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**ROLE OF NATIONALITY AND RESIDENCE
IN EU JUDICIAL COOPERATION IN CRIMINAL MATTERS**

Master thesis

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INTRODUCTION

Mr Andrew Symeou, a 20-year-old student from UK, was extradited to Greece under a European Arrest Warrant (EAW) in July 2009, accused of punching another young man in a nightclub during his holiday in Greece two years earlier, which had led to the death of the victim.¹ He was surrendered by UK to Greece where he spent in total for almost two years in prison until all charges against him were dropped by the Greek Court. The main reason for his detention was him being non-national and thus constituting a flight risk, despite he had no criminal record and he had met all the conditions of supervision back in UK.

Mr Jorge Lopes Da Silva, a Portuguese married to a French national in 2009 and resided in France, was sentenced to five years' imprisonment for the criminal offence of drug trafficking, committed between April 2002 and July 2002 in *Da Silva Jorge* and an EAW was issued.² He asked the Court not to execute the EAW and to have his sentence of imprisonment served in France; he argued based on the fundamental rights clause that it would disproportionately undermine his right to respect for private and family life, since he lived in France at the home of his wife, a French national, and he was employed in that Member State. Nevertheless, according to French law the refusal of execution of an EAW was possible solely with regard to French nationals.

In a mobile world today, about three percent of the world's population does not live in the country of their birth, which means that one of every thirty-five persons in the world is a migrant.³ Immigration is probably one of the most thrilling global issues in the 21st century and the European Union (EU) has not remained untouched from it. In the EU every single Member State is one way or another concerned both with the international migration flows from third countries and with the internal migration in the framework of free movement of persons, based on the principle of non-discrimination. Principle of non-discrimination on the basis of the nationality – one of the central values of the EU – is provided for in the

¹ Court of Appeal - Administrative Court, Patras, Greece, 01.05.2009, *Symeou v Public Prosecutors Office*, EWCH 897. – <http://high-court-justice.vlex.co.uk/vid/-58152839> (20.01.2015).

² ECJ 05.09.2012, C-42/11, *Lopes Da Silva Jorge*.

³ IOM International Organization for Migration. World Migration 2008: Managing Labour Mobility in the Evolving Global Economy. VOLUME 4 - IOM World Migration Report Series. Geneva: International Organization for Migration, 2008, p. 7.

primary law of EU.⁴ The Schengen *acquis*, related to abolishing internal border controls to anyone legally within the territory of the EU, which previously had been based on separate treaties between only a few of the Member States, was incorporated into the EU framework with Amsterdam Treaty of 1997.⁵ Building Europe “through concrete achievements which first create a *de facto* solidarity”, however, started already with the laying down the foundations of the future EU when French foreign minister Robert Schuman made his declaration on 9 May 1950.⁶

Free movement applies to anyone residing in the EU lawfully, to a national of any EU Member State (an EU citizen) or a third country national.⁷ In practice, too, the Schengen *acquis*, right to free movement and right not to be discriminated against on the grounds of nationality is widely made use of. According to recent statistics, around 14.1 million EU citizens reside permanently in a Member State other than that of their nationality.⁸ In addition, 10 % of EU citizens have lived and worked abroad temporarily during their lives and 13 % have been abroad for the purposes of education or training.⁹

Seemingly, there is thus no discrimination within EU and neither are there any restrictions to free movement. Yet the examples of Mr Symeou and Mr Lopes Da Silva above tell us something else. They pose a question about discrimination on grounds of nationality/residence of defendants in criminal proceedings in a Member State other than their own. Essentially, these situations concern the application of non-discrimination principle in the field of EU judicial cooperation.

Judicial cooperation in criminal matters is based on the principle of mutual recognition of judicial decisions, in accordance with Article 82 TFEU. Mutual recognition of judicial decisions is a process by which a decision taken by a judicial authority in one EU Member State is recognized and enforced by other Member States as if it was a decision taken by the judicial authorities of its own Member State. When a measure, any decision has been

⁴ Article 18 of the Consolidated version of the Treaty on the Functioning of the European Union (TFEU). – OJ C 326, 26.10.2012, p. 47–154.

⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community - Protocol integrating the Schengen *acquis* into the framework of the European Union. – OJ C 340, 10.11.1997, p. 93.

⁶ R. Schuman. Schuman Declaration. French Foreign Minister. 9.05.1950. – <http://www.eurotreaties.com/schuman.pdf>.

⁷ Third country national is any person who is not a national of an EU Member State but that of a third country. „Third country“ refers to non-EU state.

⁸ Eurostat, Migration and migrant population statistics (March 2013).

⁹ Eurobarometer 337/2010.

taken by a judge in exercising his or her official powers in one Member State, the measure would be accepted in all other Member States, and would have the same effects there. Mutual recognition principle is based on mutual trust between Member States, representing a “cornerstone”¹⁰ of the EU judicial cooperation.

Why is mutual recognition principle so important in judicial cooperation and when exactly does it become relevant in relation to freedom of movement? The answer is that if there is lack of mutual trust, if a Member States cannot make confidence in each other in judicial cooperation in criminal matters, mutual recognition will not function in practice and consequently the free movement principle is put in jeopardy. In a situation where people are allowed to move freely, and where crime, too, gets to cross internal EU borders more easily, we should be able to rely on other Member States when it comes to judicial cooperation in criminal matters. Free movement of persons and judicial cooperation are simply two different sides of the same coin. This is particularly so because as oppose to the former extradition system, where a “nationality clause” (States’ right not to extradite its own nationals) have always been part of the legal instruments; we no longer find the nationality clause under the mandatory grounds for non-execution in legal instruments based on principle of mutual recognition.

Having in mind the principle of non-discrimination and the mutual trust as a cornerstone of judicial cooperation in criminal matters, this thesis poses a question, whether the situations like that of Mr Symeou and Mr Da Silva Lopes are exceptional or is there a common tendency among Member States to put their own nationals in beneficial position in criminal proceedings as oppose to the nationals of other Member States staying or residing in that Member States as well as third country nationals legally staying or residing there. The question is not a about different application of law among Member States but about how the law is applied by *all* Member States with regard to their own nationals and to nationals of other Member States or third countries. The thesis seeks to find out whether own nationals are in better position in criminal proceedings in this respect and whether equal treatment is actually applied in judicial cooperation.

¹⁰ Council of the European Union. Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16.10.1999. – <http://www.refworld.org/docid/3ef2d2264.html> (01.05.2015).

The focus of the thesis is Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States¹¹ (EAW) – the very first EU legal instrument applying in practice the mutual recognition principle. Looking at national legislation and case law with regard to EAW and also communications and reports issued by European Commission, I will analyse whether nationals of other EU Member States and third country nationals have disadvantages in the way they are treated during the criminal proceedings in the host Member State they are residing or staying. Framework Decision on EAW is not only the very first mutual recognition instrument but indisputably the most extensively used one, considering also that it is the only instrument that has been implemented by all 28 Member States. Issues will be discussed that have occurred in the last 10 years since Framework Decision on EAW came into force.

The thesis is built upon variety of data by using an analytical methodology. The legal instrument itself, Framework Decision on EAW, is examined in order to find out provisions in the instrument that may become relevant in practice in terms of discrimination based on nationality/ residence as demonstrated in the two cases above. National legislation of 28 EU Member States transposing relevant provisions in the Framework Decision on EAW is then analysed to see the compliance of national legislation with the EU legal principles. What follows is the practical application of the EAW as appeared in the case law.

This includes the interpretation of the provisions by the Court of Justice of the European Union (CJEU). While criminal justice in general is a field that for a long time remained out of the full competence of the EU – only after the adoption of the Lisbon Treaty¹² as a result of the disappearance of the pillars this changed – it is particularly curious to analyse the topic as a reflection of free movement right only now. Namely, as of 1 December 2014, five years after the date of entry into force of the Treaty of Lisbon, the transitional measure according to which the powers of the CJEU were to remain the same with regard to judicial cooperation in criminal matters, ceased to have an effect. Full jurisdiction of the CJEU (and full power of the European Commission in this field) is now applied. Thus the CJEU has jurisdiction also over mutual recognition instruments. So far the Court has been able to rule

¹¹ 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, 18.07.2002, pp. 1–20.

¹² Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. – OJ C 306, 17.12.2007.

within the procedure of preliminary rulings prevailing in the criminal justice field and was subject to a declaration by each Member State recognising that jurisdiction.

The first chapter examines relevant EU legislation in Area of Freedom, Security and Justice (AFSJ) in order to clarify the meaning of relevant concepts before proceeding with the examination. This field of EU law was also long known for the incapability to react efficiently to public expectations and political and economic challenges due to its difficult decision-making procedure. The issues regulated in the field range from judicial cooperation in civil matters to abolishing internal border controls, immigration and criminal justice. Non-discrimination, free movement and the concept of EU citizenship is discussed further on. Chapter two is the key chapter of the thesis as here the analysis of practical application of EAW is examined. Several examples are brought to discuss whether the instruments are applied differently based on the nationality/residence. Chapter three of the thesis further examines possible solutions in order to do away with the shortcomings of practical application of EU law. Amendment of legal acts, improvement of procedural safeguards, judicial training and awareness raising and application of new instruments such as European Supervision Order, are among the possibilities reviewed. Also, it is suggested that CJEU will play important role in shaping the EU policy in the field.

1. RELEVANT EU LEGISLATION IN THE AREA OF FREEDOM SECURITY AND JUSTICE (AFSJ) AND ON NON-DISCRIMINATION

1.1. AFSJ and relevant provisions in primary law

Judicial cooperation in criminal matters belongs to the area of freedom, security and justice (AFSJ) in the EU law, which is one of the most controversial areas within the EU law over time. Major amendments were introduced to the Treaty on the European Union¹³ (TEU) and to the Treaty on the Functioning of the EU¹⁴ (TFEU) with the adoption of the Lisbon Treaty, and procedures were harmonized in this field. These changes affect considerably the regulation of judicial cooperation in criminal matters, which is why the topic is treated here shortly.

The most important reason why major changes have appeared is that the Lisbon Treaty does away with the pillar system. It involves demolition of the pillar structure, at least with regard to the former so-called first and third pillars as the former second pillar yet remains hidden in the new Treaty of EU. AFSJ now brings together justice and home affair policies under one heading and in five chapters. Quick look into the history of the development of the AFSJ shows that first steps in codifying justice and home affairs policies were made in the Maastricht Treaty¹⁵ in 1993 when the topic was introduced under the name “Cooperation in the field of Justice and Home Affairs” forming the third pillar. Progress followed in the Amsterdam Treaty¹⁶ in 1997 where the development of an AFSJ was set as an objective of the EU. However, in Amsterdam Treaty the AFSJ was divided into two parts: immigration and asylum was placed together with cooperation in civil matters under Title IV in the first pillar, whereas police and judicial cooperation in criminal matters remained under Title VI of the EU Treaty remaining as part of “intergovernmental” third

¹³ Consolidated version of the Treaty on the European Union. – OJ C 326, 26.10.2012, pp. 13-34.

¹⁴ Consolidated version of the Treaty on the Functioning of the European Union (TFEU). – OJ C 326, 26.10.2012, pp. 47–390.

¹⁵ Treaty on European Union, signed at Maastricht on 7 February 1992. – OJ C 191, 29.07.1992.

¹⁶ Treaty on European Union (Consolidated Version), signed at Amsterdam on 2 October 1997. OJ C 340, 10.11.1997, p. 115. – http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf (20.03.2015).

pillar. On the other hand, the Schengen *Acquis*, which previously had been based on separate treaties between some of the Member States was introduced in the EC Treaty.¹⁷

AFSJ, now placed in Title V of the TFEU is divided into five chapters:

- 1) General provisions (new Articles 67-76 TFEU);
- 2) Policies on border checks, asylum and immigration (Articles 77-80 TFEU);
- 3) Judicial cooperation in civil matters (Article 81 TFEU);
- 4) Judicial cooperation in criminal matters (Arts. 82-86 TFEU).
- 5) Police cooperation (Arts. 87-89 TFEU).

What is curious is that Article 3(2) TEU refers to the AFSJ as one of the aims of the EU – even before the establishment of the internal market and the economic and monetary union. This tells us that the policy area that only recently was “intergovernmental”, is now fully part of the EU law.

Under the general provisions, in fact within the very same article, the main principles are set that are relevant also for the key chapters in the Lisbon Treaty with regard to the subject of this thesis: Chapter 2 on immigration and Chapter 4 on criminal justice referred to above. Article 67(1) TFEU provides for that *„the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States“*. Article 67 (2) further states for that it *“shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals“*. Finally, point 3 under the same article reads: *„The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws“*.

Chapter 4 under Title V provides for judicial cooperation in criminal matters. Article 82(1) (a)-(d) TFEU establishes that EU has express powers in the following areas: *„To lay down rules and procedures for ensuring recognition throughout the Union of all forms of*

¹⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty on European Union and to the Treaty establishing the European Community - Protocol integrating the Schengen *acquis* into the framework of the European Union. – OJ C 340, 10.11.1997, p. 93.

judgments and judicial decisions; prevent and settle conflicts of jurisdiction between Member States; support the training of the judiciary and judicial staff; facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions“. Article 82 TFEU provides that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of that article, and Article 83 TFEU. Although Article 82 also provides for an opportunity to approximate laws of the Member States, it lays down principle of mutual recognition as a basis for the judicial cooperation and as main approach to the judicial cooperation. It will be explained in the next subchapter, what is the meaning of these provisions.

In addition, with regard to approximation of laws, EU may establish minimum rules on mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; and the rights of victims of crime, as stated in Article 82(2) (a)-(c) TFEU. This list, however, is not exclusive as Article 82 (2) (d) TFEU further provides for that with unanimous decision by the Council, any other fields may be added.

Chapter 2 under Title V provides for Policies on border checks, asylum and immigration. These provisions relate to abolishing internal border controls to anyone legally within the territory of the EU, as well as to the entry to and stay in the EU of third-country nationals to the EU. Article 77(1) TFEU establishes that EU has express powers in the following areas: ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; carrying out checks on persons and efficient monitoring of the crossing of external borders; and the gradual introduction of an integrated management system for external borders. Article 78 sets out common policy on asylum; Article 79 sets out common immigration policy. The latter covers EU power on rules on entry and residence in the EU (Article 79(2)(a) TFEU), legal migration of third-country nationals (Article 79(2)(b) TFEU), illegal immigration and unauthorized residence (Article 79(2)(c) TFEU) and trafficking of human beings (Article 79(2)(d) TFEU).

With regard to legal instruments used, a lot has been changed over the years. As a result, legal instruments used in judicial cooperation in criminal matters, too, have differed over time depending on the legal basis. With Amsterdam Treaty former joint actions, used in the policy field under third pillar, were replaced by Framework Decisions and

conventions.¹⁸ However, these two instruments are not the most efficient ones at least when it comes to achieving its aim, which is why EU has remained far from being harmonized in terms of legislation in the AFSJ. Namely, Framework Decisions together with common positions and conventions that were the main instruments to regulate in the field of criminal justice under the Amsterdam Treaty¹⁹, demand implementation by Member States. In addition, they do not entail direct effect and there is no infringement procedure as it was stated in the treaty *per se*, even if a Member State failed to implement a Framework Decision within the 2-year transposition period (or later). Ratification of conventions, on the other hand, was long and difficult, without a possibility to amend the instruments fast and efficiently; therefore, the instruments were not flexible enough to react promptly to challenges of implementation.²⁰

With the entering into force of the Lisbon Treaty the former third pillar instruments disappeared. The Treaty does not specify the type of act to be adopted, which means that it could be chosen the „on a case-by-case basis“, in accordance with „the principle of proportionality“ (Article 296 TFEU). As a result, in addition to immigration field, criminal justice field, too, is now regulated by former first pillar instruments. Neither does Title V hold a list of instruments; the provisions under this title rather refer to “measures”. Together with the reference to “ordinary legislative procedure” (Article 289 TFEU), it follows that any of the legal instruments applicable may be used among all “measures” foreseen: regulations, directives and decisions.

Also, in decision making a lot has changed with the entry into force of the Lisbon Treaty. Now the “ordinary legislative procedure” i.e. co-decision involving qualified majority voting (QMV) in the Council, applies to most policy areas, including the issues regulated under Title V (Article 75 TFEU). Prior to the Treaty of Lisbon entering into force, there was no involvement of the European Parliament whatsoever in decision-making in the field of criminal justice; and with regard to immigration and civil cooperation, European Parliament was mainly consulted. In principle, unanimous voting in the Council followed. The new approach of AFSJ brings along an important increase in the role of the European Parliament and the use of QMV. It is provided for in all titles: border checks, asylum and

¹⁸ Article 34(2)(b) TEU (Consolidated Version), signed at Amsterdam on 2 October 1997.

¹⁹ Article 34(2)(b) TEU (Consolidated Version), signed at Amsterdam on 2 October 1997.

²⁰ Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters. Brussels, 26.7.2000. COM(2000) 495 final, p. 2.

immigration (Article 77(2) TFEU), judicial cooperation in civil matters (Article 81(2) TFEU) and, judicial cooperation in criminal matters (Articles 82(2) and 83(2) TFEU). Nevertheless, when it comes to the decision making, there are exceptions provided for in the field of criminal justice so there are measures or “emergency breaks”²¹ for the Member States to ensure control: yellow card procedure may force the European Commission to reconsider legislative proposal²²; orange card procedure may end up the initiative being referred to the Council and European Parliament²³.

Finally, the Lisbon Treaty brought along significant change with regard to the competence of the Court of Justice of the European Union (CJEU) with a major effect on the criminal justice area. The Court in Luxembourg have had a great role in developing first the EC and then the EU competences in the AFSJ. However, under the Amsterdam Treaty, the CJEU could only rule in the criminal law field through preliminary ruling procedure and only on condition allowed by Member State through a declaration.²⁴ Thus, in the field of EU criminal justice, the case law has mainly been established by the CJEU in its decisions in the course of preliminary proceedings.²⁵ It is of significant meaning as up until the five-year transitional period set out in the Lisbon Treaty that came to an end 1 December 2014, the CJEU did not have full jurisdiction in this field. Whether the CJEU in its case law has been crossing the limits of its competence and thus going against national Constitutional Courts as it has been suggested²⁶ is to be seen based on the following discussion.

1.2. Judicial cooperation in the EU

1.2.1. Traditional Mutual Legal Assistance

As anywhere in the world, judicial cooperation in the EU was based for a long time on “classic” mutual legal assistance. “Classic” or “traditional” mutual legal assistance is based on the idea of assistance, one state simply requesting help to another state either for

²¹ C. Tobler and others (edit.). *The Lisbon Treaty. Lisbon Treaty Meeting Summaries*, 19 March 2008, Europa Institute Leiden University, Law Faculty. – <http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf> (19.12.2014), p. 26.

²² Article 8 of Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007, OJ 2007 C 306/150.

²³ Article 12(b) TEU.

²⁴ Article 35 TEU (Consolidated Version), signed at Amsterdam on 2 October 1997.

²⁵ M. Ventrella. *European Integration or democracy disintegration in measures concerning police and judicial cooperation?* – *New Journal of European Criminal Law*, Vol 4, Issue 3, 2013, pp. 290-309, p. 292.

²⁶ M. Ventrella, p. 290.

detention or prosecution of criminal offences or for execution of a criminal sentence, and the other state decides, based on its national law, whether to comply with the request or not. This is asking assistance from another country in accordance with the national law and procedure of the requested state.²⁷

A request may involve anything, from information exchange, requesting investigative acts, transfer of proceedings or transfer of judgments. Depending on a legal instrument used, the requested state may be free in its decision or less free. Thus, evidence recovered might also not necessarily be compatible with domestic rules of evidence.

The traditional system was (and continues to be) slow and also burdensome, and sometimes uncertain as the practitioner who made the request, a judge or a prosecutor, cannot always be sure what results he or she would get.²⁸ In addition, because of lack of direct effect of Framework Decisions, the effectiveness of Framework Decisions depends highly on the implementation of intergovernmental cooperation, which preceded mutual recognition.²⁹ In addition to several problems with applying legal instruments in practice, opening up the borders of the EU in 1990s had an influence on further development of the field. Europe had changed and just like other activities, crime, too, takes now place in “post-national context”.³⁰ It became clear that the old extradition system based on European Convention on Extradition of 1957³¹, was no longer efficient to fight cross-border crime.³² Thus, there was a clear need for more efficient and faster judicial cooperation, which eventually brought along introduction of new concepts.

1.2.2. Background of Mutual Recognition principle

In civil and commercial matters the term “mutual recognition” had existed long before being introduced in criminal justice. Mutual recognition of judgements related to civil and commercial matters had been provided for in the “Convention on jurisdiction and the

²⁷ COM(2000) 495 final, p. 2.

²⁸ COM(2000)495 final, p. 2.

²⁹ S. Miettinen. Criminal Law and Policy in the EU. Oxford: Routledge 2013, p. 181.

³⁰ L. Marin. Effective and Legitimate? Learning from the Lessons of 10 years of practice with the European Arrest Warrant. New Journal of European Criminal Law, Vol, 5, Issue 3, 2014, pp. 327-348, p. 327.

³¹ Council of Europe. European Convention on Extradition. ETS No. 24. Paris, 13.12.1957.– <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm> (20.12.2014).

³² E. Smith. Running before we can walk? Mutual recognition at the expense of fair trials in Europe’s area of Freedom, Justice and Security – New Journal of European Criminal Law, Vol 4, Issue 1-2, 2013, pp. 82-98, p. 84.

enforcement of judgements in civil and commercial matters”³³ since 1960s. It then became visible in the well-known decision of CJEU of “Cassis de Dijon”³⁴ and was confirmed in several consequent judgments. Out of the “four freedoms” in the field of Single Market – free movement of workers, services, goods and capitals – a notion “free movement of judgements” had evolved.³⁵ The founding idea was that if chocolate and fruits get to move freely from one Member State to another, so can the judgements in civil and commercial matters.

Borrowing from approach that had worked very well in the creation of the Single Market, seemed to be a good idea for the EU law-makers; and it was realized that judicial cooperation, too, might benefit from the concept of mutual recognition.³⁶ The logic behind acknowledging the need for something more efficient than mere mutual legal assistance is actually simple. For instance, freezing of assets shows us the need for an improvement. Goods, services and people within the EU can move around freely and fast. Money transfer from an account of an EU Member State to an account in another EU Member State, too, usually takes place relatively fast. Therefore it would be necessary if the procedure of detaining or arresting people and of freezing assets, too, was fast. The principle of mutual recognition seems to contribute to satisfying this need³⁷ as mutual recognition appearing in the field of criminal justice came down to the fact that crime has no borders.

In fact, at the time several instruments were in place also in the field of criminal justice touching upon the recognition of foreign judgments but they were soon lost in history due to poor ratification.³⁸ The only considerable instrument, the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at their Common Borders³⁹ and its

³³ Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ C 27, 26.01.1998. p. 34.

³⁴ ECJ 20.02.1978, C-120/78, *Cassis de Dijon*.

³⁵ J. Spencer. Mutual Recognition and Choice of Forum. – Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-interests, edit.: Michel Luchtmann. The Hague: Eleven International Publishing 2013, p. 64.

³⁶ COM(2000)495 final p.2.

³⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme. Brussels, 20.4.2010. COM (2010) 171 final, p.3.

³⁸ Instruments in force at the time were for example The Hague Convention on the International Validity of Criminal Judgements (1970); the Convention on the Enforcement of Foreign Criminal Sentences (1991) and EU Convention on Driving Disqualifications (1998). All of these instruments were ratified by a very few number of Member States, if any at all.

³⁹ The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. – OJ L 239, 22.9.2000, pp. 13–18.

Implementation Convention⁴⁰ (SIC) in 1990, made first steps towards efficient implementation of the principle of direct contact, which is of outmost importance in mutual recognition system. It provided for direct contact for the very first time, which at a time was revolutionary. Direct contact allows competent authorities to contact each other directly, without passing through central authorities. Competent authorities are declared through declarations. Among other novelties, in Title III, Chapter 3 of SIC rules on the application of the *ne bis in idem* principle was provided for.⁴¹ However, as oppose to mutual recognition requirement of today, law of the requested state was applicable under Schengen regime, which only changed with EU Mutual Legal Assistance Convention of 2000⁴² as the applicable law shifted to law of requesting state, with some exceptions.

The principle of mutual recognition in the field of criminal justice was eventually inserted in the EU policy documents in 1999 when the 15-16 October Tampere Special European Council on Justice and Home Affairs (JHA) Matters asked that the principle of mutual recognition should become a cornerstone of judicial co-operation not only in civil matters but also in criminal matters of the EU.⁴³ Point 33 of the conclusions stipulated that “*enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights.*” The JHA Hague Programme in 2004 once again established the mutual recognition as “cornerstone of judicial cooperation in criminal matters”.⁴⁴ Ever since the idea has been reconfirmed; the Stockholm programme of Justice and Home Affairs 2009-2014⁴⁵ and the Commission action plan for its implementation⁴⁶ further develop the concept.

⁴⁰ The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (SIC). – OJ L 239, 22.09.2000, pp. 19-62.

⁴¹ Articles 54 – 58 of SIC.

⁴² Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. – OJ C 197, 12.07.2000.

⁴³ Council of the European Union. Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16.10.1999. – http://www.europarl.europa.eu/summits/tam_en.htm (28.01.2015), para. 33.

⁴⁴ European Council. The Hague Programme strengthening freedom, security and justice in the European Union. – OJ C 53, 3.3.2005, pp. 1–14, para.3.3.

⁴⁵ European Council. The Stockholm Programme an open and secure Europe serving and protecting citizens. – OJ C 115, 05.04.2010, pp. 1-38.

⁴⁶ COM(2010) 171 final, p. 19-20.

1.2.3. Main features of Mutual Recognition principle

Mutual recognition of judicial decisions in criminal matters is a process by which a decision taken by a judicial authority in one EU Member State is recognized and enforced by other Member States as if it was a decision taken by the judicial authorities of its own Member State.⁴⁷ That is so even if in the national legislation of the executing Member State a different definition of crime is used or for the same crime different punishment would possibly be foreseen, or if according the rules of the judicial system of the executing Member State similar authority that issued the request, would not have the competence to do so, or if such authority did not even exist. It is thus merely “limited to recognition of official documents issued by the requested States”⁴⁸. When a measure, any decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure would be recognized and thus accepted in all other Member States, and have the same effects there.⁴⁹ This is the case even if an equivalent authority does not exist in the other Member State, or it would not have competence to take such decisions, or it would not have taken the same decision in a similar case.⁵⁰

The starting point of all instruments based on the principle of mutual recognition is that judicial authorities may only refuse to execute them in limited circumstances provided for in the Framework Decision itself.⁵¹ For instance, the very first mutual recognition tool, Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States⁵² (EAW) provides for mandatory grounds for non-execution (Article 3) and optional grounds for non-execution (Article 4). Some of the examples of those grounds in the articles referred to are situations of amnesty, *ne bis id idem* or cases where minors are involved. Yet numerous Member States have introduced additional grounds for non-execution, either mandatory or optional. It is also important to highlight that that no warrant may be refused from execution with justification of being in breach with fundamental rights, there is no such ground in the

⁴⁷ COM(2000) 495 p.4.

⁴⁸ J. B. Banach-Gutierrez. Globalized Criminal Justice in the European Union context. – New Journal of European Criminal Law, Vol 4, Issue 1-2, 2013, pp. 154-167, p. 158.

