Department of European Public Law
University of Zagreb Faculty of Law

Croatian Yearbook of European Law and Policy

ISSN 1848-9958 (Online) | ISSN 1845-5662 (Print)

Journal webpage: https://www.cyelp.com

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Suggested citation: A Kaczmarek, J Szkudlarek and A Fraser, 'A European System of Coercive Measures: A Study in Proportionality and Effectiveness' (2023) 19 CYELP 157.

DOI: 10.3935/cyelp.19.2023.508

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A EUROPEAN SYSTEM OF COERCIVE MEASURES: A STUDY IN PROPORTIONALITY AND EFFECTIVENESS*

Adrian Kaczmarek,** Jacek Szkudlarek*** and Aneta Fraser***

Abstract: The European instrument for judicial cooperation in criminal matters, the European Supervision Order, represents an unexploited potential of application that could provide an alternative to the leading cooperation instrument, the European arrest warrant. The use of non-custodial measures may not only strengthen cooperation between Member States, but also increase the dynamics of the whole procedure. Current judicial cooperation is assessed in this Article in the light of the principle of proportionality of the use of preventive measures in general. An important interpretative guide in this respect is the rule tightening the criteria for recognising the possibility of enforcing a custodial measure developed by the Court of Justice of the European Union in the Aranyosi & Căldăraru case. This judgment is of great importance for the principle of mutual recognition, the application of which seems to be strengthened in the judgments of the Tribunal issued in the dispute over the reform of the Polish judiciary system. Therefore, non-custodial measures that form the core of the European Supervision Order, according to the authors, can be a remedy for the challenges that have arisen. The instrument will also be discussed from the point of view of the criterion of efficiency, interpreted, inter alia, as ensuring equal implementation of the objectives of the procedure.

Keywords: European arrest warrant, judicial cooperation in criminal matters, criminal proceedings, European Supervision Order, non-custodial measures.

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* The research for this article was conducted within a project funded in the Study@Research competition by the 'Excellence Initiative - Research University' programme of Adam Mickiewicz University, Poznan. DOI: 10.3935/cyelp.19.2023.508.

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1 Introduction

The Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States[5] (hereinafter: EAW Framework Decision) authorises refusal of the executing judicial authority to execute the European arrest warrant (EAW) in specifically set-out cases defined by mandatory[6] and optional[7] grounds for such. However, one can hardly fail to notice a change in case law regarding the interpretation of the principle of mutual recognition of judicial decisions.[8] The cause for the change, a provision of the EAW Framework Decision, holds that it does not modify the obligation to respect fundamental rights.[9]

Council Framework decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on coercive measures as an alternative to provisional detention[10] (hereinafter: ESO Framework Decision) enables the transfer of coercive measures from the Member State in which a person not being a resident is suspected of committing an offence to the Member State in which he or she resides. The supervision measures that should be transposed to the legal systems of Member States belong to a closed catalogue and include the obligation of the person concerned to inform the competent authority in the executing State of any change of residence, an obligation to report at specified times to a specific authority, or an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed. The ESO Framework Decision sets out also an open catalogue of measures that may exist in the legal system of a Member State, such as an obligation to deposit a certain sum of money or give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once.

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5 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States [2002] OJ L190/01.

6 See Art 3 of the EAW Framework Decision.

7 See Art 4 of the EAW Framework Decision.

8 The initial approach of the EU legislator – exemplified in the EAW FD – which promoted automatic recognition based on 'blind trust' with little or no room for fundamental rights scrutiny by the executing agency was met with resistance by national legislators and courts. This prompted the slow evolution of CJEU case law, which, following direct and indirect dialogue with national courts, finally made a decisive move from blind to earned trust in its ruling in *Aranyosi*, which introduced a mechanism for the meaningful scrutiny of respect for fundamental rights before the individuals concerned are surrendered. Valsamis Mitsilegas, 'Mutual Recognition and Fundamental Rights in EU Criminal Law' in Sara I Sánchez and Maribel G Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (CUP 2020) 270.

9 See Art 1(3) of the EAW Framework Decision.

10 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention [2009] OJ L294/20.

The major purpose of this article is to examine in what other way than by an automatic execution of the EAW proper can cooperation in the EU in criminal matters and greater effectiveness and efficiency of the entire proceedings be achieved. It needs to be verified, therefore, whether the imperative to scrutinise the proportionality of a coercive measure by the judicial authority of an executing State is not at odds with the principle of mutual recognition of judicial decisions. If the two principles are found not to contradict one another, it will be possible to examine further legal issues such as whether the law as it stands now allows judicial authorities to apply the European Supervision Order (ESO) in response to the issued EAW.[11] Furthermore, this study will attempt to examine – by either proving or disproving – the hypothesis that an alternative use of the ESO instead of the EAW ensures a higher effectiveness of proceedings.

The aim of this article can be perceived from two angles. Firstly, it addresses the international perspective of cross-border cooperation, which involves contemplating the essence and boundaries of the principle of mutual recognition of judgments. Secondly, considerations revolve around the analysis of metrics such as effectiveness and efficiency, which are parameters that are often studied by economic scientists and representatives of various fields of law in relation to national proceedings. The significance of these criteria cannot be underestimated, as the EAW procedure begins with the presumption of a properly and lawfully issued EAW decision. This leads to some questions regarding the legitimacy of such a presumption and its compatibility with the common goal of nations to put an end to impunity. Consequently, it becomes evident that the two perspectives are closely intertwined, with the latter being closely related to the very essence of the principle of mutual recognition of judgments. The decision to elaborate on this issue is motivated by the exceptional nature of EAW proceedings, wherein procedural success is determined by the actions of two national judicial authorities, each acting in accordance with their national law systems.

This article will discuss the main issues related to the EAW issued for the purpose of conducting criminal proceedings, with special emphasis on the preparatory proceedings and pre-trial stage. It must be stressed that an assessment *de lege lata* as to whether the use of the ESO as an alternative to the EAW is legitimate does not take into account the political consequences of the choice made. What the formal-doctrinal method applied here examines is the law in force as reflected in both authoritative juristic literature and judicial decisions. The latter are of particular relevance if courts, having received an EAW to execute, applies to suspects other non-custodial measures.

[11] It seems that citing a discretionary reason for refusal, which is not explicitly provided for in the Framework Decision, may result in a conflict between the principles of mutual recognition and proportionality.

2 Proportionality check by the EAW executing authority: a way to enhance the protection of individual rights?

The principle of proportionality is meant to protect not only Member States against encroachments upon their sovereignty, but also individuals against excessive EU measures.[12] The scrutiny of proportionality is supposed to bring about a situation where the same objective can be achieved, using less onerous measures. Any test of the proportionality of a coercive measure should thus answer three questions: (1) is the objective of the measure applied sufficiently important to justify limiting a fundamental right? (2) is the measure designed to meet the legislative objective? (is it rationally connected to it?) and (3) is the measure used to restrict a right or freedom no more than is necessary to accomplish the objective?[13] A given measure therefore must be rationally connected to the objective and may not be arbitrary, unjust, or based on irrational considerations. In other words, it should be applied in accordance with the law, and any potential infringement of rights must be proportional to the objective.

The requirement of a prior check of the proportionality of an EAW is justified by criticism made in the Commission Report of 11 April 2011.[14] Most Member States have limited the proportionality principle to scrutiny by the warrant-issuing authority. One example of this may be the Polish regulation of the Code of Criminal Procedure (hereinafter: CCP), Article 607b, under which issuing an EAW is inadmissible, unless the interest of the administration of justice calls for it.[15] The national court, when ruling on the issuance of the EAW, should not satisfy itself with only examining the formal legality of the EAW, but should also assess the reasonableness

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[12] Tomasz Ostropolski, 'Zasada proporcjonalności a europejski nakaz aresztowania' (2013) 3 Europejski Przegląd Sądowy 14.

[13] In determining whether a limitation is arbitrary or excessive, it is said that the Court would ask itself whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective. *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC), para 25.

[14] Several aspects should be considered before issuing an EAW, including the seriousness of the offence, the length of the sentence, the existence of an alternative approach that would be less onerous for both the person sought and the executing authority, and a cost/benefit analysis of the execution of the EAW. There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based. Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2007] COM/2007/407 final.

