# The quest for proportionality for European Arrest Warrant

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## Contents



## Abstract

The paper examines the impact of the principle of proportionality for the European Arrest Warrant (EAW). The only function of proportionality discussed here is concerning the

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mutual recognition context. The argument is enunciated against the backdrop of over-emphasis on the principle of mutual recognition to the end of speedy judicial cooperation in criminal matters. The paper is structured in two levels; the central level of the Court of Justice of the EU (CJEU) case law analysis and the decentralised level of judicial authorities using the EAW. The analysis firstly explores the recent case law of the CJEU affirming the need to secure the operation of the mutual recognition and secondly the debate on overusing the instrument. It provides an analysis of the quest for a proportionality based analysis in the context of mutual recognition where fundamental rights protection are competing with fast judicial cooperation.

*Keywords*

'Proportionality', 'European arrest warrant', 'fundamental rights', 'mutual recognition', 'Radu', 'Melloni'

## Introduction; EAW and the competing values of 'extradition in a mutual recognition environment

The framework decision on EAW[1] provides for a judicial decision issued by one Member State and transmitted to another, with the view to request the arrest and the surrender of a person for the purpose of his prosecution or execution of a sentence or a detention order. EAW is the first instrument of mutual recognition, the so-called 'cornerstone' of judicial cooperation in criminal matters.[2] It is based on a high level of mutual trust between Member

[1] Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190/1

[2] Ibid , recital 6; For a critique on the transfer of mutual recognition from internal market to judicial cooperation in criminal matters see Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step too Far too Soon? Case Study - The European Arrest Warrant' (2004) 10 European Law Journal 200, 200;

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States, as highlighted by the preamble of the framework decision.[3] EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or when the requested person is already tried and given a custodial sentence or a detention order of at least four months.[4] The scope of the EAW also extends to a list of serious offences if they are punished by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years.[5] For this list of offences the requirement of double criminality of the act was abolished.

The measure was adopted because the previous formal extradition procedures[6] were insufficient.[7] This need became more apparent in view of EU counter-terrorism policy and EAW was adopted 'as a central plank of this policy'[8] along with the Framework Decision on Combating Terrorism.[9] Moreover, the objective to become an AFSJ highlighted the need to replace the previous politicised and slow extradition mechanism with a simplified surrender system among judicial authorities.[10] So, the framework decision has replaced the previous EU

[3] 190/1, recital 10

[4] Ibid, Art 2(1)

[5] Ibid, Art 2(2)

[6] European Convention on Extradition; European Convention on the suppression of terrorism 1977; Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders OJ L239 ; EAW Arts 3,4

[7] EAW, recital 1; Tampere Presidency Conclusions, 305

[8] Cian Murphy, *EU Counter-Terrorism Law; Pre-emption and the Rule of Law* (Hart Publishing 2012) 183; Anne Weyembergh, 'L'impact du 11 septembre sur l'équilibre sécurité/liberté dans l'espace pénal européen' in Bribosia and Weyembergh (ed), *Lutte contre le terrorisme et droits fondamentaux*, (Bruylant, collection Droit et Justice 2002)

[9] Council Framework Decision (2002/475/JHA) of 13 June 2002 on combating terrorism OJ L 164

[10] EAW, recital 5

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and international law extradition system of transfer of the individuals,[11] moving the shift from political to judicial power. The EAW procedure is a speedy process as judicial authorities complete a form and operate under limited time-frame and strict deadlines.[12]

EAW has attracted a huge debate[13] concerning the concept of surrender of the country's citizens, the partial abolition of the dual criminality requirement and fundamental rights safeguards in view of the lack of a respective ground for refusal. Some issues have been addressed to a certain extent by the CJEU.[14] The prevailing view is that the new surrender

[11] European Convention on Extradition 1957; Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union OJ C78; Convention implementing Schengen Agreement, 19;

[12]EAW, Arts 15, 17, 22, 23

[13] For an overview see Valsamis Mitsilegas, *EU Criminal law* (Modern Studies in European Law, 1st edn, Hart Publishing 2009) 120-142; Steve Peers, *EU Justice and Home Affairs Law* (Oxford EU Law library, 3 edn, OUP 2011) 696-710; Murphy, *EU Counter-Terrorism Law; Pre-emption and the Rule of Law* ch 7; Massimo Fichera, 'The implementation of the European Arrest Warrant in the European Union: law, policy and practice', University of Edinburgh (2009); Ester Herlin-Karnell, 'European Arrest Warrant Cases and the principles of Non-Discrimination and EU Citizenship' (2010) 73 Modern Law Review ; Theodore Konstadinides, 'The Europeanisation of Extradition: How many Light Years Away to Mutual Confidence?' in Theodore Konstadinides and Christina Eckes (ed), *Crime within the Area of Freedom Security and Justice: A European Public Order* (Cambridge University Press 2011); Nico Keijzer and Elies van Sliedregt (ed), *The European Arrest Warrant in Practice* (Asser Press 2009)

[14] Steve Peers, 'The European Arrest Warrant: The Dilemmas of Mutual Recognition, Human Rights and EU Citizenship' in Court of Justice of the European Union (ed), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law - La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (Court of Justice of the European Union 2013)

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system is successful.[15] This paper focuses on remaining problems; firstly on the overreliance of the case law on mutual recognition creating an imbalance between security interests and fundamental rights protection; secondly on the overuse of the instrument by the national judicial authorities. Exploring on the one hand the recent judgments of *Radu* and *Melloni* and on the other hand the debate on the disproportionate use of the EAW, the paper investigates whether a proportionality based review can make a change in EAW equilibrium. The idea of 'a proportionate answer for a Europe of Rights' was firstly expressed by Fichera and Herlin-Karnell.[16] With regard to the EAW case law, they offered 'fragments of proportionality'[17] manifestations when its rationale is adopted –to a limited extent- by the Court and acknowledge that the 'exact impact of proportionality … remains to be crystallised'. It is here that this paper intends to fit. This piece intends to contribute to the literature of EU criminal law by assessing to a greater extent the impact of proportionality for EAW. It does so by providing a more sophisticated understanding of proportionality with commitment to a certain theory, by adopting a concrete focus on EAW and the mutual recognition context and fundamental rights protection and analysis.