⁴⁹ COM(2000) 495 p.4.

⁵⁰ COM(2000) 495 p.4.

⁵¹ M. Thunberg Schunke. Whose responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU. Cambridge: Intersentia Publishing Ltd 2013, p. 16.

⁵² 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, 18.07.2002, pp. 1–20.

Framework Decision. All this applies not only to the EAW but the majority of Framework Decisions have been drafted in a similar way.

In the field of Single Market and free movement of goods, mutual recognition provides for that a “product lawfully sold in one Member State” can be marketed in any other Member State, “even when the product does not fully comply with the technical rules” of the other Member State.⁵³ The exception to this principle is very strict, the Member State of destination is only then allowed to reject the product in its market when there is proven threat to public safety, health or environment.⁵⁴ In criminal matters, nevertheless, there is an aspect in what way the principle differs from that in civil and commercial matters. That is, the aim of the mutual recognition in civil and commercial matters is to do away with all sorts of regulation in order to allow free movement of goods and services, whereas in criminal matters it is the contrary – the aim is to extend the reach of national law outside the national borders.⁵⁵ Thus, instead of avoiding any sort of interference in the regulation, here, on the contrary, Member States have to contribute actively to make sure that the judgement of another Member State is enforced.

Mutual trust constitutes a key element in the idea of mutual recognition. Based on an idea of equivalence, it is “not only trust in the adequacy of one’s partner’s rules”, but also “trust that these rules are correctly applied”, and therefore that the conclusions that another Member State has reached during the criminal proceedings, are allowed to come into effect in executing Member States’s legal sphere.⁵⁶ The importance of mutual trust in criminal law was stated by the CJEU in its case law in 2003 with its statement that “*the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied*”.⁵⁷

With regard to the number of existing instruments, there are numerous mutual recognition instruments currently in place, the majority of those in the form of Framework Decisions as they were adopted under the pre-Lisbon system. However, the majority of them are

⁵³ European Commission: Mutual recognition. Single Market and Standards, 2015. – http://ec.europa.eu/enterprise/policies/single-market-goods/free-movement-non-harmonised-sectors/mutual-recognition/index_en.htm (01.02.2015).

⁵⁴ European Commission. Single Market and Standards, 2015.

⁵⁵ S. Miettinen, p. 178.

⁵⁶ COM(2000) 495 final, p.4.

⁵⁷ ECJ 11.02.2003, C-187/01, C-385/01, *joined cases Hüseyin Gözütok and Klaus Brügge*, para. 33.

hardly applied in practice.⁵⁸ Let alone the fact that only one of the instruments, Framework Decision on EAW is the only Framework Decision so far that has been implemented by all EU Member States.⁵⁹

In the majority of the mutual recognition instruments, the list of so-called “Euro-crimes” have been introduced, as opposed to the traditional requirement of double criminality.⁶⁰ Double criminality requirement has been removed at least partially – in all relevant Framework Decisions there is a list of offences provided for that do not allow the verification of the double criminality.

Also, when the traditional MLA covers the cooperation based on conventions, protocols and agreements, in which a requested judicial authority, either a court or a Prosecution Office from a Member State provides assistance to a requesting judicial authority from another Member State, in the framework of mutual recognition we no longer talk about requests. Mutual recognition instruments are much more about proactive cooperation between two Member States, and as a result authorities are referred to as an “issuing” and an “executing” judicial authority.

Finally, another important aspect of mutual recognition is that as oppose to traditional judicial cooperation, reciprocity is not relevant. An executing Member State is obliged to follow the rule even if issuing Member State has been in breach with of EU law. The foundations of this idea are based yet again in the CJEU case law, as CJEU has ruled in historical *Flamingo Costa vs ENEL* that reciprocity does not make part of the EU legal order.⁶¹

⁵⁸ European Judicial Network. Report on the Operation and Management of the European Judicial Network 2011-2012. *Sine loco*: Publications Office of the European Union 2014 – <http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=1387> (01.12.2014).

⁵⁹ European Judicial Network. Status of Implementation. Judicial Library. – http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=14 (01.12.2014).

⁶⁰ B. Banach-Gutierrez, p. 164.

⁶¹ ECJ 15.07.1964, C-6/64, *Costa vs ENEL*.

1.3. Citizenship of the Union and Non-discrimination on grounds of nationality

1.3.1. Definition of the concept and its relevance to the issue

In order to find out whether the practical application of EU instruments in judicial cooperation has possibly brought along a breach in EU law with regard to discrimination based on nationality, it is necessary to have a closer look at the related concepts.

In accordance with Article 3(3) TEU combating discrimination is a general aim of the Union. In EU law discrimination is defined as “the application of different rules to comparable situations or the application of the same rule to different situations”.⁶² This is known as “direct” discrimination.⁶³ EU law also recognizes “indirect” discrimination, which is based on criteria, which are not openly discriminatory and is thus an outcome of not only treating people in similar situations differently, but also of providing the same treatment for people who are in different situations.⁶⁴

There are several provisions in the treaty that prohibit discrimination⁶⁵ but I will be looking at Article 18 TFEU, which is the basis of non-discrimination as this provision prohibits any type of discrimination on the grounds of nationality. Article 18 TFEU reads: “*Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.*” With regard to scope of Article 18 TFEU, there are two important points: first, the prohibition on nationality discrimination in EU law applies in the context of free movement of persons and secondly, it is only accorded to citizens of EU Member States.⁶⁶ This is where the concept of EU citizenship and the right to free movement becomes relevant. In this sense the European Convention of Human Rights⁶⁷ (ECHR) offers wider protection against

⁶² ECJ 14.02.1995, C-279/93, *Finanzamt Köln-Altstadt v. Schumaker*, para.30.

⁶³ European Union Agency for Fundamental Rights, Council of Europe. Handbook on European non-discrimination law. Luxembourg: Publications Office of the European Union 2011, p. 21.

⁶⁴ European Union Agency for Fundamental Rights; Council of Europe, p. 29.

⁶⁵ Article 45(2) TFEU prohibits discrimination of workers on grounds of nationality its scope is limited to “workers” only; Article 157(1) TFEU provides for equality between genders but its scope is limited to remuneration for work. Non-discrimination is also considered by ECJ as a fundamental right in its case law in situations that fall “within the scope of European Union law”: ECJ 17.12.1970, C-11/70, *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*; ECJ 19.01.2010, C-555/07, *Küçükdeveci v. Swedex GmbH & Co.*

⁶⁶ European Union Agency for Fundamental Rights, Council of Europe. Handbook on European non-discrimination law, p. 58.

⁶⁷ Council of Europe. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. ETS No. 5, 4.11.1950. – <http://www.refworld.org/docid/3ae6b3b04.html> (20.12.2014).

discrimination than EU law – it protects everyone within the jurisdiction of a Member State, regardless their citizenship.⁶⁸

Article 20 TFEU, which further establishes the concept of “Union citizenship”: “Every person holding the nationality of a Member State shall be a citizen of the Union”. Article 21(1) TFEU sets out the free movement principle: “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States”. The right to move and reside freely within the territory of the Member States comes thus directly from the EU citizenship in accordance with Article 20(2)(a) TFEU. Right to move freely and the associated right to equal treatment thus is no longer accompanying Single Market but of EU citizenship of political nature.⁶⁹ From a freedom of the people to pursue economic activities in Member States other than that of their nationality during the early years of the European Economic Community the concept of free movement developed into a right that may be performed for any reason.⁷⁰ The scope of the right is not restricted with merely workers but is extended to “economically inactive” people who simply are citizens of any EU Member State.⁷¹

The principle of non-discrimination associated with freedom of movement is actually just one of three main attributes of the citizenship of the EU; in addition, the electoral rights and the right to diplomatic protection are indorsed through the Union citizenship.⁷² Article 22 TFEU provides for the right to vote and to stand as a candidate at European and municipal elections in the Member State in which the person resides, under the same conditions as nationals of that State. Articles 35 TEU and 23 TFEU provide for protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State for every citizen of the EU who is, in the territory of a third country in which the Member State of which he or she is a national is not represented.

The legal definition for the European citizenship is the concept first introduced by the Maastricht Treaty, and further repeated in Amsterdam Treaty in pre-Lisbon Article 17 EC:

⁶⁸ ECtHR 18.12.1996, 15318/89, *Loizidou v. Turkey*.

⁶⁹ E. Muir, A. P. van der Mei. EU Citizenship of the Area of Freedom, Security and Justice. – Choice of Forum in Cooperation against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-interests (edit. M. Luchtman). The Hague: Eleven International Publishing 2013, p. 125.

⁷⁰ E. Muir, A. P. van der Mei, p. 125.

⁷¹ E. Muir, A. P. van der Mei, p. 125-126.

⁷² N. Moussis. Access to European Union: law, economics, policies. The ultimate textbook on the European Union. 19th updated edition. Rixensart: Euroconfidentiel 2011, p. 237.

“Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship”. Since the Lisbon Treaty was adopted, the basis is set out in Articles 20-25 TFEU, which establishes the grounding principle of EU citizenship. The rights of EU citizens and the importance of freedom of movement were highlighted in the JHA Tampere (1999-04), Hague (2004-09) and Stockholm (2010-14) programmes. By now more than 8 million EU citizens have benefitted from their right to move and reside freely and now live in another Member State of the EU.⁷³

Citizenship is said to be not only a right but indeed a responsibility to participate in the cultural, social and economic life and in public affairs of the community together with others.⁷⁴ Therefore full integration to the society is possible only through citizenship, which is, as stated, “a key to intercultural dialogue, because it invites us to think of others not in a stereotypical way – as ‘the other’ – but as fellow citizens an equals”.⁷⁵ This is how only through citizenship it is possible for a person to fully participate in and contribute to the society, and it can be considered as a key factor of the integration process. In order to improve the democratic system and to have migrants’ interests included, citizenship would be indispensable.⁷⁶

1.3.2. Movement and Residence within the EU: Directive/38/EC

The most important piece of secondary legislation with regard to the EU citizenship and on the right to move and reside freely is the Directive 2004/38/EC on the right of citizens of the European Union and their family members to move and reside freely within the territory of the EU was adopted by the European Parliament and the Council on the 29th of

⁷³ Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final. Brussels, 2.7.2009, p. 3.

⁷⁴ Council of Europe. White Paper on Intercultural Dialogue: Living together as equals in dignity. Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session. Strasbourg Cedex: Council of Europe Publishing, 2008, p. 26.

⁷⁵ Council of Europe. White Paper on Intercultural Dialogue, p. 27.

⁷⁶ G. Piening, A. Gemershausen. Council of Europe interview with G. Piening, A. Gemershausen: Faire de la citoyenneté un moyen de partager les responsabilités: la campagne de naturalisation et la politique d’intégration à Berlin. Tendances de la cohésion sociale, n 18: Quelle cohésion sociale dans une Europe multiculturelle? Concepts, état des lieux et développements. Strasbourg Cedex: Council of Europe Publishing, 2008, p. 186.

April 2004.⁷⁷ It replaces legislation that existed in this area and consolidates legislation of the free movement of persons. The Directive “*introduces more flexibility by eliminating the need for EU citizens to obtain a residence card, introducing a permanent right of residence, defining more broadly the situation of family members and restricting the scope for the authorities to refuse or terminate residence of non-national EU citizen’s family members*”.⁷⁸

As seen above, the prohibition on nationality discrimination in EU law applies in the framework of free movement of persons and is only related to citizens of EU Member States. Directive 38/2004/EC in this sense differs from this and is important to third country nationals because it is the instrument that offers to the third country a right to equal treatment in the same areas covered by other non-discrimination directives that apply only to EU citizens.⁷⁹ The directive gives rights to EU citizen’s family members, having one of the aims to facilitate the movement of family members irrespective of whether they are EU nationals or not.

Family members, irrespective of their nationality, have the right to accompany and establish themselves with a European citizen who is residing in the territory of another Member State, whereas family members who can enjoy rights under EU law include the spouse, minor or dependent children, and dependent ascendants, though in the case of students only the spouse and dependent children enjoy this right (Article 2). The definition of “family members” covers for the first time registered partners under the legislation of a Member State, if the legislation of the host Member State treats registered partners as equivalent to marriage (Article 2). Prior to this instrument coming into force, the EU law provided for shorter list that the Article 2 (2) of the directive; the family members now include, besides the spouse, a partner with whom an EU citizen has a registered partnerships as equivalent to marriage. Additionally, a dependant under the age of 21 or dependent children of a registered partner and the dependent direct relatives in the ascending line of the registered partner are also now included by the directive. Family

⁷⁷ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. – OJL 158, 30.04.2004.

⁷⁸ Area of freedom, security and justice European Commission. Directive on EU long-term resident status, 2006. http://ec.europa.eu/justice_home/fsj/immigration/residents/fsj_immigration_residents_en.htm.

⁷⁹ European Union Agency for Fundamental Rights, Council of Europe. Handbook on European non-discrimination law. Luxembourg: Publications Office of the European Union 2011, p. 59.

members who are third country nationals enjoy greater legal protection, for example in the event of death of the EU citizen on whom they depend, or the dissolution of the marriage under certain circumstances (Articles 12 and 13).

It is also the Directive 38/2004/EC where the length of the residence is defined. First, in Articles 6 and 7 residence up to three months and more than three months is defined; for a short stay up to three months “Union citizens should have the right of residence in the host Member State for a period not exceeding three months without being subject to any conditions or any formalities other than the requirement to hold a valid identity card or passport”. Secondly, it also appears that with regard to the notion “permanent residence” the directive provides that “Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the right of permanent residence there”, as stated in Article 16(1).

Protection against expulsion is provided for to the citizens of the EU and their family members in Article 28 of the Directive 38/2004/EC. In this respect, Article 28 of the directive makes here fundamental difference between EU citizens and third country nationals, even when the third country national belongs to the family members of an EU citizen as of Article 2 of the directive. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security (Article 28 (2)). If an EU citizen (but not his or her family member who is a third country national) has resided in the host Member State for the previous ten years or is minor, an expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security. Thus, as one of the foundations of the EU, freedom of movement must be interpreted in a broad sense and derogations from that principle must be interpreted strictly.⁸⁰ Member States may restrict the freedom of movement of EU citizens only on very limited occasions, on grounds of public policy or public security.⁸¹ The CJEU has emphasized that this means any action taken other than on grounds of public policy or public security which might affect the right

⁸⁰ ECJ 3.06.1986, C-139/85, *R. H. Kempf v Staatssecretaris van Justitie*, para.13; ECJ 10.07.2008, C-33/07 *Jipa v Ministry of Administration and Interior*, para.23.

⁸¹ COM(2009) 313 final, p. 10.

of persons to enter and reside freely in the host Member State under the same conditions as the nationals of that State.⁸²

Overall, the CJEU has played an important role in developing the notion of freedom of movement in its case law and what comes to restricting this right. Above all, the Court has said that as one of the foundations of the EU, the freedom of movement of persons, the derogations from that principle must be interpreted strictly.⁸³ Restrictive measures can be taken only on a case-by-case basis when there is genuine and sufficiently serious threat affecting one of the fundamental interests of the society of the host Member State by personal behaviour of individual. With regard to the restrictive measures, they cannot be adopted on general preventive grounds.⁸⁴ Such measures must be based on an actual threat, as oppose to a justification merely by a general risk, which is not permitted. Also, with regard to criminal conviction of a person, restrictive measures following the conviction is allowed but such measures cannot be automatic and must take into account the personal behaviour of the offender and that there is threat that he or she demonstrates to public policy.⁸⁵

In 2008, the CJEU created an important precedent with the *Metock*-case⁸⁶, which brought down the whole system of immigration issues in several Member States, including United Kingdom, Ireland and Denmark. The court ruled that the right of a third country national who is a family member of an EU citizen to accompany or join that citizen cannot be made conditional on prior lawful residence in another Member State. The Court over-ruled its previous judgement of the *Akrich* case in which it stated that, in order to benefit from the rights of entry into and residence in a Member State, the non-Community spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State in the company of a Union citizen.⁸⁷ Contrary to its previous opinion, in *Metock* the CJEU held that the benefit of such rights cannot depend on prior lawful residence of the spouse in another Member State. According to the Court, Directive 2004/38/EC confers on all nationals of non-member countries who are family members of a Union citizen within

⁸² ECJ 28.10.1975, C-36/75 *Roland Rutili v Ministre de l'intérieur*, para. 8-21; ECJ 27.10.1977, C-30/77 *Régina v Pierre Bouchereau*, para. 6-24.

⁸³ ECJ 03.06.1986, C-139/85 *R. H. Kempf v Staatssecretaris van Justitie*, para. 13; ECJ 10.07.2008, C-33/07 *Jipa v Ministry of Administration and Interior*, para. 23.

⁸⁴ ECJ 26.02.1975, C-67/74 *Bonsignore v Oberstadtdirektor der Stadt Köln*, para. 5-7.

⁸⁵ ECJ 19.01.1999, C-348/96 *Criminal proceedings against Donatella Calfa*, para. 17-27; ECJ 26.02.1975, C- 67/74 *Bonsignore*, para. 5-7.

⁸⁶ ECJ 24.07.2008, C-127/08, *Metock and others v Minister for Justice, Equality and Law Reform*.

⁸⁷ ECJ 25.07.2008 C-109/01, *Secretary of State for the Home Department v Akrich*, para. 22.

the meaning of point 2 of Article 2 of that directive, and accompany or join the Union citizen in a Member State other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non-member country has already been lawfully resident in another Member State.⁸⁸

Finally, the CJEU has emphasized that the directive must be interpreted and applied in accordance with fundamental rights⁸⁹, having in mind in particular the right to respect for private and family life, the principle of non-discrimination as well as the rights of the child and the right to an effective remedy as guaranteed in the ECHR and as reflected in the EU Charter of Fundamental Rights⁹⁰ (CFR).⁹¹

1.3.3. Secondary legislation applicable to third country nationals

As seen above, the prohibition on nationality discrimination in EU law applies in the framework of free movement of persons and is only related to citizens of EU Member States. There are nevertheless two important instruments granting free movement rights to third country nationals and consequently offering protection against discrimination based on nationality. It has even been said that EU's goal of Tampere Conclusions of giving legally residing third country nationals the rights which are „comparable“ or „as near as possible“ to those rights enjoyed by EU citizens, was laid down in the preambles of the two directives: Directive 2003/86/EC on family reunification⁹² and Directive 2003/109/EC on long-term resident third-country nationals⁹³.

First, the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification is a legal instrument in EC law that regulates family reunification. The directive on the right to family reunification was adopted on 22nd of September 2003. It allows for third country nationals lawfully residents in a Member State to be joined by family members in certain conditions. The directive is a legal way for family members to enter and reside within the EU through so-called “family reunification”, a right, which may

⁸⁸ ECJ 24.07.2008, C-127/08, *Metock and others v Minister for Justice, Equality and Law Reform*, para. 36.

⁸⁹ ECJ 29.04.2004, C-482/01 *Georgios Orfanopoulos and Raffaele Oliveri v. Land Baden-Württemberg*, para. 97-98; ECJ 24.07.2008, C-127/08 *Metock*, para.79.

⁹⁰ Charter of Fundamental Rights of the European Union. – OJ C 326, 26.10.2012, pp. 391–407.

⁹¹ COM(2009) 313 final, p. 3.

⁹² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. – OJ L 251, 3.10.2003, pp. 12–18.

⁹³ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. – OJ L 16, 23.1.2004, pp. 44–53.

be exercised by third country nationals who are lawfully residing in the territory of Member States.

The right to family reunification is not provided expressly in the directive 2003/86/EC, which leaves certain power in this respect to the Member States. The directive determines the conditions under which family reunification is granted to third country national already residing lawfully in the territory of an EU Member State (Article 1); whether the family relationship arose before or after the resident's entry (Article 2 (d)), and finally the rights of the family members concerned. As for the family members, since entering into force and after transportation to national law, the directive entitles legally resident third country national to bring their spouse, under-age children and the children of their spouse. Although Member States can demand that the third country national be legally resident in the country for a certain period of time before they are authorized to bring over members of their family, it is set out explicitly that this period cannot exceed two years. Some safeguards provided for to the Member States include: the right of limit family reunification rights for children if they apply after the age of fifteen (Article 4 (6)), the right to refuse to allow the entry of children over the age of twelve who travel separately from their family (Article 12 of the Preamble) and the right to have the family reunification refused for spouses under 21 years of age (Article 4 (5)).

Secondly, the most important legal instrument regulating the legal status of long-term residents within the EU is the Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. The notion “long-term resident” refers to the third country national who has legally resided for five years in the territory of a Member State.

The directive enables third country national who fulfils the conditions as provided for in the Article 5 of the directive, to enjoy a legal status comparable to that of citizens of the Member States. Long-term residents enjoy equal treatment to nationals in a number of areas of socioeconomic life (Article 11): access to employment and self-employed activity; education and vocational training; social protection and assistance; access to goods and services; tax benefits; freedom of association; free access to other Member States. As for protection against expulsion of long-term residents, Article 12 provides for that “*Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security*”.

Pursuant to the Article 14, a long-term resident has “the right to reside in the territory of Member States other than the one which granted him/her the long-term residence status, for a period exceeding three month”. When the long-term resident exercises the right of residence in another Member State and when the family was already constituted in the first Member State, the members of the family (who fulfil the conditions as provided for in the Directive 2003/86/EC on family reunification) shall be authorized to accompany or to join the long-term resident (Article 14).

The directive also sets conditions under which the long-term resident will be allowed to settle in another Member States in order to work, pursue self-employed activities, study or any other activity. It allows the person concerned to move from one Member State to another under certain conditions. This proposal of the Commission was initially carried by the idea that “*the mobility of long-term residents may make it easier to deploy existing labour forces in the various Member States*”.⁹⁴

⁹⁴ European Commission. Area of freedom, security and justice. Directive on EU long-term resident status, 2006. http://ec.europa.eu/justice_home/fsj/immigration/residents/fsj_immigration_residents_en.htm.

2. PRACTICAL APPLICATION OF EUROPEAN ARREST WARRANT WITH REGARD TO NATIONALITY AND RESIDENCE CLAUSE

2.1. Overview

In civil and commercial matters it is widely accepted that the “free movement” of judgements should correspond to the four freedoms of goods, services, people and capital. Court decisions in this field are recognized automatically by the courts of other EU Member States.⁹⁵ In the field of criminal justice this logical link seems to be less obvious, considering the number of opponents to further integration in the field.⁹⁶ On one hand it is only natural that as the commercial matters have been in the heart of EU integration from 1950s, forming actually the basis of the creation of the EU; it is not the same for the criminal justice. On the other hand, however, it should be also obvious that cross-border movement of people have brought along an increase or at least facilitation of cross-border crime, which is why similar approach of automatic recognition of judgements is necessary in criminal justice field.

Secondly, not only there is certain reluctance in practical application of mutual recognition instruments among the judiciary, the application is uneven in EU Member States and to large extent discriminative. Several issues discussed below have occurred in the last 10 years of the practical application of mutual recognition instruments since coming into force of the EAW. Over this time we have seen several cases of (mis)uses of the mutual recognition instruments. The European Commission has implied that it is not satisfied the way Member States implement Framework Decisions when it comes to providing for provisions that allows the exclusion to mutual recognition.⁹⁷

The problem is that such uneven implementation and subsequent application of the instruments may result in breach of principles of equality and of non-discrimination. This might easily lead to discrimination on grounds of nationality within the meaning of Article 18 TFEU referred to above as different treatment between the nationals of the Member State concerned and the nationals of other Member States is not justified as EU law offers

⁹⁵ J. Spencer, p. 65.

⁹⁶ M. Ventrella, p. 308.

⁹⁷ Communication from the Commission to the European Parliament and the Council. An area of freedom, security and justice serving the citizen. Brussels, 10.6.2009. COM (2009) 262 final, p. 13, p. 18, p. 19.

high level protection to the citizens. Directive 38/2004/EC gives the EU citizens the right to enter and reside freely in the host Member State under the same conditions as the nationals of that State. It offers same right to their family members with third country nationality. Introducing grounds for non-execution of EU instruments based on nationality or relate the grounds to residence is thus in breach with the EU law.

The CJEU case law is very much relevant to this point as the CJEU helps us to understand the directions EU law is being developed by the Court over the years of practical application of mutual recognition instruments.⁹⁸ The fact that only now the transition period ceased for the Court to have full jurisdiction in all issues under AFSJ, has not stopped the Court to practice in the field for years through the preliminary ruling procedure. There has been critics that the development of EU criminal matters have been unfairly carried out by the CJEU in its case law, as the only possible way would be through national parliaments and European Parliament, which are the only democratic and elected bodies within the EU.⁹⁹ While it is true that those “elected bodies” have hardly played any role in development of the EU criminal justice field due to pre-Lisbon decision making procedure (and lack of EU competence in the field) that did not give European Parliament any say in it, the procedure of preliminary rulings is not an initiative of the CJEU but that of EU legislator despite AFSJ falling partly under the former third pillar before the adoption of the Lisbon Treaty. Namely, the aim of the preliminary ruling procedure was and is to guarantee that EU law is applied in a uniform manner and that national legislation is interpreted in conformity with the EU law, including with the Framework Decisions.¹⁰⁰ Both the national authorities, and in particular the national courts, must interpret national law in conformity with the EU law.¹⁰¹

⁹⁸ M. Ventrella, p. 292

⁹⁹ M. Ventrella, p. 292.

¹⁰⁰ M. J. Borgers. Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters. – *European Journal of Crime, Criminal Law and Criminal Justice* 18, 2010, p. 99–114, p. 104.

¹⁰¹ ECJ 16.06.2005, C-105/03 *Pupino*, para. 33-34.

2.2. European Arrest Warrant in national legislation and in national case law

2.2.1. Main features of the EAW instrument

The Framework Decision on EAW¹⁰² is the first instrument within the AFSJ to apply the principle of mutual recognition. It is the only Framework Decision that has been fully implemented by all 28 Member States.¹⁰³ Framework Decision on EAW is by far most successful measure EAW decision, both in terms of implementation as in terms of frequent application by the practitioners. Its success in the early years of its application is probably related to the EU's reaction to the so-called 9/11 events and is a sign of EU's fight against terrorism.¹⁰⁴

The foundation of the EAW is just like for other mutual recognition instruments that of regulatory approach, rather than harmonisation, as provided for in the primary law in Article 82 TEU. The procedure of surrender replaces extradition. Again, as other mutual recognition instruments, Article 2(2) of the Framework Decision on EAW provides for a list of offences where the verification of double criminality is not allowed.

An EAW can only be issued for the purposes of conducting a criminal prosecution (not merely an investigation), or executing a custodial sentence or detention order.¹⁰⁵ It may only be issued for offences punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum penalty of 12 months or more in prison.¹⁰⁶ Where sentence has already been passed or a detention order has been made, an EAW can only be issued if the punishment to be enforced is at least four months.¹⁰⁷

EAWs do need not be transmitted to any particular Member State as opposed to transmission under "traditional" extradition regime, although it may be done if the location of the person sought and thus the executing judicial authority is known.¹⁰⁸ The purpose of the Framework Decision is that EAWs are recognised by All Member states once an alert for the requested person is issued in the Schengen Information System (SIS).¹⁰⁹ In addition to inserting an alert to SIS, the issuing judicial authority may seek assistance of the

¹⁰² 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, 18.07.2002, pp. 1–20.

¹⁰³ European Judicial Network 2014.

