Fundamental Rights and Effectiveness in the European AFSJ

The Continuous and Never Easy Challenge of Striking the Right Balance

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Article

ABSTRACT

In the context of the European Union's area of freedom, security and justice (AFSJ), "the need to strike the right balance" between the effectiveness of criminal prosecution and cooperation in criminal matters, and the protection of fundamental rights, but also between the primacy of EU law and national constitutions, is a core goal. By addressing two precise scenarios, this article attempts to show how the "needed balances" are understood. This analysis will further serve to show whether the EU is moving in the right direction in the field of cooperation matters. The first scenario will focus on the protection of fundamental rights in cross-border investigations within the context of EPPO proceedings under Regulation (EU) 2017/1939. Secondly, a number of aspects regarding the European Arrest Warrant are analysed. The author argues that, even if the AFSJ is advancing in quite a measured way, much can still be done to improve the protection of fundamental rights.

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I. Introduction

In the context of the European Union's area of freedom, security and justice (AFSJ), "the need to strike the right balance" has become a kind of slogan representing the wide notion of assessing the proportionality principle. A balance needs to be found between the effectiveness in crime prosecution and cooperation, and the protection of fundamental rights, but also between the primacy of EU law and national constitutions. In the end, achieving this balance will define the scope of the mutual recognition concept,[1] and such balance should always favour the protection of the fundamental rights, without losing sight of the needs of providing security. The entire history of criminal procedure at the end is the struggle to find this much-needed "right balance." My aim is not to offer a definition and not even an approximation of a concept of the "right balances" in cooperation in criminal matters in the ASFJ. This would be completely illusory and clearly doomed to fail. By addressing two precise scenarios, I will attempt to show how the "needed balances" are understood, and this should serve to further analyse whether the EU is moving in the right direction in the field of cooperation in criminal matters.[2]

The first scenario will focus on the protection of fundamental rights in cross-border investigations within EPPO proceedings under Regulation 2017/1939. The project of establishing a supranational prosecutor's office raised alarm bells within academia and had lawyers warning against the potential risks a powerful supranational prosecution institution would present for the protection of the defendant's rights and the principle of equality. Now, the moment has come to assess whether those fears are still justified or not (cf. section II.).

Secondly, I will analyse a number of aspects regarding the instrument of cooperation in criminal matters that could be seen as the "jewel of the Crown", which is the European Arrest Warrant (EAW). In section III, I will address the problems related to trials *in absentia* in the case law of the ECJ in the context of enforcement of EAWs and I will also detail the possible impact of Directive 2016/343 on the presumption of innocence and the right to be present at trial.[3] In the end (section IV), I will outline several relevant aspects that should be taken into account when analysing the shortcomings of the mutual recognition principle and the problems of its implementation.

II. EPPO: Fundamental Rights, and Cross-Border Investigations

After years of discussion and negotiations, the EPPO Regulation was finally adopted (hereinafter RegEPPO) in October 2017.[4] The model agreed upon can be defined as an "integrated model" with a central deciding and coordinating unit, and a decentralised structure where the main actions are carried out through European Delegated Prosecutors (EDP).[5] The initial idea of establishing a single legal space, where the EPPO would act on investigative measures under its own set of rules that would be applied in a uniform way all across the EU, has completely disappeared in the Regulation. Under the present system, the EPPO will be an indivisible Union body operating as one single Office (Article 8(1) RegEPPO). However, for the purpose of gathering evidence, it continues to operate on the basis of the principle of national territoriality.[6]

The lacking uniformity of this integrated model entails that the national law for the protection of procedural safeguards applies. The defendant is faced with a powerful supranational structure with "delegations" in all EU Member States having access to cross-border evidence, whereas the rights of defence continue to rely on

the diverse regulations in the national law of each State, save the minimum harmonization that the EU Directives on procedural safeguards of suspects and defendants in criminal proceedings foresee.

The EPPO Regulation addresses the protection of fundamental rights at different Recitals,[7] and Chapter VI is devoted to "procedural safeguards." This chapter, consisting of two articles, recognises the need to take into account the rights of suspects and the accused enshrined in the EU Charter of Fundamental Rights (Article 41(1) RegEPPO). Article 41(2) follows with the "minimum standards" that must be provided in every Member State's national legislation, by referring to the EU Directives on procedural safeguards of suspects and defendants in criminal proceedings.[8] The remainder is a matter of respective national law.

