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# The Impact on National Sovereignty of Mutual Recognition in the AFSJ. Case-Study of the European Arrest Warrant

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## Abstract

National sovereignty has been the key consideration for basing judicial cooperation in the European Union on mutual recognition. More than one decade after the creation of the Area of Freedom Security and Justice (AFSJ), this contribution assesses whether mutual recognition-based EU legislation in civil and criminal law indeed respects national sovereignty. To this end, it studies the Framework decision on the European Arrest Warrant (EAW), the EU's flagship instrument in the AFSJ. We distinguish two elements of national sovereignty: (a) the protection of the State and its basic structures (its *statehood*); (b) the State's values, principles and fundamental rights (its *statehood principles*), and assess the EAW from a dynamic perspective: from its initial inception, in which mutual trust primarily implied little interferences with the laws and practices of issuing states, to the current state of affairs which is marked by what could be called a 'mutual trust supported by harmonization'- approach. Especially in the judge-driven harmonization of the EAW and the dialogue between judicial authorities we witness important (and often-times overlooked) elements that impact national sovereignty. At the end, the findings of the article are put in the context of the current rule of law crisis in the EU.

**Keywords:** Mutual recognition; mutual trust; national sovereignty; Area of Freedom; Security and Justice (AFSJ); European Arrest Warrant (EAW); European harmonization

## A. Introduction

Mutual recognition has evolved into the key regulatory instrument for shaping judicial cooperation in civil and criminal matters. Transposed from EU internal market law,<sup>1</sup> the principle of mutual recognition was established as a cornerstone principle for the Area of Freedom, Security and Justice (AFSJ) in the Treaty of Lisbon. The European Council of Tampere had already voiced the ambition to do so,<sup>2</sup> and the Framework Decision on the European Arrest Warrant (EAW) has

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<sup>1</sup>For a discussion of the difficulties in this regard, see Francesco Maiani & Sara Migliorini, *One Principle to Rule Them All? Anatomy of Mutual Trust in the Law of the Area of Freedom, Security and Justice*, 57 COMMON MKT. L. REV. 7, n.10 (2020).

<sup>2</sup>See Presidency Conclusions, Tampere European Council (Oct. 15–16, 1999), para. 33, [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm).

been the flagship mutual recognition based legislative act ever since its adoption in 2002.<sup>3</sup> Indeed, the European Commission has described the EAW as “the first and most symbolic measure applying mutual recognition.”<sup>4</sup> Other legislation that has similarly been based on the principle followed in the field of EU criminal law.<sup>5</sup>

The Member States’ resistance to harmonization explains much of mutual recognition’s popularity in EU law. Especially in criminal law, the notion of the EU legislature harmonizing substantive and procedural laws of the Member States has been difficult to embrace. As Mitsilegas notes, criminal law is identified with the State’s sovereign monopoly of power; it reflects deeply-rooted social, political, and legislative choices in the Member States and has been embedded within broader national constitutional and rule of law developments.<sup>6</sup> In mutual recognition, the Member States have found a way to be able to achieve common goals while keeping national legal systems intact. Thereby, the principle presented itself as the perfect alternative to harmonization in the sovereignty-sensitive area of criminal law.<sup>7</sup>

After almost two decades of mutual recognition in EU criminal law, the time is ripe to assess whether it has been able to fulfill its promise. The question is thus whether mutual recognition has indeed enabled the achievement of EU criminal law objectives whilst respecting national autonomy and—indeed—national sovereignty? This is, in part, a political question, and for another part, it requires an assessment of empirical data as well as an analysis of how the various policy objectives of EU criminal law interrelate and must be balanced. In this Article we focus on another element, which is the relation between mutual recognition and national sovereignty. The central question of this Article is thus:

*What is the impact of mutual recognition in EU criminal law on national sovereignty?*

Addressing this question, first of all, requires consideration of the dynamic nature of mutual recognition in EU criminal law. Even, or especially, with regard to the EAW, mutual recognition has undergone fundamental changes since the adoption of the Framework Decision. The key issue in this regard is mutual trust. As the Framework decision provides only a minimum of formalities and exceptions, mutual recognition presupposes that the EU Member States trust each other’s legal systems. In recent years, however, mutual trust has come under great pressure, mainly by the serious rule of law crises in some Member States. In response to differences in legislation and practices as well as, specifically, differences in adherence to rule of law values, the Court of Justice has transformed the mutual trust obligation. Starting from a rather absolute application, or

<sup>3</sup>Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190) 1 [hereinafter EAW Framework Decision].

<sup>4</sup>*Commission Report Based on Art. 34 of Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States – Statements Made by Certain Member States on the Adoption of the Framework Decision*, COM (2006) 8 final (Jan. 24, 2006).

<sup>5</sup>Perhaps the EAW is still the most emblematic of EU enforcement enhancing measures, but certainly not the only one. The European Investigative Order (EIO) and the measures related to financial aspects of criminal law enforcement, such as those dealing with the execution of orders freezing property and financial penalties, are other key instruments: Directive 2014/14/EU of the European Parliament and the Council of 3 April 2014 Regarding the European Investigative Order in Criminal Matters, 2014 O.J. (L 130) 1; Council Framework Decision 2003/577/JHA of 22 July 2003, on the Execution of the European Union of Orders Freezing Property or Evidence 2003 O.J. (L 196) 45; Council Framework Decision 2006/783/JHA of 6 October 2006, on the Application of the Principle of Mutual Recognition to Confiscation Orders 2006 O.J. (L 328) 59; Valsamis Mitsilegas, *Mutual Recognition of Positive Asylum Decisions in the European Union*, FREE GROUP (May 12, 2015), <https://free-group.eu/2015/05/12/mutual-recognition-of-positive-asylum-decisions-in-the-european-union/>; PAUL CRAIG & GRÁINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 995 (6th ed. 2015).

<sup>6</sup>Valsamis Mitsilegas, *Autonomous Concepts, Diversity Management and Mutual Trust in Europe’s Area of Criminal Justice*, 57 COMMON MKT. L. REV. 45, 78 (2020).

<sup>7</sup>Koen Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, The Fourth Annual Sir Jeremy Lever Lecture, All Souls Coll., Univ. of Oxford 2 (Jan. 30, 2015), [https://www.law.ox.ac.uk/sites/files/oxlaw/the\\_principle\\_of\\_mutual\\_recognition\\_in\\_the\\_area\\_of\\_freedom\\_judge\\_lenaerts.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf).

blind trust,<sup>8</sup> mutual trust has now become embedded in a fundamental rights framework.<sup>9</sup> In the decision in joined cases *Aranyosi and Căldăraru*,<sup>10</sup> the Court decided that blind trust in the prison conditions in the issuing state may be rebutted. Subsequently, in other decisions, the Court interpreted key terms of the Framework decision and more generally developed standards for the application of the framework decision.<sup>11</sup> Obviously, this has affected not only the functioning of the EAW and the relation between the issuing and the executing state, but also more fundamentally the discretion of the Member States to organize their criminal justice systems autonomously. Moreover, it compels us to view the EAW's impact on the Member States as a dynamic process that is still ongoing today.

This brings us to the definition of national sovereignty, which is an essentially contested and highly controversial concept. The lack of an agreed definition makes it difficult to apply the concept as the basis of legal analysis. At the same time, however, it is difficult to overestimate the relevance of the concept and how it has informed the structure of the EAW and the choice to apply mutual recognition as the foundation thereof. Our aim is, therefore, to develop and apply a concept of national sovereignty that allows us to assess the impact of the EAW on national legal orders in a way that aligns with the underlying reasons for the Member States to be hesitant about the transfer of competences in the field. Obviously, as will be demonstrated, this is a choice that is open to criticism, especially by those who would not subscribe to the perspective taken or its normative underpinnings. Our main aim, however, is not to engage with and take a position in the conceptual discourse on national sovereignty. Rather, we seek to apply a functional, legal definition that is instrumental in assessing the Member States' initial claim that mutual recognition in EU criminal law affects national sovereignty in less significant ways than harmonization. Building on Bloks,<sup>12</sup> the key components of the concept are: the protection of the State and its basic structures, in other words, its *statehood*; and the State's values, principles, and fundamental rights, in other words, its *statehood principles*.

This approach is informed by national constitutional courts' application of national sovereignty and focuses on the normative dimension of the concept in that it seeks to explain and justify power relations.<sup>13</sup> Furthermore, focusing on the configuration of legal authority may imply a conceptualization of national sovereignty as pooled, shared, or divided rather than a traditional conceptualization of sovereignty as unitary and exclusive.

In Section B, we will describe the context in which mutual recognition was introduced in the AFSJ, and we will assess how it has developed since then. Next, in Section C, we will elaborate our conceptualization of national sovereignty, whilst shying away from opening Pandora's box on all possible interpretations, assessing their merits, and analyzing the discourse on national

<sup>8</sup>See Ermioni Xanthopoulou, *Mutual Trust and Rights in the EU Criminal and Asylum Law: Three Phases of Revolution and the Unchartered Territory Beyond Blind Trust*, 55 COMMON MKT. L. REV. 489 (2018) (arguing that the first phase of "blind trust" has been followed by a phase in which "controlled derogations" have been allowed, and questioning whether we have now entered a third phase in which individual assessments of fundamental rights compliance may be made).