¹⁰⁴ L. Marin, p. 332.

¹⁰⁵ Article 1(1) of Framework Decision 2002/584/JHA.

¹⁰⁶ Article 2(1) of Framework Decision 2002/584/JHA.

¹⁰⁷ Article 2(1) of Framework Decision 2002/584/JHA.

¹⁰⁸ Article 9(1) of Framework Decision 2002/584/JHA.

¹⁰⁹ Article 9(2) of Framework Decision 2002/584/JHA.

European Judicial Network¹¹⁰, or use services of Interpol.¹¹¹ When a person who is the subject of an EAW is found within the jurisdiction of an executing judicial authority, this authority will execute the warrant or, if it is not the competent authority, it shall automatically forward the European arrest warrant to the competent authority in its Member State and shall inform the issuing judicial authority accordingly.¹¹²

With regard to the grounds for refusal for non-execution of the EAW, there are two important provisions. Article 3 sets the grounds for mandatory non-execution, and Article 4 sets the grounds for optional non-execution of the warrant.

The controversial nationality/residence clause is provided for in Article 4(6), making it thus an optional ground for refusal to execute a warrant on the basis of nationality/residence: *“If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law”*. It has to be noted that not only Article 4 of the Framework Decision on EAW sets out optional grounds for non-execution, but that the nationality/residence ground provided for in Article 4(6) applies only to those warrants that have been issued for the purposes of execution of a custodial sentence or detention order and only on the condition that the executing Member State undertakes itself to execute the sentence or detention order in accordance with its domestic law.

Secondly, additional requirement, such as requesting return guarantee when a person in request is a national or resident of the executing Member State, is provided for under Article 5(3) of the Framework Decision – again as an option – but it has to be noted that the Framework Decision states explicitly that this may be given for the purposes of prosecution solely: *“Where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State”*.

¹¹⁰ Article 10(2) of Framework Decision 2002/584/JHA.

¹¹¹ Article 10 (3) of Framework Decision 2002/584/JHA.

¹¹² Article 10(6) of Framework Decision 2002/584/JHA.

Thus, as oppose to the former extradition system, where a “nationality clause” has always been part of the legal instruments, here the nationality clause is no longer under the mandatory grounds for non-execution. This was at the time a remarkable change. After the EAW system was introduced, many Member States continued to refuse from surrendering nationals automatically, often times based on domestic constitutional rules.¹¹³ Over time, difference from the “old” system as it triggered constitutional debates in several Member States.¹¹⁴ Before the EAW Framework Decision was adopted in 2002, 11 of the “old” 15 Member States, namely Austria and Belgium¹¹⁵, Denmark, Finland and Sweden¹¹⁶, as well as France, Germany, Greece, Luxembourg and Portugal¹¹⁷ had national rules in place according to which the extradition of own nationals was not allowed. Denmark, Finland and Sweden did allow the extradition even of the nationals of other Nordic countries elsewhere.¹¹⁸ Some of the “new Member States” joining the EU between 2004 and 2007 namely Bulgaria, Cyprus, the Czech Republic, Latvia, Lithuania, Poland, and Slovenia initially had similar rules in place.¹¹⁹

The wording of Article 4(6) of the EAW Framework Decision makes it very clear that “nationality” and “residence” both have the same force of giving rise for optional non-execution. In addition, “staying” (in the host Member State) is listed together with the latter two; whereas the Framework Decision does not provide for further explanation what is considered a “stay”. This means the EAW Framework Decision nevertheless does put some emphasis on the nationality and residence. This might raise questions but it actually implies that rather than trying to offer different treatment for nationals of the executing Member State and therefore be in breach with the principle of non-discrimination based on nationality, the EU legislator had a focus on those people making use of their right of free movement within the EU. Namely, in drafting the text of the Framework Decision, the

¹¹³ S. Miettinen, p. 188.

¹¹⁴ T. Vander Beken, B. De Ruyver, N. Siron. The organisation of the fight against corruption in the member states and candidate countries of the EU. Antwerpen: Maklu Uitgevers nv 2001, p. 47.

¹¹⁵ T. Vander Beken, B. De Ruyver, N. Siron, p. 65.

¹¹⁶ G. Mathisen. Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond. – Nordic Journal of International Law 1 at 10. 79, 2010, pp. 1-33, p. 17.

¹¹⁷ Council of Europe: List of declarations made with respect to treaty No. 024: European Convention on Extradition. These countries made an absolute reservation under the European Convention on Extradition refusing the extradition of its nationals. –

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&CM=8&NT=024&VL=1> (01.02.2015).

¹¹⁸ G. Mathisen, p. 17.

¹¹⁹ Council of Europe: List of declarations made with respect to treaty No. 024. These countries made an absolute reservation under the European Convention on Extradition refusing the extradition of its nationals.

legislator probably took into account the right to reside freely within the EU and consequently the fact that there are EU nationals that might have been brought up and still reside in a Member State other than that of their nationality.¹²⁰

It has to be mentioned there is a link between Article 4(6) of the EAW decision with the Article 25 of the Council Framework Decision 2008/909/JHA on transfer of prisoners.¹²¹ Article 25 of the latter in conjunction with Article 4(6) and 5(3) of the EAW allows a Member State to refuse to surrender a person under an EAW or to surrender only under the condition that the person has to be returned to that Member State where the requested person is a national, a resident or is staying in that Member State if that Member State undertakes to enforce the prison sentence in accordance with the Framework Decision on Transfer of Prisoners. This is yet another provision that several Member States did not implement in their national legislation when transposing the Transfer of Prisoners or provide for this possibility when the surrender request relates to its own nationals or reserved a right to make an assessment if the custodial sentence imposed corresponds to the sentence which would have been imposed in that Member State.¹²² As a result, there is a mismatch in practical application of the two decisions, which however, does not pose a problem to Member States as long as they have not transposed properly Article 4(6) of the EAW Framework Decision.

2.2.2. EU Member States' legislation transposing nationality/residence clause

A look at the transposition of the Article 4(6) of the EAW Framework Decision into national law by EU Member States in the following subparagraph reveals the mismatches and differences on the level of transposition of the EU legislation. What we can observe is that the Member States make a wide use of the optional non-execution provision with regard to the execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State. (The list

¹²⁰ L. Marin, p. 344.

¹²¹ Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners). – OJ L 327, 5.12.2008, p. 27,

¹²² Report from the Commission to the European Parliament and the Council, on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. Brussels, 5.2.2014, COM (2014) 57 final, p 10.

of the titles of the Member States' implementing legislation of the Framework Decision on EAW is provided for in Annex 1.). Both national legislation as well as domestic constitutional and higher courts play a role here. Secondly, what is curious is that more than often an optional ground has become a mandatory ground for non-execution in domestic laws of Member States. Finally, we can note that sometimes only nationals are protected whereas the national law does not benefit residents.

Below the national legislation of EU Member States transposing Article 4(6) of the Framework Decision on the EAW is examined. Instead of analysing the legislation Member State by Member State, the countries have been grouped into eight groups based on shared features of the manner EU law was transposed:

- Group 1: optional ground for refusal provided for both nationals and residents;
- Group 2: mandatory ground for refusal provided for both nationals and residents;
- Group 3: optional ground for refusal provided for nationals and for those residents that fulfil certain conditions provided in national legislation;
- Group 4: mandatory ground for refusal provided for own nationals; optional ground for refusal provided for residents;
- Group 5: mandatory ground for refusal provided for own nationals only;
- Group 6: mandatory/optional ground for refusal provided for own nationals residing in that Member State
- Group 7: grounds for refusal based on nationality/residence not provided for in the legislation;
- Group 8: optional ground for refusal provided for both nationals, residents and those "staying" that Member State, in accordance with Article 4(6) of the Framework Decision.

Altogether there are five (5) Member States in Group 1, one (1) Member State in Group 2, five (5) Member States in Group 3, four (4) Member States in Group 4, seven (7) Member States in Group 5, two (2) Member States in Group 6, three (3) Member States in Group 7, and one (1) Member States in Group 8.

2.2.2.1. Group 1

With regard to Article 4(6) of the Framework Decision the Member States I have put under Group 1, have made residents of their Member State equal to nationals – they have introduced an optional ground for refusal that is applicable likewise to nationals and

residents. Such phrasing, no reference is made to “staying” (as stated in the Framework Decision), however.

Article 6 point 4 of the law of Belgian legislation implementing the EAW states that execution can be refused if the EAW was issued for the execution of a sentence or detention order, when the person concerned is Belgian or residing in Belgium and the competent Belgian authorities undertake to execute this sentence or detention order in compliance with Belgian law.¹²³ Belgium law prohibits to surrender a person if there are serious reasons to believe that the execution of the EAW would have the effect of jeopardizing the fundamental rights of the person concerned, as they are enshrined in Article 6 of the Treaty on the European Union, despite this is not in line with the Framework Decision.¹²⁴

Germany has transposed the Framework Decision on EAW into the German legal system by Paragraphs 78 to 83k of the Law on international mutual legal assistance in criminal matters (“the IRG”) where the old terminology of extradition system has been kept – instead of a “surrender” within the meaning of the Framework Decision being described as an “extradition”.¹²⁵ In addition to German nationals, the extradition of a foreign national whose habitual residence is in Germany may also be refused, if in the case of extradition for the purpose of execution of sentence, he does not consent to such extradition after being informed of his rights and if he has an interest in execution of the sentence in Germany that deserves protection and predominates.¹²⁶ The German law does not make a difference between a “resident” and a “stayer”, instead it has been given to the judge the task to interpret it in the following paragraph 79(2) of the IRG: the body competent to grant or refuse the request (General Prosecutor’s Offices) shall indicate whether it intends to raise any grounds of non-execution, whereas reasons shall be given when a decision is made not to raise any such ground.

¹²³ Article 6 (4) of Belgian legislation implementing the European Arrest Warrant. Unofficial Translation. 22.12.2003, *Moniteur belge* (2nd edit.). –

http://www.law.uj.edu.pl/~kpk/eaw/legislation/Belgium_National_legislation_EAW.pdf (30.03.2015).

¹²⁴ Article 4 (5) of Belgian legislation implementing the European Arrest Warrant.

¹²⁵ Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz – EuHbG. BGBl. 2006 I, p. 1721. –

http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/euhaftb/bgbl106s1721.pdf (30.03.2015).

¹²⁶ Article 83b (2) (b) of the IRG.

Italy is one of those Member States that have provided for different grounds for refusal in its national legislation as oppose to the FD.¹²⁷ Article 18 of the law transposing EAW Framework Decision provides for a long list of grounds of refusals that are not foreseen in the Framework Decision itself.¹²⁸ With regard to nationality/ residence clause, a return guarantee is requested from the issuing Member State if the person subject to the EAW for the purpose of prosecution and is a citizen or resident of the Italian State.¹²⁹ The same paragraph requires also a return guarantee to serve the sentence or for any other measure involving deprivation of liberty.¹³⁰

In Poland, the EAW issued for the purpose of execution of the penalty of deprivation of liberty or other measure involving deprivation of liberty against the person being a Polish citizen, or enjoying asylum in the Republic of Poland, shall not be executed, unless such a person consents for surrender; also, execution of the EAW issued for the same purpose may be refused if a person concerned is domiciled or resident in the Republic of Poland.¹³¹ When the court refuses surrender of a person on grounds described above, it shall decide on the execution of the penalty or measure imposed by a judicial authority of the State that issue the European Warrant.¹³²

In Portugal, the execution of an EAW may be refused if the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in the national territory, has the Portuguese nationality or lives in Portugal and the Portuguese State undertakes to execute the sentence or detention order in accordance with the Portuguese law.¹³³ Where the requested person for the purposes of prosecution is a national of the executing Member State or is ordinarily resident there, surrender may be subject to the condition that the requested person, after being heard, is

¹²⁷ B. de Sousa Santos (edit.). The European Arrest Warrant in Law and in Practice: a comparative study for the consolidation of the European law-enforcement area. *Sine loco*: European Commission, 2010. – http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf (01.02.2015), p. 241.

¹²⁸ Law No 69 of 22 April 2005. Legge 22 aprile 2005, n.69. Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri. Gazzetta Ufficiale No 98, 29.04.2005. – <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2005:69> (02.04.2015).

¹²⁹ Article 20 of Law No 69 of 22 April 2005.

¹³⁰ Article 20 (c) of Law No 69 of 22 April 2005.

¹³¹ Article 607s § 1-2 of Code of Criminal Procedure Chapters 65a and 65b amended on 5 November 2009. – <http://www.legislationline.org/documents/section/criminal-codes/country/10> (02.04.2015).

¹³² Art. 607s § 3 of Law no. 65/2003 of 23 August 2003.

¹³³ Article 12(1)(g) of Law no. 65/2003 of 23 August 2003 approving the legal regime of the European arrest warrant (giving effect to the council framework decision no. 2002/584/JHA of 13 June. - Penal code, amended September 2007. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Portugal_National_legislation_EAW.pdf (02.04.2015).

returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him/her in the issuing Member State.¹³⁴

2.2.2.2. *Group 2*

Member States in this group have similarly to Member States in Group 1, made residents of their Member State equal to nationals. As oppose to Group 1, in this group refusal based on the ground of nationality/residence is mandatory.

In Slovak Republic, the law stipulates conditions for refusal to execute an EAW stating that when the requested person is a national of the Slovak Republic shall be used as the ground for refusing execution of an EAW; also, stating that analogical procedure shall apply in relation to the requested person which, under the international law, is entitled to equal treatment as a national of the Slovak Republic.¹³⁵ We can further ask how is defined the category of people “entitled to equal treatment “ that the law is referring to and whether it applies to those “staying” in Slovak Republic.

2.2.2.3. *Group 3*

The Member States in this group have similar national legislation in place as those in group 1, providing for optional ground for refusal. However, the difference is that only those residents enjoying “permanent residence” in that Member States are beneficiaries of the legislation, leaving out EU citizens and third country nationals who have not gained this status by having legally and continuously resided for a period of five years within the territory of that EU Member State. Again, no reference is made to those “staying” in each particular Member State.

Bulgarian law stipulates as a ground of which the execution of an EAW may be refused if the requested person lives or is a permanent resident of the Republic of Bulgaria or is a Bulgarian national and the Republic of Bulgaria accepts to enforce, in accordance with Bulgarian legislation, the punishment of deprivation of liberty or the detention order imposed by the court of the issuing Member State.¹³⁶ In addition, the next provision under the same law asks for return guarantee: where an EAW has been issued for the purposes of

¹³⁴ Article 13(c) of Law no. 65/2003 of 23 August 2003.

¹³⁵ Section 14 (4) of Act no 154/2010. Coll. of 09/03/2010 on the European Arrest Warrant. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Slovakia_National_legislation_EAW.pdf (02.04.2015).

¹³⁶ Article 40 (4) of Law on Extradition and European Arrest Warrant /LEEAW SG 46/3 as amended by SG 25/6 June 2008. – http://www.unodc.org/res/cld/document/bgr/2005/extradition_and_european_arrest_warrant_act_html/Bulgaria_Law_on_Extradition_and_European_Arrest_Warrant_2005.pdf (02.04.2015).

prosecuting a Bulgarian national or a person with a permanent residence in the Republic of Bulgaria, he or she shall be surrendered subject to the condition that, after being heard in the issuing Member State, he or she shall be returned to the Republic of Bulgaria in order to serve the custodial sentence or detention order passed against him/her in the issuing Member State.¹³⁷

In Denmark, when a Danish national or a person permanently residing in Denmark is surrendered for prosecution, it may be made a condition of surrendering that the person will be transferred to Denmark to serve any prison sentence or other period of detention; in addition, a request for the surrender of a Danish national or a person who is permanently residing in Denmark for execution of a judgment can be refused if the punishment can instead be served in Denmark.¹³⁸

In Lithuania, a citizen of the Republic of Lithuania or a foreigner shall be surrendered under the EAW only if it is issued for acts punishable in accordance to the law of the issuing Member state by a custodial sentence for a maximum period of at least one year or, where the EAW has been issued for execution of the already passed custodial sentence, the person shall be surrendered only if the duration of the sentence is at least four months.¹³⁹ Also, a fundamental rights clause has been introduced – a citizen of the Republic of Lithuania or a foreigner shall not be surrendered to the country issuing the EAW if the surrender of the person would be in breach of fundamental human rights and (or) liberties.¹⁴⁰ A person may not be surrendered to the country issuing EAW if the EAW is issued for the execution of a custodial sentence of a citizen of the Republic of Lithuania or permanent resident of the Republic of Lithuania and the Republic of Lithuania undertakes to execute the sentence.¹⁴¹

In the Netherlands, surrender of a Dutch person may be allowed where requested because of a criminal investigation against that person if, in the opinion of the executing judicial authority, it is guaranteed that, if he is given a non-suspended custodial sentence in the

¹³⁷ Article 41 (3) Law on Extradition and European Arrest Warrant.

¹³⁸ Articles 10(b) (1) and 10(b) (2) of Law No 833 of 25 August 2005 on Extradition (amended by Law No 538 of 08/06/2006 § 11; law No 542 of 08/06/2006 § § 6 and 7; Law No 394 of 30/04/2007 § 1; Law No 347 of 14/05/2008; Law No 99 of 10/02/2009 § 2; Law No 494 of 12/05/2010 § 2; Law No 271 of 04/04/2011 § 2; Law No 428 of 01/05/2013 § 3). – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Denmark_National_legislation_EAW.pdf (02.04.2015).

¹³⁹ Article 9/1 (2) of Criminal Code: (Zin., 2000, No. 89-2741) amended by Law No X-1236 of 28 June 2008. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Lithuania_National_legislation_EAW.pdf (02.04.2015).

¹⁴⁰ Article 9/1 (3) of Criminal Code.

¹⁴¹ Article 9/1 (3) of Criminal Code.

issuing Member State for acts for which surrender can be allowed, he will be able to serve that sentence in the Netherlands.¹⁴² Surrender of a Dutch person shall not be allowed if the person is requested for execution of a custodial sentence imposed upon him by final judgment.¹⁴³ These provisions also apply to an alien with a residence permit for an indefinite time, where he can be prosecuted in the Netherlands for the acts underlying the EAW and provided he is expected not to forfeit his right of residence in the Netherlands as a result of a sentence or order imposed upon him after surrender.¹⁴⁴

In Slovenia, the surrender of a requested person shall be refused if criminal proceedings are taking place against a requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued and that criminal offence was committed against the Republic of Slovenia or against a citizen of the Republic of Slovenia but no insurance has been given for enforcement of the pecuniary claim of the victim.¹⁴⁵ The surrender of a requested person may be refused if the warrant has been issued for the execution of a custodial sentence and the requested person is a citizen of the Republic of Slovenia or of a member state of the European Union residing on the territory of the Republic of Slovenia, or a foreign person with a permit for permanent residence in the Republic of Slovenia, if the requested person so wishes and provided the domestic court undertakes to execute the judgement of the court of the issuing member state in accordance with domestic law.¹⁴⁶

2.2.2.4. *Group 4*

The Member States in this group have introduced a mandatory ground for refusal of execution of an EAW into their national legislation for their own nationals. Nevertheless they offer certain protection also to residents as an optional ground for refusal has been added for people residing in their Member State. In some of those Member States the latter

¹⁴² Article 6 (1) of Act of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (the Surrender Act). – <http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/Dutch%20Surrender%20Act.pdf> (02.04.2015).

¹⁴³ Article 6 (2) of the Surrender Act.

¹⁴⁴ Article 6 (5) of the Surrender Act.

¹⁴⁵ Article 12 (c) of European Arrest Warrant and surrender procedures between Member States Act (ZENPP). No.: 212-05/04-32/1, 26.03.2004. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Slovenia_National_legislation_EAW.pdf (02.04.2015).

¹⁴⁶ Article 13 (c) of European Arrest Warrant and surrender procedures between Member States Act.

only applies to permanent residents or the period of minimum residence in order to have the provision applicable has been specified otherwise.

In Greece, the judicial authority deciding on the execution of an EAW shall refuse to execute the EAW if the person against whom the EAW has been issued for the purposes of execution of a custodial sentence or a detention order is a Greek national and Greece undertakes to execute the sentence or the detention order in accordance with its penal law¹⁴⁷. Also, the execution will be refused if the person, against whom the EAW has been issued for the purpose of prosecution is a Greek national and is being prosecuted in Greece for the same act. If such person is not being prosecuted, the EAW shall be executed if it is ensured that, after being heard, he or she is returned to the Greek State, in order to serve there the custodial sentence or the detention order passed against him/her in the issuing Member State.¹⁴⁸

With regard to residents, however, refusal of execution is also foreseen, as an optional ground: the execution of an EAW may be prohibited if the EAW has been issued for the purpose of execution of a custodial sentence or a detention order, where the requested person is domiciled or resides in Greece and Greece undertakes the obligation to execute the custodial sentence or the detention order according to its penal laws.¹⁴⁹ The Law further allows for a possibility, where the person, who is the subject of an EAW for the purposes of prosecution is domiciled in Greece, the execution of the EAW by the competent judicial authority may be subject to the condition that the requested person, after being heard, is returned to the Greek State, in order to serve there the custodial sentence or detention order passed against him/her in the issuing Member State.¹⁵⁰

In Cyprus, the executing judicial authority shall refuse to execute the EAW where the person who is the subject of the EAW, in view of the execution of custodial sentence or detention order, is a national and the Republic of Cyprus undertakes the obligation to execute the sentence or detention order according to its criminal laws.¹⁵¹ Where a person

¹⁴⁷ Article 11 (f) of Law 3251/2004 on European arrest warrant, amendment to Law 2928/2001 on criminal organisations and other provisions. Official Gazette FEK A-127, 9.07.2004. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Greece_National_legislation_EAW.pdf (02.04.2015).

¹⁴⁸ Article 11 (h) of Law 3251/2004.

¹⁴⁹ Article 12 (e) of Law 3251/2004.

¹⁵⁰ Article 13(3) of Law 3251/2004.

¹⁵¹ Article 13 (e) of Law No 133(I) of 2004 to provide for the European Arrest Warrant and the surrender procedures of requested persons between Member States of the European Union of 2004. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Cyprus_National_legislation_EAW.pdf (02.04.2015).

who is the subject of an EAW for the purpose of prosecution is a resident of the Republic of Cyprus, the execution of the EAW by the competent judicial authority may be subject to the condition that the requested person, after being heard, is returned to the Republic of Cyprus in order to serve there the custodial order or detention order passed against him in the issuing State of the warrant.¹⁵²

In Sweden, surrender for a specific act will not be granted if sanction for the act is statute-barred, or the sanction can no longer be imposed under Swedish law and the act took place wholly or partially in Sweden, or the requested person is a Swedish national.¹⁵³ When the person whose surrender is requested for execution of a custodial sentence or detention order is a Swedish national, surrender will not be granted if the person concerned demands that the sanction be enforced in Sweden. If, at the time of the act, the requested person has been permanently residing in the issuing Member State for at least two years, the provisions of the first paragraph applies only if, with respect to his or her personal circumstances or for any other reason, there are particular reasons why the enforcement should take place in Sweden.¹⁵⁴ Surrender may not be granted if it would contravene the European Convention for the Protection of Human Rights and Fundamental Freedoms, or the supplementary Protocols to the Convention applying as law in Sweden.¹⁵⁵

In Finland, a relevant ground for mandatory refusal of execution of EAW is that the request refers to the enforcement of a custodial sentence and the requested person is a citizen of Finland and requests that he or she may serve the custodial sentence in Finland; the custodial sentence shall be enforced in Finland as separately provided.¹⁵⁶ A ground for optional refusal is foreseen when the request pertains to the enforcement of a custodial sentence, the requested person has his or her permanent residence in Finland and requests that he or she may serve the custodial sentence in Finland and on the basis of his or her personal circumstances or another special reason it is justified that he or she serves the

¹⁵² Article 15 (3) of Law No 133(I).

¹⁵³ Section 5(6) of Act 2003:1156 on surrender from Sweden according to the European arrest warrant as amended by Act 2006:348 - Ordinance 2003:1179 on surrender from Sweden according to the European arrest warrant - Ordinance 2003:1178 on surrender to Sweden according to the European arrest warrant. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Sweden_National_legislation_EAW.pdf (02.04.2015).

¹⁵⁴ Section 6 of Act 2003:1156.

¹⁵⁵ Section 4(2) of Act 2003:1156.

¹⁵⁶ Section 5 (1)(4) of Law 2003/1286 of 30.12.2003. Last amendment 824/2014 of 01.12.2014. – <http://www.finlex.fi/fi/laki/ajantasa/2003/20031286?search%5Btype%5D=pika&search%5Bpika%5D=2003%2F1286> (02.04.2015).

custodial sentence in Finland; the custodial sentence is to be enforced in Finland in accordance with what is separately enacted on this.¹⁵⁷

2.2.2.5. *Group 5*

The Member States in this group have an optional or mandatory ground for refusal in place – for the surrender of their own nationals only.

In Czech Republic, only nationals are explicitly mentioned. The law has been amended, stating that a national of the Czech Republic may be surrendered to another Member State of the European Union only on the basis of an EAW.¹⁵⁸ The law does not provide for a requirement for return guarantees and neither there is reference to residents.

In Estonia, amendments to the Division 8 of Chapter 19 of the Estonian Criminal Procedure Code, adopted by Estonian Parliament (Riigikogu) on April 16, 2008 coming into force from May 23, 2008 adopted by Riigikogu on 28 June 2004 provide for that if an arrest warrant has been issued with regard to an Estonian citizen for the execution of imprisonment and the person applies for enforcement of the punishment in Estonia, surrender of the person is not permitted.¹⁵⁹ In addition, however, paragraph 492 (3) of the Criminal Procedure Code states that Estonia surrenders its citizens residing in Estonia on the basis of an EAW for conducting criminal proceedings provided that the punishment imposed on a person in a Member State is enforced in the Republic of Estonia.¹⁶⁰

In Spain, the law only concerns the nationals. The Spanish executing judicial authority may refuse to execute the European warrant in if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is of Spanish nationality, save when he consents to service in the issuing State. Otherwise, the requested person must serve the sentence in Spain.¹⁶¹ Likewise, where a person who is the

¹⁵⁷ Section 6 (1)(6) of Law 2003/1286.

¹⁵⁸ Article 21(2) of the Act of 20 March 2013 on International Judicial Cooperation in Criminal Matters amending Act No 140/1961, the Criminal Code, as subsequently amended, and Act No 119/2002 on firearms and ammunition and amending Act No 156/2000 on the certification of firearms, ammunition and pyrotechnic items and amending Act No 288/1995 on firearms and ammunition, as amended by Act No 13/1998, and Act No 368/1992 on administrative charges, as subsequently amended, and Act No 455/1991 on trading (the Trading Act), as subsequently amended, as subsequently amended. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Czech_Republic_National_legislation_EAW.pdf. (15.03.2015).

¹⁵⁹ § 492 (1) (4) of Estonian Criminal Procedure Code. – RT I 2004, 54, 387 ... RT I, 19.03.2015, 1.

¹⁶⁰ § 492 (3) of Estonian Criminal Procedure Code.