Through the assignment system, the Regulation provides for cross-border cooperation in the gathering of evidence to be carried out between the EDPs in every Member State taking part in the EPPO: the EDP handling a case assigns the necessary investigative measure to one of the EDPs of the State in which it has to be carried out (Article 30(1) RegEPPO). The assisting EDP "shall undertake the assigned measure, or instruct the competent national authority to do so" (Article 31(4) RegEPPO).

The "assignment" is neither subject to any type of recognition procedure nor to any additional conditions. The authority providing the assistance does not oversee the need, adequacy, or proportionality of the measure (save for Article 31(5) lit. c) RegEPPO, see below) or of the *ne bis in idem* principle.[9] The Regulation also does not include grounds for refusal to execute the assignment. Any circumstance that might appear to affect the execution of the measure shall be communicated by the assisting EDP to his/her supervisor and to the handling EDP.

While this system moves towards mutual recognition in the execution of the requested (assigned) investigative measure, it does not mean that the mutual recognition of evidence has improved. The single office will still have to act within a fragmented legal area. The original idea was to create a single area precisely to overcome the shortcomings of such fragmentation, which entail difficulties for both the prosecution and the accused persons: the former risks evidence obtained abroad being declared inadmissible, and the latter risks not being able to adequately check the legality of the evidence gathered abroad under the rules of a foreign legal system. In short, as regards evidence, the EPPO proceedings will be subject to the same fragmentation as any other transnational criminal proceedings in the EU territory at the moment.

Does this system provide for the "right balance" between more efficient supranational prosecution and protection of the rights of the defence in these cross-border investigations? First, from the point of view of the protection of fundamental rights, this double-check of the evidentiary measure requested (insofar as it has to comply with the *lex loci* and the *lex fori*) means compliance with the highest standard. If the assigned measure requires judicial authorisation in the issuing State, the EDP assigning the measure shall accompany the judicial warrant (Article 31(3) RegEPPO). If it is only required in the executing State, the assisting EDP shall obtain such authorisation. This approach is similar to the one provided for in the EIO Directive,[10] as the principle of mutual recognition does not allow skipping judicial authorisation if it is needed under the laws either of the issuing or of the executing State. This system guarantees the application of the highest standard of protection for judicial authorisation.[11]

Second, there is also the possibility that the assisting EDP conducts a certain proportionality test of the assigned measure. In terms almost identical to Article 10(3) of the EIO Directive, Article 31(5) lit. c) RegEPPO allows the assisting EDP to adapt the assignment to the proportionality principle: if the same results can be obtained through another less intrusive measure, he shall contact the handling EDP to resolve the matter bilaterally.

In my opinion, such an assignment system ensures an adequate balance. The problem is not the assignment system, but rather the weaker position of the defence in any transnational setting. From the viewpoint of the defence, apart from the fact that access to cross-border investigative measures might be quite difficult in practice, there are also complex hurdles to overcome in checking the legality of the evidence obtained abroad and thus ensuring compliance with the national rules on admissibility of evidence.[12]

How can defence be improved? Multi-level legal assistance should be granted to this end, with lawyers having knowledge of the different legal orders involved. The Directive on Access to a Lawyer (hereinafter: DAL),[13] however, does neither address the right to defence in transnational criminal proceedings when evidence is collected in another Member State nor in the assessment of the necessity and proportionality of the evidence collected via assignment. Leaving aside the questioning of the suspect or accused, the DAL does not provide for legal assistance to be granted in both States except for the EAW (Article 10 DAL).

Ultimately, with regard to defendants who lack sufficient financial resources, the Directive on Legal Aid[14] does not grant the right to a lawyer in the procedure of cross-border evidence gathering either. It should be emphasised that, except in cases of detention, the right to free access to a lawyer will only be granted according to the national law and will only be mandatory if "the interests of justice so require."[15] Among the cases that justify the granting of free legal aid, it would have been desirable if the Directive on Legal Aid had also included those cases in which evidence is gathered in another Member State, as such cases clearly entail an additional complexity for the defence.

In sum, even if the assignment systems could be viewed as balanced, assessed as a whole, does not ensure the adequate balance. As neither the EU Directive on Access to Lawyer nor the EU Directive on Legal Aid contribute to the adequate protection of the right to an effective defence in proceedings involving cross-border investigations under the EPPO, the protection – if any – is left to the national law of each Member State. Therefore, one can say that EU secondary law has failed in striking the "right balance" between prosecution and defence in cross-border investigations undertaken by the EPPO.

