

1. STILL NOT RESOLVED? CONSTITUTIONAL CHALLENGES TO THE EUROPEAN ARREST WARRANT: A LOOK AT CHALLENGES AHEAD AFTER THE LESSONS LEARNED FROM THE PAST

*Elspeth Guild & Luisa Marin**

Introduction

On 20 January 2009, The European Court of Human Rights handed down judgment in the case of *Slawomir Musial v. Poland*¹ in which it found that the conditions in a Polish prison contravened article 3 of the European Convention on Human Rights. The Court went on to state

‘Moreover, the Court finds that the fact that for the most part the applicant has received the same attention as the other inmates, notwithstanding his particular state of health, shows the failure of the authorities’ commitment to improving the conditions of detention in compliance with the recommendations of the Council of Europe.’ (para 96).

Poland is a country which issues among the most substantial number of EAWs to other Member States for the surrender and return of individuals. The decision of the European Court of Human Rights that Polish prison conditions can, and do in some circumstances, contravene the duty of Poland to ensure there is no inhuman or degrading treatment within its jurisdiction creates new problems for the EAW. The Court has already held that the surrender or return of an individual to a country where he or she fears inhuman and degrading treatment is contrary to article 3 ECHR.²

This book is designed to provide an up-to-date view on the EAW and its application over the past seven years. The new challenge which faces the EU as regards Member States’ compliance with EAWs in light of their human rights obligations is only just starting to emerge. However, it is certainly a problem capable of overshadowing many of the other issues that arise in the chapters of this book.

* Elspeth Guild is Professor of European Immigration Law at the Radboud University Nijmegen, The Netherlands; Luisa Marin is working at the Centre for European Studies of the University of Twente, The Netherlands.

1 Application no. 28300/06.

2 *Soering v. UK* Application number 14038/88; 7 July 1989.

1. Constitutional Challenges – Still Not Resolved?

By 2009, seven years had passed since the formal approval of the European Arrest Warrant Framework Decision,³ which became operational in 2004. In 2006, we published an edited volume, ‘Constitutional challenges to the EAW’, on the constitutional issues triggered by the enactment, at European level, of the Framework Decision 2002/584/JHA and first reactions within some EU Member States. As perceived by the legal community, those first reactions were, to some extent, challenges to the instrument itself. One could, therefore, say that the first years of the life of the EAW have been marked by some reluctance and resistance from judicial and law enforcement circles within several Member States towards the most significant reforms implied by the EAW, such as the partial elimination of the double criminality principle, the abolition of the general ban, traditional in many Member States, on extraditing nationals and the exception of political offences. These and other major changes of the EAW instrument derive from the political choice of endorsing the principle of mutual recognition as the main paradigm for the reform of the system of extradition applicable across Member States. To use a metaphor, the ‘childhood’ of the EAW has been marked by ‘constitutional challenges’ brought by Member States toward the European instrument itself. This resistance was expressed by several actors at the level of Member States, among them mainly higher courts.

Some of the issues which arose between 2004 and 2006 can be considered ‘settled’ by the European Court of Justice’s judgment in the action brought by the association of lawyers, C-303/05 *Advocaten voor de Wereld*, of 3 May 2007. In that decision, the European Court of Justice answered the challenges ‘against’ the EAW: the key questions related to whether the EAW itself should not be adopted in the form of a convention and whether the list of offences for which double criminality is abolished is not inconsistent with the principles of equality and non-discrimination. Ten Member States were involved in the case, indicating the importance of the issues. The Court’s answer was clear – the EAW does not offend the two principles, as its objective is not harmonisation. The decision marks a significant moment in the life of the EAW. The crucial meaning of this development for the academic community is to suggest a shift of attention from the EAW Framework Decision itself towards its implementation into domestic legal orders and especially towards the issues arising in the context of its actual functioning and operation. In this second edition of the book, we seek to examine how the implementation of the EAW has evolved. Has the European Court of Justice really resolved the issues which troubled the legal community between 2004 and 2006 regarding the changing face of European criminal law? Have other issues arisen which we did not foresee in 2006 and which must now be resolved? These are the central questions that this edition of the book will examine.