¹⁶¹ Article 12(2) (f) of Code of Criminal Procedure. Spanish Law 23/2014 of 20.11.2014 of mutual recognition of criminal decisions in the European Union, Spanish Official State Gazette No. 282, 21.11.2014, Sec. I. P. 95437. – <http://www.ejn->

subject of a European warrant for the purposes of prosecution is of Spanish nationality, surrender may be subject to the condition that the person, after being heard, is returned to Spain in order to serve the custodial sentence or detention order passed against him in the issuing State.¹⁶² When the EAW has been issued for the purpose of executing a sentence or measure involving deprivation being the requested person a Spanish citizen, unless it consents to fulfil the same in the issuing State, otherwise, the sentence must be served in Spain.¹⁶³

In France, article 695-24 of the French Code of Criminal Procedure states that the execution of an EAW may be refused if the person requested for the purposes of executing a custodial sentence or a measure involving deprivation of liberty is of French nationality and the competent French authorities undertake to execute that sentence or measure.¹⁶⁴

In Latvia, if a foreign European arrest decision was made as a Latvian citizen, then surrender takes place on the condition that the person after conviction is handed over to Latvia to serve the sentence according to domestic legislation.¹⁶⁵ Surrender shall not be granted if issuing a Latvian citizen of a European Union Member State the sentence imposed execution.¹⁶⁶

In Austria, the execution of an EAW issued against an Austrian citizen by an Austrian judicial authority shall be only in accordance with the following the provisions provided for in national legislation.¹⁶⁷ The execution of an EAW against an Austrian Nationals for offenses that fall under the scope of the Austrian penal laws, is not permitted.¹⁶⁸ The execution of an EAW against an Austrian Citizen is not permitted if the person has not

crimjust.europa.eu/ejnupload/InfoAbout/Ley%20Reconocimiento%20Mutuo%20Resoluciones%20Judiciales%20Penales%20EN.pdf (15.03.2015).

¹⁶² Article 11(2) of Spanish Law 23/2014 of 20.11.2014.

¹⁶³ Article 48 (2) (b) Spanish Law 23/2014 of 20.11.2014.

¹⁶⁴ LOI n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité; J.O n° 59 du 10 mars 2004 page 4567. – <http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=889> (15.03.2015).

¹⁶⁵ Par 506/1 of Criminal Procedure Law (the CPL). 21.04.2005 (amended 29.07.2008; 09.07.2009 and 21.10.2010 2010). – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Latvia_National_legislation_EAW.pdf (15.03.2015).

¹⁶⁶ Par 506/4 of CPL.

¹⁶⁷ § 5. (1) of Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG). National Council: GP XXII RV 370 AB 439, page 56. Federal Council: 7002 AB 7033, page 707. Original version: Federal Law Gazette I No. 36/2004 as amended by the following laws: Federal Law Gazette I No. 164/2004; Federal Law Gazette I No. 38/2007; Federal Law Gazette I No. 112/2007; Federal Law Gazette I No. 134/2011; Federal Law Gazette; Federal law Gazette I No 175/2013. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Austria_National_legislation_EAW.pdf (02.04.2015).

¹⁶⁸ § 5. (2) of EU-JZG.

committed any offenses within the territory of the issuing State, and under Austrian law outside the Federal territory committed acts of the same kind not subject to the scope of the Austrian penal laws.¹⁶⁹

In Romania, the executing Romanian judicial authority may refuse to execute an EAW where an EAW has been issued in view of executing a penalty, if the requested person is a Romanian citizen and the competent Romanian court ordains execution of the penalty in Romania, according to Romanian law.¹⁷⁰

2.2.2.6. Group 6

Member States in this group interpret Article 4(6) very strictly. The nationality/residence ground for non-execution is only applicable for own nationals who at the same time reside in that Member State.

In Hungary, if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is a national residing in the Republic of Hungary, the executing judicial authority must refuse to execute the EAW, and undertake to execute the sentence or detention order in accordance with the Hungarian law.¹⁷¹ However, where a person who is subject of an EAW for the purposes of prosecution is a national residing in the Republic of Hungary, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate that where a sentence has been passed or a detention order has been made, the person, at his request, after being heard, is returned to the territory of the Republic of Hungary in order to serve there the custodial sentence or detention order passed against him.¹⁷² Thus, with regard to an EAW issued for the execution of a custodial sentence or detention order, the ground for refusal of execution is mandatory; with regard to an EAW for the prosecution, non-execution is optional.

In Croatia, the regulation is similar. If an EAW has been issued for the purpose of prosecution and the requested person is a national of the Republic of Croatia residing in

¹⁶⁹ § 5. (3) of EU-JZG.

¹⁷⁰ Article 88 (2) (c1) of Law No 302/2004 on international judicial cooperation in criminal matters (*Legea nr. 302/2004 privind cooperarea judiciară internațională în materie penală, Monitorul Oficial al României*). Part I, No 377 of 31 May 2011; ‘Law No 302/2004’. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Romania_National_legislation_EAW.pdf (02.04.2015).

¹⁷¹ Section 5 (1) of Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30.11.2012. HU Official Journal/Magyar Közlöny, No 160/2012, p. 26718. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Hungary_National_legislation_EAW.pdf (02.04.2015).

¹⁷² Section 5 (2) of Act No CLXXX of 2012.

the Republic of Croatia, surrender of nationals is optional and depending on the return guarantee.¹⁷³ If the EAW has been issued for the purpose of execution of a custodial sentence or a measure including deprivation of liberty, where the requested person is a Croatian national residing in the Republic of Croatia who consented to serve the sentence in the Republic of Croatia, the court shall refuse the execution of the EAW.¹⁷⁴

2.2.2.7. *Group 7*

Member States in this group have no reference to the nationality/residence clause in their legislation. The Member States in this group are Common Law countries such as United Kingdom but also Luxembourg and Malta. Due to historical and other ties to what today is Commonwealth and the United Kingdom, several principles from the past has been kept in the Maltese judicial system; it Maltese judicial system is a mixture of British Common Law and European Civil Law.¹⁷⁵ The Common Law countries according to the case law are guided by the State's sovereign right to judge their citizens and protecting them from jurisdiction of another State.¹⁷⁶ Just like in Malta¹⁷⁷, also in United Kingdom there is no specific provision in the relevant legislation; it is rather decided by case law on case-by-case basis.¹⁷⁸

In Luxembourg, relevant provisions in Luxembourgish law do not introduce the nationality/residence clause under grounds for refusal of execution of an EAW.¹⁷⁹

¹⁷³ Article 22a(1) of Act on Judicial Cooperation in Criminal Matters with Member States of the European Union of 14.07.2010 as amended by the act on the Amendments to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 28.06.2013 and coming into force on 1.07.2013 as amended by the act on the Amendment to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 10.10. 2013.

¹⁷⁴ Article 22a(2) of Act on Judicial Cooperation in Criminal Matters with Member States of the European Union of 14.07.2010.

¹⁷⁵ I. Sammut. The EU and Maltese legal orders: what kind of marriage between them? Malta in the European Union 2004 – 2009. The Report. Malta in the European Union: Five Years on and Looking to the Future. Civil Society Project Conference: 2009, pp. 97-112, p. 97.

¹⁷⁶ M. Fichera. The implementation of the European Arrest Warrant in the European Union: law, policy and practice. Cambridge: Intersentia 2011, p. 129.

¹⁷⁷ Extradition (Designated Foreign Countries) Order of 7.06.2004, S.L. 276.05 (Extradition Act-Cap.276). – <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9718&l=1> (02.04.2015).

¹⁷⁸ The Extradition Act 2003 as amended by the Police and Justice Act 2006. No. 992 2015. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/United_Kingdom_National_legislation_EAW.pdf (02.04.2015).

¹⁷⁹ Law of 17 March 2004 on the European arrest warrant and surrender procedures between Member States of the European Union as amended by Law of 3 August 2011. Publication Mem. A n° 39 od 22.03.2004. – <http://eli.legilux.public.lu/eli/etat/leg/loi/2004/03/17/n1> (15.03.2015).

2.2.2.8. *Group 8*

In Ireland, Article 4 (6) of EAW act 2003 has quite literally copied the Framework Decision in terms of nationality/residence clause, making Ireland the only Member State that has transposed the Framework Decision literally, word by word. Just like Member States in Group 1, Ireland has made residents of their Member State equal to nationals – optional ground for refusal that is applicable likewise to nationals and residents. Unlike Member States in Group 1, reference is made also to those “staying” in Ireland (as stated in the Framework Decision).

According to the provision in national law, the executing judicial authority may refuse to execute the EAW if the EAW has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.¹⁸⁰ Article 5(3) gives the judicial authority an opportunity (but does not set it as mandatory requirement) to ask for a return guarantee: where a person who is the subject of an EAW for the purposes of prosecution is a national or resident, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.¹⁸¹

2.2.3. Approach of national courts

Despite certain triumph of the EAW instrument in the field of criminal justice, the system is far from perfect. Or to put it in the other way round, the EAW is so perfect that it is said to be a victim of its own success.¹⁸² Such claims relate to the wide use of the instrument, which sometimes ends up with disproportional use of it for minor crimes, which triggers debates among experts whether issuing a warrant for the chicken or bicycle thefts is proportional and whether issuing a disproportional warrant is in breach with the

¹⁸⁰ Article 4(6) of European arrest warrant Act 2003 as amended by the Criminal Justice (Terrorist Offences) Act 2005, the Criminal Justice (Miscellaneous Provisions) Act 2009 and the European arrest warrant (application to third countries and amendment) Act 2012. –

http://www.law.uj.edu.pl/~kpk/eaw/legislation/Ireland_National_legislation_EAW.pdf (15.03.2015).

¹⁸¹ Article 5(3) of European arrest warrant Act 2003.

¹⁸² K. Weis. The European Arrest Warrant – a victim of its own success? – New Journal of European Criminal Law, Vol. 2, Issue 2, 2011, p.124.

fundamental rights.¹⁸³ I would argue that also in respect of nationality and residence issue the EAW system, or more precisely the application of this system, is yet to be improved. Despite the provisions related to optional and mandatory grounds for non-execution, having seen the national legislation Member States, the reality is different.

The disparity appears also in national case law. What we can often times observe is that if the request concerns a citizen on another Member States, who is not a resident of that Member States, the execution tends to be much smoother as oppose to those requests that concern own nationals in particular – also long-term residents from another Member State are being discriminated against in this context. Such discrimination is demonstrated by the fact that executing Member States tend to apply additional control with regard of the requests concerning own nationals or additional requirements are requested from the issuing Member State. Either the national courts thus follow the national legislation that has been transposed inappropriately or there is a political element involved in decision making.

In the early times of EAW, right after the introduction of the new instrument, the national courts seemed to be overwhelmed by the new procedure as seeing the case law dating from the beginning of the EAW, we see less reluctance among national courts in executing an EAW. There was certain enthusiasm for the automaticity of the procedure in the early practice of the EAW.¹⁸⁴ Therefore, initially, the grounds for refusal of execution were less often overstepped and national courts gave primacy to the mutual recognition.¹⁸⁵ However, since then, its practical application has become more and more controversial and the CJEU in its preliminary rulings have many times made the national courts to change their case law. The main source of dispute is about how to achieve an equilibrium between surrendering a suspect or an offender and the fundamental rights of this person. In the light of this thesis we only discuss the fundamental rights issue with regard to the nationality/residence clause. When does execution of surrender become a breach of the offender's fundamental rights considering his or her nationality/ residence? The system works against non-nationals who are residing in another Member State. Namely, as mentioned above, non-nationals are often automatically thought to be a "flight risk" and they are therefore

¹⁸³ L. Marin, p. 335; K. Weis, p. 125; M. Ventrella, p. 290.

¹⁸⁴ T. Ostropolski. The principle of proportionality under the European Arrest Warrant. – *New Journal of European Criminal Law*, Vol. 5, Issue 2, 2014, p.167-191, p. 175.

¹⁸⁵ T. Ostropolski, p. 176.

not released when the trial is pending.¹⁸⁶ It also works other way round – despite ties with the a host Member State, sometimes very strong ones, a suspect is being surrendered under EAW – for instance when national law protects only nationals but not residents – and he or she is then being detained waiting for a trial in an issuing Member State. This has been brought out also by the European Commission for instance with reference to detention, stating that EU citizens who are neither nationals nor residents in the Member State where they are suspects of committing a criminal offence “are quite often kept in pre-trial detention, mainly because of the lack of community ties and the risk of flight”.¹⁸⁷

A case of Mr Andrew Symeou is an example of this. Andrew Symeou was a 20-year-old student from UK extradited to Greece under an EAW in July 2009, charged for manslaughter.¹⁸⁸ He was accused of punching another young man in a nightclub during his holiday in Greece two years earlier, an episode which had resulted in victim to fall and to get a head injury leading to his death.¹⁸⁹ Mr Symeou claimed that he was not present in the situation, and he left to UK without knowing about the offence – Greek authorities did not even question him when he was still in Greece.¹⁹⁰ After his surrender, he first spent 11 months in prison in Greece together with convicted prisoners for rape and murder and in total he released for almost two years later in June 2011 when all charges against him were dropped by the Greek Court.¹⁹¹

The main reason for his detention was him being non-national and thus constituting a “flight risk”, despite he had no criminal record and that he had been organized by his father an apartment to stay in Greece for the time waiting for the trial. Also, he had met all the conditions of supervision back in UK.¹⁹²

Similarly, Mr Garry Mann, a fireman from the UK was arrested in Portugal during the European championship in 2004. Despite he claimed being innocent and not in the location of the riot that he was being accused for taking part of, he was tried and convicted for two

¹⁸⁶ E. Smith, p. 90.

¹⁸⁷ 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. Brussels, 11.4.2011. COM (2011) 175 final, p.7.

¹⁸⁸ Court of Appeal - Administrative Court, Patras, Greece, 01.05.2009, *Symeou v Public Prosecutors Office*, EWCH 897. – <http://high-court-justice.vlex.co.uk/vid/-58152839> (20.01.2015).

¹⁸⁹ M. Thunberg Schunke, p.1.

¹⁹⁰ M. Thunberg Schunke, 2013, p. 1.

¹⁹¹ Court of Appeal - Administrative Court, Patras, Greece, 01.05.2009, *Symeou v Public Prosecutors Office*, EWCH 897, para.65.

¹⁹² Court of Appeal - Administrative Court, Patras, Greece, 01.05.2009, *Symeou v Public Prosecutors Office*, EWCH 897 para.66.

years in prison under a temporary system set up to combat football hooliganism. Although in the case of Mr Mann, he was luckier than Mr Symeou, as he was initially released by the Portuguese authorities, an EAW was issued and he was returned to Portugal.¹⁹³

It has to be concluded that in the light of principle of equality and non-discrimination within the EU, there is no rational consideration why a Member State should be able to deny surrendering its national. On the contrary, allowing this, for instance, a national may use the Member State of his or her nationality as a “refuge”.¹⁹⁴ Countries have two different approaches, either they are guided by the territorial jurisdiction and by *aut dedere aut judicare* principle, extradite or prosecute principle, or by the principle of active personality according to which the State has jurisdiction over its citizens and thus they choose non-extradition of the nationals.¹⁹⁵ The Common Law countries for instance, as seen also above, are among those that traditionally are guided by the State’s sovereign right to judge their citizens and protecting them from jurisdiction of another State.¹⁹⁶ This perspective, however, seems very much political, as it raises the question of residents – why legally residing nationals of other Member States or legally residing third country nationals should be less protected? From different perspective, some countries that do not allow for surrendering of nationals are rather led by the individual rights, as a right not to be taken away from one territory.¹⁹⁷ Again in the framework of the EU and free movement, this does not seem justified as people get to choose their home just like they get to choose where to commit a crime. A pragmatic approach would tell that prosecuting a person in the country where the crime was committed is justified because the values of this particular society were violated.¹⁹⁸

It will be further looked at, how CJEU has treated the same issue.

¹⁹³ M. Tunberg Schunke, p. 1.

¹⁹⁴ M. Fichera, p. 128.

¹⁹⁵ M. Fichera, p. 128.

¹⁹⁶ M. Fichera, p. 129.

¹⁹⁷ M. Fichera, p. 130.

¹⁹⁸ M. Fichera, p. 130.

2.3. CJEU Case Law in relation to nationality/ residence clause

2.3.1. CJEU Case Law: examples

In *Lopes Da Silva Jorge*¹⁹⁹ the *Tribunal criminal de Lisboa* had sentenced “Mr Lopes Da Silva Jorge to five years’ imprisonment for the criminal offence of drug trafficking, committed between April 2002 and July 2002” and an EAW was issued.²⁰⁰ Mr Da Silva Jorge married to a French national in 2009 and resided in France until 2010 when he was summoned on telephone in relation to this case and he subsequently presented himself in French Police, when the Public Prosecutor of the Court of Appeal of Amiens had requested that Mr Da Silva Jorge be surrendered.²⁰¹ He asked the Court of Appeal of Amiens the not to execute the EAW and to have his sentence of imprisonment to be served in France; he argued based on the fundamental rights clause that “*his surrender to the Portuguese judicial authorities would be contrary to Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950*” and that “*it would disproportionately undermine his right to respect for private and family life, since he lives in France at the home of his wife, a French national, and he is employed in that Member State as a long-distance lorry driver under a contract of indefinite duration by a French company*”.²⁰²

The French court turned to the CJEU in preliminary proceedings, asking whether the French national law transposing Article 4(6) of the Framework Decision on EAW in a way that the execution of an EAW may be refused solely with regard to French national was in line with EU law. What resulted was that the CJEU stated that French law was in breach of the principle of non-discrimination based on nationality. The Court concluded that a Member State cannot, considering the principle of non-discrimination on the grounds of nationality, limit the ground for optional non-execution of Article 4(6) in the Framework Decision of the EAW “solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State”.²⁰³ So the Court took the position that Member State cannot automatically exclude

¹⁹⁹ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*.

²⁰⁰ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*, para. 17-18.

²⁰¹ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*, para. 20-23.

²⁰² ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*, para. 24.

²⁰³ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*, para.50.

residents in their Member States who are not nationals of this Member State, without taking into account the persons connections with this Member State.

In addition, the CJEU emphasized that before deciding upon refusal of surrender the national courts must “*examine whether, in the main proceedings, there are sufficient connections between the person and the executing Member State – in particular family, economic and social connections – such as to demonstrate that the person requested is integrated in that Member State, so that he is in fact in a comparable situation to that of a national*”.²⁰⁴

In *Kozłowski* case the personal situation of Mr Kozłowski was different.²⁰⁵ Mr Szymon Kozłowski had grown up in Poland and had worked in Germany until the end of 2003. From 2005 until 2006, when he was arrested in Germany, Mr Kozłowski lived mainly in Germany with short interruptions during the 2005 Christmas holidays, and possibly for other shorter periods. He worked occasionally on construction sites but earned his living essentially by committing crimes. He was single and childless and he had little or even no command of the German language.²⁰⁶

With judgment of 28 May 2002 of the Local Court of Tuchola, Poland, Mr Kozłowski had been sentenced to five months’ imprisonment for destruction of another person’s property.²⁰⁷ The Polish authorities issued an EAW in 2007 requesting German executing judicial authority to surrender Mr Kozłowski for the purposes of execution of the sentence.²⁰⁸ Mr Kozłowski was at the time has been imprisoned in Stuttgart, Germany, where he is serving a custodial sentence of three years and six months, to which he was sentenced by two judgments of the *Amtsgericht* Stuttgart due to 61 fraud offences committed in Germany.²⁰⁹

Having in mind these circumstances, the *Oberlandesgericht* Stuttgart referred to CJEU the the questions for a preliminary ruling about whether the Mr Kozłowski should be considered as “staying” or “residing” in Germany in the sense of Article 4(6) of Framework Decision on EAW (due to the fact that his stay in the Germany was not completely uninterrupted; his stay did not comply with German national legislation on residence of

²⁰⁴ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*, para.58.

²⁰⁵ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*.

²⁰⁶ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.24-25.

²⁰⁷ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.19.

²⁰⁸ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.21.

²⁰⁹ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.20.

foreign nationals; he systematically committed crimes there; and that he was in detention serving a custodial sentence) and whether it was in line with EU law that extradition of a national of the executing Member State against his will was always impermissible, whereas extradition of nationals of other Member States against their will can be authorised.²¹⁰

The Court, first, held that only the facts that his stay had not been uninterrupted and that his stay did not comply with national law on residence of foreign nationals, "can be of relevance for the executing judicial authority when it has to ascertain whether the situation of the person concerned falls within Article 4(6) of the Framework Decision".²¹¹ More importantly, it concluded that the terms "staying" and "resident" cannot be defined by the Member States themselves.²¹² According to the Court, the reason for that was a need for the uniform application of the EU law and for the implementation of the principle of equal treatment and as a result, the provisions of the EU law must be interpreted in an autonomous and uniform manner.²¹³

The Court explained the terms further: a person is "residing" in the host Member State when he or she has established his actual place of residence there; a person is "staying" in the host Member State when he has developed, "following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence".²¹⁴ Here, it is important to consider "objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State".²¹⁵ According to the Court, the objective of the optional non-execution stated in Article 4(6) of the Framework Decision is to enable "the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires".²¹⁶

From that, it also follows that the CJEU concluded that the EAW system is mandatory and that Member State must not overcome its mandatory nature by introducing additional

²¹⁰ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.28.

²¹¹ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.52.

²¹² ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.41.

²¹³ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.42-43.

²¹⁴ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.46.

²¹⁵ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.48.

²¹⁶ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.45.

grounds for non-execution. If it was up to the Member States to fill in the terms “staying” and “resident”, it would result in uneven legislation in Member States and consequently an uneven application of the instrument.

On the other hand in *Wolzenburg*²¹⁷, the CJEU admitted that the executing Member State may refuse to surrender. Mr Wolzenburg was a German citizen who resided in the Netherlands since June 2005 in an apartment in Venlo, under a letting agreement concluded in the name of him and his wife.²¹⁸ In 2002, two German courts gave him two suspended custodial sentences for offences committed during 2001, mainly related to trafficking marijuana into Germany.²¹⁹ In 2005, the *Amtsgericht* Plettenberg, Germany, revoked the conditional suspension because Mr Wolzenburg had breached the conditions of the suspension and subsequently in 2006 the German authority issued an EAW against Mr Wolzenburg.²²⁰ Mr Wolzenburg did not consent to his surrender.²²¹

Rechtbank Amsterdam referred to the CJEU for a preliminary ruling with an observation that Mr Wolzenburg did not “meet the conditions for grant of a residence permit of indefinite duration for the Netherlands on the ground that he has not yet resided in the Netherlands for a continuous period of five years” admitting at the same time that “citizens of the Union who reside lawfully in a Member State by virtue of Community law do not always choose to apply for such a permit”.²²² Among its questions, *Rechtbank* Amsterdam asked the CJEU if “staying” and “residents” within the meaning of Article 4(6) of the Framework Decision on EAW cover also those persons “who do not have the nationality of the executing Member State, but do have the nationality of another Member State and are lawfully resident in the executing Member State pursuant to Article 18(1) EC, regardless of the duration of that lawful residence” and whether “a national measure specifying the conditions under which an EAW issued with a view to the enforcement of a custodial sentence is rejected by the judicial authority of the executing Member State come within the (material) scope of the EC Treaty”.²²³

²¹⁷ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*.

²¹⁸ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.28.

²¹⁹ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.26.

²²⁰ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.29-30.

²²¹ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.36.

²²² ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.38.

²²³ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.39.

The CJEU did not discuss the majority of the questions posed in the preliminary proceedings by *Rechtbank Amsterdam*. However, the Court took the position in whether such national legislation that provides for different treatment of Dutch nationals and nationals of other Member States with regard to refusal to execute an EAW is compatible with EU law and with the prohibition of discrimination on the basis of nationality. The CJEU concluded that Article 16(1) and Article 19 of Directive 2004/38/EC make it very clear that any EU citizen who has resided within another EU Member State legally for a continuous period of at least 5 years has a right of permanent residence in this Member State but that there is no mandatory requirement for residence of indefinite duration (such as holding a residence permit of indefinite duration) because “such a document has only declaratory and probative force but does not give rise to any right”.²²⁴ As a result, such document, as an administrative requirement, cannot be a “precondition to application of the ground for optional non-execution of an EAW set out in Article 4(6)”.²²⁵

As regards facilitating reintegration in society, the CJEU stated that “*although the ground for optional non-execution set out in Article 4(6) of the Framework Decision has, just like Article 5(3) thereof, in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires, such an objective, while important, cannot prevent the Member States, when implementing that Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6) thereof.*”²²⁶

With regard to the “primacy” of mutual recognition *Melloni*²²⁷ is an example, which allows us to predict the CJEU future case law. Here the CJEU took the position that the respect for the fundamental rights cannot lead to such an interpretation by the national court that it „would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to display EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution“, meaning that judgements *in absentia* the right of fair trial does not necessarily require a

²²⁴ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.49-51.

²²⁵ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.52.

²²⁶ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.62

²²⁷ ECJ 26.02.2013, C-399/11, *Melloni*.

new trial in case the person fled but was nevertheless represented by lawyers of the persons own choice.²²⁸ Although as a whole, in judgements trialled *in absentia*, the CJEU has not had such a strong emphasis on the mutual recognition and has stressed also the fundamental rights. It nevertheless took the position that „where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised“.²²⁹ In fact there are several cases where the Court seems to be very protective of mutual recognition principle. In *Radu* the Court emphasized the grounds for refusal listed in the Framework Decision on EAW.²³⁰ The main question to the CJEU in this case was merely whether according to the Framework Decision, the requested person must be heard by the issuing authority before being surrendered or not, which the Court declined.²³¹ The CJEU concluded that Member State should not be able to refuse “to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities before that arrest warrant was issued”.²³²

2.3.2. Implications of CJEU Case Law

Several conclusions can be drawn on the tendency of the CJEU case law. One of the important questions has been, how to define “resident” and “staying” within the meaning of Article 4(6) of the Framework Decision – what should be the nature of the stay of a person in the host Member State in order to be considered either “residing” or “staying”? Framework Decision itself has not defined the meaning and scope of these terms. The Court, on the other hand, stated that “staying” and “resident” cannot be defined by the Member States themselves for the sake of uniform application across EU. When we turn to the EU law for an answer, however, we see that the EU law is familiar with the terms in primary law and in Directive 38/2004/EC. The instrument differentiates residence based on duration: right of residence for up to three months is provided for in Article 6 and right of residence for more than 3 months is provided for in Article 7. In first case, the EU

²²⁸ ECJ 26.02.2013, C-399/11, *Melloni*, para.58.

²²⁹ ECJ 26.02.2013, C-399/11, *Melloni*, para.60.

²³⁰ ECJ 29.01.2013, C-396/11, *Radu*, para. 36.

²³¹ ECJ 29.01.2013, C-396/11, *Radu*, para. 20, 36-43.

²³² ECJ 29.01.2013, C-396/11, *Radu*, para. 39.

citizens do not need to have completed any formalities, they must simply possess a valid identity document or passport. With regard to “permanent residence”, EU nationals obtain the right to it in the host Member State after a five-year period of uninterrupted and legal residence.²³³

The Court, too, did not follow the definition of staying as something of a short-term duration. It is reasonable considering that giving an optional ground for non-execution of EAW in case of a temporary (short term) stay, perhaps on a person’s way of driving through the host Member State, would not be in line with the aim of the Framework Decision. According to the Court, *“the terms “resident” and “staying” cover, respectively, the situations in which the person who is the subject of an EAW has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State, which are of a similar degree to those resulting from residence”*.²³⁴ So in judicial cooperation in criminal matters, “staying” is defined through a much longer duration. Nevertheless, would this definition help to protect defendants like Andrew Symeou and an EAW would not be executed when the person involved in the proceedings in another Member State is held responsible for an offence that was committed during the defendant’s short stay, such as holiday, in that Member State, is doubtful.

