

The implementation of the European Arrest  
Warrant in the European Union: law, policy and  
practice

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## ABSTRACT OF THESIS

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The European Arrest Warrant (EAW) is the first and most important measure in the field of European criminal law for the purpose of implementation of the principle of mutual recognition of judicial decisions. The Framework Decision which introduced it was adopted on 13 June 2002 following point 35 of the Conclusions of the Tampere European Council of 15-16 October 1999 (aiming at abolishing the formal extradition procedure among the Member States of the European Union). The Warrant is a judicial decision issued by a Member State, which requires the arrest and surrender of a person by another Member State, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order. It is issued when the person whose return is sought is accused of an offence for which the law establishes a maximum of at least one year in prison, or when the person has already been sentenced to a prison term of at least four months.

The research aims at exploring the context in which the EAW was adopted, as part of the mutual recognition agenda. This will be done through an analysis of the substantive and procedural legal aspects of its implementation. Is mutual recognition correctly implemented? While some authors hail it as a giant leap towards a new system of inter-state judicial cooperation, others view it as a danger for the traditional principles of criminal law as developed in Europe in the last centuries.

The thesis will look at the functioning of the EAW in the EU criminal law area and at its implications for national sovereignty as well as individual rights, with particular reference to the radical modification of the principles of classical extradition law. An evaluation of its effectiveness and its real importance will be carried out from both an international and a European law point of view.

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## Abbreviations

AC	Law Reports Appeal Court
AER	All England Law Reports
BMLR	Butterworth's Medical Law Reports
BVerfG	BundesVerfassungsgericht
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CISA	Convention Implementing the Schengen Agreement
CPS	Crown Prosecution Service
CUP	Cambridge University Press
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
ETS	European Treaty Series
EU	European Union
EWCA	England and Wales Court of Appeal
FATF	Financial Action Task Force on Money Laundering
FBI	Federal Bureau of Investigation
GA	United Nations General Assembly
HCJAC	High Court of Justiciary (Appeal Court)
JHA	Justice and Home Affairs
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILM	International Legal Materials
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
OJ	Official Journal of the European Communities
OLAF	European Anti-Fraud Office
OUP	Oxford University Press
QB	Queen's Bench (Division)
S.D.N.Y.	Southern District of New York
SIS	Schengen Information System
SOCA	Serious Organised Crime Agency
StGB	StrafGesetzBuch
UK	United Kingdom
UKHL	United Kingdom House of Lord
ULB	Université Libre de Bruxelles
UN	United Nations
UNTS	United Nations Treaty Series
US or USA	United States of America
WLR	Weekly Law Reports

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## Introduction

If a Covenant be made, wherein neither of the Parties performe presently, but trust one another; in the condition of meer Nature (which is a condition of Warre of every man against every man) upon any reasonable suspition, it is Voyd: But if there be a common Power set over them both, with right and force sufficient to compell performance; it is not Voyd. For he that performeth first, has no assurance the other will performe after; because the bonds of words are too weak to bridle mens ambition, avarice, anger, and other Passions, without the feare of some coërcive Power (...)<sup>1</sup>

The area of cooperation in criminal matters within the European Union (which corresponds to the current Third Pillar) has been one of the most interesting areas of European Union (EU) law. One of the reasons is that it incorporates principles and mechanisms of international law within a framework which possesses some supranational features. This obviously generates tensions and challenges relating for instance to the level of democracy, rule of law, human rights and constitutional structure. One fundamental principle which lies at the heart of this *sui generis* system is mutual recognition. The purpose of this thesis is to look at the most prominent instrument of mutual recognition, the European Arrest Warrant (EAW), and the extent to which the new mechanism effectively operates within a non-harmonised landscape. It will consider it both as a significant example of implementation of mutual recognition (which can serve as a test for all the other measures which have been adopted or will soon be adopted) and as an evolution of classic extradition.

After giving an overview of the evolution of cooperation in criminal matters in general and of the so-called “European extradition model” in particular (chapter one), the principle of mutual recognition will be examined in more detail, tracing its birth back at the time when the first examples of cooperation originated within the Council of Europe framework (chapter two). An assessment will be carried out firstly of its theoretical significance in relation to harmonisation/approximation of substantive and procedural criminal law and secondly of its current effectiveness in

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<sup>1</sup> T. Hobbes, *Leviathan* (9th ed. CUP 2006) 96.

light of its gradual development and the non-uniform features which can be identified in the various instruments adopted so far. The concept of mutual recognition will be analysed further in order to verify whether it is possible to justify it and utilise it as a legitimate model for the development of judicial cooperation in criminal matters. In particular, the thesis will explore the possibility of viewing it as a constitutionally embedded principle, linked to the rule of law.

Following these introductory chapters, the thesis will then analyse the adoption of the Framework Decision on the EAW on the assumption of a high degree of mutual trust and as a product of a strong pressure to fight terrorism following 9/11 (chapter 3). It will be shown that the initial drafts were very different from the current measure, as (for instance) the scope of its applicability was restricted mostly to terrorist crimes, the number of grounds for refusal was lower and the purpose of surrender was not only prosecuting or sentencing an individual, but also merely carrying out an investigation. After 9/11, the removal of the principle of double criminality was extended to a “positive” list of thirty-two categories of offences and, on the other hand, a higher number of grounds for refusal were provided for. It is maintained that the reason is that most of these “categories” can be somehow linked to terrorism or organised crime.

One of the main problems of the Framework Decision list is that some of the “offences” are vaguely defined or have not been the subject of adequate approximation. Following a comparative study of the definitions of some of those offences at the national level, it will be argued that: 1) the list should be reduced to those “offences” in relation to which agreement can be more easily found and 2) more approximation should be pursued in order to identify clearly the constituent elements of the offences and penalties at the EU level (chapter four).

The need for approximation is also evident from the procedural point of view, as is demonstrated by an analysis of the implementation of the EAW in the United Kingdom and Italy (chapter five). Both legislation and case law in those two countries (one belonging to the common law tradition, the other to the civil law

tradition) show that the transposition of the Framework Decision has diverged and in Italy it has even strikingly betrayed the spirit of mutual recognition. The general overview of the implementation of the EAW in all twenty-seven Member States as well as interviews carried out with practitioners will confirm that mutual trust has not developed uniformly within the EU. An attempt is then made to define the concept of mutual trust in the area of cooperation in criminal matters, drawing on the social sciences literature as well as anecdotal evidence.

Finally, the thesis will look at the delicate issues of human rights protection and in particular the principle of legality and the rights of the defence and will conclude that, although the EAW mechanism is generally more effective than traditional extradition, it presents less guarantees and should therefore be improved (chapter six). Concerns also relate to the relatively weak powers of Eurojust and the lack of common rules on conflicts of jurisdiction. The final assessment of the implications of the new surrender scheme will entail a general overview of the potential developments of European Criminal Law as a whole. This work states the law in this area as of 20<sup>th</sup> February 2009.

# 1. Cooperation in criminal matters in Europe

## Introduction

What does cooperation in criminal matters consist of and by what principles is it governed? This chapter offers an historical analysis of the development of extradition and cooperation in order to sketch the main features of the broad canvas within which the EAW is situated. First, it will give a general overview of the main forms of cooperation in criminal matters (section 1.1). Second, it will focus on the evolution of the European extradition model, as it is assumed that extradition is not only the most ancient but also the paradigmatic form of cooperation, in so far as it is more directly related to issues of sovereignty and jurisdiction (section 1.2). Third, it will offer an historical account of European cooperation from the earliest, informal structures to the legislative framework of the EU (sections 1.3 and 1.4). Some first preliminary conclusions will be given at the end (section 1.5).

## 1.1 Forms of cooperation in criminal matters in Europe

Scholars normally identify four main methods of cooperation in criminal matters: mutual assistance in criminal matters, transfer of proceedings, enforcement of foreign judgments, extradition<sup>1</sup>. Concerning the former, the first step was made with the European Convention on Mutual Assistance<sup>2</sup>. This provided for contact between the Ministries of Justice of the States Parties, or, in cases of urgency or (alternatively) where a bilateral arrangement so provided, directly between the

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<sup>1</sup> See, for instance, D.McClean- *International Co-operation in civil and criminal matters* (OUP 2002); E. Müller-Rappard, 'Inter-State Cooperation in Penal Matters Within the Council of Europe Framework', in M.C. Bassiouni (ed.), *International Criminal Law, Procedural and Enforcement Mechanisms* (2<sup>nd</sup> ed. Transnational Publishers 1999) 331.

<sup>2</sup> European Convention on Mutual Assistance in Criminal Matters, 20/04/1959, Strasbourg, ETS n. 30. As of 18 February 2009, it has been ratified or acceded to by 47 States, of which 27 are EU Member States. See <http://conventions.coe.int/>.

judicial authorities. Assistance occurred upon request for a wide range of measures, in respect of offences the punishment of which, at the time of the request, fell within the jurisdiction of the judicial authorities of the requesting State. A request could relate to facilitation of the appearance and hearing of witnesses or technical experts before a court of the requesting State, exchange of information on judicial records, taking of evidence by means of a letter rogatory. Of course, refusal was possible, for instance when the requested State reserved the right to make the execution of certain letters rogatory dependent on the condition that the offence was an extraditable offence under its domestic law and/or met the double criminality requirement, or when the execution of the request might, in the view of that State, harm its essential interests. The possibility of making reservations was practically unlimited. This is the main reason why, following a similar pattern as extradition, a Convention was drafted in 2000 within the EU context, as it was believed that cooperation would be more effective<sup>3</sup>. Indeed, this Convention, which is not supposed to replace but merely supplement previous instruments adopted in this area, only allows those reservations that are expressly provided for. Secondly, it does not allow refusal for offences which are not extraditable under the law of the requested State or are not defined by its domestic law. Thirdly, the political, military and fiscal offence exceptions are excluded. As is evident from the Preamble, the detailed provisions of this Convention are all said to stem from the confidence that State Parties have in each other's legal system<sup>4</sup>. This is why this instrument is very much geared towards effective and fast-track procedures, which include innovative provisions such as, for instance, interception of terrestrial and satellite communications and hearings of witnesses by videoconference or telephone (when they are in another Member State) or controlled deliveries. It has been observed that this is necessary, even at the expenses of lower standards in the protection of the rights of individuals (both

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<sup>3</sup> Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197 12/07/2000 as well as Protocol, OJ C 326 16/10/2001 and Explanatory Report, OJ C 379, 30/11/2000. It has been ratified by 23 Member States so far (it entered into force on 23 August 2005).

<sup>4</sup> For a full account of the complex issues related to mutual assistance in criminal matters, see E. Denza, 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) 40 *Common Market Law Review* 1047.

suspects and non suspects), as the measures at issue do not involve directly the arrest or the detention of the suspect<sup>5</sup>.

As far as the second and the third form of cooperation are concerned, they have been for a long time inspired by an embryonic principle of mutual recognition of judicial decisions. The need to fight new types of criminality evolving in the last decades of the past century encouraged States to give up part of their national sovereignty in order to develop new instruments of cooperation. There are indeed many problems connected to the recognition and enforcement of judgments<sup>6</sup>: some States distinguish three types of penalties entailing deprivation of freedom (penal servitude, imprisonment and detention), some others two or one; the minimum and maximum of a sanction can vary considerably; in some States a judgment may have other effects than in another.

The first instruments were adopted within the framework of the Council of Europe<sup>7</sup>. Examples of these are: the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and the European Convention on the Punishment of Road Traffic Offences, both of them of 30 November 1964<sup>8</sup>; the European Convention on the International Validity of Criminal Judgments, agreed at The Hague in May 1970; the European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972; the Convention on the Transfer of Sentenced Persons of 21 March 1983. However, at the same time some steps were taken within the European Communities. An example is the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991. All the Conventions mentioned above have therefore a regional or sub-regional scope<sup>9</sup>.

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<sup>5</sup> E. Denza, 'The 2000 Convention on Mutual Assistance in Criminal Matters', *supra* 1057.

<sup>6</sup> D.McClean, *International Co-operation in civil and criminal matters*, *supra*.

<sup>7</sup> See also M. Fichera, 'Mutual Recognition in Criminal Matters from Its Creation to the New Developments in the Lisbon Treaty', *UACES Seminar Exchanging Ideas on Europe 2008- Rethinking the European Union*, Edinburgh, 1-3 September 2008, available at <http://www.uaces.org/events/conferences/papers/abstract.php?recordID=22>.

<sup>8</sup> ETS n. 51 and n. 52. They entered into force, respectively, on 22/8/1975 and 18/7/1972.

<sup>9</sup> See respectively The Hague, 28/5/1970, ETS n. 70; Strasbourg, 15/5/1972, ETS n. 73; Strasbourg, 21/3/1983, ETS n. 112, ratified by 11, 13 and 27 EU Member States respectively as of 18 February

The first two European Conventions already contain a few provisions aiming at speeding up and simplifying the procedure of recognition and enforcement of decisions<sup>10</sup>. They also contain mandatory and optional grounds of refusal (including the double criminality requirement<sup>11</sup>) and ensure the application of a set of common rules.

The 1970 European Convention entered into force on 26 July 1974. It goes a step forward as it has a more general scope and contains some important definitions. For instance, it defines “European criminal judgment” as any final decision delivered by a criminal court of a Contracting State as a result of criminal proceedings and “sanction” as any punishment or other measure expressly imposed on a person, in respect of an offence, in a European criminal judgment, or in an *ordonnance pénale*. It was decided that “considerations of national sovereignty (...) should no longer be an obstacle to the recognition of the legal effects of foreign judgments”, due to the existing “mutual confidence” between Member States of the Council of Europe<sup>12</sup>.

Many of these instruments, such as the Additional Protocol to the European Convention on the Transfer of Sentenced Persons and the 1991 Convention on the Enforcement of Foreign Criminal Sentences, have never entered into force<sup>13</sup>. The reason for this lies probably in the fact that, despite all good intentions, mutual confidence between Member States had not developed at that time to a sufficient degree.

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2009. See also E. Müller-Rappard, ‘Inter-State Cooperation in Penal Matters Within the Council of Europe Framework’ in M. C. Bassiouni (ed.), *supra* 331.

<sup>10</sup> See, for example, Art. 9 and 30 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and Art. 20 of the European Convention on the Punishment of Road Traffic Offences, *supra*.

<sup>11</sup> See Art. 4 of the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders *supra*.

<sup>12</sup> European Convention on the international validity of criminal judgments, Explanatory Report, ETS n. 070, par. 1.

<sup>13</sup> Additional Protocol to the European Convention on the Transfer of Sentenced Persons, Strasbourg, 18/12/1997, ETS n. 167; 1991 Convention on the Enforcement of Foreign Criminal Sentences, *supra*. See also D. McClean, *International Co-operation in civil and criminal matters*, *supra* 374.

The common points of these Conventions are: the general rule that enforcement is governed by the law of the requested State; the provision of a number of grounds of refusal; in some of them, the possibility for the State of enforcement to arrest the offender upon request of another State and to seize his assets (subject to conditions and limits); the possibility given to the State of enforcement of converting the penalty issued in another State into a penalty provided for by its national law for the same or comparable offences, provided that the penal situation of the sentenced person is not aggravated.

The issue of mutual recognition was at one point moved within the framework of the European Union. At the Cardiff European Council in 1998 the Council was asked to “identify the scope for greater mutual recognition of decisions of each other’s courts”<sup>14</sup>. As a result, the Tampere European Council one year later introduced this principle for the first time in the Third Pillar. However, although mutual recognition is considered “the cornerstone of judicial cooperation in both civil and criminal matters within the Union”<sup>15</sup> in an area of freedom, security and justice, it is not yet entirely clear what it means and there is not much related case law<sup>16</sup>. Mutual recognition is therefore at the moment more a political concept than a juridical one.

In the same year as the Cardiff European Council, the Vienna Action Plan<sup>17</sup> called for the adoption within two years after the entry into force of the Treaty of Amsterdam of measures with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters<sup>18</sup>. It also stressed, on the one hand, the connection between Article 31 (e) TEU dealing with prevention and fight against

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<sup>14</sup> Cardiff European Council (15-16 June 1998) Presidency Conclusions, par. 39, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm). The UK government was the main promoter of mutual recognition. See also *infra* chapter 3 note 22.

<sup>15</sup> Tampere European Council (15-16 October 1999) Presidency Conclusions, par. 33, see link above.

<sup>16</sup> However, the ECJ held in Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-01345 that the *ne bis in idem* principle according to Art. 54 of the 1990 Schengen Convention implied that the Member States “have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied” (par.33).

<sup>17</sup> Council and Commission Action Plan on How to Best Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, OJ C 19/01 3/12/2001.

<sup>18</sup> *Ibid.* point 45 (f).



crime and Article 61 (a) TEC dealing with free movement of persons<sup>19</sup> and, on the other, the need to establish minimum rules relating to the constituent elements and to penalties in the field of organised crime, terrorism and drug trafficking, as well as other crimes specifically mentioned<sup>20</sup>. A report on the first steps of this agenda is contained in the Communication from the Commission on the Mutual Recognition of Final Decisions in Criminal Matters in July 2000<sup>21</sup>. This document pointed out that none of the previous international instruments would be sufficient to establish a full regime of mutual recognition and that traditional judicial cooperation in criminal matters, based on the “request” principle, was slow and cumbersome and led to uncertain results. Indeed, common rules on jurisdiction were necessary and the number of grounds for refusal was too high. Hence the need for a European registry of criminal sentences and of criminal proceedings, which would avoid problems connected to the *ne bis in idem* principle and conflicts of jurisdiction, ensuring at the same time data protection<sup>22</sup>. The Commission also suggested that a set of common rules on jurisdiction, identifying only one Member State as having competence, could be agreed, similarly to what already exists in the area of civil and commercial matters. In this context, however, the Commission recognised that mutual recognition cannot be understood in absolute terms, as a system with no form of *exequatur* procedure at all is not feasible. Minimum rules should at least provide for a translation of the text and a control as to whether the decision had been issued by a competent authority. We can therefore summarise the main features of this new form of international cooperation: more rapidity, more certainty, less discretion.

A Programme of measures to implement the principle of mutual recognition of decisions in criminal matters was then issued by the European Council in November 2000<sup>23</sup>. In this Programme priority rating 1 was accorded to the need to draw up an instrument on mutual recognition of decisions on the freezing of evidence and of an

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<sup>19</sup> *Ibid.* points 5 and 25.

<sup>20</sup> *Ibid.* points 18 and 46 (a) and (b).

<sup>21</sup> Communication from the Commission to the Council and the European Parliament- Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final.

<sup>22</sup> The Vienna Action Plan, point 49(e), already required, as one of the measures to be taken within five years of the entry into force of the Amsterdam Treaty, an examination of the possibility to create a register of pending cases.

<sup>23</sup> Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/02 15/01/2001.

instrument on mutual recognition of orders to freeze assets. The need to introduce an arrest warrant was only accorded priority rating 2 and was limited to the most serious offences in Art. 29 TEU, i.e. terrorism, trafficking in persons and offences against children, illicit drugs trafficking, illicit arms trafficking, corruption and fraud<sup>24</sup>.

Specific measures implementing the principle at issue were then adopted, but, following the events of 9/11, the Council Framework Decision on the EAW was adopted first and quite rapidly<sup>25</sup>. This was followed by the Council Framework Decisions on the freezing of assets, on confiscation of crime-related proceeds and on the application of the principle of mutual recognition to financial penalties: these measures will be examined in detail in the following chapter, but it should be pointed out here that, as far as the arrest warrant is concerned, its applicability is not restricted to a few serious crimes, but extends to all those punishable by the law of the issuing Member State by a custodial sentence or detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

In order to fix priorities and assess the implementation of the measures in the field of freedom, security and justice, the idea of a multiannual programme, which had been inaugurated with the Tampere Programme, was further developed with the Hague Programme, at the European Council of 4-5 November 2004. This programme identifies the objectives of strengthening freedom, security and justice as well as ten priorities for the period 2005-2009. According to Priority n. 9, “(...) Approximation will be pursued, in particular through the adoption of rules ensuring a high degree of protection of persons, with a view to building mutual trust and strengthening mutual recognition, which remains the cornerstone of judicial cooperation”<sup>26</sup>. A more

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<sup>24</sup> The Programme also refers to recommendation N. 28 of the European Union’s Strategy for the beginning of the new millennium, which envisaged the possibility to create a single European legal area for extradition.

<sup>25</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

<sup>26</sup> Communication from the Commission to the Council and the European Parliament- The Hague Programme: Ten Priorities for the next five years- COM (2005) 184 final.

detailed list of measures is provided for in the Action Plan<sup>27</sup>, which is considered as part of a framework including the Drugs Action Plan, the Action Plan on Combating Terrorism and the Strategy on the external aspects of the area of freedom, security and justice. An annual report on the implementation of the Hague Programme (called “Scoreboard plus”) is required, in order to evaluate the progress achieved in the adoption of the legislative acts and in the implementation of the measures at the national level. The first “Scoreboard plus” was presented in 2006<sup>28</sup>.

The debate on the essence and functioning of mutual recognition is still very intense. Indeed, the Finnish Presidency of the Council of the European Union, which started on 1 July 2006, put as one of the priorities of its agenda the need “to explore ways of reinforcing decision-making on criminal law and police cooperation”<sup>29</sup>. An informal JHA Ministerial Meeting was held in Tampere, on 20-22 September 2006. From that meeting it emerged that, while the Commission and the Parliament tended to favour the use of the “bridging” clause, among the Member States only Finland and France clearly supported this view, with Germany, Ireland, the Netherlands and Slovakia more inclined to retain their veto power. The UK was reported to implicitly oppose the new proposal<sup>30</sup>. Some suggested, as a compromise, to apply the so-called “emergency brake” procedure, already provided for by Art. III-270 and 271 of the European Constitution, which (prior to the signing of the Lisbon Treaty) would have allowed Member States to opt out of those proposals which affect the nature of their national penal systems<sup>31</sup>.

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<sup>27</sup> Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198/01 12/8/2005.

<sup>28</sup> Communication from the Commission to the Council and the European Parliament - Implementing the Hague Programme: the way forward COM (2006) 331 final; Communication from the Commission to the Council and the European Parliament - Evaluation of EU Policies on Freedom, Security and Justice COM (2006) 332 final; Communication from the Commission to the Council and the European Parliament COM (2006) 333 final.

<sup>29</sup> Finnish Prime Minister’s Office Press Release - 30 June 2006-  
[http://www.eu2006.fi/news\\_and\\_documents/press\\_releases/vko26\\_/en\\_GB/162650/?u4.highlight](http://www.eu2006.fi/news_and_documents/press_releases/vko26_/en_GB/162650/?u4.highlight)

<sup>30</sup> Assemblée Nationale, Rapport d’information n. 2829 sur les conséquences de l’arrêt de la Cour de Justice 13 septembre 2005, 25 janvier 2006; House of Lords European Union Committee, 42<sup>nd</sup> Report, Session 2005-06, 28 July 2006, 35; *EU wants more powers in criminal matters*, EUObserver.com, 8 May 2006; *EU to clash on national justice vetoes*, EUPolitix.com, 20 September 2006

<sup>31</sup> *Interview with F. Frattini*, EUPolitix.com, 26 June 2006; *Drive to give European court a role in settling asylum cases*, Financial Times, 28 June 2006. See also Treaty Establishing a Constitution for Europe, OJ C 310 16/12/2004.

While an in-depth analysis of the implications of mutual recognition will be carried out in the next chapter, the following section will focus on the most significant form of cooperation, which is represented by extradition. One of the reasons is that the EAW represents a point of convergence of both mutual recognition and extradition, which confirms its importance in the broader context of the Third Pillar.

## 1.2 The European Extradition Model

Extradition is a mechanism of international cooperation by which one or more States agree to assist each other in criminal matters<sup>32</sup>. Extraditing means surrendering an individual to the requesting State so that he or she can be prosecuted or a sentence can be served. This can occur either on the basis of a multilateral or bilateral Treaty or without a previous arrangement. Most common law countries allow extradition only on the basis of a Treaty<sup>33</sup>. Where an agreement already exists, it normally imposes upon the requested State an obligation to extradite the criminal or, in alternative, to prosecute him/her (*aut dedere aut judicare* principle<sup>34</sup>). Otherwise, no such duty can be identified in international law: the procedure relies exclusively on reciprocity and (as some argue) comity<sup>35</sup>.

Extradition starts with a request formally transmitted through diplomatic or governmental channels: all the necessary documents are indicated by the Treaty or

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<sup>32</sup> M.C. Bassiouni, *International Extradition: United States Law and Practice* (5<sup>th</sup> ed., Oceana Publications Inc. 2007); M.C. Bassiouni, 'Reforming International Extradition: Lessons of the Past for a Radical New Approach' (2003) 25 *Loyola International and Comparative Law Review* 389; G. Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff, The Hague-Boston-London 1998); I. Shearer, *Extradition in International Law* (Oceana Publications Inc., Manchester 1971).

<sup>33</sup> However, the UK allows *ad hoc* extradition as well. See the UK Extradition Act 2003 (c.41) and Explanatory Notes.

<sup>34</sup> M.C. Bassiouni, E. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, London-Dordrecht 1995), who at 22-26 and 51-53 suggest that this rule could be considered not only part of customary international law but also a *jus cogens* norm. The expression is a modern version of the maxim *aut dedere aut punire*, which was used by H. Grotius, *De Jure Belli ac Pacis* (Book II, Chapter XXI, par. III and IV 1625) 526-528 (*Classics of International Law* 1925). See M.C. Bassiouni, *International Extradition*, *supra*, 5.

<sup>35</sup> See, e.g., M.C. Bassiouni, *International Extradition*, *supra*.

the national Act of the requested State. Usually Treaties make it possible for a State to obtain, pending receipt of a formal request, the provisional arrest of the sought person. This can be performed following an exchange of information between the competent authorities or through a “red individual notice” issued by Interpol<sup>36</sup>. Both extradition procedure and pre-extradition (provisional) detention measures are regulated by the domestic rules of the requested State<sup>37</sup>. The intervention of the executive is therefore decisive: this does not mean however that the judiciary cannot exercise any control. There is a general distinction between common law and civil law countries: in the latter, surrender needs to be declared admissible by a criminal court<sup>38</sup>; in the former, its lawfulness can be reviewed in *habeas corpus* proceedings<sup>39</sup>. This is why a reasoned request must be submitted to a local magistrate or to the government: however, the extradition hearing does not aim at determining the guilt or innocence of the individual<sup>40</sup>. After this “judicial” phase, an “administrative” phase follows, in which the final decision is made by the executive. In some countries the negative assessment of a court is binding upon the government<sup>41</sup>.