III. EAW: Right Balance Regarding Trials *in absentia*?

The EAW is undoubtedly the most successful instrument of judicial cooperation in the EU based upon the principle of mutual recognition, as confirmed by statistics.[16] While functioning very effectively in most cases, there are certain aspects that might be worth discussing in the context of assessing the "right balance."[17] The cases related to conviction sentences rendered *in absentia* have been turned out particularly problematic, precisely with regard to Article 4a(1) of the FD EAW.

If the defendant knew about the date and location of the trial (either because he was summoned personally or by any other means unequivocally establishing that he had this knowledge) and was informed about the consequences, such a ground for refusing to execute the EAW shall not be invoked, as it can be presumed that he waived his right to be present at trial. In addition to these two requirements (personal summoning or awareness by official means and information of the consequences of non-appearance),[18] Article 4a(1) lit. b) FD EAW establishes a further presumption of the waiver to appear if "being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial."[19]

Article 4a(1) FD EAW has given rise to several references for a preliminary ruling to the ECJ. Have these decisions achieved the right balance between the effectiveness of the EAW and the need to ensure the right

to be present at trial? And does Directive 2016/343 provide elements for counterbalancing the interests at stake?

1. The ECJ's approach

The much-discussed judgment in the *Melloni* case, which dealt with the execution of an EAW by Spain for serving a custodial sentence rendered *in absentia* in Italy, addressed the crucial question of which level of protection of fundamental rights must prevail when there is a conflict between the level of protection afforded by national constitutions and by EU law.[20]The issue directly affects the role that national constitutional courts and their understanding of fundamental rights play in the EU legal system as well as the scope of fundamental rights recognised in the EU Charter. After reaffirming the primacy of EU law when the unity and effectiveness of EU law are compromised, the ECJ excluded the possibility of accepting any grounds for refusal of the execution of a EAW beyond the ones set out in the framework decision, despite the higher level of protection provided by the Spanish Constitutional Court in cases tried *in absentia*. The importance of this judgment lies not so much in the particular circumstances surrounding the request for Mr. Melloni's extradition, but in the stance taken by the ECJ in defining European inter-constitutionalism. The *Melloni* judgment was widely criticised precisely for not adequately balancing the role of the national constitutional courts *vis-à-vis* the primacy of EU law.

In this context, it is necessary to mention the *Taricco* case,[21] even if it does not relate to an EAW. In the *Taricco* saga, after the preliminary ruling of the ECJ in 2015, the Italian Constitutional Court filed another preliminary ruling request regarding the enforcement of the first one. The Italian Constitutional Court claimed that enforcement of the first ECJ ruling would run against the Italian "constitutional identity" and therefore asked for further clarification via a second preliminary ruling.[22] Unlike the *Melloni* case – where the issue of national constitutional identity was never raised – the Luxembourg Court concluded, in its judgment of 5 December 2017 (*Taricco II*),[23] that the national rules shall be disapplied in order to enforce EU law, "unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed."[24]

While underlining again the primacy of EU law, in the *Taricco II* case, the ECJ took a much more balanced approach in interpreting Article 53 of the EU Charter and allowing precedence of the national law when it affects an issue of constitutional identity. This judgment is to be welcomed for showing a much more balanced approach towards the complex interplay between courts and for avoiding an open clash of courts on issues regarding the level of protection of fundamental rights.

Recent judgments of the ECJ on the subject matter of trials *in absentia* also show a shift towards a more balanced approach in favour of the protection of fundamental rights.[25] The *Dworzecki* case[26] dealt with the execution of an EAW issued by a Polish judicial authority for the surrender of a Polish citizen residing in the Netherlands for the execution of several custodial penalties. The defendant was tried *in absentia*, after "the summons was sent to the address which Mr Paweł Dworzecki had indicated for service of process and it was collected by an adult occupant at this address, Mr Paweł Dworzecki's grandfather",[27] in compliance with national law. The request for a preliminary ruling by the District Court of Amsterdam concerned the content of Article 4a(1) lit. a) of the FD EAW. The ECJ found that this provision contains autonomous concepts of EU law ("summoned in person" and "by other means actually received official information (…) in such a manner that it can be unequivocally established that he or she was aware of the scheduled trial").[28] It also found that indirect summons as handed over in the case "when it cannot be ascertained from the European arrest

warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision".[29] By requiring that it be unequivocally established that the defendant was aware of the date and place of the trial – and not simply presuming that he was aware of the date and place – the ECJ opted for an interpretation of Article 4a(1) lit. a) FD EAW that is most favourable for the rights of the person convicted *in absentia* when facing the execution of a EAW.

