The European Arrest Warrant and the Rule of Law

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1 Introduction

The increasing case law concerning the parameters of the European Arrest Warrant (EAW) has been essential reading for anyone interested in European Union (EU) constitutional law matters in recent years. In the *LM* case concerning the surrendering of a person to Poland, the Court of Justice of the EU (CJEU), has confirmed that there is no obligation to blindly trust another Member State if the EU values set out in Article 2 Treaty on European Union (TEU) are not fulfilled and if the judiciary cannot be regarded as independent anymore.[1] In this regard the EAW cases are dependent on other constitutional rulings, such as the EU institutions procedures against Poland and Hungary. In several rulings the CJEU has stated that Article 19 TEU, gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, and entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights.[2] The CJEU has held in essence that respect for the rule of law is essential for citizens to trust public institutions and that without such trust, democratic societies cannot function. Indeed, the rule of law crisis in the EU has had wide implications for the execution of arrest warrants, since the EAW is based on mutual trust between the Member States. [3]

The idea of trust in other Member States is built on the presumption of equality between the states and reciprocity. Thus, mutual recognition of judicial decisions across the Member States presupposes a climate of trust between the domestic legal orders which appears particularly difficult to achieve in an area as sensitive as criminal law. Furthermore, one common problem, and as such frequently highlighted by academic commentary, which arises when discussing the notion of EU criminal law cooperation is that there is no definition of ‘mutual trust’ in the field of criminal law. This lack of conceptualization has been considered as constituting a significant lacuna in EU criminal law cooperation. In this regard (and prior to the entry into force of the Lisbon Treaty) it was often pointed out that there was insufficient mutual trust between the Member States and no adequate European regime for the protection of human rights within the former third pillar to justify such an analogy with the internal market and mutual recognition.

Moreover, a key question has been whether mutual recognition respects sovereignty at all as a method of integration. Thus, the very notion of mutual recognition represents a vertical transfer of sovereignty. Nevertheless, as Kalyspso Nicolaides pointed out a long time ago, mutual recognition is not absolute. Instead, she argues that the notion of recognition should be managed.

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[1] Case C-216/18 PPU *LM,* ECLI:EU:C:2018:586.

[2] E.g. Case C-619/18, *European Commission v Poland,* ECLI:EU:C:2019:531, Case C-791/19, *Commission v Poland,* ECLI:EU:C:2021:596.

[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 (as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, [2009,] OJ L81/24).

[4] Thus, managed mutual recognition implies that acceptance of the norms of other Member States can and must be reciprocal and proportionate.

This chapter is structured as follows. The first part discusses the meaning of trust and why it is so important in EU criminal law matters. The second part discusses the EAW in the specific context of the Rule of Law. The third part of the chapter briefly discusses the principle of proportionality. The fourth part concludes by discussing some of the main challenges for the future.

2 The Meaning of Trust

Diego Gambetta has described trust as a crucial notion albeit difficult to grasp and by illuminating its slippery nature by coining the phrase "trusting trust".[5] According to Gambetta "the importance of trust pervades the most diverse situations where cooperation is at one and the same time a vital and fragile commodity: from marriage to economic development, from buying a second-hand car to international affairs, from the minutiae of social life to the continuation of life on earth".[6] As noted, the EAW is an instrument based on mutual recognition and thereby trust as a mechanism for integration. Yet the idea of free movement and mutual recognition in criminal law has caused some problems. What makes the EAW particularly controversial is that it abolished the requirement of dual criminality for 32 crimes with 3 years imprisonment in the sentencing scale in respective Member State. This dual criminality rule has previously been intrinsic in the law on extradition as touching upon the core of nation state sovereignty.[7] Therefore, many scholars have argued that criminal law – unlike the creation of an integrated market for economic freedoms – demands a common set of standards and meta-standards of general application.[8]

Throughout the development of for example EU criminal law cooperation the idea of trust has been a main drive of integration. It is often pointed out that there is currently insufficient mutual trust and overly divergent criminal laws between the Member States to justify the application of a trade-based internal market model of mutual recognition in the area of freedom, security and justice (AFSJ) law. Indeed, the enforcement of EU law through the template of mutual recognition is constitutionally challenging and interesting, as it is based upon solidarity and trust across the European traditions. Dependence on trust in "ordinary" EU law is, however, far from new. After all, it was the classic ruling

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4 K Nicolaïdis, "Trusting the Poles? Constructing Europe through mutual recognition", (2007) 14 *Journal of European Public Policy*, 682 -698.