There are different models of extradition. The European model is particularly interesting because it has recently undergone radical changes. This section will provide a broad overview of its evolution, in the light of the fundamental principles and exemption rules of extradition law (nationality, *prima facie* evidence, speciality,

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<sup>36</sup> A “red notice” is based on an arrest warrant (issued when a person is wanted for prosecution) or a court order (when the person is wanted for the purpose of serving a sentence). On the basis of the information contained in the “red notice”, the competent judicial authority decides whether or not to allow for provisional arrest. Following the arrest, the requesting country is notified of the person’s detention and starts the formal extradition proceedings. See [www.interpol.int](http://www.interpol.int).

<sup>37</sup> These rules have been elaborated in different ways from State to State. For instance, some States (e.g. Austria, Germany) have enacted a comprehensive piece of legislation dealing with all forms of cooperation in criminal matters. Some others (e.g. Italy) have devoted to such issues a specific section of the code of criminal procedure. Yet others (e.g. UK) have enacted separate legislation for each form of international cooperation in criminal matters.

<sup>38</sup> See e.g. G. Vermeulen, T. Vander Beken, ‘Extradition in the European Union: State of the Art and Perspectives’ (1996) 4 *European Journal of Crime, Criminal Law and Criminal Justice* 200.

<sup>39</sup> See, e.g., I. A. Shearer, *Extradition in International Law*, *supra*.

<sup>40</sup> M.C. Bassiouni, *International Extradition*, *supra*.

<sup>41</sup> For general information on national extradition procedures, see European Committee on Crime Problems, European Convention on Extradition- *A Guide to Procedures*, 2 October 2003, PC-OC INF 4 at [www.coe.int](http://www.coe.int).

double criminality, territoriality, extraditable offences, military, fiscal and political offence exceptions, *ne bis in idem*, death penalty, fair trial or asylum clause).

The first steps were taken within the framework of the Council of Europe. The 1957 European Convention<sup>42</sup> was the result of the growing legal and political homogeneity of the European States<sup>43</sup>. It was the first example in Europe of a multilateral arrangement which gave up some of the features of the old model, in accordance with the modern view that the sought person must be considered the subject, rather than merely the object of criminal proceedings<sup>44</sup>. It provided a general scheme which each State Party may supplement by way of bilateral or multilateral arrangements<sup>45</sup>.

Some important changes were introduced. First of all, under this Convention Member States are not required to provide evidence of a *prima facie* case of guilt, except where the requested State has made a specific reservation<sup>46</sup>. However, some evidence will still be needed in order to assess whether the conduct for which a request has been made is an offence punishable by deprivation of liberty or detention order for a maximum of at least one year, or (if a sentence or detention order have already been issued) for which a punishment of at least four months is awarded. This is the “minimum maximum penalty threshold” method (or eliminative method), i.e. a traditional mechanism whose purpose is to restrict extradition to the most serious

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<sup>42</sup> European Convention on Extradition and related Explanatory Memorandum, ETS n. 24, Paris 13/12/1957.

<sup>43</sup> M. Mackarel, S. Nash, ‘Extradition and the European Union’ (1997) 46 *International and Comparative Law Quarterly* 948; G. Vermeulen, T. Vander Beken, ‘Extradition in the European Union’, *supra*; H.J. Bartsch, ‘The Western European Approach’ (1991) 62 *International Review of Penal Law* 499.

<sup>44</sup> European Convention Explanatory Memorandum, ETS n. 24, Paris 13/12/1957. Interestingly, during the negotiations Scandinavian delegates pointed out the model followed by their countries, based on mutual confidence and facilitated by the “great similarity between the penal codes of Scandinavian countries in their definition of offences”.

<sup>45</sup> G. Gilbert, *Transnational Fugitive Offenders in International Law*, *supra*.

<sup>46</sup> This requirement is typical of common law countries, although e.g. by virtue of a reservation made on 27 September 1967 Israel still requires the making of a *prima facie* case. Interestingly, the 1988 Criminal Justice Act and the 1989 Extradition Act permitted the UK to strike agreements with foreign States whose domestic law does not require *prima facie* evidence. This is why the UK was then able to ratify the Convention on 13 February 1991. See D. Poncet, P. Gully-Hart, ‘The European Approach’ in M.C. Bassiouni (ed.), *International Criminal Law, Procedural and Enforcement Mechanisms* (2<sup>nd</sup> ed., Transnational Publishers 1999) 277.

offences<sup>47</sup>. This was preferred to the “list” or “enumerative” method, consisting in naming those crimes for which extradition applies: the reason was that the former system is more flexible and can adapt to changing priorities in the criminal policy of the Member States. Of course, a condition for an optimal functioning of the eliminative method is that the legal systems which it refers to apply a similar level of penalties. The identification of “extraditable offences” goes hand in hand with the requirement of double criminality, according to which the alleged conduct must be punishable under the laws of both States involved<sup>48</sup>. This requirement is respected by States on the basis of reciprocity and is considered a corollary of the *nulla poena sine lege* principle (no crime without a law).

Secondly, some innovations were introduced in relation to the grounds for refusal. Their rationale lies in the need to preserve State sovereignty, although their effect is also the protection of the individual against abuse. A secondary effect is that they may seriously prevent cooperation in the suppression of criminality. As can be argued from the provisions of the Convention, they were clearly the result of a compromise between different approaches but did not achieve the objective of making the procedure more rapid and effective: instead, they had the opposite outcome. Indeed, a major flaw of the 1957 Convention was the abundance of such grounds, conferring upon the requested State a very wide discretion when deciding whether or not to allow surrender. In particular, concerning nationality, the right to refuse extradition is recognised (Article 6), although it is combined with the *aut dedere aut judicare* principle<sup>49</sup>. In the case of a refusal, the requesting State may demand that the case be submitted to the competent authorities, although there is no obligation to take legal proceedings if it is not deemed appropriate, i.e. if there are no sufficient reasons for trying the individual. A similar combination was included later

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<sup>47</sup> Two exceptions are provided for in Article 2: first, extradition may be granted below this threshold whenever the request includes also offences punishable by at least one year’s imprisonment (“accessory extradition”); second, a State Party can exclude specific offences from the application of this rule.

<sup>48</sup> M. Plachta, ‘The Role of Double Criminality in International Cooperation in Penal Matters’ in N. Jareborg (ed.), *Double Criminality Studies in International Criminal Law* (Iustus Förlag, Uppsala 1989).

<sup>49</sup> In the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, 1962, *Moniteur Belge*, October 24, 1964, there is an obligation, rather than a simple right, not to extradite nationals (Article 5) and *aut dedere aut judicare* does not apply.

in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>50</sup>. It is worth mentioning that the drafters of the latter Convention considered the option of limiting or excluding this exception, although in the end these proposals were rejected<sup>51</sup>. The mechanism provided for in Articles 6 (5), 4 (2) (a) as well as 6 (9) of that Convention ensures that, where extradition is refused on grounds of nationality, States establish jurisdiction over the offences committed by the person concerned and this person may be prosecuted or serve the sentence imposed upon him or her. However, these provisions should not be considered equivalent to an extradition Convention, creating obligations for the Parties: they simply rely on existing and future extradition Treaties. All existing extradition Treaties are modified in order to include drug trafficking offences - established in Article 3(1)- and the same offences must be included as extraditable offences in future Treaties. *Inter alia*, paragraph 3 (addressed to those States that extradite only on the basis of a Treaty) makes it clear that the Convention *may* be used as the legal basis for extradition and not as a Treaty *per se*<sup>52</sup>.

Under the European Convention, a State is entitled to reject a request also if it believes that the alleged conduct amounts to a crime having a political nature, or is a purely military offence, or is a fiscal offence (respectively, Articles 3, 4 and 5). The first exception is a remnant of a historical period in which surrender mostly concerned those who threatened the political stability of the sovereign State. It is a direct derivation of the principles of freedom and democracy, which represented in 18<sup>th</sup> century Europe a “weapon” against the oppression of absolutist States<sup>53</sup>. It is here limited by two rules: the so-called “Belgian clause”, excluding its application in the case of murder or attempted murder of a Head of State or a member of his family;

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<sup>50</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances available at [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf)

<sup>51</sup> Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations Publications, New York 1998, 157.

<sup>52</sup> J. Schutte, ‘Extradition for drug offences: new developments under the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances’ (1991) 62-1/2 *Révue Internationale de Droit Penal* 137; N. Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer Law International, The Hague 2001) 260.

<sup>53</sup> M.C. Bassiouni, *International Extradition, supra*, 33 and 594-676. See also G. Gilbert, *Transnational Fugitive Offenders, supra*, 203-334; C. van den Wyngaert, *The Political Offence Exception to Extradition: the Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer 1980).



the amendment of the First Additional Protocol, removing it in respect of crimes against humanity under the UN Genocide Convention and war crimes (both covered by the 1949 Geneva Conventions and by customary law)<sup>54</sup>. Moreover, the above mentioned exception is accompanied by the so-called fair trial, non-discrimination or asylum clause: refusal is possible also if the requested authorities have substantial grounds for believing that a request relating to an ordinary criminal offence has been for the purpose of prosecution or punishment by reason of race, religion, nationality or political opinion. It is worth noting that, as in most extradition treaties, the definition of “political offence” is left to the courts of each State Party (which have given diverging interpretations over the years)<sup>55</sup>. The third exception, which was an expression of the traditional approach according to which States are not supposed to assist each other in the protection of their finances, is also subject to restrictions. According to Article 5, extradition can be granted only if previous arrangements have been made. However, the Second Additional Protocol (Article 2)<sup>56</sup> allows surrender if the act amounts to an offence “of the same nature” under the law of the requested Party, i.e. whenever the essential constituent elements are identical. Moreover, it prohibits refusal on the mere ground that the law of the requested State does not impose the same kind of tax or duty.

A State can also refuse a request when it is clear that the requesting State seeks to prosecute and punish an individual for an offence other than that for which he was extradited, unless the surrendering State consents. This is the so-called rule of speciality (Article 14) and ensures that the person has the opportunity to leave the territory of the State to which he has been surrendered within 45 days of his or her final discharge. If he or she has not done so, or has returned to that State, the rule does not apply. A further consequence is that a person cannot be surrendered by the

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<sup>54</sup> Additional Protocol to the European Convention on Extradition, Strasbourg, 15/10/1975, ETS n. 86 and related Explanatory Report (ratified by 17 Member States); Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, New York 9/12/1948; the Geneva Conventions are retrievable at <http://www.unhchr.ch/html/intlinst.htm>.

<sup>55</sup> See e.g., for the UK, *In Re Castioni* [1891] 1 QB 149 and *T v. Secretary of State for the Home Department* [1996] 2 ALL ER 865; for France, *In Re Giovanni Gatti* [1947] Ann. Dig. 145 (Case n. 70) and *Piperno and Pace* [1979] Chambre d'Accusation de Paris; for Switzerland, *In Re Nappi* [1952] 19 Int. L Rep. 375.

<sup>56</sup> Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17/3/1978, ETS n. 98 and related Explanatory Report. It has been ratified by only 21 Member States so far.

requesting State to a third Party without the consent of the requested State in respect of offences committed prior to his or her surrender (Article 15).

The *ne bis in idem* or double jeopardy<sup>57</sup> rule is contained in Articles 7, 8 and 9. This is a general principle of criminal procedure, which allows no more than one prosecution for the same offence and is therefore a shield for individual rights. Despite this, it is not recognised as an international principle, as sovereign States prefer to retain their right to prosecute for offences defined by their domestic legal systems. Nevertheless, it applies in the Council of Europe extradition system. The provisions mentioned above make it both a mandatory and an optional ground for refusal. In particular, it is mandatory if final judgement<sup>58</sup> has been passed by the competent authorities of the requested Party in respect of the same offence. It is optional in two circumstances: a) where the competent authorities of the requested Party have decided either not to initiate or to terminate proceedings concerning the same offence and the same person (*ordonnance de non lieu*); b) where they are currently proceeding against that person for the same act. Furthermore, a State which is about to initiate proceedings for an offence that has been committed in whole or in part on its territory, may refuse extradition (as an application of territoriality). A mandatory ground for refusal was added by the First Additional Protocol in relation to the extradition of persons who are subject to final judgements given by the courts of third States Parties to the Convention for the same offence or offences (though only in specific cases, such as when the court decides to acquit them).

The 1957 Convention mentions two additional grounds for refusal: capital punishment, which allows a State whose law does not provide for death penalty to refuse surrender, unless the requesting State gives assurance that the penalty will not be carried out (Article 11)<sup>59</sup>; and lapse of time, granting the sought person immunity

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<sup>57</sup> See, *inter alia*, C. van den Wyngaert, G. Stessens, 'The International Non Bis in Idem Principle: Resolving Some of the Unanswered Questions' (1999) 48 *International and Comparative Law Quarterly* 779. On this principle, see also *infra*, chapter 4 p. 131.

<sup>58</sup> A final judgement can be acquittal, conviction or pardon.

<sup>59</sup> The issue of extradition for death penalty was particularly relevant in ECtHR *Soering v. UK*, 7 July 1989, Application no. 14038/88, in which the ECtHR stated that a lengthy wait before execution falls within the definition of "inhuman and degrading punishment" under Article 3 ECHR, also in the light of both age and mental conditions of the sought person. Indeed, capital punishment is not prohibited

from prosecution or punishment (Article 10). A further guarantee for the rights of the individual was provided for by the Second Additional Protocol (Article 3): a request made following judgement *in absentia* can be rejected if the requested Party believes that the minimum rights of defence were not respected in that judgement, unless the other Party gives an assurance that a right to a (fair) re-trial will be granted.

The traditional approach that was still visible in the 1957 Convention was, as already said, neither effective nor efficient<sup>60</sup>. As a result, it was repeatedly revisited. Apart from the two Additional Protocols, which have been previously mentioned, some significant changes were made by the European Convention on the Suppression of Terrorism, concluded in 1977<sup>61</sup>. The Convention attempted to modify the political offence exception through a double formula. On the one hand, it listed a number of exemptions for some particularly serious terrorism-related offences (such as kidnapping, taking of hostages, use of bombs or seizure of aircraft)<sup>62</sup>. All States that have ratified the Convention with no reservation are bound by this provision. On the other hand, States that have made a reservation retain the right to qualify those acts as political offences, although they undertake to take into account a few criteria included in Article 13 when assessing the nature of the offence<sup>63</sup>. This approach was

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by Article 2 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4/11/1950, ETS n. 5); Protocols n. 6 and 13 later abolished the death penalty. Although the ECHR does not grant the fugitive a right not to be extradited, it is believed that he or she can rely on Article 3 ECHR to argue that his or her fundamental rights may be violated by the requesting country. See W. Schabas, *The abolition of the death penalty in International Law*, (3<sup>rd</sup> ed. CUP 2002).

<sup>60</sup> In the Recommendation n. R (80) of the Committee of Ministers of the Council of Europe Concerning the Practical Application of the European Convention on Extradition, 27 June 1980, [www.coe.int](http://www.coe.int) it was pointed out that “(...) with a view to expediting extradition (...) consideration should be given to the use of a summary procedure enabling the rapid surrender of the person sought without following ordinary extradition procedures, provided that the person concerned consent s to it”. This would be put into practice only 15 years later with the 1995 and 1996 EU Conventions (see *infra* p. 20-21).

<sup>61</sup> European Convention on the Suppression of Terrorism, and Related Explanatory Report, ETS n. 90, Strasbourg, 27/01/1977, ratified by all Member States; Protocol Amending the European Convention on the Suppression of Terrorism, ETS n. 190, Strasbourg, 15/05/2003 (which has only been ratified by 10 Member States and is not in force yet).

<sup>62</sup> Article 1 European Convention, *supra*. Many of these offences were covered by UN Conventions, although these did not directly impact on the scope of the political offence exception, unlike the Terrorist Bombing Convention, *infra* note 64.

<sup>63</sup> At the same time, Article 2 allowed Contracting States to exclude from the scope of this exception all *other* serious offences involving an act of violence against the life, physical integrity or liberty of a person, an act against property creating a collective danger against persons as well any attempt to commit these offences or participation as an accomplice.

criticised as some maintained that keeping the political offence no longer made sense among democratic European States bound by the rule of law. Despite this, the formula was defended, on humanitarian grounds, by those who argued that fair trial should be granted regardless of the character of the offence<sup>64</sup>. Some went further to suggest that, while those committing pure political crimes or serious crimes against repressive regimes would be covered by the non-discrimination clause, the exception should be abolished (as an initial step) within the European Union (because of the relative homogeneity of its legal systems)<sup>65</sup>.

In the '90s, due to the increasing development of transnational organised crime and the removal of frontiers both within the EU and between East and West, the need to improve the old extradition system was particularly pressing. As a result, two Conventions were drawn up. The first was the 1995 Convention on simplified extradition procedure; the second was the 1996 Convention relating to extradition between the Member States of the EU<sup>66</sup>. Their declared aim was to supplement the 1957 and 1977 Conventions (rather than replace them) by making surrender procedures more efficient. Indeed, under Article 2 of the 1995 Convention, where the person sought consents and the requested State gives its agreement, a simplified procedure takes place. Such procedure is linked to the Schengen mechanism<sup>67</sup> and applies only in so far as special and more favourable agreements have already been struck between Member States. If a request for provisional arrest is sent, or a person

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<sup>64</sup> For more details on this debate, see C. van den Wyngaert, 'The Political Offence Exception to Extradition: How to Plug the 'Terrorist's Loophole' Without Departing from Fundamental Human Rights' (1991) 62 *International Review of Penal Law* 291. Moreover, the 1997 International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164 1998, denies the possibility of invoking the political offence exception as a ground for refusal for a number of offences related to terrorist bombings (see Articles 2 and 11).

<sup>65</sup> J. Dugard, C. Van Den Wyngaert, Report of the Committee on Extradition and Human Rights to the International Law Association, Helsinki, 1996, 142-170.

<sup>66</sup> Convention drawn up on the basis of Article K 3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union, OJ C 78, 30/03/1995 and related Explanatory Report, OJ C 375 12/12/1996; Convention drawn up on the basis of Article K 3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C 313 23/10/1996 and related Explanatory Report, OJ C 191 23/06/1997.

<sup>67</sup> Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic union, the federal Republic of Germany and the French Republic on the gradual abolition of check at their common borders and Convention implementing the Schengen Agreement, OJ L 239/11 and 19 respectively, 22/09/2000 (the Convention was signed in 1990, but came into force in 1995). Articles 59-66 (Chapter 4) contain some provisions on extradition supplementing the 1957 Convention.

is reported in the Schengen Information System (SIS), this must be accompanied by adequate information on the identity of the individual and on the elements of the offence. The purpose is to enable the requested State to consider the case having sufficient knowledge of its essential aspects as well as to allow the individual to give consent to extradition. If consent is given, this can be coupled with renunciation to the speciality rule (Article 7). The whole procedure must be fair and occur before the competent authorities: for this purpose, the right to legal counsel is ensured.

The 1996 Convention provides for a few innovations, of which the most important is the exception to double criminality included in Article 3. An extradition request may not be refused on this ground for two specific categories of offences, namely: a) conspiracy or association to commit the crimes referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, and b) any other serious offence punishable by deprivation of liberty or detention order of a maximum of at least 12 months, provided that it is included in the area of drug trafficking or other forms of organised crime or other acts against the life, physical integrity or liberty of a person, or creating a collective danger for persons. The provision's attempt to lift the traditional requirement of dual criminality was a positive step forward but had two flaws: first, it made it possible for Member States to reserve their right not to apply this exception or to apply it under certain conditions; second, the lack of a clear legal definition of "organised crime" and "conspiracy" made cooperation between common law and civil law countries more problematic<sup>68</sup>.

The right to make a reservation was somewhat limited by paragraph 4, which imposed on the Member State a duty to extradite where the conduct consists of a contribution by one person to the commission by a group of other persons acting with a common purpose of the offences mentioned above. This applies even where the individual does not actually participate in the execution of the offence, provided that the contribution is intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence. The partial abolition of dual criminality is not the only relevant

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<sup>68</sup> V. Mitsilegas, 'Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of Freedom, Security and Justice' (2001) 26 *European Law Review* 565.

change contained in the 1996 Convention. Concerning extraditable offences, Article 2 lowers the threshold established by the 1957 Convention: the term of imprisonment can be of a maximum of at least six months under the law of the requested State (at the same time, the one-year threshold was kept for the requesting State).

Concerning the political offence exception, Article 5(1) eliminates it *tout court*. The potential of this innovative step is not however fully exploited, as paragraph 2 entitles each Member State to declare by way of reservation that paragraph 1 only applies to the offences mentioned in Articles 1 and 2 of the European Convention on the Suppression of Terrorism as well as conspiracy or association to commit offences referred to in those Articles. Nevertheless, this was a sign that the political offence exception had lost its appeal. As has been observed, “[t]he political offence exception is a double-edged sword. While it is intended to protect individual rights and personal freedom, it imposes national standards and values on other states”<sup>69</sup>. Its use makes little sense among Member States sharing a common history and common legal and political values.

A similar pattern can be found in two other provisions. The first is Article 7, which abolishes the ground for refusal based on nationality. The second is Article 6, relating to fiscal offences, which continues along the path which was begun by Article 5 of the 1957 Convention (as amended by the Second Additional Protocol). If the offence corresponds to a similar offence under the law of the requested Member State, the latter must extradite: no refusal is admissible on the ground that its own law does not impose the same type of taxes or duties as the law of the requesting State. Unfortunately, both Articles allow Member States to enter a reservation excluding or limiting the applicability of these provisions<sup>70</sup>. Despite this, the ground was ready at that time for a new approach on these issues. There are in fact many

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<sup>69</sup> M.C. Bassiouni, *International Extradition*, *supra* 674.

<sup>70</sup> In particular, according to Article 6 (3), any Member State may declare that it will grant extradition for fiscal offences only for acts or omissions which may constitute an offence in connection with excise, value-added tax or customs; according to Article 7 (2), any Member State may declare that it will not grant extradition of its nationals or will authorise it only under certain conditions.

arguments in favour of the nationality exception<sup>71</sup>: an individual should not be withdrawn from his natural judges and a State should protect its own citizens; a foreign State's criminal system should not be entirely trusted; a national should not be prosecuted in a foreign environment, where cultural and language difficulties may arise and gathering sufficient evidence may prove costly and hard<sup>72</sup>. Moreover, the need for social rehabilitation and reintegration of the offender in the society where he belongs to should be considered<sup>73</sup>. However, the real rationale behind it is, as previously pointed out, the need for the State to preserve its own sovereignty. By way of this exception, each State claims the right to judge its nationals for acts committed within its own territory. It is a perfectly understandable argument, connected to the desire to maintain the judicial integrity of a legal system, with its own guarantees and its own methods of punishment. This reasoning however is less justifiable if this need is balanced with the political pressure towards intensifying efforts against transnational crime in the EU (and it is even less justifiable in light of the common culture and geographical proximity of the Member States). In the same context, keeping the fiscal offence exception is in sharp contrast with the increasing cooperation between Member States in fiscal and financial matters (e.g. against tax evasion, in which case a non-cooperative behaviour evidently risks to create safe havens for those criminals who are able to exploit such legal loopholes).

The speciality rule is also applied differently in the 1996 Convention. Under Article 10, the accused person may be prosecuted for offences other than those for which extradition is requested even without the consent of the requested State. This is possible only for offences which are not punishable by deprivation of liberty; where this punishment is provided for, the person extradited may waive the speciality rule,

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<sup>71</sup> On the nationality exception in general, see *inter alia* I.A. Shearer, *Extradition in International Law*, *supra*, 94-132; M.C. Bassiouni, *International Extradition*, *supra* 682-689.

<sup>72</sup> Z. Deen-Racsmany, R. Blekxtoon, 'The Decline of the Nationality Exception in European Extradition?' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 317; I.A. Shearer, *Extradition in International Law*, *supra*, 98. They both cite a Report of the British Royal Commission on Extradition, Parliamentary Papers, 1878, vol. 24, 907-17. The chair was Lord Cockburn.

<sup>73</sup> See e.g. Article 19 (2) European Convention on extradition, *supra*, which allows for conditional extradition (i.e. extradition on the condition that a person who is serving a sentence in the requested State is returned there). According to Article 18 (3) of the Benelux Treaty, *supra* the time spent in detention in the territory of the requesting State must be deducted from the sentence to be served in the requested State.

provided that this is done before the competent judicial authorities and in such a way as to show that the person has given it voluntarily and in full awareness of the consequences.

Despite their sincere effort to improve the extradition procedures among the EU Member States, the 1995 and 1996 Conventions entered into force between only some Member States and after a slow process of ratification<sup>74 75</sup>. This proved that the attempt to transfer them from the Council of Europe system into the framework of the EU was doomed to fail without a common project that could serve as basis for a better functioning of inter-State cooperation in criminal matters. This common basis needed a political input as well as some form of legitimacy that were missing at that time. The European Parliament was well aware of this: in a Resolution drawn up in relation to the 1996 Convention it recognised that the traditional system of extradition should be abandoned:

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<sup>74</sup> [http://ec.europa.eu/justice\\_home/doc\\_centre/criminal/extradition/doc\\_criminal\\_extradition\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/criminal/extradition/doc_criminal_extradition_en.htm).

The 1996 Convention entered into force between 12 Member States on 29 June 2005. As of 18 August 2005, the 1995 Convention was also applied by only 12 of them. Although replaced by the Council Framework Decision on the EAW since 1 January 2004 (see *infra*, chapter 3), they can be utilised whenever the latter is not applicable. Most of those States that have ratified the Convention have also entered reservations. Council Decision 2003/169/JHA of 27 February 2003 established which provisions of the two Conventions constitute developments of the Schengen *acquis* in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen *acquis* (OJ L 67 12 /03/2003). This clarifies the relationship between the two Conventions on the one hand and on the other, first of all, the Schengen agreement (see *supra*, note 67) and, secondly, the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis* (OJ L 176 10/07/1999).