On the other hand, with regard to “residence”, the CJEU links it clearly to the provisions in the JHA, namely Directive 2004/38/EC.²³⁵ Here it has to be noted that the Court makes it very clear that in order for the EU law to be interpreted in an autonomous and uniform manner, the definition of the term (neither of the terms) may by no means established by the Member States themselves. Neither are the Member States allowed to provide law any sort of administrative requirement in their national legislation in order to consider the person as a “resident” in that Member State. The only preconditions are those set out in primary law and in Directive 38/2004/EC.

Also, with this, the CJEU seems to imply that as oppose to broad definition of the terms, stricter interpretation that does not necessarily give rise to refusal of execution, is allowed. The question has been raised, what is then the optional nature of the non-execution ground laid down in Article 4(6) of the EAW Framework Decision for if there is no power to

²³³ Article 16(1) of Directive 38/2004.

²³⁴ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.46

²³⁵ ECJ 21.11.2009, C-123/08 *Dominic Wolzenburg*, para.71.

derogate? Yet contra-argument would be that the power to derogate is up to the judge based on the uniform and autonomous meaning of the terms and not for the national legislation.²³⁶

Secondly, there seems to be an elusive trend to take into account the ties of the person subject to an EAW with the host Member State. In *Kozłowski*, and in *Lopes Da Silva Jorge* the CJEU pointed out the importance of taking into account the connections the person has with the host Member State “which are of a similar degree to those resulting from residence” and other “objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State”.²³⁷ This shows that the CJEU did not relate the non-execution on the grounds of nationality/ residence with the EU citizenship as such as the basis for equal treatment between nationals of different Member States, but instead to economic, family, and social connections of the person concerned with the host country as elements that should be evaluated by the national court on case-by-case basis.²³⁸ Member States cannot limit the scope of the non-execution of an EAW by automatically excluding the non-nationals without taking into consideration their connections with that Member State.²³⁹ The underlying rationale in this approach is that it should be the national judge of the execution Member State who has to assess whether a non-national should serve a sentence in that Member State, taking into account objective criteria such as length of stay, ties with the host Member State and criteria related to citizenship.²⁴⁰

However, from the way the judgements were rephrased, order of rank in the *Kozłowski* and *Wolzenburg* cases judgements can be brought out – reintegration in society was the parameter to define the autonomous and uniform interpretation of Article 4(6) of the EAW Framework in *Kozłowski*; in *Wolzenburg* not applying an optional ground for non-execution on the grounds of nationality/residence is allowed; thus it seems that “the

²³⁶ M. J. Borgers, p. 108.

²³⁷ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para.46 and 48.

²³⁸ E.R. Brouwer, K.M. de Vries. Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach. M. Van den Brink, S. Burri & J. Goldschmidt (Eds.), *Equality and human rights: nothing but trouble?* Utrecht: SIM 2015, pp. 123-124, p. 142.

²³⁹ L. Marin, p. 344.

²⁴⁰ L. Marin, p. 345.

importance of reintegration in society is not so compelling that it can block surrender”, and is therefore not a value that could rank higher than the principle of mutual recognition.²⁴¹

This leads us to the third conclusion. What we can also conclude is that the mutual recognition principle in judicial cooperation in criminal matters, is defended by the Court over and over again. This is seen in *Da Silva Jorge*, *Radu* and *Melloni*. In *Da Silva Jorge*, the Court concluded in its findings that Member States “cannot, without undermining the principle that there should be no discrimination on the grounds of nationality, limit that ground for optional non-execution solely to their own nationals, by excluding automatically and absolutely the nationals of other Member States who are staying or resident in the territory of the Member State of execution irrespective of their connections with that Member State.”²⁴² However, even here, the Court admits that non-execution is possible “in so far as that person demonstrates a degree of integration in the society of that Member State”.²⁴³ The Court went even further with *Radu* judgement, raising several debates among practitioners²⁴⁴, seemingly even placing the mutual recognition principle above defendants’ rights in the proceedings and in *Melloni* the Court kept this position.

We can justify the CJEU’s approach by having a look at the preamble of the Framework Decision on EAW. The instrument is based on the principle of mutual recognition and is for the purpose of introducing a “new and simplified system of surrender”.²⁴⁵ As a result, it should be assumed that EAWs are in principle to be executed, whereas non-execution of an EAW should depend on a limited list of optional and mandatory grounds for non-execution.²⁴⁶ Consequently, the grounds for non-execution are to be used only as an exception, regardless the questions raised. On the other hand, it has been suggested that the CJEU seems to do things in reverse order, it forgets about the position of an individual in the criminal proceedings, and that the aim is the prosecution of a person or the enforcement of the sentence, which should be the starting point and not other way round as it currently stands – mutual recognition has the primary place.²⁴⁷

²⁴¹ M. J. Borgers, p. 110.

²⁴² ECJ 05.09.2012, C-42/11, *Lopes Da Silva Jorge*, para. 50.

²⁴³ ECJ 05.09.2012, C-42/11, *Lopes Da Silva Jorge*, para. 51.

²⁴⁴ Mansell, p. 44 ; Marin, p. 345 ; M. Ventrella, p. 300.

²⁴⁵ Recitals no 5 of the preamble of Council Framework Decision 2002/584/JHA.

²⁴⁶ M. J. Borgers, p. 108.

²⁴⁷ L. Marin, p. 345.

2.4. Relationship between Mutual Recognition principle and Fundamental Rights

As seen from the case law and from national legislation of the EU Member States, voices about breaching the fundamental rights with regard to practical application of the mutual recognition instruments have been echoed loudly and on continuous basis. Fundamental rights, especially with regard to defence rights, becomes particularly important considering that Member States are obliged to recognise judicial decisions not made by themselves. It is therefore worth having a brief look on how the question of individual rights relates to the topic of nationality/residence in the light of practical application of these instruments.

As mentioned above, none of the Framework Decisions described above makes reference to fundamental rights as a ground for refusal of non-execution, should there be a breach with the latter; none of the mutual recognition instruments contains a justification based on the violation of fundamental rights as a ground for refusal of executing a request. Protection of fundamental rights is provided for in legally binding CFR (since the Lisbon Treaty came into force).

Yet there are some indications to the fundamental rights in the instruments; including in EAW. Article 1(3) of the EAW decision refers to the primary law, by stating that the Framework Decision “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”. In addition, Recitals 12 in the preamble provides for that the Framework Decision “respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof”. Article 6 (1) TEU provides for that “*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*”. Article 6(3) TEU further provides for that the EU will accede to the ECHR. As a result it seems that it is necessary to have a look also at the relations with ECHR. Despite several copied articles from the ECHR, there are also new rights introduced to EU law with the CFR and its scope is wider compared to ECHR.²⁴⁸ The reason for that is that while being in line with interpretation of scope and meaning of the ECHR to avoid conflicts between the two as stated in Article 52(3), the aim is to allow the EU to offer

²⁴⁸ M. Thunberg Schunke, 2013, p. 55.

wider protection where necessary and therefore to have the Charter functioning “as a floor but not necessarily as a ceiling”.²⁴⁹

At least to some extent the practical application of mutual recognition instruments is and should be in line with the ECHR. One of the reasoning on the relevance of fundamental rights to the implementation of principle of mutual recognition in judicial cooperation in criminal matters claims that mutual recognition principle must be compatible with the ECHR system because if a violation of fundamental rights takes place, a Member State would be liable in front of the European Court of Human Rights (ECtHR).²⁵⁰ All EU Member States are signatures of the ECHR, however, the case law of ECtHR, which is not discussed here, illustrates that we cannot simply assume that all Member States are in line with ECHR *per se* – for instance, the ECtHR has ruled in field of asylum law that automatic application of the instrument cannot lead to breach of human right and has criticized Belgium and Greece for that.²⁵¹ The CJEU, on the other hand, as seen above, has showed controversial approach in this respect. On one hand it has confirmed the point of view of ECtHR, coming to a similar conclusion in *N.S* and *M.E* cases.²⁵² These cases were related to EU asylum law and here the Court, too, emphasized the value of the mutual trust at making it as a basis of AFSJ; nevertheless it admitted that at the same time we cannot simply presume that Member States comply with ECHR and CFR.²⁵³ So here, the CJEU has set its case law in line with ECtHR.

On the other hand more than once the CJEU has strongly backed up the mutual recognition principle and has made it clear that if the mutual recognition system is threatened, CJEU will protect it. Several examples are in its case law. In *Radu* the court interpreted the principle of mutual trust as a facilitator of judicial cooperation and stated that the CFR does not require that a judicial authority of a Member State should be able to refuse to execute an EAW issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard by the issuing judicial authorities.²⁵⁴ It thus precluded the questions on the compatibility of the EAW from the right to be heard before a court.²⁵⁵

²⁴⁹ M. Thunberg Schunke, p. 56.

²⁵⁰ J. B. Banach-Gutierrez, p. 158.

²⁵¹ ECtHR 21.01.2011, 30696/09, *M.S.S v Belgium and Greece*.

²⁵² ECJ 21.12.2011, C-411/10, *NS and Others v SSHD*; ECJ 22.09.2011, C-493/10, *ME & Others v Refugee Applications Commissioner & MEJLR*.

²⁵³ ECJ 21.12.2011, C-411/10, *NS and Others v SSHD*, para. 84 and 94.

²⁵⁴ ECJ 29.01.2013, C-396/11, *Radu*, para. 39.

²⁵⁵ L. Marin, p. 338.

This is one of the most controversial decisions as the CJEU has been claimed to state that protection of fundamental rights comes second after the goals of an AFSJ and mutual recognition, which, however, is not legitimate.²⁵⁶ The court has gone even further than that. In *Wolzenburg* the CJEU seemed to have made mutual recognition the goal in itself and implying as if enforcement of the judgement of another EU Member State is an ultimate aim.²⁵⁷ Provisions in the national legislation that narrowed the scope of grounds for refusal were seen as if they contribute to this aim.²⁵⁸

In light of these judgements, it is at least understood, if not agreed upon, that there might be concerns on those sides that are eager to protect fundamental rights; some critics even blame it for the CJEU for allowing the issuing of EAW “at the sacrifice of freedoms of individuals”²⁵⁹ and “overriding national identities”²⁶⁰. Even though some judgements go so far as if the Court actually challenges the fundamental rights, it is also clear that had the Court in *Radu* and *Melloni* refused to admit the compatibility of the situation with fundamental rights, it would have seriously hindered the effectiveness of the EAW.²⁶¹

2.5. Differences in Case Law with regard to Third Country Nationals

The scope of Article 18 TFEU that prohibits discrimination on the grounds of nationality differs between EU citizens and third country nationals. With regard to EU citizens this provision is inclusive, which means that it guarantees equal treatment for EU citizens in other Member States representing thus a key feature within the EU citizenship concept in allowing free movement; however, with regard to third country nationals Article 18 TFEU is exclusive as it not applicable to third-country nationals.²⁶² In this sense, the EU citizens who live in a Member State other than that of their origin are in better position compared to third country nationals legally residing in that Member State.

²⁵⁶ M. Ventrella, p. 300.

²⁵⁷ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para.51.

²⁵⁸ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*, para. 52.

²⁵⁹ M. Ventrella, p. 290.

²⁶⁰ M. Ventrella, p. 308.

²⁶¹ Also confirmed by ECJ in earlier cases, see: ECJ 03.05.2007, C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*.

²⁶² E.R. Brouwer, K.M. de Vries, p. 123-124.

Curiously, such discrimination is recognized already in the framework of ECHR. ECtHR used to justify different treatment with “the special legal order of the EU”.²⁶³ However, recently, the Court in Strasbourg upholds the principle equal treatment by stating that different treatment based solely on the grounds of nationality obliges the Member State to have particularly substantial reasons in order to be justified.²⁶⁴ This approach by ECtHR is not entirely new, however, already in the past the Court has come to the same conclusion.²⁶⁵ What is the reason for different approach in different cases by the ECtHR? The answer is that “where states are allowed to differentiate between foreigners and their own nationals, they may also differentiate between different categories of foreigners and hence grant preferential treatment to EU citizens from other Member State”.²⁶⁶ On the other hand, situations that require equal treatment between foreign nationals and the nationals of that Member State, equal treatment must be guaranteed for everyone alike – to nationals, to EU citizens and to third country nationals.²⁶⁷

With regard to the case law of CJEU, so far the Court has not come out with the explaining the scope of Article 18 TFEU, neither there is anything explained in this respect with regard to third country nationals. Some implications of the approach of the Court can be found in 2009 judgement of *Vatsouras* where the CJEU stated that non-discrimination provision only concerns situations where nationals are discriminated against nationals of another Member State solely on the basis of his or her nationality and that the provision “is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries”.²⁶⁸ From the case law of ECtHR it seems that a parameter that enables the judge to decide whether different treatment of third country nationals should be allowed or not, is related to the length of the residence; the law is applied differently to those enjoying long-term lawful residence. Bearing in mind that in its case law the CJEU, too, has considered the ties of the person with the host Member State and this his or her social integration – and the length of residency in the light of this – when examining whether execution or non-execution of the EAW has been justified, we may

²⁶³ ECtHR 18.02.1991, 12313/83, *Moustaquim v. Belgium*, para. 49; ECtHR, 21.06.2011, 5335/05, *Ponomyanov v. Bulgaria*, para. 54.

²⁶⁴ ECtHR 08.04.2014, 17120/09, *Dhabhi v. Italy*, para. 53.

²⁶⁵ ECtHR 16.09.1996, 17371/90, *Gaygusuz v. Austria*, para. 42; ECtHR 27.11.2007, 77782/01, *Luczak v. Poland*, para. 52 and 59 etc.

²⁶⁶ Brouwer, E.R. & Vries, K.M. de Vries, p. 134.

²⁶⁷ Brouwer, E.R. & Vries, K.M. de Vries, p. 134.

²⁶⁸ ECJ 04.06.2009, C-22/08, *Vatsouras v. Arbeitsgemeinschaft Nürnberg*, para. 52.

assume, that the position of the CJEU would be similar to that of ECtHR. In this case third country nationals who are family members of EU citizens and those third country nationals who are subject to Directive 2003/86/EC on family reunification and Directive 2003/109/EC on long-term residents would be in a beneficial position both compared to third country nationals who are not subject these directives but also compared to EU citizens who do not have “ties” with the host Member state; who probably have stayed there for a shorter period of time. Such interpretation, which offers broader protection for those third country nationals is highly desirable, considering that the EU nationals who do not have “ties” with the host Member State may at least try to rely on Article 18 TFEU, whereas third country nationals cannot even when possessing “ties” with the host Member State.

3. WAY OUT OF DISCRIMINATION: POSSIBLE SOLUTIONS

3.1. Amending the Framework Decision on EAW

Despite calls on amendments in the legislation by the EU legislator²⁶⁹ the European Commission is clearly reluctant to amend the Framework Decisions and instead suggests that questions concerning this particular instrument should be solved through judicial interpretations and best practices.²⁷⁰ There are fears that re-opening negotiations on the EAW instrument would be a “Pandora box” of the EU.²⁷¹ As a result, it is clear at this stage that amending the Framework Decision is a no-go for the European Commission and therefore not a possible solution.

The European Commission seems, however, at least willing to amend the Handbook on EAW as after issuing the first Handbook, soon an amendment followed.²⁷² The Commission subsequently urged Member States “to take positive steps to ensure that practitioners use the amended handbook (in conjunction with their respective statutory provisions, if any)”.²⁷³ Should we amend the Handbook on EAW once again in relation with the nationality/residence clause? The answer depends on a separate analysis to what extent the Member States are guided by the handbook. The first amendment, revised version of the handbook introduced guidance on how to apply proportionality check as stated in recommendation 9 of the final report of the Fifth Round of Mutual Evaluation in order to find a solution at EU level for the issuing of any EAW²⁷⁴; and yet the issues with un-proportional warrants persist.²⁷⁵ So not all Member States are led by the instructions.

On the other hand, having in mind both the European Commission’s insistence on the Member States for consistent and uniform application of the mutual recognition principle; as well as the case law of the CJEU, it could be of help having the ideas of the Court

²⁶⁹ L. Marin, p. 336.

²⁷⁰ COM (2011)175, p. 8.

T. Ostropolski, p. 167.

²⁷² Council of the European Union. Revised version of the European handbook on how to issue a European Arrest Warrant. 01.12.2010. 17195/1/10 REV. –

<http://register.consilium.europa.eu/doc/srv?l=en&f=ST%2017195%202010%20REV%201> (02.03.2015).

²⁷³ COM (2011) 175, p.8.

²⁷⁴ Council of the European Union, 17195/1/10 REV, p. 1.

²⁷⁵ European Parliament: Report with recommendations to the Commission on the review of the European Arrest Warrant Committee on Civil Liberties, Justice and Home Affairs. RR\1017132EN.doc 28.01.2014.– : <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0039+0+DOC+PDF+V0//EN> (27.04.2015).

reflected in the Handbook, especially with regard to making difference between “staying” and “resident”.

It would also enable to reflect the idea that Member States are not allowed to narrow the EU primary law with any kind of national administrative rules and calling on the Member States to set its national legislation in line with the non-discrimination principle by offering to the nationals of other EU Member States same conditions that to the nationals of their own Member States. Thus, despite it has been said that amending the EAW Handbook is a “shortcut” aiming to avoid the involvement of the European Parliament in “politically sensitive issues”²⁷⁶, the reluctance by the European Commission to amend the Framework Decision itself may only result in amending the Handbook instead.

3.2. Reinforcing Procedural Safeguards: an answer to Fundamental Rights’ concerns

Mutual recognition relies upon mutual trust. It is very difficult to make Member States to trust in each other simply because all these countries belong to the EU. Also, mutual trust as such or any guidance on this is not defined at EU level.²⁷⁷ Much has been disputed whether the mutual trust in mutual recognition instruments has been justified as true feature of the relations between Member States or simply an optimistic presumption made by the EU legislator.²⁷⁸ It has been claimed that the mutual trust, which is an underlying foundation of mutual recognition principle, “is sometimes misplaced”²⁷⁹ and that the EAW is “based on misplaced assumption about basic rights protection”.²⁸⁰ It has also been suggested that one of the main reasons for divergence in application of mutual recognition instruments and in particular EAW, is the lack of protection of defence rights.²⁸¹

In addition, we saw that the fact that Member States are bound to ECHR is claimed not to guarantee sufficient protection of defence rights as ECHR is implemented differently and Member States have been often times found in breach with their obligations by ECtHR.²⁸²

²⁷⁶ L. Marin, p. 338.

²⁷⁷ M. Ventrella, p. 300.

²⁷⁸ M. Thunberg Schunke, p. 18.

²⁷⁹ D. Mansell. The European Arrest Warrant and Defence Rights. – European Criminal Law Review, Volume 2, Number 1, March 2012, pp. 36-46, p. 40.

²⁸⁰ E. Smith, p. 84.

²⁸¹ L. Marin, p. 343.

²⁸² M. Thunberg Schunke, p. 5.

Even according to the European Commission, the fact all EU Member States are subject to ECHR “has not proved to be an effective means of ensuring that signatories comply with the Convention’s standards”.²⁸³ These concerns are very much relevant also in relation to nationality/residence issue because as seen above often times is the lack of trust in other Member States that make the Member States differentiate nationals of their own and of other Member States.

If it is true that many Member States do not offer sufficient fundamental rights protection, the most efficient answer to the problem is to reinforce procedural safeguards; to provide support for defendants and suspects. In parallel, when there are serious doubts that Member States that are all part of ECHR and have full obligations under CFR, are not able to fulfil the requirement of respecting fundamental rights (and apparently there are), we should improve the Member States’ capability and willingness to comply with European and international standards with regard to fundamental rights protection, rather than going back in time and amend the surrender procedure under EAW.

As seen above reference to the protection of individual’s fundamental rights is not a ground for refusal of executing a request *per se* in any of the mutual recognition instruments. It has nevertheless been suggested by several authors that executing Member State should have an opportunity to request a guarantee that the fundamental rights of the requested person would be respected – until the issuing Member State does not provide sufficient guarantees within a reasonable period of time, an executing Member State will have a ground not to execute a warrant.²⁸⁴ This, however, would seriously harm the efficiency of the EAW procedure and the aim of the Framework Decision and would go against the aim of the Framework Decision. Protection of fundamental rights is set out in Article 6 (1) TEU. Also, Article 1(3) of the Framework Decision states that it shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union. Considering that fundamental rights have been recognized by the CJEU as a general principle of the EU law since 1970s²⁸⁵, the regulation should be sufficient by now and the question is more about practical application of the acts and principles.

²⁸³ COM(2011) 175, p.6.

²⁸⁴ E. Smith, p. 90.

²⁸⁵ ECJ 17.12.1970, C-11/70, *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*.

If introduced as a ground for refusal, there is a risk the fundamentals rights justification may do away with the mutual recognition principle when used as a ground for refusal. Secondly, it would not be much help of the nationality/residence issue – seeing that Member States have different standards based on nationality and/or residence, such amendment might actually worsen the situation by giving the Member States an additional alternative to protect their nationals.

Thus, instead of attempting to increase the level of mutual trust between the Member States by introducing an additional ground for refusal of execution, we should alternatively focus on procedural safeguards. Guaranteeing procedural safeguards equally in all EU Member States seems to be a first logical step in EU's seek to increase the trust. Harmonization of procedural safeguards is provided for *per se* in the Treaty. Article 82 (2) provides for the establishment of minimum rules regarding mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; and the rights of victims of crime.

Fortunately, it has been understood by the EU policy-makers that the system of mutual recognition can only work successfully if there is trust between the Member States and thus steps have been taken towards this direction. In order to set and protect minimum procedural rights for suspects and defendants, the European Council invited the European Commission to issue the procedural safeguards in the Stockholm programme of Justice and Home Affairs 2009-2014.²⁸⁶ It was stated that “*a new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned*”.²⁸⁷ A set of measures were introduced in a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, adopted by the Council in 2009.²⁸⁸ As the Council puts it in Recital 10, “*efforts should be deployed to strengthen procedural guarantees and the respect of the rule of law in criminal proceedings, no matter where citizens decide to travel, study, work or live in the European Union*”.

²⁸⁶ European Council. The Stockholm Programme.

²⁸⁷ European Council. The Stockholm Programme.

²⁸⁸ Council of the European Union. Resolution of the Council on a roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. – OJ C 291, 4.12.2009, p. 1. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF> (01.04.2015).

Meanwhile, relevant steps have been taken. By 2015 the following directives have been put in place: Directive on the Right to Interpretation in Criminal Proceedings (2010/64/EU)²⁸⁹; Directive on the Right to Information in Criminal Proceedings (2012/13/EU)²⁹⁰; and Directive on the right to have access to a lawyer in criminal proceedings and the right to communicate upon arrest (2013/48/EU)²⁹¹. In line with the Roadmap and according to the recent Commission Communication, a package consisting further measures is yet to be adopted: three proposals for Directives on first, strengthening certain aspects of the presumption of innocence, secondly, on special safeguards for children suspected or accused in criminal proceedings, and thirdly, on provisional legal aid for suspects or accused persons, accompanied by two recommendations.²⁹²

These initiatives seem a right step towards a right direction and would certainly contribute to increased trust among Member States. It is however also important to make sure that the procedural rights implemented would also be upheld by the Member States.²⁹³ Fulfilling the formalities will not be sufficient (for instance, also the ECtHR has held that the State's obligation to provide free legal assistance is not met merely by appointing a publicly funded lawyer²⁹⁴). Thus, after adopting the legislative package, a lot of work is yet ahead; the EU has to guarantee that the tools are actually implemented and used in practice.

3.3. Harmonization of EU Substantial and Procedural Criminal Law

The idea of mutual recognition is that the executing authorities do not doubt in the quality and reasoning of the request, regardless the judicial system of the issuing Member State. Legality and legitimacy is presumed *ipso iure*.²⁹⁵ On the other hand, in order such approach

²⁸⁹ Directive 2010/64/EU of 20 October 2010 on the Right to Interpretation in Criminal Proceedings. – OJ L 280, 26.10.2010, pp. 1–7.

²⁹⁰ Directive 2012/13/EU of 22 May 2012 on the Right to Information in Criminal Proceedings. – OJ L 142, 1.6.2012, pp. 1–10.

²⁹¹ Directive 2013/48/EU of 22 October 2013 on the right to have access to a lawyer in criminal proceedings and the right to communicate upon arrest. – OJ L 294, 6.11.2013, p. 1–12.

²⁹² European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee the Committee of the Regions Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice. Brussels, 27.11.2013. COM(2013) 820 final, p. 3.

²⁹³ M. Thunberg Schunke, p. 5.

²⁹⁴ ECtHR 04.10.2010, 42371/02, *Pavlenko v. Russia*, para. 99.

²⁹⁵ J. A. Vervaele. European Criminal Law and General Principles of Union Law. Research papers in law 5/2005. College of Europe, European Legal Studies, p.5-6. : https://www.coleurope.eu/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf (21.12.2014).

could work in practice, it seems that certain degree of harmonization of substantial law is necessary.

So far, different rules, principles and approach in different Member States have in practice led to a situation that the principle of mutual recognition has turned into a biggest illusion in the field of criminal justice – Member States simply do not follow it. On the other hand, even if it was applied “in the pure or absolute form”²⁹⁶, it could result in different outcome and unfair treatment of individuals in criminal proceedings. Establishing more minimum standards on common rules seems thus inevitable. In order to apply mutual trust, one must also have a trust in the common rules. Certain lack of trust may be understood, however, towards those countries that are not bound to the EU legal order, which is why the non-extradition of own nationals is preserved in the extradition and MLA agreements with third countries.²⁹⁷

We saw above that Article 82 (1) TFEU makes reference to both to the principle of mutual recognition of judgments, as well as to the approximation of the laws and regulations of the Member States. Article 82 (2) TFEU provides for the EU to establish minimum rules “to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. Article 83(1) TFEU allows for the same for “concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension”, concerning thus the substantial criminal law. In light of overall legal and political developments reflected and milestones set in Tampere Presidency Conclusions, it seemed reasonable to place mutual recognition ahead of approximation of laws with regard to the priorities of the EU policies. However, now, after seeing certain incompatibility of the approach of different EU Member States, in particular with regard to definition of crimes, a question may be asked, whether the EU legislator predicted the need to approximate national laws simultaneously with the implementation of mutual recognition principle, rather than having a preference towards the latter? With regard to the scope of both criminal procedural law and to substantial criminal law, the rules are not limited to the list provided for in the Treaty. Both Articles TFEU (82)2 and TFEU 83(1) allow for the Council by

²⁹⁶ J. B. Banach-Gutierrez, p. 166.

²⁹⁷ For instance in Article 4(1) EU-USA extradition agreement, Article 4(4) EU-USA MLA agreement, Article 11(2) EU-Japan MLA agreement.

acting unanimously through consultation procedure identify any areas, where such rules would be necessary.

In fact, already back in 2001 a programme of measures to implement the principle of mutual recognition of decisions in criminal matters²⁹⁸ provided for a set of rules for the implementation of the principle. Article 70 TFEU provides for that Member States are being evaluated in terms of implementation of the EU policies referred to in Title V of TFEU “in order to facilitate full application of the principle of mutual recognition”. This implies that the principle of mutual recognition is neither automatic nor absolute as it is not possible to put in force the legal rules of one Member State in another Member State.