2. The Contents

This book is comprised of contributions by experts, mainly legal practitioners, at European level and academics. It is divided into two parts. The first part (the chapters by

3 Council Framework Decision 2002/584/JHA, [2002] O.J. L190/1.

Keijzer, van Ballegooij, Kortenhorst, Zeman, Gualtieri, Walley) deals with general or horizontal issues, framing the second part of the collection, which is organised as a study across Member States (contributions from Vandamme – Belgium, Ojanen – Finland, Errera – France, Geyer – Germany, Bárd – Hungary, Marin – Italy, Zagrodnik – Poland, Jimeno-Bulnes – Spain, Henley and Williams – United Kingdom). Though focusing on the experiences of individual legal orders, these analyses aim to contribute to the debate on the common framework sketched in the first part, by analysing the legal issues encountered in these individual legal orders.

In the first of his contributions, former Advocate General to the Dutch *Hoge Raad*, Nico Keijzer, provides a detailed analysis of the EAW and its ‘birth’: the negotiation phase marked by haste that raised acute democratic deficit issues. Radical innovations in terminology and the speed of the new procedure are analysed in comparison to the previous legal framework under extradition. In his second contribution, the author discusses the main highlights of both implementation and interpretation at domestic level, focusing on surrender of nationals, *locus delicti* exceptions, *ne bis in idem*, judgments *in absentia* and human rights exceptions. The analysis places the EAW in the broader context of instruments which applied previously. In his third contribution, Keijzer focuses on the controversial issue of dual incrimination. He places the discussion of the EAW in its wider setting of the relationship of criminal law to the social and political setting within which it has been negotiated.

Wouter van Ballegooij’s contribution aims to tackle the (sensitive) issue of mutual recognition, which is increasingly at the top of the agenda in some Member States and their legal circles.⁴ After a useful introduction to the principle of mutual recognition in its institutional and normative frameworks, as well as the factual circumstances of application, the author discusses the normative implications of mutual recognition with reference to the rule of law and proportionality principles.

The chapter by Peter Kortenhorst focuses on peer or mutual evaluations and the results that have emerged. The evaluations have proved to be important instruments, which provide valuable information on the functioning of the EAW as implemented within individual legal orders. One significant fact emerging from the first round of evaluations is the success of the EAW as the first and the main instrument based on the principle of mutual recognition. Justice and police authorities benefit from the EAW as a generally (very) effective tool, when compared to extradition proceedings. The time saved by law enforcement authorities and the shorter deadlines are among the main advantages of the current system. From the law enforcement perspective, the quicker the better. While this appears also to be true of the accused when he or she consents to transfer, it may be less so when he or she disputes the charge.

Despite this positive impression, the EAW is far from being a single system; one could say that there are as many EAWs as there are Member States’ legislation. Diverging implementation on many core aspects of the EAW continue to represent a threat to any uniformity in its application. At the same time, statistical surveys reveal that domestic authorities perceive and employ the EAW in very different ways. In 2007 for exam-

4 See the article that appeared on 5 March 2009, in the *Irish Times*, on ‘Court asked to extradite chicken stealer’, available at <http://www.irishtimes.com/newspaper/ireland/2009/0305/1224242305084.html>.

ple, the *ratio* of EAWs issued per million inhabitants was 30 times higher for Polish authorities when compared to their British counterparts (see Table 3, Kortenhorst). This has created some concern across Europe as it revealed very different ‘unwritten’ conventions on the EAW and on its significance, and, even more interestingly, on criminal justice in general. After years of ‘propaganda’ about the benefits and appropriateness of mutual recognition as the organising principle of EU criminal law cooperation, based on mutual trust among state actors in the Member States, the questions now arise: Who are these people we trust? Do we actually trust them?

The National Member of the Czech Republic at Eurojust, *Pavel Zeman*, recalls, in his contribution, the main differences between the current and the previous systems of extradition, focusing on main practical issues and the problems that have arisen with the implementation of 27 (sometimes diverging) acts of domestic implementing legislation. He provides an overview of the constitutional challenges brought against the EAW and draws attention to one of the Achilles’ heels of the EAW procedure, as seen from the EU institution most involved in the operation of the EAW, namely that it does not provide for a procedure for the return of sentenced persons.