Two further cases in which the ECJ was called upon to interpret the expression "trial resulting in the decision" within the meaning of Article 4a(1) lit. a) FD EAW are also worth mentioning. In the *Tupikas* case,[30] the EAW had been issued by a Lithuanian Court , seeking the arrest and surrender of Mr. Tupikas, a Lithuanian national with no fixed abode or place of residence in the Netherlands, for the purpose of carrying out a sentence of imprisonment of one year and four months. Mr. Tupikas appeared at the first-instance trial, where he was sentenced to a custodial penalty. He later appealed that conviction, the appeal was dismissed, and the first-instance sentence confirmed. The issue at stake was whether his absence during the appeal proceedings was relevant under Article 4a(1) lit. a) FD EAW. Should the defendant be considered convicted *in absentia* for the aim of executing the EAW? The ECJ concluded that the concept "trial resulting in the decision" within the meaning of Article 4a(1) FD EAW covers the instance at which the decision on the guilt of the offender was finally adopted; therefore the appeal proceedings fall within that concept.[31]

On the same day, the ECJ took a very similar decision in the *Zdziaszek* case.[32] This case concerned an EAW issued by a Polish court to enforce a custodial sentence, where the second-instance hearing was held *in absentia*, hence the similarity to the *Tupikas* decision.[33] The stance taken by the ECJ in these two judgments is undoubtedly most favourable for the defence rights of the accused person.

Lastly, in the *Ardic* case,[34] the ECJ had to deal with the execution of an EAW in the Netherlands issued by the prosecution service of Stuttgart, Germany, with a view to executing two custodial sentences in Germany. Mr. Ardic, a German national residing in Amsterdam appeared at the trial, at which he was sentenced to two custodial penalties, each for one year and eight months. After Mr. Ardic had served a portion of these two sentences, the competent German courts granted a suspension of execution of the remainder of those sentences. Due to an infringement of the prescribed conditions, the suspension was revoked: Mr. Ardic was not present at the proceedings that resulted in the revocation decision, being unaware of them because he was notified by publication according to German criminal procedure law.

For the purposes of applying Article 4a(1) lit. a) FD EAW, the ECJ had to determine whether a decision to revoke suspension of execution of a previously imposed custodial sentence can be equated with a "trial which resulted in the decision". The Court found that the 'decision' concept "must be interpreted as not including subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed".[35]

Here, the ECJ followed the case law of the ECtHR and struck a balance between the effectiveness of the EAW and the protection of fundamental rights, also taking into account that the person subject to the EAW would be granted the right to be heard upon being surrendered to the German authorities. This decision cannot be objected to, because the decision rendered *in absentia* affected neither the establishment of the guilt of the defendant nor the nature or quantum of the penalty, but only the conditions for serving the sentence. To my mind, the judgment takes a fully balanced approach to the respect of the fundamental rights.

2. The Impact of Directive (EU) 2016/343

Beside certain aspects of the presumption of innocence, Directive (EU) 2016/343[36] includes two provisions on the right to be present at the trial. Article 8 defines the minimum requirements to allow the holding of a trial *in absentia*. Its content is almost identical to that of Article 4a(1) lit. a) of the FD EAW, although the wording in the FD EAW regarding notifications ensures a higher standard.[37] Article 9 requires a new trial or remedy with "fresh determination of the merits of the case" to be provided when the "waiver principle" is not fully established/is not unequivocal.[38] The regulation of remedies, however, is left to national procedural rules. Harmonisation is therefore kept to a minimum.

The content of Article 9 ensures the possibility of exceptional remedy against sentences rendered *in absentia* only in cases in which the conditions under Article 8(2) have not been met. To my mind, this is clearly not sufficient to ensure the right to defence, even if the text of Recital 34 might allow a broader interpretation of this provision.[39] The way in which Article 9 is drafted, however, does not promote strengthening of the protection of human rights in criminal proceedings in the EU AFSJ, and it also does not even follow the principles set out in the case law of the ECtHR:[40] in consequence, Article 9 of the Directive can be considered to provide "less than minimum" safeguards. It may be argued that these minimum rules do not prevent national States from providing higher safeguards, but even they do not make null and void the EU Member States' obligations to follow the case law of the ECtHR. While this is clearly true, the question then is why the EU legislature has opted for such a low standard of harmonisation, going even lower than the standard established by Strasbourg case law: not enabling the defendant to request the re-opening or review of a judgment rendered *in absentia*, when he knew the date of the trial and was represented by lawyer, cannot be said to comply with the fundamental rights of defence. There might be situations in which the defendant should be granted the opportunity to state the reasons why he was deprived of his right to be present at trial or why his rights of defence where infringed upon, even though a lawyer represented him in court.