[15] See the Polish Code of Criminal Procedure (Kodeks Postępowania Karnego Dz U 1997 Nr 89 poz 555), Art 607b.

of surrendering the requested person in terms of the nature and gravity of the offence he or she committed.[16]

Importantly, the EAW Framework Decision does not provide for the explicit power to check proportionality by the authority of the executing State. The EAW Framework Decision deals with proportionality checks by the authority of the executing State with respect to the national decision on arrest and not to the EAW that it is based on. An example of the application of the EAW Framework Decision, Article 12(1), comes from a ruling by a court in Stuttgart of 25 February 2010,[17] in which the court held that the principle of proportionality of offences and punishments was not only part of national law, but also constituted a general principle of EU law pursuant to Article 49(3) of the EU Charter of Fundamental Rights (hereinafter: the Charter).[18] Thus, a national decision on arrest is disproportionate when the offence charged is negligible and the expected punishment is not proportional to the negative consequences brought about by the arrest itself. In this context, a German court, assessing proportionality, took into account the right of the requested person to freedom and safety, the cost of formal proceedings, the interest of the issuing Member State in prosecution, and any other measures alternative to the EAW.

For this study, the CJEU decision in *Aranyosi & Căldăraru* is crucial. In it, the Court for the first time went beyond the closed list of grounds for refusing to execute the EAW.[19] The decision put the burden of checking proportionality also on the executing State. While remanding a person in custody by virtue of Article 6 of the Charter,[20] it is argued that it should be ensured that proceedings in the matter of executing a penalty are conducted with due care and that the period of imprisonment is not excessively long.[21] Furthermore, the decision stated that the judicial authority of the executing State should proactively look for measures ensuring the

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[16] Rafał Czogalik, 'Odmowa wydania europejskiego nakazu aresztowania ze względu na interes wymiaru sprawiedliwości' (2018) 2/18 Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury 81.

[17] As an arrest under German law must conform to the requirements of German constitutional law and since the principle of proportionality forms part of that law, any arrest order must comply with that principle. OLG Stuttgart, 25 February 2010 – 1 Ausl (24) 1246/09.

[18] See Charter of Fundamental Rights of the European Union [2012] OJ C326/405, Art 49.

[19] In Joined Cases *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, the Court observed that Art 3 of the Convention confirms the absolute character of Art 4 of the Charter and additionally imposes a positive obligation on the authorities of the issuing State to make sure that every prisoner is deprived of liberty under conditions respecting human dignity. What is more, the authorities need to make certain that the manner the measure is executed does not cause any harm to the prisoner. Hence, respect for Art 4 of the Charter calls for a two-stage test. Joined Cases C404/15 and C659/15 *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* ECLI:EU:C:2016:198, para 90.

[20] See Art 6 of the Charter.

[21] See Art 52(1) of the Charter.

protection of the rights of the individual.[22] The *Aranyosi & Căldăraru* decision therefore represents a watershed in the CJEU approach to the concept of mutual trust. This judgment confirms a transition from the automatic recognition of decisions based on blind mutual trust to one relying on trust earned in the individual assessment of potential consequences of surrendering the person concerned under specific circumstances. Moreover, the decision stresses the need to assess not only the law, but also how fundamental rights are protected with respect to the requested person.[23]

The requirement of a tailor-made two-stage test developed in *Aranyosi & Căldăraru* was upheld in another CJEU decision announced on 25 July 2018.[24] The Court yet again observed that under special circumstances the principle of mutual recognition of decisions could be limited because the executing judicial authority may refuse to execute an EAW pursuant to Article 1(3) of the EAW Framework Decision. Its refusal has to be based on specific and thorough scrutiny of the case at hand, leading to the conclusion that there is a real risk of infringing the right of the requested person to an independent court. It must be noted, however, that in the Opinion to the decision, the Court did not explicitly refer to the principle of proportionality.[25] However, by invoking the conclusions of the Court's decisions of 17 December 2020[26] and 22 February 2022,[27] the executing judicial authority may refuse to surrender the person concerned if it has evidence of systemic irregularities affecting the judiciary in the issuing Member State.

Having regard to the case law and the position taken by authoritative juristic literature, one tends to favour the view that to strike the right balance in the application of the principle of mutual recognition of decisions, it is necessary to check proportionality in every case by both the issuing

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[22] Ermioni Xanthopoulou, *Fundamental Rights and Mutual Trust in the Area of Freedom, Security and Justice: A Role for Proportionality?* (Bloomsbury Publishing 2020) 71.

[23] Mitsilegas (n 4) 266.

[24] Case C-216/18 *LM Minister for Justice and Equality* ECLI:EU:C:2018:586.

[25] The Court only referred to the Charter, Art 52(1), mentioned earlier, under which any limitation to the exercise of the rights and freedoms recognised by this Charter must be provided for by law and must respect the essence of those rights and freedoms. For more on this, see Xanthopoulou (n 18) 74.

[26] Joined Cases C-354/20 and C-412/20 *L and P v Openbaar Ministerie* ECLI:EU:C:2020:1033, para 51.

[27] In April 2021, Polish courts issued two EAWs against two Polish citizens residing in the Netherlands. The Dutch Court observed that since 2017 there had been systemic or general irregularities in Poland, affecting the right to a fair trial, in particular the right to be heard. In *X and Y v Openbaar Ministerie*, the Court observed that having regard to the collected evidence the judicial authority involved should find that in the circumstances of the case, there was serious and hard evidence to assume that the fundamental right of the person concerned to a fair trial before an independent and impartial tribunal defined in the Charter, Art 47 (second para), had been violated. Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100.

and executing judicial authorities.[28] Hence, the principle of proportionality of a measure should be understood more broadly than merely as a requirement to be fulfilled in the issuing State. As part of cross-border cooperation, authorities should be obliged to consider alternative ways of cooperation when the application of the original measure stands in contradiction to the protection of fundamental rights and the rule of law.[29] Thereby, all interests will be safeguarded, being both a part and foundation of the cross-border EU Criminal Justice Area.

3 Leveraging the ESO to mitigate risks arising from restrictions of cooperation in criminal matters

Another step in reinterpreting the operation of the principle of mutual recognition of decisions is viewing it in a tense international context brought about by the reform of the Polish administration of justice. The reform has aroused a great deal of emotions in international juristic discourse. So much so that extreme[30] opinions have arisen, calling the in-

[28] The court then considered the extradition arrest and began by invoking Art 12, first sentence of the Framework Decision. This means that such a decision, even if made in furtherance of an EAW, remained a sovereign act, being unaffected by the Framework Decision. Therefore, any such arrest must be in full conformity, not simply with the implementing statutory provisions, but also with German constitutional norms which include the principle of proportionality. Therefore, a proportionality test of the 'extradition arrest' was also necessary. That the overall process involves two distinct steps is of some importance, as the court was anxious to emphasise, when it said that the proportionality check of a German extradition arrest warrant must not be confused with a proportionality check of the underlying European arrest warrant itself. Many experts hold that, due to the principle of mutual recognition, it is not possible for the executing Member State to check the proportionality of an EAW. However, it must be noted that the Council of the European Union assesses the problem of disproportional EAWs to be a 'priority'. It quoted the Final Report on the Fourth Round of Mutual Evaluations prepared by the Council on 28 May 2009 in support of the emphasised quote. Supreme Court, *Minister for Justice & Equality v Ostrowski* [2013] IESC 24, para 84.

[29] Under an integrative approach, national authorities would be required to consider alternative options to cooperate in cases in which the way originally foreseen would be at odds with the sufficient safeguarding of fundamental rights and the rule of law. Thereby, cooperation is more likely to satisfy the legitimate wish to combat crime and prevent impunity, also across national borders, while at the same time fair account is taken of the rights of the individual involved. See Jannemieke Ouwerkerk, 'Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area' (2021) 29(2) European Journal of Crime, Criminal Law and Criminal Justice 87.

[30] The cited opinion appears to overlook the research findings of global geopolitical institutes examining the level of democracy in individual countries. In this regard, it is important to refer to reports such as the Democracy Index 2021 <https://pages.eiu.com/rs/753-RIQ-438/images/eiu-democracy-index-2021.pdf?mkt_tok=NzUzLVJJUS00MzgAAAGLi-_cxgdOtysN9OdFZg_O-Dpwb0ekf8bErT3YLTijdFNGxbtlQ8QVp3mEzHKzRilRFUJNWizWVyVIxo7Yuy3ZywRtFubczblZP4h5dpz8zg9jjg> accessed 24 July 2023; Freedom in the World 2023 <https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigtalPDF.pdf> accessed 24 July 2023; or Democracy Report 2023 <https://www.v-dem.net/documents/30/V-dem_democracyreport2023_highres.pdf> accessed 24 July 2023. Taking into account the criteria arising from the constitutional systems of both countries and conducting a preliminary analysis, a significant difference in the classification of Poland and Belarus can be identified.

troduced changes as 'authoritarian backsliding'[31] or a 'Belarusinisation'[32] by reason of disdain for fundamental values, assuming that 'the essential presumption behind the core of the Union do not hold any more'.[33] Such a stigmatising[34] attitude is hugely worrying because if it is adopted by the majority of jurists, it may result in wasting all the EU legal achievements of recent years and, consequently, cause cooperation in criminal justice to collapse.[35] If it comes to that, fleeing abroad from Polish law enforcement agencies will thwart the efforts of judicial authorities to apprehend and punish offenders. Since such an opinion continues to be strongly voiced by some scholars, ignoring it may favour its gradual confinement to the European line of legal thinking.