Claudia Gualtieri’s chapter focuses on the position of the European Parliament, recalling its contribution, despite its very limited powers under the third pillar. The scenario will radically change if the Lisbon Treaty enters into force. In the meantime, the European Parliament fulfills a twofold task: to one extent it aims to bring into the debate values, such as the protection of fundamental rights, and thus contributes to a more balanced definition of the Area of Freedom, Security and Justice.⁵ To another extent, the European Parliament supports the enforcement of those principles and measures to whose forging it cannot really contribute. After all, its position is certainly interesting but also controversial, if not even contradictory in many respects. Indeed, the case of fundamental rights fully reveals this paradox. Hopefully another institutional scenario will help the Parliament to free itself from this position.

The last contribution of the first part, written by advocate *Luc Walley*, focuses on the relationship between international developments in criminal law, namely the International Criminal Court and the ICC arrest warrant, and the EAW and their reciprocal relationship. The chapter considers the Belgian legal order as the framework for analysis, and discusses recent case law.

Turning to the second part of the book, focusing on the implementation and practice of the EAW instrument in some Member States, the contribution by *Thomas Vandamme* places the European Court of Justice case, *Advocaten voor de Wereld*, in its domestic constitutional context. He explains the relationship between European and domestic systems, how European law has become part of the *bloc de constitutionnalité* and provides a detailed analysis of the reference for preliminary ruling brought by a not-for-profit organisation not involved with a concrete EAW, as well as the answers given by the Belgian Constitutional Court on the concept of trust.

5 The support given to the Framework Decision on procedural guarantees in criminal proceedings is an example. See also more recently, the draft report with a proposal for a European Parliament recommendation to the Council on Development of an EU criminal justice area, rapporteur Ms M.G. Pagano, MEP, available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/771/771669/771669en.pdf.

Tuomas Ojanen's chapter sketches the Finnish constitutional panorama, explaining the role of fundamental rights as limits to the implementation of European law. At the same time, the contribution informs the reader about conditions enabling enactments of legislation conflicting with the Constitution. The author further analyses the limits to extradition, such as the extradition of nationals. His last section focuses on the implementation process, on the *ex ante* review of constitutionality and on the additional grounds of refusal enshrined in the Finnish implementing legislation for the safeguard of fundamental rights.

The French chapter, written by *Roger Errera, Conseiller d'Etat honoraire*, provides an admirable picture of the operation of the EAW in France. The statistics and figures included provide information about the real life of the EAW. After an analysis of the French situation under the previous extradition scheme, focusing especially on the length of proceedings and the extradition of nationals, the author discusses the constitutional problems of EAW implementation through the opinions of the *Conseil d'Etat*. In its *ex ante* review of constitutionality, a feature common to the French and the Finnish systems, it found a problem in the political aim of a request for surrender. This required a revision of the Constitution, which is presented in detail, as well as the French implementing legislation, which enacted a fully jurisdictional system that does not foresee any further involvement by the government and *Conseil d'Etat*. The chapter closes with a very interesting analysis of key court decisions regarding challenges brought on the basis of allegations of torture and other human rights violations.

The German case is presented by *Florian Geyer*, who discusses the famous 'constitutional challenge' of the *BundesVerfassungsgericht* of July 2005 and the subsequent implementing legislation, which is still under scrutiny by German political actors with a view to further enhancement. The second EAW implementing act of July 2006 is described as 'minimalistic' in its changes. So far, the second German implementing legislation has survived challenges. Interestingly, at the operational level, national courts seem open to arguments against the execution of EAWs based on fundamental rights protections. However, the implementing legislation is still controversial within both academic and governmental circles.

While national implementing legislation in Hungary has not been subject to a constitutional challenge, its application has begun to raise difficult questions for the courts, according to *Petra Bárd*. A rather *sui generis* constitutional situation has arisen in Hungary where a constitutional amendment is needed but for practical and political reasons the legislature is awaiting the adoption of the Lisbon Treaty. For the moment the situation is in abeyance. A very high-profile case regarding the non-execution of a Hungarian EAW by Ireland reveals a complex web of political interests and legal obstacles, all of which point towards a lack of trust among authorities in different Member States regarding the execution of EAWs.