<sup>75</sup> ECJ C-296/08 PPU *Ignacio Pedro Santesteban Goicoechea* 12 August 2008 dealt with the case of a Spanish citizen, living in France, who was sought from Spanish authorities for acts committed in Spain. One of the requests was based on the 1996 Convention. This Convention is included by Article 31 (1) of the Framework Decision on the EAW in the list of international instruments that have been replaced by the EAW as of 1 January 2004 (i.e. the date by which all States should have enacted the corresponding legislation), although under par. 2 of the same Article Member States can continue to apply bilateral or multilateral agreements or arrangements, as long as these permit to extend or enlarge the objectives of the Framework Decision and they are notified to the Council and Commission. Under this provision, the Spanish request could not be acceded to, as Spain had not notified the Convention. However, the ECJ held that, because the acts were committed in 1992, Article 32 of the Framework Decision would apply instead, because France had made a declaration specifying that, concerning acts committed before 1 November 1993, it would continue to rely on the extradition system applicable before 1 January 2004. Article 32 therefore allows an executing State to apply the 1996 Convention even when this has entered into force in this State after 1 January 2004. Concluding, while Article 31 regulates the relationship between the Framework Decision and existing extradition agreements, Article 32 deals with cases where the EAW regime does not apply.



(...) the system of extradition seems to have less and less justification and *raison d'être* within a Union of States governed by the rule of law and equally respectful of human rights(...), in which internal borders seem to be gradually losing their significance and whereas this system should ultimately be abandoned in favour of an automatic extradition procedure or the simple handing over of the person sought, subject to respect for fundamental rights and the judicial nature of the procedure(...)<sup>76</sup>

In the same Resolution the Parliament regretted that the Convention had been concluded by the Presidency of the Council without any prior consultation or information, which was in contrast with what is required by Article K 6 of the Treaty on European Union (TEU)<sup>77</sup>. It also regretted that, unlike what had been established by the new Article K 7 TEU, as introduced by the Amsterdam Treaty<sup>78</sup>, the Convention did not provide for any form of control by the European Court of Justice (ECJ). In the light of these evident flaws and of the evolution of the cooperation mechanisms in the EU, it is now all the more significant what the Parliament called for in paragraph 19 of the Resolution: namely, the creation of an “area of freedom, security and justice” with a view to the elimination of the disparities between legal systems in the Member States. The next section will attempt to briefly describe the steps that have been taken in that direction and will also offer an analysis of the future challenges.

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<sup>76</sup> European Parliament Resolution on the Convention drawn up on the basis of Article K 3 of the Treaty on European Union, relating to extradition between the Member States of the European Union (C4-0640/96).

<sup>77</sup> Treaty of Maastricht, original version, OJ C 191, 29/07/1992.

<sup>78</sup> Treaty amending the Treaty on European Union and the Treaty Establishing the European Community, Amsterdam, OJ C 340, 2/10/1997. As will be seen later in this chapter, the Court of Justice had under this provision (which corresponds to current Article 35 TEU) a role of supervision over the Conventions.

### 1.3 The evolution of European cooperation in criminal matters until the Maastricht Treaty

In order to understand the historical background behind the adoption of the EAW, it is necessary to give a brief overview of the gradual development in Europe of a unique framework of cooperation in criminal matters. Two phases can be distinguished: from the beginning to the Maastricht Treaty (current section) and from the Maastricht Treaty to the Lisbon Treaty (next section).

Concerning the first phase, it is essential to understand what is meant by justice and home affairs (JHA). The area of JHA is traditionally probably the most sensitive area of State's sovereignty. It covers such disparate policies as customs cooperation, external boundaries, immigration, visas, asylum and treatment of refugees, cooperation in civil matters and in criminal matters. This list gives an idea of what issues may emerge when it comes to implementing measures and how deeply they can be entrenched in the culture and in the identity of a State. Despite this, the Member States of the European Community felt almost since the beginning the need to strike agreements and set up mechanisms of cooperation, as these were perceived as the most effective tool to face the enormous challenges deriving from the new globalised world.

European States started cooperating in these fields through Conventions, Resolutions or Recommendations as early as the '60s (in the case of judicial cooperation in civil matters<sup>79</sup> or customs cooperation<sup>80</sup>) and the '70s (as regards police and judicial cooperation in criminal matters). As far as the latter is concerned<sup>81</sup>, cooperation took

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<sup>79</sup> Brussels Convention on the jurisdiction and enforcement of judgments in civil and commercial matters, OJ C 27 26/01/1998 (consolidated version). The original Convention was agreed in 1968. Other Conventions followed in the fields of asylum and conflict of law. On the evolution of JHA see S. Peers, *EU Justice and Home Affairs Law* (2<sup>nd</sup> ed. OUP 2006) 4.

<sup>80</sup> In 1968 the Customs Union was achieved in the European Economic Community.

<sup>81</sup> For an overview of the development of EU cooperation in criminal matters, see S. Douglas-Scott, 'The rule of law in the European Union-putting the security into the "area of freedom, security and justice"' (2004) 29 *European Law Review*; P.J. Kuijper, 'The evolution of the Third Pillar from Maastricht to the European Constitution: Institutional aspects' (2004) 41 *Common Market Law*

place also through informal committees that flourished outside the framework of the European Communities: the most important was the Trevi Group, created in Rome in 1975 (based on a Dutch proposal) after a special meeting of the European ministers of justice and home affairs. The committee was initially supposed to develop cooperation in the fight against terrorism and later against organised crime, and was of a purely intergovernmental nature<sup>82</sup>. The fundamental flaw of these informal mechanisms was that they did not have stable structures and sufficient resources to deal with the increasing phenomenon of cross-border crime. No clear strategy had been conceived and no legal basis within the EC framework had been established. Two years later the idea of setting up a “European judicial space” was put forward by the French President Giscard d’Estaing. He had in mind a system of judicial cooperation in which a new type of extradition should take place. The new extradition would be different from the old one, provided for by the Council of Europe Convention, as it would operate independently of the nature of the crime, with a minimum penalty threshold of five years and a judicial control over whether the crime has been materially committed. This “*convention d’extradition automatique*” would therefore apply not only to terrorism but to all particularly serious offences<sup>83</sup>.

Interestingly, the broad areas of internal market, judicial cooperation in civil matters and police and judicial cooperation in criminal matters developed almost simultaneously, albeit at a different pace. In 1986, the Single European Act<sup>84</sup> formally introduced the objective of the internal market. This implied abolition of the controls at the internal borders of the Member States and therefore the need to enhance measures aimed at reducing the flow of illegal migrants and the increase in criminality. This is why, in the same period, the Schengen Agreement on the gradual

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Review 609; M. Jimeno-Bulnes, ‘European Judicial Cooperation in Criminal Matters’ (2003) 9 *European Law Journal* 614.

<sup>82</sup> M. Anderson *et al.*, *Policing the European Union* (Clarendon Press, Oxford 1995) 53. Four Trevi groups were actually established over the years : Trevi I and II (1975), Trevi III (1985) and Trevi ’92 (1988). See J. Peek, ‘International Police Cooperation within Justified Political and Juridical Frameworks : Five Theses on Trevi’ in J. Monar, R. Morgan (eds.), *The Third Pillar of the European Union : cooperation in the fields of justice and home affairs* (EIP Brussels 1995) 85.

<sup>83</sup> Conseil Européen, Proposition de M. Valéry Giscard d’Estaing concernant l’espace judiciaire européen, Bruxelles, 5/12/1977, and Conférence de presse du président Giscard d’Estaing à l’issue du Conseil , available at <http://www.diplomatie.gouv.fr>.

<sup>84</sup> Single European Act, OJ L 169 29/06/1987

abolition of checks at common borders was concluded (1985), followed by the implementing Convention (1990)<sup>85</sup>. As far as cooperation in criminal matters is concerned, the Convention provided for common rules on transborder surveillance, hot pursuit, the fight against drug trafficking and *ne bis in idem*.

In 1992, after the objective of the internal market had been mostly achieved, the newly born European Union (as it was named by the Maastricht Treaty<sup>86</sup>) set itself a further, very ambitious target: creating an area of justice and home affairs (or, better, developing “close cooperation in justice and home affairs”<sup>87</sup>). The input had been given by the Rhodes European Council, which observed that the development of the internal market, and in particular the free movement of persons, was to be necessarily linked with strengthening inter-governmental cooperation in the fight against terrorism, international crime, drug trafficking and trafficking of all kinds<sup>88</sup>. Following these guidelines, a coordinators’ group on the free movement of persons<sup>89</sup>, composed of representatives of each Member State, met on several occasions between February and June in Brussels and in Palma de Mallorca (Spain). The purpose of those meetings was to replace the informal committees such as Trevi with a structured approach to a range of issues, from immigration, asylum and visa to cooperation in criminal matters, including both law enforcement and judicial aspects. The latter focused, once again, on drug trafficking and terrorism (and other forms of illicit trafficking). As a result, a report to the European Council was elaborated by the coordinators’ group (the Palma Document<sup>90</sup>), which, while acknowledging the existence of diverging views as to what legal and political framework should be adopted, attempted to suggest practical measures and set priorities for the Member States. The report also mentioned, perhaps for the first time, the possibility of harmonising certain provisions regarding judicial cooperation and of approximating

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<sup>85</sup> Schengen Agreement of 14 June 1985, *supra* note 67.

<sup>86</sup> Treaty of Maastricht, OJ C 191 29/07/1992. See also consolidated versions of the Treaty on European Union (TEU) and of the Treaty Establishing the European Community (TEC), OJ C 325 24/12/2002.

<sup>87</sup> Article B Treaty of Maastricht, original version, *supra*.

<sup>88</sup> Rhodes European Council (2-3 December 1988) Presidency Conclusions, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm).

<sup>89</sup> This group was afterwards replaced by the “K4 Committee”, a committee of senior civil servants assisting the Council and created by the Maastricht Treaty.

<sup>90</sup> The report is available at [www.statewatch.org](http://www.statewatch.org).

national laws with a view to achieving an area without internal frontiers. On the other hand, that document was far from having the legal strength necessary to commit Member States to more than wishful thinking.

The implications of this important step were well known, as is demonstrated by the cautious wording of Article F of the 1992 Treaty, which made it clear that it was up to the Union, on one hand, to “respect the national identities of its Member States” and, on the other, to “respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”(1950)<sup>91</sup> as well as those deriving from the constitutional traditions common to the Member States. A specific Pillar, the Third, was to embrace the new policy areas.

This was seen as a first stage towards an “ever closer Union among the peoples of Europe”, in which decisions should be taken as closely as possible to the citizen (Article A). One can easily spot here the classical tension between the federalist ideal and more sceptical views of the EU model of cooperation. It is remarkable that the very wording of Article A could be used as a weapon for a general *critique* of the functioning of the Third Pillar: since it was created, it has been characterised by a high number of decisions taken without consulting or even informing the citizens (as will be better seen later<sup>92</sup>).

The result of the aforementioned tension and of the development described above was that the new Pillar<sup>93</sup> (along with the Second one, which is devoted to Common Foreign and Security Policy, CFSP) had an intergovernmental nature, closer to the mechanisms of decision-making of international law than the First Pillar (i.e. the Community Pillar) is. The main features were: the requirement of unanimity at the Council (which adopts all acts except Conventions, as they are only recommended to Member States for adoption); a weak right of initiative of the Commission (which shared it with the Member States or was in some cases deprived of it); the restricted

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<sup>91</sup> ETS n. 5, Rome, 4 November 1950 and subsequent amendments

<sup>92</sup> See *infra*, Chapter 2.

<sup>93</sup> Articles K to K9 (Title VI) Treaty of Maastricht, original version, *supra*.

role of the European Parliament<sup>94</sup>; the absence of control by national parliaments; a very limited jurisdiction of the Court of Justice<sup>95</sup>; the adoption of binding instruments (joint positions, joint actions, Conventions, common positions)<sup>96</sup> that can be seen more as the result of a “horizontal” relationship between sovereign States, rather than of a “vertical” relationship between the supranational institutions and the national authorities.

Two points need to be stressed: the distribution of “legislative powers” and the type of instruments adopted. Concerning the “legislative powers”, Member States retained their monopoly of initiative in the fields of customs cooperation and judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime (Articles K1 (7-9) and K3). One may wonder whether the latter category of crimes could be connected to those that would later be included in the 1998 Statute of the International Criminal Court, or ICC (genocide, crimes against humanity, war crimes, crime of aggression)<sup>97</sup> or in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993) and the International Criminal Tribunal for Rwanda (ICTR, 1994)<sup>98</sup>. Be that as it may, these crimes were considered to be so important that a common approach should be identified in the newly born European Union, since Member States found themselves unable to cope with them in the most effective way.

Concerning the type of instruments, a few Conventions were adopted, such as the 1995 Convention on the protection of EC financial interests or the 1997 Convention

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<sup>94</sup> The only requirement for the Presidency of the Council and the Commission was that they informed the Parliament regularly about their meetings and consulted it on the principal aspects of their activities. On the other hand, the Parliament could ask questions and make recommendations to the Council and hold an annual debate (Article K 6 Treaty of Maastricht).

<sup>95</sup> Article K(3)(2)(c) Treaty of Maastricht established that provisions could be included in a Convention attributing competence to the ECJ to make an interpretation of them and to decide disputes arising from their application.

<sup>96</sup> Article K 3 Treaty of Maastricht for the first three; Article K 5 for the common positions. Other (non-binding) instruments were Resolutions and Recommendations (already existing beforehand).

<sup>97</sup> Article 5 of the Statute of the International Criminal Court, Rome (17/07/1998) UN Doc. A/CONF. 183/9\*, 37 ILM 999 (1998), amended by UN Doc, PCNICC/1999/INF/3\*.

<sup>98</sup> For the constitutive documents, see UN Doc. S/RES/808 (1993) and UN Doc. S/RES/827 (1993), as well as Annex and S/RES/955 (1994) and subsequent amendments UN Doc. S/RES/1329 (2000) and S/RES/1503 (2003).

on the fight against corruption involving officials of the EC or officials of the Member States of the EU<sup>99</sup>. However, the adoption of these Conventions proved to be a slow and cumbersome exercise, as both unanimity at the Council and ratification by all Member States in accordance with their own constitutional requirements were necessary. On the other hand, some important joint actions were also adopted, for instance on the fight against organised crime<sup>100</sup>.

The existence of this new intergovernmental structure made all informal groups created in the previous years superfluous and they were suppressed.

#### **1.4 Freedom, Security and Justice: the new agenda**

The second phase of evolution of cooperation in criminal matters (as identified in the previous section) is marked by the “freedom, security and justice” motto. This concept is relatively new in the EU. It is the expression of an intense effort to consolidate the rule of law and achieve a political rather than only an economic union. It is not by chance that, in the context of what was once called European Political Cooperation<sup>101</sup>, when the need to promote Western values against the East was particularly felt, the Member States were (already in 1988) “(...) determined to make full use of the provisions of the Single European Act in order to strengthen solidarity among them, coordination on the political and economic aspects of

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<sup>99</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316 27/11/1995; Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 25/6/1997.

<sup>100</sup> Joint Action 97/827/JHA of 5 December 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime, OJ L 344 15/12/1997; Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351 29/12/1998.

<sup>101</sup> The European Political Cooperation (EPC) was created as an informal cooperation structure in the '70s: it was later reformed and became Common Foreign and Security Policy (CFSP) in the Maastricht Treaty.

security, and consistency between the external policies of the European Community and the policies agreed in the framework of the European Political Cooperation”. This was to be put into practice by protecting human rights and fundamental freedoms and the “free circulation of people and ideas”, as well as “the establishment of a secure and stable balance of conventional forces in Europe at a lower level” and “the strengthening of mutual confidence”. This was a long-term (some would say today “global”) political project pursued as an essential feature of the external relations of the EU for the following decade. The traditional geo-political balance of power of the 20<sup>th</sup> century was about to shift radically and new policies were therefore urgently needed. It was an optimistic project. This is why the European Council invited all countries “(...) to embark with the European Community as world partner on an historic effort to leave to the next generation a Continent and a world more *secure*, more *just* and more *free*”(emphasis added)<sup>102</sup>. Only a few years later the Maastricht Treaty (1992)<sup>103</sup> would have set up the Second Pillar for the Common and Foreign Security Policy and the Third Pillar for Justice and Home Affairs.

As a result of the Maastricht Treaty, the EU acquired indeed its first modest competences in criminal matters. Some years earlier however two important instruments had been concluded by the Benelux, France and Germany: the Schengen Agreement (1985) and the Convention implementing the Schengen Agreement (CISA, 1990), which were in 1997 integrated in the Amsterdam Treaty by means of a Protocol<sup>104</sup>. The Schengen *acquis* provided the participating Member States with mutual assistance tools for national police and judicial authorities.

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<sup>102</sup> For all this, see the Rhodes Declaration on the International Role of the European Community, attached to the Rhodes European Council, Conclusions of the Presidency, *supra*.

<sup>103</sup> Treaty of Maastricht, OJ C 191 29/07/1992. See also consolidated versions of the Treaty on European Union (TEU) and of the Treaty Establishing the European Community (TEC), OJ C 325 24/12/2002.

<sup>104</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; Convention implementing the Schengen Agreement, OJ L 239 22/09/2000; Treaty of Amsterdam, OJ C 340 10/11/1997. Benelux, Germany and France were the first countries in 1985, but more countries (including the new Member States) joined thereafter. On this, see e.g. J. Monar- ‘The Impact of Schengen and Home Affairs in the European Union: An Assessment on the Threshold to its Incorporation’ in M. Den Boer (ed.) *Schengen Still Going Strong: Evaluation and Update* (EIPA Maastricht 2000) 21; M. Den Boer (ed.) *The implementation of Schengen, Maastricht* (EIPA Maastricht 1997).



In the period between Maastricht and Amsterdam, a great number of criminal law instruments were approved, but due to the absence of a coherent European criminal policy and rather weak Third Pillar instruments, the qualitative outcome was rather modest<sup>105</sup>. Nevertheless, some clear signs were given that the European Union was heading towards more integrated judicial cooperation instead of a purely political inter-state cooperation.

The Amsterdam Treaty's<sup>106</sup> goal of creating an Area of Freedom, Security and Justice resulted in the sharpening of judicial cooperation tools and in general a strengthening of the competences of the European institutions in criminal justice cooperation. More powerful Third Pillar legal instruments were created, in particular the Framework Decisions, which, together with the Decisions, were to be legally binding.

The entry into force of the Amsterdam Treaty in 1999 therefore represented a fundamental step in the evolution of the Third Pillar. The creation of an area of "freedom, security and justice"<sup>107</sup> was perhaps even more important than the introduction of the Third Pillar itself. Indeed, from 1999 onwards the structure and functioning of this intergovernmental pillar were no longer a mere auxiliary tool for the achievement of the internal market (with the specific aim of dealing with some of the consequences of the removal of frontiers within the Community). "Freedom, security and justice" became a goal in itself, although its proclamation constantly runs the risk of raising excessively the expectations of the citizens or of hiding a conceptual *vacuum* behind which lay striking contradictions. We shall see later what this involves. Suffice it to say, at the moment, that a large part of the measures

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<sup>105</sup> See e.g. Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests OJ C 316 27/11/1995; Joint Action 96/750/JHA of 17 December 1996 concerning the approximation of the law and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, OJ L 342 31/12/1996.

<sup>106</sup> Treaty amending the Treaty on European Union and the Treaty Establishing the European Community, *supra*.

<sup>107</sup> The Treaty of Amsterdam turned Article B, which listed as objectives of the EU that of developing close cooperation on justice and home affairs (*supra*, note 78), into Article 2, which aims at maintaining and developing "(...) the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border control, asylum, immigration and the preventing and combating of crime".

adopted under the new framework betrayed an inherently repressive nature, with little or no focus on the rights of the victim or of the suspected or condemned person. From a constitutional perspective, the purpose of the Amsterdam Treaty was to improve the decision-making and clarify the objectives of the Third Pillar as well as strengthen the legal effect of the measures adopted within it.

A first major change brought about by the Amsterdam Treaty was the “communautarisation” of a substantial part of the Third Pillar, namely asylum, migration policy, external borders’ control, the status of third country nationals and judicial cooperation in civil matters. These areas were all transferred to the First Pillar (Title IV, Articles 61-69 TEC, entitled “Visas, Asylum, Immigration and other policies related to free movement of persons”)<sup>108</sup>. As a result, on one hand they were placed under the full control of the European Court of Justice; on the other, the adoption of more effective instruments (EC directives and regulations) and decision-making procedures was made possible (although some intergovernmental features were retained)<sup>109</sup>. At the same time, the Schengen *acquis* was incorporated into the framework of the European Union<sup>110</sup>. Concerning, more in particular, what remained of the Third Pillar, Title VI of the TEU (Articles 29-42) was entirely devoted to “Provisions on Police and Judicial Cooperation in Criminal Matters”. The intergovernmental structure was maintained, although it acquired some “Community” elements: more precisely, the Commission gained a right of initiative in this field (together with the Member States, Article 34 TEU) and the competence of the Court of Justice was established, although with some limitations (Article 35)<sup>111</sup>. However, this was not intended to be a rigid structure. Indeed, under the “passerelle” procedure, the whole area could be at any time “communautarised” by the Council, acting upon impulse by the Commission or a Member State according to

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<sup>108</sup> This phenomenon was particularly successful especially in the area of civil cooperation, in which many Third Pillar instruments were translated into Community instruments, such as EC Regulation 44/2001, OJ L 12/1 16/1/2001 (the “Brussels I Regulation”) or EC Regulation 1347/2000 OJ L 160/19 replaced by EC Regulation 2201/2003, OJ L 338/1 23/12/2003 (the “Brussels II Regulation”).

<sup>109</sup> Art. 61-69 TEC.

<sup>110</sup> Protocol incorporating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty of Amsterdam (“the Schengen Protocol”).

<sup>111</sup> On this, see *infra*, Chapter 2.

the mechanism provided for by Article 42 TEU<sup>112</sup>. This left some room for manoeuvre in the event of a global policy change in the European Union: however, when an intense debate started on the possibility of using this tool as an alternative option to compensate for the failed ratification of the Constitutional Treaty, many States were reluctant and plans were dropped<sup>113</sup>. Similarly, the ideas of using “implied powers” under Article 308 TEC or enhanced cooperation as provided for by new Title VII (Articles 43-45), Articles 40-41 TEU and Article 11 TEC were never really put into practice in this area.

While giving considerable impetus towards European integration, the Amsterdam Treaty also included some opt-in/opt-out clauses for Ireland, the UK and Denmark, which decided not to participate in the communitarisation of justice and home affairs and in the incorporation of the Schengen *acquis*<sup>114</sup>. As will be seen later, this differentiation would characterise this area and would even be intensified in the subsequent amending treaties, which highlights the underlying issue of how to strengthen cooperation while at the same time respecting profound cultural and legal/political divergence.

The second major change was the introduction of two new binding instruments, replacing the joint actions: Framework Decisions and Decisions (Article 34)<sup>115</sup>. While the former can be adopted for the purpose of approximation of the laws and regulations of the Member States, the latter pursue any other objective in accordance with the provisions of Title VI. Neither is directly effective, although both are binding: in particular, Framework Decisions, similar to the Directives of the First Pillar, leave to the national authorities the choice of forms and methods. A major

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<sup>112</sup> Under Article 42 TEU “The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements”.

<sup>113</sup> Brussels European Council (15-16 June 2006) Presidency Conclusions, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm).

<sup>114</sup> See Protocol on the position of UK and Ireland and on the position of Denmark annexed to the Treaty of Amsterdam.

<sup>115</sup> “Article 36 Committee” replaced the “Article K 4 Committee” in the task of contributing to the preparation of the Council’s discussions in the areas referred to in Article 29 TEU, including *inter alia* cooperation in criminal matters and substantive criminal law.

difference between these instruments and the old joint actions is that the former are directed at the same time to national Governments and parliaments. The other instruments provided for by Article 34 are common positions (defining the approach of the Union to a particular matter) and conventions. The need for common action is stressed by Article 31, *inter alia* in order to facilitate extradition between Member States, ensure compatibility in rules applicable in the Member States (as may be necessary to improve their cooperation) and progressively adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. This provision laid down the basis for the approximation of criminal laws.

A third major amendment produced by the Amsterdam Treaty in the Third Pillar was the strengthening of the role of the Court of Justice. Article 35 enabled the ECJ to give preliminary rulings on the validity and interpretation of Framework Decisions and Decisions, on the interpretation of conventions and on the validity and interpretation of the measures implementing them. However, the jurisdiction of the ECJ was made dependent on a declaration by the Member States, specifying whether they accept the Court's jurisdiction and whether the request for a preliminary ruling can be sent by any court or tribunal or only a court or tribunal of last instance<sup>116</sup>. While the aforementioned provision recalled the classical Article 234 TEC remedy that has been frequently used in the context of the First Pillar, paragraph 6 of the same Article introduced a mechanism similar to the action for annulment (or judicial review) under Article 230 TEC. More precisely, the ECJ was given the power to review the legality of Framework Decisions and Decisions whenever a Member State or the Commission brings an action on three grounds: lack of competence; infringement of an essential procedural requirement, of a Treaty provision or of any other rule of law relating to its application; misuse of powers. The right to bring

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<sup>116</sup> Among the pre-2004 Member States, only the UK, Denmark and Ireland have declined the Court's jurisdiction. Concerning the ten new Member States that joined the EU in 2004, only Czech Republic and Hungary have accepted the jurisdiction so far. Among all those that have accepted it, Spain and Hungary allow only final courts or tribunals to make a reference for preliminary ruling. Nine of them have reserved the right to establish in their national law an obligation of the final court or tribunal to bring the matter before the ECJ. See Information concerning the date of entry into force of the Treaty of Amsterdam, OJ C 120/24 1999 and OJ L 114/56 1999; Declaration by the Czech Republic on Article 35 of the EU Treaty, OJ L 236/980 2005 ; and, finally, information on France and Hungary, OJ L 327/19 2005.

annulment proceedings was in any case restricted to these two applicants: this excludes both individuals and other institutions, such as, for instance, the European Parliament (which are entitled to promote this action within the First Pillar). Moreover, the ECJ was also conferred with jurisdiction over disputes between Member States arising from the interpretation or the application of any Third Pillar act as well as controversies between the Member States and the Commission on the interpretation and the application of Conventions. This was conceived of as a residual remedy in cases which failed to be settled by the Council within six months. One significant limitation was left: the ECJ was prevented by Article 35 (5) from reviewing the validity or proportionality of operations carried out by the police or other law enforcement services as well as the exercise of responsibilities by Member States concerning the maintenance of law and order and the safeguarding of internal security. Finally, Article 46 stated that the provisions of the three Treaties (European Community, European Coal and Steel Community and European Atomic Energy Community) relating to the powers of the Court and to their concrete exercise could be extended to Title VI, subject to the conditions laid down in Article 35.