I am not stating that the right to a new trial should be ensured in all cases, but excluding it when certain conditions are met implies the assumption of significant risks for the protection of fundamental rights. This is confirmed by numerous applications to the ECtHR related to trials *in absentia* and, in particular, the cases *Mariani v. France*[41] and *Sejdovic v. Italy*.[42]

In sum, while the case law of the ECJ shows a shift in balancing effective judicial cooperation in the execution of EAWs towards the protection of fundamental rights, EU legislation in form of Directive 2016/343 could frankly have done more in granting the right to have the decision rendered *in absentia* revised.

IV. "Right Balance" or Imbalance: What is Ideal and What is Possible in the AFSJ

When discussing the adequate balance between fundamental rights and the effectiveness of judicial cooperation in the AFSJ, it should not be forgotten that one of the main objectives is to establish an area of justice (Article 67(1) TFUE). An analysis should always be focused on eliminating obstacles that hinder cooperation, but with full respect to human rights and "the different legal systems and traditions of the Member States." Establishing such an area must necessarily be oriented towards the free circulation of judicial decisions, the free circulation of evidence, and effective cooperation in the arrest and surrender of accused persons. Establishing this freedom of "circulation" in the field of criminal justice can face even greater challenges than the free movement of goods, services, people, and capital.[43]

Once the internal borders in the EU were (almost) eliminated, it became logical that the EU had to deal primarily with preventing the fragmented legal and judicial spaces from hindering the effective fight against crime in the EU. It did not take long for criticism to arrive. One point of criticism was that the EU's focus was on prosecuting crimes while disregarding the need to provide protection for the rights of suspects and the accused in transnational criminal proceedings. It is true that, initially, the focus of attention was on the free circulation of judicial decisions and less on the "circulation" of procedural safeguards. The approach was understandable, but the criticism was also legitimate.

Reaching an agreement among the Member States in setting a high standard of protection of human rights has not been possible until now, for various reasons: the diverging national approaches towards procedural safeguards, reluctance to yield sovereign powers, unwillingness to accept additional costs, mistrust towards some Members States, etc. Faced with this situation, the principle of mutual recognition seemed the only feasible solution so far. 20 years after the 1999 Tampere Council agreed on the mutual recognition principle as the corner stone of judicial cooperation, can its implementation be seen as balanced? In my opinion, the answer is yes.

The answer is also yes to the question whether more can be done, both in improving cooperation and in strengthening the protection of fundamental rights of suspects and the accused. Currently, the functioning of judicial cooperation is not perfect from the perspective of the effectiveness. The protection of fundamental rights of persons subject to transnational proceedings is also less than perfect, as can be seen in the *Aranyosi and Căldăraru* judgment,[44] in which the degrading and inhumane conditions of certain detention centres in some Member states posed the risk of reversing the mutual recognition principle.

A very recent reference for a preliminary ruling to the ECJ filed by the High Court of Ireland raises again the issue of effectiveness against protection of fundamental rights.[45] It deals with the enforcement of a EAW issued by Polish authorities for the purpose of prosecuting a person staying in Ireland for two offences (drug trafficking and participation in an organised criminal group). Based on reports, mainly on the Opinion of the Council of Europe's Venice Commission on the legislative changes and their effect on the independence of the judicial system in Poland,[46] the referring court asks whether – at the sight of such cogent evidence of a real risk of denial of justice (violation of Article 6 ECHR) –, the court should carry out further assessments as to the real risks for the individual concerned before deciding on the execution of the EAW.[47] Is the lack of sufficient safeguards for judicial independence and consequent risks for the rights enshrined in Article 6 ECHR to be interpreted as a refusal ground to execute an EAW in the future? In general, I do not believe that the perils of the rule of law in general should be interpreted as a ground for refusal to execute a EAW. It will be interesting, however, to observe to which extent the ECJ allows the executing authority to take evidence and file inquiries for taking the decision to refuse or not.

Although, the approach and the measures adopted by the EU institutions and ECJ case-law with regard to the judicial cooperation in criminal matters seem balanced, this does not prevent us from recognizing that the situation, both regarding effectiveness of cooperation as well as protection of fundamental rights, can be improved. Some national peculiarities might have to be sacrificed for more efficient cooperation, as witnessed in the *Melloni* case. It will also be necessary for the ECJ to take into account other national specificities that are part of constitutional identity, as seen in the *M.A.S. and M.B* case (known as the *Taricco* II case). The primacy and effectiveness of European law are the principles that shall prevail, but not at any cost. Likewise, not every national understanding of procedural rights should be upheld at the cost of effectiveness within the AFSJ.