The case law is discerned by two centrifugal powers; the protection of fundamental rights of the person sought to be arrested and surrendered and the states' interest to arrest the person

[15] For recent empirical assessments of the mechanism see Cian C. Murphy Aldo Zammit Borat and Lucy Hoyte, *Prosecutor and Government Officials Perspectives on Impact, Legitimacy and Effectiveness of the European Arrest Warrant* (SECILE: SecuringEurope through Counter-Terrorism – Impact, Legitimacy & Effectiveness, 2014); Anne Weyembergh Ines Armada and Chloe Brière, 'Critical Assessment of the existing European arrest warrant framework decision' (2014) European Parliament, DG for Internal policies of the Union

[16] Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) European Public Law

[17] Ibid 771

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with the minimum of formalities and employ the system of the EAW in its full effectiveness. Fundamental rights protection in the EAW context mainly concerns rights of due process in general and in particular the right to effective judicial protection, the right to a fair trial and the defence rights with regard to criminal trials. The security based interests on the other hand are shaped by the commitment of the EU to create an area of security and justice. To this end the judicial authorities of the Member States cooperate in a spirit of mutual trust and recognise each other's judicial decisions (mutual recognition).

The paper investigates whether proportionality can make a change to the EAW equilibrium. The principle of proportionality is a multifaceted principle pertaining to different areas of law and to different functions.[18] Focusing on EU criminal law, it only engages with the proportionality based analysis in mutual recognition setting and discusses the balancing between fundamental rights protection against the interest of speedy cooperation in the framework of EAW. Therefore the paper does not consider proportionality with regard to criminalisation and with regard to the exercise of EU competence in substantive criminal law. It only engages with the particular function of proportionality as regards fundamental rights in the context of mutual recognition. More particularly, it only discusses case law pertaining to fair trial rights.

Furthermore, it should be noted that the paper does not aim to contribute to the existing literature of fundamental constitutional rights theory and the development of the principle of proportionality in constitutional law. The paper rather relies on the existing developed theories of rights and proportionality so as to make a contribution of an original idea to

[18] Proportionality is identified in various fields of law. For substantive criminal law see Douglas Husak, 'The Criminal Law as a Last Resort' (2004) 24 Oxford Journal of Legal Studies J. W. Ouwerkerk, 'Criminalisation as a Last Resort: A National Principle Under the Pressure of Europeanisation?' (2012) 3 New Journal of European Criminal Law 228 For penology see Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice For constitutional law see Alec Stone Sweet and Jud Matthews, 'Proportionality balancing and global constitutionalism' (2009) 47 Columbia Journal of Transnational Law 73; For EU law see Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal

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fundamental rights protection in the EAW framework of mutual recognition in the field of EU law.

This paper reflects on two levels of analysis; one pertaining to the central level of judicial review by the CJEU and the second with reference to the debate on overusing the EAW even for petty crimes. The paper firstly sets the theoretical understanding of the principle of proportionality. Secondly it critically discusses recent significant judgments of the CJEU in relation to fair trial rights and finally explores the problematic overuse of the instrument even in minor offences. It is acknowledged that proportionality should be inherent in the operation of mutual recognition as compared to a blind model of mutual recognition.[19] Eventually, the paper sheds light on the impact of proportionality at two different levels with a common element, mutual recognition. At the central CJEU level, it is argued that a *stricto-sensu* proportionality analysis conducted by the Court could lead to the development of common criteria to assess the surrender. It is argued that mutual recognition should not be treated as an objective with the effect of trumping fundamental rights, especially when a higher level of fundamental rights protection is at stake. Finally at the national level of mutual recognition, it is argued that the national judicial authorities, performing the infamous suggested proportionality test should reflect on the objectives of the EAW, the existence of alternatives and on certain criteria developed by the judicial authorities.

## Proportionality based analysis

Having set the scope of the paper, it is important to take into account the theoretical framework of proportionality.[20] As it is clarified at the introduction, the paper does not intend

[19] Fichera and Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' 764

[20] There is a vast amount of literature in constitutional theory: Alec Stone Sweet, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2011) 60 Emory Law Journal ; Moshe Cohen-Eliya &

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to make a contribution to constitutional law theory. It clearly focuses on the context of mutual recognition and the EAW operation. Having said that, it is necessary to employ a certain, consistent and realistic understanding of proportionality throughout the paper in order to assess its impact. In line with these criteria, the work of Klatt and Meister was chosen, which is in turn influenced by the work of Alexy.[21] The value of the principle is recognised despite being recently challenged.[22] The paper also acknowledges what Moller had argued; the incorrect application of the principle by courts should not be confused with the principle as such rendering it pointless.[23]

The proportionality based analysis is composed of four stages; legitimate objective stage, suitability stage, necessity stage and *stricto sensu* proportionality/balancing stage. At the first

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Iddo Porat, 'American balancing and german proportionality: The historical origins' (2010) 8 International Journal of Constitutional Law 263 ; Matthews, 'Proportionality balancing and global constitutionalism'; Moshe Cohen-Eliya & Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013); Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justifi cation: The Point of Rights-Based Proportionality Review' (2010) 4 Law & Ethics Hum Rts ; Aharon Barak, *Proportionality: Constitutional rights and their limitations* (Cambridge University Press 2012)

[21] Matthias Klatt and Moritz Meister, *The constitutional structure of proportionality* (Oxford University Press 2012); Robert Alexy, *A theory of constitutional rights* (Oxford University Press 2002)

[22] On the recent debate on the value of the principle see Grégoire Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 Canadian Journal of Law and Jurisprudence ; Stavros Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 Int' l J Const L 468; Matthias Klatt and Moritz Meister, 'Proportionality—a benefit to human rights? Remarks on the I·CON controversy' (2012) 10 International Journal of Constitutional Law 687; Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality ' (2014) Legal Studies Research Paper Series, paper no 2014-14 ; Madhav Khosla, 'Proportionality: An assault on human rights?: A reply' (2010) 8 International Journal of Constitutional Law 298

[23] Kai Möller, 'Proportionality: Challenging the critics' (2012) 10 International Journal of Constitutional Law 709

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stage it is considered whether the measure in question involves a legitimate objective. At the second stage, it is asked whether the measure is suitable to achieve the required result. At the third stage, it is considered whether the limitations that the measure requires are necessary and whether it is the least restrictive measure. Finally, the last stage involves a cost-benefit analysis.

Klatt and Meister, in an attempt to define the first stage, suggest that only interests of constitutional status can be accepted as legitimate goals.[24] At the second stage, the interference must be a suitable means to achieve the goal; otherwise the measure is rendered unsuitable and there is no point for balancing. Questions like 'is the interference with this right actually going to serve the policy pursued?' are asked at this stage. At the stage of necessity there are two considerations that should be taken into account. Firstly, it should be identified whether there are other alternatives which lead to the same result and in case there is another measure which requires less interference with the right, the measure in question should be considered as failing the review.