The Amsterdam Treaty was signed and ratified in a period of intense reform for the Third Pillar (as well as for the EU in general). On 1 July, 1999 Europol began its activity<sup>117</sup>, although since 1993 a Europol Drugs Unit had already been in existence. Articles 3 and 5 of the Europol Convention list all the activities of this body, such as exchange of information (which involves data collection as well<sup>118</sup>), crime analysis and facilitating coordination of investigations. They do not include arresting suspects or carrying out autonomous investigations. Europol's mandate has also been extended to all forms of international crime indicated in the Annex to the Convention<sup>119</sup>. These include *inter alia* drug trafficking and trafficking in human

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<sup>117</sup> Council Act drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316 27/11/1995. The Convention entered into force in 1998. However, see also, recently, Proposal for a Council Decision establishing the European Police Office, Brussels, 20/12/2006, COM (2006) 817 final.

<sup>118</sup> Article 10 of the Europol Convention provides for a wide range of options and has been criticised for the dangers that this can bring about. See e.g. S. Douglas-Scott- 'The rule of law in the European Union-putting the security into the "area of freedom, security and justice"' (2004) 29 *European Law Review* 219.

<sup>119</sup> Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, C 362 18/12/2001.

beings, terrorism, money laundering and fraud against the EU. Soon after the 9/11 attack, a cooperation agreement was signed between Europol and the US and a second one on the exchange of information followed in 2002<sup>120</sup>. The latter in particular was strongly criticised as yet another example of lack of effective supervision over the activities of this body<sup>121</sup>. These considerations are worth mentioning, also in the light of what has been said in relation to the lack of judicial review of police activities by the ECJ.

Later in the same year as the launch of Europol, the Heads of State gathered in Tampere and agreed new policies in this area, which would be further developed in the following years (especially with regard to the principle of mutual recognition)<sup>122</sup>. Among other innovations, the Tampere European Council (point 46) also suggested the creation of Eurojust, which would be charged with the task of supporting national judges and prosecutors as far as cross-border crimes are concerned. One year before, the European Judicial Network had been set up<sup>123</sup> as a network of “contact points” situated in all Member States. The purpose was to enable national authorities to inform each other on investigations carried out in one or more countries and, as a result, coordinate their activities. However, Eurojust itself started functioning only after 9/11, following the adoption of a Council Decision<sup>124</sup>. A parallel development in the First Pillar (once again in 1999) was the creation of OLAF, whose main tasks were the fight against fraud, corruption and any other illegal activity adversely

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<sup>120</sup> Agreement between the USA and Europol, 6 December 2001; Supplemental Agreement between Europol and the USA on the Exchange of Personal Data and Related Information, Doc. 13689/02 Europol 82 and 13689/02 Europol ADD 1, both available at <http://www.europol.europa.eu/>.

<sup>121</sup> Statewatch, February 2002, The Activities and Development of Europol- Towards an Unaccountable FBI in Europe and, more recently, Statewatch, Europol: the Final Step in the Creation of and Investigative and Operational European Police Force, January 2007, at <http://www.statewatch.org/>.

<sup>122</sup> Tampere European Council (15-16 October 1999) Presidency Conclusions, available at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm). See Chapter 2, *infra*.

<sup>123</sup> Joint Action 98/428/JHA adopted by the Council on the basis of Article K 3 of the Treaty on European Union, on the creation of a European Judicial Network, OJ L 191 07/07/1998. See now Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, OJ L 348 24/12/2008.

<sup>124</sup> Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 6/03/2002; Eurojust Rules of Procedure, OJ C 286/1 22/11/2002. Previously, a provisional unit had been created. See Council Decision 2000/799/JHA setting up a Provisional Judicial Cooperation Unit, OJ L 324 21/12/2000. See now Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, Doc. 5347/09, Brussels, 20 January 2009.

affecting the Community's financial interests<sup>125</sup>. As the Eurojust Decision pointed out in its preamble, the objectives of Eurojust are the same as those indicated in the EC Regulation concerning the investigations carried out by OLAF (although the same Preamble carefully prevents OLAF from having access to the information collected by Eurojust in its activities)<sup>126</sup>. Interestingly, it was felt that in order to contrast serious crimes directly affecting the economic core values of the EU, the supranational, rather than the intergovernmental structure would be more appropriate.

We shall look in chapter six more in detail at the structure and functioning of Eurojust<sup>127</sup>. What should be borne in mind at the moment is that, while this body (composed of a prosecutor, a judge or police officer of equivalent competence from each Member State) can neither investigate nor prosecute autonomously, it has legal personality and its range of competences is wider than the one Europol has<sup>128</sup>. In particular, apart from the crimes that fall within the remit of the latter under Article 2 of the Europol Convention, the list covers computer crime, fraud and corruption and any criminal offence affecting the Community's financial interests, money laundering, environmental crime, participation in a criminal organisation and other offences committed together with those mentioned above (Article 1 of the Eurojust Decision). Moreover, Eurojust may be requested to provide assistance by a national competent authority in investigating and prosecuting crimes not covered by that list. As far as all these crimes are concerned, the main tasks of this body include exchange of information and collection of personal data. The future development of Eurojust (as, perhaps, the European equivalent of the FBI) is strictly related to the

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<sup>125</sup> Commission Decision establishing the European Anti-Fraud Office (OLAF), 1999/352/EC, ECSC, Euratom, OJ L 136/21 31/05/1999.

<sup>126</sup> Council Decision 2002/187/JHA setting up Eurojust, *supra*, Preamble, point 5; Regulation n. 1073/1999 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF) OJ L 136 31/05/1999.

<sup>127</sup> See *infra* chapter 6 p. 209-212.

<sup>128</sup> On the relationship Eurojust-Europol, see e.g. P. Berthelet and C. Chevallier-Govers, 'Quelle relation entre Europol et Eurojust? Rapport d'égalité ou rapport d'autorité?' (2001) *Revue du Marché Commun de l'Union européenne* 450. However, see now Article 85 Lisbon Treaty, Consolidated version of the Treaty on European Union (TEU) and of the Treaty on the functioning of the European Union (TFEU) OJ C 115 09/05/2008.

creation of a European Public Prosecutor, as provided for in the failed European Constitution (Article III-274) and in the Lisbon Treaty (Article 86 TFEU)<sup>129</sup>.

The Treaty of Nice<sup>130</sup> did not introduce any significant innovation, apart from referring to Eurojust and amending the areas of asylum, immigration and cooperation in civil matters. However, since then new impetus came from the Member States and a Draft Constitutional Treaty was adopted by the European Convention in July 2003 and, after discussion at the Intergovernmental Conference (IGC) agreed in June 2004 and finally signed in October 2004<sup>131</sup>. The Constitution intended to radically modify the mechanisms of cooperation in criminal matters. Although the project was not successful due to the negative referenda in France and the Netherlands (2005), most of it has been reproduced in the Lisbon Treaty<sup>132</sup>. First of all, the Pillar structure is to be abolished. This is considered a necessary step in order to reduce frictions and uncertainty over the appropriate legal basis, solve most of the problems relating to the decision-making in the Third Pillar and simplify the complex and often confusing relationship between organs and instruments belonging to different Pillars<sup>133</sup>. However, the merging is not complete: in the area of police and judicial cooperation in criminal matters, the Commission still has to share with the Member States its right of initiative (Article III-264 Constitution and Article 76 TFEU)<sup>134</sup>, unanimity partly applies and the European Parliament is often only given a consultative role. To be sure, the co-decision procedure and qualified majority voting (QMV) are extended

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<sup>129</sup> Treaty amending the TEU and the TEC, OJ 306 17/12/2007. The Treaty was signed on 13 December 2007 after the failed approval of the European Constitution. It needs to be ratified by all 27 Member States before entering into force. Ireland voted 'no' in a referendum held in June 2008. See also Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), *supra*.

<sup>130</sup> Treaty of Nice, OJ C 80 10/03/2001. It was signed on 26 February 2001 and entered into force on 1 February 2003.

<sup>131</sup> Draft Constitutional Treaty, CONV 850/03, July 2003. For the final version, see Treaty Establishing a Constitution for Europe, OJ C 310/1 16/12/2004.

<sup>132</sup> See Lisbon Treaty *supra* note 129.

<sup>133</sup> On these issues, see D. Thym, 'The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe' - *WHI Paper* 12/04; J. Monar, 'Towards a New Framework of Co-operation in EU Justice and Home Affairs? The Results of the European Convention', Contribution to the Conference 'Plenty of News in the East, Poland and the Union's Area of Freedom, Security and Justice' organised by the Centre for International Relations on 17-18 October 2003, Warsaw.

<sup>134</sup> Measures in the areas of judicial and police cooperation in criminal matters and regulations ensuring administrative cooperation in the same areas can be adopted either on a proposal from the Commission or on the initiative of a quarter of the Member States.



to freedom, security and justice, but the exceptions are still numerous as far as “delicate” matters are concerned<sup>135</sup>. A relevant innovation relating to the right of initiative is the enhanced role of the European Council, which can define the strategic guidelines for legislative and operational planning (Article III-258 Constitution and Article 68 TFEU). Second, an important change is the strengthening of the role of the European Parliament and of the national parliaments: for instance, they are enabled to take part in the evaluation process of the activities of Europol and Eurojust and of the national authorities (in general, Articles III-260, III-273 and III-276 Constitution; Articles 70, 71 and 88(2) TFEU). Third, the formal protection of fundamental rights in this field was to be ensured through the incorporation of the Charter of Fundamental Rights<sup>136</sup> in part II of the Constitution. The Charter will now acquire binding value after the entry into force of the Lisbon Treaty, although it will not be part of any Treaty. The general objectives of the area of freedom, security and justice will include respect for fundamental rights and the different legal systems and traditions of the Member States (Article III-257 Constitution; Article 67 (1) TFEU). Also, the EU will be required to accede to the ECHR<sup>137</sup>. Fourth, the jurisdiction of the ECJ is expanded, so that the Court can give preliminary rulings in the context of police and judicial cooperation in criminal matters: however, the limitation envisaged in Article III-377 of the Constitution and Article 35 (5) TEU<sup>138</sup> has been retained by the Lisbon Treaty (Article 276). Fifth, as already seen both the Constitution and the Lisbon Treaty make it possible to establish the office of the European Public Prosecutor: its jurisdiction will however only encompass crimes affecting the EU financial interests, although the European Council (acting unanimously) may extend its powers to include serious cross-border crimes. Sixth, Europol’s remit will be able to embrace all serious cross-border crimes and its tasks will include not only

<sup>135</sup> Unanimity and mere consent of Parliament apply whenever the Council intends to extend the EU competence in substantive and procedural criminal law (Articles III-271 (1) and 270(2)(d) European Constitution; 83 (1) and 82 (2) (d) TFEU) or lay down rules relating to the carrying out of operations by the competent authorities of one Member State in the territory of another Member State following agreement with the latter’s authorities (Articles III-275(3) and III-277 European Constitution; 87 (3) and 89 TFEU). The same is required for the establishment of a European Public Prosecutor (Article III-274(1) European Constitution; 86 TFEU) and, outside the area of cooperation in criminal matters, for family law (Article III-269(3) European Constitution and 81 (3) TFEU).

<sup>136</sup> Charter of Fundamental Rights of the European Union, OJ 364/1, 18/12/2001. It does not have binding legal value at the moment.

<sup>137</sup> Protocol n. 8, Lisbon Treaty *supra*.

<sup>138</sup> See *supra* p. 29.

collecting, storing, analysing and exchanging data, but also coordinating, organising and implementing joint actions of national authorities. This succinct account of the constitutional structure of the Third Pillar will serve as basis for our discussion of the main challenges facing the implementation of the EAW. In relation to this, the following chapter will deal with the innovations introduced in the more specific context of mutual recognition of judicial decisions.

## 1.5 First preliminary conclusions

This chapter has described the origins and main features of the new inter-State system in the post-Amsterdam era. The EAW operates in this cooperative framework, in which extradition and mutual assistance play a pivotal role. However, as anticipated in a previous section<sup>139</sup>, the area of freedom, security and justice, despite its undeniably innovative nature, hides a few tensions which can potentially undermine the objectives that it purports to achieve. A detailed account of the numerous concerns stemming from such considerations lies outside the scope of this work. Nevertheless, a general overview will be attempted, in order to provide in general terms a background for the analysis of the features and the functioning of the EAW in the European Union. The tensions which we have referred to above concern, first of all, the very notion of freedom, security and justice. Secondly, they relate to the need to promote trust. Thirdly, they involve the complex issue of legitimacy (which is itself deeply connected to the developing structure of the European Union). Finally, and in relation to this last aspect, it is not possible to leave aside the relationship and the distinction between the First and the Third Pillar, which are supposed to collapse should the Lisbon Treaty enter into force.

The first tension line is represented by the notion of freedom, security and justice. To be sure, these concepts are in themselves not very innovative, as they are the outcome of a thousand-year reflection (and practice) in the political and legal sphere.

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<sup>139</sup> See *supra*, section 1.3, p. 29.

What is really innovative is their development outside the traditional structure of the sovereign State, through a process of gradual shift that benefits the Community institutions at the expenses of the single Member States. The question is therefore if ‘justice’, for instance, is elaborated and effectively operates in the same “strong” meaning as when it is ensured by State authorities. If this were the case, then it would be necessary to justify and define the contours of its source or sources. Can measures adopted by the Council or the Commission be considered ‘just’ in terms of e.g. equal treatment, correct procedures, respect of minorities? Can these organs be considered a democratically justifiable source of law? Following this reasoning, can the Court of Justice decide in a ‘just’ manner and would it be legally possible to create a “criminal chamber” dealing exclusively with criminal law cases? One can also wonder whether ‘freedom’ is really being pursued, given the very limited number of measures adopted for the protection of individual rights, such as fair trial, questioning of suspects, treatment of personal information, etc. On the other hand, ‘security’ measures seem to have been high on the agenda of EU institutions and Member States. The notion of ‘security’ often tends to be ambiguous. It can be viewed either in negative terms (as a means to justify the adoption of excessively repressive measures) or in positive terms (as an individual and/or collective right). Some commentators have suggested an alternative positive view, arguing that “(...)the good of security is not to be found (...) in a situation in which ‘security’ is ‘shallow’ and ‘wide’- a precarious, routinely fretted-over effect of the supply and presence of (ever-)increasing numbers of policing and crime-control measures. Nor is the good of security to be found in a situation where it is ‘deep’ and ‘wide’ – where it is reified as the overweening end rather than the modest beginning of social policy. (...)The pursuit of security, in other words, is best thought of as ‘deep’ and ‘narrow’ (...)understood and configured not as a form of perpetual *striving*, but as a state of well *being*- a state in which we are able to live – and live together- securely with risk”<sup>140</sup>. Unfortunately, the trend of EU criminal policy so far has been towards the ‘shallow’ and ‘wide’ meaning of security, with the creation of Europol and Eurojust, the adoption of fast-track cooperation mechanisms as well as the publication of statistics, surveys and Eurobarometers pointing out the need to fight

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<sup>140</sup> I. Loader, N. Walker, *Civilising Security* (Cambridge University Press 2007) 168-169.

terrorism and drug trafficking as these are being perceived as pressing needs by public opinion. Little or no time at all has been devoted to setting up and agreeing on standards of protection of the rights of the defence, and when an attempt has been made, this has miserably failed, due to the reluctance of some Member States<sup>141</sup>. It is, of course, primarily a matter of sovereignty. This leads us to a specific area which has grown at a very fast pace in the last years: mutual recognition. This principle deserves a more detailed analysis and this will be done in the following chapter.

A second issue that needs to be stressed here is trust. The creation of a new structure of cooperation in criminal matters can only succeed if this prerequisite exists. This must be promoted both at the institutional/governmental level and at the operational level, among practitioners and organs of cooperation. It has been observed that trust is strictly connected to security and is different from confidence: it “(...)is instead viewed as that in which we must invest when we do not – or do not yet - have confidence in the workings of institutions or the behaviour of other agents. In other words, while confidence is an accomplished state upon which we can more or less passively rely; trust is an active way of building confidence or otherwise dealing with the absence of confident expectations”<sup>142</sup>. The main purpose of the following chapters is exactly to verify whether *mutual* trust (rather than simply confidence) really exists in the European Union and, if so, to what extent one may claim that it effectively operates. The implementation of the EAW may prove to be in this sense a very useful template for an enquiry into the concrete possibility of creating a European criminal law<sup>143</sup>.

The third delicate issue that must be considered is legitimacy. If a European criminal law area is to be developed, then this can only occur if the actors involved in this process can claim some sort of legitimacy. As will be better seen in the following chapters, this is surely not the case nowadays, since cooperation in criminal matters

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<sup>141</sup> Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28/04/2004, COM (2004) 328 final.

<sup>142</sup> N. Walker, ‘The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis’ in M. Anderson, J. Apap (eds.), *Police and justice cooperation and the new European borders* (Kluwer Law International, The Hague 2002) 22.

<sup>143</sup> An attempt to elaborate a notion of mutual trust in the area of judicial cooperation in criminal matters is made in chapter 5 p.190.

still falls within the scope of the Third Pillar, which is irremediably flawed from this point of view. The conclusion might be different if the constitutional structure of the European Union is amended by the Lisbon Treaty. Last but not least, closely connected to what has just been mentioned is the fourth issue, i.e. the way the First and the Third Pillar interact with each other. There has been a trend towards blurring the distinction between these Pillars, outside the classic dichotomy between intergovernmentalism and supranationalism<sup>144</sup>, but this has not prevented (rather, it has increased) confusion as to the legal basis of the measures to be applied and conflicts between the Commission and the Council<sup>145</sup>. The question in this context is what will be the position of the Framework Decision on the EAW if the new Treaty enters into force. A Directive would presumably have to be adopted and this could go some way towards reducing the concerns relating to the “democratic deficit” of the Third Pillar (although most of the problems highlighted in this work will remain).

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<sup>144</sup> F. Snyder, ‘Institutional Development in the European Union: Some Implications of the Third Pillar’ in J. Monar, R. Morgan (eds.), *The Third Pillar of the European Union: cooperation in the fields of justice and home affairs* (European Interuniversity Press, Brussels 1995) 85.

<sup>145</sup> ECJ C-440/05, *Commission v. Council* (Ship Source Pollution case) [2007] ECR I-9097; ECJ C-176/03, *Commission v. Council* (Environmental Pollution case) [2005] ECR I-7879.

## 2. The principle of mutual recognition in criminal matters: evolution and main features

### Introduction

This chapter aims at analysing the principle of mutual recognition, giving an overview of its evolution in recent years until its incorporation in the Lisbon Treaty, signed on 13 December 2007. The analysis will be done in the context of European cooperation in criminal matters and the project of a European criminal law. Is this project feasible and was it clearly conceived from the beginning? First, an account of the mutual recognition measures adopted so far will be given, considering their level of implementation and their effectiveness (section 2.1.). Second, mutual recognition will be examined both within the structure of the current Third Pillar, in relation to harmonisation, and within the more general debate on the development of EU law and international law (section 2.2 and 2.3). Finally, a general conclusion will be drawn on the essence of this principle and on its relevance for the process of European integration (section 2.4).

### 2.1 The current mutual recognition agenda

As mentioned in the previous chapter, the beginning of the post-Amsterdam era was marked by two strands of development in inter-State cooperation. The first was the 2000 Convention on Mutual Legal Assistance, which substantially enhanced the role of the national judge by stressing the importance of direct contact between judges. The Convention also introduced joint investigation teams.<sup>1</sup> Furthermore, the *forum regit actum* principle, enshrined in this Convention, enabled the requesting Member

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<sup>1</sup> Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197 12/07/2000, Protocol, OJ C 326 16/10/2001 and Explanatory Report, OJ C 379 30/11/2000. It has been ratified by 23 Member States so far (it entered into force on 23 August 2005).

State to specify to the requested Member State how the gathering of evidence should be carried out in order to be valid in the requesting Member State<sup>2</sup>.

The second strand was mutual recognition, i.e. the principle whereby a decision by the judicial authority of a Member State is recognised and, if necessary, enforced in another Member State. This section will focus on the latter development and will give an overview of the current state of affairs.

Indeed, all the legislative measures adopted so far have taken the form of a Framework Decision, which is the main instrument within the Third Pillar.<sup>3</sup> The first instrument of mutual recognition to be created (in 2002) was the European Arrest Warrant,<sup>4</sup> which is applicable both to final judgments and the pre-trial phase. Other instruments within the Mutual Recognition Programme followed afterwards. They can all be grouped according to the phase of criminal proceedings to which they apply. The execution of orders freezing property or evidence, confiscation orders, non-custodial pre-trial supervision measures and the European Evidence Warrant<sup>5</sup> all belong to the pre-trial phase. A proposal for a Framework Decision on taking account of previous convictions in the course of new criminal proceedings is also on the table<sup>6</sup>. Finally, mutual recognition also applies to judgements imposing custodial

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<sup>2</sup> E. Denza- 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) 40 *Common Market Law Review* 1047.

<sup>3</sup> The reasons why this instrument was chosen and its many flaws cannot be analysed here. See for instance A. Klip and H. van der Wilt (eds.)- *Harmonisation and harmonising measures in criminal law* (Royal Netherlands Academy of Arts and Sciences Amsterdam 2002).

<sup>4</sup> Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States, OJ L 190 18/07/2002.

<sup>5</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence OJ L 196 02/08/2003; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property concerning minimum harmonisation of confiscation procedures in Member States, OJ L 68 15/03/2005; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 328 24/11/2006; Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, Brussels, 13 December 2007 Doc. 16494/07 COPEN 181; Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 30/12/2008.

<sup>6</sup> Draft Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, Brussels, 11 June 2008 Doc. 9960/08 COPEN 103.

sentences or measures involving deprivation of liberty for the purpose of their enforcement in their European Union<sup>7</sup>.

The first of the instruments mentioned above aims at securing evidence, which can then be used by the issuing Member State; it can also be issued for the purpose of confiscation, which is dealt with by another Framework Decision. Recognition of freezing orders must occur without formality and the execution must be 'immediate'. In any case, the judicial authority of the executing State must observe the formalities and procedures indicated by the competent judicial authority of the issuing State.<sup>8</sup> The non-custodial pre-trial supervision measures can be applied to persons in their country of origin. More specifically, the European supervision order is a decision issued by a judicial authority in one Member State that must be recognised by a competent authority in another Member State. The purpose is to guarantee the suspect a pre-trial supervision measure in his or her natural environment (i.e. his or her residence). The European Evidence Warrant can be issued, as mentioned in the previous section, for the purpose of obtaining objects, documents and data for use in criminal proceedings. The double criminality requirement is lifted for a list of thirty-two crimes, just as in the case of the European Arrest Warrant, although Germany may reserve its right to maintain it for some offences<sup>9</sup>.

Concerning final judgments, one of the main instruments is the Framework Decision on the mutual recognition of financial penalties.<sup>10</sup> It applies to final decisions requiring a financial penalty to be paid following a criminal offence. Here again we may observe that decisions must be recognised without formality and immediately executed. Interestingly, the list of offences for which double criminality is excluded

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<sup>7</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, OJ L 327 5/12/2008.

<sup>8</sup> Art. 5(1) of the Framework Decision.

<sup>9</sup> See *infra*, p.51.

<sup>10</sup> Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties OJ L 76 22/03/2005. The others are the European Arrest Warrant, confiscation orders and the taking account of previous convictions. A proposal on the *ne bis in idem* principle has been dropped. See Initiative of the Hellenic Republic for the adoption of a Framework Decision of the Council on the application of the *ne bis in idem* principle, Council doc. 6356/03 Brussels 13 February 2003.



is broader than in previous Framework Decisions<sup>11</sup>. Another important measure is the Framework Decision on the mutual recognition of judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions<sup>12</sup>. It is interesting to observe some wishful thinking in point 17 of the Preamble, where it is recommended that refusal on grounds of territoriality should occur only in exceptional circumstances after consultation between the competent authorities.

It is possible to note some common points in all these measures: the provision of a certificate to be completed by the issuing State as well as of a standard form, the speeding up of the procedures for recognition and execution of decisions, a limited list of mandatory and optional grounds for refusal. The non-inclusion of the protection of human rights among the specific grounds for refusal has already built up some friction and ambiguities which are likely to continue in the future, perhaps until the European Court of Justice intervenes to clarify the scope of protection to human rights which Member States can offer.<sup>13</sup>

As regards the mutual recognition of judgements imposing custodial sentences or measures restricting individual liberty, it is designed to allow enforcement of a sentence in the executing State instead of the issuing State, whenever this is considered to facilitate the social reintegration of the sentenced person. Contrary to the 1983 Convention on the Transfer of Sentenced Person (and related 1997 Protocol), the recognition of the judgement and the enforcement of the sentence

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<sup>11</sup> See Article 5 Framework Decision on the mutual recognition of financial penalties, *supra*: crimes which do not feature in the EAW Framework Decision include criminal damage, smuggling of goods, infringement of intellectual property rights, threats and acts of violence against persons, including violence during sport events.

<sup>12</sup> Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337 16/12/2008. Point 4 of the Preamble points out that this instrument is presumed to be more effective than the Council of Europe Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (see chapter 1 *supra* p.6-7).