5 D Gambetta, 'Can We Trust Trust?', in D Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York, 1988), 213-237.

6 D Gambetta, "Foreword", in D Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* (Basil Blackwell, New York, 1988), 213-237, at ix-x. On trust and the EAW see e.g A Willems, *The Principle of Mutual Trust in EU Criminal Law* (Oxford, Hart Publishing, 2021) and V Mitsilegas, *EU Criminal Law* (Oxford: Hart Publishing 2016).

7 E van Sliedregt, "The dual criminality requirement", in N Keijzer & E van Sliedregt (eds), *The European Arrest Warrant in practice* (The Hague, T.M.C. Asser Press 2009), Chapter 4.

8 E.g. E Guild, "Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice", 10 *European Law Journal* (2004) 224.

in the *Cassis de Dijon* case[9] which introduced mutual recognition into EU law for the freedom of movement of goods. It meant that when goods actually existed in the common market, there would be no other cross border obstacles and thus "trust" also became a key concept in European integration law. However, as the Advocate-General of the CJEU, Paolo Mengozzi expresses it in the *Da Silva Jorge* ruling:[10]

> the principle of mutual recognition which lies at the heart of the mechanism behind the European arrest warrant cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification, or a driving licence issued by another Member State. …. The principle of mutual recognition, more specifically where it is applied in relation to a European arrest warrant issued for the purposes of executing a sentence, as it is in the main proceedings, cannot be applied automatically but must, on the contrary, be viewed in the light of the personal and human context of the individual situation underlying each request for the execution of that warrant.[11]

Nevertheless, the function of trust is notably the assumption that the Member States trust each other sufficiently not to require further legal guarantees or checks to execute their commitments within the framework of judicial cooperation in criminal matters. Accordingly, the EAW system is based on the principle of mutual recognition. This is in turn based on the mutual trust that exists between Member States as regards the ability of the national legal orders to ensure an equal and effective protection of the fundamental rights that are recognised in Union law and in particular in the Charter of Fundamental Rights of the European Union (the Charter).

The issue is, however, the extent to which mutual recognition can be limited by other legal principles, such as the rules for a fair trial in accordance with European Convention on Human Rights (ECHR) as well as the Charter. In the *IB* ruling on the application of the European Arrest Warrant, the European Court of Justice confirmed that mutual recognition is not absolute and that there may be individual aspects hampering the effectiveness of mutual recognition.[12] Moreover, in *Wolzenburg*[13], the issue of whether the possibility to serve the remainder of a sentence in another Member State was touched upon. In that case, the CJEU stipulated that according to the European Directive 2004/38/EC on EU Citizenship, an EU citizen must have lived in another Member State for five years before being able to enjoy all its benefits.[14] The Court also established that

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[9] Case C-120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*. ECLI:EU:C:1979:42.

[10] Case C-42/11 *Da Silva Jorge* ECLI:EU:C:2012:517.

[11] Paragraph 28, opinion delivered on delivered on 20 March 2012.

[12] Case C-306/09, *IB* ECLI:EU:C:2010:626.

[13] Case C-123/08, *Wolzenburg*, ECLI:EU:C:2009:616.

[14] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

it lies in its very nature that the principles of proportionality and non-discrimination as understood in mainstream EU law should be regarded as applicable in the area of EU judicial cooperation in criminal law, even before the Lisbon Treaty was adopted. After all, it could be argued that there was a need to recognise that a system based upon enforcement and mutual recognition also needed the other side of the coin, namely, substantial principles of non-discrimination and the recognition of citizenship rights.