It follows from CJEU case law that the principle of the rule of law as a value cannot be interpreted only in its substantial aspect, but also in a formal one. The evolution that started with the judgment in *Granaria* of 13 February 1979, in which the Court said that 'that principle also imposes upon all persons subject to Community Law the obligation to acknowledge that regulations are fully effective',[36] and recently continued with judgments concerning Poland unequivocally indicates that the principle of rule of law is ever more widely viewed from the perspective of Community standards. There is no doubt therefore that the CJEU does not perceive the principle of rule of law as an individual fundamental right to judicial protection but also sees it as an obligation to reconstruct hierarchically tied legal norms so that they constitute an overall system

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[31] Monika Nalepa, Georg Vanberg, and Caterina Chiopris, 'Authoritarian Backsliding'. Unpublished manuscript, University of Chicago, Conference: Constitutional Crises and Human Rights (2018) https://www.researchgate.net/publication/326272047_AUTHORITARIA> accessed 25 July 2023.

[32] Dimitry Kochenov and Petra Bárd, 'Rule of Law Crisis in the New Member States of the EU' (2018) Reconnect, Working Paper No 1, July 2018, 24 <https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf> accessed 8 March 2023.

[33] ibid 25.

[34] Due to significant selectivity, discussing the politics and legal system of a particular country in this manner is likened to a 'rhetorical bubble', ultimately leading to the re-evaluation of the form of further cooperation with the Member State affected by such a flaw. Csaba Varga, 'Rule of Law. Contesting and Contested' (2021) 2 Central European Journal of Comparative Law 245.

[35] Currently, the sole consequence of such actions is the exclusion of Poland from the European Network of Councils for the Judiciary, which is significant in terms of achieving consensus in cooperation regarding constitutional matters, rather than in criminal matters. 'Poland Becomes First Country to Be Expelled from European Judicial Network' (*Notes from Poland*, 29 October 2021) <https://notesfrompoland.com/2021/10/29/poland-becomes-first-country-to-be-expelled-from-european-judicial-network/> accessed 24 July 2023.

[36] Case 101/78 *Granaria v Hoofd produkts chapvoor Akkerbouw produkten* ECLI:EU:C:1979:38.

of formal-procedural guarantees.[37] Accordingly, to this end, the principle of rule of law is called an *umbrella constitutional principle* in accordance with which 'the central moral purpose of the EU rule of law is to guarantee the existence of a legal order where natural and legal persons subject to this order, as a matter of principle, are judicially protected against any eventual arbitrary or unlawful exercise of Community/Union power'.[38]

CJEU decisions concerning the application of custodial coercive measures under the EAW Framework Decision have significantly affected national judiciaries in Member States. For the purpose of further discussion, relying on the established body of thought, two major aspects of this impact will be discussed in detail.

The first is the necessity to apply the modified test set up in *Aranyosi & Căldăraru.*[39] The modification was meant to adjust it to a specific situation so that scrutiny could be 'carried out in the possibly most concrete manner'.[40]

It may seem that for a long time the 'rule-of-law test' in CJEU case law evolved towards creating more grounds for limiting the use of the EAW. The reason for this was the clear risk of a serious breach of the values listed in Article 2 of the Treaty on European Union (TEU) involved in the execution of the EAW. The judgment of the Grand Chamber in Joined Cases C-562/21 PPU and C-563/21 PPU seems to tighten the test criteria. The independence of judges and the impartiality of courts must therefore be examined by answering the question about whether or not the court is established by law, as well as by scrutinizing its composition, member appointment and tenure principles, and the reasons for the recusal or dismissal of its members.[41] The Court observed that the administration of the test:

> presupposes an overall assessment, on the basis of any evidence that is objective, reliable, specific and properly updated concerning the operation of that Member State's judicial system, in particular the general context of appointment of judges in that Member State.[42]

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[37] Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union' (2009) New York University School of Law, Jean Monnet Working Paper 04/09, 52–53 <https://jeanmonnetprogram.org/paper/the-rule-of-law-as-a-constitutional-principle-of-the-european-union/> accessed 8 March 2023.

[38] ibid 54.

[39] Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: LM' (2019) 56(3) Common Market Law Review 743.

[40] Maciej Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego* (Wolter Kluwer Polska 2019) 393.

[41] Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100, para 69.

[42] ibid, para 77.

The already demanding criteria of Stage II were tightened further as it is on the person who is the subject of an EAW that the burden of adducing concrete worrying circumstances was placed. They must show that systemic irregularities will affect the hearing of his or her case. The authority executing an EAW, in turn, should ask the issuing authority for all necessary information.[43] However, already in the LM case, a positive result of the second stage of the test was very difficult to achieve.

> From the perspective of defence lawyers the test is rather disappointing: they must invest too much effort to provide the respective material evidencing potential fair trial violations against the client in the issuing State, with little effect.[44]

The second aspect is the protection of the rule of law in the EU as its fundamental and overriding principle that encompasses the general principles of EU law.[45] In line with the approach aimed at strengthening European ties, the principle of rule of law, as an institutional ideal, should be additionally safeguarded:

> Not only the reform of the enforcement mechanisms, but the reform of the Union as such, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, to aspire to protect at both the national and supranational levels.[46]

In the face of this approach, it seems rational to believe that:

> Since the State that systemically violates the rule of law needs not be treated equally to other States with respect to the EU law, such an extraordinary reaction in matters involving an EU element would be consistent with this approach.[47]

This leads to the conclusion that the judicial authority whose organisation infringes EU standards will thus issue documents having a systemic flaw. Taborowski observes that '[i]f the judicial authority that issues an EAW does not satisfy the requirement of independence, the document it issues will not be an EAW as defined in the EAW Framework Decision'.[48] However, some controversial ways of reasoning seem to create a deductive thread between the catalogue of sanctions set out in Article 7(3) and Article 7(1) TEU, thus obliterating the difference between the steps distinguished in the TEU.

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43 ibid, paras 83–84.

44 Thomas Wahl, 'Refusal of European Arrest Warrants Due to Fair Trial Infringements' (2020) 4 eucrim 321 <https://eucrim.eu/articles/refusal-of-european-arrest-warrants-due-to-fair-trial-infringements/> accessed 8 March 2023.

45 Konstadinides (n 35).

46 Kochenov and Bárd (n 28) 26.

47 Taborowski (n 36) 411.

48 ibid 405.

The effects produced by the CJEU understanding of the principle of rule of law vis-à-vis the Polish administration of justice reform are noticeable in the cited decisions. Regardless of how they are judged, they create incontrovertible juridical facts, making up the so-called position of European courts and tribunals. However, any limitation of international cooperation seems to be adequate only in the event of a serious and persistent breach (Article 7(2) TEU) as a sanction therefor (Article7(3) TEU):

> As long as the European Council does not decide that there has been a 'serious and persistent' breach of the rule of law as the second step of the Article 7 procedure, execution of an EAW can only be refused in exceptional circumstances, namely if the executing authority acknowledges a real risk of violation of the essence of the right to a fair trial on account of a specific and precise examination of the individual case.[49]

The category of 'exceptional circumstances' thus marks the borderline that, if it is not crossed, makes 'the mechanisms of cooperation between the courts of Member States operate normally'.[50]

The two aspects discussed above represent a departure from the principle of mutual recognition. The judgment in *Aranyosi & Căldăraru* already substantially undermined the principle: '[it] raised the thresholds for cooperation between the Member States by creating more formalities, causing delay and without strengthening legal remedies for the citizen'.[51] In its wake, new grounds for refusal developed, going beyond the EAW Framework Decision, Articles 3 & 4, that had constituted the only limit to the applicability of the EAW until then.[52] The CJEU's attempt to maintain balance by indicating that 'execution of the European arrest warrant constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'[53] does not resolve the impasse. Therefore, this may create a situation where the EAW will no longer be an effective coercive measure.

The EAW has been widely criticised by scholars. Awareness of how vital its application is – to secure a proper course of proceedings – may make one conclude that the developments in the matter undermine the fundamental ideological assumptions, guiding the designers of the area of freedom, security and justice. At this juncture, the ESO should be considered a possible substitute for the EAW. The ESO would reconcile legalism with mutual recognition. A study of decisions of Polish courts may shed new light on the issue.

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[49] Wahl (n 35).

[50] Taborowski (n 40) 383.

[51] André Klip, 'Eroding Mutual Trust in a European Criminal Justice Area without Added Value' (2020) 28(2) European Journal of Crime, Criminal Law and Criminal Justice 109.