*Stricto-sensu* proportionality, the fourth stage, balances all the relevant legitimate, suitable and necessary considerations acting as limiting clauses against the right at issue, which have made it to this stage 'surviving' the scrutiny of the previous stages. The reasoning of this stage is based on the logic that the restrictive interests must not pose a disproportionate burden to the right-holder (balancing stage-proportionality in the strict/narrow sense). It has to be decided here which one of the conflicting values takes priority in every case *in concreto* and it is commonly said that those values need to be balanced in order to see whether the

[24] Matthias Klatt&Moritz Meister, *The Constitutional Structure of Proportionality* (OUP 2013) 10

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sacrifice is worthy of the gain. According to Alexy, balancing can be broken down into three steps.[25]

a. Establishing the degree of non-satisfaction or of detriment to the first 'principle' (in accordance with his terminology) is the first step,

b. Establishing the importance of satisfying the competing principle is the second step and

c. Establishing whether the importance of satisfying the second principle justifies the non-satisfaction or the detriment of the first one.

The paper adopts a trump theory of rights, according to which, rights have a priority status against other competing public considerations, in contrast to the interest model which conceptualises rights as interests equal to competing public interests.[26] According to the trump model followed here, rights should enjoy priority over other considerations. However, rights which are absolute and therefore should 'trump' any other consideration, are in fact rare. The rest are relative which should be amenable to limitations. For that reason, a strong trump theory of rights that accepts that rights should trump every consideration is accepted only for those rights which are absolute and should not be amenable to limitations, such as the right not to be tortured. For the rest of the rights, a weak-trump theory of rights in particular is adopted here. This theory combines both balancing and trumping as opposed to the interests theory and the strong trumps theory. It considers rights as having priority over other considerations but that they are also balanced against other strong constitutional values.[27]

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[25] Robert Alexy, 'On Balancing and Subsumption. A Structural Comparison' (2003) 16 Ratio Juris 433, 436–7.

[26] Klatt and Meister, *The constitutional structure of proportionality* ; Möller, 'Proportionality: Challenging the critics'

[27] Klatt and Meister, *The constitutional structure of proportionality* ch2

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Through balancing, speedy judicial cooperation in criminal matters is acknowledged and rights can be limited for the purpose of achieving certain objectives illustrated at the Treaties. Concurrently, through trumping**,** the rights are conceived as having a priority status in relation to their competing interest with the result that they cannot be simply outweighed by the security interests that have the effect of limiting them. Those rights can only be overruled by other constitutional values.[28] Considerations which do not enjoy constitutional status cannot be balanced against fundamental rights. It follows that the principle is not always relevant in fundamental rights protection. The nature of the right determines whether judicial reasoning should use proportionality based reasoning or not.

## The quest for proportionality at the central judicial review of the CJEU with reference to EAW and mutual recognition

In EAW case law, a conflict between fundamental rights protection and the interest to arrest and surrender the person with the minimum of formalities and delays is observed. The Court's interpretations of the framework decision are more beneficial for the interest to fast and effective judicial cooperation in a plethora of cases.[29] Mutual recognition, mutual trust, cooperation without delays are values that have a central position in the judicial reasoning of the CJEU case law on the EAW, which is in particular discussed here. Mutual recognition is treated by the Court as a constitutional value with the effect of trumping competing considerations about fundamental rights violations. The imbalance is problematic, in view of the commitment of the EU to provide an area of freedom and justice to its citizens, apart from

[28] Ibid ch 2

[29] *Case C-303/05 Advocaten Voor de Wereld [2007] ECR I- 03633* ; Case C-66/08 *Kozlowski* [2008] ECR I-06041 ; *Case C-296/08 Santesteban [2008] ECR I- 06307* ; Case C-399/11 *Melloni* [2013] nyr ; *Case C-396/11 Radu [2013] nyr* r; Case C-261/09 *Mantello* [2010] ECR I- 11477

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an area of security. The EU is moreover founded on 'the values of respect of human dignity, freedom, democracy… the rule of law and respect of human rights' according to Article 2 TEU.

It should be noted that the presumption of mutual trust was recently rebutted in the context of asylum system, where the Court had stated 'that European Union law precludes the application of a conclusive presumption'.[30] This development in asylum law was expected to influence EAW case law[31] but instead the Court in *Radu* ruled that the interpretation of the framework decision in light of the Charter does not allow the judicial authorities to refuse to execute an EAW even in the event that fundamental rights are breached.[32]

This section of the paper will assess the impact of a proportionality based analysis in the setting of EAW with particular regard to the operation of the mutual recognition setting. The analysis focuses on recent case law of the CJEU.

## *Radu*; Execution of an EAW in the event of defence rights violations in light of proportionality

In *Radu* the CJEU was asked *inter alia* whether the executing judicial authority may refuse to execute the EAW in light of a potential breach of the right to fair trial and defence rights (Articles 5 and 6 of the ECHR or Articles 6, 48 and 52 of the Charter). The question was raised in the context of a preliminary reference made by the Romanian Court of Appeal. Mr Radu was a Romanian national, subject to four arrest warrants, issued by the German judicial

[30] *M.S.S. v Belgium and Greece* Application no 30696/09 (ECHR 21 January 2011) ; Joined Cases C-411/10 *N.S. v Secretary of State for the Home Department* and C-493/10 *M.E. and Others v Refugee Applications* , para 105; Malin Thunberg Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU*, vol 16 (Supranational Criminal Law, Intersentia 2013)

[31] Case C-396/11 *Radu* [2013] nyr Opinion of AG Sharpston para 76

[32] *Case C-396/11 Radu [2013] nyr*r, para 39

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authority for the purpose of conducting criminal prosecution in respect of acts of robbery. The judicial authorities of the Member States are in principle obliged to execute an EAW except for certain circumstances, provided for in Articles 3 and 4 of the framework decision. The articles do not provide for a specific ground for refusal for fundamental rights violations. However, fundamental rights considerations are identified in various places of the measure such as Article 1 (3), which proclaims Member States obligation to respect fundamental rights.

Mr *Radu,* the requested person, claimed that he had 'not been notified in respect of the charges against him, not been subpoenaed in respect of them and found himself in a situation where it was completely impossible to defend himself'.[33] As he did not consent to his surrender, he claimed that the contested warrants were issued without him having been summoned or having had a possibility of hiring a lawyer or presenting his defense, in breach of Articles 47 and 48 of the EUCFR and Article 6 of the ECHR.[34] The CJEU was asked by the Romanian Court of Appeal, *inter alia,* whether the executing judicial authority may refuse to execute an EAW, where the execution of the EAW would infringe or would risk infringing the right to a fair trial and the defence rights. The question for the Court is whether, in light of the potential breaches of the right to a fair trial and the defence rights, the framework decision should be read in such a way as to allow an executing authority to refuse to execute an EAW because it was issued against a backdrop of rights breaches or because there is a serious danger of future rights breaches.