<sup>13</sup> Article 1(3) of the Framework Decision on the EAW for instance specifies that nothing in this instrument has the effect of modifying the obligation to respect fundamental rights and fundamental legal principles under Art. 6 TEU. Recital 12 in the Preamble of the same Framework Decision also pays attention to the protection of human rights. However, the problem is that the former, albeit not listed among the grounds for refusal, might be given the same effect in practice.

delivered in one State is compulsory<sup>14</sup>. However, this may only occur following the consent of the sentenced person given under the law of the issuing State, unless the judgement and related certificate are sent to the State of nationality where he lives or is deported or the State to which he has fled or otherwise returned<sup>15</sup>. Moreover, a relatively high number of grounds for refusal is provided for, including cases where less than six months of the sentence remain to be served or where the sentence contains measures of psychiatric or health care or other restricting measures which cannot be executed in the legal system of the executing State<sup>16</sup>. Finally, it is worth noting that recital 1 of the preamble to the Framework Decision timidly suggests that mutual recognition “(...) *should become* the cornerstone of judicial cooperation”, whereas priority number 9 of the Communication from the Commission to the Council and the European Parliament on The Hague Programme<sup>17</sup> claimed that the principle “(...) *has become* the cornerstone of judicial cooperation”.

To sum up, the main obstacle facing the implementation of the mutual recognition programme at the moment appears to be a growing lack of enthusiasm on the part of certain Member States. Whereas the Framework Decision on the European Arrest Warrant was approved within a relatively short timeframe, the procedure for the approval of all other measures was quite lengthy.

However, even the implementation of the Framework Decision on the EAW has faced obstacles and presents some flaws. Amongst others, we can mention the failure to bring it into force on time and the inclusion of further grounds of refusal, both optional and mandatory, in the Member States’ implementing legislation. Difficulties

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<sup>14</sup> Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 3 (1). For the Convention on the Transfer of Sentenced Persons, see chapter 1 *supra* p. 7.

<sup>15</sup> Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 5(1) and 6. When the person is still in the issuing State, he must be given the opportunity to state his opinion and this opinion must be taken into account. Moreover, the provision not requiring consent when the judgement is sent to the State of nationality where the person lives is not applicable to Poland where the judgement has been issued within five years of the date by which Member States are required to comply with the Framework Decision: see Article 6(5).

<sup>16</sup> Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences *supra* Article 9.

<sup>17</sup> Communication from the Commission to the Council and the European Parliament- The Hague Programme: Ten Priorities for the next five years- COM (2005) 184 final.

were also encountered at the constitutional level in Germany, Poland and Cyprus, whose respective Constitutional Courts stated that surrender is unconstitutional when it involves nationals of their countries<sup>18</sup>. In the same period, the Belgian Constitutional Court referred to the European Court of Justice the preliminary question of the compatibility of the Framework Decision with Article 34(2)(b) TEU as well as Article 6(2) TEU (which states the principles of legality, equality and non-discrimination). The applicant, which had submitted an annulment action of the Belgian legislation enacting the EAW before the Belgian *Cour d'arbitrage*, also argued that international cooperation in criminal matters should be regulated by Convention and not by Framework Decision<sup>19</sup>. The European Court of Justice has nevertheless decided that the Framework Decision does not violate the principles of legality and non-discrimination and that the Council is free to select a Framework Decision rather than a Convention as the most appropriate instrument even outside the scope defined by Art. 31 (1) (e) TEU<sup>20</sup>.

The implementation of the Framework Decision on the freezing of assets and evidence was also difficult. Although the decision should have been implemented in all Member States by August 2005, only a few of them had done it by the end of 2006<sup>21</sup>. Another example is represented by the European Evidence Warrant (EEW), whose text was agreed on 1 June 2006 at the Luxembourg JHA Council, after three years of lengthy negotiations<sup>22</sup>.

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<sup>18</sup> Polish Constitutional Court, Judgment P 1/05 of 27 April 2005; German Constitutional Court BVerfG, 2 BvR 2236/04 of 18 July 2005; Cyprus Constitutional Court Judgment of 7 November 2005. In Germany, a new law was issued in July 2006, taking into account the Court's decision. See *Bundesgesetzblatt Jahrgang 2006 Teil I n.36, 25 Juli 2006*.

<sup>19</sup> See Belgian *Cour d'arbitrage*, Judgment n. 124/2005 of 13 July 2005.

<sup>20</sup> ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, 3 May 2007. See *infra* Chapter 6 p.212.

<sup>21</sup> Council of the European Union General Secretariat, doc. 5937/2/06 REV 2, Brussels, 31 October 2006.

<sup>22</sup> Justice and Home Affairs Council, Luxembourg, 1-2 June 2006, see Council of the European Union Document 10081/06 Presse 168. The negotiations had to face many problems. For instance, the Netherlands pushed for a partial application of the territoriality principle, to allow it to refuse to comply with an EEW relating to offences committed wholly or partly in its territory. Germany has the possibility by means of a declaration to make execution of an EEW conditional on the verification of double criminality for six categories of offences: terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion, swindling. This does not apply when the issuing authority has declared that the offence concerned under its own national law is covered by the criteria defined in the declaration. See now Council Framework Decision 2008/978/JHA on the European evidence warrant, *supra* note 5.

At the same time, the failed approval of the Framework Decision on procedural rights<sup>23</sup> is a warning sign: while, on the one hand, the prosecution and enforcement side of the Third Pillar has been developed considerably in the last years, much more is required to strengthen human rights protection. In addition, the safeguards envisaged by the proposal, even in its original version, were still largely incomplete<sup>24</sup>, as they did not include, for instance, rules on the presumption of innocence, right to bail, double jeopardy or admission of evidence<sup>25</sup>.

More generally, the main flaws of mutual recognition in criminal matters can be identified in: slow negotiation process; decision-making in the third pillar (which has been, *inter alia*, blamed for lack of transparency); lack of rules on conflicts of jurisdiction and *ne bis in idem*; lack of rules on procedural guarantees, presumption of innocence, minimum standards for evidence-gathering; problems in defining the grounds for refusal, the requirement of double criminality and the offences to which the measures should apply. In addition, it seems that the various instruments of mutual recognition present different features in terms, for instance, of dual criminality and grounds for refusal. More coherence would be desirable. These issues are all connected to the question of the competence of the European Community in criminal law. The European Court of Justice, in a conflict of competence between the Council and the Commission over the subject of environmental protection, confirmed

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<sup>23</sup> Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28/04/2004, COM (2004) 328 final. See M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union' in E. Guild, F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate Aldershot 2008).

<sup>24</sup> The original proposal included: right to legal advice, right to free interpretation and translation, right to receive appropriate attention if not able to understand or follow the proceedings, right to communicate, *inter alia*, with foreign authorities in the case of foreign suspects, right to be notified of one's own rights by means of a written "Letter of Rights". Interestingly, during the consultation process preceding the adoption of the Green Paper, many more rights were considered. See M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights' *supra* 174-175.

<sup>25</sup> The right to bail is supposed to be the subject of a future Green Paper. On the presumption of innocence, see European Commission Green Paper: The Presumption of Innocence, Brussels, 26/04/2006, COM (2006) 174 final. On double jeopardy, see European Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, Brussels, 23/12/2005, COM (2005) 696 final. A Green Paper on the handling of evidence and a Proposal on minimum standards relating to the taking of evidence were initially envisaged in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198 12/08/2005.

its view that both substantive and procedural criminal law are not included in the European Community's competence. However, measures may still be taken when the application of effective, proportionate and dissuasive penalties by the competent national authorities is necessary in the fight against serious environmental offences<sup>26</sup>. Since the question is general and touches upon the very nature of the European Union, disputes in other sectors have been emerging recently<sup>27</sup>. Do the powers of the Community extend to the possibility of prescribing penalties and defining the offences and to all other aspects of criminal law or are they limited to the identification of cases in which criminal penalties are necessary in order to provide an effective, proportionate and dissuasive sanction? While leaving aside the issue of competence, the following section will address more in detail the relationship between harmonisation and mutual recognition.

## 2.2 Mutual recognition v. harmonisation

Long before the European Union acquired some initial competence in criminal law areas, many international instruments of criminal law, mainly Conventions, were developed within the Council of Europe. As noted earlier<sup>28</sup>, a few Conventions already included mutual recognition elements: the majority of these instruments have never entered into force, due to the lack of confidence between the countries which were at that time members of the Council of Europe.

Since mutual recognition seems to be viewed by the EU institutions as a principle essential for the development of European Criminal Law, it may be useful to look more carefully at how we can define it in its modern version and identify its main features. To this end, this section will adopt a purely legal viewpoint: it will briefly explore the two concepts of mutual recognition and harmonisation both *per se* and in the light of the Treaty provisions. The following section contains a more conceptual analysis.

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<sup>26</sup> ECJ Case C-176/03, *Commission v. Council* (Environmental Pollution case) [2005] ECR I-7879.

<sup>27</sup> See e.g. Case C-440/05 *Commission v. Council* (Ship source Pollution case) [2007] ECR I-9097.

<sup>28</sup> See *supra* chapter 1, p. 6-8.

Mutual recognition is different from harmonisation. In a first attempt to define the two concepts, we may be tempted to argue that the latter's aim is to eliminate differences and create a homogeneous system possibly with one code and one judicial court, while in the former differences are kept within a system of cooperation and mutual trust. In the first case there is a common normative standard which is agreed by more subjects at the same time, whereas in the second case there are many normative standards that co-exist and every subject can impose its own standard through a request to another subject that is obliged to incorporate it into its system<sup>29</sup>.

However, the above-mentioned attempt is bound to fail if we look at the legal provisions and at the opinions of the experts. Both terms (harmonisation and mutual recognition) seem to be used in different contexts and with different purposes, sometimes with a lack of coherence. Harmonisation is sometimes seen more as approximation of rules<sup>30</sup>, in the sense of bringing different laws of different states closer to each other. Sometimes it only refers to substantive criminal law, some other times to procedural criminal law. Some authors do not consider harmonisation as elimination of differences, but rather as elimination of conflicts between different legal systems<sup>31</sup>. However, it is reasonable to believe that once a common model of law is created, at least some of the disparities need to disappear in order for it to function properly. In order to have a clearer concept of harmonisation, we may therefore distinguish different degrees, from the lowest, i.e. approximation, to the highest, i.e. unification, which is the one we have referred to above.

Mutual recognition applies to both final decisions and decisions taken before them. As far as the former are concerned, the definition of "final decision" has been worked out on the basis of already established texts, as, for instance, the provisions

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<sup>29</sup> On this, see, *inter alia*, I. Bantekas, 'The Principle of Mutual Recognition in EU Criminal Law' (2007) 32 *European Law Review* 365.

<sup>30</sup> A. Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme' (2005) 42 *Common Market Law Review* 1567.

<sup>31</sup> F. M. Tadić- 'How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law' - in A. Klip and H. van der Wilt (eds.)- *supra* 1.

of the 1968 Brussels Convention<sup>32</sup>. A “final decision” is therefore to be considered as an act that resolves a matter with a binding effect and against which no appeal is possible or, if possible, has no suspensive effect. Such a decision may be adopted not only by a court, but also by other organs and it may also be an extra-judicial agreement between the accused person and the prosecution authorities<sup>33</sup>.

As far as the other types of decisions are concerned, they are mostly adopted in the so-called pre-trial phase. They include such investigation measures as questioning suspects or witnesses or other methods of evidence-gathering (e.g. through wire-tapping or monitoring of bank accounts) as well as other measures such as freezing of assets, home detention during the investigation stage (so-called “house arrest”) or non-custodial supervision measures.

Another problem is the distinction between criminal and non-criminal matters, which has for a long time been under debate. Some legislative instruments only consider the substance of the matter and include decisions of a non-criminal nature. This is the option chosen by the 1970 Hague Convention on the International Validity of Foreign Criminal Sentences and the 1991 Convention on the Enforcement of Foreign Criminal Sentences. Indeed, Art. 1(b) and 1(1)(a) respectively of these two Conventions refer to decisions taken by administrative authorities, provided that the right of (fair) trial is granted to the accused person<sup>34</sup>.

Harmonisation and mutual recognition in criminal law matters represent two options that are often seen as alternatives. Those who oppose harmonisation argue that criminal law can only be dealt with properly at the national level, as it is rooted in the culture of a nation. Harmonisation as such leads to a repressive approach, as it involves the application of the same level of punishment to all States, regardless of how each crime is qualified in each legal system. They also believe that the institutional framework of the European Union in the Third Pillar lacks democratic

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<sup>32</sup> Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ C 27 26/1/1998 (consolidated version).

<sup>33</sup> Communication from the Commission to the Council and the European Parliament- Mutual Recognition of Final Decisions in Criminal Matters, Brussels, COM(2000) 495 final.

<sup>34</sup> See *supra* chapter 1 p. 6-8.

legitimacy. In the context of co-operation in criminal matters, therefore, once mutual recognition is established, a system of harmonisation at *all* levels is not the best solution<sup>35</sup>. On the other hand, those who support harmonisation consider it as the most effective instrument to fight against transnational or “globalised” crime (as a single *corpus iuris* would be easier to apply) but they also believe it is able to provide better safeguards for human rights. According to this view, mutual recognition does not allow evaluation of the fairness of a trial, in particular as to the evidence gathered abroad<sup>36</sup>.

If we look at the structure of the Third Pillar, in which some harmonisation and mutual recognition measures have taken place through Framework Decisions, we can easily notice relevant differences to the structure and functioning of the First Pillar. Most of the legislative power is attributed to the Council of the European Union, while the European Parliament only has a limited consultative role: there is therefore nothing comparable to the co-decision procedure in the First Pillar. The Commission shares its right of initiative with the Member States. The European Court of Justice, whose powers have been increased by the Maastricht Treaty, cannot verify the validity and proportionality of police or law enforcement operations and its power to take preliminary decisions depends on the consent of Member States<sup>37</sup> (moreover, there is no infringement procedure). As a result, an executive organ (the Council) has the power to deal with criminal matters through acts (the Framework Decisions) that do not need to be approved by the citizens of a State or ratified by a national

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<sup>35</sup> T. Vander Beken- ‘Freedom, security and justice in the European Union. A plea for alternative views on harmonisation’, in A.Klip, H. van der Wilt (eds.), *supra* 95.

<sup>36</sup> A.Klip- ‘European integration and harmonisation and criminal law’, in D.M. Curtin *et al* (eds.), *European Integration and Law* (Intersentia METRO, Antwerpen-Oxford 2006) 134; J.R.Spencer- ‘Why is the harmonisation of penal law necessary?’, in A.Klip, H. van der Wilt (eds.), *supra* 43. Against mutual recognition is B. Schünemann, ‘Alternative Project for a European Criminal Law and Procedure’, (2007) 18 *Criminal Law Forum* 227, who suggests, as an alternative, the application of the most favoured treatment principle and of the Swiss model. See also A. Weyembergh, *L’harmonisation des législations: condition de l’espace pénal européen et révélateur de ses tensions* (Institut d’études européennes Brussels 2004).

<sup>37</sup> More precisely, Member States can accept the Court’s jurisdiction to give preliminary rulings through a declaration. The power to request preliminary ruling can be attributed either to any national court or tribunal or only to a court or tribunal against whose decisions there is no judicial remedy under national law (Article 35 TEU).



Parliament. These acts are also deprived of direct effect<sup>38</sup>. Finally, the unanimity rule makes the whole decision-making process lengthy and inefficient.

Harmonisation within Title VI of the Treaty of the European Union (TEU) takes place only to a certain degree, for limited areas and to the extent that a more effective inter-State co-operation is encouraged. This principle is clearly stated by the TEU, which in Art. 29 provides that the area of freedom, security and justice shall be achieved, *where necessary*, through approximation of rules on criminal matters, in accordance with Art. 31(e)<sup>39</sup>.

From these provisions we can deduce that in the TEU:

- (a) harmonisation is intended as approximation;
- (b) it refers to substantive criminal law more explicitly than procedural criminal law- in particular, to the fields of organised crime, terrorism and illicit drug trafficking;
- (c) it is aimed at establishing common minimum rules, therefore leaving the Member States free to adapt the remaining rules to their own system.

Approximation in the original spirit of the TEU is therefore an instrument to eliminate all the most relevant disparities in the criminal law of the Member States<sup>40</sup> and therefore render a foreign judicial decision more “recognisable” and easier to accept.

On the other hand, it could be argued that, just as the EC law principle of supremacy<sup>41</sup> represents a challenge to sovereignty along a *vertical* line (relating to the relationship between EC institutions and single Member States), so the principle

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<sup>38</sup> Instead, they have *indirect* effect. See ECJ C-105/03 *Pupino* [2005] ECR I-5285.

<sup>39</sup> Art. 31(e) encourages the Member States to adopt progressively measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organised crime, terrorism and illicit drug trafficking. The legal instrument designed for the approximation of the laws and regulations of the Member States is the Framework Decision as established by Art. 34(2)(b).

<sup>40</sup> F. M. Tadić, ‘How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law’ in A.Klip, H. van der Wilt (eds.), *supra* 1 *et seq.*

<sup>41</sup> ECJ *Costa v. ENEL* Case 6/64 [1964] ECR 585.

of mutual recognition, in civil and, all the more so, in criminal matters is a challenge along a *horizontal* line (relating to the relationship between the States).

Both mutual recognition and approximation acquire a more defined status in the new Lisbon Treaty<sup>42</sup>. The new Treaty empowers the European Parliament and the Council to establish minimum rules relating to the definition of criminal offences and sanctions in the areas of a number of particularly serious cross-border crimes (Article 83 of the Treaty on the Functioning of the European Union (TFEU), replacing Article 31 TEU). The *seriousness* of these crimes, justifying a stricter cooperation between the Member States, is determined through two criteria: the nature and impact of the offences and the need to combat them on a common basis. These criteria seem to be quite broad, just as the list of offences to which the norm applies. This list is indeed made up of *categories* of crime (including not only terrorism and organised crime but also, for instance, trafficking in human beings, money laundering, and computer crime). They are more numerous than in the current TEU and have all been subject to approximating measures<sup>43</sup>.

We can therefore conclude that a means/ends relationship exists between approximation and mutual recognition. The former is conceived as a tool to promote the development of the latter. Their role and functioning are better defined than in the current EU legal landscape and lay the groundwork for an embryonic European criminal law. In particular, it should be welcomed that, for the first time, the principle of mutual recognition acquires a clear legal basis in the Treaty. This development is even more important as far as approximation in procedural criminal

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<sup>42</sup> Treaty amending the TEU and the TEC, OJ 306 17/12/2007. The Treaty was signed on 13 December 2007 after the failed approval of the European Constitution (see Treaty establishing a Constitution for Europe, CIG 87/2/04 Rev 2, Brussels 29 October 2004). It needs to be ratified by all 27 Member States before entering into force. See also Consolidated Versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), OJ C 115 9/05/2008.

<sup>43</sup> See, for instance, Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism or the new Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300 11/11/2008. It is worth noting that approximation will be pursued by way of a new procedure involving the European Parliament and the Council (i.e. the co-decision procedure, renamed “ordinary legislative procedure”) as well as new acts (i.e. directives, rather than framework decisions). However, only the Council may by unanimity extend the list, although the consent of the Parliament is required. Furthermore, the possibility of approximating criminal laws and regulations in other areas is ensured (par. 2 of the same Article).

law is concerned, as provided for by Article 82 TFEU. Minimum rules may be established by the European Parliament and the Council (once again following the ordinary legislative procedure)<sup>44</sup>.

It must be pointed out that what is provided for here is not *full* harmonisation, but a lower degree. This is why Article 82 TFEU carefully requires respect for the differences between the legal traditions and systems of the Member States. Politically, this reflects the choice of the Heads of State to opt for the combination approximation/mutual recognition and create the basis for a “minimum” European criminal law, rather than pursue the radical harmonisation approach<sup>45</sup>.

The question therefore is whether such a system can effectively guarantee a uniform development of the “European judicial space” in any case or whether insoluble contrasts between the criminal policies of some Member States may pave the way for friction and ultimately undermine the project mentioned above. This is not a purely theoretical consideration. Examples may be a disagreement between Sweden and the Netherlands in establishing an adequate level of penalties for drug trafficking or in qualifying possession of illicit drug as an offence (Dutch drug policy being much more permissive than the Swedish one); or failure to reach a compromise as to which evidence should be admitted in court (for instance, which value should be given to the testimony of an accused in a closely connected trial, to what extent the witness should be protected, etc.)<sup>46</sup>. In order to shed some light on the very essence of this system, it is necessary to look at mutual recognition in the broad context of EU and

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<sup>44</sup> These rules will relate to: mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime; any other aspect of criminal procedure (in which case, the Council may act by unanimity vote after the consent of the Parliament).

<sup>45</sup> According to Article 84 TFEU, the European Parliament and the Council may establish measures to promote and support the action of Member States in the field of crime prevention, *excluding* any harmonisation of the laws and regulations of the Member States.

<sup>46</sup> In both types of approximation a “safeguard clause” (“emergency break”) allows any Member State that believes that fundamental aspects of its criminal justice system are affected to request that the draft directive be referred to the European Council. In this case the procedure is suspended until the decision of the European Council and starts again if within four months a consensus is reached. Where consensus is not reached, a mechanism of “enhanced cooperation” is supposed to avoid potential stalemates: such mechanism can only be triggered by at least nine countries (currently a third), which wish to adopt the directive notwithstanding the opposition of one or more other States.

international law and try to assess whether this is really a “journey into the unknown”<sup>47</sup>.

### 2.3 Mutual recognition: rationale and context

Outside the specific area of criminal law, the concept of mutual recognition is relatively old. In Community law, it was first applied in the area of diplomas and professional qualifications and then developed in the internal market law and in the area of recognition of civil and commercial matters<sup>48</sup>. As far as the internal market is concerned, after attempts to establish free trade through harmonisation failed, the European Court of Justice introduced the principle of mutual recognition in the area of free movement of goods in its famous judgment *Cassis de Dijon*<sup>49</sup>. In this judgment the Court held that products lawfully marketed in one Member State could in principle be sold in any other Member State. However, no analogy can be found between the internal market and criminal law, mainly because “criminal law products” are only “a legal fiction that represents no economic value”<sup>50</sup>.

Despite this, there is a risk that this principle, when applied to the criminal law context, is interpreted in the light of a purely economic/functional approach. This postulates an equivalence between “products” and “judicial decisions”, without

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<sup>47</sup> V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.

<sup>48</sup> In civil and commercial matters, it all started with the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention), at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>. See D. Boytha, 'La libre circulation des jugements dans l'espace judiciaire européen en matière civile et commerciale' (2006) *Revue de Droit de l'Union Européenne* 629. Concerning diplomas and professional qualifications, see *inter alia* Council Directive 89/48/EEC of 21 December 1988 (the 'Diplomas Directive'), OJ L19 24/01/1989 and Directive 2005/36/EC of 7 September 2005 on the recognition of professional qualifications OJ L 255 30/09/2005.

<sup>49</sup> ECJ Case 120/78 *Rewe (Cassis de Dijon)* [1979] ECR 649. The approach adopted afterwards, however, was a mixture of mutual recognition and harmonisation. See Commission White Paper 'Completing the Single Market' COM (85) 310.

<sup>50</sup> A.Klip- 'European integration and harmonisation and criminal law' *supra* 133; see also S. Peers- 'Mutual recognition and criminal law in the European Union: has the Council got it wrong?' (2004) 41 *Common Market Law Review* 23.

looking at the legal and cultural background from which the latter derive. The following analysis will attempt to view mutual recognition from an ontological perspective and locate it in the broad context of European integration.

More generally, mutual recognition can be considered in at least four dimensions: a) historically, as a form of cooperation; b) as a conflict rule; c) as a policy option or form of governance; d) as a legal principle.

The historical perspective looks at the development of inter-State cooperation in the last decades of the past century and carries out a critical analysis of the major changes that have occurred<sup>51</sup>. This approach may be useful to identify possible flaws in the process and to understand its legal and political implications, but it does not grasp its essence and fails to distinguish the functional from the ontological aspects.

Another option is to view mutual recognition as a conflict rule, which can be used to establish criteria determining which rule is to apply to a certain case or which competence must be exercised. This perspective focuses on the functional benefits of mutual recognition, as a mechanism that fosters legal certainty and reliability. Nevertheless, it is probably better for the purpose of this work to identify mutual recognition as a form of governance, regulating processes and relationships between different actors: in this sense it can be linked to sovereignty and similarity issues<sup>52</sup>. These two aspects are particularly important in the context of cooperation in criminal matters. They are inseparable and interdependent. It has been observed that one obvious area where this connection emerges is international law and international relations<sup>53</sup>. In this area diplomatic recognition of States can be seen as emblematic of a process which is initially based on binding trust (which raises expectation as to

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<sup>51</sup> This is what has been done in chapter 1 concerning the area of cooperation in criminal matters. See also M.Fichera, 'Mutual Recognition in Criminal Matters from its Creation to the New Developments in the Lisbon Treaty', *UACES Seminar Exchanging Ideas on Europe 2008- Rethinking the European Union*, Edinburgh, 1-3 September 2008, at <http://www.uaces.org/events/conferences/papers/abstract.php?recordID=22>.

<sup>52</sup> In the same sense M.P. Maduro, 'So close and yet so far: the paradoxes of mutual recognition' (2007) 14 *Journal of European Public Policy* 814, who however admits the possibility of mutual recognition even when there is identity and not only similarity.

<sup>53</sup> K. Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 *Journal of European Public Policy* 682.

each other's behaviour) and becomes constitutive and irreversible: such features can be seen as generally applicable to other areas as well<sup>54</sup>. Indeed, concerning the sovereignty link, one could say that State A recognises State B when it accepts State B as an equal sovereign. In criminal law, State A accepts the effects of State B's monopoly on the use of force within its territory, as long as: a) State A is allowed to produce the same effects outside its territory, and b) this does not conflict with its basic values. However, it can be argued that a similar pattern can be traced in more traditional forms of cooperation, such as extradition. What makes mutual recognition distinctive is therefore its link with similarity, which explains why State sovereignty is affected more deeply. I recognise you as my similar. As will be better illustrated later, this also means that when mutual recognition operates, there is always at least one element of diversity. Legal systems are therefore supposed to become porous, malleable. To be sure, there has always been some degree of permeability in inter-State relations. However, in the case of mutual recognition permeability is such that it allows for a higher degree of interaction, in the sense of a more intense reciprocal exchange of rights and obligations. The potential implications of the social, cultural and legal facets of this interaction have not yet been fully acknowledged.