<sup>9</sup>Koen Lenaerts, *La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust*, 54 COMMON MKT. L. REV. 805 (2017). Lenaerts underlines that the key mechanisms to provide this fundamental rights framework are the Charter, the CJEU itself, and the EU legislature, as otherwise the effectiveness of the system of mutual recognition would be jeopardized. By contrast, Xanthopoulou, *supra* note 8, expected more from better cooperation and communication between national authorities in this regard.

<sup>10</sup>ECJ, Joined Cases 404 & 698/15 PPU, *Aranyosi & Căldăraru v. Generalstaatsanwaltschaft Bremen*, ECLI:EU:C:2016:198 (Apr. 5, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-404/15>.

<sup>11</sup>Mitsilegas has elaborated a typology of various ways in which the CJEU has developed autonomous concepts which will be discussed below. See Mitsilegas, *supra* note 6.

<sup>12</sup>See generally Suzanne A. Bloks, *The Impact on Sovereignty: Assessing an Essentially Contested Concept*, in BEGRENZENDE EN BEVRIJDENDE SOEVEREINITEIT 51 (Sascha Hardt, Aalt Willem Heringa & Antonia Waltermann eds., 2018).

<sup>13</sup>*Id.* at 52.

sovereignty in a comprehensive manner. In Section D, which forms the core of this Article, we assess the impact of mutual recognition in the AFSJ on national sovereignty, focusing on the EAW.<sup>14</sup> We will not only consider mutual recognition from a dynamic perspective, but we also view it as a regulatory phenomenon that includes both horizontal and vertical dimensions. Whereas claims on national sovereignty implications often tend to be limited to the vertical dimension, described as the division of authority between the Member States and the EU,<sup>15</sup> we will also consider the horizontal dimension, which concerns the division of authority between the Member States. This will prove to be a crucial dimension for the sovereignty implications of mutual recognition.

## B. Mutual Recognition in the AFSJ: Origins, Trust, and Avoiding Harmonization

Mutual recognition originates as a principle of cooperation in the Internal Market. During the EU Presidency in 1998, the UK had initiated “borrowing” the principle from the framework of cooperation in the Internal Market, where it was perceived to be successful in creating a single area of cooperation while keeping national legal systems intact,<sup>16</sup> and transplanting it to the AFSJ. The principle was endorsed by the EU Member States as “the cornerstone of judicial co-operation in both civil and criminal matters within the Union”<sup>17</sup> during the Tampere European Council of October 1999 and was implemented as a regulatory principle in criminal law when the AFSJ was created in the 2007 Lisbon Treaty. Mutual recognition was perceived as a principle that offered a middle ground between the European Commission’s desire to boost further European integration in criminal matters and the Member State’s protective attitudes towards their national sovereignty.

First and foremost, the principle of mutual recognition was intended to boost cooperation in criminal matters *post*-Maastricht. In the 1992 Maastricht Treaty, cooperation in criminal matters was part of the third pillar of the EU three-pillar structure, which was called the pillar for Justice and Home Affairs (JHA) and was renamed the pillar for Police and Judicial Cooperation in Criminal Matters (PJCC) in the 1997 Amsterdam Treaty. Because of the sovereignty sensitivity of EU competence in the field of criminal law, the framework of cooperation in criminal matters in

<sup>14</sup>The assessment of the EAW, and EU criminal law more broadly from the perspective of national sovereignty, is not new, but such assessments have been primarily dealing with issues of national constitutional limits; especially the limits to the surrender of own nationals and the decisions of national constitutional courts in that regard have been the subject of analysis. See, e.g., Massimo Fichera, *The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?*, 15 EUR. L.J. 70 (2009); Oresto Pollicino, *European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance Between Interacting Legal Systems*, 9 GERMAN L.J. 1313 (2008); Jan Komárek, *European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles”*, 44 COMMON MKT. L. REV. 9 (2007). Some authors have discussed the implications of such national constitutional decisions on the status of EU law in the Member States and the principle of supremacy in particular. See, e.g., Krystyna Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERMAN L.J. 1355 (2005).

<sup>15</sup>This vertical division of authority between the Member States and the EU is commonly approached via the principle of conferred powers. See, e.g., Samuli M. Miettinen, *The Evolution of Competence Distribution Between the European Union and Member States in the Criminal Field*, in *THE NEEDED BALANCES IN EU CRIMINAL LAW: PAST, PRESENT AND FUTURE* (Anne Weyembergh & Chloé Brière eds., 2017). Miettinen takes a historical perspective to the development of EU competences in EU criminal law, ending with the uncertainties of the current article 83 TFEU. Also, the principle of subsidiarity has served as a lens to view the division of authority between the EU and its Member states. See, e.g., Ester Herlin-Karnell, *Subsidiarity in the Area of EU Justice and Home Affairs Law—A Lost Cause?*, 15 EUR. L.J. 351 (2009). Our approach differs in that it focuses on the effects on national sovereignty rather than on the scope of EU competences.

<sup>16</sup>This unambiguous success story of mutual recognition in the Internal Market was, however, not widely shared by commentators, who criticized the lack of success of mutual recognition in actually achieving internal market objectives. See Ton van den Brink, *Horizontal Federalism, Mutual Recognition and the Balance Between Harmonization, Home State Control and Host State Autonomy*, 1 EUR. PAPERS 921, 933 (2016).

<sup>17</sup>See Presidency Conclusions, *supra* note 2, at para. 33.

the Maastricht and Amsterdam Treaties had an intergovernmental rather than community-based character with a fairly limited number of EU harmonization measures. Criminal measures at the EU level could be adopted only by unanimity in the form of Joint Actions—the legal form of which is still contested—or Conventions, which more closely resemble traditional international law instruments than community legislation as they require ratification by national parliaments.<sup>18</sup> Also, the EU Member States cooperated on the basis of traditional judicial cooperation in criminal matters, governed by conventions under the Council of Europe. Traditional judicial cooperation is characterized by what the European Commission calls the “request” principle: “One sovereign state makes a request to another sovereign state, who then determines whether it will or will not comply with this request.”<sup>19</sup> Mutual recognition would render this slow, cumbersome and uncertain request procedure between the EU Member States superfluous, as it introduced “a process by which a decision usually taken by a judicial authority in one EU country is recognized, and where necessary, enforced by other EU countries *as if* it was a decision taken by the judicial authorities of the latter countries.”<sup>20</sup>

At the same time, mutual recognition was perceived as a regulatory strategy that would keep national legal systems intact and avoid European harmonization. This protective attitude of the EU Member States towards national sovereignty in the already sovereignty sensitive area of criminal law was fueled by the European Commission’s failed attempts to take more comprehensive measures towards enhancing European cooperation in criminal matters. Specifically, the proposals of the European Commission to establish further going European cooperation in countering budgetary fraud had offended those who guarded over national sovereignty. In 1997, the European Commission’s working group under the name of *Espace judiciaire Européen*, consisting mainly of criminal lawyers with EU interest, proposed a so-called EU *Corpus Juris* as a solution to fraud with EU subsidies and grants. The *Corpus Juris* would turn the whole EU territory into a single area for the purpose of investigating, prosecuting, and punishing budgetary fraud by defining a single set of European criminal offenses, formulating a common set of rules of criminal procedure and evidence, and establishing a “European Public Prosecutor.”<sup>21</sup> The Commission’s working group had somewhat overestimated the political reactions that a European scheme to fight EU budgetary fraud would evoke. Consequently, neither the 1997 *Corpus Juris* nor the 2001 proposal based on the *Corpus Juris* was ever realized.

Being susceptible to the idea that mutual recognition was a way to avoid further EU harmonization, the EU Member States seemed to neglect that, as a transplant of mutual recognition in the Internal Market, mutual recognition in the AFSJ does not necessarily have the same sovereignty implications. Indeed, mutual recognition in the AFSJ is based on a similar idea as in the Internal Market: the recognition of national standards by the other EU Member States<sup>22</sup> in an “area without internal frontiers.”<sup>23</sup> Both in the AFSJ and the Internal Market, mutual recognition supports free movement. However, this relates to the free movement of goods, services, capital, and persons in the Internal Market, whereas it is the free movement of suspects and judicial decisions in the AFSJ. Consequently, there is a difference in the object of recognition: while the object of recognition in the Internal Market is the other country’s rules on products and

<sup>18</sup>Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 COMMON MKT. L. REV. 1277, 1278 (2006).

<sup>19</sup>Commission Communication on Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) 495 final (July 26, 2000).

<sup>20</sup>European Commission, *Judicial Cooperation*, [http://ec.europa.eu/justice/criminal/recognition-decision/index\\_en.htm](http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm) (last visited Jan. 31, 2017).

<sup>21</sup>John R. Spencer, *The Corpus Juris Project and the Fight Against Budgetary Fraud*, 1 CAMBRIDGE Y.B. EUR. LEGAL STUD. 77, 83–84 (1998).

<sup>22</sup>Mitsilegas, *supra* note 18, at 1281.