Certainly, the new powers of the European Commission as of December 2014 imply that changes in EU legislation are yet to come. The disappearance of the former third pillar instruments with the entering into force of the Lisbon Treaty and putting in place first pillar instruments, such as directives that entail direct effect, also in the criminal law field, as well as changes in the decision making procedure, contribute to the Commission’s next steps in the criminal law field. The Lisbon Treaty offers to the Commission new tools for that. The directives that since Lisbon are used in criminal justice field, will certainly have different effect on Member States policies, considering the direct effect of directives after the transposition period has passed to start with. Replacing unanimous voting in the Council with QMV in the decision-making process, too, will contribute to the faster and smoother adoption of the legislation as Member States in the Council have traditionally represented more reluctant views in particular in the criminal justice field.

On the other hand, harmonization cannot go too far as it has to respect the difference of legal traditions and systems of the Member States, as provided for in Article 82(2) TFEU. After all, one of the reasons for preferring mutual recognition to harmonization of substantive and procedural criminal law in the first place, has been enormous differences between criminal law systems in the EU.²⁹⁹ Nevertheless, in the aftermath of the Lisbon Treaty and with the transitional period for European Commission’s new competences coming to an end, we may wait for new initiatives also in terms of harmonizing EU

²⁹⁸ Council of European Union. Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. OJ C 12, 15.1.2001, pp. 10–22. – [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001Y0115\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001Y0115(02)) (15.03.2015).

²⁹⁹ M. Thunberg Schunke, p. 8.

substantial laws. Several proposals for new legislation are already made by the Commission.³⁰⁰

Finally, it must be noted that one of the new tools adopted already after Lisbon Treaty coming into force and being thus a directive and no longer a framework decision also answers to the debates and concerns raised in relation to fundamental rights protection. In the most recent mutual recognition instrument, the Directive EU/2014/41 of 3 April 2014 on the European Investigation Order in criminal matters³⁰¹ (EIO), Article 11(1)(f) provides for different grounds for non-execution or non-recognition as oppose to previous instruments. Article 11(1)(f) reads that the recognition or execution of an EIO may be refused in the executing State where “*there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter*”.

3.4. Improved Detention System and European Supervision Order

Excessive use of pre-trial detention and long-term detention is probably yet another key reason for those advocating lesser and better controlled execution of EAWs. As seen above, many times defendants who are non-nationals are not released when the trial is pending. Thus, there is a risk of different treatment in the Member State trial is taking place between those who are residents, those who are nationals and those who are none: a non-resident – or someone considered a non-resident by the domestic legislation of execution Member State – risks being kept in custody during pending trial even where, in similar circumstances, a national would not. It is thus necessary to ensure that a persons subject to criminal proceedings are treated similarly despite their nationality and residence.

One on hand, the problem is practical. When it comes to the detention it is the “poor human right standards” of the detention conditions that “undermine mutual trust”.³⁰² The European Commission, too, has stated in its Communication that the “detention conditions can have a direct impact on the smooth functioning of mutual recognition of judicial decisions”.³⁰³

³⁰⁰ One of the most remarkable example of the initiatives by the Commission is the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office. COM/2013/0534 final - 013/0255. – <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52013PC0534v> (23.04.2015).

³⁰¹ Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, pp. 1–36.

³⁰² D. Mansell, p. 41.

³⁰³ COM (2013) 820 final, p. 3.

An option would thus be an improvement of detention conditions in the home Member State of defendants.

On the other hand, the problem is also of legal nature. In democratic societies, there should be a time limit of 12 months for detention.³⁰⁴ Therefore a binding legislation in terms of pre-trial detention could be a solution. Relevant legislation would aim at achieving efficient trials, which would benefit the overall interests of justice, interests of victims of crime as well as would be cost-savvy for the Member States.³⁰⁵ It has been said that it should be used only as a last resort when there are no other alternatives but the wide-spread use of pre-trial detention has come into breach with Articles 5 and 6(2) of ECHR (the right to be presumed innocent until proven guilty).³⁰⁶ Whether to agree with it or, in addition the procedure being expensive for the Member States, long detention is a serious obstacle for a suspect to live his or her daily routine, go to work and take care of the family.

Again, the EU legislator is taking steps towards introducing new legislative rules with regard to improving detention system. On 23 October 2009 the Council adopted Framework Decision 2009/829/JHA 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.³⁰⁷ This Framework Decision introducing European Supervision Order (ESO) provides for rules enabling a person resident in one Member State, but subject to criminal proceedings in a second Member State, to be supervised by the authorities in the State in which he or she is resident whilst awaiting trial. In fact, it is the very aim of the ESO to protect the non-nationals as it is stated so in the preamble of the Framework Decision: “as regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure

³⁰⁴ E. Smith, p. 97.

³⁰⁵ E. Smith, p. 97.

³⁰⁶ E. Smith, p. 95.

³⁰⁷ Council Framework Decision 2009/829/JHA20 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. OJ L 294, 11.11.2009, p. 20.

that a person subject to criminal proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident”.³⁰⁸

ESO thus offers a possibility of transferring a non-custodial supervision measure from the Member State where the non-resident is suspected of having committed an offence to the Member State where he or she is normally resident.³⁰⁹ Defendants who meet supervision conditions in the home Member States should in that case be permitted to leave the host Member State until the case is ready for trial.³¹⁰ As a result a suspected person may stay in his or her home country pending trial in another Member State while being a subject to a supervision measure.

There is an intentional link between ESO and the EAW. Article 21(1) and 21(2) of the ESO provides for the possibility to issue an EAW to return the person when he or she must attend trial in the issuing Member State or if he does not fulfil the conditions imposed by the ESO. Again out of those Member States implemented the Framework Decision, not all Member States have implemented Article 21.³¹¹ However, implementing this provision, would allow persons go to their home Member States during pending trial. This is also probably the reason why the EU legislator did not introduce a condition that the offence for which the EAW is issued in this context, is punishable by a custodial sentence for a maximum period of at least 12 months as oppose to the EAW in normal circumstances.

The practical question is, however, on the transposing of this instrument by the Member States. As of March 2015, 12 Member States out of 28 have not yet transposed the instrument.³¹² In addition, out of those transposed the Framework Decision, several Member States have done it partially.³¹³ Finally, apart from transposing the legislation, another challenge is the practical application of the new tool – do Member States find it useful? Or even more importantly, it has to be seen by judges across the EU as a worthwhile tool and alternative to pre-trial detention rather than by the politicians in EU Member States and officials in the ministries. So far there has been rather limited practical application of

³⁰⁸ Recital 5 of Framework Decision 2009/829/JHA.

³⁰⁹ COM(2011) 175, p.7.

³¹⁰ E. Smith, p. 97.

³¹¹ COM(2014) 57 final, p. 10.

³¹² European Judicial Network. Status of Implementation. Judicial Library. – http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=39 (01.04.2015).

³¹³ COM(2014) 57 final, p. 6.

the tool. According to the Commission's report dating summer 2014 – only three Member States have ever made use of the ESO instrument.³¹⁴

3.5. “Best practices”, Training of the Judiciary and Awareness-raising

One of the “soft” solutions to any problem, including that of related nationals/residence clauses, is spreading “best practices” among practitioners, training the judiciary and awareness raising. In fact, whatever the solution chosen, in training and awareness raising of the practitioners and officials should always be a mandatory prerequisite.

On several occasions European Commission calls on training of the judiciary.³¹⁵ With the entry into force of the Lisbon Treaty, the scope of EU competence in the field of judicial training was widened. Articles 81(2) and 82(1) TFEU provide that the EU is competent to "support the training of the judiciary and of judicial staff" in judicial cooperation in civil and in criminal matters. A landmark communication from the Commission of September 2011, Building trust in EU-wide justice. A new dimension to European judicial training, set the goal of ensuring that half of all legal practitioners in the EU (around 700 000) be trained in EU law or the national law of another Member State by 2020.³¹⁶

With regard to nationality/ residence clause, where a Member State has given a discretion right to the judge, whether to execute an EAW or not, the training should focus on the non-discrimination aspect too. “Creation of the common legal culture”³¹⁷ should be an ultimate aim and national judges must be aware that they are not only national judges but also European judges and thus applying EU law. Where Member State has provided for in its national legislation a mandatory ground for non-execution for the nationals or makes an unjustified difference between residents and nationals, awareness should be raised among central authorities and also on political level in order to call on the Member States to set its national legislation in line with the non-discrimination principle by offering to the nationals

³¹⁴ Belgium, Finland and the Netherlands. COM (2014) 57 final, p. 7.

³¹⁵ COM(2009) 262, p. 11.

³¹⁶ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Building trust in EU-wide justice: a new dimension to European judicial training. Brussels, 13.9.2011.COM (2011) 551 final.

³¹⁷ J. B. Banach-Gutierrez, p. 167.

other EU Member States same conditions that to the nationals of their own Member States. At every level it must be prepared to act in the “integrated Europe”³¹⁸, not only the judges.

3.6. The future of CJEU Case Law?

There is no doubt that the role of CJEU will be (even more) crucial in the upcoming years. It will have the task and the challenge of developing European criminal law as part of European law and addressing all fundamental questions raised. As seen, the Court has taken an active role in tackling the issues raised; it may be estimated that the importance of its role increases explosively now that the transition period is over and the court enjoys full powers.

So far, the tension between the fundamental rights issue and the EAW remains unsolved by the court. The “gap filling function” of the principles³¹⁹ is needed from the Court. Hope has been expressed that the end of the transitional period will do away with “grey zones” around the EAW and the fact that it used to be part of the third pillar and that questions that have not been fully replied to will be clarified by the court.³²⁰

However, concerns that the CJEU will be far too “loyal” for the mutual recognition principle³²¹ as oppose to standing up against breach of fundamental rights may not be fully justified. While in cases like *Radu* and *Melloni* the CJEU preferred to go around the fundamental rights issues it has made the importance of fundamental rights very clear in other cases.³²² In addition, rather than putting all the steam on fundamental rights, the Court could help to develop the procedural rights with its case law.

In modern criminal law since Beccaria the punishment has to take into account social rehabilitation and reintegration into the society.³²³ In the ECHR framework social integration aspect and the requested person’s ties with the Member are reflected in Article 8 of the ECHR. According to Article 6(2) TEU of the Lisbon Treaty, the EU accedes the ECHR: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in

³¹⁸ J. B. Banach-Gutierrez, p. 167.

³¹⁹ S. Miettinen, p. 206.

³²⁰ L. Marin, p. 334.

³²¹ M. Thunberg Schunke, p. 121.

³²² ECJ 21.12.2011, C-411/10, *NS and Others v SSHD*.

³²³ L. Marin, p. 345.

Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. This implies that the case law of the both courts – that in Luxembourg and that in Strasbourg – will have effect on each other. We have seen above that there is already tendency in doing that by the CJEU also with regard to nationality/residence clause, the Court in Luxembourg has taken into account of what ECtHR has previously said, and this is likely to be continued.

As a result, despite its reasoned reluctance of undermining the principle of mutual recognition in its case law, the CJEU has nevertheless been carried by the ideas of this mind-set. In fact the importance of “social integration” is what the Court is particularly stressing in all cases discussed. According to the court, non-execution is justified by the executing authority if the latter considers that the person’s odds of reintegrating into society after the sentence imposed on him or her has expired.³²⁴ Thus, it might not necessarily be clear that the CJEU is into “absolute application” of the EU law and “automatic and total mutual recognition” as it has been suggested in the literature.³²⁵ Whether marginal or not but the social rehabilitation side of the punishment is most of the times taken into account by the CJEU and we can predict that this will continue.

With regard to third country nationals, who are staying or residing in a EU Member States, the position the Court will take is yet to be seen. Will the CJEU apply Article 18 TFEU strictly to citizens or, as it has been questioned, is it time for broader interpretation?³²⁶ After all, the now binding CFR does not differentiate third country nationals and EU citizens in what concerns discrimination based on nationality. Article 21 (2) of the CFR provides for: *“Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.”* If the CJEU follows the case law of ECtHR and adopts the reasoning of the latter, we may expect that the limited scope of Article 18 TFEU (only covering EU citizens) will be interpreted bearing in mind new context, in particular EU migration law and the ECHR. Alternatively, for the purposes of “European integration and reciprocity between the Member States”

³²⁴ ECJ 05.09.2012, C-42/11, *Lopes Da Silva Jorge*; para.32; ECJ 21.11.2009, C-123/08 *Dominic Wolzenburg*, para.62 and 67, ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*, para. 45.

³²⁵ L. Marin, p 345.

³²⁶ E.R. Brouwer, K.M. de Vries, p. 125.

preferential treatment of EU nationals of other Member State in comparison with third country nationals would still be justified.³²⁷

³²⁷ E.R. Brouwer, K.M. de Vries, p. 145.

CONCLUSION

Free movement of persons is one of the foundations of the EU. More than 14 million EU nationals reside permanently in a Member State other than that of their nationality; in addition, there are a lot of people who during some period in their lives work or study in another EU Member State. The concept of EU citizenship has developed from covering cross-border workers to economically inactive people who simply are citizens of any EU Member State. Third country nationals legally residing within the EU have similar rights. All these people make use of their right to move freely within the EU, provided for in the EU law. They enjoy their right to not to be discriminated against on the grounds of nationality, while expecting that the conditions that are applicable to them are the same as those to the nationals of the host Member State.

The principle of non-discrimination is provided for in the EU primary law: Article 18 TFEU provides for prohibition based on nationality, Article 20 TFEU establishes the concept of EU citizenship. The CJEU has emphasized that the rights established with these provisions prohibit any action taken other than on grounds of public policy or public security, which might affect the right of persons to enter and reside freely in the host Member State under the same conditions as the nationals of that Member State.

However, the discussions in the thesis showed that the discrimination based on nationality is hidden in the field of judicial cooperation in criminal matters. The cases of Mr Andrew Symeou and of Mr Lopes Da Silva illustrate that non-discrimination and free movement of persons are actually breached by EU Member States during criminal proceedings when applying the mutual recognition principle in judicial cooperation. This brings us to an astonishing conclusion: discrimination based on nationality is very much alive. It therefore reveals the “dark side” of the mutual recognition principle, as it turns out that the principle is far from being fair and not only because of lack of trust between Member States as constantly pointed out by European Commission in its reports but also, and maybe more disturbingly, when it comes to what such lack of trust results in – unfair and unequal treatment of the EU citizens.

Judicial cooperation in criminal matters is based on the principle of mutual recognition of judicial decisions, which is a process by which a decision taken by a judicial authority in one EU Member State is recognized and enforced by other Member States as if it was a decision taken by the judicial authorities of its own Member State. Practical application of

the Framework Decision on European Arrest Warrant, the most widely used mutual recognition instrument by far and the only one implemented by all 28 Member States, illustrates on several occasions breach of non-discrimination provisions of EU law. Namely, as oppose to the former extradition system, where a States' right not to extradite its own nationals – “nationality clause” – has always been part of the legal instruments, we no longer find the clause under the mandatory grounds for non-execution in legal instruments based on principle of mutual recognition, including the EAW Framework Decision. The nationality/residence clause is provided for in Article 4(6) of the Framework Decision and it provides for merely an optional ground for refusal to execute a warrant on the basis of nationality/residence.

Yet a brief look at the legislation of 28 Member States transposing the EAW Framework Decision demonstrates that Article 4(6) has been transposed very unevenly. First, there is a group of Member States, which have made this provision as a mandatory ground for refusal of execution, covering both their own nationals but also residents, some of those Member States restrict the term “resident” for instance, with the duration of the person's stay. Others have made refusal mandatory but it only concerns their own nationals. There are also Member States that transposed the provision as an optional ground for refusal of execution for their own nationals only. The difference in transposition brings along difference in practical application of EAW. Thus, what we can observe is that there is a big difference in ways of applying EU law in the Member States.

It is a problem because in this way, as shown in the thesis, the system works against non-nationals who are residing in another Member State and third country nationals legally residing in that Member State. Namely, non-nationals are often automatically thought to be a “flight risk” and they are therefore not released when the trial is pending. It also works other way round – despite ties with the host Member State, sometimes very strong ones, a suspect is being surrendered under EAW – for instance when national law protects only nationals but not residents.

The CJEU, however, has clearly taken the position that “residents” should be treated equally to “nationals”. It upheld the principle of mutual recognition on several occasions. According to the Court, the provisions of the EU law must be interpreted in an autonomous and uniform manner and Member States cannot define the terms in a more restrictive sense that provided for in the Treaties and in secondary legislation. In fact the Court has gone so far that it has even been criticized for placing the mutual recognition principle above

defendants' rights in the proceedings. Indeed we may ask, which of the several values is above the other, whether it is the fundamental rights factor, the principle of non-discrimination or that of mutual recognition of judgements, and whether the mutual recognition is a value in itself at all or it remains a mean of cooperation between the Member States, merely a tool. So it is not to say that the concerns about fundamental rights raised are completely irrelevant.

It has to be noted that the Court has also emphasized the importance of social integration in its case law and has called on national judges to take into account the defendants ties with the host Member State before taking the decision whether to execute the warrant or not. CJEU Case law implies that the optional nature of the non-execution ground laid down in Article 4(6) of the EAW Framework Decision is power to derogate given to the national judge and not for the legislators of Member States for them to interpret the provision. The national judge would have to apply the provision in practice on case by case basis and considering the social economic and family ties of the person concerned with the host Member State in each specific case.

Both judicial cooperation in criminal matters and free movement of people within the Schengen area is built on a system that relies on mutual trust – trust in the judicial system of other Member States and trust that each Member State has the will and ability to put in place and eventually to implement the *acquis* forming the set of rules of the European free movement area. Problems in transposing the EU law and its practical application seem to come down to the lack of trust, the undelaying foundation of the principle of mutual recognition, that has led to an uneven transposition of Article 4(6) of the Framework Decision on EAW, the “nationality clause”.

Obviously, Member States may be reluctant to apply the law properly as mutual recognition principle in criminal matters eventually aims at extending the reach of national law outside the national borders, as oppose to that in civil and commercial matters where the aim is to do away with regulation in order to allow free movement of goods and services. In any event, to make the mutual recognition system work – and to avoid discrimination based on nationality – there is a need to increase trust between the Member States with regard to judicial cooperation in criminal matters.

In order to achieve even application of the EAW tool in the Member States, there are several solutions. Amending the wording in the Framework Decision is not a solution due

to the reluctance of the European Commission to open the “Pandora box”. There are solutions that at the same time contribute to the reinforcing mutual trust between the Member States. Harmonization of substantial and procedural criminal law is possible, The Treaty, namely Articles Article 82 (1) TFEU Article 83(1) TFEU certainly allow it. Especially now that the Commission has full powers in this field as of December 2014, we may expect novelties in the EU legislation.

Another reason for diverse application of particular EAW, is the lack of protection of defence rights as apparently, the fact all EU Member States are subject to ECHR is not sufficient to assume that the Member States are actually upholding those standards in practice. In the light of this, European Commission’ legislative proposals in order to set and protect minimum procedural rights for suspects and defendants are highly welcome. Several instruments have been adopted already, a package consisting further measures is yet to be adopted.

With regard to detention, many times defendants who are non-nationals are not released when the trial is pending due to the “flight risk” they are claimed to present. Another initiative by the Commission, the Framework Decision introducing European Supervision Order (ESO) is set to improve this. The Framework Decision on ESO provides for rules enabling a person resident in one Member State, but subject to criminal proceedings in another Member State, to be supervised by the authorities in the State in which he or she is resident whilst awaiting trial. In fact, it is the very aim of the ESO to protect the non-nationals as it is stated so in the preamble of the Framework Decision. It is yet to be seen how the new tool is seen by the practitioners; 12 Member States out of 28 have not yet transposed the instrument; final challenge is the practical application of the new tool by national authorities.

Further on, training and awareness raising of the practitioners should always be a mandatory prerequisite. National judges must be aware that they are not only national judges but also European judges and thus applying EU law training. Improving their knowledge and making the judges aware that they are not only national judges but also European judges and thus applying EU law helps to contribute to the creation of the European common legal culture. In the end it is the national judge who will be actually considering that Mr Andrew Symeou has a life back in UK, a family waiting for him, perhaps a steady job next to ongoing studies in the university. It is the national judge who

will be the one who has to bear in mind that Mr Jorge Da Silva Lopes has wife and kids in France – profound ties and family connections.

Finally, the CJEU continues to develop the ideas of judicial cooperation in criminal matters in its case law. Having seen the reluctance of the CJEU to undermine the principle of mutual recognition in its case law, we may expect the practice to continue. With regard to the prohibition of discrimination on grounds of nationality provided for in Article 18 TFEU, we will its application in relation to third country nationals. We have already seen the Court relating the non-execution on the grounds of nationality/ residence to economic, family, and social connections of the person with the host Member State, rather than to the EU citizenship as such as the basis for equal treatment between nationals of different Member States. This means broader protection for third country nationals too, especially most likely when they are family members of EU citizens or they are subject to any of the other two directives, Directive 2003/86/EC on family reunification and Directive 2003/109/EC on long-term residents. CJEU will nevertheless have to consider the binding nature of CFR and the individual rights deriving from the Charter when weighing facts over whether to uphold the mutual recognition principle in a particular case or not.

So far the Court has only been able have a say in the issue through the preliminary proceedings. Having in mind that the CJEU has since 1. December 2014 full jurisdiction in AFSJ and based on the existing case law we can expect the Court to remain loyal to the principle and thus contributing to fight against discrimination based on nationality. However, achieving the mindset “*de facto* solidarity” expressed by Robert Schumann in 1950s, continues to be a challenge for both Member States and the citizens.

Kodakondsuse ja elukoha roll EL liikmesriikide vahelises õigusalas koostöös kriminaasjades.

RESÜMEE

Juulis 2009.a. väljastas Kreeka Euroopa vahistamismääruse, mille alusel andis Ühendkuningriigid Kreekale välja Andrew Symeou, 20-aastase tudengi Ühendkuningriikidest, keda süüdistati kaks aastat varem puhkusreisi ajal Kreekas ühe noore mehe tõukamises, mille tagajärjel viimane kukkus ja saadud vigastustesse suri. Andrew viibis Kreeka eeluurimisvanglas ligi kaks aastat, kuni Kreeka kõigist süüdistustest tema vastu loobus. Peamine põhjus, miks teda kinni peeti ja vahi alla võeti, oli asjaolu, et olemata Kreeka kodanik kujutab Andrew endast põgenemisriski, seda hoolimata sellest, et tal puudusid varasemad karistused ning ta oli täitnud kõik tingimused vahi alt vabastamiseks.

Jorge Lopes Da Silva, Portugali kodanik, kes oli 2009.a. alates abielus Prantsusmaa kodanikuga ning elas Prantsusmaal, mõisteti Portugali alamastme kohtu poolt süüdi narkokaubanduses kuritegude eest, mis pandi toime vahemikus 2002 ja 2009, ja teda karistati viie-aastase vabadusekaotusega. Portugal väljastas Euroopa vahistamismääruse Jorge Lopes Da Silva karistuse kandmiseks Portugalis, kuid Jorge Lopes Da Silva taotles karistuse täitmist Prantsusmaal põhjendusega, et vastasel juhul rikutaks tema põhiõigusi eelkõige tema era- ja perekonnaelu puutumatus, kuna tema elu- ja töökoht on Prantsusmaal. Prantsusmaa õigus aga ei näinud ette Euroopa vahistamismääruse alusel isiku loovutamist keelduda juhul, kui tegemist ei ole Prantsusmaa kodanikuga.

Tänapäeva maailmas umbes 3% rahvastikust ei ela oma sünniriigis. Migratsioon on seetõttu ilmselt 21. sajandi üks aktuaalsemaid teemasid. Ka Euroopa Liit (EL) ei ole jäänud migratsiooni teemast puutumata. Iga EL liikmesriik on ühel või teisel moel seotud migratsiooniga väljastpoolt EL-i, aga ka isikute vaba liikumisega EL siseselt. Täna elab rohkem kui 14 miljonit EL kodanikku mõnes EL liikmesriigis, mille kodanik ta ise ei ole; lisaks sellele, 10% EL kodanikest on mingi perioodi oma elust on õppinud või töötanud mõnes teises EL liikmesriigis ja 13% on viibinud teistes liikmesriikides lühema-ajaliselt. Schengen *acquis*, mille keskne idee on EL sisepiiride kaotamine, on täna osa EL lepingust. Siiski on vaba liikumise idee üksi vanimad alates EL loomisest 1950ndatel; juba Robert Schuman rõhutas solidaarsust oma kõnes 9. mail 1950.a.

Võimalus liikuda ja elukohta valida põhineb võrdse kohtlemise põhimõttel ja diskrimineerimise keelul EL-is. Kodakondsuse põhine diskrimineerimiskeeld on üks EL põhiväärtusi, mida näevad ette EL aluslepingud, eelkõige EL toimimise lepingu Artikkel 18. Artikkel 18 keelab igasugune diskrimineerimine kodakondsuse alusel. Artikliga 20 kehtestatakse liidu kodakondsus. Euroopa Kohus (EK) on rõhutanud, et nimetatud sätetest tulenevaid õigusi võib piirata üksnes juhul, kui on põhjendatud alust arvata, et isik ohustab avalikku korda või riigi julgeolekut.

Vaba liikumise õigust ja võimaust kasutavad nii EL kodanikud kui ka kolmandate riikide kodanikud, kes elavad seaduslikult EL-is. Tänu kodakondsuse põhisele diskrimineerimiskeelule ja isikute vaba liikumise põhimõttele on neil see võimalus. Lisaks on neil seetõttu õiguslik ootus saada koheldud samaväärselt ja samasugustel tingimustel nagu elukohariigi kodanikud.

Pealtnäha seega ELis isikute vaba liikumist ei piirata ja diskrimineerimist aset ei leida. Samas Andrew ja Jorge kaasuses räägivad millestki muust. Nende kaasuste puhul tõstatub küsimus, kas EL õiguslase koostöö raames on kriminaalmenetluses kahtlustatava või süüdistatava õigused kaitstud, mis puudutab diskrimineerimist kodakondsuse alusel.

EL õiguslane koostöö kriminaalasjades põhineb vastastikkuse tunnustamise põhimõttel, vastavalt EL toimimise lepingu artiklile 82. Kohtuotsuste vastastikkune tunnustamine on protsess, mille käigus EL liikmesriik tunnustab teise EL liikmesriigi kohtuotsust ja jõustab selle oma riigis selliselt, nagu oleks otsus tehtud samas liikmesriigis. Ühes liikmesriigi kehtestatud meedet aktsepteeritakse kõikides EL liikmesriikides ning see toob kõikides liikmesriikides kaasa õigusliku tagajärje. Vastastikkuse tunnustamise põhimõtte on rajatud liikmesriikide vastastikkusele usaldusele, kujutades endast EL õiguslase koostöö „nurgakivi“.