Luisa Marin's chapter presents the Italian case, recalling the early 'antagonistic' role played by the Italian Government in respect of the list of offences excluded by double incrimination, and its sudden change, despite allegations of breach of the Constitution. The contribution begins by exploring the constitutional background investigating the constitutional complaints raised by the government against the EAW; secondly it presents some problematic issues arising from the actual implementation of the EAW, namely limitation in the scope of application of some procedural rules or guarantees to Italian nationals and its compatibility with the non-discrimination principle based on

nationality. This problem, though with some variations, is also common to other national legislations, like the current German one (which is, on this issue, more problematic than the preceding one), as Florian Geyer points out, and the Dutch one (case C-123/08, *Wolzenburg*, currently pending before the European Court of Justice).

Jarostaw Zagrodnik presents the current situation in Poland with regard to the EAW. This was the first state where a successful challenge to the EAW implementing legislation led to a constitutional stalemate. Nonetheless, the legislator invested the authority and energy to carry through constitutional amendments to enable Poland to adopt implementing legislation. The solution at the national level, which was provided to the problem of surrender of own nationals, is somewhat ingenious. It consists of two additional provisos, which do not exist in the Framework Decision itself. It could even be argued that the mechanism effectively reintroduces double incrimination for the execution of an EAW against a Polish national in Poland.

The Spanish chapter, by *Mar Jimeno-Bulnes*, provides a full overview of the fairly calm passage of the EAW in Spain, both as a sending and receiving country. While Spain was the first country to implement the Framework Decision (not least because of the great political support for the project), the issue of *in absentia* trials, however, has become more problematic as the Spanish Constitutional Procedural Act has been amended to lighten the burden on the prosecutor. The lack of progress so far on a Framework Decision on the rights of the defence is seen as one of the key weaknesses of the EAW system. Spain is a substantial user of the EAW system both in terms of issue and surrender.

Martin Henley and Felicity Williams provide a fascinating picture of the travails of the EAW in the UK. The famous Spanish extradition case against General Pinochet, when he was physically present in the UK, provides an excellent starting point for the discussion. Clearly the issue of *in absentia* trials is problematic for the UK's execution of EAWs. But that is not the only source of friction. The UK courts appear to be uneasy about limitations on fundamental rights reasons for refusing the execution of an EAW. The case law indicates a tendency in some courts to give a wide interpretation of the human rights exception in national legislation in order to avoid a conflict with international (and domestic) fundamental rights obligations.

3. The EAW and the Challenges Ahead

In a number of institutional circles, the verdict on the EAW is that it is a success, it works and it is applied in all Member States. From the perspective of these actors, the main advantages of the EAW over traditional extradition are connected to shorter time frames and swifter procedures (speedy track) because of the diminished controls. The EAW is good because it is fast. Fast is good, in these circles.

Law enforcement authorities, the police and judges, are clearly the first actors benefiting from the new system. The European Criminal Bar Association, the professional association of defence lawyers, is somewhat more circumspect about the EAW.⁶ The divergent practices among Member States provide an easy target for criticism but one

⁶ http://www.ecba.org/cms/index.php?option=com_content&task=blogcategory&id=7&Itemid=21.

has the impression that there is a deep malaise about the fair trial issues which the EAW raises – does the individual always receive a fair trial in every Member State or is there merely a confirmation of a conviction reached *in absentia*? The cases which have come up surrounding issues of fundamental rights raise even more concerns, as highlighted in the French and UK chapters. Are all EU Member States actually living up to their fundamental rights obligations in respect of their criminal justice systems – this question is under the spotlight as a consequence of making the EAW system work.

The first element on which scholars' community must reckon is that the main beneficiaries of the EAW and the principle of mutual recognition in criminal matters are state authorities. Mutual recognition is a tool to compensate for powers which states' coercive agencies consider they have lost as a result of the abolition of inter-Member State border controls and the realisation of free movement of persons. Individuals can circulate more quickly and with fewer checks than in the past.⁷ As paradoxical as this may be, the principle aims at realising a liberalisation of domestic measures, either in order to enforce a judgment or in order to bring to justice someone subject to prosecution. As the main project of European integration is the internal market, the main beneficiaries are enterprises and economic actors and, more generally, the public. State coercive authorities have not traditionally been substantial beneficiaries of the project. In the Area of Freedom, Security and Justice, these coercive agencies come into their own,⁸ state authorities are frequently the immediate beneficiaries of legislation.

Even for those who uphold the legitimacy of every EAW, challenges still lie ahead. A first set involves the 'EAW system' itself, articulated in the Framework Decision and varying domestic implementing legislation. A second set relates to the positions within the legal community.