<sup>23</sup>Consolidated Version of the Treaty on the Functioning of the European Union art. 3(2), June 7, 2016, 2016 O.J. (C 202) 1 [hereinafter TFEU].

production methods, the object of recognition in the AFSJ is “sovereign acts of the judiciary in their interpretation and application of a whole set of material and procedural laws.”<sup>24</sup> Also, there is a difference in the actors that benefit from mutual recognition. As the subject of cooperation in the Internal Market is economic goods and services, the beneficiaries are societal actors. By contrast, the mutual recognition of judgments and judicial decisions in the AFSJ benefits state representatives.<sup>25</sup>

The most important difference in terms of sovereignty implications is the relation between mutual recognition and other mechanisms of European integration, such as EU harmonization measures. Mutual recognition in the Internal Market is justified by accompanying harmonization measures. By contrast, the reluctance in the AFSJ towards formulating common EU standards and establishing common enforcement institutions means that mutual recognition in the AFSJ is accompanied by *mutual trust*.<sup>26</sup> The principle of mutual trust leaves the freedom of Member States intact to organize their criminal justice systems the way they see fit. It is not only the EU Member States that are expected to put trust in their respective criminal justice systems based on prior and continued knowledge of a commitment to EU values in their respective legal systems, but also the EU institutions themselves and indeed EU law more generally. Thus, mutual trust seemed to be the “wonder oil” that allowed for the respect of national autonomy and, at the same time, ensures the effectiveness of AFSJ policy aims. In this way, it is ensured that there is a similar level of protection of national institutional and procedural autonomy in the AFSJ as there is in the Internal Market and other areas of EU law. However, as we will see later, the existence of serious differences in normative standards in the EU Member States has exposed that mutual trust is not the magic wonder oil after all. In order to overcome the difficulties of diversity, significant limitations to mutual trust and “trust-enhancing” harmonization measures have been introduced, with diverging sovereignty implications.

This singles out the difficulty of reaching generic conclusions on the impact of mutual recognition and mutual trust on national sovereignty. Following Prechal, who argued that mutual trust is to be applied in tandem with secondary Union law,<sup>27</sup> Maiani and Migliorini have explored various EU legislation based on mutual trust. They found that mutual trust operates in quite divergent ways. Legislation varies in terms of the degree of trust imposed on the Member States, the fundamental rights context in which it operates, and the constellation of interests involved.<sup>28</sup> Insofar as our subsequent analysis is primarily based on the European Arrest Warrant, caution is warranted in extrapolating our findings to other areas.

As the principle of mutual trust serves to balance the effectiveness of mutual recognition arrangements and national autonomy, it should be noted that the exact relation between mutual recognition and mutual trust has been subject to further debate, especially regarding the issue of

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<sup>24</sup>Sandra Lavenex, *Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy*, 14 J. EUR. PUB. POL'Y 762, 765 (2007). See *id.* for a comparison between mutual recognition in the AFSJ and in the Internal Market. It should be noted that this sharp contrast, drawn by Lavenex, between mutual recognition in the Internal Market and in the AFSJ should be nuanced when looking at the functioning of mutual recognition in specific areas of the Internal Market. Nicolaïdis gives two reasons why she thinks that Lavenex overstates the differences between the two realms. See Kalypso Nicolaïdis, *Trusting the Poles? Constructing Europe through Mutual Recognition*, 14 J. EUR. PUB. POL'Y 682, 690 (2007).

<sup>25</sup>See generally Lavenex, *supra* note 24.

<sup>26</sup>Peers has criticized mutual recognition in EU criminal law precisely for the lack of legislative embedding, in contrast to the Internal market in which a legal framework has emerged that combines harmonization and mutual recognition. See Steve Peers, *Mutual Recognition and Criminal law in the European Union: Has the Council Got it Wrong?*, 41 COMMON MKT. L. REV. 5 (2004).

<sup>27</sup>Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, 2 EUR. PAPERS 75 (2017).

<sup>28</sup>Maiani and Migliorini, *supra* note 1, 26–29. Janssens has equally assessed EU legislation—both in the field of the Internal market and the Area of Freedom, Security and Justice—from the perspective of the relation between mutual recognition and harmonization. The analysis demonstrates an equally varied picture of mutual recognition arrangements, especially in relation to substantive and procedural mutual recognition arrangements. See Christine Janssens, *THE PRINCIPLE OF MUTUAL RECOGNITION IN EU LAW* (2013).

causality. Some consider mutual trust a prerequisite for mutual recognition to function properly, while others—including Advocate General Bot—have argued that mutual trust is rather a consequence of mutual recognition.<sup>29</sup> A key aspect of the latter view is that mutual recognition results in the cooperation of authorities between and across Member States. The experience therein and knowledge about authorities and how they work helps to build trust. At the same time, a total absence of mutual trust from the beginning would create an absolute obstacle for any mutual recognition scheme. Indeed, as Cambien has argued, “it would make no sense to require a Member State to systematically recognize the decisions and rules of another Member State if it did not have trust in the adequacy of the legal system of that other Member State.”<sup>30</sup> As such, mutual trust may be viewed as a more fundamental requirement than the duty to recognize rules or acts produced by another legal system as the former requires a more stable and advanced relationship than mutual recognition.<sup>31</sup> In a similar vein, Lenaerts has argued that this “advanced relation” is based on a set of shared values that demonstrate fundamental equality not only of EU citizens but also of the Member States.<sup>32</sup> The Court of Justice of the European Union (CJEU) seems to consider mutual trust to be a prerequisite of mutual recognition indeed. In the joined cases of *Aranyosi* and *Căldăraru*, the Court ruled that “the principle of mutual recognition on which the European arrest warrant system is based is itself founded on the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter of Fundamental Rights of the European Union.”<sup>33</sup> Before the decision in *Aranyosi* and *Căldăraru*, the Court had already considered that the principle of mutual trust would impede the EU Member States from checking fundamental rights compliance in the other Member States in the context of mutual recognition arrangements.<sup>34</sup> This “lock” on the accession to the European Convention on Human Rights (ECHR) has been much debated and heavily criticized.<sup>35</sup> Still, for the purposes of the current inquiry, it suffices to note that the lock demonstrates the difficulty of balancing fundamental rights concerns, national autonomy, and the effectiveness of mutual recognition arrangements.<sup>36</sup>

### C. Defining National Sovereignty

Although the EU Member States agreed that mutual recognition could enhance EU cooperation in the AFSJ while abstaining from interference with national sovereignty, a univocal answer to the question of the impact of mutual recognition on national sovereignty has never been given. More than twenty years after the principle was endorsed and more than ten years after its

<sup>29</sup>Nathan Cambien, *Mutual Recognition and Mutual Trust in the Internal Market*, 2 EUR. PAPERS 93, 100–01 (2017); ECJ Case C-486/14, *Prosecutor v. Kossowski*, 2016 E.C.R. 483, para. 43 (June 29, 2016), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0486>.

<sup>30</sup>Cambien, *supra* note 29, at 100.

<sup>31</sup>*Id.* at 100.

<sup>32</sup>See Lenaerts, *supra* note 9, 807–812.

<sup>33</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU at para. 77. The decision in *Bob-Dogi* is in line with this position: Case C-241/15, *Bob-Dogi*, ECLI:EU:C:2016:385 (June 1, 2016), para. 33, <http://curia.europa.eu/juris/liste.jsf?num=C-241/15>.

<sup>34</sup>Opinion 2/13 of the Court on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454 (Dec. 18, 2014), para. 191, <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>.

<sup>35</sup>We will limit ourselves here by referring only to Wischmeyer, who has construed one of the most fundamental arguments against a “top-down-imposition” of the mutual trust obligation. By first deconstructing the relation between law and trust, Wischmeyer proposes a fundamentally opposing alternative of a “bottom-up” fostering of trust. See Thomas Wischmeyer, *Generating Trust Through Law? Judicial Cooperation in the European Union and the “Principle of Mutual Trust”*, 17 GERMAN L.J. 339 (2016).

<sup>36</sup>Adam Łazowski & Ramses A. Wessel, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 GERMAN L.J. 179 (2015).

implementation as a cornerstone of judicial cooperation in civil and criminal matters with the creation of the AFSJ, it is time to make up the balance.

Several authors have touched on the impact on national sovereignty of mutual recognition in the AFSJ and pointed out that the impact may be considerably higher than expected *prima facie*. For example, Maduro<sup>37</sup> observed that mutual recognition often leads to *ex-post* harmonization and does not change so much “the degree of sovereignty transferred but more how it is transferred.”<sup>38</sup> Also, Van den Brink observed in his “quick-scan”<sup>39</sup> of the impact on national legal systems of the European Arrest Warrant (EAW) that mutual recognition in a context of mutual trust has substantially reduced national discretion of the executing Member State.

Both authors seem to conceptualize national sovereignty in terms of a claim to legal authority. This carries “a type of normative power which purports to be able to settle for practical purposes matters within the polity which are controversial and disputed.”<sup>40</sup> For example, van den Brink proposes the criterion of national discretion: “[D]oes EU legislation provide the Member States with a full and complete regulatory framework or does it rather leave policy choices and the further elaboration of norms to the Member States?”<sup>41</sup>

In this Article, we similarly conceptualize national sovereignty as the national autonomy to exercise legal authority. Then, the question of the impact of mutual recognition on national sovereignty becomes the question of whether mutual recognition has changed the extent to which national authorities are the bearer of legal authority.