In the context of the EAW, it is the judiciary – contrary to the law on extradition where the politicians decide whether to extradite or not – that need to trust one another across the European borders. Thus, mutual recognition of judicial decisions across the Member States presupposes a climate of trust between the domestic legal orders which appears particularly difficult to achieve in an area as sensitive as criminal law. It is often stated that the main problem with mutual recognition is the absence of sufficient trust and that this is problematic, as Article 67 TFEU presupposes that mutual recognition plays the key role in this area. The problem is that trust is a vague concept, and it is too indirect and subjective as a legitimating link to the attribution of powers in the Union. Moreover, it remains unclear how to measure and achieve trust, and the notion of trust has always been a very nebulous notion.[15]

The function of trust is notably the assumption that the Member States trust each other sufficiently not to require further legal guarantees or checks to execute their commitments within the framework of judicial cooperation in criminal matters. As mentioned above, the European Arrest Warrant is perhaps the most well-known example of mutual recognition within the EU in a criminal law context. The EAW system is based on the principle of mutual recognition. This is in turn based on the mutual trust that exists between Member States as regards the ability of the national legal orders to ensure an equal and effective protection of the fundamental rights that are recognised in Union law and in particular in the Charter. The European Court of Justice has pointed this out in *Aranyosi* and *Căldăraru*[16]:

> Both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow an area without internal borders to be created and maintained. More specifically, the principle of mutual trust requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law.

The judgment in *Aranyosi and Căldăraru*, proposes a two-step approach in determining whether fundamental rights have been breached. An initial finding of general or systemic deficiencies in the protections in the issuing state must be made, and the executing judicial authority must then seek all necessary supplementary information from the issuing state as to the protections for the individual concerned. These tests have been predicated on mutual trust and

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[15] See e.g., K Lenaerts and J Gutiérrez-Fons, 'The European Court of Justice and Fundamental Rights in the Field of Criminal Law', in M Bergström et al (eds), *Research Handbook on EU Criminal Law* (Cheltenham: Edward Elgar 2016), ch. 1.

[16] Case C-404/15 C-659/15 PPU, *Aranyosi* and *Căldăraru*, ECLI:EU:C:2016:198.

mutual recognition. A problem with adopting that approach in the present case is that the deficiencies identified are to the edifices of a democracy governed by the rule of law. The CJEU observed that in those circumstances, it is difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.[17]

As Ermioni Xanthopoulou points out, "Overcrowding in prisons was reported by the European Committee for the Prevention of Torture and resulted in inhumane living standards that were undeniable and which could no longer support mutual trust in the form of blind trust relying on conclusive presumptions."[18] The notion of trust-based EU law is interesting and is highly political in the sense that it is assumed to simply exist. The notion of trust in EU law is a vague concept. Still the idea of trust between the EU Member States has in many ways worked as claimed *panacea* for a lack of uniformity and the absence of legislation in AFSJ matters.

Why are trust and mutual recognition sometimes considered controversial from the perspective of European integration? Naturally, there are several reasons for this. The Member States have a great deal in common but there are also many differences. It comes as no surprise that it is the principle of mutual recognition regardless of the fact that it is inherently hard to define, which has been popular among EU political leaders, since it has been regarded as an effective way to maintain national legislation despite increased integration. It has gradually been broadened to also apply to the EU's judicial cooperation in criminal matters. The presumption of trust has constituted a way to broaden the competence of the EU when the EU has not had the legislative power. The reason is simple: before the Lisbon Treaty came into effect, the EU had very limited competence to adopt legislation in the area of justice and home affairs (previously the third pillar). Yet what about the legitimacy of the issue of trust? It seems unclear whether trust as a legitimising factor in this respect has ever been a part of either national or international criminal law. It constitutes, in other words, a unique European strategy and more importantly, it seems to be a translation taken directly from the model of the Single Market without any underlying research into whether it actually might lead to successful judicial cooperation in the area of criminal law at all. The function of trust in EU criminal law is thus still a mysterious issue. Even if it is important to question whether an integration model that is based on trust is as forceful as tangible legislation, the concept of trust seems to have been used to justify the promotion of the EU project, even if it from the start was much too far-reaching and ambiguous. This explains why the CJEU to such a large extent focuses on the effectiveness of the EU's judicial cooperation[19] in the area of criminal law and why only very few cases (until recently) have been allowed to break the presumption of mutual trust

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[17] ibid.

[18] E Xanthopoulou, "The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?", forthcoming *European Law Journal* (manuscript on file with the author).

[19] E Herlin-Karnell, "From Mutual Trust to the Full Effectiveness of EU law: 10 Years of the European Arrest Warrant" (2013) *European Law Review* 79.

between Member States (for example, as regards the risk of inhumane treatment such as torture).