In the first case, one of the challenges to the 'EAW system' is fragmentation. Differences in implementing legislation are clearly one of the weak points. This is, first, a consequence of the formal framework of the third pillar, which lacks direct effect and infringement procedures which 'proper' EU (*rectius*, EC) law enjoys. This implies limited opportunity for supervision or judicial review.⁹ Differentiation in the EAW system not only undermines its effectiveness; it leads to differential treatment of individuals in similar or identical situations. This undermines legal certainty, creates distrust among legal operators and law enforcement agencies, and increases the degree of fragmentation within the system. In this respect it will be interesting to monitor whether the European equality principle, *i.e.*, the principle of non-discrimination on the basis of nationality, will be able to play a role in rebalancing the system, bearing in mind the fact that the EAW Framework Decision is 'light' with respect to legal guarantees. This is also

7 S. Lavanex, Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy, 14 *Journal of European Public Policy* (2007), p. 773.

8 For a critique of the concept, see D. Bigo, Liberty, whose liberty? The Hague programme and the conception of freedom, in: T. Balzacq & S. Carrera (Eds), *Security vs. Freedom, a new challenge for Europe's future*, Ashgate 2006, p. 35, stressing how the main target of the AFSJ is to strengthen security.

9 See E. Guild, Introduction, in E. Guild (Ed.), *Constitutional Challenges to the European Arrest Warrant*, Nijmegen: Wolf Legal Publishers 2006, p. 7.

reflected in domestic implementation, which diverges on issues of legal guarantees, creating situations of differential treatment for non-nationals.

Evaluation mechanisms are important, since they can contribute to understanding how the EAW system works within individual national legal orders. There is a need for investigations aimed at how the EAW is enforced at domestic level, not only in the dimension of legislation, but also in implementation, looking at the way domestic actors enforce (execute and issue) European arrest warrants: namely evaluations which look at the EAW in its enforcement environment. One problem at the moment is that such reviews are peer led, which while useful cannot be a substitute for independent evaluation.

A more complete and clear overview of the EAW system, including those aspects which the Commission indicates are breaches of the Framework Decision, should lead to a fruitful discussion over the EAW, far from the haste and political pressure of the 2001 setting in which it was adopted. Divergence in the implementation of the Framework Decision at domestic level should be dealt with in 'political arenas' as well as academic ones in order to monitor and track the effects and consequences of implementation. This discussion should also focus on the reasons for divergence and thus devote attention to the origins of the problems encountered or choices made by Member States in the implementation. The lack of Commission power to take infringement procedures could be, thereby, counterbalanced by discussion at a political level based on strong independent empirical evidence, in order to assess and tackle implementation problems. If this does not happen, the risk is that courts will be faced with too many political issues. Without digressing here over the many virtues of consistent interpretation, one should be aware that a possible scenario is that all sorts of legal issues are left to the judiciary. Consistent interpretation can certainly solve problems in implementation, but it cannot fix the democratic deficit of the venue in which the Framework Decision finds itself: the third pillar. Implementation of the EAW is indeed already a task for the judiciary; mutual recognition in this field is consistently presented as a principle to grant states some compensation for the powers that have been lost. If the judiciary is to solve implementation problems, we suggest that the risk implied by the enforcement of the principle of mutual recognition could be a complex shift of powers that would be difficult to monitor. The shift of powers that a third pillar instrument based on mutual recognition implies must be counter-balanced by the capacity of other constitutional actors (European but also domestic) to reactivate a political debate over those sensitive aspects that will emerge from analysing the enforcement of the EAW in domestic legal orders. Assuming that the Lisbon Treaty will come into force, some of these deficits will be resolved through the collapsing of the EU pillar structure and the establishment of a single framework for all EU law.

There is also an important role for national parliaments. It is at implementation that the most significant, if not the only, intervention by domestic parliaments takes place. The German case illustrates how the Constitutional Court can rebuke a parliament for failing to do its job properly. The case of diverging implementation on fundamental rights raises other issues which are related to democratic accountability. The Framework Decision does not deal with fundamental rights seriously, but they are used as an *ordre public* safety break in several implementing legislations, with different scopes and consequences (see, for example, the case of The Netherlands, Italy and the UK). Further, a tool of judicial review against the EAW has been introduced by some Member

States, although this was not foreseen in the EAW Framework Decision. In the case of Spain, this resulted from a judgment of the Constitutional Court, consistent with its case law about *in absentia* convictions.¹⁰ This divergence creates uncertainty for enforcement actors and, at a different level, reveals a structural political issue of the EAW that cannot be quickly labelled as ‘bad implementation’, as the Commission appears to do in its implementation reports.