There are three key conceptual components to consider when imagining an impact on national sovereignty as a transfer of legal authority. The first is the *point of reference*: what is the *status quo* configuration of legal authority; for example, what was the configuration of legal authority before the introduction of mutual recognition in the AFSJ? Our point of reference will be the configuration of authority during traditional judicial cooperation, in which the executing Member State had the authority to determine whether it would or would not comply with the request from the issuing Member State, and the EU had no influence on this request procedure.

The second conceptual component that needs clarification concerns the question of *who* bears the legal authority. The legal conception of national sovereignty is often subdivided into an internal and external component. As Bloks explains:

The internal dimension of legal sovereignty relates to the internal affairs of a polity. It refers to the ultimate source of authority *within* a territory. This can be either a particular institution (the King or Parliament) or a collectivity (the people) within the State. The external dimension of sovereignty contains a claim to legal authority in relation to other polities. Through the legal fiction of international law, external sovereignty is usually attributed to the State as whole. This is a legal abstraction, for ultimately the bearer of sovereignty is an institution or collectivity within the State, since those entities that can plausibly make sovereignty claims in the external dimension are precisely those that claim internal ultimate decision-making authority.<sup>42</sup>

<sup>37</sup>See generally Miguel Poiars Maduro, *So Close and Yet So Far: The Paradoxes of Mutual Recognition*, 14 J. EUR. PUB. POL'Y 814 (2007).

<sup>38</sup>*Id.* at 819.

<sup>39</sup>Ton van den Brink, *The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations*, 19 CAMBRIDGE Y.B. EUR. LEGAL STUD. 211, 224 (2017).

<sup>40</sup>See Neil Walker, *Sovereignty and Differentiated Integration in the European Union*, 4 EUR. L.J. 355, 357 (1998); see also Bloks, *supra* note 12, at 51.

<sup>41</sup>van den Brink, *supra* note 39, at 213.

<sup>42</sup>Bloks, *supra* note 12, at 62. See Cormac S. Mac Amhlaigh & Andrew R. Glencross, *Sovereignty in the EU Constitutional Order: Integrating Law and Political Science* 3 (Edinburgh Sch. L. Working Paper Series, Working Paper No. 2009/20, 2009); Bruno de Witte, *Sovereignty and European Integration: The Weight of a Legal Tradition*, 2 MAASTRICHT J. EUR. & COMPAR. L. 145, 147 (1995).

In this Article, we will only explicate the bearer of national sovereignty within a State when we are specifically concerned with a transfer of authority within the State; otherwise, we will speak of the national sovereignty of EU Member States.

The third conceptual component is: the authority over *what*? In an analysis of the use of the concept of national sovereignty by national constitutional courts in cases involving a conflict between EU and national law, Bloks identified that national constitutional courts ultimately intend to protect (1) the existence of the State and its basic structures, and (2) the State's values, principles, and fundamental rights.<sup>43</sup> That is, national constitutional courts posed limits to the transfer of legal authority to the EU in order to protect *statehood* and *statehood principles*. The criterion of statehood entails that the primary political area should remain the State, and that the structures of the State should not be determined by other authorities. In particular, the internal configuration of authority should remain an ultimately national affair. The criterion of statehood principles concerns the extent to which the State has the discretion to determine the content and the level of protection of the State's values, principles, and fundamental rights.

The criterion of statehood principles is the more fundamental of the two. For example, the German Constitutional Court regards the existence of the State and its basic structures as a means to the end of protecting the State's values, principles, and fundamental rights. The Court considers only the protection of the existence of the State and its basic structures as equally important, because it perceives the State as the primary and only political community in which the State's values, principles, and fundamental rights can flourish.<sup>44</sup> Furthermore, the State's values, principles, and fundamental rights are defining features of the State's basic structures, for we could think of a political community that is shaped according to the State's principles of democracy, the rule of law, and the *trias politica*.

Thus, in the remainder of this Article, we will assess to what extent mutual recognition in the AFSJ has changed the configuration of authority between the EU Member States and the EU over Member States' basic structures, values, principles, and fundamental rights with reference to the configuration of authority during traditional judicial cooperation.

It should be noted that any conceptualization of national sovereignty is likely to raise criticism, as national sovereignty is considered to be *an essentially contested concept*, meaning that debate over its conceptualization is inherent to its very nature.<sup>45</sup> This is not the place to debate whether sovereignty is absolute or limited, unitary or pooled, and can be shared or divided. We will analyze the transfer of legal authority between and within the EU Member States and the EU, whether this implies a complete loss or gain of national sovereignty or only a partial limitation or extension of national sovereignty.

#### D. Changing the Configuration of Authority?

Mutual recognition is often viewed as affecting national sovereignty in a less profound way than harmonization. Proponents of this view usually focus exclusively on the vertical transfer of authority between the EU and the Member States. Although harmonization might simply consist of such a vertical transfer of authority, mutual recognition paints a rather more complex picture. Mutual recognition creates an institutional triangle between the executing Member State, the issuing Member State, and the EU.<sup>46</sup> Consequently, national legal authority is affected by mutual recognition on three dimensions: the horizontal dimension between the executing and the issuing Member State,

<sup>43</sup>Bloks, *supra* note 12, at 51.

<sup>44</sup>*Id.* at 67.

<sup>45</sup>*Id.* at 51.

<sup>46</sup>van den Brink, *supra* note 16, at 933; Ton van den Brink & Tony Marguery, *Hogere evenwichtskunst in het Europees Aanhoudingsbevel. Meer rechtsbescherming en ook meer Europa?*, 2 SEW TIJDSCHRIFT VOOR EUROPEES EN ECONOMISCH RECHT 46, 51 (2018).

the vertical dimension between the executing Member State and the EU, and the vertical dimension between the issuing Member State and the EU. In this section, we will discuss the impact of mutual recognition on national sovereignty along the lines of these three dimensions.

### *I. The Horizontal Transfer of Authority between the Executing and Issuing Member State*

Mutual recognition in the AFSJ concerns the recognition of acts of states by states: it facilitates “the cross-border movement of sovereign acts exercised by states’ executives and judicial organs.”<sup>47</sup> Courts and police authorities have to accept and are authorized to act on judgments and procedures of authorities from the other EU Member States. This creates extraterritoriality of law enforcement as other national standards must be recognized and applied in foreign jurisdictions.<sup>48</sup> Although such a system of transnational enforcement underscores rather than denies state power by retaining the authority to issue and execute legal acts at the national level,<sup>49</sup> it is also an institutionalized exchange of jurisdictional authority among the EU Member States that intertwines the legal systems. Through “extraterritoriality,” mutual recognition extends the regulatory scope of national legal acts beyond the boundaries of the state and, hence, decouples “the exercise of sovereign power from its territorial anchor through reciprocal allocation of jurisdictional authority to prescribe and enforce laws.”<sup>50</sup>

In particular, a dependence of the executing Member State on the legal system of the issuing Member State is created. The issuing Member State has an *in-principle* leading role in determining the rules and procedures, and, thereby, also in protecting statehood principles. By applying mutual recognition, the executing Member State not only accepts and enforces a foreign legal act, but also accepts and recognizes the norms of the legal system in which the legal act is embedded. Consequently, mutual recognition entails much more than the mere acceptance of foreign legal acts: it also involves the acceptance of “the need to co-operate in the enforcement of the other states’ systems of law.”<sup>51</sup> As mutual recognition facilitates the co-existence of different normative standards in a context of mutual trust, this can be depicted as a “journey into the unknown.”<sup>52</sup>

Mutual recognition based on mutual trust worked relatively well until serious problems came to light, which exposed that mutual trust could lead the executing Member States on a journey into the undesirable when there is no longer a common commitment to the rule of law, democracy, and the protection of fundamental rights. In response, the CJEU has left the principle of mutual trust itself intact but has set outer limits to its functioning. Thereby, mutual trust is confirmed to be a *binding* form of trust that requires prior and continued knowledge of the Member States about each other’s legal systems and binds the states to each other’s expectations. It is not to be a *blind* form of trust, which would be “predicated on separateness at best, mutual ignorance at worst.”<sup>53</sup>

In the case of the EAW, non-compliance with the outer limits of mutual trust may easily be sanctioned by allowing the executing Member States not to execute EAWs. In other words, the issuing Member States will be deprived of their enhanced criminal enforcement powers beyond their geographical borders.

One of the key decisions here is the decision of the CJEU in joined cases *Aranyosi* and *Căldăraru*,<sup>54</sup> which revealed that the presumption of mutual trust is not unconditional and

<sup>47</sup>Lavenex, *supra* note 24, at 765.

<sup>48</sup>Mitsilegas, *supra* note 18, at 1281.

<sup>49</sup>Nicolaïdis, *supra* note 24, at 688.

<sup>50</sup>*Id.* at 685.

<sup>51</sup>Lavenex, *supra* note 24, at 765.

<sup>52</sup>Mitsilegas, *supra* note 18, at 1282.

<sup>53</sup>Nicolaïdis, *supra* note 24, at 683.