The Court made reference to the purpose of the instrument to replace the multilateral system of extradition between the Member States with a system of surrender between the judicial

[33] Case C-396/11 *Radu* [2013] nyr Opinion of AG Sharpston para 65; Case C-396/11 *Radu* [2013] nyr paras 26, 29

[34] Case C-396/11 *Radu* [2013] nyr para 29

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authorities and that this system of surrender is based on the principle of mutual recognition[35] as was affirmed by recent case law.[36] It further elaborated on the objective of the framework decision to facilitate and speed up the judicial cooperation with the purpose of contributing to the objective of creating a European space of freedom, security and justice.[37] The Court stressed that the Member States are 'in principle obliged' to implement an EAW[38] and that this strict obligation is further qualified only by the explicit exceptions and guarantees that the law provides in Articles 3, 4, 4a and 5 of the framework decision.[39]

The Court further clarifies that the EAW in question was issued for the purpose of conducting a criminal prosecution and indicates that this scenario does not fall within the scope of exceptions for executing an EAW that the law provides.[40] It then simply asserts that respect for the rights does not require that the executing authority may refuse to execute an EAW, in the event of fundamental rights breaches.[41] The Court remained loyal to the letter of the instrument with respect to the exhausting list of ground for refusal. It left no space for any interpretation enlightened by the Charter or even by Article 1(3) of the framework decision, read in conjunction with Article 6 TEU and the Charter provisions. The only argument provided in this respect was that if the person was to be heard before the issuing authority, this would inevitably affect the effectiveness of the instrument, would lead to the failure of the system of surrender and would consequently forestall the achievement of an AFSJ.[42]

[35] Ibid para 33

[36] Case C-42/11 *Lopes Da Silva Jorge* [2012] ECLI 517 para 28

[37] Case C-396/11 *Radu* [2013] nyr para 34

[38] Ibid para 35

[39] Ibid paras 36, 37

[40] Ibid para 38

[41] Ibid para 39

[42] Ibid para 40

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Following the latter generalised statement, the Court in a spirit of reassurance, stated that the 'European legislature has ensured that the right to be heard will be observed in the executing Member State'. It then added the last word. The observance of the right to be heard will be performed in such a way so as not to compromise the effectiveness of the EAW system.[43] The last insertion manifestly demonstrates that the focus of the Court is the effectiveness of the surrender system. The analysis asserts rather than substantiates the arguments.

### The different outcome of a proportionality based reasoning

This section aims to substantiate the hypothesis that the court's ruling would have not relied on a blind understanding of mutual recognition if a proportionality based analysis was applied by the CJEU in order to assess the possibility of refusal.

Had the Court employed a proportionality based reasoning, it should have first examined whether the measure serves a legitimate objective. The EAW serves the objective of fast judicial cooperation which serves the end of an area of freedom, security and justice, in the spirit of mutual trust. The objective is to facilitate the judicial cooperation in cross-border serious crimes and to simplify the extradition procedures.[44] It is an objective set both by the framework decision and by the Treaties.[45] Therefore, the first stage of proportionality is satisfied.[46] Mr Radu was sought to be prosecuted by Germany for the offence of aggravated robbery, which constitutes a serious crime in both countries. Setting an exhaustive list of grounds for refusal for the executing judicial authority is moreover a suitable means to achieve the objective of fast cooperation, which satisfies the second stage of the test.[47]

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[43] Ibid para 41

[44] EAW, Preamble, Recital 1, 3

[45] TFEU, Art 82

[46] Klatt and Meister, *The constitutional structure of proportionality* 10

[47] Ibid 9

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Nevertheless, under the third stage of a proportionality test, the Court's decision to prohibit the executing state from refusing to execute the EAW in light of an interpretation informed by fundamental rights obligation is not substantiated as necessary. The assertion that the surrender system is based on the principle of mutual recognition and that a different result would endanger the effectiveness of the instrument are not adequate arguments.[48]

### Stricto sensu proportionality; Seriousness and remediability of the violation as criteria for balancing

This balancing stage will secure that the surrender of the requested person is not manifestly disproportionate. At this stage, the executing judicial authority, is called to balance the different interests, as long as the surrender passed the other three tests.

Taking a strict interpretation on grounds for refusal solely based on the list of grounds with the result of precluding fundamental rights considerations to inform a wider interpretation is moreover not consistent with the framework decision *per se*. Member States' obligation to respect fundamental rights is stressed both at Recital 12 of the Preamble and at Article 1 (3) of the framework decision. In contrast to the Court, Advocate General Sharspton states that Member States should be in principle obliged to 'act upon a European Arrest Warrant',[49] as otherwise the spirit of mutual recognition would not be meaningful. However, mutual recognition should not be blind.[50]

The clarification that the EAW in question was issued for the purpose of conducting criminal prosecution and that hearing the person would go against the whole spirit of the EAW is furthermore not convincing. This is because of the coercive quality of the EAW effects. The requested person is subject to a definitive judgment of a judicial authority of a state different

[48] Ibid

[49] *Case C-261/09 Mantello [2010] ECR I- 11477, Opinion of AG Bot, para* 36

[50] Case C-396/11 *Radu* [2013] nyr Opinion of AG Sharpston para 69

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from the one where he resides and with different jurisdiction. The arrest and transfer result in a surrender to the alien (for him) authorities. What is more, he was not heard for this definitive judgment issued by alien authorities which resulted in his own relocation. As much as it is the spirit of the EAW to necessitate the surprise of the defendant (according to the CJEU), it is the spirit and the coercive effects of the *same* instrument that necessitate a more wide interpretation of it. Furthermore, the cases *Andrew Symerou, Edmond Arapi* and *Graham Mitchell* are well-known and should not be ignored by the central European judiciary.[51] Given that these concerns on fundamental rights protection undermine the spirit of mutual trust an interpretation not as strict as the one provided by the Court would empower the judicial authorities to be more flexible and balance the cases' different considerations.

Having said that, the paper does not advocate against the principle of mutual recognition. The value of the EAW system and of mutually recognising and trusting judgments across the EU is admittedly high. However, the coercive effect of the instrument coupled with fundamental rights concerns demonstrate that the Court's judgment is missing those shortcomings. Generally establishing that the executing authorities cannot refuse in any case to execute an EAW, even when it is issued for the purpose of a criminal prosecution, on the grounds that the requested person was not heard by the issuing state is an absolute judgment whose necessity was not adequately demonstrated. A reflection on certain criteria is necessary.