Secondly, another set of challenges lie ahead for the domestic measures implementing the EAW system, which come from the emerging European constitutional order. Some provisions, sometimes in the form of guarantees (though this status is questioned by some actors) of the Framework Decision, have been implemented in domestic legislation in a manner that grants privileged treatment to an executing state’s nationals and provides a different legal position for non-nationals. Nationality clauses rejected by the front door are somehow coming in through the windows. This means that the concerns they represent are still present. Such provisions might be questioned via the principle of non-discrimination on the basis of nationality, inasmuch as these differences in treatment breach the proportionality requirement. After the silence of the European Court of Justice on this issue, it is likely that some answers will be provided by the case C-123/08 *Wolzenburg*, in which Advocate General Bot gave an opinion (24 March 2009). Similar considerations also arise in respect of the double criminality clause. Rejected from the main door it seems to reappear through the windows, in order to grapple with problems still on the table. For instance, EAWs issued for the theft of chickens, EAWs issued 30 times more frequently in Poland than in the UK, certainly cannot be explained away by the ‘reassuring’ slogan of mutual trust and shared legal traditions: they are indeed worrying and deserve further consideration. As revealed in the chapters, German and Dutch case law exhibit some distrust towards EAWs issued by Greek authorities; the French authorities read very carefully EAWs with a Spanish stamp. We could highlight more examples; however the lesson is that mutual trust is like a medicine: you should not exaggerate the dosage, as it can be dangerous and, in some cases, fatal.

In addition to EAWs, which are formally in compliance with the EAW Framework Decision, but annoy the executing authorities because of the relatively minor nature of the offence, there are other cases where EAWs are issued for the purposes of serving a judgment or to take evidence from a person during investigations.¹¹ Some attention to the instrument of the EAW is required. The system must foresee some mechanisms of correction against the logic of liberalisation typical of the mutual recognition principle, since persons are obviously not goods. It is important that the legal actors who supervise the issue and execution of EAWs are able to not only apply the principle of proportionality but also that their experiences are taken into account in the reframing of the instrument. Another element to be stressed is that there should be

10 See M. Jimeno-Bulnes’ contribution to this volume, paragraph 2.1.

11 See the judgment of 17-19 April 2007, No. 15970 (*Piras & Stori*) of the Italian *Corte di Cassazione*, quashing a surrender decision in a case in which the requested persons were not suspected or accused of the crime in question but surrender had merely been demanded in order to interrogate them in a preliminary investigation concerning other persons. Reported in L. Marin, The European Arrest Warrant in the Italian Republic, *European Constitutional Law Review* 2008, p. 251-273 (266).

investigation into the number of the unusual uses of EAWs. More statistics are needed and figures should be made available in order to allow better monitoring of the phenomena which need to be investigated, focusing especially on European legal orders.

When looking at the EAW, jurists are looking into a kind of kaleidoscope. The EAW is indeed 'changing shapes' and is thus changing reality depending on the legal order under consideration. Lawyers should be aware of this; further investigation is needed in order to understand the 'many EAWs' resulting from the implementation of the Framework Decision in twenty-seven Member States. This should also be coupled with a complementary approach, as yet not much explored by jurists, but potentially very valuable: it is the approach of quantitative methods of investigations in the field of legal research. While some contributions to this book include statistical information, these are in the minority. It is only by reading through the numbers of the phenomena that the magnitude of a problem is revealed.

By the end of 2009, the Lisbon Treaty may have been ratified by all Member States. If this is the case, then the process of transforming the measures adopted under the third pillar into new Lisbon compliant law will commence. As the star of the third pillar's mutual recognition in criminal matters, the EAW is likely to make a seamless transition from one legal order to the other. But this might be an excellent moment, to reconsider the EAW and the issues which it has raised, particularly in relation to the rights of individuals and proportionality and remedy at least some of the more glaring problems before they become part of a new, unified EU legal order post-Lisbon Treaty.