[52] Case 123/08 *Netherlands v. Wolzenburg* ECLI:EU:C:2009:616, para 57.

[53] Joined Cases C-354/20 and C-412/20 *L and P v Openbaar Ministerie* ECLI:EU:C:2020:1033.

It should be noted that, consistently with established Polish case law, the execution of an EAW issued in preparatory proceedings does not have to cause detention. This is clearly illustrated by the Supreme Court decision of 26 June 2014 (I KZP 9/14). In that case, the Court rightly found itself incompetent to examine the evidence for issuing the warrant. It observed, however, that a decision to apply provisional detention in connection with an issued EAW was subject to the general principles that guide judicial authorities when imposing a coercive measure. Moreover, the Court invoked Article 257(1) CCP, under which detention in the course of preparatory proceedings is an *ultima ratio* measure.[54] In turn, the Court of Appeal in Katowice in the decision of 8 September 2010 (II AKz 502/10) observed that 'although harmonious cooperation with other EU Member States requires mutual recognition of judicial decisions, including decisions to detain a person, any automatism in such matters is out of the question',[55] thereby allowing the possibility of applying a non-custodial coercive measure. This is of particular importance in the context of mandatory and optional grounds for refusing to execute an EAW. The reasoning cited here is copied in other decisions, for instance in the decision of the Court of Appeal in Kraków of 20 June 2018 (II AKz 291/18), which said that the execution of an EAW did not have to entail detention but that it was possible 'also to apply only a non-custodial coercive measure or not to apply any coercive measure on condition that, despite a non-application of any coercive measure, the surrender of the requested person to a foreign state be possible'.[56] Another decision relevant to this line of argument is the one rendered by the Court of Appeal in Wrocław on 26 April 2021 (II AKz 276/21). The court decided to apply conditional provisional detention in lieu of a financial guarantee. It based its argument on the wording of Article 607k(3) CCP, which states that *a district court may apply provisional detention*. Hence, it has no obligation to do so in view of the fact that '[i]t is a principle of the Polish criminal trial and any such other trial that a suspect answers charges against him/her as a free person, while provisional detention may be applied only exceptionally'.[57]

A closer look at these judicial decisions makes one believe that courts have instruments at their disposal, allowing them to apply a non-custodial measure to non-residents. This option is available also when the judicial authorities of a Member State have issued an EAW. However there is uncertainty as to whether the position adopted by courts means they in fact apply the ESO, without being aware of its execution, or whether this is the application of conditional provisional detention in lieu of a financial guarantee, following from the construction of the EAW in the light of criminal procedure principles. In the next step, it must be considered

[54] Supreme Court Decision (7) of 26 June 2014, I KZP 9/14, para 60.

[55] Decision of the Katowice Court of Appeal of 8 September 2010, II AKz 502/10.

[56] Decision of the Kraków Court of Appeal of 20 June 2018, II AKz 291/18.

[57] Decision of the Wrocław Court of Appeal of 26 April 2021, II AKz 276/21.

whether the ESO can also be applied by adjusting a coercive measure when an EAW has been issued by the prosecuting Member State.

An affirmative answer to the above issue coincides with the principle of minimising coercive measures, formulated in Article 5 of the European Convention on Human Rights.[58] At the procedural stage, this principle is connected to the principle of free appraisal of evidence by the court, which follows also from Polish case law and is seen in the fact that the application of a coercive measure results from an order to apply it and not from an order to issue it.[59] Owing to this, the right to defence is not limited because in the opposite situation, when the EAW is applied automatically, the defence counsel is faced with a *fait accompli* that leaves only the possibility to appeal against the measure ordered without being able to suggest an alternative measure, one securing the proper course of preparatory proceedings.

Yet, it can be seen that the ESO and EAW are two separate legal instruments. They differ in their underlying principles and scope of application.[60] Nevertheless, it is recommended that 'issuing authorities thoroughly consider the application of other available measures'.[61] Neither can it be ignored that the grounds for non-execution of the EAW enumerated in the EAW Framework Decision refer only to special and exceptional situations, where the respective decision cannot be executed. Thus, they are an exception to the rule, restricting the latitude of the executing judicial authority in applying a coercive measure.

Keeping in mind these findings and working on the proposition that non-custodial measures provided for in the ESO Framework Decision should be alternatively applied, when carrying out the obligations imposed by an EAW-issuing authority, jurists need to consider a hypothetical situation. This would involve a Member State judicial authority detaining a suspect and thereby executing an EAW issued by a prosecuting judicial authority in another Member State, one subjected to the procedure provided for in Article 7 TEU. Then, the application of an ESO instead of an EAW, instead of carrying out the two-stage test or refusing to execute the EAW, would be mutually advantageous.[62]

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[58] Louisa Martin and Stefano Montaldo, *The Fight Against Impunity in EU Law* (Bloomsbury Publishing 2020) 164.

[59] Decision of the Kraków Court of Appeal of 5 November 2015 II AKz 415/15.

[60] For more on this subject see Andrea Ryan, 'The Interplay Between the European Supervision Order and the European Arrest Warrant: An Untapped Potential Waiting to Be Harvested' (2020) 5/3 European Papers 1532.

[61] Commission Notice 'Handbook on how to issue and execute a European arrest warrant' [2017] OJ C335/01.

[62] The Federal Constitutional Court (Ger *Bundesverfassungsgericht*) on two occasions refused to execute an EAW issued by a Polish judicial authority, citing the 'rule-of-law crisis': OLG Karlsruhe, 27 November 2020 – Ausl 301 AR 104/19, OLG Karlsruhe, 07 January 2019 – Ausl 301 AR 95/18.

By not interfering so strongly with the sphere of individual freedom, a non-custodial measure, unlike the EAW, is not as strongly affected by the principle of mutual trust. By reason of its subtler nature, a non-custodial measure lays less responsibility on judicial authorities. Hence, one may speculate that the rigorous rules for carrying out the two-stage independence test may not be applicable. Perhaps the ESO could be a reasonable solution when trust in the Polish administration of justice is being eroded and whose status is questioned in the decisions of European courts. Non-custodial measures could be a remedy for the EAW, preventing also offender impunity as there is a danger of offenders trying to take unfair advantage of Poland's judicial crisis.

The undermining of trust in the Polish administration of justice by the decisions of European courts should not carry negative consequences for the functioning of the area of security, freedom and justice. The principle of legalism, being the foundation of the proper operation of law-enforcement and prosecuting agencies within the EU, should be safeguarded regardless of the political situation in a given Member State. This certainly is an integrative approach towards cross-border cooperation in criminal justice that to some extent lessens the deleterious effects of present-day political turmoil concerning Poland:

> Under an integrative approach national authorities would be demanded to consider alternative options to cooperate in cases in which the way originally foreseen would be at odds with a sufficient safeguarding of fundamental rights and the rule of law.[63]

Consequently, instead of 'writing this instrument of cooperation off',[64] the ESO should become a bond guaranteeing the better protection of victims of crime and the public at large.

4 Perspective on the effectiveness and efficiency of the criminal procedure and international cooperation in the context of applying the EAW and ESO

The application of the ESO may also be viewed from the angle of efficiency. It is a cliché to say that effectiveness played a major role in the origins of the measures of cooperation in criminal matters between EU Member States. Effectiveness thus continues to be taken into account in the current application of these measures as a parameter to assess the specific mechanism and its operation.

To analyse the effectiveness of the ESO and EAW respectively, it is necessary first to establish the meaning of the term 'effectiveness' in European legal culture. Its Oxford English Dictionary definition reads: 'The

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[63] Ouwerkerk (n 25).

[64] The European Supervision Order for Transfer of Defendants: Why Hasn't It Worked? <https://www.penalreform.org/blog/the-european-supervision-order-for-transfer-of-defendants/> accessed 7 December 2022.

degree to which something is successful in producing a desired result; success'[65] or, according to Cambridge Dictionary, 'the degree to which something is effective'.[66] In other words, efficiency is about achieving the intended outcome in the right way. Effectiveness is also the principal parameter for assessing various phenomena, actions, or mechanisms. The term is close to efficiency, but there is an essential difference between these two notions, as efficiency is a measure of quality and, on the other hand, effectiveness is a productivity (economic) metric. This difference is clearly recognised in the economic sciences and the use of these terms is scrupulously adhered to, which cannot be said so emphatically of the legal sciences in Europe where these terms happen to be used interchangeably. These linguistic shortcomings often result from frequent translations from European national languages into English and vice versa.