In this regard it is necessary to mention, albeit very briefly a recent case regarding an EAW issued against Catalan leader Carles Puigdemont accused of rebellion and embezzlement. Without entering into the details

of the precise facts and without aiming to analyse the present stage of the proceedings and decisions already taken, the EAWs sent by the Spanish authorities to Belgium and Germany requesting the surrender of Mr. Puigdemont has certainly brought to the forefront the issues of "mutual trust" and the principle of mutual recognition. This case is interesting for the topic discussed here as it shows that a traditional approach to the concept of sovereignty – and establishing the double criminality as an absolute requirement to comply with the requests for judicial cooperation in the execution of an EAW – undoubtedly weakens the effectiveness of the international judicial cooperation, while it is not necessarily justified on grounds of protection of human rights. Does this approach meet the right balances sought in the AFSJ?

Whatever the outcome in this specific case is and whatever the reasons for the German court to adopt a traditional approach towards the meaning of double criminality in the EAW proceedings is, the entire case leads us to question of whether Europe has really advanced, not so much in terms of cooperation – that is indisputable – but in terms of mutual trust and mutual recognition. So far, the case against Carles Puigdemont gives rise to think that the ASFJ is still far from being a reality, at least when it comes to sensitive cases that are not exempt from the double criminality test. Perhaps a more balanced approach by the national authorities towards cooperation in cases where no human rights issue are at stake should be fostered.

V. Concluding Remarks

As the principle of mutual recognition has been adopted for building the AFSJ, – as long as the Member States do not opt for more legal harmonisation – finding the right balance between the effectiveness of judicial cooperation and protection of fundamental rights is not and will not be an easy task. It has first been shown that the gathering of cross-border evidence by the EPPO in particular by means of the assignment system is adequate. However, the established EPPO regime does not sufficiently ensure the equality of arms of the parties since the EU Directive on access to a lawyer does not give a proper answer to the protection of fundamental rights in transnational proceedings. Granting the right to be assisted by lawyer only for the three investigative measures under Article 3(3) lit. c) of said Directive – assuming that it would also be applicable to transnational proceedings – seems to be clearly insufficient.

Within the EAW scenario – the second issue examined in this article – the ECJ has moved from a rather effectiveness-oriented stance towards a position more attentive to the protection of fundamental rights, as seen in the recent cases relating to trials *in absentia*. Paradoxically, the provisions included in the EU Directive 2016/343 on trials *in absentia* seem to entail an inadequate balance because it partly shifts away from the ECHR standard.

Mutual trust should not just be presumed; instead, it has to be supported and reinforced with a high standard of fundamental rights protection if Europe is to advance in consolidating the principle of mutual recognition. Much more must be done, especially regarding detention conditions, legal aid, and right to have the judgment *in absentia* revised. So far, however, the judgments of the Luxembourg Court seem to be achieving the "right balance" between the interests at stake, and they show more sensitivity towards the role the Court has to play in protecting fundamental rights. After the *Melloni* case, the protection of the primacy of EU law has been balanced adequately so far, with a view to respecting constitutional identities and fundamental rights.

In situations where none of the affected parties' interests are fully satisfied, this is due to two reasons: either the solution adopted is imbalanced (thus being a failure) or, on the contrary, it has really struck the best possible balance between the competing interests (thus reached a compromise). In the context of the AFSJ, the achieved balance between effectiveness of judicial cooperation and protection of fundamental rights within the AFSJ, as shown in the two examples analysed, although not perfect, can be viewed as positive. Applying a too strict interpretation of the double criminality requirement for refusing to execute a EAW,

however, does not seem to be striking such a good balance as can be shown by the current "Puigdemont case": in these cases, the effectiveness seems to be undermined by an excessive distrust or by a position too prone to maintaining sovereign powers instead of fostering cooperation. Much has still to be done towards building up trust, because distrust among Member States – justified or not – may also destroy the necessary "right balance."