### The seriousness of the violation

The violation at issue –past or the risk of a future one- must be so detrimental that the core of the right to fair trial and to substantially and adequately defend oneself are absolutely impaired. In this respect, Advocate General Sharpton developed a systematic and informed reasoning, in *Radu*. She suggested, in her opinion, a sophisticated balancing test for the

[51] http://www.fairtrials.org/cases/andrew-symeou/; http://www.fairtrials.org/cases/graham-mitchell/; http://www.fairtrials.org/cases/edmond-arapi/

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executing judicial authority to carry out. Although the executing judicial authorities are in principle engaged to surrendering the person,[52] she argues that they can refuse the request for surrender, 'where it is demonstrated that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process'.[53] She suggests that this refusal should be 'exceptional' and for reasons such as complying with the EAW would 'fundamentally to destroy the fairness of the process'.[54]

In this respect, it is essential to consider closely the rights at issue in order to assess the seriousness of the violation. Everyone charged with a criminal offence shall have the right to be informed 'of the nature and cause of the accusation against him', as it is provided for by Article 6 (3a) ECHR. The information shall be given promptly and in a language that the person understands, according to the same article. At EU level two directives were adopted in this respect; one on the right to information in criminal proceeding[55] and another on the right to interpretation and translation in criminal proceedings.[56] The absence of written translation of the indictment which might result in the misinformation and the hindrance of the defence of the person accused violates Article 6 (3a), according to the jurisprudence of the Strasbourg court.[57]

Moreover, both Article 6 (3b) ECHR and Article 14 (3b) ICCPR provide for the right to prepare the defence which focuses on two elements. First the defendant shall have adequate

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[52] *Case C-396/11 Radu [2013] nyr Opinion of AG Sharpston*, para 68

[53] Ibid, para 97

[54] Ibid

[55] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF

[56] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF

[57] Kamasinski 1989 ECHR A168 para 81

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time to prepare and second he shall have adequate facilities. ICCPR adds a third element, that of communication with a counsel of the defendant's own choosing, which applies at the appeal stage of criminal proceedings.

Article 6 (3c) ECHR furthermore provides that everyone who is charged with a criminal offence shall have the right to defend himself in person or through legal assistance. The lawyer should be of his own choosing, which highlights that the legal assistance must be substantial and real. If the defendant does not have the sufficient means to pay for legal assistance, it should be provided to him for free.

According to the ECtHR case law with regard to grounds for refusal to extradite, general references to a risk of fundamental rights violation in a country are not accepted as a ground for refusal.[58] The reasons should be serious and well-founded. In *Soering v United Kingdom* the ECtHR held that the a state should not extradite the requested person, 'where *substantial* grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country'.[59] A 'flagrant denial' of the right to fair trial in particular may give rise to the refusal of the contracting state to extradite the requesting person according the Strasbourg court.

Although the *Soering* doctrine of the ECtHR was not transposed in EAW case law of the CJEU, similar reasoning is identifiable in CJEU jurisprudence,[60] where the Court was asked to interpret the Regulation establishing criteria for determining the Member State responsible for examining an asylum application. The Court was asked to assess the impact of Article 4

[58] *Dzhaksybergenov v Ukraine* Application no 12343/10 (ECtHR 10 February 2011) para 37

[59] *Soering v United Kingdom* Application no 14038/88 (ECtHR 07 July 1989) , para 44

[60] Case C-411/10 *N.S. and Others* [2011] ECR I-13905

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of the Charter with regard to prohibition of torture and inhuman or degrading treatment or punishment to the interpretation of this regulation. It held that the Member States may not transfer an asylum seeker to another Member State, 'where they *cannot be unaware* that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to *substantial grounds* for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment'.[61]

Advocate General Sharpston eventually opinioned in *Radu* that the CJEU should not establish the threshold of a *flagrant denial* of the requested person's fundamental rights.[62] She considers that this test is *unduly stringent*,[63] as it might require that every part of the process had violated the fundamental rights. She submits her approach which is that the crucial element is whether the infringement is so fundamental that it absolutely impairs the fairness of the process, which was also suggested by Lord Phillips in the case *RB (Algeria) and Another* v *Secretary of State for the Home Department*.[64]

In this paper, it is argued that the seriousness of the violation is certainly a criterion to be balanced at the fourth stage, in line with what Advocate General Sharpston had suggested and in line with the ECtHR in *Soering*. The violation of the right must be so serious that the right holder is absolutely divested of the possibility to fairly enjoy his due process rights to the extent that this is not remediable.

Moreover, another indication that the Court could provide is that the crucial element must be examined *in concreto* with particular regard to the normative content of the right in question,

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[61] Ibid, para 94

[62] *Case C-396/11 Radu [2013] nyr Opinion of AG Sharpston*, para 82

[63] Ibid, para 83

[64] http://www.publications.parliament.uk/pa/ld200809/ldjudgmt/jd090218/rbalge-1.htm para 136

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as it is developed by the ECtHR, the CJEU –if there is relevant case law- and by the national constitutional traditions. For instance, in *Radu,*[65] the alleged violations concerned, *inter alia*, the right to be informed and the right to prepare the defence. In light of the first right, everyone charged with a criminal offence shall have the right to be informed 'of the nature and cause of the accusation against him', as provided for by Article 6 (3a) ECHR. At EU level two directives were adopted in this respect; one on the right to information in criminal proceeding[66] and another on the right to interpretation and translation in criminal proceedings.[67] Moreover, the framework decision provides for the arrested person's right to be informed of the EAW and of its contents.[68] According to ECtHR case law the information shall be given promptly and in a language that the person understands, according to the same article. The absence of written translation of the indictment which might result in the misinformation and the hindrance of the defence of the person accused violates Article 6 (3a), according to the jurisprudence of the Strasbourg court.[69]

In addition, Article 6 (3b) ECHR and Article 14 (3b) ICCPR provide for the right to prepare the defence which focuses on two elements. First the defendant shall have adequate time to prepare and second he shall have adequate facilities. The adequate preparation of defence requires that the defendant or his counsel should be able to have access to the case and any evidence against the defendant.[70] In this respect, it was ruled by the ECtHR in *Hatzianastasiou* that Greece violated the right to prepare the defence because Article 425 (1)

[65] Case C-396/11 *Radu* [2013] nyr Opinion of AG Sharpston65

[66] Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L 142/1

[67] Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1

[68] EAW Article 11 (1)

[69] *Kamasinski v Austria* Application no 9783/82 (ECtHR 19 December 1989) para 81

[70] *Krenzow v Austria* Application no. 12350/86 (ECtHR 21 September 1993)

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of the Greek Military Penal Code provided for a 5 days term for appealing against the judgment of the military criminal tribunal, which starts from the oral announcement at the public hearing of the ruling. The judges did not have to develop their reasoning at the announcement of the ruling, which prevented the defendant from preparing for his appeal as he was deprived of the ability to submit the reasons why the first stage ruling was erroneous.[71]

In *Radu*, the applicant claimed that he was neither informed of the charges against him, nor was he subject to subpoena, with the result that his defence was impaired. It is correct that not being informed in due time of the charges and not being subject to subpoena can impair the fairness of the process. Without information on the specific charges against oneself and without being summoned, it is indeed difficult to prepare the defence of the case. It is also true that the strict time limits that the framework instrument sets render the preparation of the defence even more difficult, especially for someone who is not aware of why he is arrested. Therefore, his rights were seriously breached.