Since the enactment of the first laws, effectiveness, alongside efficiency, has been the principal parameter for assessing the operation of law, which, as a rule, is teleological. The enactment of specific prohibitions and prescriptions was aimed at achieving the effect of eliminating specific types of behaviour by individuals subject to a given authority. The measure of the effectiveness of a law is the degree to which it produces the intended effect, in the right way, with particular attention to the final result, which must realise the entirety of the principles and rules. However, the way law understands effectiveness is not unequivocal and the study of this element often yields to a strictly economic analysis of efficiency. One elaborate theory dealing with the effectiveness and efficiency of law was developed in the philosophical trend known as law and economics.[67] A key claim of this trend is that a law that does not meet minimum efficiency criteria in fact ceases to be law *per se*.[68]

Moreover, law and economics theory is also helpful as it represents efficiency as a component of effectiveness. The former designates the actual possibility of the realisation and application of law, and accordingly achieving an effect.[69] The crucial difference between the two terms based on this theory is that effectiveness ignores the outlay of resources on achieving the right effect in the right way (objective), while efficiency treats it as a critical aspect.

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[65] Oxford Dictionary Online – meaning of 'effectiveness' in English <https://www.oed.com/dictionary/effectiveness_n?tab=meaning_and_use> accessed 3 March 2022.

[66] Cambridge Dictionary Online – meaning of 'effectiveness' in English <https://dictionary.cambridge.org/dictionary/english/effectiveness> accessed 3 March 2022.

[67] Jarosław Bełdowski and Katarzyna Metelska-Szaniawska, 'Law & Economics – geneza i charakterystyka ekonomicznej analizy prawa' (2007) 10 Bank i Kredyt 51.

[68] Jerzy Stelmach, 'Efektywne prawo' in Stanisław Grodziski (ed), *Vetera novis augere. Studia i prace dedykowane Profesorowi Wacławowi Uruszczakowi* (vol 2 Wydawnictwo Uniwersytetu Jagiellońskiego 2010) 958.

[69] Richard Zerbe Jr., *Economic Efficiency in Law and Economics* (Edward Elgar Publishing 2001).

The current development of legal culture and legal doctrine in Europe is paying increasing attention to the parameter of effectiveness in order to examine legal processes in relation to their quality and the achievement of the intended effect (eg in EU law).[70] Therefore, the measure of effectiveness may be applied to the whole legal system or particular regulations and sets of provisions constituting a law institution, mechanism, or process. The EAW and ESO, as part of the body of regulations transposed to national legal systems, belong to trial regulations and directly affect the effectiveness of a criminal trial, as it can influence the execution of all the laws and rules of the process, thus partly creating the final outcome.

In spite of the fundamental nature of this issue, the effectiveness of a criminal trial is not consistently defined. The principal manner in which it is understood gives pride of place to effectiveness with only adequate use of law and economics theory (dominance of efficiency over effectiveness). In this approach, effectiveness is judged chiefly by actual trial efficiency, speed, and economy, and can certainly be called pragmatic. The criminal trial in a broad sense has specific objectives which in the European legal tradition include detection of a crime, identification of its perpetrators, and bringing them to account, ones that also form the foundation of European Criminal Procedure.[71]

The degree to which these objectives are achieved should serve as a main measure of criminal trial effectiveness, ie effectiveness in the strict sense. The criminal trial is an exceptional element of the legal system of any democratic state as it regulates the manner in which the state invades the rights and freedoms of the individual.[72] It is for this reason that criminal trial effectiveness can be viewed differently. The criminal trial, apart from the fundamental universal objectives mentioned earlier, has also secondary objectives and specific axiological values, which ought to be respected.[73] Therefore, the effectiveness measure proves to be more appropriate for this area of law, as it is based on achieving the right outcome – which must meet all the objectives of the process and not just the basic ones.

An example of the recognition of such values is Article 2 CCP, forming part of the Polish criminal procedure.[74] Besides giving expression to the universal objectives in the national context, this provision says that one

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[70] Petra Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' (2022) 27/1-3 The European Law Journal 185.

[71] Roberto E Kostoris, *Handbook of European Criminal Procedure* (Springer Link 2018).

[72] Sarah J Summers, *Fair Trials. The European Criminal Procedural Tradition and the European Court of Human Rights* (Bloomsbury Publishing 2007).

[73] Jerzy Skorupka, 'Znaczenie naczelnych zasad procesu karnego' in Jerzy Skorupka (ed) *Proces karny* (Wolters Kluwer Polska 2022) 124–126; Jerzy Skorupka, 'Cele procesu karnego' in Jerzy Skorupka (ed), *Proces karny* (Wolters Kluwer Polska 2022) 42.

[74] Michał Kurowski, 'Przepisy wstępne – Komentarz do Art. 2 Kodeksu Postępowania Karnego' in Dariusz Świecki (ed), *Kodeks postępowania karnego. Tom I. Komentarz* (Wolters Kluwer Polska 2022).

of the objectives of criminal proceedings is to prevent an innocent person from bearing any responsibility and to ensure that a proper use is made of legal measures provided for in the statute. The protection therefore of innocent persons is a major task of criminal proceedings that judicial authorities should engage in as much as the objectives directly related to the efficiency and economy of the trial. The protection of innocent persons thus is not limited merely to the prevention of a wrongful conviction but includes also adherence to the due process of law.[75] The proper use of measures provided for by law in this context is closely related to respect for the rights of the individual and the adjustment of actions taken to the circumstances of the case. Considering the axiological values of the criminal trial when judging its effectiveness can be viewed as effectiveness in the broad sense. With this approach to effectiveness, all the objectives and values of criminal proceedings should be equally respected in order to make the proceedings generally effective.

This means that one may not sacrifice one objective for another.[76] By way of example, detection of a crime and identification of its perpetrators may not violate due process of law. A criminal trial that would focus chiefly on establishing objective truth may, admittedly, be effective and economically efficient in the eyes of law enforcement agencies, but because it sacrifices specific axiological values, it should not be considered effective in the broad sense. A departure from the pragmatic understanding of criminal trial efficiency and a focus on effectiveness allow judicial authorities to uphold and satisfy the due process of law such that the accused should enjoy, and respect, the interests and dignity of the victim.

Effectiveness is a vital assessment measure also in respect of international judicial cooperation in criminal matters and judicial protection in EU law.[77] Cooperation between EU Member States prior to the enactment of the EAW and ESO was based on traditional instruments regulated by international agreements. This form of cooperation was highly inefficient and was not compatible with the realities the EU functioned in, especially the free movement of persons, goods, and services. The enactment of a new measure was a necessity to which attention had been drawn in EU politics on many occasions.[78]

On 13 June 2002, a framework decision enacted a new cooperation measure – EAW – based on the mechanism of mutual recognition and signified a new simplified form of extradition between the EU Member

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[75] Paweł Wiliński, *Zarys teorii konfliktu w prawie karnym* (Wolter Kluwer Polska 2020) 146.

[76] Jerzy Skorupka, 'Kolizja zasad procesu karnego' in Jerzy Skorupka (ed), *Proces karny* (Wolters Kluwer Polska 2022) 129.

[77] Andrea Biondi, 'Rapports: European Court of Justice: Effectiveness Versus Efficiency: Recent Developments on Judicial Protection in EC Law' (2000) 6(3) European Public Law 311.

[78] Andrzej Górski and Adam Sakowicz, 'Geneza i istota europejskiego nakazu aresztowania' in Piotr Hofmański (ed), *Europejski nakaz aresztowania w teorii i praktyce państw członkowskich Unii Europejskiej* (Wolters Kluwer Poland 2008).

States. The new mechanism was founded on completely different principles as a remedy for the inefficient, inconsistent, and lame earlier methods of cooperation. It was the force of the EAW Framework Decision binding on all Member States as far as its objectives were concerned and the mechanism of mutual recognition built into it that became key to efficient and effective cooperation. Article 1(2) of the EAW Framework Decision clearly said that any EAW had to be executed in accordance with the provisions of the Decision.[79]

It should be noted that the change to uniform cooperation across the EU has greatly improved both effectiveness and efficiency, while the imposition of time limits for the execution of an EAW have significantly contributed to its improvement.[80] Since the early years of the EAW, the time necessary to surrender a requested person has considerably shortened; with traditional extradition, it was about a year. Statistics for late 2005 and early 2006[81] show that the average time for surrendering a requested person after issuing an EAW was 43 days, and if the requested person consented to his or her surrender, this fell to 11 days. An increase in the number of issued warrants,[82] which peaked at 20,226 in 2019 (including 5,665 executed ones), did not cause any significant change of efficiency in this respect. The 2019 statistics show that the average time for surrendering a detainee was 55.75 days and if he or she consented to surrender – 16.7 days. There is no doubt that the EAW brought about a marked increase in the efficiency of international cooperation.[83] Moreover, the EAW made the work of law enforcement agencies far easier, owing to the decentralisation, simplification, and unification of the surrendering procedure of requested persons. Furthermore, the streamlining of a traditionally protracted procedure by introducing and replacing it with the EAW improved effectiveness by enhancing the fundamental guarantee of the right to a hearing within a reasonable time (based on the ECHR and national laws).[84] All in all, the EAW became a remedy for the problems of bringing suspects before prosecuting authorities because under the previous law

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79 See Art 1(2) of the EAW Framework Decision.