3 The EAW and the Rule of Law

Given the public law nature of the EAW cooperation, controlling coercive power and respecting human rights, the rule of law is of crucial importance when discussing the EU criminal law.[20] The rule of law is a constitutional principle of the EU, as recognised in Article 2 TEU. Central to the rule of law is the idea of bounded government, restrained by law from acting outside its powers.[21] While the rule of law is an overarching principle for guaranteeing a high human rights protection, democracy and legality, the principle of legality is a more narrowly defined concept in criminal law.[22] Specifically, the debate on the EAW has for a long time been centred on the question of the interpretation of mutual trust and thereby the elasticity of the loyalty principle, Article 4 (3) TEU, in national courts. Nevertheless, although the main rule under the EAW is the presumption of mutual trust as the basis for mutual recognition so that no extra judicial safeguards are needed, in the context of the smooth operation of the EAW this raised problems as regards the possibility for national courts to review the compatibility of the EAW with human rights protection. More recently the practice of the EAW has concerned the rule of law as such. Yet the question of the limits of trust has become the crucial testing-ground for the credibility of the EAW. For example, the aforementioned *LM* case concerned the question of whether surrendering someone to Poland would undermine the rule of law and EU values. [23] The national Irish court had argued that it was difficult to see how individual guarantees can be given by the issuing judicial authority as to fair trial when it is the system of justice itself that is no longer operating under the rule of law.[24]

The CJEU partly confirmed the worry as expressed by the Irish court but pointed out that it is chiefly for the European Council to monitor the Member States' compliance with the rule of law.[25] The CJEU held that it is only if the European Council were to adopt a decision determining, as provided for in

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[20] On the rule of law in the EU see e.g. T Konstadinides, *The Rule of Law in the European Union* (Oxford: Hart Publishing 2017); K Lane Scheppele, D Kochenov, B Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law* (2020) pp 3-121.

[21] See e.g., M Kumm, 'Constitutionalism and the Moral Point of Constitutional Pluralism' in P Eleftheriadis and J Dickson (eds) *Philosophical Foundations of EU law* (Oxford: Oxford University Press 2012), ch. 9.

[22] On legality in EU criminal law see e.g. C Peristeridou, *The Principle of Legality in European Criminal Law* (Antwerp: Intersentia 2015).

[23] Case C-216/18 PPU *LM,* ECLI:EU:C:2018:586.

[24] High Court of Justice, *The Minister for Justice and Equality vs. Arhur Celmer,* judgment of Ms Justice Donnelly delivered on the 12th day of March, 2018.

[25] E Herlin-Karnell "The Politics of EU law and the Area of Freedom, Security and Justice" chapter in PJ Cardwell & M-P Granger,(eds) *Handbook on the Politics of EU Law* (Cheltenham: Edward Elgar 2020).

Article 7 (2) TEU, that there is a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU that the executing judicial authority would be required to refuse automatically to execute any EAW. But in the absence of such a Council decision, the national court will still need to critically engage in a serious deliberation as to whether the presumption of mutual trust could legitimately be rebutted and if there is a serious risk of degrading treatment of the individual in question.

As the CJEU has often emphasized, the rule of law really is, therefore, the backbone upon which to base EU co-operation.[21] This is especially so in the current debate on "backsliding" – or regression – and the challenges to the rule of law in certain EU Member States such as Poland and Hungary.[22] For example, Article 7(1) TEU provides for the possibility for the EU Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Article 2 TEU. Given this risk of divergent standards, what does trust, and solidarity really mean in the EU with its motto of "united in diversity"? This is largely a political question. Consequently, in a policy document on the rule of law, the Commission points out that where Member State mechanisms to secure the rule of law cease to operate effectively, this endangers the functioning of the EU's need to protect this principle as a common value of the Union.[23] For sure, the EU needs to be firm on its commitment thereto, as it is so closely related to the protection of human rights globally, and the kind of AFSJ that will emerge in the Commission's vision for 'Europe 2020' and beyond.[24] It is particularly important as, in its Opinion 2/13,[25] the CJEU concluded that the present EU legal framework would not allow accession to the ECHR. According to the Court, (paragraph 163-169 of the judgment) the planned arrangements for complying with the obligation imposed on the EU by Article 6 (2) TEU to accede to the ECHR are not compatible with EU law. What is important from the perspective of this chapter is that the Court, in its judgment in Opinion 2/13, especially singled out the AFSJ as a crucial area in which the EU's relationship to the ECHR and the notion of trust is crucial, but understudied. The Court held that the trust principle requires, particularly with regard to the AFSJ, each Member State, save in exceptional circumstances, to consider all the other Member States to be complying both with EU law and particularly with the fundamental rights recognised by the Charter. The question seems to boil down to the issue whether there is a way to enhanced trust and how it relates to the values of the EU.