An optimal system of reciprocal exchanges of rights and obligations should also allow for a form of approximation "by default", based on a bottom-top (and not only top-bottom) type of relationship. An informal network of bodies, contact points, agencies should be developed in order to facilitate mutual learning and understanding. This already occurs to some extent in the Third Pillar<sup>55</sup> but more efforts are needed. Such development is only possible where the differentiation between Member States' policies and legal systems is not too high<sup>56</sup>. It can also be said that a sufficient degree of similarity is necessary to draw a line between members and non-members<sup>57</sup>, as only those that are "inside" can be recognised. However, this necessitates a set of core values. Since one of the main principles

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<sup>54</sup> K. Nicolaidis, *ibid.* 693.

<sup>55</sup> See e.g. Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, OJ L 348 24/12/2008.

<sup>56</sup> M.P. Maduro, 'So close and yet so far: the paradoxes of mutual recognition' *supra* 823.

<sup>57</sup> J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (2000 The MIT Press) 203.

laying the foundations of the EU is the protection of human rights, this set of values must be constitutionally defined. We shall see in a later chapter what this involves<sup>58</sup>.

Suffice it to consider here that the system designed in the Third Pillar inevitably impacts on how a particular legal/political community is formed at the national level<sup>59</sup>. One may wonder however what right EU institutions or other Member States have to affect so deeply the structure and functioning of a community. The combination of mutual recognition and approximation could effectively lead, as noted in the previous section, to the imposition of a minimum punishment threshold to at least a few States, regardless of what their particular policy is. There is therefore a problem of legitimacy, which is exacerbated by the concerns relating to the EU democratic deficit. One could imagine two patterns of mutual recognition/approximation: a “coercive pattern” and an “informal pattern”. The first implies the formal establishment of a legal framework within a pre-determined system of cooperation; the second is developed “by default”, through the bottom-top approach mentioned above. In a context in which it is not (yet) possible to locate one single monopoly on the use of force in European Criminal Law, a combination of the two patterns is probably the best option.

Indeed the instruments of mutual recognition adopted so far have undermined the State’s monopoly of the right to adjudicate and punish. Although this has not led to “unregulated competition” (to use a market analogy), there is a growing need for clear rules on the conditions for the exercise of these competing powers and parallel sovereignties. It is not only a question of identifying, for instance, rules on conflicts of jurisdiction. Since, as indicated above, there is a legitimacy issue, one has to look more thoroughly into the essence of mutual recognition.

This is why it is necessary to consider the fourth dimension of mutual recognition, as a (constitutionally embedded) legal principle. The reason is that we need grounds for upholding the cooperation mechanisms. In this regard, it could be argued that mutual recognition cannot be brought to its extreme consequences. What currently happens

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<sup>58</sup> See *infra*, chapter 6.

<sup>59</sup> M.P. Maduro, ‘So close and yet so far: the paradoxes of mutual recognition’ *supra* 819.

is that a given system of values is required to recognise as *equivalent* not merely single acts but the values and fundamental features of another system as a whole.<sup>60</sup> However, because no system of values is identical, we can never have full recognition. If system X were to recognise the whole of system Y, this would mean that they were identical, but in that case there would be no need for recognition, because there would be no difference: we would instead have harmonisation. As a result, mutual recognition can never be absolute, but can only operate under pre-defined conditions that presuppose diversity.

The first three dimensions referred to above (form of cooperation, conflict rule, form of governance) assume that the actors (which are also seen as beneficiaries) are perfectly rational and make choices with a view to achieving a common goal, be it more efficient cooperation, implicit harmonisation etc. However, this assertion cannot be automatically accepted and must be proved: hence the need for a rational justification of their behaviour, which must be found *outside* that behaviour. Furthermore, those three dimensions focus on States, rather than their citizens. This is surprising, given the general trend of international law towards attributing to individuals the quality of “subject”. This is important also because the EU has been recently re-defining its identity as an autonomous legal order in international law, based on the rule of law, protection of human rights and effective judicial review<sup>61</sup>. As opposed to those three dimensions, mutual recognition as a legal principle (which relies on the liberal assumption that there is no best system) is linked to the principle of legality and the rights of the individual *vis-à-vis* State authority, which can provide justification in the area of criminal matters. However, exploring the implications of this principle highlights the main flaws of the current system: this dimension has not developed as it should have.

Let us suppose that one Member State decides to criminalise participation in some environmental groups protesting vehemently against some government measures

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<sup>60</sup> S. Lavenex, ‘Mutual recognition and the monopoly of force: limits of the single market analogy’ (2007) 14 *Journal of European Public Policy* 762, 765.

<sup>61</sup> See e.g. ECJ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (3 September 2008).



(and/or to freeze their assets etc.). The new law is considered compatible with the national constitution in view of the need to protect public order or national security. Since there is no prosecutorial discretion, the competent authorities must issue an EAW for the purposes of prosecution (or a request for assets freezing etc.). Should the executing State accept this request? The Framework Decisions on mutual recognition do not offer any clear and binding guideline in such cases, since all relevant provisions are contained in their Preambles, with the exception of the Framework Decision on the EAW, whose Article 1 (3) mentions the need to respect fundamental rights and fundamental legal principles as established in Article 6 TEU<sup>62</sup>. However, although one can refer to the general principles of the EU, including the principle of proportionality, there is nothing (even in the text of Article 1) that can oblige a Member State's judicial authority to refuse a request in any specific circumstance of breach of individual rights. In the case of an EAW, it is possible to refer to the classic extradition principles and deny surrender in case of a flagrant denial of human rights<sup>63</sup>, but in borderline cases there is no ultimate authority that has the last word. Moreover, there is a risk of "politicising" some delicate issues, which should be taken into account. This potentially leads to differential treatment in the EU as well as accountability concerns: how can EU institutions and national governments justify the implementation of mutual recognition to their citizens?

## 2.4 Conclusion

Concluding, one may wonder whether mutual recognition both as a form of governance and as a legal principle is the way forward for building up the project of a European criminal law. Certainly, cooperation in criminal matters as shaped by new pieces of legislation and case law (not only at the European, but also at the national level), is far from featuring the classic elements of national criminal law, in

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<sup>62</sup> See *infra*, chapter 6.

<sup>63</sup> *Ibid.*

particular sufficient safeguards of individual rights and monopoly on the use of force originating from a single, well-defined source<sup>64</sup>. While this second aspect may be appropriately adapted to the EU entity (whether or not in line with a federalising aim), and is therefore open to derogations and flexible solutions, the first aspect needs to be handled with much more care. One of the main reasons is that a lack of adequate provisions for instance on the rights of the defence risks undermining mutual trust, thus triggering a self-destructive vicious circle.

The consolidation of mutual recognition in its “new” form, while imposing a pure obligation to execute upon the States, still has to cope with problems of definition and a variable number of grounds for refusal, which highlights a limit to smooth cooperation and mutual trust. This does not mean that mutual recognition should operate in the same way at all times. Rather, it will need to adapt to the specific features of each single instrument.

More fundamentally, there is a problem of legitimacy and coherence that will still be evident in the Lisbon Treaty scenario, in which the Third Pillar and the First Pillar will be merged. However, leaving aside the question of EU competence in criminal law, it emerges from the analysis carried out above that there is a pressing need for more approximation both from the substantive and procedural point of view and that the approach through which mutual recognition has been conceived and implemented is far from uniform.

The way EU criminal policy will be shaped in the future will determine the way the EU wants to view itself and appear to its citizens. What is therefore the added value of mutual recognition in this context? It could certainly be considered as a move from a notion of legal and social order based on vertical, hierarchical structures to a horizontal, network-like order, which is generated by interactions and mutual exchanges. One may wonder whether or not this needs an over-arching authority. As repeatedly mentioned, one of the consequences of such a move is that sovereignty tends to be increasingly diffused. There has indeed been a trend in some regions of

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<sup>64</sup> One could talk more about a coordination of national systems rather than a distinct system *per se*. See M. Fletcher, R. Löff, B. Gilmore, *EU Criminal Law and Justice* (Edward Elgar 2008) 108.

the world to shift the source of decisions away from single entities (States) and national legislative bodies towards executive or quasi-executive bodies which are located at a considerable distance from the people. This phenomenon should be examined more carefully in the area of criminal law in the EU and a process of intense constitutionalisation should be carried out more decisively. This does not necessarily include a debate on the federalisation of the EU, but may involve an analysis of what type of “behavioural expectations”<sup>65</sup> are stabilised by the redistribution of sovereignty on the premise of mutual trust.

The following chapters will use the EAW experience as evidence that much still needs to be done in the direction of coherence, legitimacy and effectiveness of the new system.

It is to be hoped that the legal framework provided by the Lisbon Treaty will be the starting point in a common effort to re-adjust European cooperation in penal matters.

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<sup>65</sup> J. Habermas, *The Divided West* (Polity Press, Cambridge 2006) 130.

### **3. Emergence and nature of the European Arrest Warrant**

#### **Introduction**

The purpose of this chapter is to explain the political and legal reasons for the adoption of the Framework Decision on the EAW. It will demonstrate that this instrument was not conceived out of the blue, but is the product of some reflection within the European institutions. However, it will also show that the current version of the EAW has been strongly influenced by the anti-terrorism agenda of the Western governments at the beginning of the 21<sup>st</sup> century.

#### **3.1 The trend towards simplified forms of extradition**

The simplification of extradition has been a constant feature in the development of judicial cooperation mechanisms across the world. Regional and sub-regional arrangements have been concluded since the 1950s: some of them are characterised by the relaxation of one or more of the main principles of classic extradition law. This is particularly evident in the Nordic Extradition Scheme as well as in the Australia-New Zealand and Ireland-UK backing of warrants systems<sup>1</sup>. These cases

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<sup>1</sup> On the Nordic Extradition Agreement, see the website of the Swedish Government: [www.sweden.gov.se/sb/d/2710/a/15435;jsessionid=aJiWcTLGMrY](http://www.sweden.gov.se/sb/d/2710/a/15435;jsessionid=aJiWcTLGMrY) ; on the Australia-New Zealand backing of warrants, see *A new extradition system. A review of Australia's extradition law and practice*- Federal Attorney-General's Department, Commonwealth of Australia, 2005; on the Ireland-UK backing of warrants, see J.R. Spencer, 'The European Arrest Warrant' (2003) 6 *The Cambridge Yearbook of European legal studies* 201; P. Jackson, 'Backing of Warrants (Republic of Ireland) Act 1965' (1966) 29/2 *The Modern Law Review* 186. Another form of surrender is "interstate rendition" or "interstate extradition", which is internal to some federal systems, such as Australia or the United

present some embryonic elements of what now is the EAW (and its Nordic counterpart, the Nordic Arrest Warrant). The first one operated without the requirement of dual criminality: it was enough that the act was punishable in the requesting State; moreover, no assessment of guilt was made by the requested State, although the decision on the basis of which the extradition was sought (indicating the existence of probable cause for suspicion) was to be sent to the competent authority. All these schemes are mostly based on direct contact between the judicial authorities (or the police authorities in the Australia-New Zealand backing of warrants) and the reduction of the role of the executive. The geographical proximity and the deep legal/political similarities of these countries were the background that made it possible to create these “heterodox” examples of surrender.

In Europe, back in 1989 the Member States had already agreed to simplify the forms of transmission with the so-called “Fax Agreement”: that was a first step towards the right direction<sup>2</sup>. However, after the failure of the 1995 and 1996 Conventions (which attempted to simplify extradition procedures) and the proclamation of the principle of mutual recognition of judicial decisions at Tampere<sup>3</sup>, new (bilateral) agreements were struck as the expression of a general effort to go beyond classic extradition and its main shortcomings. There was indeed a pressing need to contrast the new forms of crime that were quickly developing together with technological, economic and also cultural progress.

These agreements were the Treaty between the Italian Republic and the Kingdom of Spain on the prosecution of serious offences (the Italy-Spain Treaty) and the analogous Treaty between the Kingdom of Spain and United Kingdom (the UK-

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States. See e.g. section 51 (xxiv) of the Australian Constitution as well as (*inter alia*) sections 82 and 83 of the Service and Execution of Act 1992; Article 4 (2) US Constitution.

<sup>2</sup> Acuerdo entre los Estados Miembros de las Comunidades Europeas relativo a la simplificación y a la modernización de las formas de transmisión de las solicitudes de extradición, Donostia-San Sebastián, Spain, 26 May 1989- Boletín Oficial del Estado 17/05/1995. The agreement introduced a system of transmission of requests for extradition by fax.

<sup>3</sup> Tampere European Council (15-16 October 1999) Presidency Conclusions, available at [http://www.europarl.eu.int/summits/tam\\_en.htm](http://www.europarl.eu.int/summits/tam_en.htm).

Spain Treaty)<sup>4</sup>. It is interesting to observe that the first one was concluded before the events of 9/11, while the second one dates back to just after<sup>5</sup>.

The Italy-Spain Treaty is based on the two States' "confidence in the structure and functioning of their respective judicial systems and in their ability to ensure a fair trial", as mentioned in the Preamble. In a Joint Declaration of the Ministers for Justice of the two countries, signed in Madrid on 20 July 2000, Italy and Spain had already expressed their intention to create "(...) a common area of freedom, security and justice between the two countries to guarantee, through mutual assistance, the exercise of the rights and freedoms of citizens, with the removal of any obstacles or impediments that might give rise to areas of impunity within their territory"<sup>6</sup>. The main reason behind the ratification of this Treaty was the need to facilitate extradition from Spain to Italy of Italian citizens charged *in absentia*, in particular with crimes connected to mafia-related activities.<sup>7</sup>

The Parties declare they are both inspired by the principles laid down by the European Convention for the Protection on Human Rights, refer explicitly to the Tampere European Council and fix as their objective the creation of an area of freedom, security and justice, in line with Article 29 TEU. All this makes it clear that the Treaty anticipates the measures on mutual recognition that the European Union would start implementing in the following years. The Treaty is thus the first clear example of the application of mutual recognition as imagined in Tampere. Its scope is restricted to some critical areas, as the Parties agree to eliminate extradition

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<sup>4</sup> Treaty between the Italian Republic and the Kingdom of Spain on the prosecution of serious offences without the need for extradition in a common area of justice, Brussels, 15 December 2000, Council Document 14643/00 COPEN 85; Tratado entre el Reino de España y el Reino Unido de Gran Bretaña e Irlanda del Norte relativo a la entrega judicial acelerada para delitos graves en un espacio común de justicia, Madrid, 23 November 2001, in Boletín Oficial de las Cortes Generales, Serie A, N. 313 7 junio de 2002.

<sup>5</sup> A similar agreement was in the process of being struck between Spain and France in the same period. See *España pide a Francia un acuerdo para la entrega de terroristas sin extradición*- El País, 01/02/2001.

<sup>6</sup> Italy-Spain Treaty, *supra*, Preamble.

<sup>7</sup> See Relazione del Ministero della Giustizia sul Disegno di legge recante: "Ratifica ed esecuzione del Trattato tra la Repubblica italiana e il Regno di Spagna per il perseguimento di gravi reati attraverso il superamento dell'extradizione in uno spazio di giustizia comune, fatto a Roma il 28 novembre 2000, nonché norme di adeguamento interno", available at [http://www.giustizia.it/dis\\_legge/relazioni/trat\\_Italia\\_spagna\\_relazione.htm](http://www.giustizia.it/dis_legge/relazioni/trat_Italia_spagna_relazione.htm)

procedures “ (...) for the serious offences of terrorism, organised crime, drug trafficking, trafficking in human beings, sexual abuse of minors and illegal arms trafficking”<sup>8</sup>. This list reflects the areas of crime which were felt as more urgent to tackle as both countries are at the centre of the main trafficking routes where European and non-European organised criminal groups operate<sup>9</sup>.

The UK-Spain Treaty follows a similar pattern and the Preamble is identical. However, the scope of application seems to be broader. First of all, Article 2 refers to judicial decisions, a term which includes something more than “criminal convictions and court orders”. Indeed, Article 2 (2) specifies that by judicial decision it is meant any detention order, criminal sentence, enforcement decision or any other decision having the same effect and issued in the requested State with the purpose of detaining the sought person and surrendering him or her to the requesting State.

Secondly, there is no limitation to specific areas of crime. Potentially, the Treaty aims to cover all crimes, as long as the “minimum maximum” penalty threshold is respected.

### **3.2 The birth of the European Arrest Warrant: background and *ratio***

As has been observed, “Surely the uncertainty of the danger belongs to the essence of terrorism. (...) In Israel people at least know what can happen to them if they take a bus, go into a department store, discotheque, or any open area—and *how frequently* it happens. In the U.S.A. or Europe one cannot circumscribe the risk; there is no

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<sup>8</sup> Italy-Spain Treaty, *supra*, Preamble.

<sup>9</sup> See e.g. G. Turone, *Il delitto di associazione mafiosa* (2nd ed. Giuffrè Milano 2008); J. L. De la Cuesta, ‘Organised Crime Control Policies in Spain: A Disorganised Criminal Policy for Organised Crime’, in C. Fijnaut, L. Paoli (eds.) *Organised Crime in Europe: concepts, patterns and control policies in the European Union and beyond* (Springer, Dordrecht 2004) 795.

realistic way to estimate the type, magnitude, or probability of the risk, nor any way to narrow down the potentially affected regions”<sup>10</sup>.

The 9/11 attacks to the Twin Towers were followed by an unprecedented political pressure for new and effective measures in the fight against the terrorist threat. To be sure, the need to forge new mechanisms of cooperation had already convinced European countries to initiate a Programme of mutual recognition since the end of the 90s<sup>11</sup>. It is not surprising in this context that global action against terrorism was considered a priority. The European Union expressed its solidarity with the US population and the first emotional reactions turned soon into a common sense of unity and the urgency to act promptly<sup>12</sup>.

It should be pointed out that, at least at the beginning, the very purpose of the drafters of the first documents of the mutual recognition agenda was not clear. As mentioned in a previous chapter, in the 2000 Programme on Mutual Recognition<sup>13</sup>, priority rating 1 was accorded to two instruments: one on mutual recognition of decisions on the freezing of evidence and another on mutual recognition of orders to freeze assets; the adoption of an arrest warrant was only given priority rating 2 and was only limited to the most serious offences mentioned in Art. 29 TEU, i.e. terrorism, drug trafficking, trafficking in human beings and offences against children, trafficking in weapons, corruption and fraud<sup>14</sup>. Other draft documents in the same year show uncertainty as to which approach should be followed.

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<sup>10</sup> G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (University of Chicago Press 2003) 27 (Interview with J. Habermas).

<sup>11</sup> See *supra* chapter 1 p.8 *et seq.*

<sup>12</sup> On the implications of this see M. Byers, ‘Terrorism, the Use of Force and International Law After 11 September’, (2002) 51 *International and Comparative Law Quarterly* 401. See also B. Gilmore, ‘The Twin Towers and the Third Pillar: Some Security Agenda Developments’, *EUI Working Paper* n. 2003/7.

<sup>13</sup> Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/02 15/01/2001.

<sup>14</sup> On this, see also European Union Strategy for the Beginning of the New Millennium, OJ C 124, 03/05/2000, whose recommendation n.28 specified that consideration should be given to the *long-term* (rather than short-term) possibility of the creation of a single European legal area for extradition.



The main options were: “pure” or “absolute” mutual recognition (which was supported mainly by the UK government<sup>15</sup>), including only formal grounds for non-execution and/or applied to a limited number of “serious” offences; approximation through the “minimum maximum” method and mutual recognition beyond this threshold. The option of complete harmonisation was rejected because it was not considered realistic in the short term. There were a considerable number of problems concerning the definition of “serious” offences, the scope of mutual recognition, the list of offences to which mutual recognition was to be applied, and the grounds for refusal. The first was dealt with by using a parameter to define the “seriousness” of an offence: the “minimum maximum” penalty threshold. Sometimes the list of offences included drug trafficking, trafficking in human beings, money laundering, fraud and participation in a criminal organisation (therefore excluding terrorism-which confirms that political priorities were quite different at that time), some other times it included counterfeiting of the euro and corruption rather than participation in a criminal organisation.

In the aftermath of the 9/11 terrorist attack on the Twin Towers, political pressure changed direction and, as a result, the adoption of the European Arrest Warrant was prioritised over any other measure. At the same time, a remarkably different list of offences was elaborated in the mutual recognition documents. This list was much broader than the previous ones and included not only offences for which an approximation measure had already been adopted<sup>16</sup>, but also a number of offences for which there was (and there is) no common definition at the European level<sup>17</sup>. In order to partly deal with this “anomaly”, a double-track approach was adopted: the double criminality requirement was lifted for those offences, but it was kept for all the crimes falling outside the list (although this list is not exhaustive and may be

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<sup>15</sup> The very idea of mutual recognition came from a British proposal (which opposed complete harmonisation). See Cardiff European Council (15-16 June 1998) Presidency Conclusions, at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm) and also H. Nilsson, ‘Mutual Trust and Mutual Recognition of Our Differences, a Personal View’, in G. de Kerchove, A. Weyembergh (eds.) *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne* (Brussels Editions ULB 2001) 155.

<sup>16</sup> In particular terrorism (the corresponding Framework Decision was adopted on the same day as the EAW: see Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164, 22/06/2002), but also drug trafficking, money laundering, counterfeiting of euro, trafficking in human beings, fraud against the European Communities, organised crime.

<sup>17</sup> Examples include murder, extortion and racketeering, swindling.

extended by the Council); more grounds for refusal were included than in the previous drafts<sup>18</sup>. Thus the combination of mutual recognition and approximation through the “minimum maximum” method seems to be the result of a compromise between the different approaches that Member States intended to pursue<sup>19</sup>. It is interesting to observe that a similar yet reduced version of the list can be found in Articles 40 and 41 of the Schengen Convention (CISA)<sup>20</sup> in the chapter on police cooperation, which provide for special rules on surveillance and hot pursuit without the need for prior authorisation in urgent cases. Some categories of offences can only be found in this list (as in the case of aggravated burglary or illicit transportation of toxic and hazardous waste), some others are missing (as in the case of organised crime or terrorism). A similar list is also contained in Article 2 of the 1995 Europol Convention and related Annex. No reference is made to organised crime as such. However, the new proposal reproduces exactly the list to which the EAW applies<sup>21</sup>.

The idea that extradition should be replaced by an arrest warrant, characterised by the elimination of the double criminality requirement, came (once again) from the

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<sup>18</sup> On these drafts, see *inter alia* Council Document 6522/00 of 2 March 2000; Doc. 5126/01 of 2 February 2001; OJ C 075 07/03/2001; Doc. 6552/02 of 22 February 2002.

<sup>19</sup> On the birth of the European Arrest Warrant and, more in general, of mutual recognition instruments, see also N.Keijzer, ‘The European Arrest Warrant Framework Decision between Past and Future’, in E.Guild (ed.)- *Constitutional Challenges to the European Arrest Warrant*, (Wolf Legal Publishers Nijmegen 2006) (hereinafter N. Keijzer A); V. Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU’ (2006) 43 *Common Market Law Review* 1277; S. Peers, ‘Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?’ (2004) 41 *Common Market Law Review* 5; S. Alegre, M.Leaf, ‘Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study- The European Arrest Warrant’ (2004) 10 *European Law Journal* 200; W.Gilmore, The EU Framework Decision on the European Arrest Warrant (2002) 3 *ERA-FORUM* 144.

<sup>20</sup> Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 22/09/2000 as amended by EC Regulation n. 1160/2003 of the European Parliament and of the Council, OJ L 191 22/07/2003. The list includes the following offences: murder, manslaughter, rape, arson, forgery of money, aggravated burglary and robbery and receiving stolen goods, extortion, kidnapping and hostage taking, trafficking in human beings, illicit trafficking in narcotic drugs and psychotropic substances, breach of the laws on arms and explosives, wilful damage through the use of explosives, illicit transportation of toxic and hazardous waste.

<sup>21</sup> Convention based on Article K3 of the Treaty on European Union, on the Establishment of a European Police Office OJ C 316 27/11/1995; Proposal for a Council Decision establishing the European Police Office, Brussels, 20/12/2006, COM (2006) 817 final; consolidated text, Brussels, 10 April 2008 Doc. 8296/08.

UK government<sup>22</sup>. On 21 September 2001, the members of the European Council gathered at an extraordinary session to stress once and for all their intention to cooperate with the US and to set out the guidelines of an action plan against terrorism<sup>23</sup>. Key elements of this action plan were the introduction of the EAW and the adoption of a common definition of terrorism. As the Conclusions of the Meeting pointed out, it was felt that extradition procedures did not “(...) reflect the level of integration and confidence between Member States of the European Union”.

The proposal for the Framework Decision had in fact been prepared by the European Commission and presented on 19 September, together with the other proposal for a Framework Decision on combating terrorism<sup>24</sup>. This occurred – it is worth mentioning - only 8 days after the attack on the US. It seems that before this attack it was anyway planned that the proposal should be adopted on 26 September<sup>25</sup>.

The European Council also called upon the Justice and Home Affairs (JHA) Council to refine the proposal on the EAW “as a matter of urgency and at the latest at its meeting on 6 and 7 December 2001”. At the same time, it urged it to implement “as quickly as possible” the Tampere measures on mutual recognition. The JHA Council had already identified these priorities on 20 September<sup>26</sup>. It is interesting to observe that the Conclusions of the JHA Council focused very much on the “handing over” of “perpetrators of terrorist attacks” and “the need to overcome the requirement of double criminality in terrorist cases”; the entry into force of the two Conventions on extradition was still considered possible by 1 January 2002. The initial goal had in fact been to make use of a specific fast-track surrender procedure (following the model of the previous bilateral Treaties) and to eliminate “traditional” extradition

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<sup>22</sup> Note from UK Delegation to K4 Committee, 7090/99 29 March 1999. Indeed, the UK has experience of a similar mechanism: the “backing of warrants”. See *supra* p.68.