80 See ibid, Art 17.

81 Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2020] COM/2020/270 final.

82 The number of issued EAWs grew from about 7,000 in 2005 to 15,500 in 2009 (of which 4,400 were executed). After 2009, the number dropped to 10,000 to 13,000 on average per year in 2010–2014 only to grow again, first in 2015–2018, to 17,000 on average per year. However, in 2020 the number reached as many as 20,226. <https://e-justice.europa.eu/90/EN/european_arrest_warrant/> accessed 02 January 2023.

83 Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2020] COM/2020/270 final.

84 Caroline Savvidis, *Court Delay and Human Rights Remedies. Enforcing the Right to a Fair Hearing 'Within a Reasonable Time'* (Routledge 2016) 95.

in force extradition procedures were limited.[85]

The origins of the EAW lie in the need for efficient international co-operation in criminal matters. Such a strong need, however, did not arise in the case of the ESO. The purpose of this measure was not the need to make substantial improvements to proceedings, but rather to reduce the number of pre-trial detentions. While being a very intrusive measure, pre-trial detention is nonetheless the foundation of the EAW and has contributed to prison overcrowding. The 2004 Hague Programme and 2009 Stockholm Programme recognised the problem of overuse of detention and set the objective of increasing the use of alternative measures as a major EU policy. This means that the origins of the new measure bear a relationship to criminal trial effectiveness. Both overcrowded prisons and overuse of pre-trial detention, being closely interrelated, pose a serious risk to effectiveness by affecting its key aspects such as the use of resources and the achievement of trial objectives. In this case, the objectives ensure the law is obeyed and the due process of law is adhered to.

As explained earlier, the assessment of effectiveness takes into account the outlay of resources, one of them being the use of administration of justice measures in a criminal trial. The EAW system, providing for detention as a default measure for executing a request, has its overuse as a direct consequence. The overuse of custodial coercive measures in the EU Member States is of course a much greater problem that has many causes, but the overuse of pre-trial detention due to the EAW is yet another one that exacerbates the above problem.[86]

The EAW Framework Decision does not formulate any independent reasons for applying pre-trial detention in the course of executing a request. In turn, transpositions made by Member States vary greatly, from considering the EAW as an independent ground for pre-trial detention, through invoking grounds already known to their legal systems, to enacting special grounds (either positive or negative).[87] No matter how the transposition of the EAW Framework Decision is followed, pre-trial de-

[85] Most EU Member States forbade extraditing their citizens to another State, eg in Poland the ban was laid down in the Constitution, Art 55; now, it has been amended to allow for the EAW. Austrian legislation, specifically, *1979 The Austrian law on Extradition and Mutual Assistance in Criminal Matters (Auslieferungs und Rechtshilfegesetz) (ARHG)*, Art 12(1), theoretically still forbids the extradition of Austrian citizens.

[86] Poland is one example. The problem was raised on many occasions in 2002: Memorandum to the Polish Government: Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights [2002] CommDH(2007)13, Report of the Commissioner for Human Rights on a visit to Poland 18–22 November 2002 for the Committee of Ministers and Parliamentary Assembly [2003] CommDH(2003)4. The current data also show also that pre-trial detention is overused, which is mentioned in Bartosz Pilitowski, 'Aktualna praktyka stosowania tymczasowego aresztowania w Polsce. Raport z badań empirycznych' (2019) <https://courtwatch.pl/wp-content/uploads/2019/12/tymczasowe_aresztowania_FCWP.pdf/> accessed 8 March 2023.

[87] Andrzej Górski, 'Implementacja europejskiego nakazu aresztowania w państwach członkowskich Unii Europejskiej' in Piotr Hofmański (ed), *Europejski nakaz aresztowania w teorii i praktyce państw Unii Europejskiej* (Wolters Kluwer Poland 2008).

tention in the case of the EAW is overused. One of the major causes may be the profile of the requested persons, many of whom purposefully hide abroad from justice. Such persons, often having no permanent residence, by the very fact they may flee abroad, raise the risk of fleeing from justice, which is a reason for applying provisional detention, for instance in the Polish CCP, to name but one.

Furthermore, there are tendencies in the case law of national courts to lower the requirement threshold for applying pre-trial detention in the case of the EAW (both during its execution and after the surrender of a requested person).[88] This means in turn that under the same circumstances a person subject to an EAW request is in a much worse situation than one for whom an application for pre-trial detention is considered along national principles. The degree to which the Convention principle of minimising coercive measures is observed is highly unsatisfactory in the case of a request for an EAW. The result is an uneven standard of fundamental rights and freedoms applied to people taking advantage of the right of free movement and residence within the EU.

However, the worst situation is that of those who are not residents of either the issuing Member State or the executing Member State. Such individuals will always meet the criteria for applying a custodial measure, regardless of the gravity of their offence or other circumstances of their case, because non-custodial measures are difficult to apply then. This, in turn, argues against the principle of minimising coercive measures and interferes with the due process of law, following from national legal systems and the Convention. At the same time, to uphold the fair trial principle is one of the objectives of the criminal trial whose achievement is a measure of its effectiveness. Consequently, if an objective is achieved only to a lesser degree, trial effectiveness inevitably drops since the result differs from what was originally intended.

The overuse of pre-trial detention is seen not only in the execution of the EAW. The immediate consequences of surrendering the requested person to the issuing State shed a different light on the problem. It is common practice to apply a custodial coercive measure to the person surrendered under an EAW also in the issuing State. Persons surrendered under an EAW, frequently residing permanently in a different State than the issuing State, as a rule cannot have other coercive measures applied to them.

Another threat to both the effectiveness and efficiency of a criminal trial is the procedure for refusing to execute an EAW. In recent years, among grounds for the non-execution of an EAW, a possible infringement of Article 3 of the Convention in the issuing State has come to the fore. This is illustrated by the case of Ireland where many EAWs issued by

[88] Witold Klaus, Justyna Włodarczyk-Madejska and Dominik Wzorek, 'In the Pursuit of Justice: (Ab)Use of the European Arrest Warrant in Polish Criminal Justice System' (2021) 10(1) Central and Eastern European Migration Review 95; Ouwerkerk (n 25).

Greece or Lithuania have been rejected for this reason.[89] These refusals were made possible by judgments of the CJEU which broke the inviolability of the principle of mutual recognition (eg the *Aranyosi and Căldăraru* case), which was strongly protected in the earlier line of case law.[90] Uneven standards of treatment afforded to inmates and the overcrowding of prisons, and the deteriorating conditions in them, have posed new risks to criminal trial effectiveness. A refusal to execute an EAW in such circumstances practically paralyses the administration of justice in a given case. After a refusal to surrender, the person requested by the issuing State acquires immunity of sorts as long as he or she stays in the Member State that has refused to surrender him or her. A criminal trial of such a person becomes completely inefficient and, consequently, ineffective.

An identical problem to the one described above has arisen in some Member States due to a rule-of-law crisis.[91] As mentioned earlier, the infringement of the rule of law by the issuing State is yet another ground for refusing to execute an EAW. In this case, too, the non-execution of an EAW blocks the criminal trial.

The challenges presented above and their impact on the effectiveness of international cooperation and the criminal trial have become serious risks in recent years. The position of the EAW as a very effective means of cooperation has been weakened. In this situation, it is necessary to find ways to solve this problem and a remedy for the undermining of the principle of mutual trust. A natural step forward is to consider a newer and far less common instrument, namely the ESO. To analyse thoroughly whether it can constitute a remedy for the ineffectiveness of the EAW when its execution has been refused and if it will remain an effective means of international cooperation, it is necessary to trace its origins.[92]

The enactment of the ESO was not exactly related to the need to find new and effective means of international cooperation in criminal matters. Certainly, these means had been introduced earlier by the EAW, and neither was the objective of the ESO to improve the EAW substantially, but rather to solve the problem of the overuse of custodial coercive measures.[93]

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89 Ryan (n 51).

90 Tomasz Ostropolski, 'The CJEU as a Defender of Mutual Trust' (2015) 6(2) New Journal of European Criminal Law 166.

91 Examples are offered by the German OLG Karlsruhe, 27 November 2020 - Ausl 301 AR 104/19, OLG Karlsruhe, 7 January 2019 - Ausl 301 AR 95/18. A standard of no-execution of the EAW, a so-called 'LM test', emerged as a spin-off of a CJEU judgment concerning prejudicial questions of an Irish court later elaborated and improved in the matter of prejudicial questions of a Dutch court. See Joined Cases C-562/21 and C-563/21 *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100.