The question is whether the violation is so detrimental that the fairness of the process as a whole is destroyed, to such a degree that the person is actually divested of any possibility to enjoy the normative content of the specific right, as is suggested in the paper. The condition of the seriousness of the violation in tandem with the normative content of the right should be accompanied by a condition of remediability. The violation in question can clearly be remedied so that the person retains the time needed to prepare his defence. To this point Advocate General suggested that the executing authority may not refuse to execute an EAW in the event of breaches which are remediable.[72] A lack of subpoena is a remediable breach of

[71] *Hadzianastassiou v Greece* Application no. 12945/87 (ECtHR 16 December 1992)

[72] Case C-396/11 *Radu* [2013] nyr Opinion of AG Sharpston , para 88

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the fair trial right which alone does not justify the refusal, according to her opinion.[73] As a result, Mr Radu is not in a position where his rights are so detrimentally impaired that they cannot be remedied and therefore he is not *absolutely prevented from preparing* his defence.

Hence, it is argued here that the CJEU, instead of affirming strict adherence with mutual recognition and precluding any refusal to execute, could have developed certain central guidelines for the national judicial authorities. Whether the violation can be remedied or not must constitute a criterion for the executing authorities to consider since the interest to judicial cooperation in a spirit of mutual trust must also shape the mentality of the judicial authorities across the EU. The knowledge that a fundamental right violation can be remedied in the future might lead to the issuing authority neglecting its fundamental right protection obligation. Therefore, it is argued that when a violation of the right by the issuing authority has been identified, the executing authority may not surrender the person unless it secures that the issuing authority will definitely provide for a remedy.

## *Melloni;* Execution of an EAW issued in absentia ignoring national constitutional right to appeal in light of proportionality

The Court in *Melloni* was asked whether it is permissible for the executing state to make the surrender of the requested person, convicted *in absentia*, conditional upon a subsequent retrial at the issuing state. This higher level of protection was provided by the Spanish constitutional law in contrast to the framework decision on the EAW which explicitly prohibits the executing state from refusing to cooperate under the circumstances of the case. The Court faced with a supremacy type of question delivered a landmark ruling firstly reiterating EU law primacy. Secondly it stated that the framework decision in light of Article of 53 of the Charter should be interpreted in a way that the executing Member State is not allowed to make the surrender conditional upon the conviction rendered *in absentia* being

[73] Ibid, para 90

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open to review in the issuing Member State. The Court again and similarly to *Radu* argued that allowing the executing authority to make the surrender of the person convicted *in absentia* conditional upon a subsequent review of the judgment leading to an EAW would undermine the efficacy of the framework decision.[74] It is argued here that again the Court's reasoning extensively relied on the preservation of mutual recognition and the efficacy of the surrender system, to the detriment of lowering the level of protection of a fair trial right as it is enshrined by the national constitutional law. The following sections argue on the basis of the first stage of proportionality that the objectives set out by the Court do not enjoy the adequate constitutional status in order to be balanced against fundamental rights protection enshrined at constitutional level.

### Mutual recognition as means and not an objective

The Court stated that the framework decision established a simplified and more effective system for the surrender of persons. Facilitating and accelerating judicial cooperation, as a result, aims to contribute to the objective set for the European Union to become an AFSJ. AG Bot opinioned that the objective of creating an area of freedom security and justice shapes the framework of fundamental rights protection within the EU.[75] The Court, in *Melloni*, referred to the interest of establishing an AFSJ,[76] a primary law objective enshrined in the Treaties, as well as respect for the principles of mutual recognition and effectiveness,[77] general principles of EU law and the simplification of the extradition system, secondary law objectives.[78]

[74] *Case C-399/11 Melloni [2013] nyr* para 63

[75] Case C-399/11 *Melloni* [2013] nyr, Opinion of AG Bot , paras 107,112,113,115

[76] Ibid, paras 107,112,113,115

[77] *Case C-399/11 Melloni [2013] nyr*, para 62

[78] Ibid, para 43

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First, it is argued that not all the interests shaping law-making here should be capable of trumping constitutional fundamental rights. It is suggested here that not all the interests should be accepted as objectives, in the sense granted to them by the first stage of the proportionality tests, as they are not all equally valued by the constitutional treaties. The interest of preserving an area of freedom and security within the European space and the objective of facilitating the judicial cooperation are objectives having high constitutional value in the Treaties. These interests could be discussed here and balanced against the possibility of preserving a higher level of fair trial rights protection as they, by nature, constitute objectives/aims.

However, should the principle of mutual recognition also enjoy the status of a highly valued constitutional objective, whose promotion should justify the limitation of a constitutional right? The answer to the question here is negative. Acknowledging that the ultimate objective which stimulates the relevant law-making in this area is security, it follows that cooperation among judicial authorities is a penultimate objective to this end. The principle of mutual recognition is a regulatory method through which the above-mentioned law objectives are better achieved and promoted. There is admittedly an interest of preserving and facilitating the mutual recognition of judgments in Europe. However, this is not a law *objective* eligible to be balanced against fundamental rights protection. Therefore the Court's stance of using the interest to maintain the mutual recognition of judgments, not only as a balancing unit but as a trump, is wrong.

### Secondary law objective

Furthermore, the Court in *Melloni* invoked framework decision objectives in order to justify the limitations to the right. The judgment stated that Article 4a of the framework decision, including the limitation in question, should be interpreted in light of the objectives of the

framework decision 2009/299. This measure intended to facilitate JCCM through harmonisation of the grounds for non-recognition of judgments issued *in absentia*.[79]

It is similarly suggested that the objective of the framework decision alone shall not be accepted as a legitimate aim in view of which the higher level of protection of national constitutional law should be prevented from applying. . It is merely an objective of a secondary law. Only objectives of constitutional value should be balanced against the fundamental rights of the requested person. The paper argues this strict precondition for the context of an evolving and sensitive field of law with far-reaching implications on fundamental rights, enshrined in national constitutions.

Through this perspective of granting to rights a higher constitutional position than the one that secondary legislative measures enjoy, it follows that the Court would allow for the executing authority to make the surrender conditional upon a guarantee given by the issuing authority that the person will enjoy the right to appeal against the decision issued *in absentia* resulting in the EAW.