<sup>54</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU. See generally Koen Bovend’Eerd, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?*, 32 *UTRECHT J. INT’L & EUR. L.* 112 (2016).

can be violated if there is a “real risk of inhuman or degrading treatment.” In the cases of *Aranyosi* and *Căldăraru*, there were strong indications of fundamental rights violations due to poor detention conditions in, respectively, Hungary and Romania, which led the German Higher Regional Court of Bremen to question the reach of *binding* mutual trust in accepting and enforcing an EAW. The CJEU introduced a two-stage test that the executing Member State must conduct in order to determine whether denying the surrender of a person to the issuing Member State is justified. The two-step test requires, first, that the executing Member State determines whether there are deficiencies in the detention conditions, “which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention,” by relying on “objective, reliable, specific and properly updated evidence with respect to detention conditions.” Second, the executing Member State has to assess the risk for the person to be surrendered and must, to that end, request supplementary information from the issuing Member State, which “must send that information within the time limit set in the request.”<sup>55</sup>

The two-stage test creates a dialogue between the executing and issuing authorities, wherein the executing judicial authorities must request that the issuing judicial authorities provide supplementary information before deciding whether the surrender procedure should be brought to an end.<sup>56</sup> If this dialogue leads to the conclusion by the executing judicial authorities that a risk of inhuman and degrading treatment cannot be discounted, the executing judicial authorities may bring the surrender procedure to an end, which is practically equivalent to refusing the execution of an EAW.

The CJEU decision in joined cases *Aranyosi* and *Căldăraru* marks the start of a whole line of jurisprudence on profoundly political issues. Challenges to democracy and pressure on the rule of law in the EU Member States show the precariousness of the balance between mutual trust and effective transnational law enforcement through mutual recognition when there exist different normative standards. In particular, three political upheavals have posed this dilemma for both politicians and the judiciary in the EU: Brexit, the Catalan independence movement in Spain, and the pressure on the rule of law in Poland.

First, in the context of Brexit, the Irish High Court had to consider the question of whether it is required to enforce an EAW issued by the UK, as the person to be surrendered is likely to remain in prison after the withdrawal of the UK from the EU, meaning his rights under EU law cannot be guaranteed. In September 2018, the CJEU ruled that the mere notification of the intention to withdraw from the EU does not have the consequence that the executing Member State must refuse to execute or must postpone executing an EAW pending clarification of the law that will be applicable in the issuing Member State after its withdrawal from the EU. A refusal to execute an EAW of a current EU Member State would be justified only if there are substantial grounds to believe that the person to be surrendered is at a real risk of being deprived of his fundamental rights following the withdrawal from the EU of the issuing Member State.<sup>57</sup>

Second, EAW’s issued by Spain against ousted Catalan President Carles Puigdemont and four other Catalan officials in self-exile in Belgium challenged the mutual trust between Spain and the other EU Member States. Puigdemont and the other Catalan politicians were charged with rebellion and embezzlement. On two occasions, the Spanish Supreme Court issued an EAW against the politicians on this basis, and each time decided to drop the charges following a politically sensitive dialogue. On the first occasion, the Belgian court had to decide on the extradition request. Pending the final decision of the Belgian court, the Spanish Supreme Court decided to withdraw the EAW because it had realized that EAW’s were not meant for alleged crimes committed by a wider group of people, namely the Catalan government. On the second occasion, the German Court of

<sup>55</sup>The procedural steps are further explained in the Commission Notice—Handbook on How to Issue and Execute a European Arrest Warrant, 2017 O.J. (C 335) 1, 33.

<sup>56</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU at para. 104.

<sup>57</sup>ECJ, Case C-327/18 PPU, *Minister for Just. & Equality v. RO*, ECLI:EU:C:2018:733 (Sept. 19, 2018), <http://curia.europa.eu/juris/liste.jsf?num=C-327/18>.

Schleswig-Holstein refused to surrender Puigdemont based on rebellion because rebellion was not criminalizable in Germany and, hence, the requirement of “double criminality” was not met. But the German court decided that Puigdemont could be extradited for the less serious crime of embezzlement. Following this ruling, the Spanish Supreme Court dropped the charges against Puigdemont and the other politicians and, thereby, closed the EAW procedures once again.

Third, the rule of law procedure of Article 7 of the Treaty on European Union (TEU)<sup>58</sup> that the EC has triggered against Poland has led to the suspension of surrender requests because of doubts about the independence of the Polish judiciary. In September 2019, the Chamber of International Judicial Assistance (*Internationale Rechtshulpkamer* (IRK)) in Amsterdam, the Netherlands, requested again more information about the independence of the judiciary in the Polish court that will deal with the prosecution of a person to be surrendered to Poland on the basis of an EAW.<sup>59</sup> Earlier in the year, the Amsterdam court had already suspended the decision to execute the EAW’s issued by Poland against this suspect and eight other suspects, and it had decided to surrender to Poland nine other persons who were not found to be at a real risk of being compromised in their right to a fair trial.<sup>60</sup>

Also, in the pending Irish case of *Ministry of Justice v. Celmer*,<sup>61</sup> the Irish High Court judge asked the CJEU in a preliminary reference procedure whether it should halt or suspend judicial cooperation based on mutual recognition if persuasive evidence pointed to a real risk of a flagrant denial of fundamental rights on account of a systematic breach of the rule of law in Poland. The responding CJEU’s ruling stated that the Article 7 procedure is independent from judicial proceedings and that the two-step test of *Aranyosi* and *Căldăraru*<sup>62</sup> should be followed when making the decision of suspending judicial cooperation.<sup>63</sup> Following this ruling, the Irish High Court judge interpreted the CJEU’s test concerning a “breach of the *essence* of a right” in the sense of the “*flagrant* denial of justice” test, which was laid down by the European Court of Human Rights (ECtHR) in, inter alia, *Soering v. UK*<sup>64</sup> and *Othman (Abu Qatada) v. UK*.<sup>65</sup> It surprisingly decided that a real risk of a flagrant denial of justice had not been established but permitted a “leapfrog”<sup>66</sup> appeal of Mr. Celmer at the Supreme Court of Ireland. In the pending appeal procedure at the Supreme Court, the Irish Human Rights and Equality Commission (IHREC) has submitted a statement of legal assistance to the Supreme Court, in which it argues that the CJEU’s test affords greater, or different, protection to the right of a fair trial than the “flagrancy” test of the ECtHR. The IHREC contends that although an absence of independence on the part of the Polish judiciary may not constitute a flagrant denial of justice for the suspect—as other indices of fair trial rights in Poland remain intact—“it is difficult to see how the absence of something ‘essential’ can be compensated for by the presence of other factors.”<sup>67</sup>

<sup>58</sup>TFEU art. 7.

<sup>59</sup>Rechtbank Amsterdam [District Court Amsterdam] Sept. 27, 2019, *Nederlands Jurisprudentie Feitenrechtspraak* [NJFS] 2019, 287 (Neth.).

<sup>60</sup>District Court Amsterdam, *Overleveringen naar Polen deels toegestaan, deels opnieuw aangehouden*, DE RECHTSPRAAK (Apr. 16, 2019), <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/Overleveringen-naar-Polen-deels-toegestaan-deels-opnieuw-aangehouden.aspx> (last visited Oct. 3, 2019).

<sup>61</sup>Minister for Just. & Equality v. Celmer [2019] IESC 80 (H. Ct.) (Ir.).

<sup>62</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU.

<sup>63</sup>ECJ, Case C-216/18 PPU, Minister for Just. & Equality v. LM, ECLI:EU:C:2018:586 (July 25, 2018), <http://curia.europa.eu/juris/liste.jsf?num=C-216/18>. For further discussion on *Celmer*, see references at VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL, <https://verfassungsblog.de/tag/celmer/> (last visited Jan. 18, 2019).

<sup>64</sup>*Soering v. UK*, App. No. 14038/88, para. 113 (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619>.

<sup>65</sup>*Othman (Abu Qatada) v. UK*, App. No. 8139/09, para. 260 (Jan. 17, 2012), <http://hudoc.echr.coe.int/eng?i=001-108629>.

<sup>66</sup>In a leapfrog appeal, the case is sent from the High Court immediately to the Supreme Court, skipping a decision of the Court of Appeal.

<sup>67</sup>The Irish Human Rights and Equality Commission as Amicus Curiae at 21, Minister for Just. & Equality v. Celmer [2019] IESC 80 (H. Ct.) (Ir.) (Supreme Court Record No. S:AP:IE:2018:000181), [https://www.ihrec.ie/app/uploads/2019/07/Celmer\\_IHREC\\_Amicus\\_Submissions\\_2-July-2019.pdf](https://www.ihrec.ie/app/uploads/2019/07/Celmer_IHREC_Amicus_Submissions_2-July-2019.pdf).

The discussion in the Irish Supreme court makes clear that the CJEU's limitation to mutual trust, laid down in *Aranyosi* and *Căldăraru*, needs further clarification in terms of its scope of application. Does the test require a serious denial of the rights of the specific person to be surrendered or is a serious deficiency in the foreign legal system in general enough to end judicial cooperation? It remains to be seen how the CJEU wishes its test of "a breach of the essence of a right" to be interpreted. In any event, the line of case law following *Aranyosi* and *Căldăraru* is to be applied only if there are very serious deficiencies resulting from already existing obligations, most notably fundamental rights-based obligations that flow from the TEU and the European Convention on Human Rights (ECHR). Thus, the limitations to mutual trust revolve around the enforcement of already existing values and do not fundamentally change existing values or create new ones.