Moreover, there is a growing case law on the definition of judicial authorities. The question of judicial independence is closely linked to case law regarding the meaning of the term 'judicial authority' that can issue as well as supervise the execution of an EAW.[26] In a series of cases, the Court stated that where an EAW is issued by an authority that is not a court, the warrant must be capable of being subject to judicial review by a court.[27] In addition, the Court held that a public

[26] L. Mancano, 'You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence', 58 (2021) *Common Market Law Review*, 683; E Xanthopoulou, "The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?", forthcoming manuscript *European Law Journal.*

[27] Joined Cases 508/18 and 82/19 *PPU OG and PI Public Prosecutors of Lübeck and of Zwickau* ECLI:EU:C:2019:456.

prosecutor can also be considered a judicial authority, provided that their independence is guaranteed in the presence of effective judicial supervision, where needed.[28] Accordingly, defining what constitutes a judicial authority is crucial for the purposes of ensuring effective judicial protection throughout the procedures of an EAW.[29] The Court specified numerous occasions[30] when an authority may amount to a judicial authority within the meaning of the law with the purpose of forging judicial independence and eventually judicial protection. As several commentators note, the Court has placed significant weight on this matter, and this is indicative of a recognition that respect to due process rights is paramount for judicial cooperation.[31]

4 The Principle of Proportionality and the Rule of Law

David Beatty has famously described the proportionality principle as the ultimate rule of law.[32] The idea of mutual recognition in the EU context is that states should mutually trust one another in Europe, and recognise, inter alia, a judgment, product, qualification or arrest warrant from another EU state. The crucial point here is that the proper application of proportionality functions as a rebuttal of the previous assumption that there were no, or very few, limits to mutual recognition in this area. When human rights are at stake, there needs to be a good justification for relying on trust.

Even if trust in the Member States is a rather vague concept, the idea is that it should contribute to enhancing solidarity within the EU. If solidarity is to have any real meaning in a criminal law context, it must be based on common sense of a kind of respect and reciprocity. This is often mentioned in discussions on proportionality. It is here that the idea of proportionality represents the core of constitutional law.[33] Proportionality in an EU context means a line of reasoning based on common sense where the idea of "suitability" and "balance" constitute the golden rule on which decisions concerning the desirability of a certain piece of EU legislation rest, determining whether the costs are higher than the actual

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[28] Case 489/19 PPU *NJ in the presence of Generalstaatsanwaltschaft Berlin*, ECLI:EU:C:2019:849.

[29] E Xanthopoulou, "The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?", forthcoming manuscript *European Law Journal.*

[30] Case 477/16 *Openbaar Ministerie v Ruslanas Kovalkovas*, ECLI:EU:C:2016:861; Case 452/16 PPU *Openbaar Ministerie v Krzysztof Marek Poltorak*, ECLI:EU:C:2016:858; Case 453/16 PPU *Openbaar Ministerie v Halil Ibrahim Özçelik, ECLI:EU:C:2016:860*; Joined Cases 508/18 and 82/19 *PPU OG and PI (Public Prosecutors of Lübeck and of Zwickau*, ECLI:EU:C:2019:456*;* Case 509/18 *Minister for Justice and Equality v PF*, ECLI:EU:C:2019:457.

[31] E Xanthopoulou, "The European Arrest Warrant in a Context of Distrust: Is the Court Taking Rights Seriously?", forthcoming manuscript *European Law Journal*, A Willems, The Principle of Mutual Trust in EU Criminal Law (Oxford, Hart publishing, 2021), L. Mancano, 'You'll never work alone: A systemic assessment of the European Arrest Warrant and judicial independence', 58 (2021) *Common Market Law Review*, 683.

[32] D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2005).