### *Necessity*

Although it *seems* indeed necessary in view of effectiveness and consistency of EU law to choose the level of protection provided for by the framework decision, it is moreover not demonstrated how this is the *least* restrictive choice. It was simply asserted –rather than demonstrated- that this was necessary for respecting the principles of consistency and effectiveness. Lowering the level of protection below the threshold set by national constitutional law, would certainly require a more detailed and convincing analysis. This analysis should illustrate why this is the option leading to the expected result with the least possible interference with the right.

[79] Ibid, para 43

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## The quest for proportionality at the national judicial authorities level

Discussing proportionality for the surrender system established by the framework decision on EAW based on the principle of mutual recognition should also regard the disproportionate enforcement of the law in context.

### Execution of an EAW in cases of minor offences in light of proportionality

In 2010, Poland of 38 million population has issued 3753 EAWs whereas Germany of 82 million population issued 2096 and the UK of 62 million population issued 257 EAWs.[80] As a result, the proportionality of the extradition as such is a major point of discussion.[81] It is broadly acknowledged that proportionality is necessary in cases of minor offences.[82] The

[80] Fair Trials International, *The European Arrest Warrant eight years on- Time to amend the FD?* (2012) 3-5

[81] European Commission, *Report from the Commission to the European Parliament and the Council; On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* (COM (2011) 175 final, 2011) 7-8; Meeting of Experts European Commission, *Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant; The issue of proportionality*, 5 November 2009); Council of the EU, *Revised version of the European handbook on how to issue a European arrest warrant*, 17 December 2010) 14; Council of the EU, *Follow up to the evaluation reports on the fourth round of mutual evaluations: practical application of the European arrest warrant and the relevant surrender procedures between Member States*, (18 November 2011); Council of Europe, *Press Release: Overuse of the European Arrest Warrant-a threat to human rights* (2011); Fair Trials International, *The European Arrest Warrant eight years on- Time to amend the FD?* 3, para 4 – 6

[82] Sergio Carrera Elspeth Guild, Nicholas Hernanz *Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System* (CEPS Special Report No 76/March 2013) 16-18; Sarah Haggenmüller, 'The Principle of Proportionality and the European Arrest Warrant' (2013) 3 Oñati Socio-Legal Series 95; Valsamis Mitsilegas, 'Note on Lukaszewski, Pomieschowski, Rozanski and R. ' (2013) 2 Criminal Law Review 149; Valsamis Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From automatic Inter-State Cooperation to the slow Emergence of the Individual' (2012) 31 Yearbook of European Law 319, 323-330; Fair Trials International, *The European Arrest Warrant eight years on- Time to amend the FD?* 3-5;

counterfeiting of 100 euros,[83] the theft of two tyres[84] or the theft of two piglets,[85] theft of ten chickens,[86] are only a few examples of petty crimes for which EAWs were issued.

The use of disproportionate EAWs may in some cases lead to a breach of the requested person's fundamental rights.[87] An extradition for petty crimes might disproportionately limit the person right to liberty (Article 5 ECHR / Article 6 Charter), the right to a fair trial (Article 6 ECHR / Article 47 Charter). The financial burden of the process should also not be ignored.

## Proportionality test

Various solutions are extensively discussed with regard to the problem of disproportionate extradition.[88] One suggestion concerns the legislative amendment of the instrument with the view of raising the threshold of Article 2 (1).[89] Another suggestion, which is the prevailing one, concerns the introduction of a proportionality test conducted by the issuing authority, either through the amendment of the framework decision[90] or without an amendment. A third suggestion concerns again the introduction of a proportionality test for both the executing and the issuing judicial authority.

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Joachim Vogel, Spencer, J. R., 'Proportionality and the European arrest warrant' (2010) Criminal Law Review 474, 474;

[83] Case of Patrick Connor, in Fair Trials International, *The European Arrest Warrant eight years on- Time to amend the FD?* 4.

[84] Council, *Report on France Council Doc. No 9972/2/07*, 20 July 2007) 23

[85] Council, *Report on Italy, Doc. 5832/2/09 REV 2*, March 2009) 11, FN 1

[86] Case *Sandru v Government of Romania*, 28 October 2009 EWHC 2879

[87] Brière, 'Critical Assessment of the existing European arrest warrant framework decision'34

[88] Ibid 34-38;

[89] Elspeth Guild, *Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System* 28

[90] International, *The European Arrest Warrant eight years on- Time to amend the FD?* Para 7

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The institutions call the *issuing* judicial authority to conduct an explicit proportionality test and to take into account certain criteria.[91] The Commission further suggests that the issuing authority should explain on the EAW form the reasons why the mechanism is used.[92] Member States also agree that a proportionality check should be applied by the issuing authority as well.[93] This approach moreover gains ground with the national courts.[94] Lord Philips argued that the 'the scheme of the EAW should be reconsidered in order to make express provision for consideration of proportionality'.[95] It is also argued by the civil society that Art. 2 should be amended so that "an EAW may not be issued unless the requesting state is satisfied that the person's extradition from another MS is necessary and proportionate".[96] The latter suggestion is counter argued on grounds of the reference to proportionality in a plethora of resources[97] at any relevant level of legal hierarchy, arguably renders the above-mentioned proposal unnecessary. However, since the test is not conducted by all the judicial

[91] EU, *Revised version of the European handbook on how to issue a European arrest warrant* 14; European Commission, *Report from the Commission to the European Parliament and the Council of 11 April 2011 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* (2011)7

[92] European Commission, *Implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant; The issue of proportionality* 2

[93] EU, *Follow up to the evaluation reports on the fourth round of mutual evaluations: practical application of the European arrest warrant and the relevant surrender procedures between Member States*

[94] Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From automatic Inter-State Cooperation to the slow Emergence of the Individual' 327;

[95] *Assange v The Swedish Prosecution Authority* [2012] UKSC 22 , para 90

[96] Fair Trials International, *The European Arrest Warrant eight years on- Time to amend the FD?*, para 7, 4

[97] Art 5 (4) TEU, Art 69 and 296 (1) TFEU, Art 49 (3) Charter, Art 52 (1) Charter; Art 5 para 1 ECHR;

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authorities, despite the consensus by Member States and institutions, the suggestion does not seem to be that pointless.[98]

This contribution does not aim to suggest another solution or to analyse the current ones. It rather aims to shed some light to the actual test which admittedly should be conducted by the judicial authorities. In view of the overall consensus, it is necessary, crucial and time-sensitive to inform the substantial content of the desired proportionality check that is wholeheartedly suggested._The paper, embarking from the common ground of the need to insert proportionality into the surrender system, draws on the substantial content of this test with reference to the different stages of review. It is suggested here that the judicial authorities should not limit their test as to whether the EAW is manifestly disproportionate but that they should go through every stage of the test.