This line of case law restores the configuration of authority *between* the issuing and the executing Member State to the situation as it was before the introduction of mutual recognition in the AFSJ. Indeed, the sanction of non-execution creates a situation that would have been the normal situation in the absence of EU law. The line of case law recovers the authority of the executing Member State to protect already existing values at the cost of the enhanced authority that mutual recognition had given to the issuing Member State. Thus, as conditions are attached to the recognition of an EAW, the system of mutual recognition increasingly resembles the slow, cumbersome, and uncertain request procedure in traditional judicial cooperation.

However, this line of case law also creates a transnational constitutional dialogue that radically reconfigures authority *within* the democratic structures of the states concerned. Mutual recognition turns political questions concerning the conditions for extraditing to a foreign legal system into the purely legal question of executing an EAW. It institutionalizes the authority to determine the mutual compatibility of national legal systems into a regime of conditionality that is "managed"<sup>68</sup> by judicial and administrative authorities. The EAW cases related to Brexit, the Catalan independence movement, and the pressure on the rule of law in Poland tellingly illustrate this trend towards the judicialization of political decision-making. The consequence is that these authorities become part of a new constitutional framework. Apart from the national constitutional framework—within which they relate to other constitutional actors—the mutual recognition framework embeds these authorities in a transnational constitutional framework, which comes with "a certain degree of autonomy in decision-making and implementation."<sup>69</sup>

Some have signaled certain risks with such levels of autonomy of judicial and administrative authorities in the transnational constitutional framework. This includes the risk of politicization,<sup>70</sup> raising the question of whether the judicial and administrative decisions can be held democratically accountable and, worse still, democratically accountable beyond a territorially-defined citizenry. This is not the place to further assess this argument, but it demonstrates that the states' basic structures have been supplemented by a transnational constitutional system in which national authorities have been awarded a second mandate next to their national one.

It should be noted that the creation of a transnational constitutional dialogue is not specific to the EAW. For example, in EU asylum law, the CJEU ruled in the seminal *N.S.* decision that the return to Greece of two asylum seekers based on the Dublin Regulation should be aborted if substantial grounds for believing that systematic deficiencies exist in the reception of asylum seekers in Greece.<sup>71</sup> Thereby, the CJEU formulated an exceptional circumstance that would renounce the presumption of compliance.<sup>72</sup>

<sup>68</sup>See generally Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 MICH. REV. INT'L L. 267 (2005).

<sup>69</sup>Lavenex, *supra* note 24, at 769.

<sup>70</sup>Elspeith Guild, *Drawing the Conclusions: Constitutional Concerns Regarding the European Arrest Warrant*, in CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT 272 (Elspeith Guild ed., 2006).

<sup>71</sup>ECJ, Joined Cases 411 & 493/10, *N.S. v. Sec'y of State for the Home Dep't*, ECLI:EU:C:2011:865 (Dec. 21, 2011), para. 86, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-411/10>.

<sup>72</sup>See *Opinion 2/13*, *supra* note 34, at para. 191.

To conclude, the boosting of the transnational enforcement capacity of state acts by mutual recognition in the AFSJ may have a limited impact on the configuration of authority between the issuing and executing Member State, especially since the new line of case law following *Aranyosi and Căldăraru*. But it has a potentially serious effect on the configuration of authority within the Member States concerned. De-politicization of the decision to recognize foreign legal acts may come at the cost of legal certainty. Individuals become exposed to foreign acts in their national legal system that have not been internally negotiated. A democratic deficit looms.<sup>73</sup>

## II. The Vertical Transfer of Authority: The Executing Member State

Mutual recognition underscores the relation between national legal orders and the actors therein, but it obviously entails a strong vertical dimension as well. The creation of a mutual recognition regime is in itself already an establishment of EU authority.

In the case of the EAW, the European legislature has determined the applicable conditions and standards of the mutual recognition procedure, its scope of application, the procedural requirements, and the optional and obligatory grounds for refusal. Thus, the executing Member State relinquishes the authority to determine the grounds for accepting or refusing extradition requests from the other Member States.<sup>74</sup> Mutual compliance with the standards agreed upon in a bi-lateral agreement, as in traditional judicial cooperation, has been replaced with compliance with EU-wide standards. The voluntary and obligatory refusal grounds are pre-determined by the EU and may not be changed or supplemented at the national level.<sup>75</sup>

The list of thirty-two offenses that are excluded from the optional refusal ground of double criminality in the EAW Framework Decision has a specific position in this discussion.<sup>76</sup> The requirement of “double criminality” entails that a suspect can only be extradited for an offense that is also criminalizable in the executing Member State. The verification of double criminality for these offenses would contradict the obligation of the EU Member States to recognize and execute an EAW based on mutual recognition.<sup>77</sup> Some critics of the listed offenses have argued that the EU has usurped a competence to decide over criminal law by formulating this list.<sup>78</sup> The EU’s decision to abolish double criminality for certain broadly defined criminal offenses could force a State to execute a judicial decision related to an act that is not an offense under its national law. As the Member States may qualify each broad category of offenses differently, the executing Member State might find itself obliged to enforce legal acts that do not constitute a criminal offense, or the same criminal offense, in their legal order. For example, Belgium does not consider abortion or euthanasia to be murder, while another Member State might issue a warrant related to abortion or euthanasia on that basis. Furthermore, the Member States might give a different interpretation to broad notions such as “racism and xenophobia.”<sup>79</sup> The extraterritorial enforcement of national criminal offenses has, in this light, been qualified as an “over-extension of the punitive sphere” imposed by the EU.<sup>80</sup> To counter this critique, it should be mentioned that all EU Member States have accepted the list explicitly as the adoption of the EAW Framework Decision was

<sup>73</sup>Mitsilegas, *supra* note 18, at 1280–82.

<sup>74</sup>LIBOR KLIMEK, MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN EUROPEAN CRIMINAL LAW 34 (2017).

<sup>75</sup>John Vervaele, *The European Arrest Warrant and Applicable of Fundamental Rights in the EU*, 6 REV. EUR. ADMIN. L. 37, 39 (2013).

<sup>76</sup>See Article 4(1) of the EAW Framework Decision for the principle of double criminality in the list of optional refusal grounds and see Article 2(2) of the EAW Framework Decision for the thirty-two offenses that are excluded from the double proportionality requirement.

<sup>77</sup>Mitsilegas, *supra* note 18, at 1286.

<sup>78</sup>Diede Jan Dieben, *The Academic Assessment of the European Arrest Warrant, in CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT*, *supra* note 70, at 224–25.

<sup>79</sup>Fichera, *supra* note 14, at 79.

<sup>80</sup>Mitsilegas, *supra* note 18, at 1286–89.

subject to unanimity decision-making. Thus, this critique has a more limited scope and regards perhaps only the lack of definition of the listed offenses in the Framework Decision.

Furthermore, the argument that the EU has relinquished the authority to determine the optional and obligatory refusal grounds should be further nuanced, considering that some EU Member States have not limited themselves to the Framework Decision and have added refusal grounds related to fundamental rights compliance.<sup>81</sup> Rather than overturning these national choices, the CJEU has more or less accepted it with the *Aranyosi* and *Căldăraru* case law. Although the lack of fundamental rights compliance still does not constitute an officially accepted refusal ground, it now de facto is, as executing authorities may postpone or refuse the execution of an EAW in case of grave concerns about fundamental rights protection.<sup>82</sup>

In compliance with EU-wide standards other than the refusal grounds, the CJEU has also awarded national authorities a considerable margin of appreciation. The decision of the CJEU in *Lanigan* demonstrates this well.<sup>83</sup> Although the Framework Decision on the EAW explicitly limits the maximum custody for deciding on an EAW to ninety days, the CJEU ruled that a breach of time limits does not necessarily hinder the execution of the EAW. The CJEU allowed national authorities to decide on the legality of a longer custody, taking into account the possible justification of the length of the procedure, the sentence potentially faced by the requested person, and the potential risk of that person absconding.<sup>84</sup>

Thus, mutual recognition has had a limited vertical impact on the executing Member State. It is true that criminal law is, in most Member States, viewed as one of the “crown jewels” of national sovereignty, as the German Constitutional Court demonstrated when it declared criminal law to be a core area of German statehood. It is highly questionable, however, whether the EU has truly usurped the competence to decide over criminal law at the cost of the executing Member State. The EAW is too much of a coordinating instrument to warrant that conclusion.

### III. The Vertical Transfer of Authority: The Issuing Member State

For the issuing Member States, mutual recognition—and the EAW in particular—first and foremost constituted a horizontal expansion of its law enforcement capacity as it was strongly based on the notion of mutual trust, meaning that all aspects regarding an issued EAW would be governed by the law of the issuing state and executing states had very little possibilities for review. However, serious differences in normative standards between the EU Member States have led the Court to gradually qualify the trust presumption and accept more room for rebuttal of that presumption.<sup>85</sup> Besides enhancing the role of the executing Member State in verifying compliance with fundamental rights standards by the issuing Member State, trust-enhancing harmonization measures have been introduced with which the issuing Member State needs to comply.<sup>86</sup> Almost as compensation for obtaining an enhanced law enforcement capacity, the issuing Member States need to accept a certain level of intrusion into their criminal law system.