[33] M Klatt and M Meister, *The Constitutional Structure of Proportionality* (Oxford, Oxford University Press, 2012).

gains. When the CJEU or the legislator in the EU determines whether a law is proportional, they examine whether the measure is suitable or appropriate in order to achieve a desired result or whether the same can be achieved through a less onerous measure. Proportionality is thus a general control mechanism in EU legislation that is suitable for the assessment of the reasonability of EU measures and the actions of Member States when they later fall within the area of application of the EU Treaties. Moreover, the idea of proportionality governs the extent to which the Member States may be exempt from their duties and obligations under EU law. The principle of proportionality is also an important tool for making decisions concerning whether exercising the legislative competence of the EU is justified. In this respect, every legislative measure must be effective in order to achieve the goal of the competence that has been granted. Finally, the negative impact on other interests must be compensated by the positive impact of EU action in a specific area.

The principle of proportionality has always played a central role in EU legislation (both legislative and judicial). Naturally, the Lisbon Treaty stipulates that the EU shall respect freedom and justice but also establishes a high level of security within Europe. It is still unclear what this actually entails in practice and how the right balance between these two different values can be achieved. The question is rather whether a correct application of the principle of proportionality may function as a correction of the assumption made previously that there was no, or at least very few, limits regarding the principle of mutual recognition in the area of freedom, security and justice. Therefore, it is important that at least non-discrimination and proportionality within the framework of EU criminal legislation are seen as principles that are inextricably linked. The question of trust in EU criminal law must be seen in a broader perspective. As has been explained above, the Arrest Warrant has played a central role in the emergence of criminal law at the EU level, but as has also been mentioned above, the EU's principle of mutual recognition has never been a success due to the lack of trust between Member States.

In Article 49 of the Charter that became legally binding through the Lisbon Treaty, a guarantee was now stipulated for the legality and proportionality of sanctions in a more all encompassing manner than in the ECHR. However, it is interesting to note that the principle of proportionality can both broaden rights and shrink them. Despite this, Article 52 (1) establishes certain important exceptions from the application of the Charter in its entirety. This provision clearly stipulates that:

> 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 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.

Such a limitation as the one provided in Article 52 of the EU Charter is not unique for the EU. For example, also the ECHR Article 5 includes a similar possibility to subject fundamental freedoms and rights to limitations if these are necessary in a democratic society. The risk is that even if it is of utmost importance to maintain security in a society, the security agenda can easily be

manipulated to always suit "what is necessary in a democratic society". That is why it is so important that the principle of proportionality is used in a broader sense as a part of the establishment of trust in the area of freedom, security and justice. The explanatory notes also indicate that the reference to general interests that are recognised by the EU includes both the goals mentioned in Article 3 TEU as well as other interests that are protected through special provisions in the Treaties, given that these limitations actually respond to a general EU interest. By illuminating the impact of proportionality in the context of mutual recognition, this chapter seeks, in particular, to demonstrate the force and power of proportionality as a governing principle, and why it is needed as a device for constructing the AFSJ space. Remarkably, the proportionality principle has not been applied to any great extent in the legally thorny terrain of the AFSJ, with its complex ties between the EU, the Member States, and their citizens, despite this being an area that is closely connected to national sovereignty and the protection of human rights. Important legal measures in this area include the EAW, which introduced the concept of mutual recognition in the fight against crime, which seem to have been excluded from such a proportionality test.[34]

With regard to the possible usefulness of balancing in concrete cases and of applying Barak's view of proportionality as inherent in the balancing test, it is useful to turn to the mutual recognition arena.[35] The crucial point here is that the proper application of proportionality functions as a rebuttal of the previous assumption that there were no, or very few, limits to mutual recognition in this area. When human rights are at stake, there needs to be a good justification for relying on trust.

In any case, it is clear that the Charter offers itself as an important trendsetter with regard to proportionality as a balancing mechanism and its future scope as a constitutional principle in the AFSJ. Specifically, it has had a huge impact on the emerging EU criminal law principles of procedural law. With respect to due process rights, Article 49 provides for the guarantee of legality and proportionality in a more extensive way than the ECHR. Article 47 of the Charter also guarantees the right to an effective remedy, while Articles 48 and 49 stipulate the presumption of innocence and the right of defence.[36] The latter provision also makes it clear that the severity of penalties must not be disproportionate to the criminal offence.