92 Raimundas Jurka and Ieva Pentolite, 'European Supervision Order: Is It the Ballast for Law Enforcement or the Way Out of the Deadlock' (2017) 2017 J E-Eur Crim L 3.

93 European Parliament legislative resolution of 29 November 2007 on the proposal for a Council framework decision on the European supervision order in pre-trial procedures between Member States of the European Union [2007] COM(2006)0468 – C6-0328/2006 – 2006/0158(CNS).

The ESO was thus a response to the abuse of remand when applying the EAW whereby unnecessary or protracted pre-trial detention and uneven standards of applying and executing custodial measures had been branded by EU institutions on many occasions as serious risks that lower the level of trust between Member States, possibly threatening EU residents' rights and freedoms. Already in 2004 in the Hague Programme[94] and in 2009 in the Stockholm Programme,[95] the overuse of pre-trial detention was identified as a serious risk to the EU. Moreover, an objective was set to increase the use of alternative non-custodial measures as a major EU policy. At the same time, the EAW, giving new grounds for applying custodial measures, aggravated the existing problem of overusing the imprisonment of suspects, a problem to which attention had been drawn before the new instrument was introduced.

A new instrument of cooperation – the ESO – offers an alternative for Member States prosecuting persons residing abroad. The ESO has been developed to make efficient prosecution possible without the need to turn to the EAW. The ESO, allowing judicial authorities to use a variety of non-custodial coercive measures in respect of wanted persons residing abroad, was supposed to solve the problem of resorting to the EAW in cases that did not warrant it. Undoubtedly, the possibility of securing the course of proceedings without turning to a request for surrendering the wanted person, and without recourse to pre-trial detention, is a way to even up, so to speak, the situation of detainees. This is regardless of whether they avail themselves of freedom of movement or whether they are residents or not. A reduction in the application of custodial measures was meant to improve the situation in overcrowded prisons and help respect fundamental rights, at the same time securing the course of proceedings. Judicial authorities, owing to the new mechanism, could use all the available means at the national level in the administration of justice, thereby making it possible to use their resources in common and better adjust their responses to an offence. More options for securing the course of proceedings, therefore, and raising the set standard of the right to a fair trial may considerably contribute to improving criminal trial effectiveness.

Further, the ESO may undeniably be a non-custodial and also an efficient alternative to the EAW by favourably affecting the effectiveness of international cooperation and the criminal trial.[96] The problem of a refusal to apply an EAW, mentioned earlier, due to the risk of breaching Article 3 of the Convention (or later Article 4 of the Charter), by the issuing State, may be an opportunity for the ESO to replace the rejected

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[94] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union [2005] OJ C53/01.

[95] The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens [2010] OJ C115/01.

[96] Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer Link 2016) 393.

measure and thereby ensure effective criminal proceedings. The problem of EAW non-execution in Member States, it should be noted, is caused by discrepancies in prison standards and non-compliance in the treatment of inmates with the standard set by the European Convention on Human Rights[97] (hereinafter: ECHR, Convention) and the decisions of the European Court of Human Rights (ECtHR). Many EU Member States have struggled with prison system problems for decades, which have grown in magnitude as a result of a progressive rise in the standards of treatment of prison inmates brought about by ECtHR decisions.[98] Poor living conditions, overcrowding, cells too small for the number of inmates, poor sanitary facilities, insufficient heating and ventilation or access to light are only some shortcomings that the ECtHR has decried in its comprehensive case law concerning the infringements of human rights listed in the ECHR.[99]

A risk of infringing Article 3 of the ECHR is considered by the court executing an EAW and, as mentioned earlier, may constitute grounds for refusing to execute it. The court, by refusing to execute an EAW, suspends the principle of mutual trust (mutual recognition) in this single instance due to the high risk of infringement of fundamental rights provided for by the Convention. In the situation of a pre-trial application of the EAW, turning to the ESO may provide a solution to the problem of a criminal trial being completely blocked by the inability to have the suspect brought in for the trial. At the same time, the ESO, being a non-custodial measure of international cooperation in criminal matters, does not carry the risk of infringing fundamental rights since the person concerned is not surrendered to the issuing Member State. With the execution of an EAW being refused, having recourse to the ESO thus secures the due course of criminal proceedings in the issuing State and helps to prosecute effectively serious offences. Surprising as it may seem, the advantages of the ESO are not one-sided. A State considering an ESO, owing to the possibility of applying a (non-custodial) coercive measure, can supervise a potential offender. Without applying an ESO, the executing Member State, to extend coercive measures to a potential offender, must apply for a transfer of prosecution and risks a much more difficult procedure and has to pay all the costs of the proceedings.

It can be seen that the non-execution of an EAW due to a rule-of-law crisis in the issuing State brings the same consequences for effectiveness. The difference lies in the grounds for refusal to execute an EAW.[100]

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97 The European Convention on Human Rights [1950].

98 Nasiya Ildarovna Daminova, 'The ECHR Preamble vs the European Arrest Warrant: Balancing Human Rights Protection and the Principle of Mutual Trust in EU Criminal Law?' (2022) 49(2) Review of European and Comparative Law 125.

99 Bojana Zimonjić, 'The Problem with Implementation of Human Rights in the Execution of European Arrest Warrant' (2015) 2(1) International Journal Vallis Aurea 97.

100 Theodore Konstadinides, 'Judicial Independence and the Rule of Law in the Context of Non-execution of a European Arrest Warrant: LM' (2019) 56(3) Common Market Law Review 743.

These are the general and systemic shortcomings of the administration of justice and their actualisation in a given case. General flaws in the administration of justice, having a bearing on a given case, are grounds for suspending the automatism of mutual trust (mutual recognition). A court, after performing a suitable test in accordance with CJEU guidelines, finds that surrendering the person concerned will violate his or her right to a fair trial.[101]

When this case of refusal to execute an EAW is analysed, the question ought to be asked if the application of the ESO (granting the request) in this situation is admissible – if it will ensure that the rights of the individual are sufficiently protected. Undoubtedly, it may be argued that an EAW issued by a State in a rule-of-law crisis is defective. Taking a very restrictive view of the guarantee of a fair trial, one can claim that since the circumstances of a given case carries a high risk of breaching the law while executing an EAW, a breach will occur also while executing an ESO. Adopting this view, a judicial authority suspends the execution of any measure interfering with the freedom of the person concerned because the person's rights may be infringed.

This view, however, ignores a fundamental difference between the EAW and ESO. The two measures interfere with the rights and freedoms of the individual in a markedly different manner. The ESO, being a considerably more lenient, non-custodial measure to secure the course of proceedings, in principle interferes less with the rights and freedoms of a citizen. When this difference is taken into account, one may take a different view on the possibility of applying the ESO as an alternative. Owing to its different degree of intrusiveness, the judicial authority considering it may differently assess the risk of infringing fundamental rights in the given circumstances. Thus, the risk of violating the right to a fair trial, when a non-custodial measure is executed, will obviously be reduced. Therefore, the preclusion of the principle of mutual recognition would be disproportionate to the risk.

If a request for an ESO is thus treated in the manner suggested above, it becomes a much sought-after alternative to an EAW that is impossible to execute. An additional advantage of making use of the ESO in similar circumstances is the opportunity for local judicial authorities to supervise the criminal trial of the person concerned. In this context, information accumulated during cooperation on an ESO between the judicial authorities of both States may become valuable when it comes to considering another EAW for executing punishment. Making such a use of the ESO ensures that the trial will be effective and fair, and guarantees the right of citizens to safety (by supervising a potential offender).

[101] Patricia Popelier, Giulia Gentile and Esther van Zimmeren, 'Bridging the Gap between Facts and Norms: Mutual Trust, the European Arrest Warrant and the Rule of Law in an Interdisciplinary Context' (2021) 27(1-3) European Law Journal 167.

The ESO, in spite of the fact that in theory it seems to be a remedy for EAW dysfunctions, is neglected in international cooperation in criminal matters. The number of issued EAWs continues to grow while the problem of excessive pre-trial detention remains. The reason behind this state of affairs is the strong reluctance of Member States to cooperate more closely in the application of measures based on the mutual recognition of decisions. One also needs to bear in mind that the ESO Framework Decision was transposed to the legal systems of Member States over many years due to prolonged consultations.[102] In fact, in many States it is only in recent years that the ESO has been transposed.[103] Certainly, this state of affairs has been largely brought about by the huge success of the introduction of the EAW whereby law enforcement agencies regard it as highly effective, while Member States have grown accustomed to this form of cooperation through practice in recent years. Many Member States, no doubt, go along with the lameness of the EAW, but appreciate its effectiveness, absolute nature, and the opportunity it affords to secure the course of a trial to a maximum.