### Legitimate objective

The first stage of the proportionality based analysis determines that the contested measure aims to achieve a legitimate objective. Here, when the judicial authorities are facing a situation when an EAW *may* be issued they should always reflect on framework decision objective. The Commission adds emphasis to the *objective* of the law. The *issuing* authority specifically should ensure that the extradition is necessary, emphasising the discretionary character of the instrument.[99] The judicial authority before issuing a warrant should consider the objective for which the framework decision was initially adopted.

As the objective was preventing criminals to take flight within the borderless Europe in cases of serious cross-border crimes, the issuing authority should apply a proportionality test *in*

[98] Brière, 'Critical Assessment of the existing European arrest warrant framework decision'

[99] Commission, *Report from the Commission to the European Parliament and the Council of 11 April 2011 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* 8

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*concreto* in order to avoid the excessive use of the EAW**.** The framework decision's objective is to abolish the slow and complicated extradition system and replace it with a quick and simplified system of surrender between judicial authorities.[100] The EAW, according to the teleological approach suggested by the Commission, should be used by the issuing authority when it is necessary to have the requested person on the country's territory, as the instrument provides that an 'EAW *may* be issued for acts...'.[101]

The link to the objective of the framework decision should be established so as not to end up issuing EAWs for suspects of minor offences. The framework decision was not adopted for the purpose of addressing issues of minor criminality in Europe. The historical circumstances under which the instrument was adopted should not be ignored when the judicial authorities consider the objective of the framework decision. The instrument was urgently adopted in the context of the EU counter terrorism policy, which is demonstrated by the short timeline of its adoption; the framework decision was adopted only nine months following Commission's proposal.[102] It should not be forgotten that the impact of counter terrorism policies was significant.[103]

### Necessity test-The least restrictive measure

At the stage it is established that the measure that is chosen is the least restrictive one but adequately effective at the same time. The ratio of proportionality requires more than one options. The choices are assessed so that the least restrictive but still effective option will be

[100] EAW, recital 5

[101] EAW, Art 2(1)

[102] See Weyembergh, 'L'impact du 11 septembre sur l'équilibre sécurité/liberté dans l'espace pénal européen';

[103] Murphy, *EU Counter-Terrorism Law; Pre-emption and the Rule of Law*, 183; Theodore Konstadinides, 'The Perils of 'Europeanisation' of Extradition Procedures in the EU Mutuality, Fundamental Rights and Constitutional Guarrantees' in Cristina Eckes and Theodore Konstadinides (ed), *Crime within the Area of Freedom, Security and Justice: A European Public Order* (Cambridge University Press 2011) 192

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eventually selected. It follows that using the coercive mechanism of arrest and surrender to another Member State should be necessary and should be the least restrictive option. Article 2 (1) of the framework decision states that an EAW 'may be issued' rather than 'should/must be issued'. The Council also introduced an amendment to the handbook as regards proportionality, which sets out several factors to be considered before issuing an EAW.[104] The list includes the seriousness of the offence, a possibility of detention, the penalty which is likely to be imposed, effective protection of the public and the interests of the victims of the offence. It suggests particularly that a warrant should not be issued when the coercive measure could be other than detention.[105]

Some available relevant measures, which could be considered by the judicial authorities are the framework decision on probation decisions, or the framework decision on custodial sentences.[106] It is therefore argued that these measures should further inform the application of the proportionality test, alongside with other criteria suggested at the handbook.[107]

### *Stricto-sensu* proportionality

As long as the previous stages are successful the judicial authorities should finally assess whether the process is manifestly disproportionate. In order to assess this element, the judicial authorities should consider the different competing interests in 'extradition'.

[104] EU, *Revised version of the European handbook on how to issue a European arrest warrant* 14

[105] Ibid14; Commission, *Report from the Commission to the European Parliament and the Council; On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*100

[106] Stéphanie Bosly Daniel Flore, Amandine Honhon, Jacqueline Maggio (ed), *Probation Measures and Alternative Sanctions in the European Union* (Intersentia 2012 ) 537-538

[107] EU, *Revised version of the European handbook on how to issue a European arrest warrant*, 14

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An interesting development is worth considering.[108] The judicial direction suggested for extradition involves a table with categories of offences whose seriousness shall not justify the extradition on the grounds that it is disproportionate, 'unless there are exceptional circumstances'.[109] The table involves the offences of 'minor theft, minor financial offences (forgery, fraud, tax offences), minor road traffic, driving and related offences, minor public order offences, minor criminal damage and possession of controlled substance of a very small quantity and intended for personal use'.[110] The categories are further qualified with examples. The exceptions regard cases which involve 'vulnerable victims, crime committed against someone because of their disability, gender, identity, race, religion or belief, or sexual orientation, significant premeditation, multiple counts, extradition also sought for another offence, previous offending history'. The Criminal Practice Directions constitutes a useful consolidation of informed judicial guidance over balancing the different interests of extradition.

## Conclusion

Proportionality, which is explored here, has plentiful and diverse functions. The paper, engaging with only one aspect of the principle, attempted to shed some light on its impact in the context of mutual recognition in EAW. The paper places emphasis both on central and national judicial review. It firstly examined how the recent judgments of the CJEU would have been different had the Court applied a proportionality test. It then proceeded to the proportionality test to be conducted by the national judicial authorities when they are faced

[108] Court of Appeal (Criminal Division), *Criminal Practice Directions Amendment No. 2* [2014] EWCA Crim 1569

[109] Ibid para 17 A.3

[110] Ibid para 17 A.5

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with ostensibly disproportionate cases. In *Radu* analysis, it was argued that the seriousness of the violation and whether the violation is remediable are certain criteria to be considered at the stage of *stricto sensu* proportionality. It is argued that the seriousness must be so crucial that the person is absolutely divested by the possibility to defend himself. In *Melloni* analysis, it was argued that the principle of mutual recognition albeit a fundamental, it should not be treated as an objective but as a means to the objectives pursued. Finally, the paper critically examined the problem of disproportionate EAWs and suggested that the national judicial authorities should also involve a proportionality test in their reasoning.

The full impact of the principle of proportionality still remains to be developed with regard to other rights involved in CJEU case law. Moreover, a consolidation of the occasions which led to a diversion of the national judicial authorities of the central path of mutual recognition would truly enlighten the impact of proportionality on mutual recognition and EAW. Finally, a comprehensive development by the CJEU of *stricto-sensu* proportionality criteria in the event of fundamental rights breaches would certainly play a significant role.

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