<sup>23</sup> Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, SN 140/01.

<sup>24</sup> Draft Framework Decision on combating terrorism, Brussels, 19/9/2001, COM (2001) 521 final ; Draft Framework Decision on the European arrest warrant and the surrender procedures between the Member States, Brussels, 19/9/2001, COM (2001) 522 final (although a slightly revised version is dated 25/9/2001).

<sup>25</sup> Information obtained by interviews with EU officials.

<sup>26</sup> Conclusions adopted by the Council (Justice and Home Affairs), Brussels, 20 September 2001, Doc. 12156/01, 25/9/2001.

only in the long term<sup>27</sup>. This was in line with the initial idea of applying this procedure only to convicted criminals, and not also suspects<sup>28</sup>. By way of contrast, the Conclusions of the European Council the day after referred to the handing over of “wanted persons” (i.e. a broader term), and to the replacement of the whole system of extradition. It was therefore a more ambitious project that pushed for a radical change. That is why at the same time the need to protect fundamental rights and freedoms was carefully stressed. This different approach was to be stressed again at an informal meeting of the European Council in Ghent on 16 October, where the Heads of State and Government declared their determination to abolish double criminality “for a wide range of actions”<sup>29</sup>.

The proposal of the European Commission drew on the previous Conventions on extradition and mutual assistance and the bilateral Treaties (both Italy-Spain and UK-Spain). However, it proposed the creation of an instrument which was both complex and innovative. Although it was not yet the final version, it already featured the main elements of the EAW as we now know it. The EAW was defined in Article 3 as a “request, issued by a judicial authority of a Member State, and addressed to any other Member States, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subject to a judgement or a judicial decision (...)”. This was a somewhat broader definition than the one contained in the final version and even in the Italy-Spain and UK-Spain Treaties. It was conceived not as a judicial decision but as a request for assistance (which recalls the language of the 2000 Convention on Mutual Assistance in Criminal Matters: indeed, surrender for investigative purposes was included). The purpose was to merge the two phases of the traditional extradition procedure: the provisional arrest warrant and the request for extradition. More precisely, the actual EAW was split up into four actions (search, arrest, detention and surrender), the first three of which characterised the classical arrest warrant in the extradition Conventions. What is more, search and

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<sup>27</sup> See e.g. European Union Strategy for the Beginning of the New Millennium, *supra*, note 14.

<sup>28</sup> According to point 35 of the Tampere Conclusions, *supra* chapter 1 p.8, extradition should be abolished “(...) as far as persons are concerned who are fleeing from justice after having been finally sentenced.”

<sup>29</sup> Declaration by the Heads of State or Government of the European Union and the President of the Commission, Follow-up to the September 11 attacks and the fight against terrorism, Brussels, 19 October 2001, SN 4296/2/01.

arrest could not be refused on grounds of double criminality, extraterritoriality, amnesty and immunity<sup>30</sup>. On the other hand, detention was the object of an autonomous decision (Article 14): the executing judicial authority could in such case provisionally release the arrested person if it believed that he or she would not escape, continue to commit offences or destroy evidence, and if the person undertook to remain available for the execution of the EAW.

Both the requirement of double criminality and the speciality principle were eliminated. However, the change was not complete. Concerning double criminality, each Member State had the option of setting up a “negative list” for which it declared in advance its intention to refuse execution on the grounds that it would be contrary to fundamental principles of its legal system (Article 27). In addition, where the issuing State exercised extraterritorial jurisdiction (i.e. for offences which did not occur, at least in part, on its territory), the executing State could still apply double criminality (Article 28). The “negative list” mechanism was created in order to allow Member States to exclude from the new system those offences which they considered appropriate to decriminalise. Examples include drug possession and use, euthanasia and abortion. It also made it possible to take into account the minimum age for criminal liability<sup>31</sup>. As far as speciality was concerned, Article 41 still maintained the principle for the offences included in the “negative list”, as well as for cases of extraterritoriality or amnesty.

Direct contact was established between judicial authorities (Article 7) and provisions were included on the use of the Schengen Information System (SIS, Articles 8-9). Strict time limits were provided for. The 90-day limit on the decision to execute was taken from the Italy-Spain Treaty (Article 20). The date for the surrender could be agreed upon by the authorities, although it was 20 days in specific cases, e.g. when the arrested person gives his consent (Article 23).

The Proposal distinguished between grounds for non-execution of the arrest warrant and grounds for refusal to surrender (thus following the two-phase procedure

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<sup>30</sup> See Draft Framework Decision on the European arrest warrant, *supra* note 24, Explanatory Memorandum.

<sup>31</sup> *Ibid.*

mentioned above). They were limited, although more numerous than in the Italy-Spain and UK-Spain Treaties. Grounds for non-execution (Articles 26-32) included, apart from the exceptional cases in which dual criminality could be used: *ne bis in idem*, amnesty, immunity and lack of necessary information. The first applied in two cases: where the executive judicial authority passed final judgement and where it decided either not to institute or to terminate proceedings in respect of the offence which the EAW referred to. The second applied whenever the executing Member State was competent to prosecute the offence under its own criminal law. Limitation periods (which were a ground for refusal under the 1996 Convention on extradition) were not considered. Immunity was included as a result of the “judicialisation” of the surrender, as in the conventional extradition procedure this was a matter for the executive. The provision was taken from the Italy-Spain Treaty. Finally, execution could be refused if the EAW did not contain important information such as the identity of the requested person, the issuing judicial authority, the nature of the judgement, the nature and legal classification of the offence and the description of the circumstances in which the offence was committed. Concerning the grounds for refusal, Articles 33-34 referred to the principle of integration and the system of videoconference. The executing authority was allowed to refuse execution if the requested person was believed to have better possibilities of reintegration in the executing Member State and he or she consented to serve the sentence there. Similarly, surrender for the purpose of trial could become superfluous if a videoconference mechanism could be used and both States accepted it. The 2000 Convention on Mutual Assistance clearly served as a model in this case.

Among the so-called “special cases”, apart from situations in which EAWs were issued on the basis of judgements *in absentia* (which required a new hearing of the case) and of execution conditional on return to the executing Member State, the Proposal included the possibility to request assurance by the issuing State that the sentence of life imprisonment would not be carried out (Article 37). Indeed, Portugal had attached a declaration in this sense to the 1996 Convention. Curiously, no trace of this Article can be found in the final version of the proposal. Another special case was the deferment of execution on humanitarian grounds, if it was believed that the person’s life or health were in danger for age, health or other humanitarian reasons

(Article 38). This provision too would not survive the negotiations. Deferment of surrender and multiple requests were also regulated (Article 39-40).

As already mentioned, agreement on the number of offences to be considered and, more generally, on the scope of application of mutual recognition was not easy to obtain. Regarding more specifically the EAW, the negotiation was mainly focused on the issues of double criminality, nationality exception, rule of speciality, grounds for refusal, time limits and rights of the defence<sup>32</sup>. The elimination *tout court* of double criminality, proposed by the Commission and supported by, among others, Spain and the UK, was considered to be too extreme by a number of other Member States. This is the reason why, on 31 October, the Belgian Presidency came up with a compromise: a list of offences for which double criminality was excluded and a list of other offences for which it still applied (i.e. offences against public decency and sexuality, offences against the freedom of expression and association, abortion and euthanasia)<sup>33</sup>. The Italian Government pushed for a restricted list of six offences, reproducing those mentioned in the Italy-Spain Treaty. It is worth noting that it was decided to focus on *categories* of offences, rather than specific crimes, in order to leave to Member States some discretion at the moment of the transposition of the Framework Decision in their national legal systems. As will be seen later in this work, this is exactly one of the main objections to the EAW.

Some important changes were ultimately made to the Commission proposal, also as a consequence of amendments by the European Parliament<sup>34</sup>. The number of grounds for refusal was increased and speciality was reintroduced. The purposes of the EAW were restricted to conducting a criminal prosecution or executing a custodial sentence or detention order. The videoconferencing mechanism was eliminated. As we will see later, the abolition of nationality as a ground for refusal was in the end not complete. The rights to free assistance of legal counsel and of an interpreter (in case of lack of adequate means to pay them) were not retained.

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<sup>32</sup> For more details on this, see N. Keijzer A, *supra* 20-23.

<sup>33</sup> See Document 13425/01, 31 October 2001.

<sup>34</sup> See e.g. European Parliament Report on the Commission proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (COM(2001) 522 – C5-0453/2001 – 2001/0215(CNS)), 14 November 2001 ('Watson Report').

On 6 and 7 December the proposal was submitted to the JHA Council and political agreement on the Framework Decision was in the end reached before the Laeken European Council<sup>35</sup>. The Italian Government backed down on 11 December 2001, after having initially stated it would not support the proposal<sup>36</sup>. On 13 June 2002, the Framework Decision was formally adopted by the EU Council of Ministers, just nine months after the terrorist attack planned by Al-Qaeda.

### **3.3 General features of the European Arrest Warrant. A new creature or a hybrid?**

The EAW as it is currently understood is a judicial decision by which one Member State (i.e. the State of issue<sup>37</sup>) requests another (i.e. the State of execution) for the arrest and surrender of a person who is permanently or temporarily in the latter. The reasons for the adoption of this measure are either the prosecution of the person concerned or the execution of a custodial sentence or a detention order. It is issued when the person whose return is sought is accused of an offence for which the law establishes a maximum of at least one year in prison, or when the person has already been sentenced to a prison term of at least four months<sup>38</sup>.

The EAW is regarded as the first and most important measure in the field of European criminal law for the purpose of implementation of the principle of mutual recognition of judicial decisions and pre-trial orders<sup>39</sup>. It was introduced in the European Union in 2002 following point 35 of the Conclusions of the Tampere

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<sup>35</sup> Laeken European Council (14-15 December 2001) Presidency Conclusions, at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm) in particular point 17, which hails the EAW as a decisive step in the fight against terrorism.

<sup>36</sup> *Berlusconi urged to support Europe-wide arrest warrant*, The Observer, 9 December 2001; *Italy U-turn on arrest warrant*, BBC News, 11 December 2001 <http://news.bbc.co.uk/1/hi/world/europe/1704168.stm>. See also *infra*, chapter 5 p.147 *et seq.*

<sup>37</sup> The expressions “State of issue”, “issuing State” or “requesting State” and, correspondingly, “State of execution”, “executing State” or “requested State” will be used indifferently hereinafter.

<sup>38</sup> Article 2 (1) Council Framework Decision, *supra*.

<sup>39</sup> G. De Kerchove and A. Weyembergh (eds), *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l’Union Européenne*, (Brussels Editions ULB 2001).



European Council of 15-16 October 1999<sup>40</sup> (aiming at abolishing the formal extradition procedure among the Member States of the European Union).

The purpose underlying the adoption of the EAW was (as explicitly mentioned in recital 5 of the Preamble) the abolition of the extradition procedure and its replacement by “a system of surrender between judicial authorities”, in the name of free movement of judicial decisions in criminal matters. This statement suggests that the traditional principles of extradition no longer apply. True, the EAW can still be viewed in the context of the evolution of the European model. It certainly is not a simple surrender<sup>41</sup>, but, in its very substance and purpose, is not extradition either.

The European model<sup>42</sup> is indeed an interesting example of how the political, cultural and geographical ties among certain countries can forge long-established extradition procedures so as to adapt them to the specific needs of a regional or sub-regional area. The ever closer relationships of European countries determined a gradual abolition of traditional bars and *caveat* and a parallel simplification of procedures, as an effect of the growing Member States’ confidence in each other’s legal system<sup>43</sup> - a concept that has now been developed into “mutual trust” as a precondition to mutual recognition.

The EAW is situated at the end of this process of transformation. However, as already mentioned, its applicability is restricted to acts punishable by the law of the State of issue by a custodial sentence or a detention order for a maximum period of at

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<sup>40</sup> See *supra* note 3.

<sup>41</sup> Some authors believe that the “surrender” as a form of international cooperation in criminal matters differs from “extradition” mainly because it operates between a State and an international criminal tribunal, rather than between States. See M.Plachta., ‘European Arrest Warrant: revolution in extradition?’ (2003) 11 *European Journal of Crime, Criminal Law and Criminal Justice* 178. However, other forms of surrender between States do exist: see *supra* p.77-78. See also Z. Deen-Racsmay, ‘The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges’ (2006) 14 *European Journal of Crime, Criminal Law and Criminal Justice*, 2006 271; O. Lagodny, ‘Extradition without a granting procedure: the concept of surrender’, in R. Blextoon, W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague 2005) 39.

<sup>42</sup> M.Mackarel, S.Nash, ‘Extradition and the European Union’ (1997) 46 *International and Comparative Law Quarterly* 948.

<sup>43</sup> See to this regard Preamble to the 1996 Convention relating to extradition between the Member States of the EU, OJ C 313 , 23/10/1996: “The High Contracting Parties (...)EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial (...)”.

least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least 4 months. It is doubted whether aggravating circumstances or statutory reductions (for instance, where only an attempt is committed) should be counted<sup>44</sup>. We can observe that the rules on, *inter alia*, the nationality exception, the human rights clause and double criminality show independent features from classical extradition. It has been observed that the centralisation of the role of the judge *might* lead to a “politicisation” of the judiciary<sup>45</sup>. It surely is an expression of a presumption of a high degree of trust. As established in recital 10 of the Preamble of the Framework Decision, such presumption is so strong that the implementation of the EAW may be suspended only when human rights have been seriously and persistently violated<sup>46</sup>.

### 3.3.1 General principles

A first major change produced by mutual trust is the removal of the nationality exception. No Member State of the European Union can in principle refuse the surrender of a suspected or a convicted person on grounds of nationality. This classical ban of extradition can be found in a considerable number of bilateral or multilateral arrangements and is normally an option for the State Party<sup>47</sup>. The reason is that most civil law countries include it in their domestic law, sometimes at a constitutional level, as an expression of a State’s sovereignty and guarantee of the fundamental rights of the individual; common law countries generally ignore this ground for non-execution, although they often provide for other (functionally

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<sup>44</sup> Article 7 of the Italian Implementing law does not consider these circumstances. See F. Impalà *Le mandat d’arrêt européen et la loi italienne d’implémentation* (2005 Fondazione Giovanni e Francesca Falcone), available at <http://www.eurowarrant.net>.

<sup>45</sup> E. Guild, ‘Drawing the Conclusions: Constitutional Concerns regarding the European Arrest Warrant’, in E. Guild (ed.), *supra*, 267-272.

<sup>46</sup> See *infra* chapter 5 p. 156 and 169 and chapter 6 p. 196.

<sup>47</sup> For instance, it is an option under Article 6 European Convention on Extradition and related Explanatory Memorandum, ETS n. 24, Paris 13/12/1957 and Article 4 UN Model Treaty on Extradition, A/RES/45/116, 14 December 1990, amended by A/RES/52/88, 12 December 1997. However, refusal on this ground is mandatory under Article 5 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, signed at Brussels on 27 June 1962, UNTS n. 8893, 120. On the other hand, refusal is not allowed under Article 4 Extradition Treaty between United States and Italy, signed at Rome on 13 October 1983 991 UNTS 285.

equivalent) requirements which cannot be found in civil law systems, such as the need for *prima facie* evidence of guilt.

The nationality exception has not been done away with entirely. A residual possibility for the Member State to avail itself of such requirement is left in Articles 5 (3), 4 (6) and 25 (1). The first provision refers to nationality as a *guarantee*: where a request for surrender has been made *for the purposes of prosecution* in the requesting State, the requested State may make execution conditional on the assurance that, upon conviction, the individual is returned to the State of nationality or of residence to serve the sentence there. The second provision qualifies nationality as a *ground for optional non-execution*. It enables the Member State to refuse execution where a EAW has been issued *for the purposes of execution* of a custodial sentence or detention order in respect of a national, a resident or a person “staying” in the requested State and this State undertakes to execute the sentence or detention order in accordance with its domestic law. Finally, Article 25 (1) uses nationality for a “*conditional transit*”: where a EAW has been issued *for the purposes of prosecution* and the person who is sought is a national or resident of the State of transit, this State may subject transit to the condition that the person, after being heard, is returned there in order to serve the custodial sentence or detention order. It has already been pointed out<sup>48</sup> that these provisions may cause some problems in connection to double criminality. Under a number of international conventions<sup>49</sup>, the transfer of a sentenced person is only possible where the act or omission for which the sentence has been imposed is punishable by the law of the administering State (i.e. in this case the requested State): whenever dual criminality is lifted, this makes it impossible to guarantee return under Article 5 (3) *and* serve a sentence for an act which is not considered a crime in the State of nationality or residence. In a similar situation, execution of a custodial sentence or detention order as provided for by

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<sup>48</sup> Z. Deen-Racsmany, R. Blextoon, ‘The Decline of the Nationality Exception in European Extradition?’ (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 337 *et seq*; N.Keijzer A, *supra*, 43.

<sup>49</sup> Art. 3 (1) (e) Convention on the Transfer of Sentenced Persons, Strasbourg, 21/03/1983 ETS n. 112; Art. 4 European Convention on the International Validity of Criminal Judgements, The Hague, 28/05/1970 ETS n.70; Art. 5 (b) Convention between the Member States of the European Communities on the Enforcement on Foreign Criminal Sentences. Only the first two are in force.

Article 4 (6) is not possible. As a result, potential sources of conflict remain with regard to the residual elements of nationality still present in the Framework Decision.

Double criminality is still an optional ground for refusal under Articles 2 (4) and 4 (1) of the Framework Decision<sup>50</sup>. It applies both in its *simple* and in its *qualified* version. More precisely, it can still be required: for all acts included in the list under Article 2 (2) and punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of *less than* three years; for all acts not included in the list (i.e. any type of offence, including minor criminal offences or those subject only to administrative or pecuniary sanctions), within the boundaries of applicability set out by par. 1 of the same Article. The wording of Article 2 (4) does not entirely solve the problems connected to the temporal element of dual criminality as pointed out by *Pinochet 3*<sup>51</sup>. The provision states that for offences falling outside the Framework list, surrender may still be subject to the condition that the acts referred to in the EAW “constitute” an offence under the law of the executing Member State. It remains unclear whether this expression relates to the time of the request or to the time in which the act was committed.

As far as Article 4 (1) is concerned, dual criminality does not apply to cases in which the law of the requested State does not impose the same type of tax or duty or does not contain the same type of rules as regards taxes, duties and customs and exchange regulations as the law of the State of issue (therefore, the fiscal offence exception is excluded). It does apply in all cases where differences exist in the way an act (e.g. participation or inchoate crimes) or an attempt is qualified and punished in the Member States<sup>52</sup>.

The verification of double criminality is not required for the list of 32 categories of offences mentioned in Article 2 (2), as long as they are punishable in the State of issue by a custodial sentence or detention order for a maximum period of at least

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<sup>50</sup> N. Keijzer, ‘The double criminality requirement’, in R. Blextoon, W. van Ballegooij, *supra* 137-163 (hereinafter N. Keijzer B).

<sup>51</sup> *Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)* [1999] 2 WLR 827. See C. Warbrick, ‘Extradition law aspects of Pinochet 3’ (1999) 48 *International and Comparative Law Quarterly* 958.

<sup>52</sup> For all this, see N.Keijzer A, *supra*, 33-34.

three years. In principle, as confirmed by the Court of Justice<sup>53</sup>, only the definition given by the domestic law of the issuing State should count. However, there are a number of acts included in the list which are not qualified as crimes in every Member State. The problems connected to this “disharmony” will be dealt with in a subsequent chapter<sup>54</sup>.

The Framework Decision deals with the *ne bis in idem* (or double jeopardy) principle in Articles 3 (2) and 4(2), (3) and (5). First of all, it is a ground for mandatory non-execution when the judicial authority is informed that the person against which the EAW has been issued has been finally judged by a Member State in respect of the same act, provided that, where there has been sentence, the sentence has been passed or is currently being served or may no longer be executed under the law of the sentencing Member State. This wording includes judgements from third Member States. Secondly, it is a ground for optional non-execution in three cases: a) where the requested person is being prosecuted in the executing Member State for the same act as that on which the EAW is based; b) where the judicial authorities of the executing Member State have decided either not to prosecute for the offence or to halt proceedings, or where a final judgement has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; c) where the requested authority is informed that the person has been finally judged by a third non-Member State in respect of the same acts, provided that, where there has been a sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country.

A further effect of the proclamation of mutual trust is the abolition of the political offence exception, although the fair trial or asylum clause is maintained in recital 12 of the Preamble. However, at the same time Article 1 (3) takes into account the obligation to respect fundamental rights and fundamental legal principles under Article 6 TEU. Recital 13 contains a reference to the cases where there is a serious risk that the person sought would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment. Two options for interpretation can

<sup>53</sup> ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, 3 May 2007.

<sup>54</sup> See for more details *infra*, chapter 5.

be considered: a) the combination of these articles should be read in light of the *Soering* judgement<sup>55</sup>, so that the obligation to extradite and the obligation to respect fundamental rights, as guaranteed by the European Convention of Human Rights (ECHR)<sup>56</sup>, will have to be weighed against each other on a case-by-case basis and the standard of proof that human rights have been violated will be very high; or b) the Framework Decision provides for a human rights exception. The second option has been chosen by eleven Member States in their implementing laws, although the above mentioned provision and recitals 10, 12 and 13 have not always been explicitly included in domestic implementing laws<sup>57</sup>. Once again, the effective degree of mutual trust existing among the Member States is put on trial. The more human rights are used as a ground of refusal, the less one can legitimately presume that the EAW fosters mutual confidence. It is reasonable to expect that on at least a few occasions surrender will be refused on this ground. It follows that this is one of the main parameters to evaluate the effective functioning of the EAW. The risk of a high number of cases of refusal (be it legitimate or not) is obviously a serious danger for the building of mutual trust in the European Union.

The EAW restricts considerably one of the classic principles of extradition law: the rule of speciality<sup>58</sup>. Significantly, this change is not radical. As previously pointed out<sup>59</sup>, this rule had been almost eliminated in the previous version of the Framework Decision, but was at the end reintroduced. The current Article 27 qualifies it first of all as a general principle. Paragraph 2 clarifies that the surrendered person may not be prosecuted, sentenced or otherwise be subject to deprivation of liberty for an offence which he or she committed before surrender and which is different to the one that the EAW refers to. This general statement is limited by two categories of exceptions. The first category of exception is the effect of a sort of reciprocity. Member States that have notified the General Secretariat of the Council that consent

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<sup>55</sup> ECtHR 7 July 1989, *Soering v. UK* 7 July 1989, Application no. 14038/88.

<sup>56</sup> See Article 6 (2) TEU.

<sup>57</sup> The eleven States are: Austria, Belgium, Cyprus, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Slovenia, United Kingdom. See for other details Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States in 2005, 2006 and 2007, COM (2007) 407 final and Annex to the Report, SEC (2007) 979. See also *infra*, chapter 5.

<sup>58</sup> See *supra* chapter 1 p.17.

<sup>59</sup> See *supra* p. 77-79.

is presumed to have been given for the abolition of the rule can put in place a special regime (paragraph 1). This regime would only operate for these States, unless the executing judicial authority decides otherwise in a particular case. Thus speciality is excluded as a result of political will, although a judicial authority can still retain it.

The second category of exceptions operates, as it were, “automatically”. There are a number of cases in which the principle does not apply, i.e. it is possible to prosecute and convict a person for an offence “other”. They are listed in paragraph 3: when the person having had the opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within forty-five days of his or her final discharge, or has returned to that territory after leaving it; when the offence is not punishable by a custodial sentence or detention order; when the criminal proceedings do not give rise to the application of a measure restricting personal liberty; when the person could be liable to a penalty or a measure not involving the deprivation of liberty, in particular a financial penalty or a measure in lieu thereof, even if the penalty or measure may give rise to a restriction of his or her personal liberty. Another exception operates when the executing judicial authority which surrendered the person gives its consent in accordance with paragraph 4. According to this paragraph, consent must be requested to the executing judicial authority, including the same documentation required for an EAW. The judicial authority decides within thirty days of the receipt if the request: it gives its consent when the offence is itself subject to surrender; it refuses it on one of the mandatory or optional grounds mentioned in Article 3 and 4. Member States are obliged to provide the guarantees mentioned in Article 5.

The surrender person can expressly waive entitlement to speciality. He or she must do so before the competent authority of the issuing Member State and this decision must be recorded following the rules of that State’s legal system. As a minimum requirement, the person has the right to legal counsel and the procedure must guarantee that he or she has expressed consent voluntarily and in full awareness of the consequences.

The exact scope of application and implications of the rule of speciality have been examined by the Court of Justice in *Leymann and Pustovarov*<sup>60</sup>. First of all, the Court clarified that, in order to identify an offence “other” than that for which the person was surrendered, it is necessary to look at the constitutive elements of the offence and verify whether the information contained in the warrant and those mentioned in the later procedural measure correspond<sup>61</sup>. In this context, time and place can be modified, as long as they emerge from the data collected during the investigations in the issuing State, the nature of the offence is not altered and there are no grounds for refusal<sup>62</sup>. Secondly, it held that a modification in the description of the offence, merely concerning the type of drugs, is not sufficient to determine an offence “other” as indicated in Article 27 (1)<sup>63</sup>. Thirdly, the Court interpreted the exception to speciality provided for by Article 27 (3) (c) (when the criminal proceedings do not give rise to the application of a measure restricting personal liberty) as meaning that, where a coercive measure is not applied, the person may be prosecuted and convicted for an offence “other” before the consent following the procedure described in paragraph 4 is given. However, even where a coercive measure is applied, the person can be subjected to such measure before the consent is given, if this measure is justified in relation to other offences mentioned in the EAW<sup>64</sup>.

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<sup>60</sup> ECJ C-388/08 PPU *Leymann and Pustovarov*, 1 December 2008. Two cases were dealt with by the Court. In the first, the request sent by a Finnish prosecutor to Poland for the surrender of Mr. Leymann, referred to the offence of illegally introducing in Finland a considerable quantity of amphetamines with the purpose of selling it: however, Mr. Leymann was thereafter prosecuted in Helsinki for illegally introducing haschisch, following consultation with the Polish representative in Eurojust. In the second, two different requests were sent by Finland to Spain for the surrender of Mr. Pustovarov. The later request sought the Spanish authorities’ consent in order to prosecute him for the offence of haschisch trafficking instead of amphetamines trafficking. However, he was convicted before the consent was actually received.