5 Ensuring effective judicial protection in EAW proceedings

By virtue of Article 47 of the Charter[104] and Article 13 of the Convention,[105] the Court of Justice has found the right to an effective remedy before a tribunal to be a general principle of the law of the European Union.[106] However, the EAW Framework Decision does not enact any specific remedy against a decision to issue an EAW. The case law, in turn, opines that the EAW Framework Decision should be interpreted to mean that the requirement of an effective remedy before a tribunal is met if the grounds for issuing an EAW, in particular its proportionality, are subject to judicial review in the issuing Member State.[107]

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[102] In 2019, in a presidency report, some Member States argued for another round of consultations.

[103] An example of a late transposition of the ESO Framework Decision to a national legal system is Ireland where the ESO was transposed only in 2019. Irish Criminal Justice (Mutual Recognition of Decisions on Supervision Measures) (Bill 63 of 2019).

[104] See Art 47 of the Charter.

[105] See Art 13 of the Convention.

[106] EU Agency for Fundamental Rights: Article 47 – Right to an effective remedy and to a fair trial <https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial> accessed 8 March 2023.

[107] Framework Decision 2002/584 must be interpreted as meaning that the requirements inherent in effective judicial protection that must be afforded any person in respect of whom a European arrest warrant is issued in connection with criminal proceedings are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State. Joined Cases 566/19 and 626/19 *JR and YC v Parquet général du Grand-Duché de Luxembourg* ECLI:EU:C:2019:1077, para 74; See also Adriano Martufi, 'Effective Judicial Protection and the European Arrest Warrant: Navigating Between Procedural Autonomy and Mutual Trust' (2022) 59 Common Market Law Review 1379.

Since the EAW Framework Decision does not provide for a sufficient remedy against a decision to issue an EAW, the right to a remedy is supplemented to a lesser or greater degree by national legislations. Accordingly, the law in individual Member States, as a matter of principle, allows the requested person to question only the decision on his or her surrender.[108] The right to appeal only after surrender, however, appears not to ensure full protection of the procedural rights of the requested person because it may unduly prolong detention. He or she has to wait for surrender only to challenge an *ab initio* wrong and the disproportionate application of the EAW in the issuing Member State.

A promising and more effective solution would be one allowing the requested person to challenge the EAW prior to the decision on his or her surrender. For example, Greek legislation allows the requested person to challenge his or her detention in the executing judicial authority prior to surrender. The executing judicial authority may then revoke the decision on detention or replace it with suitable alternative measures such as an ESO.[109] A special solution is the right of a detainee to have it verified if the detainee's case is not one of mistaken identity. Once the detainee files an appeal, the competent court holds a hearing at which the detainee and his or her defence counsel may submit their arguments.[110] The mandatory hearing of the detainee and defence counsel guarantees the detainee's right to defence. Having regard to the speed of proceedings, it appears, however, that every regulation of the rights of the requested person should be counterbalanced by an obligation to take action within a strict time limit.

A study of the case-law opinion mentioned earlier justifies the conclusion that the remedy against a decision to issue an EAW is consistent with the two-stage test of proportionality. Such a review does not undermine the principle of mutual trust, but instead aims at protecting the rights of the requested person.[111] Arguably, an appeal from a decision to issue an EAW should concern primarily the grounds for, and propor-

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[108] Fair Trials: Protecting Fundamental Rights in Cross-border Proceedings: Are Alternatives to the European Arrest Warrant a Solution? (2021) <https://www.fairtrials.org/app/uploads/2021/11/EAW-ALT_Report.pdf> accessed 8 March 2023.

[109] See Greek statute του N 4307/2014, Art 12(1).

[110] See Greek statute του N 3251/2004, Art 15(4).

[111] A proportionality-based analysis here would act as a shield protecting fundamental rights, and not mutual trust or mutual recognition, which are methodological principles and means, not objectives. This will not entail ceasing all transfers that have implications for fundamental rights. If the principle of proportionality is properly applied, and the balancing criteria are developed by the Court, transfers would be allowed as the interference is proportionate as remediable or because an equivalence has been determined. A proportionality-based analysis in qualified mutual trust would not extinguish already challenged mutual trust but would seek for equivalences and remedies in a continuing process of challenging, preserving, and remedying evolving and active cooperation. This is based on treating mutual trust as an evolving organism rather than as static norms. Ermioni Xanthopoulou, 'Mutual Trust: From Blind to Gained Trust' (2018) 55(2) Common Market Law Review 44.

tionality of, the measure applied. To deprive the requested person of this right appears to be unreasonable, provided that the remedy is lodged by the person concerned in the right form and within an applicable time limit. To allow the remedy is not at odds with the principles of mutual trust or mutual recognition of judicial decisions because they should not be applied automatically and in an overly literal manner. The principle of mutual recognition of judicial decisions therefore should be commensurate with the necessity to achieve the objective of the decision rendered.[112] Hence, filing an effective remedy against a decision to issue an EAW, invoking legitimate grounds, does not stand in the way of achieving its objective, namely to identify and punish the right offender.

Guaranteeing the requested person the right to challenge the proportionality of the EAW respects his or her right to defence. The guarantee thus implements a proceedings directive, empowering the requested person to defend his or her interests, making use of a set of procedural rights, against the legal consequences that may threaten the person. This definition, it can be seen, is not only consistent with the right to defence in national proceedings, but also corresponds to the objectives of cross-border proceedings.

6 Conclusion

It is not without reason that a growing number of executing judicial authorities invoke grounds for refusal not expressly listed in the EAW Framework Decision, such as the need to protect the rule of law. The result of a proportionality test[113] performed by the executing judicial authority influences the assessment of how defective or correct a decision to issue an EAW is. However, obligating courts to perform a two-stage proportionality test each time may provoke abuse in this field. If executing judicial authorities are granted inordinate powers, there is a risk that the persons who have actually broken the law will try to prolong the procedures related to their detention. Therefore, the application of an ESO may resolve the problem of the non-execution of an EAW, giving infringement of Article 3 of the Convention as the grounds for it:

The proportionality principle in criminal matters requires that coercive measures, such as pre-trial detention or alternatives to such detention, are only used when this is absolutely necessary and only for as long

[112] Therefore, a complete normative reconceptualisation of mutual trust must take into account the role of fundamental rights in the AFSJ and their position in relation to constitutional values. Mutual trust is a state of mind that Member States need if they are to cooperate, with reference to a specific situation, rather than a dogmatic principle that should be blindly followed. Mutual recognition is the outcome of mutually trusting each other. Its role in the AFSJ is to promote cooperation among Member States with different rules without having to dispense with legal diversity. As such, it is a method or a means of judicial cooperation in criminal matters or cooperation in asylum matters. Despite its importance, its position in the constitutional mosaic of the AFSJ should not be overestimated, to the detriment of the protection of fundamental rights. ibid 44.

[113] The two-stage proportionality test described in *Aranyosi & Căldăraru*.

as required. It falls to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time and complies with the principle of the presumption of innocence and the right to liberty whilst meeting the necessities of the investigation of criminal offences.[114]

It is thus crucial on what grounds and in what legal circumstances a judicial authority refuses to execute an EAW. The grounds for refusing to execute an EAW determine further powers of the authority, which, after meeting certain conditions, should be empowered to apply a coercive measure closest to the one applied by the issuing State. The power to substitute one measure for another, however, is not to be enjoyed as a default in any circumstance, but rather should be taken under consideration, taking into account a number of factors such as proportionality, the due process of law, the rule of law, and ensuring a proper course of proceedings.

In conclusion, one may opine that the proportional granting of more powers to the executing judicial authority and empowering it to substitute an ESO measure for an EAW in strictly defined situations may not only prevent the excessive application of the EAW, but also contribute to greater trial effectiveness in general.[115] It appears that such an extension of powers of the executing judicial authority should have its consequence in granting the individual the right to a remedy against a decision to issue an EAW. This right would relieve, to a degree, the need for the administration of justice to test the proportionality of an issued EAW and, as a consequence, make cooperation in criminal matters in cross-border proceedings more effective and efficient.

Suggested citation: A Kaczmarek, J Szkudlarek and A Fraser, 'A European System of Coercive Measures: A Study in Proportionality and Effectiveness' (2023) 19 CYELP 157.

[114] Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention [2011] COM/2011/327 final.

[115] See Joanna Beata Banach-Gutierrez, 'The Surrender of Prosecuted Persons under the EAW Procedure: Issues of Transposition of EU Criminal Policy to the National Level' (2020) 11 New Journal of European Criminal Law 54. The author comes to interesting conclusions in this regard, highlighting that there is a need to avoid the use of isolating measures and penalties.