<sup>81</sup>KLIMEK, *supra* note 74, at 34.

<sup>82</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU.

<sup>83</sup>ECJ, Case C-237/15 PPU, Minister for Just. & Equality v. Flanigan, ECLI:EU:C:2015:474 (July 16, 2015), <http://curia.europa.eu/juris/liste.jsf?num=C-237/15>.

<sup>84</sup>*Id.* at para. 59.

<sup>85</sup>Auke Willems, *The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal*, 20 GERMAN L.J. 468 (2019). A number of years before, Herlin-Karnell had already convincingly argued that the mutual trust had already lost its monopoly position as the sole legal basis for the mutual recognition obligation of the EAW. See Ester Herlin-Karnell, *From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant*, 38 EUR. L. REV. 79 (2013).

<sup>86</sup>Lenaerts, *supra* note 7, at 9.

In the case of the EAW, the EU legislature has harmonized the rules for dealing with EAWs regarding *in absentia* judgments.<sup>87</sup> It has also introduced general rules to better protect fundamental rights such as the Directives on Access to Lawyers and on Interpretation and Translation Rights.<sup>88</sup> But perhaps even more importantly, the CJEU has had a strong harmonizing role as well.<sup>89</sup> This has been mostly the result of interpreting key concepts of the framework decision in an autonomous way.<sup>90</sup> Cases such as *Bob-Dogi*—in which the CJEU required that a European arrest warrant should be based on a separate national arrest warrant<sup>91</sup>—and *Dworzecki*—in which the CJEU gave interpretations of the *in absentia* rules<sup>92</sup>—have had harmonizing effects on criminal procedure. More fundamentally, in another line of case law, the CJEU has defined the meaning of the term “judicial authority.” Excluding police officers (*Poltorak*)<sup>93</sup> and national Ministries for Justice (*Kovalkovas*)<sup>94</sup> whilst accepting an EAW issued by a police authority but confirmed by a public prosecutor (*Özçelik*),<sup>95</sup> it seemed that term was sufficiently clarified. More recently, however, the CJEU has added another layer, this time focusing more probingly on the exact position of the public prosecution. In a decision in which the CJEU examined the public prosecution’s position in Germany and Lithuania,<sup>96</sup> it assessed whether these authorities enjoyed a sufficient level of independence vis-à-vis the executive, most notably the Ministry of Justice, in the issuing of EAWs. Admitting that the term judicial authority is “not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State,”<sup>97</sup> the CJEU went so far as concluding that the German public prosecution did not fall under this broad definition. The CJEU did not preclude the possibility that the issuing of an EAW could be subject, in a given case, to an instruction from the Minister of Justice of the relevant country. By contrast, the CJEU qualified the legal position of the Lithuanian public prosecution as objective, safeguarded by the Lithuanian state, which affords it a guarantee of independence from the executive in connection with the issuing of an EAW.

Undeniably, such “judicial harmonization” affects the Member States’ basic structures in profound ways. As Mitsilegas has argued, this is particularly the case with regard to the

<sup>87</sup>Council Framework Decision 2009/299/JHA of 26 February 2009, Amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, 2009 O.J. (L 81) 24 (enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial).

<sup>88</sup>See Directive 2013/48/EU of the European Parliament and of the Council of October 22, 2013, (2013) O.J. (L 294) 1 (noting 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); Directive 2010/64/EU of the European Parliament and of the Council of October 20, 2010, (2010) O.J. (L 280) 1 (discussing the right to interpretation and translation in criminal proceedings).

<sup>89</sup>For an overview of this line of case law in Dutch, see van den Brink & Marguery, *supra* note 46, at 48–50.

<sup>90</sup>Mitsilegas, *supra* note 6.

<sup>91</sup>*Bob-Dogi*, Case C-241/15.

<sup>92</sup>ECJ, Case C-108/16 PPU, *Openbaar Ministerie v. Dworzecki*, ECLI:EU:C:2016:346 (May 24, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-108/16>.

<sup>93</sup>ECJ, Case C-452/16 PPU, *Openbaar Ministerie v. Poltorak*, ECLI:EU:C:2016:858 (Nov. 10, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-452/16>.

<sup>94</sup>ECJ, Case C-477/16 PPU, *Openbaar Ministerie v. Kovalkovas*, ECLI:EU:C:2016:861 (Nov. 10, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-477/16>.

<sup>95</sup>ECJ, Case C-453/16 PPU, *Openbaar Ministerie v. Özçelik*, ECLI:EU:C:2016:860 (Nov. 10, 2016), <http://curia.europa.eu/juris/liste.jsf?num=C-453/16>.

<sup>96</sup>See ECJ, Joined Cases 508 & 82/19 PPU, *Minister for Just. & Equality v. OG & PI*, ECLI:EU:C:2019:456 (May 27, 2019), <http://curia.europa.eu/juris/liste.jsf?num=C-508/18> (illustrating cases from the Public Prosecutor’s office of Lübeck as well as from the Public Prosecutor’s office of Zwickau); see also ECJ, Case C-509/18 PF, ECLI:EU:C:2019:457 (May 27, 2019), <http://curia.europa.eu/juris/liste.jsf?num=C-509/18> (illustrating a case from the Prosecutor General of Lithuania).

<sup>97</sup>See cases cited *supra*, note 96.

harmonization of the “judicial authority” concept.<sup>98</sup> It is also exactly the harmonization of this concept, which has directly affected the states’ basic structures. The organization of criminal enforcement, especially the position of the public prosecution therein, is the result of developments that may have spanned centuries, and is often firmly embedded in the national legal order. In *Poltorak*, one of the main arguments to conclude that police authorities could not qualify as judicial authorities under the EAW was the firm distinction *in EU law* between police and judicial cooperation.<sup>99</sup> In this case, the CJEU seems to base its decision on a specific interpretation of the principle of *Trias Politica* that diverges from interpretations in at least some Member States.<sup>100</sup> Consequently, the principle of *Trias Politica* is no longer assumed to be respected by all Member States—in other words, subject to an assumption of mutual trust—but is rather a principle that should be enforced in and upon the Member States and is even defined by EU law itself. This creates an idea of emerging “EU basic structures” that may affect the Member States and, indeed, their basic national structures.

The CJEU has stressed that its decisions are limited to the issuing of EAWs: it does not impose general obligations on the national organization of criminal law enforcement but limits only the ability of public prosecutors to issue EAWs. However, taking away the right to issue EAWs deprives law enforcement of an instrument that is ever more crucial in an EU with open borders. Compliance with the standards set by the CJEU thus becomes inevitable. Moreover, in the decisions of the CJEU on judicial independence, this connection to the implementation of EU law has been significantly weakened. Instead, Article 19 of the TEU serves as a direct basis to enforce judicial independence upon the Member States.<sup>101</sup> The CJEU has confirmed that the scope of Article 19 is broad: it applies to “the fields covered by Union law,” irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.<sup>102</sup> Judicial independence is defined by the CJEU in the *Portuguese Judges* case as meaning that a court or a tribunal should be able:

[T]o exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.<sup>103</sup>

The CJEU has used this approach as a powerful weapon to address the Rule of law crisis in the EU Member States. In the case in which the CJEU assessed the Polish retirement provisions for judges, the Polish and Hungarian governments put forward what may be viewed as sovereignty arguments.<sup>104</sup> They contended that the organization of justice lies in the national sphere of competence. The CJEU addressed this argument in a rather formal sense and considered that placing limits on the exercise of that competence would by no means imply taking this competence out of the hands of the Member States.<sup>105</sup> While this may formally be true, it would require a very flexible mind to deny the sovereignty implications that come from such a reduced discretion to decide on the organization of the national system of justice.

<sup>98</sup>Mitsilegas, *supra* note 6, 63–70.

<sup>99</sup>*Poltorak*, Case C-452/16 PPU.

<sup>100</sup>*Id.*

<sup>101</sup>Treaty on European Union art. 19., Feb. 7, 1992, 35 O.J. (C 191) [hereinafter TEU].

<sup>102</sup>*Id.*

<sup>103</sup>EJC, Case C-64/16, Associação Sindical dos Juizes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018), para. 44, <http://curia.europa.eu/juris/liste.jsf?num=C-64/16>.

<sup>104</sup>EJC, Case C-619/18 European Comm’n v. Republic of Poland, ECLI:EU:C:2019:531 (June 24, 2019), <http://curia.europa.eu/juris/liste.jsf?num=C-619/18>.

<sup>105</sup>*Id.* at para. 52.

There is, however, also another side to the coin. This side is illustrated well by the reference for a preliminary ruling in which a Hungarian court asked the CJEU to examine the current Hungarian judicial system in light of the principles of the Rule of law and judicial independence.<sup>106</sup> Concrete threats to judicial independence, partly brought along by the President of the National Judicial Office,<sup>107</sup> made the court ask for a preliminary ruling as he feared that a conviction on his part would be challenged at international forums based on the damages done to judicial independence in Hungary. In this case, it is not the CJEU imposing EU norms upon the Member States, but rather a national institution—one of the main pillars of the state's basic structure—seeking help from the European court to uphold the basic national structures and values upon which it is based. Thus, the vertical relation in this instance cannot be defined in a simple top-down manner.