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1. On the notion of the mutual recognition principle in the AFSJ, see W. van Ballegooij, *The Nature of Mutual Recognition in European Law,* 2015, pp. 119 et seq.↩
2. See also D. Flore, "The Issue of Mutual Trust and the Needed Balance Between Diversity and Unity," in: C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law,* 2017, pp. 157 et seq.↩
3. Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *O.J.* L 65, 11.3.2016, 1.↩
4. Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J.* L 283, 31.10.2017, 1.↩
5. Art. 8 RegEPPO. On the structure and features of the EPPO, see for example, K. Ligeti and M. Simonato, "The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?", (2013) *New Journal of European Criminal Law*, 7–22; K. Ligeti and A. Weyembergh "The European Public Prosecutor's Office: Certain Constitutional Issues" in: L.H. Erkelens, et al (eds.), *The European Public Prosecutor's Office. An extended Arm or a Two-Headed Dragon?*, 2015, pp. 53–77.↩
6. See already L. Bachmaier Winter, "The Potential Contribution of a European Public Prosecutor Office in Light of the Proposal for a Regulation of 17 July 2013", 23 (2015) *European Journal of Crime, Criminal Law and Criminal Justice*, 121, 133; D. Negri, "Best Practices and Operational Models in Financial-Economic Investigations in Europe in View of the EPPO" in: A. Bernardi and D. Negri (eds.), *Investigating European Fraud in the EU Member States*, 2017, p. 149, 151.↩
7. See Recitals 80 and 83 to 86.↩
8. On the contents of the Directives at the sight of the ECHR, see T. Wahl, "Die EU-Richtlinien zur Stärkung der Verfahrensrechte im Spiegel der EMRK", (2017) *ERA-FORUM*, 311–333.↩
9. P. Csonka, C. Juszczak, and E. Sason, "The Establishment of the European Public Prosecutor's Office. The Road from Vision to Reality", (2017) *eucrim,* 125, 129. They call this a *sui generis* system moving away from the mutual legal assistance regime.↩
10. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J.* L 130, 1.5.2014, 1.↩
11. In the same sense, H.H. Herrnfeld, "The Draft Regulation on the Establishment of the European Public Prosecutor's Office – Issues of Balance Between Prosecution and Defence", in: C. Briére and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, 2017, p. 382, 406.↩
12. See S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung,* 2007; S. Ruggeri, "Transnational Investigations and Prosecution of Cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice" in: S. Ruggeri (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*, , pp. 193–228; and S. Ruggeri, *Audi Alteram Partem in Criminal Proceedings. Towards a Participatory Understanding of Criminal Justice in Europe and Latin America*, 2017, pp. 403 et seq.↩
13. See L. Bachmaier Winter, "The EU Directive on Access to Lawyer: A Critical Assessment" in: S. Ruggeri (ed.), *Human Rights in European Criminal Law*, 2015, pp. 111–131; Z. Durdevic, "The Directive on the Right to Access to a Lawyer in Criminal Proceedings: filling a human rights gap in the European Union legal order" in: Z. Durdevic and E. Ivicevic (eds.) *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*, 2016, p. 9, 18 et seq.↩
14. Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *O.J.* L 297, 4.11.2016, 1.↩
15. As regards the criteria for identifying when an "interest of justice" exists in granting the right to free legal assistance, see the ECtHR, 24 May 1991, *Quaranta v. Switzerland,* Appl. No. 12744/87.↩
16. According to the Commission Staff Working Document "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015", SWD(2017) 320 final, p. 4, the total number of EAWs issued by the 28 Member States in 2015 was 16,144. See also the article of D. Vilas Álvarez, (doi 10.30709/eucrim-2018-005) in eucrim 1/2018, p. 64.↩
17. See L. Bachmaier Winter, *Mutual recognition instruments and the role of the CJEU: grounds for non execution*, (2015) *NJECL*, 505–526; J.A.E. Vervaele, "The European arrest warrant and applicable standards of fundamental rights in the EU", (2012) *Review of European Administrative Law*, 37–54; S. Ruggeri, op. cit. (n. 12), pp. 431 et seq.↩
18. For a critical view of the lack of precision of the terms used in Article 4a FD EAW, see T. Wahl, "Der Rahmenbeschluss zu Abwesenheitsentscheidungen: Brüsseler EU-Justizkooperation als Fall für Straßburg?", (2015) *eucrim*, 70, 72–73.↩
19. Finally, paragraphs (c) and (d) of Article 4a(1) FD EAW define situations in which the EU legislator already establishes the right of the person convicted *in absentia* to challenge the judgment or to enable the re-trial of the case.↩
20. On the *Melloni* judgment, see L. Bachmaier Winter, "Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentales en juicios in absentia en el derecho europeo", (2015) 56 *Rev. Española de Derecho Europeo,* 153–181; L. Bachmaier Winter, "Dealing with European Legal Diversity at the Luxembourg Court: Melloni and the Limits of European Pluralism" in: R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity, 2016*, pp. 160–178; V. Mitsilegas, *Justice and Trust in the European Legal Order. The Copernicus Lectures,* 2016, pp. 112–116.↩
21. ECJ, 28 September 2015, case C-105/14 *Ivo Taricco and Others*. For the questions raised in this case, see also the article of C. Di Francesco Maesa, (doi 10.30709/eucrim-2018-003), in eucrim 1/2018, p. 50.↩