Thus, the scope of EU human rights protection in legal terms seems to turn on the elasticity of the proportionality principle, an argument which is easily accused of paving the way for circular reasoning. So, a general adherent to justice would mean that there are limits to what the Member States may deny their citizens upon the basis of proportionality. Of course, in the EU context, the Member States also have a right to justification if they adhere to the basics of

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[34] The European Arrest Warrant, 584/JHA [2002] OJ L190/1 Council Framework Decision.

[35] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge, Cambridge University Press, 2012).

[36] In her opinion delivered on 18 October in *Radu* C-396/11 (para 103), AG Sharpston discusses the boundaries of Article 49 of the Charter by stipulating that it would be interesting to explore the boundaries of these provisions in the context of Article 3 ECHR in which the ECtHR has held that a sentence that is grossly disproportionate could amount to ill-treatment contrary to Article 3 ECHR. The Court did not elaborate on this issue.

power which grant Union action. The notion of proportionality in EU law in general is certainly a well-explored legal axiom, but the Socratic model adds to this well-trodden debate by going one step further and investigating the actual impact of requiring reasoned action from both the EU and the Member States. It is a true umbrella concept underlying all Union activity in all fields of law, and points in the direction of a federal balance. Yet with regard to the operation of the EAW, the EAW was for a long time largely exempted from this golden rule of balancing.

As a result, in an attempt to address this deficit, the Commission published an evaluation of the implementation of the EAW framework decision in 2011.[37] The Commission pointed out that the systematic issue of warrants for the surrender of persons has undermined the application of the EAWs, which are often sought in respect of very minor offences. In addition, the Commission states that there is a need to apply a proportionality test to make sure that offences which, even if they fall within the scope of Article 2(1) of the EAW, are not serious enough to justify the measures and co-operation which the execution of an EAW requires. In particular, the Commission stipulates that the handbook on the EAW needs to be adjusted in order to comply with proportionality. The amended handbook now sets out the factors to be assessed when issuing an EAW and the possible alternatives to be considered before issuing an EAW.[38] This is thus an example of where the proportionality principle could have crucial impact. More specifically, any limitation upon the basis of proportionality must respect the essence of free movement rights, the principle of proportionality, and that the limitation must be necessary and genuinely meet the objectives of general interest recognised by the EU, even if that very essence is still largely unexplained.

In a different context, in *Kadi II*, the Court adopted a restrictive reading of the proportionality requirement as a derogation possibility under Article 52 of the Charter. The General Court of the EU[39] had held that the restrictive measures adopted against Mr Kadi had been implemented without any real safeguards which would have enabled the applicant to put his case to the competent authorities, and therefore amounted a breach of proportionality.[40] The CJEU, in turn, focused on the need to ensure a fair balance between the maintenance of international peace and security, and the protection of the fundamental rights and freedoms of the person concerned, those being shared values of both the UN and the EU.[41] For this reason, it concluded that there had been no violation of the proper legal safeguards in question. Therefore, it could be argued that the scope of EU human rights protection under the Charter turns on the width of the proportionality principle. Although the Member States could invoke proportionality to derogate from the rights guaranteed in the Charter, since

[37] COM (2011) 175 final 'On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States'.

[38] ibid.

[39] T-85/09 - *Kadi v Commission*. ECLI:EU:T:2010:418.

[40] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518.

[41] ibid.

Article 52 applies to all rights, there are limits in the light of dignity and the rule of law (EU law principles). Nonetheless, the explanatory memorandum on the Charter confirms that these exceptions are based upon the Court's well-established case law that restrictions may be imposed on the exercise of fundamental rights.[42] The explanatory notes also make it clear that the reference to the general interests recognised by the Union covers both the objectives mentioned in Article 3 TEU and other interests protected by specific provisions of the Treaties provided that those restrictions do, in fact, correspond to the objectives of general interest of the EU. Moreover, these explanatory notes state that such restrictions may not, with regard to the aim pursued, be disproportionate or cause unreasonable interference, thereby undermining the very substance of any Charter rights.[43] So, unlike the ECHR, which limits derogations from certain absolute rights, the Charter does not appear to recognise absolute rights, except for the notion of dignity and the right to life and the ban on torture, in the sense that all rights may be derogated from in accordance with Article 51(1) Charter. However, the Charter refers to the ECHR in Article 52(3), in pointing out that the ECHR is always the minimum standard of protection.