To conclude, as a result of the judicial harmonization by the CJEU, the authority of the issuing Member State to determine the rules and procedures in criminal law—an area that is one of the crown jewels of national sovereignty—has been diminished in order to make place for EU basic structures. It is important to note that, while there may be good reasons for this case law—derived from both rule of law considerations and the effectiveness of EU judicial cooperation mechanisms—as a matter of principle, it has an odd place in mutual recognition arrangements. The autonomous and uniform interpretation of concepts in EU law is motivated by the need for a uniform application of EU law, which is much more self-evident in the case of harmonized legislation. In fact, it could be argued that aiming for a uniform application of EU law runs counter to the objective of mutual recognition, which is to achieve an objective sought at the EU level by maintaining separateness, national treatment, in a context of a minimum level of sameness, harmonization.<sup>108</sup> Thus, we see that the eclipse of mutual trust in the AFSJ has led precisely to the harmonization that the Member States wanted to avoid when they accepted mutual recognition as the cornerstone of judicial cooperation in the AFSJ. Moreover, this harmonization does not emanate from political-democratic decision-making but is an *ex-post* form of harmonization that has been designed by the EU's judiciary.

## E. Conclusion

Mutual recognition has not met the expectations that made the Member States define it as the key principle to shape EU criminal law. At the time of the introduction of mutual recognition in the AFSJ, the principle was commended as the best alternative for boosting European integration in criminal matters, as it would leave the substantive aspects of national criminal laws intact and would, therefore, have less impact on national sovereignty than harmonization measures would. One explanation for the mistaken expectations is that the dynamic evolution of mutual recognition over the last two decades has made it difficult to foresee or predict its functioning. Another explanation is that not all relevant aspects have been properly considered when the expectations were formulated. In particular, the horizontal dimension of an impact on national sovereignty was largely ignored at the time. Our analysis shows that the effects of mutual recognition in the AFSJ on national sovereignty, in terms of the States' basic structures and statehood principles, have been diverse in both the vertical and the horizontal dimensions.

<sup>106</sup>Dániel G. Szabó, *A Hungarian Judge Seeks Protection from the CJEU – Part I*, VERFASSUNGSBLOG (July 28, 2019), <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/>; Biró Marianna, *Hungarian Judge Requests European Court of Justice to Examine His Own Independence*, INDEX (July 17, 2019) [https://index.hu/english/2019/07/17/hungary\\_judicial\\_independence\\_european\\_court\\_of\\_justice\\_suspended\\_case/](https://index.hu/english/2019/07/17/hungary_judicial_independence_european_court_of_justice_suspended_case/).

<sup>107</sup>For an elaborate account of the threats to the rule of law and judicial independence in Hungary, see Viktor Vadász, *A Hungarian Judge Seeks Protection from the CJEU – Part II*, VERFASSUNGSBLOG (Aug 7, 2019), <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii>.

<sup>108</sup>See van den Brink & Marguery, *supra* note 46, at 52.

A main effect of mutual recognition on national sovereignty has been generated by the CJEU. Whilst the Member States have sought to avoid *ex-ante* harmonization, mutual recognition has, in fact, led to *ex-post* harmonization by CJEU decisions. There have been good reasons to do so: to enhance mutual trust in the AFSJ and thereby ensure the effective functioning of transnational criminal law enforcement. At the same time, however, *ex-post* harmonization has created the exact situation that the EU Member States sought to avoid, namely that substantive aspects of national criminal laws as well as the organization of the national criminal law systems are determined at the EU level.

This *ex-post* harmonization is a *judicial* form of harmonization. The CJEU has played a leading role in harmonizing criminal procedure by interpreting key terms in the EAW framework decision. With its autonomous and uniform interpretation of concepts in EU law, the CJEU has created EU basic structures to which the issuing Member States have to abide, directly affecting their authority over basic national structures. The independence from the political sphere allows the CJEU, in dialogue with national courts, to emanate from politically-constituted basic structures and gradually replace it with the judicially-constituted basic structures.<sup>109</sup> It is important to note that in contrast to political-democratic harmonization, judicial harmonization lacks the institutional expression of agreement, or disagreement, by the Member States. The issuing Member States have become subject to the interpretation of principles and values by the CJEU, which they cannot influence. For the executing Member States, there is also a positive side in terms of the values. As we have seen, the newer development in the CJEU's case law allows the executing Member States to supervise Rule of law compliance in the issuing Member States, albeit that the underlying values are defined at the EU level.<sup>110</sup>

Closely intertwined with this point of *ex-post* harmonization by the CJEU is the creation of a transnational judicial dialogue.<sup>111</sup> Besides usurping the competence to decide over the interpretation of supposedly European values and principles, the CJEU has also strengthened the position of national courts by creating a judicial dialogue with and between national courts about the execution of EAWs when there is a lack of trust of the executing Member State in the issuing Member State's adherence to a common set of values. In the joined cases *Aranyosi* and *Căldăraru*,<sup>112</sup> the CJEU required the executing Member State to request supplementary information from the issuing Member State, which must send this information within the time limit set in the request, when it has indications of a real risk of inhuman or degrading treatment in the issuing Member State. This transnational judicial dialogue seems to be at odds with the mantra of mutual recognition, which is to enforce each other's legal acts "with a minimum of formalities and with very few exceptions."<sup>113</sup>

This judicial dialogue has strengthened the authority of the executing judiciary to impose conditions on the issuing Member State. Thereby, the CJEU seems to have rebalanced the authority of the executing Member State at the cost of the authority of the issuing Member State. In some

<sup>109</sup>For a reference to sovereignty effects of judicial dialogue, see Andrea Hamann & Hélène Ruiz Fabri, *Transnational Networks and Constitutionalism*, 6 ICON 481 (2008).

<sup>110</sup>These EU values and principles do not necessarily live up to national guarantees. See generally Anneli Albi, *An Essay on How the Discourse on Sovereignty and on the Co-Operativeness of National Courts has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU*, in CONSTITUTIONAL CONVERSATIONS IN EUROPE: ACTORS, TOPICS AND PROCEDURES, 41–70 (Monica Claes et al. eds., 2012).

<sup>111</sup>Note that there is a vast body of literature on transnational constitutional dialogue. Meuwese and Snel discuss the multiple forms of employment of the term "constitutional dialogue." Anne Meuwese & Marnix Snel, *Constitutional Dialogue: An Overview*, 9 UTRECHT L. REV. 123 (2013). The dialogue between courts is often referred to by the term "judicial dialogue." For a reference to the judicial dialogue in the AFSJ specifically, see Koen Lenaerts, *The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Independence*, Speech at the Supreme Court of the Republic of Poland, (March 19, 2018), available at [http://www.nsa.gov.pl/download.php?id=753&mod=m/11/pliki\\_edit.php](http://www.nsa.gov.pl/download.php?id=753&mod=m/11/pliki_edit.php) (last visited Dec. 11, 2019).

<sup>112</sup>*Aranyosi & Căldăraru*, Joined Cases 404 & 698/15 PPU.

<sup>113</sup>See *Judicial Cooperation*, EUROPEAN COMMISSION, [http://ec.europa.eu/justice/criminal/recognition-decision/index\\_en.htm](http://ec.europa.eu/justice/criminal/recognition-decision/index_en.htm) (last visited March 3, 2020).

sense, it restores the situation that existed before the introduction of mutual recognition, only with a not-to-be-ignored aftertaste: the strengthened role of the judiciary *vis-à-vis* the executive institutions of the Member States. The strengthened role of national courts goes hand in glove with a trend of transferring the authority to decide over profoundly political issues to the judiciary. The CJEU's key decision in joined cases *Aranyosi* and *Căldăraru* was followed by a line of case law in which national courts questioned their obligation to enforce EAWs in light of a lack of mutual trust due to diverging normative standards. These cases show that the political dilemma of whether to cooperate with a country that, for instance, exits the EU, criminalizes an independence movement, or erodes the Rule of law, suddenly falls into the lap of the judiciary.

A third element to be considered in relation to the unexpected effects of mutual recognition in the AFSJ on national sovereignty is the transformation of mutual trust. Initially, the presumption of mutual trust enabled the EU Member States to organize their own criminal law systems as they saw fit, thereby minimizing the effects on their basic structures and adhering to their own defined values. Over the past decades, we have moved into an “eclipse of mutual trust,” as there is no longer an irrebuttable assumption that trust is always present. The consequences thereof have been profound, both in terms of effects on statehood values and on the states' basic structures, as we have seen above. Paradoxically, however, with mutual recognition based on the current notion of mutual trust, the EU has created a new instrument to ensure that the EU Member States adhere to European values and principles. Denying an EU Member State the right to issue EAWs when it fails to comply with EU basic structures could be a more effective ultimate solution to ensure adherence to European values than the deadlocked “Rule of law” procedure of Article 7 of the TEU.<sup>114</sup> The EU Member States that fear the intrusion on their national sovereignty of the Article 7 procedure<sup>115</sup> are probably not aware that the most pressing sovereignty implications are hidden in plain sight with mutual recognition in the AFSJ.

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<sup>114</sup>See TEU art. 7.

<sup>115</sup>In December 2017, the EU triggered the Article 7 procedure against Poland. In September 2018, the European Parliament voted for a motion to trigger the Article 7 procedure against Hungary and voiced strong criticism against Malta.