22. F. Fabbrini and O. Pollicino, "Constitutional Identity in Italy: European Integration As the Fulfilment of the Constitution", *EUI Department of Law Research Paper No. 2017/06,* Posted: 9 March 2017, available at http://cadmus.eui.eu/bitstream/handle/1814/45605/LAW_2017_06.pdf?sequence=1&isAllowed=y (accessed May 2018), p. 11.↩
23. ECJ, 5 December 2017, case C-42/17, *M.A.S. and M.B*.↩
24. ECJ, ibid., para. 62.↩
25. In the same sense, L. Mancano, "A New Hope? The Court of Justice Restores Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System" in: C. Brière and A. Weyembergh (eds.), *op. cit.* (n. 11), p. 285, 307.↩
26. ECJ, 24 May 2016, case C-108/16, *Pawel Dworzecki*. See also T. Wahl, (2016) *eucrim*, 80.↩
27. ECJ, ibid., para. 12.↩
28. ECJ, ibid., para. 32.↩
29. ECJ, ibid., para. 54. Here, the ECJ follows the reasoning set out by the ECtHR, 18 May 2004, *Somogyi v. Italy,* Appl. No. 67972/01 as to the elements needed to conclude that the waiver of the right to be present had been unequivocally established.↩
30. ECJ, 10 August 2017, case C-270/17, *Tadas Tupikas*. See T. Wahl, (2017) *eucrim*, 117.↩
31. See further ECJ, ibid., para. 99↩
32. ECJ, 10 August 2017, case C-271/17, *Slawomir Andrezj Zdziaszek*. See T. Wahl, (2017) *eucrim*, 118–119.↩
33. Cf. in particular ECJ, ibid., para. 111.↩
34. ECJ, 22 December 2017, case C-571/17, *Samet Ardic*.↩
35. ECJ, ibid. para. 92.↩
36. Op. cit. (n. 3). On the process of adopting this Directive, see S. Cras and A. Erbeznik, "The Directive on the Presumption of Innocence and the Right to Be Present at Trial, (2016) *eucrim*, 25–35.↩
37. Under Article 4a FD EAW, the safeguards in the summoning are higher ("summoned in person" or "unequivocally established that he was aware of the scheduled trial") than under Article 8(2) of Directive 2016/343 ("has been informed"). Both texts are almost identical, and both follow the two main requirements established by the ECtHR (see also Recital 36).↩
38. The adjective "unequivocal" is not to be found in Article 9 of the Directive, but under Recital 35.↩
39. Recital 34 Directive 2016/343.↩
40. See ECtHR judgments, 12 February 1985, *Colozza v. Italy*, Appl. No. 9024/80; 13 February 2001, *Krombach v. France* Appl. No. 29731/96; 18 May 2004, *Somogyi v. Italy,* Appl. No. 67972/01. Although the Court in *Medenica v Switzerland*, 14 June 2001, Appl. No. 20491/92, para. 59, stated that "regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant's conviction in absentia and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty".↩
41. ECtHR, 31 March 2005, *Mariani v. France*, Appl. No. 43640/98. In this case, the defendant knew about the date of the trial before a French court and was represented by lawyer before the trial. It cannot be concluded, however, that he had waived his right to be present, because his absence stemmed from the fact that he was serving a custodial sentence in an Italian prison.↩
42. ECtHR (GC), 1 March 2006, *Sejdovic v. Italy*, Appl. No. 56581/00.↩
43. For an interesting comparison of the mutual recognition principle in the internal market and in the AFSJ, see W. van Ballegooij, op. cit. (n. 1), pp. 315 ff.↩
44. ECJ, 5 April 2016, joint cases C-404/15 y C-659/15, *Pál* Aranyosi *and Robert Căldăraru*.↩
45. Referenced at the ECJ under case C-216/18.↩
46. Opinion 904/2017, of the Venice Commission "On the Laws of the Supreme Court, Ordinary Courts and National Council of the Judiciary" of 11 December 2017, accessible under http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e (accessed 24 May 2018).↩
47. The referred question reads as follows: "Is it necessary for the executing authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?".↩

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