While the principle of proportionality is part of the EU's arsenal for deciding on the legislative authority for the EU legislator, it is also a principle that is addressed to individuals in the free movement context. This is usually called the strict proportionality aspect of the otherwise rather state-centric proportionality test. The problem – for a long time – has been that the AFSJ seems to have been largely exempted from this golden rule of balancing. Remarkably, the proportionality principle has not been applied to any great extent in this legally thorny terrain, with its complex ties between the EU, the Member States, and their citizens, despite this being an area closely connected to national sovereignty and the protection of human rights. Important legal measures in this area with regard to arrest warrants, which introduced the concept of mutual recognition in the fight against crime, seem to have excluded such a proportionality test.[44] As noted, in the joined case of *Aranyosi* and *Căldăraru*,[45] the CJEU stated that the executing judicial authority of an arrest warrant must respect the requirement of proportionality, laid down in Article 52(1) of the Charter, with respect to the limitation of any right or freedom recognised by the Charter. The CJEU held that 'The issue of a European arrest warrant cannot justify the individual concerned remaining in custody without any limit in time'.[46] The Court also stated that the consequence of the execution of such a warrant must not be that the individual in question suffers inhuman or degrading treatment. This sounds self-evident, but the case was handed down in 2016, indicating the somewhat bizarre situation with regard to arrest warrants in Europe for a long time. The *LM c*ase and

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[42] The Explanations relating to the Charter of Fundamental Rights, [2007] OJ C83/2, see, also, the discussion in P Craig *EU Administrative Law* (Oxford: Oxford University Press 2012) 473–74.

[43] ibid.

[44] European Arrest Warrant, 584/JHA [2002] OJ L190/1, Council framework decision.

[45] Joined Cases C-404/15 and C-659/15 PPU, judgment of 5 April 2016. See also, Case C-578/16 PPU.

[46] ibid, paras 101–03 of the judgment. See also *Schrems* and *Tele 2 Sverige*.

subsequent cases should be seen in the wider context of challenges to the rule of law in the EU.

5 Conclusion

The rule of law crisis has had crucial implications for the EAW and the function of trust in this area. More specifically the rule of law debate and the lack of judicial independence and incompliance with EU values in certain Member States such as Poland and Hungary have confirmed the difficulties with a system based on trust. Crudely put, the EU cannot ask the Member States to trust a judiciary that according to the EU:s own values have serious shortcomings. Likewise, is the problem with overcrowded prisons such as in Romania, a problem for a system based on trust where the right to dignity is guaranteed. Judicial cooperation in the area of criminal law in the EU is currently in an interim phase and its future in the area of freedom, security and justice is uncertain. The many crises that dominate Europe do make it possible to go back to the very beginning and critically discuss how cooperation should progress. A strong commitment to the constitutional state and the protection of human rights must be the guiding principle throughout this legal and policy area. Future EU criminal law will therefore to a large extent not only depend on the politics of the EU institutions but also on the level of commitment and understanding among all those who in some way work in this area. It may also require further harmonization in order to level the playing field.

This chapter has highlighted the issue of mutual trust and the concept of trust in EU law and its consequences on the area of freedom, security and justice. The main purpose has been to give a perspective of the concept of "trust" which is both used with mutual recognition in criminal law and how the principle of proportionality in the EU may contribute to an improved and more balanced system. The chapter has also underlined the promises and pitfalls of the proportionality test as it may provide an opening to depart from EU law depending on what proportionality is deemed to mean in an EU context.

It is therefore more important that the EU and its Member States strive towards a coordination of their case law in the area of criminal law bearing the Charter in mind. Another important aspect is that the CJEU now emphasises the importance of reasonable trust as well as the importance of common EU values as regards the full protection of human rights. Moreover, it is necessary to strike a balance between the different components that together shape an area of freedom, security and justice as well as EU law more generally. Against this background, the principle of proportionality should be accorded a greater importance in the EU's legislative process and similarly, the European Court of Justice should integrate a proportionality test in its interpretation of the concept of trust as a way of assuring the Member States that the Charter and the ECHR are the lowest common denominator. Moreover, the EU must uphold the rule of law even when it may lead to fragmentation in the sense that mutual trust and mutual recognition, the very foundation for EU cooperation does not function in the whole of the EU because of the enforcement deficit that still confronts the EU. In the meantime, what we may see is therefore a two-speed Europe with regard to the operation of the EAW and levels of trust.