the Library of Congress.
<https://www.loc.gov/item/2019670579/>.
- Popelier, Patricia, Giulia Gentile, and Esther Zimmeren. 2021. “Bridging the Gap Between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context.” *European Law Journal: Review of European Law in Context* 27, no. 1-3(2021): 167–84. <https://doi.org/10.1111/eulj.12436>.
- Rosano, Alessandro. “If You Are a Judicial Authority and You Know It, Raise Your Hands – Case Note on C-452/16 PPU, Poltorak, C-453/16 PPU, Özçelik, C-477/16 PPU, Kovalkovas.” *European Criminal Law Review* 7, no.1 (2017): 89–98.
<https://doi.org/10.5771/2193-5505-2017-1-89> .
- Satzger, Helmut. “Mutual Recognition in Times of Crisis – Mutual Recognition in Crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant.” *European Criminal Law Review* 8, no.3 (2018): 317–31. <https://doi.org/10.5771/2193-5505-2018-3-317>.
- “Statistics on the Practical Operation of the European Arrest Warrant – 2019.” Europa. European Commission, August 6, 2021.
https://ec.europa.eu/info/sites/default/files/law/search_law/documents/eaw_statistics_2019_swd_2021_227_final_08_2021_en.pdf.
- Tralmaka, Ilze. “Upholding Fundamental Rights in National Arrest Warrant Proceedings in Practice: a Need for Third Level of Judicial Protection?” *European Journal on Criminal Policy and Research* 28, no. 3 (2022): 451–64. <https://doi.org/10.1007/s10610-022-09518-6> .
- Van der Mei, Anne-Peter. “The European Arrest Warrant System: Recent Developments in the Case Law of the Court of Justice.” *Maastricht Journal of European and Comparative Law* 24, no.6 (2017): 882–904. <https://doi.org/10.1177/1023263X17745804> .
- Wendel, Mattias. “Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM.” *European Constitutional Law Review* 15, no.1 (2019): 17–47.
<https://doi.org/10.1017/S1574019619000063> .
- Wigand, Christian, and Guillaume Mercier, eds. “Commission Reports on European Arrest Warrant: 56,000 Persons Surrendered since 2005, Member States Need to Improve Implementation.” (European Commission, July 2, 2020).
https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1245.
- Zimmermann, Frank. 2022. “Concerns Regarding the Rule of Law as a Ground for Non-Execution of the European Arrest Warrant: Suggestions for a Reform.” *European Criminal Law Review* 12, no.1 (2022): 4–24. <https://doi.org/10.5771/2193-5505-2022-1-4>

Zuber, Helene and Mathieu von Rohr. "Former Catalan President Puigdemont 'I Don't Like Being in Exile'." *Der Spiegel*, August 13, 2018.
<https://www.spiegel.de/international/europe/former-catalan-president-puigdemont-i-dont-like-being-in-exile-a-1222545.html>.

Works Consulted

Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Caldaru*, judgment of 5 April 2016. EU:C:2016:198.

Case C-241/15, *Bob-Dogi*, judgment of 1 June 2016. EU:C:2016:385.

Case C-453/16 PPU, *Özçelik*, judgement of 10 November 2016. EU:C:2016:860;

Case C-216/18 PPU, *LM*, judgment of 25 July 2018. ECLI:EU:C:2018:586.

Case C-414/20 PPU, *MM*, judgment of 13 January 2021. ECLI:EU:C:2021:4.

Case C-648/20 PPU, *PI*, judgment of 10 March 2021. EU:C:2021:187.

Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*, opinion of 17 December 2020. ECLI:EU:C:2020:1033.