Miks on vastastikkuse tunnustamise põhimõtte õiguslases koostöös kriminaalasjades niivõrd tähtis ning kuidas on see seotud isikute vaba liikumisega? Vastus on see, et kui liikmesriikide vahel puudub selle põhimõtte aluseks olev vastastikkune usaldus, siis vastastikkuse tunnustamise põhimõtte praktikas ei tööta, mis omakorda ohustab isikute vaba liikumise põhimõtte rakendamist. Ajal ja olukorras, kus inimestel on võimalus EL piires vabalt liikuda ja valida elukohta, ning kus seetõttu on ka kuritegevusel mõnevõrra lihtsam levida üle EL sisepiiride, peaksid EL liikmesriigid olema siiski võimelised üksteist usaldada. Isikute vaba liikumine ja õiguslane koostöö on justkui sama mündi kaks erinevat

külge. Seda eriti arvestades asjaolu, et Euroopa vahistamismääruse menetluse näol on tegemist kaasaegse menetlusega, kus traditsiooniline isikute väljaandmise süsteem, kus iga riik ise võtab väljaandmistootluse alusel otsuse väljaandmise osas, asendati kiirema ja efektiivsema Euroopa vahistamismäärusega. Traditsioonilises väljaandmise süsteemis on lubatud isiku väljaandmise taotlus jätta rahuldamata „kodakondsuse sätte“ alusel st riik üldjuhul oma kodanikku välja ei anna. EL õigusaktid, millega aga rakendatakse vastastikkuse tunnustamise põhimõtet, ei anna EL liikmesriigile piiramatut õigust väljaandmist piirata juhul, kui tegemist on oma kodanikuga. Selline õigus on ette nähtud kaalutlusõigusena.

Pidades silmas diskrimineerimiskeeldu ja võrdse kohtlemise põhimõtet ning EL õigusala koostöö põhimõtteid, esitatakse käesolevas uurimuses küsimus, kas Andrew ja Jorge kaasused liikmesriikide ja EL-i õiguspraktikas on erandlikud või on tegemist üldise aruamaga EL õigusest ning liikmesriikidel on endiselt tavaks oma kodanikke kohelda kriminaalmenetluses teisiti pelgalt kodakondsuse põhjal, võrreldes teiste liikmesriikide kodanikega ja kolmandate riikide kodanikega, kes selles liikmesriigis seaduslikult viibivad või elavad. Küsimus ei ole niivõrd selles, et liikmesriigid kohaldavad õigust erinevalt, küsimus on selles, et kas kõik liikmesriigid rikuvad õiguse kohaldamisega EL-i aluslepingutest tulenevaid põhimõtteid ehk kas isikute võrdse kohtlemise põhimõtet ikka rakendatakse kriminaalmenetluses.

Uurimuse fookuses on EL Raamotsus 2002/584/JSK Euroopa vahistamismääruse ja liikmesriikidevahelise üleandmiskorra kohta³²⁸, mille näol on tegemist kõige esimese EL õigusaktiga, millega rakendati vastastikkuse tunnustamise põhimõtet EL-is. Tegemist on üksiti ka kõige edukama vastastikkuse tunnustamise põhimõtet rakendava õigusaktiga, arvestades asjaolu, et raamotsuse on üle võtnud eranditult kõik liikmesriikidest, erinevalt kõikidest teistest vastastikkuse tunnustamise põhimõtet rakendavatest õigusaktidest. Vaadeldes EL liikmesriikide siseriikliku õigust, millega raamotsus üle võeti, samuti EL Komisjoni teatiseid ja raporteid, analüüsin uurimuses, kas teiste EL liikmesriikide kodanikel ja kolmandate riikide kodanikel, kes viibivad või elavad mõnes muus EL liikmesriigis, on kriminaalmenetluses ebasoodsas olukorras võrreldes selle riigi oma kodanikega. Kirjeldatud analüütilist meetodit kasutades on käesolevas uurimuses püütud

³²⁸ 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, 18.07.2002, pp. 1–20.

välja selgitada olukorra põhjused ja arutletud võimalike lahenduste üle. Arutluse all olevad asjaolud on esinenud viimase kümne aasta jooksul, ajast mil vastav raamotsus jõustus ning seda hakati rakendama praktikas.

Tuleb mainida ka seda, et õigusmõistmine kriminaalasjades on olnud pikka aega liikmesriikide pädevuses. EK pädevus on olnud piiratud eelotsusmenetlusega. Pärast Lissaboni lepingu jõustumist, millega kaotati sambad, sai Lissaboni kriminaalasjades õigusemõistmise valdkond ühise õiguse osaks. Seetõttu laienes ka EK pädevus õigusmõistmisele kriminaalasjades. Üleminekusätted, millega nähti ette, et täielik pädevus muutub kohaldatavaks alles viis aastat pärast Lissaboni lepingu jõustumist, kaotasid kehtivuse 1. detsembril 2014. Üleminikusätted puudutasid ka Euroopa Komisjoni pädevust vastavas valdkonnas. Seetõttu on eriti nüüd käesoleva küsimuse uurimine aktuaalne, kui võrd varasema praktika pinnalt eelotsustusmenetluses võib püüda ette näha, mis suunas EK praktika on arenemas, samuti milliseid meetmed kavatseb kasutusele võtta Euroopa Komisjon ning kas ja kuidas soovitakse poliitilisel tasandil täna kehtivat korda muuta või mõjutada.

Raamotsuse Artikkel 4(6) sätestab, et *„kui Euroopa vahistamismäärus on tehtud vabadusekaotuse või vabadust piirava julgeolekumeetme täitmiseks ja tagaotsitav viibib vahistamismäärust täitvas liikmesriigis või on selle kodanik või omab seal elukohta ning see riik kohustub karistuse või vabadust piirava julgeolekumeetme täitma vastavalt oma siseriiklikule õigusele“* võib vahistamismäärust täitev õigusasutus keelduda Euroopa vahistamismääruse täitmisest. Samas 28 EL liikmesriigi siseriikliku õiguse, millega vastav säte on üle võetud, analüüs näitab, et vaid üks liikmesriikidest on sätte võtnud üle korrektset. Liikmesriigid on sättele leidnud terve rida erinevaid tõlgendusviise. Ühed kohaldavad alust kohustuslikuna, teised kohaldavad sätet üksnes oma kodanikele, mitte aga selles riigis elavatele teise liikmesriigi kodanikele. Esineb ka kombineeritud lahendust – täitmisest keeldumine on kohustuslik juhul, kui tegemist on oma kodanikuga, kuid vabatahtlik juhul, kui tegemist liikmesriigi elanikuga. Ka esineb lahendust, kus elanikule kohaldatakse sätet üksnes juhul, kui tegemist on näiteks pikaajalise elanikuga.

Praktikas ilmneb diskrimineerimine olukordades, kus mitte-kodanikud vahistatakse kriminaalmenetluses üksnes seetõttu, et nad oma kodakondsusest tulenevalt kujutavad endast põgenemisriski. Teine näide diskrimineerimisest on see, et oma kodanikke ei anta välja – vastavalt siis siseriiklikule õigusele – küll aga lähtutakse hoopis erinevast põhimõttest, kui tegemist on kolmanda riigi kodanikuga või teise EL liikmesriigi

kodanikuga. Seetõttu võib asuda seisukohale, et kodakondsusel põhinev diskrimineerimine on üsna levinud, vähemalt mis puudutab kriminaalmenetlust, kusjuures ei diskrimineerita mitte üksnes kolmandate riikide kodanikke, vaid teisi EL kodanikke, kes ometi omavad teatud positsiooni EL õiguses, arvestades eelkõige EL toimimise lepingu Artiklist 20 tulenevat EL kodakondsusega kaasnevaid õigusi. Siinkohal tuleb arvestada, et teoorias on EL kodanikud soodustatud võrreldes kolmandate riikide kodanikest elanikega, sest Artiklist 18 tulenev diskrimineerimiskeeld on seotud otsesõnu liidu kodakondsusega ning kolmandate riikide kodanikud ei ole sellest sättest tuleneva kaitsega kaetud (mõistagi laieneb neile aga muudest õigusaktidest ja sätetest tulenevpõhiõiguste kaitse).

Uurimuses on vaadeldud EK praktikat, analüüsitud on eelkõige *Lopes Da Silva Jorge*³²⁹, *Kozłowski*³³⁰ ja *Wolzenburg-i*³³¹ kohtulahendeid. EK on siiski asunud teistsugusele seisukohale kui liikmesriigid. Esiteks on kohus öelnud, et liikmesriikidel ei ole lubatud Artiklis 4(6) nimetatud mõisteid „elama“ (omama elukohta) ja „viibima“ sisustada kitsamalt kui EL aluslepingutest tuleneb, sest tegemist on ühenduse õiguse autonoomsete mõistetega. Liikmesriikidel ei ole järelikult õigust anda neile mõistetele artikli 4 (6) ülevõtvas siseriiklikus õiguses laiemat ulatust kui see, mis tuleneb eelnimetatud ühetaolisest tõlgendusest. Nii näiteks ei ole lubatud „elamise“ mõiste sisustamisel siduma sätte kehtivust mõne administratiivse asjaoluga, näiteks elamisloa olemasolu EL kodanikul, kuivõrd sellist piirangut sätte kehtimisele ei näe ette EL õigus. „Viibimine“ EL õiguses tuttav mõiste ei ole; sEuroopa Parlamendi ja nõukogu direktiiv 2004/38/EÜ, mis käsitleb Euroopa Liidu kodanike ja nende perekonnaliikmete õigust liikuda ja elada vabalt liikmesriikide territooriumil³³², räägib lühiajalisest elamisest st vähem kui kolm kuud, kuid seda ei nimetata „viibimiseks“. EK on oma kohtupraktikas seostanud „viibimise“ sarnaselt elamisega pikaajalisuse kriteeriumiga, asudes seisukohale, et esinema peavad objektiivsed asjaolud, mis näitavad, et isikul on selles liikmesriigis majanduslikud, perekondlikud ja sotsiaalsed sidemed. Selline seisukoht on kriminaalasjade õigusmõistmises on üsna loogiline – kui kahtustatav või süüdistatav viibis kriminaalmenetluse alustamise põhjuseks olevate asjaolude tekkimisel teises liikmesriigis näiteks läbisõidul, ei ole põhjendatud tema väljaandmisest keeldumine artikli 4(6) alusel. Küll aga võib esitada küsimuse, et kellel on antud sätte kohaldamisel kaalutlusõigus? Kas „võib“ viitab seadusandjale või kohtunikule?

³²⁹ ECJ 05.12.2012, C-42/11, *Lopes Da Silva Jorge*.

³³⁰ ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*.

³³¹ ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*.

³³² ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*.

EK on üheselt andnud mõista, et tegemist on siseriikliku kohtuniku kaalutlusõigusega, mitte aga liikmesriigi suvaga, millisel kujul antud säte üle võtta.

Teiseks, mis puudutab kahtlustava või süüdistava sidemeid elukohaga, siis EK hinnagnul on selge, et tegemist peab olema objektiivsete asjaoludega, mis aga ei ole seotud liidu kodakondsusega võrdse kohtlemise alusena. Võrdse kohtlemise alus on ikkagi isikul „mõnda aega püsivalt selles liikmesriigis viibimise tulemusena tekkinud /---/ side, mis vastab selles riigis elamisest tulenevale seotuse astmele“ ning seda seetõttu, et täitmata jätmise vabatahtliku aluse „eesmärk on võimaldada vahistamismäärust täitval õigusasutusel suurendada tagaotsitava isiku ühiskonda taasintegreerimise tõenäosust pärast seda, kui viimane on talle mõistetud karistuse ära kandnud“.³³³

Kolmandaks nähtub EK kohtupraktikast kohtu äärmiselt tugev kaitsepositsioon vastastikkuse tunnustamise põhimõtte alal hoidmisel. Kohtule on isegi ette heidetud, et kohati seatakse vastastikkuse tunnustamise põhimõtte justkui tähtsamale positsioonile kui kahtlustava või süüdistava õiguste kaitse kriminaalmenetluses.³³⁴ Nimelt raamotsuse artiklis 3 on sätestatud Euroopa vahistamismääruse täitmata jätmise kohustuslikud alused ja artiklis 4 vabatahtlikud alused. *Melloni*³³⁵ ja *Radu*³³⁶ kohtuasjades on kohus välistanud mistahes muude Euroopa vahistamismääruse täitmata jätmise aluste siseriiklikus õiguses sätestamine. Kuna artiklid 3 ja 4 ei näe ette keeldumise alusena põhiõiguste rikkumist, ja just selle alusel viidatud kohtuasjades isikud täitmisest keeldumist taotlesid, asus EK seisukohale, et nendes asjades vahistamismääruse mitte täitmine ei olnud lubatud. Siinkohal läheb kohtupraktika kohati isegi vastuollu Euroopa inimõiguste kohtu praktikaga, mis on leidnud, et asjaolu, et EL liikmesriigid on kõik ühinenud Euroopa Inimõiguste Konventsiooniga³³⁷, ei ole piisav eeldamaks, et EL riikides põhiõiguste rikkumist kindlasti ei toimu.³³⁸ Kuigi EK jäika seisukohta võib põhjendada raamotsuse enda preambulas sätestatud mõttega, mis seab uue süsteemi ja raamotsuse eesmärgiks väljaandmise lihtsustamine, võib ikkagi küsida, kas vastastikkuse tunnustamise põhimõte

³³³ ECJ 17.07.2008, C-66/08, Szymon Kozłowski, para.45-46.

³³⁴ D. Mansell, p. 44 ; Marin, p. 345 ; M. Ventrella, p. 300.

³³⁵ ECJ 26.02.2013, C-399/11, *Melloni*.

³³⁶ ECJ 29.01.2013, C-396/11, *Radu*, para. 36.

³³⁷ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

³³⁸ ECtHR 21.01.2011, 30696/09, *M.S.S v Belgium and Greece*.

on väärtus ja eesmärk iseenesest või on tegemist üksnes vahendiga mõne muu väärtuse tagamiseks ja eesmärgini jõudmiseks.

Ühelt poolt on kriitikute seisukohad ja liikmesriikide teatav vastuseis raamotsuse korrektsele üe võtmisele ja rakendamisele mõistetav, sest vastastikkuse tunnustamise põhimõtte kohaselt on liikmesriik kohustatud teise riigi kohtuotsust igal juhul aktsepteerima, mida kindasti ei ole lihtne saavutada. Et liikmesriik seda teha saaks, peab ta teist liikmesriiki usaldama. See nõuab aga väga suurt pingutust nii riikide enda kui ka Euroopa Komisjoni poolt, kes selle peaks tagama.

Tagamaks Euroopa vahistamismääruse ühtlast rakendamist, ja veel tähtsam, suurendamaks liikmesriikide vahelist usaldust, on erinevaid lahendusi ja võimalusi. Raamotsuse sõnastuse muutmine ei tule kõne alla, Euroopa Komisjon on üheselt väljendanud, et õigusakti muutma ei hakata ning lahendusi tuleb otsida mujalt. Ühe võimalusena võib näha Euroopa kriminaalõiguse ja kriminaalmenetlusõiguse ühtlustamise, võimalus, mille näevad ette EL toimimise lepingu artiklid 82 (1) ja 83(1). Seda võimalust saab Komisjon kasutada alates üleminekuaja lõppemisest 1. detsembril 2014. Komisjon ongi sellega alustanud ja esitanud mitu uut eelnõu kriminaalõiguse vallas.

Kahtlustava ja süüdistatava menetlusõiguste suurem kaitse on teine võimalus liikmesriikide vahelist usaldust suurendada ja selles osas on Komisjon ka initsiatiivi näidanud ning tehtud on ettepanek terve menetlusõiguste paketi vastuvõtmiseks, millest nii mõnigi õigusakt on juba vastu võetud.

Kolmas võimalus on parandada kinnipidamisasutuste tingimusi, kuna usaduse puudumine liikmesriikide vahel ja sellest tulenev soovimatus anda välja oma kodanik on muuhulgas põhjustatud ka sellest, et teise riigi kinnipidamisasutuste tingimusi ei peeta rahuldatavaks. Rahuolematus on põhjendatud ka Euroopa Komisjoni meelest, mis oma raportites on leidnud, et tingimused erinevad suuresti eri riikides. Lisaks tingimuste parandamisele praktikas on võimalus muuta süsteemi ja ka sellega on juba algust tehtud – vastu on võetud raamotsus 2009/829/JSK EL liikmesriikides vastastikkuse tunnustamise põhimõtte kohaldamise kohta järelevalvemeetmete rakendamise otsuste kui kohtueelse kinnipidamisega seotud alternatiivse võimaluse suhtes.³³⁹ Õigusakti eesmärk on akti

³³⁹ Council Framework Decision 2009/829/JHA20 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. OJ L 294, 11.11.2009, p. 20.

preambula kohaselt teha järelevalvet kohtualuse liikumise üle, pidades silmas peamist, avalikkuse kaitse eesmärki, ja ohtu, mida põhjustab avalikkusele praegune süsteem, mis näeb ette üksnes kaks võimalust: kohtueelse kinnipidamise või järelevalveta liikumise. Sagedasem järelvalve kohaldamine praktikas, kohtueelse kinnipidamise asemel, peaks suurendama ka liikmesriikide omavahelist usaldust, kusjuures oleks tagatud isiku põhiõiguste kaitse. Komisjon peaks aga nüüd tagama akti ülevõtmise ja ka rakendamise praktikas, sest tänaseks on raamotsuse üle võtnud vaid 12 liikmesriiki.

Neljas võimalus, mis peaks lahendama probleeme väga paljudes EL valdkondades, on kohtunike koolitus. See peaks olema kohustuslik, sest iga kohtunik mistahes EL riigis peaks mõistma, et ta ei kohalda enam mitte üksnes siseriikliku õigust vaid ka EL õigust, mis omakorda aitab kaasa EL õiguskultuuri loomisele. Lõppkokkuvõttes on siseriiklik kohtunik see, kes peab otsuse tegemisel arvesse võtma, et Andrew Symeou'l ja Jorge Da Silva Lopes'il on kusagil kool pooleli, korralik töökoht ning pere ja lapsed.

LITERATURE

Books

1. M. Fichera. The implementation of the European Arrest Warrant in the European Union: law, policy and practice. Cambridge: Intersentia 2011.
2. S. Miettinen. Criminal Law and Policy in the EU. Oxford: Routledge, 2013.
3. N. Moussis. Access to European Union: Law, Economics, Policies. The ultimate textbook on the European Union. 19th updated edition. Rixensart: Euroconfidentiel 2011.
4. B. de Sousa Santos (edit.). The European Arrest Warrant in Law and In Practice: A Comparative Study or the consolidation of the European law-enforcement area. *Sine loco*: European Commission, 2010. – http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf. 30.04.2015.
5. J. Spencer. Mutual Recognition and Choice of Forum. – Choice of Forum in Cooperation Against EU Financial Crime. Freedom, Security and Justice and the Protection of Specific EU-interests, edit. Michel Luchtmann. The Hague: Eleven International Publishing 2013.
6. C. Tobler and others (edit.). The Lisbon Treaty. Lisbon Treaty Meeting Summaries, 19 March 2008, Europa Institute Leiden University, Law Faculty. – <http://media.leidenuniv.nl/legacy/lisbon-treaty-summaries.pdf>. 30.04.2015.
7. M. Thunberg Schunke. Whose responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU. Cambridge: Intersentia Publishing Ltd 2013.
8. T. Vander Beken, B. De Ruyver, N. Siron. The organisation of the fight against corruption in the member states and candidate countries of the EU. Antwerpen: Maklu Uitgevers nv 2001.

Articles

9. J. B. Banach-Gutierrez. Globalized Criminal Justice in the European Union context. – New Journal of European Criminal Law, Vol 4, Issue 1-2, 2013, pp. 154-167.
10. E.R. Brouwer, K.M. de Vries. Third-country nationals and discrimination on the ground of nationality: article 18 TFEU in the context of article 14 ECHR and EU migration law: time for a new approach. M. Van den Brink, S. Burri & J. Goldschmidt (Eds.), Equality and human rights: nothing but trouble? Utrecht: SIM 2015, pp. 123-146.
11. M. J. Borgers. Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters. – European Journal of Crime, Criminal Law and Criminal Justice 18, 2010, pp. 99–114.
12. D. Mansell. The European Arrest Warrant and Defence Rights. – European Criminal Law Review, Volume 2, Number 1, March 2012, pp. 36-46.
13. L. Marin. Effective and Legitimate? Learning from the Lessons of 10 years of practice with the European Arrest Warrant. New Journal of European Criminal Law, Vol, 5, Issue 3, 2014, pp. 327-348.
14. G. Mathisen. Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond. – Nordic Journal of International Law 1 at 10. 79, 2010, pp. 1-33.

15. E. Muir, A. P. van der Mei. EU Citizenship of the Area of Freedom, Security and Justice. – Choice of Forum in cooperation against EU financial crime. – M. Luchtmann (edit.). Freedom, Security and Justice and the protection of specific EU-interests. The Hague: Eleven International Publishing 2013.
16. T. Ostropolski. The principle of proportionality under the European Arrest Warrant. – New Journal of European Criminal Law, Vol. 5, Issue 2, 2014, pp. 167-191.
17. G. Piening, A. Gemershausen. Council of Europe interview with G. Piening, A. Gemershausen: Faire de la citoyenneté un moyen de partager les responsabilités: la campagne de naturalisation et la politique d'intégration à Berlin. Tendances de la cohésion sociale, n 18: Quelle cohésion sociale dans une Europe multiculturelle? Concepts, état des lieux et développements. Strasbourg Cedex: Council of Europe Publishing, 2008.
18. I. Sammut. The EU and Maltese legal orders: what kind of marriage between them? Malta in the European Union 2004-2009. The Report. Malta in the European Union: Five Years on and Looking to the Future. Civil Society Project Conference: 2009, pp. 97-112.
19. E. Smith. Running before we can walk? Mutual recognition at the expense of fair trials in Europe's area of Freedom, Justice and Security – New Journal of European Criminal Law, Vol 4, Issue 1-2, 2013, pp. 82-98.
20. M. Ventrella. European Integration or democracy disintegration in measures concerning police and judicial cooperation? New Journal of European Criminal Law, Vol 4, Issue 3, 2013, p. 290-309
21. J. A. Vervaele. European Criminal Law and General Principles of Union Law. Research papers in law 5/2005. College of Europe, European Legal Studies, pp. 5-6. –
https://www.coleurope.eu/content/studyprogrammes/law/studyprog/pdf/ResearchPaper_5_2005_Vervaele.pdf. 30.04.2015.
22. K. Weis. The European Arrest Warrant – a victim of its own success? – New Journal of European Criminal Law, Vol. 2, Issue 2, 2011.

Normative acts:

23. Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. – OJ C 27, 26.01.1998. p. 34.
24. Charter of Fundamental Rights of the European Union. – OJ C 326, 26.10.2012, pp. 391–407.
25. Consolidated version of the Treaty on the European Union. – OJ C 326, 26.10.2012, pp. 13-34.
26. Consolidated version of the Treaty on the Functioning of the European Union. – OJ C 326, 26.10.2012, pp. 47–154.
27. Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. – OJ C 197, 12.07.2000.
28. 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, 18.07.2002, pp. 1–20.
29. Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty (Transfer of Prisoners). – OJ L 327, 5.12.2008, p. 27.

30. 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. – OJ L 294, 11.11.2009, p.20.
31. Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. ETS No. 5, 4.11.1950. – <http://www.refworld.org/docid/3ae6b3b04.html>. 30.04.2015.
32. Council of Europe European Convention on Extradition. ETS No. 24. Paris, 13.12.1957.– <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>. 30.04.2015.
33. Directive 2003/86/EC of the European Parliament and of the Council of 22 September 2003 on the right to family reunification. – OJ L 251, 3.10.2003, pp. 12–18.
34. Directive 2003/109/EC of the European Parliament and of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents. – OJ L 16, 23.1.2004, pp. 44–53.
35. Directive 2004/38/EC/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. – OJ L 158, 30.04.2004.
36. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings. – OJ L 280, 26.10.2010, pp. 1–7.
37. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings. – OJ L 142, 1.6.2012, pp. 1–10.
38. Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. – OJ L 294, 6.11.2013, pp. 1-12.
39. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. – OJ L 130, 1.5.2014, pp. 1–36.
40. Protocol (No 2) on the application of the principles of subsidiarity and proportionality, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union by the Treaty of Lisbon of 13 December 2007, OJ 2007 C 306/150.
41. The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders. – OJ L 239, 22.9.2000, pp. 13–18.
42. The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders signed at Schengen on 19 June 1990. – OJ L 239, 22.09.2000, pp. 19-62.
43. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007. – OJ C 306, 17.12.2007.

44. Treaty on European Union (Consolidated Version), signed at Amsterdam on 2 October 1997. OJ C 340, 10.11.1997, p. 115. – http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf. 30.04.2015.
45. Treaty on European Union, signed at Maastricht on 7 February 1992, OJ C 191, 29.07.1992. – http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf. 30.04.2015.

National legislation

46. Act 2003:1156 on surrender from Sweden according to the European arrest warrant as amended by Act 2006:348 - Ordinance 2003:1179 on surrender from Sweden according to the European arrest warrant - Ordinance 2003:1178 on surrender to Sweden according to the European arrest warrant. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Sweden_National_legislation_EAW.pdf. 30.04.2015.
47. Act no 154/2010. Coll. of 09/03/2010 on the European Arrest Warrant. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Slovakia_National_legislation_EAW.pdf. 30.04.2015.
48. Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30.11.2012. HU Official Journal/Magyar Közlöny, No 160/2012, p. 26718. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Hungary_National_legislation_EAW.pdf. 30.04.2015.
49. Act of 20 March 2013 on International Judicial Cooperation in Criminal Matters amending Act No 140/1961, the Criminal Code, as subsequently amended, and Act No 119/2002 on firearms and ammunition and amending Act No 156/2000 on the certification of firearms, ammunition and pyrotechnic items and amending Act No 288/1995 on firearms and ammunition, as amended by Act No 13/1998, and Act No 368/1992 on administrative charges, as subsequently amended, and Act No 455/1991 on trading (the Trading Act), as subsequently amended, as subsequently amended. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Czech_Republic_National_legislation_EAW.pdf.
50. Act of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the surrender procedures between the Member States of the European Union (the Surrender Act). – <http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/Dutch%20Surrender%20Act.pdf>. 30.04.2015.
51. Act on Judicial Cooperation in Criminal Matters with Member States of the European Union of 14.07.2010 as amended by the act on the Amendments to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 28.06.2013 and coming into force on 1.07.2013 as amended by the act on the Amendment to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 10.10. 2013.
52. Act on Judicial Cooperation in Criminal Matters with Member States of the European Union of 14.07.2010. Amended September 2007. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Portugal_National_legislation_EAW.pdf. 30.04.2015.
53. Belgian legislation implementing the European Arrest Warrant. Unofficial Translation. 22.12.2003, *Moniteur belge* (2nd edit.). – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Belgium_National_legislation_EAW.pdf. 30.04.2015.

54. Code of Criminal Procedure Chapters 65a and 65b amended on 5 November 2009. –
<http://www.legislationline.org/documents/section/criminal-codes/country/10>. 30.04.2015.
55. Code of Criminal Procedure. Spanish Law 23/2014 of 20.11.2014 of mutual recognition of criminal decisions in the European Union, Spanish Official State Gazette No. 282, 21.11.2014, Sec. I. P. 95437. – <http://www.ejn-crimjust.europa.eu/ejnupload/InfoAbout/Ley%20Reconocimiento%20Mutuo%20Resoluciones%20Judiciales%20Penales%20EN.pdf>. 30.04.2015.
56. Criminal Code: (Zin., 2000, No. 89-2741) amended by Law No X-1236 of 28 June 2008. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Lithuania_National_legislation_EAW.pdf. 30.04.2015.
57. Criminal Procedure Law (the CPL). 21.04.2005 (amended 29.07.2008; 09.07.2009 and 21.10.2010 2010). – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Latvia_National_legislation_EAW.pdf . 30.04.2015.
58. Estonian Criminal Procedure Code. – RT I 2004, 54, 387 ... RT I, 19.03.2015, 1.
59. European arrest warrant Act 2003 as amended by the Criminal Justice (Terrorist Offences) Act 2005, the Criminal Justice (Miscellaneous Provisions) Act 2009 and the European arrest warrant (application to third countries and amendment) Act 2012. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Ireland_National_legislation_EAW.pdf. 30.04.2015.
60. European Arrest Warrant and surrender procedures between Member States Act (ZENPP). No.: 212-05/04-32/1, 26.03.2004. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Slovenia_National_legislation_EAW.pdf. 30.04.2015.
61. Extradition (Designated Foreign Countries) Order of 7.06.2004, S.L. 276.05 (Extradition Act-Cap.276). – <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=9718&l=1>. 30.04.2015.
62. Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG). National Council: GP XXII RV 370 AB 439, page 56. Federal Council: 7002 AB 7033, page 707. Original version: Federal Law Gazette I No. 36/2004 as amended by the following laws: Federal Law Gazette I No. 164/2004; Federal Law Gazette I No. 38/2007; Federal Law Gazette I No. 112/2007; Federal Law Gazette I No. 134/2011; Federal Law Gazette ; Federal law Gazette I No 175/2013. – http://www.law.uj.edu.pl/~kpk/eaw/legislation/Austria_National_legislation_EAW.pdf. 30.04.2015.
63. Gesetz zur Umsetzung des Rahmenbeschlusses über den Europäischen Haftbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäischen Union (Europäisches Haftbefehlsgesetz – EuHbG. BGBl. 2006 I, p. 1721. –
http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/euhaftb/bgbl106s1721.pdf. 30.04.2015.
64. Law 2003/1286 of 30.12.2003. Last amendment 824/2014 of 01.12.2014. –
<http://www.finlex.fi/fi/laki/ajantasa/2003/20031286?search%5Btype%5D=pika&search%5Bpika%5D=2003%2F1286>. 30.04.2015.
65. Law 3251/2004 on European arrest warrant, amendment to Law 2928/2001 on criminal organisations and other provisions. Official Gazette FEK A-127, 9.07.2004. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Greece_National_legislation_EAW.pdf. 30.04.2015.

66. Law No 133(I) of 2004 to provide for the European Arrest Warrant and the surrender procedures of requested persons between Member States of the European Union of 2004. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Cyprus_National_legislation_EAW.pdf. 30.04.2015.
67. Law No 302/2004 on international judicial cooperation in criminal matters (*Legea nr. 302/2004 privind cooperarea judiciară internațională în materie penală, Monitorul Oficial al României*). Part I, No 377 of 31 May 2011; ‘Law No 302/2004’. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Romania_National_legislation_EAW.pdf. 30.04.2015.
68. Law No 69 of 22 April 2005. Legge 22 aprile 2005, n.69. Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d’arresto europeo e alle procedure di consegna tra Stati membri. Gazzetta Ufficiale No 98, 29.04.2005. –
<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2005;69>. 30.04.2015.
69. Law No 833 of 25 August 2005 on Extradition (amended by Law No 538 of 08/06/2006 § 11; law No 542 of 08/06/2006 § § 6 and 7; Law No 394 of 30/04/2007 § 1; Law No 347 of 14/05/2008; Law No 99 of 10/02/2009 § 2; Law No 494 of 12/05/2010 § 2; Law No 271 of 04/04/2011 § 2; Law No 428 of 01/05/2013 § 3). –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/Denmark_National_legislation_EAW.pdf. 30.04.2015.
70. Law no. 65/2003 of 23 August 2003 approving the legal regime of the European arrest warrant (giving effect to the council framework decision no. 2002/584/JHA of 13 June. - Penal code,
71. Law of 17 March 2004 on the European arrest warrant and surrender procedures between Member States of the European Union as amended by Law of 3 August 2011. Publication Mem. A n° 39 od 22.03.2004. – <http://eli.legilux.public.lu/eli/etat/leg/loi/2004/03/17/n1>. 30.04.2015.
72. Law on Extradition and European Arrest Warrant /LEEAW SG 46/3 as amended by SG 25/6 June 2008. –
http://www.unodc.org/res/cld/document/bgr/2005/extradition_and_european_arrest_warrant_act_html/Bulgaria_Law_on_Extradition_and_European_Arrest_Warrant_2005.pdf. 30.04.2015.
73. LOI n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité; J.O n° 59 du 10 mars 2004 page 4567. – <http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=889>. 30.04.2015.
74. The Extradition Act 2003 as amended by the Police and Justice Act 2006. No. 992 2015. –
http://www.law.uj.edu.pl/~kpk/eaw/legislation/United_Kingdom_National_legislation_EAW.pdf. 30.04.2015.

Case Law

75. *Symeou v Public Prosecutors Office at Court of Appeals, Patras, Greece*, 2009 EWCH 897.
76. ECJ 15.07.1964, C-6/64, *Costa vs ENEL*
77. ECJ 17.12.1970, C-11/70, *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*
78. ECJ 26.02.1975, C-67/74 *Bonsignore v Oberstadtdirektor der Stadt Köln*
79. ECJ 28.10.1975, C-36/75 *Roland Rutili v Ministre de l’interieur*
80. ECJ 27.10.1977, C-30/77 *Régina v Pierre Bouchereau*
81. ECJ 20.02.1978, C-120/78, *Cassis de Dijon*

82. ECJ 03.06.1986, C-139/85 *R. H. Kempf v Staatssecretaris van Justitie*
83. ECJ 14.02.1995, C-279/93, *Finanzamt Köln-Altstadt v. Schumaker*,
84. ECJ 19.01.1999, C-348/96 *Criminal proceedings against Donatella Calfa*
85. ECJ 11.02.2003, C-187/01, C-385/01, *joined cases Hüseyin Gözütok and Klaus Brügge*
86. ECJ 29.04.2004, C-482/01 *Georgios Orfanopoulos and Raffaele Oliveri v. Land Baden-Württemberg*
87. ECJ 16.06.2005, C-105/03 *Pupino*
88. ECJ 25.01.2007, C-370/05 *Criminal Proceedings against Uwe Kay Festersen*
89. ECJ 10.07.2008, C-33/07 *Jipa*
90. ECJ 10.07.2008, C-33/07 *Jipa v Ministry of Administration and Interior*
91. ECJ 17.07.2008, C-66/08, *Szymon Kozłowski*
92. ECJ 24.07.2008, C-127/08, *Metock and others v Minister for Justice, Equality and Law Reform*
93. ECJ 25.07.2008 C-109/01, *Secretary of State for the Home Department v Akrich*
94. ECJ 04.06.2009, C-22/08, *Vatsouras v. Arbeitsgemeinschaft Nürnberg*
95. ECJ 21.11.2009, C-123/08, *Dominic Wolzenburg*
96. ECJ 19.01.2010, C-555/07, *Küçükdeveci v. Swedex GmbH & Co.*
97. ECJ 22.09.2011, C-493/10, *ME & Others v Refugee Applications Commissioner & MEJLR*
98. ECJ 21.12.2011, C-411/10, *NS and Others v SSHD*
99. ECJ 05.09.2012, C-42/11, *Lopes Da Silva Jorge*
100. ECJ 29.01.2013, C-396/11, *Radu*
101. ECJ 26.02.2013, C-399/11, *Melloni*.
102. ECtHR 18.02.1991, 12313/83, *Moustaquim v. Belgium*
103. ECtHR 16.09.1996, 17371/90, *Gaygusuz v. Austria*
104. ECtHR 18.12.1996, 15318/89, *Loizidou v. Turkey*
105. ECtHR 27.11.2007, 77782/01, *Luczak v. Poland*
106. ECtHR 04.10.2010, 42371/02, *Pavlenko v. Russia*
107. ECtHR 21.01.2011, 30696/09, *M.S.S v Belgium and Greece*
108. ECtHR, 21.06.2011, 5335/05, *Ponomaryovi v. Bulgaria*
109. ECtHR 08.04.2014, 17120/09, *Dhabhi v. Italy*

Other sources

110. Communication from the Commission to the Council and the European Parliament: Mutual Recognition of Final Decisions in Criminal Matters. Brussels, 26.7.2000. COM(2000) 495 final.
111. Communication from the Commission to the European Parliament and the Council. An area of freedom, security and justice serving the citizen. Brussels, 10.6.2009. COM(2009) 262 final.
112. Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final. Brussels, 2.7.2009

113. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen. Brussels, 20.4.2010., COM(2010) 171 final.
114. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme. Brussels, 20.4.2010. COM(2010) 171 final.
115. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Schengen governance - strengthening the area without internal border control. Brussels, 16.09.2011. COM(2011) 0561 final.
116. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Building trust in EU-wide justice: a new dimension to European judicial training. Brussels, 13.9.2011. COM(2011) 551 final.
117. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee the Committee of the Regions Making progress on the European Union Agenda on Procedural Safeguards for Suspects or Accused Persons - Strengthening the Foundation of the European Area of Criminal Justice. Brussels, 27.11.2013. COM(2013) 820 final.
118. Council of Europe. List of declarations made with respect to treaty No. 024: European Convention on Extradition. – <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?CL=ENG&CM=8&NT=024&VL=1>. 30.04.2015.
119. Council of Europe. White Paper on Intercultural Dialogue: Living together as equals in dignity. Launched by the Council of Europe Ministers of Foreign Affairs at their 118th Ministerial Session. Strasbourg Cedex: Council of Europe Publishing 2008.
120. Council of European Union. Programme of measures to implement the principle of mutual recognition of decisions in criminal matters. OJ C 12, 15.1.2001, pp. 10–22. – [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001Y0115\(02\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001Y0115(02)). 30.04.2015.
121. Council of the European Union. Replies to questionnaire on quantitative information on the practical operation of the EAW - Year 2013. Working Party on Cooperation in Criminal Matters (Experts on the EAW). 15.10.2014. 8414/3/14 REV 3. – <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208414%202014%20REV%201>. 30.04.2015
122. Council of the European Union. Revised version of the European handbook on how to issue a European Arrest Warrant. 01.12.2010. 17195/1/10 REV. – <http://register.consilium.europa.eu/doc/srv?l=en&f=ST%2017195%202010%20REV%201>. 30.04.2015.
123. Council of the European Union. Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16.10.1999. – http://www.europarl.europa.eu/summits/tam_en.htm. 30.04.2015.
124. Council of the European Union. Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. OJ C 291,

- 4.12.2009, pp. 1-3. – [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32009G1204(01)) .
30.04.2015.
- 125.Eurobarometer 337/2010.
- 126.European Commission. Area of freedom, security and justice. Directive on EU long-term resident status, 2006. –
http://ec.europa.eu/justice_home/fsj/immigration/residents/fsj_immigration_residents_en.htm.
30.04.2015.
- 127.European Commission. Report from the Commission to the European Parliament and the Council, on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention. Brussels, 5.2.2014, COM (2014) 57 final.
- 128.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. Brussels, 11.4.2011. COM (2011) 175 final.
- 129.European Commission. The Schengen area and cooperation. Summaries of EU legislation, 2009. –
<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429911146784&uri=URISERV:133020>.
30.04.2015.
- 130.European Commission. Mutual recognition. Single Market and Standards, 2015. –
http://ec.europa.eu/enterprise/policies/single-market-goods/free-movement-non-harmonised-sectors/mutual-recognition/index_en.htm. 30.04.2015.
- 131.European Council. The Hague Programme strengthening freedom, security and justice in the European Union. – OJ C 53, 3.3.2005, pp. 1–14.
- 132.European Council. The Stockholm Programme an open and secure Europe serving and protecting citizens. – OJ C 115, 05.04.2010, pp. 1-38.
- 133.European Judicial Network. Report on the Operation and Management of the European Judicial Network 2011-2012. *Sine loco*: Publications Office of the European Union 2014. – <http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=1387>. 30.04.2015.
- 134.European Judicial Network. Status of Implementation. Judicial Library. – http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=14. 30.04.2015.
- 135.European Parliament. Report with recommendations to the Commission on the review of the European Arrest Warrant Committee on Civil Liberties, Justice and Home Affairs.
RR\1017132EN.doc 28.01.2014.– <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0039+0+DOC+PDF+V0//EN>. 30.04.2015.
- 136.European Union Agency for Fundamental Rights, Council of Europe. Handbook on European non-discrimination law. Luxembourg: Publications Office of the European Union 2011.
- 137.Eurostat, Migration and migrant population statistics (March 2013).

138. International Organization for Migration. World Migration 2008: Managing Labour Mobility in the Evolving Global Economy. VOLUME 4 - IOM World Migration Report Series. Geneva: International Organization for Migration, 2008.
139. R. Schuman. Schuman Declaration. French Foreign Minister. 9.05.1950. - <http://www.eurotreaties.com/schuman.pdf>. 30.04.2015.

EAW – Member States’ implementing legislation as at 1 April 2014

Member State	Legislation title	Most recent change/entry into force date
Austria	Federal law on judicial cooperation in criminal matters with the Member States of the European Union (EU-JZG) (National Council: GP XXII RV 370 AB 439, page 56. – Federal Council: 7002 AB 7033, page 707.) Original version: Federal Law Gazette I No. 36/2004 Amendments: As amended by the following laws: Federal Law Gazette I No. 164/2004; Federal Law Gazette I No. 38/2007; Federal Law Gazette I No. 112/2007; Federal Law Gazette I No. 134/2011; Federal Law Gazette ; Federal law Gazette I No 175/2013	1 August 2013
Belgium	Law on the EAW dated 19/12/2003 – Published on the 22/12/2003, <i>Moniteur belge</i> , 2nd ed.	19 December 2003
Bulgaria	Law on Extradition and EAW /LEEAW SG 46/3 as amended by SG 25/6 June 2008	6 June 2008
Croatia	Act on Judicial Cooperation in Criminal Matters with Member States of the European Union of 14 July 2010 (came into force on Croatia’s accession to EU on 1 July 2013) as amended by the act on the Amendments to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 28 June 2013 and coming into force on 1 July 2013 as amended by the act on the Amendment to the Act on Judicial Cooperation in Criminal Matters with Member States of the European Union passed on 10 October 2013 and coming into force on 1 January 2014.	1 January 2014
Cyprus	No 133(I) of 2004 Law to provide for the EAW and the surrender procedures of requested persons between Member States of the European Union of 2004.	30 April 2004

Czech Republic	Act of 20 March 2013 on International Judicial Cooperation in Criminal Matters – came into effect from 1 January 2014.	1 January 2014
Denmark	<ul style="list-style-type: none"> - Law No 433 of 10 June 2003 amending the Law on the extradition of offenders and the Law on the extradition of offenders to Finland, Iceland, Norway and Sweden (transposition of the Council Framework Decision on the EAW, etc.) (Date: 10.06.03) - Law No 833 of 25 August 2005 on Extradition (amended by Law No 538 of 08/06/2006 § 11; law No 542 of 08/06/2006 § § 6 and 7; Law No 394 of 30/04/2007 § 1; Law No 347 of 14/05/2008; Law No 99 of 10/02/2009 § 2; Law No 494 of 12/05/2010 § 2; Law No 271 of 04/04/2011 § 2; Law No 428 of 01/05/2013 § 3) - Law No 394 of 30 April 2007 amending the Law no 833 of 25 August 2005 on Extradition and various other Acts and repeal of the Act on Extradition of Finland, Iceland, Norway and Sweden - Law No 555 of 25 May 2011 Act on cooperation with Finland, Iceland, Norway and Sweden concerning the enforcement of sentences, etc., amending article § 2 I of law no 394 of 30 April 2007 	25 May 2011
Estonia	Division 8 of Chapter 19 of the Estonian Criminal Procedure Code, adopted by <i>Riigikogu</i> (Parliament) on 28 June 2004 (<i>RT I 2004, 54, 387</i>). Amendments adopted by Estonian Parliament (Riigikogu) on April 16, 2008 coming into force from May 23, 2008.	23 May 2008
Finland	<ul style="list-style-type: none"> - Act on Extradition On the Basis of an Offence Between Finland and Other Member States of the European Union. Issued in Helsinki on 30 December 2003 (424/2003) - Act on extradition between Finland and other Nordic countries (1383/2007) repealing section 34(2) of Finland's EU Extradition Act coming into force on 1 January 2008 	1 January 2008
France	Code of Criminal procedure - Title X (International Judicial Cooperation), Chapter IV The EAW and Procedures for Transfer between Member States resulting from the European Council Framework Decision of 13 June 2002 Articles 695-11 and following.	12 May 2009
Germany	Part VIII - "Assistance to Member States of the European Union in extradition and transit matters" - of the Law on International Assistance in Criminal Matters as inserted by Law of 20 July 2006.	20 July 2006
Greece	Law 3251/2004 EAW, amendment to Law 2928/2001 on criminal organisations and other provisions. Official Gazette FEK A-127, of 9 July 2004.	

Hungary	Act No CLXXX of 2012 on cooperation in criminal matters with the Member States of the European Union of 30 November 2012 (published in HU Official Journal/Magyar Közlöny, No 160/2012 page 26718)	
Ireland	EAW Act 2003 as amended by the Criminal Justice (Terrorist Offences) Act 2005, the Criminal Justice (Miscellaneous Provisions) Act 2009 and the EAW (application to third countries and amendment) Act 2012.	24 July 2012
Italy	Law No 69 of 22 April 2005 setting out the provisions adapting domestic law to the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between Member States (2002/584/JHA)., published in the Gazzetta Ufficiale No 98 of 29 April 2005 and entered into force on 14 May 2005	14 May 2005
Latvia	Division fourteen -"Extradition", part C "International Cooperation in criminal matters" of the Criminal Procedure Law ("the CPL") chapters 65- "Extradition of a person to Latvia" and 66 - "Extradition of a person to a foreign State" promulgated on 21 April 2005 and entered into force on 1 October 2005. Amended on 29 July 2008, 1 and 9 July 2009 and 21 October 2010.	1 January 2011
Lithuania	Criminal Code: (Zin., 2000, No. 89-2741) amended by Law No X-1236 of 28 June 2008	
Luxemburg	Law of 17 March 2004 on the EAW and surrender procedures between Member States of the European Union as amended by Law of 3 August 2011.	3 August 2011
Malta	Subsidiary Legislation 276.05 (adopted under the authority of the Extradition Act - Chapter 276) Extradition (Designated Foreign Countries) Order of 7 June 2004, LEGAL NOTICES 320 of 2004 (as amended by Legal Notices 224 of 2006, 275, 367, 390 and 396 of 2007, 278 of 2008, 123 of 2010, 213 of 2011, and 247, 249 and 421 of 2013), 289 of 2005 and 72 of 2007.	
Netherlands	Act of 29 April 2004 implementing the Framework Decision of the Council of the European Union on the EAW and the surrender procedures between the Member States of the European Union (the Surrender Act)	

Poland	Code of Criminal Procedure Chapters 65a and 65b amended on 5 November 2009	8 June 2010
Portugal	- Law no. 65/2003 of 23 August Approves the legal regime of the EAW (giving effect to the council Framework Decision no. 2002/584/JHA of 13 June). - Penal code, amended September 2007	
Romania	Law No. 302 of 28 June 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law No. 224/2006 and as amended by Law No. 222/2008 of 10 November 2008	14 November 2008
Slovak Republic	Act no 154/2010 on the EAW of 1 September 2010	1 September 2010
Slovenia	The Cooperation in Criminal Matters with the Member States of the European Union Act (ZSKZDČEU-1) passed by the National Assembly of the Republic of Slovenia at its session of 23 May 2013. No 003-02-5/2013-11	
Spain	- Organic Act 2/2003, March 14, complementing the Act on the EAW - Act 3/2003, March 2003 on the EAW - Code of Criminal Procedure	
Sweden	- Act (2003:1156) on surrender from Sweden according to the EAW as amended by Act (2006:348) - Ordinance (2003:1179) on surrender from Sweden according to the EAW - Ordinance (2003:1178) on surrender to Sweden according to the EAW	
United Kingdom	The Extradition Act 2003 as amended by the Police and Justice Act 2006	15 January 2007

Source: European Judicial Network. Status of Implementation. Judicial Library. http://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=14 (27.01.2015).

Extract of Council Secretariat Questionnaire



**Council of the
European Union**

Brussels, 15 October 2014

**8414/3/14
REV 3**

LIMITE

**COPEN 103
EJN 43
EUROJUST 70**

From :	General Secretariat
To :	Working Party on Cooperation in Criminal Matters (Experts on the EAW)

No. prev. doc.:	8111/05 COPEN 75 EJN 23 EUROJUST 24 8414/2/14 REV 1 COPEN 103 EJN 43 EUROJUST 70
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Subject:	Replies to questionnaire on quantitative information on the practical operation of the EAW - Year 2013
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Further to the questionnaire set out in 8111/05 COPEN 75 EJN 23 EUROJUST 24, delegations will find in ANNEX an updated compilation of the replies received with regard to the year 2013 and in ANNEX I and ANNEX II the replies to questions 6.2. and 12.

Questions to Member States as issuing States:

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
5.1. How many persons have been arrested under an EAW in your country?	81		156 ³⁴⁰	30	1924 ³⁴¹	49		880	837	1441 ³⁴²		28	32	72			9		170	276	90	780	54	53	37	111	
5.2. How many have been effectively surrendered?	37		187 ³⁴³	39 ³⁴⁴	1141	493 ³⁴⁵		762	691	907 ³⁴⁶		28	32	72 ³⁴⁷			8		238	211	73	685	45	38	37	105	

³⁴⁰ CZ: +15 imprisonment.

³⁴¹ DE: In the period under review, there were 1 924 hits on alerts under Article 26 of the Council Decision on SIS II (previously Article 95 of the CISA) by EU Member States (104 of which for the associated States of Norway, Iceland, Switzerland and Liechtenstein).
No distinction can be made here between actual arrests and mere indications of the whereabouts of a person sought in cases in which an alert has been flagged. The figure indicated includes cases in which the person sought was already either serving a sentence or remanded in custody in Germany, so there was no arrest, just superimposed detention where appropriate. However, it does not include cases in which arrest warrants are transmitted directly to judicial authorities without an alert being issued. In the period under review, a European arrest warrant was the basis for a decision on extradition in 1 349 cases.

³⁴² IE: Since commencement of EAW.

³⁴³ CZ: 131 + 1case from 2009 + 6 cases from 2010 + 9 cases from 2011 + 40 cases from 2012.

³⁴⁴ DK: As of August 2014. (28 persons were surrendered in 2013 and 11 persons were surrendered in 2014).

³⁴⁵ EE: 3 EAWs has been withdrawn by the issuing Member State, 2 EAWs were issued for the extension of surrender and 1 person regarding whom the EAW was submitted to Estonia is still wanted.

³⁴⁶ IE: However, please note that a number of European Arrest Warrants may be transmitted by an issuing State for a single individual, therefore while 907 orders have been made, a number of these orders may refer to a single individual.

³⁴⁷ LT: 18 of them base on EAWs issued in previous years.

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
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5.3. Of those surrendered, how many consented to the surrender?	348		112 ³⁴⁹	21	665	47		320	453	391		24	28	66			8		154	153	46	632	37	21	20	35	
5.4. Of those surrendered, how many did not consent to the surrender?	350		75 ³⁵¹	18	475	2		442	238	516		4	4	6			none		84	58	27	60	17	17	17	70	

³⁴⁸ BE: No exact statistics , at least 3 cases registered.

³⁴⁹ CZ: 84 + 3 cases from 2010 + 5 cases from 2011 + 20 cases from 2012.

³⁵⁰ BE: No exact statistics , at least 16 cases registered.

³⁵¹ CZ: 47 + 1 case from 2009 + 3 cases from 2010 + 4 cases from 2011 + 20 cases from 2012.

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
6.1. In how many cases have the judicial authorities of your Member State refused the execution of an EAW?	16		73	7	166 ³⁵²	none		36	47	183		none	1	4			1		46	52	5	57	10	4	3	5	

352

DE: The European Arrest Warrant was withdrawn in (the remaining) 43 cases.

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
10.1. In how many cases did the judicial authorities of your Member State execute an arrest warrant with regard to a national or resident of your Member State?	353		31 ³⁵⁴	6 ³⁵⁵	67 ³⁵⁶	21		31	84 ³⁵⁷	193		none	10	65			4		4	15	25	223	8	22 ³⁵⁸	2	4	

353

BE: Belgian authorities have registered the surrender of at least 3 people with Belgian nationality. There are no statistics on the number of Belgian residents that have surrendered in 2013.

354

CZ: 28 nationals, 3 residents.

355

DK: 3 cases concerning Danish nationals and 3 cases concerning foreign nationals resident in Denmark.

356

DE: German nationals were surrendered in 35 cases.

357

FR: Nationals.

358

SK: The Slovak Republic does not investigate the residence of arrested persons.

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
10.2. In how many of those cases did the judicial authorities of your Member State request a guarantee under Article 5(3) of the Framework Decision?	359		21360	4	49361	21		10	25	none			none	362			none		none	85	3	93	2	363	none	4	

359

BE: No statistics .

360

CZ: 21 nationals, 0 residents.

361

DE: 32 involving German nationals and 17 involving foreign nationals; see 10.1.

362

LT: In all cases concerning the surrender of citizens of the Republic of Lithuania.

363

SK: No statistics .

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
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11. In how many cases have the judicial authorities of your Member State requested additional guarantees under Article 5(1) or Article 475(2) of the Framework Decision?	364		none	none	1	none		none	365			none	none	none			none		5	16	1	23	1	367	none	368	
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Source: Council of the European Union. Replies to questionnaire on quantitative information on the practical operation of the EAW - Year 2013. Working Party on Cooperation in Criminal Matters (Experts on the EAW). 15.10.2014. 8414/3/14 REV 3. –

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208414%202014%20REV%201> (20.02.2015).

³⁶⁴ BE: No statistics .

³⁶⁵ FR: Data not .

³⁶⁶ IE: Statistics not .

³⁶⁷ SK: No statistics .

³⁶⁸ SE: Data related to the number of requested guarantees as provided for in Article 5 (1) are not . Sweden does not require a guarantee as provided for in Article 5 (2).

Lihtlitsents lõputöö reprodutseerimiseks ja lõputöö üldsusele kättesaadavaks tegemiseks

Mina, Ele-Marit Eomois,

1. annan Tartu Ülikoolile tasuta loa (lihtlitsentsi) enda loodud teose „Legal aspects of nationality/residence within the EU: In view of the principle of mutual recognition in judicial cooperation“, mille juhendaja on Katre Luhamaa:

1.1.reprodutseerimiseks säilitamise ja üldsusele kättesaadavaks tegemise eesmärgil, sealhulgas digitaalarhiivi DSpace-is lisamise eesmärgil kuni autoriõiguse kehtivuse tähtaja lõppemiseni;

1.2.üldsusele kättesaadavaks tegemiseks Tartu Ülikooli veebikeskkonna kaudu, sealhulgas digitaalarhiivi DSpace'i kaudu kuni autoriõiguse kehtivuse tähtaja lõppemiseni.

2. olen teadlik, et punktis 1 nimetatud õigused jäävad alles ka autorile.

kinnitan, et lihtlitsentsi andmisega ei rikuta teiste isikute intellektuaalomandi ega isikuandmete kaitse seadusest tulenevaid õigusi.

Tartus, 04.05.2015.a.