<sup>61</sup> ECJ *Leymann and Pustovarov*, par. 59.

<sup>62</sup> *Ibid.*

<sup>63</sup> ECJ *Leymann and Pustovarov*, par. 63.

<sup>64</sup> ECJ *Leymann and Pustovarov*, par. 76.



### 3.3.2 Procedure

It is curious that Article 1 (2), according to which the EAW must be executed on the basis of the principle of mutual recognition, has only been explicitly mentioned by six Member States<sup>65</sup>. An EAW is issued and executed by judicial authorities (Article 6). A list of the competent authorities designated according to domestic law is sent by each Member State to the General Secretariat of the Council. As opposed to traditional extradition, the role of the executive is limited to mere assistance (as repeated in recital 9 of the Preamble). Article 7 allows Member States to designate one or more central authorities to assist the competent judicial authorities: all indications thereof must be communicated to the Council. Central authorities can also be made responsible for the administrative transmission and reception of an EAW or any relating correspondence.

We may split up the whole procedure regulated by the Framework Decision<sup>66</sup> into four phases: issuing of the EAW; transmission of the EAW to the competent authorities of the executing State; decision to execute; surrender. Each of these phases is considered by the Framework Decision autonomously, with its own rules and exceptions. The same will be done in the following paragraphs.

#### *a) Issuing of the EAW*

The mechanism comes to life with a judicial decision issued by a judge or a public prosecutor in accordance with the procedural law of his own State. The decision is “judicial”, therefore it cannot emanate from a police body (as occurs, for instance, in the Australia-New Zealand backing of warrants system). It cannot emanate from a political or diplomatic authority either (as was the case in previous extradition models in Europe). The definition of “judicial authority” is taken over directly from the 1957 Convention on Extradition, which itself referred to the Bilateral Convention

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<sup>65</sup> Annex to the Report from the Commission, *supra* 4.

<sup>66</sup> As will be seen later, the scheme delineated in the Framework Decision does not always correspond to the actual procedure applied in the domestic law of each Member State.

concluded between France and Germany in 1951. The *ratio* of the decision to request surrender is the need to initiate a criminal trial against a suspected person or execute a custodial sentence or detention order. By the latter is meant “any order involving deprivation of liberty which has been made by a criminal court in addition to or instead of a prison sentence”<sup>67</sup>. However, the competent authority can only avail itself of such an instrument for acts which are punishable by its national law by a custodial sentence or detention order for a maximum of at least one year or, in case the sentence has already been passed or the detention order made, for sentences of a minimum of four months.

*b) Transmission of the EAW*

The transmission of the EAW from the issuing authority to the executing authority (Articles 9 and 10) follows different rules depending on whether or not it knows where the sought person is. In the first case, the EAW is sent directly. In the second case, an alert is issued in the Schengen Information System (SIS)<sup>68</sup>: such alert has the same effect as an EAW and is in line with the provisions of the CISA<sup>69</sup>. However, since the SIS is not yet capable of transmitting all the information required, the alert is considered equivalent to an EAW only until the original is received “in due and proper form” by the executing judicial authority. If it is not possible to make use of the SIS, transmission may occur indirectly through Interpol. Alternatively, the issuing authority may choose to use the telecommunications system of the European Judicial Network.

The issuing authority may face problems. For instance, it is possible that it does not know what the competent executive authority is. In this case, it will need to start appropriate enquiries and here too the contact points of the European Judicial

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<sup>67</sup> Definition taken from Article 25 of the 1957 Convention on Extradition, which repeated Article 21 of the Bilateral Convention between France and Germany. See European Convention on Extradition, Explanatory Memorandum, ETS n. 24.

<sup>68</sup> The option of using the SIS is available in any case, even when the location of the person is known.

<sup>69</sup> See, in particular, Article 95 of the Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985, *supra* note 20.

Network may prove useful. It may of course happen that a request is erroneously sent to an authority which is not competent: the latter is under a duty to forward the EAW to the competent authority of its own State and to inform the issuing authority of this mistake. It is equally possible that the authenticity of one or more documents sent together with the request is questioned. The general principle is that such problems should be dealt with either by direct contact between the judicial authorities or through the central authorities<sup>70</sup>.

The content and form of the EAW are specified in Article 8. More precisely, an EAW must contain: the identity and nationality of the requested person; the name, address, telephone and fax numbers and e-mail address of the issuing judicial authority; evidence of an enforceable judgement, an arrest warrant or any other enforceable judicial decision having the same effect; the nature and legal classification of the offence; a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the offence by the requested person; the penalty imposed, if there is a final judgement, or the prescribed scale of penalties for the offence under the law of the issuing Member State; if possible, other consequences of the offence.

Translation of the warrant into the official language(s) of the requested State is compulsory; Member States may in any case deposit a declaration with the General Secretariat of the Council accepting a translation in one or more other official languages of the European Union<sup>71</sup>.

*c) Decision to execute*

Once a request for surrender has been received by the executing judicial authority, the first action is (wherever this is possible) the arrest of the requested person. Such person has the right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State. He or she must be

<sup>70</sup> Article 10 (5) of the Framework Decision.

<sup>71</sup> Article 8 (2) of the Framework Decision.

informed of the EAW and its contents (Article 11). The executing authority may decide, if it deems it necessary, to keep the arrested person in detention. Otherwise, it may release him or her provisionally at any time, provided that all appropriate measures are taken to prevent the person from fleeing (Article 12).

The arrested person must also be informed of the possibility of consenting to surrender. If consent is not expressed, then a hearing is arranged, in accordance with the law of the executing Member State (Article 14). If consent is expressed before the competent judicial authority, then Article 13 applies. The necessary measures must be adopted in order to make it possible that the person has done so voluntarily and in full awareness of the consequences. Renunciation of the speciality rule is possible at the same time as consent to surrender, following the same procedure. Both must be recorded. Although they cannot be revoked as a general rule, Member States which wish to provide exceptions must inform the General Secretariat of the Council of their intention at the moment of the adoption of the Framework Decision. The period between the date of consent and that of its revocation are not to be considered for the purpose of establishing the time limits for the decision to execute.

#### *d) Decision to surrender*

The surrender phase takes place within very strict time limits. The purpose of this urgency is twofold. On the one hand, it reflects the need to speed up the proceedings and allow for an efficient cooperation between States. In a way, this reinforces mutual trust, as the requesting State will be satisfied with a prompt handing over of the suspect or sentenced person. On the other hand, a quick surrender guarantees also the person who is subject to the EAW, as he or she will not go through long and unreasonable detention pending a decision of the court.

According to Article 17 (which repeats that an EAW must be executed “as a matter of urgency”), the decision to execute the EAW must be taken within 60 days of the

arrest. However, if the person consents to his surrender, the time limits are even shorter: 10 days after consent has been given.

An EAW may be partially or totally incomplete. This is why the Framework Decision provides that, if the executing judicial authority believes that the information communicated by the issuing State is insufficient, it may request additional information. The most important “gaps” to be filled are, in this case, those relating to the existence of mandatory or optional grounds for refusal, the guarantees established by Article 5, or one or more of the essential elements of an EAW, as indicated by Article 8. Where these inconveniences occur, the request needs to be satisfied “as a matter of urgency”. Indeed, Article 15 gives the executing judicial authority the power to fix a time limit for the receipt of the information, taking into account the general time limits of the whole procedure.

More generally, where, for any reason, the time limits cannot be observed, the executing judicial authority is required to immediately inform the issuing judicial authority and give the reasons for such delay. As a result, the time limits may be extended for a further thirty days. In addition, the Member State must inform Eurojust. It may also occur that a particularly negligent State will repeatedly breach these provisions. In such cases it is up to the issuing State to report it to the Council. However, no other legal consequences seem to be provided for: Article 17 (7) simply states that this will be taken into account for the purposes of the evaluation of the implementation of the EAW.

The actual surrender must take place “as soon as possible” on a date which has been previously agreed by the States involved. As a general criterion, a term of ten days from the final decision on the execution of the EAW is established by Article 23. Once again, the provision is flexible and states that, where circumstances beyond the control of the Member States prevent them from respecting the time limit, they must contact each other and agree on a new date: however, the person must be surrendered within ten days of this new date. If this does not occur, he or she must be immediately released, with only one exception, stated in Article 23 (4). This

paragraph states that surrender may in extraordinary cases be postponed for *serious humanitarian reasons*. One example is mentioned: where there are substantial grounds for believing that the operation would manifestly endanger the life or health of the sought person. Once the reasons for the delay cease to exist, the executing judicial authority must inform immediately the issuing authority and agree on a new date: in such a case, surrender will have to be performed within ten days. Again, there are no legal remedies where these provisions are not respected. One can wonder whether *Pinochet*<sup>72</sup> could here be repeated, postponing the surrender several times. The procedure could theoretically involve a political interference, although one could argue that its “judicialisation” should guarantee a fair balance between the need to secure justice and the safeguards of the individual. Moreover, it is possible that the provision of Article 23 (5), providing for immediate release in case of expiry of any of these time limits, is utilised to escape prosecution and/or imprisonment.

Article 24 mentions another possibility of postponing surrender, which is provided where the decision to execute has already been made. The executing judicial authority may do so either in order to allow for prosecution of the requested person in the executing Member State or to permit that he or she serve a sentence there for another act not included in the EAW. It may also decide a *temporary* or *conditional* surrender, after concluding an agreement in writing with the issuing judicial authority.

One of the main effects of surrender is that it is up to the issuing State to deduct all periods of detention deriving from the execution of an EAW from the total period of detention that is supposed to be served in that State after a custodial sentence or detention order have been passed (Article 26). All information on the duration of the detention on the basis of the EAW must be transmitted by the executing authority (or the central authority, if this has been created) to the issuing authority at the time of the surrender.

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<sup>72</sup> *Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)* [1999] 2 WLR 827. Note that that case is slightly different, as extradition was refused rather than postponed and the decision was taken by the executive rather than the judiciary (i.e. the UK Home Secretary) by using the “serious humanitarian reasons argument”. See also *supra* p.84.

A special mechanism is regulated by Article 28 for cases in which Member States notify the General Secretariat of the Council that, in relation with other Member States which have given the same notification, the consent for the surrender of a person to a State other than the executing State is presumed to have been given, unless stated otherwise in the decision to surrender. This applies to EAWs issued for offences which have been committed prior to surrender. However, extradition to a third (non-Member) State can only occur with the previous consent of the competent authority of the executing State, in accordance with the provisions of its domestic law as well as the related Conventions.

In exceptional circumstances, a person who has already been surrendered to the issuing State may be handed over (pursuant to an EAW) to a third Member State *without the consent of the executing State*. This applies in three cases: a) if the sought person has had the opportunity to leave the territory of the Member State to which he or she has been surrendered but has not exploited it within 45 days of the final discharge, or has returned to that territory after leaving it; b) if the sought person consents to being further surrendered. Obviously, the right to legal counsel is guaranteed. It is also necessary that consent is given before the competent judicial authorities of the issuing Member State and recorded following that State's domestic law. It must be clear that consent has been given voluntarily and in full awareness of the consequences; c) if the speciality rule does not apply, and more precisely in the cases mentioned in Article 27 (3) (a), (e), (f) and (g).

The consent of the executing judicial authority to another Member State is subject to specific rules. The request for consent must be transmitted following Articles 8 and 9. The decision must be taken within 30 days of receipt of the request. The grounds for refusal and the guarantees relating to the EAW may be utilised. In one case consent is mandatory: when the offence which it refers to is itself subject to surrender.

### 3.4 Conclusion

As can be deduced from this chapter, the EAW is not an entirely new creature in the area of cooperation in criminal matters. There is some continuity between traditional extradition, the forms of surrender which were bilaterally agreed upon at the beginning of this century and the EAW proper. It is a fact however that in some respects the Italy-Spain Treaty and the UK-Spain Treaty were at the same time more innovative (as, for instance, the grounds for refusal were considerably restricted in contrast to classic extradition) and incomplete (as they did not contain provisions on speciality, territoriality or *ne bis in idem*). The initial Commission project for the identification of a surrender scheme for the countries of the EU was also to some extent rather audacious, as it conceived the new mechanism as a powerful tool involving at the same time the search, arrest, detention and surrender of a person. The requirement of an effective and quick procedure was met by the provisions imposing strict time limits and establishing direct contact between judicial authorities. One of the most remarkable achievements was the removal of dual criminality, although the Commission draft attempted to balance this daring step with some leeway left for the Member States. As has been shown earlier, this draft was soon to be dropped and a rather different approach prevailed.

The final outcome was a somewhat bizarre compromise between the guidelines identified by the European Council, which overtly promoted cooperation with the US, in particular in the fight against terrorism, and the conditions imposed by the European Parliament, which *inter alia* limited the application of the EAW to prosecution or execution of a sentence (or detention order) and increased the number of grounds for refusal. This outcome took the form of a Third Pillar instrument (which as we know has a weaker binding force than the classic First Pillar acts).

Most notably, dual criminality was removed for a considerable number of categories of offences. As will be seen in another chapter, this clearly contradicts the earlier proposals on the application of mutual recognition, which referred to a much smaller



list of crimes<sup>73</sup>. It is submitted here that confusion and political pressure prevented adopting a rational and balanced measure and no proper reflection was made on the consequences and risks of such strategy.

The EAW is different from extradition and its main features can all be explained at least theoretically in terms of mutual trust in foreign legal systems. Nevertheless, its internal structure and functioning as well as the context in which it operates (i.e. judicial cooperation in criminal matters) have not been developed coherently. The move from the inter-governmental level (which extradition belongs to) to the judicial level has not been complete, because the EAW has been generated within a framework (the Third Pillar) which is itself flawed and subject to criticism from many points of view. Some of the problems of the EAW relate to the substantive law, which will be analysed in the next chapter.

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<sup>73</sup> See *infra* chapter 4 p. 131.

## **4. Defining crimes in the European Union: a Sisyphean task? Double criminality and related issues**

### **Introduction**

One of the main concerns deriving from the adoption of the EAW is its relationship with the substantive and procedural features of EU legal systems. While the latter will be looked at in the following chapter, the aim of this chapter will be to reflect on some of the potential obstacles that might arise from the definition of the categories of offences which the EAW applies to. Some solutions to overcome them will be suggested. Finally, an overview of the problems relating to the implementation of the principle of double jeopardy will be given.

### **4.1 Crimes for which double criminality is lifted: all problems solved?**

The partial elimination of the double criminality requirement is certainly a remarkable achievement of the Framework Decision on the EAW. As has been noted in chapter three, this means that surrender may occur for an act defined as a crime by the requesting State's legal system, regardless of whether the same act is criminalised in the requested State. This is limited to a few categories of offences, provided that the required penalty threshold is respected<sup>1</sup>. It is maintained in this chapter that this system may only operate effectively if a sufficient degree of approximation is ensured at the European level for a number of clearly identified offences. Moreover, it is argued that double criminality should have been removed for a shorter list of categorised offences for which common minimum denominators can be more easily found. These arguments will be exposed by analysing the main problems deriving from the suppression of double criminality.

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<sup>1</sup> See *supra*, chapter 3 p.84.

First of all, it should be noted that the emergence of a European criminal law is not an entirely new phenomenon. The need for harmonisation of European States' legal systems has been stressed by many scholars and practitioners<sup>2</sup>. Already in the sixties the general choice between a theoretical approach and a more pragmatic approach was at the centre of the debate. It was already evident that this is not a purely legal matter, as it involves consideration of sociological and cultural aspects. As was pointed out, "(...) if we adopted criminological parameters rather than follow metaphysical parameters, we would agree more easily on common concepts which would very much facilitate, I believe, international cooperation"<sup>3</sup>.

Secondly, the principles constituting the basis of legal systems in Europe are, in their essential features, similar to each other. For instance, the notion of criminal responsibility is normally defined in the light of a prohibited conduct and a mental element. However, the approaches diverge as to where these two concepts need to be allocated. Thus, common law and some civil law countries maintain a distinction between the two<sup>4</sup>. Some other civil law countries elaborate, aside from a legal description of the crime (*Tatbestand*), a further division between the wrongful character of a conduct or unlawfulness (*Rechtswidrigkeit*) and culpability or blameworthiness (*Schuld*)<sup>5</sup>. The twofold distinction between *actus reus* and *mens rea* separates the definitional elements of the crime (marked by their unlawfulness or absence of grounds of justification) and the psychological or subjective elements:

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<sup>2</sup> See e.g. A. Weyembergh, *L'harmonisation des législations: condition de l'espace pénal européen et révélateur de ses tensions* (Institut d'études européennes Brussels 2004) and *supra* chapter 2 p. 55.

<sup>3</sup> Droit pénal européen, Congrès organisé les 7, 8 et 9 Novembre 1968 par l'Institut d'Etudes Européennes (ULB Brussels 1970) 629 (my translation. The original reads as follows: *si nous admettions des paramètres criminologiques plutôt que de suivre et de continuer à suivre des paramètres métaphysiques, nous arriverions plus aisément à de grandes notions communes qui faciliteraient beaucoup, je pense, la collaboration internationale*").

<sup>4</sup> In England and Wales, Scotland, Northern Ireland and Ireland, *actus reus* is the "physical" element, while *mens rea* (including intention, knowledge, recklessness, negligence) is the "fault" element of an offence (*actus non facit reum nisi mens sit rea*). See, e.g. Smith and Hogan, *Criminal law* (11<sup>th</sup> ed OUP 2005); A.P. Simister, G.R. Sullivan, *Criminal law: theory and doctrine* (2<sup>nd</sup> ed. Hart Publishing Oxford 2003). An analogous (albeit not identical) distinction (between the material/objective elements and the psychological/subjective elements) can be found in some civil law countries, such as France and Italy. See, e.g. B. Bouloc, G. Stefani, G. Levasseur, *Droit pénal général* (20<sup>th</sup> ed. Dalloz Paris 2007); F. Carrara, *Programma del corso di diritto criminale, Vol. 1 Parte generale* (5<sup>th</sup> ed. Giusti 1877); F. Mantovani, *Diritto penale. Parte generale* (5<sup>th</sup> ed. CEDAM Padova 2007).

<sup>5</sup> This is the case in Germany, Austria, Spain and Portugal. See e.g. H. Jescheck, T. Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil* (6<sup>th</sup> ed. Dunker & Humblot Berlin 1998); C. Blanco Lozano, *Tratado de derecho penal español: El sistema de la Parte general: la estructura del delito* (JM Bosch Barcelona 2005).

this distinction is rigid and no exception is admitted<sup>6</sup>. On the other hand, the tripartite distinction mentioned above incorporates intention within the concept of criminal act and identifies *mens rea* with a reproach of the wrongdoer for his act, based on two grounds: awareness of the unlawfulness and criminal capacity<sup>7</sup>. One consequence of adopting this latter theory, developed in Germany, is that, for example, unavoidable mistake of law constitutes a defence (whereas in English law ignorance of the law is normally no defence<sup>8</sup>). On the other hand, a feature that we find in similar terms in civil and common law systems (albeit with nuances and with no formal status in the second case) is the distinction between justification (qualifying as lawful an act that is otherwise unlawful) and excuse (qualifying the act as unlawful but exculpating its perpetrator)<sup>9</sup>.

None of these general theories is immune from criticism. On the one hand, the *actus reus/mens rea* distinction has sometimes been considered simplistic, as it would not take into account relevant differences between the various doctrines that are grouped within them<sup>10</sup>. On the other hand, the tripartite structure has also been criticised as incapable of dealing with some specific issues<sup>11</sup>. Other more detailed remarks attack the volitional element of the civil law notion of *dolus eventualis* (which is very

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<sup>6</sup> However, in some countries, such as Italy, some authors have argued that some subjective elements can be included in the *actus reus*. See e.g. G. Fiandaca, E. Musco, *Diritto penale, Parte generale* (5<sup>th</sup> ed. Zanichelli Bologna 2007). This is due to the influence of German doctrine. A variation of the bipartite doctrine is the quadripartite doctrine, adopted in many former Communist countries: see more recently G. Fletcher, *The Grammar of Criminal Law* Vol. I (OUP 2007) 47.

<sup>7</sup> This distinction (in its modern form) was elaborated by the German *finalist* doctrine or teleological theory of action (so-called *finale Handlungslehre*), which argued that all human acts are purpose-orientated, as opposed to the previous *classical theory* based on causation (*kausaler Handlungsbegriff*), which distinguished only between the objective and the subjective side of criminal liability. See H. Welzel, *Das Deutsche Strafrecht*, (11th ed. de Gruyter Berlin 1969), also reported in G. Fletcher, *Rethinking Criminal Law* (OUP Oxford-New York 2000) 434.

<sup>8</sup> See section 17 of the German Criminal Code. Concerning English law, see *R. v. Bailey* (1800), Russell & Ryan 1, 168 ER 651.

<sup>9</sup> See J. Pradel, *Droit pénal comparé* (2<sup>nd</sup> ed. Dalloz Paris 2002) 325. The distinction is not approved by A.P. Simester, G.R. Sullivan, *Criminal law: theory and doctrine, supra* 541; it is supported by G. Fletcher, *Rethinking Criminal Law* (OUP Oxford-New York 2000) 759. R. A. Duff, *Answering for Crime* (Hart Publishing Oxford-Portland 2007) 263 argues that a different distinction should be utilised.

<sup>10</sup> See e.g. P.H. Robinson, 'Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?' in S. Shute, J. Gardner, J. Horder (eds.) *Action and Value in Criminal Law* (Clarendon Press Oxford 1993) 187.

<sup>11</sup> R.L. Christopher, 'Tripartite structures of criminal law in Germany and other civil law jurisdictions' (2007) 28 *Cardozo Law Review* 2675.

similar to the common law notion of subjective recklessness) as fictitious and difficult to prove<sup>12</sup>.

This necessarily brief survey does not take into account the various categorisations that have been elaborated by the doctrine and jurisprudence of each country. However, it hints at the number of issues that potentially stem from an analysis of the divergent approaches. At the source of all difficulties lies however the risk of referring to concepts and mechanisms that are intimately connected to the legal system in which they have been generated. This has been recognised, at the international level, by the *ad hoc* Tribunals, which had to apply analogous notions in their case law<sup>13</sup>. Despite this, a common understanding has been found on the definition of war crimes, crimes against humanity and genocide and this has constituted the basis for the work of all international criminal Tribunals, including the International Criminal Court<sup>14</sup>. This is so because the prohibition of the conducts corresponding to those crimes reflects the need to protect a set of core values that are seen as identical in all legal systems as part of the international community.

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<sup>12</sup> G. Taylor, 'Concepts of intention in German criminal law' (2004) 24 *Oxford Journal of Legal Studies* 99. According to German law, *dolus eventualis* (*bedingter Vorsatz*) is established when a person foresees the forbidden consequence of his conduct as a not entirely remote possibility, but despite this he performs the conduct, by internally approving such consequence or reconciling himself with it. By contrast, in order to establish (subjective) recklessness, common law does not inquire into the defendant's attitude to the risk and is normally satisfied with the cognitive element, i.e. foresight of an unreasonable risk which has nonetheless been taken (i.e. the accused is *not* considered reckless when he fails to consider an obvious risk or knows that there might be some risk). For an overview, see e.g. A.P. Simester, G.R. Sullivan, *Criminal law: theory and doctrine*, *supra* 139, who nevertheless believe there is still some scope for objective recklessness. For discussions on *dolus eventualis* by various legal writers, see e.g. H. Jescheck, T. Weigend, *Lehrbuch des Strafrechts*, *supra* 299; G. Fletcher, *Rethinking Criminal Law*, *supra*, 445; C. Elliott, *French criminal law* (Willan Publishing 2001) 71; G. Fiandaca, E. Musco, *Diritto penale, Parte generale*, *supra* 321.

<sup>13</sup> For instance, in *Prosecutor v. Delalić et al.* (Case n. IT-96-21-T), Judgement, 16 November 1998 (1999) 38 ILM 57, the ICTY, in relation to the issue of establishing the *mens rea* for the offences of "wilful killing" and "murder" (in the context of war crimes), observed that "...In any national legal system, terms are utilised in a specific legal context and are attributed their own specific connotations by the jurisprudence of that system. Such connotations may not necessarily be relevant when these terms are applied in an international jurisdiction" (par. 431). The Tribunal however was clearly inspired in its judgement by both common law and civil law approaches. For the Statutes of the International Tribunal for the Former Yugoslavia (1993) and the one for Rwanda (1994), see UN Doc. S/RES/808 (1993) and UN Doc. S/RES/827 (1993), as well as Annex and S/RES/955 (1994) and subsequent amendments UN Doc. S/RES/1329 (2000) and S/RES/1503 (2003).

<sup>14</sup> Statute of the International Criminal Court, Rome, (17/07/1998) UN Doc. A/CONF. 183/9\*, 37 ILM 999 (1998), amended by UN Doc. PCNICC/1999/INF/3\*.

The context in which the EAW list (the “Article 2 list”) operates is different. Although crimes within the jurisdiction of the International Criminal Court are mentioned, there are another 31 categories ranging from crimes against property to crimes against the person to typically transnational offences<sup>15</sup>. While the number of unlawful conducts covered by the list is impressive, they have not been systematised with an apparent *ratio*. However, there is a further, more important remark on this legislative choice: what we have here is not a description of specific offences (*Tatbestände*, as seen before) which should constitute the basis for prosecution. The Framework Decision rather identifies “empty boxes” which have no legal value *per se*. The mere use of expressions such as “corruption”, “terrorism”, “rape”, “sabotage” is not intrinsically legal, as these are common words used daily by ordinary people. It is up to the requesting State to fill the “empty box” with the corresponding definition deriving from its own system. The purpose is to provide States with a minimum basis to facilitate mutual recognition not only of judgements but also of offences. Steps in this direction had already been taken in a certain sense when double criminality was applied. First of all, this requirement was in most cases in practice not viewed *in abstracto* (i.e. referring only to the definition of a crime) but *in concreto* (i.e. referring to justification, excuses and any other circumstances excluding punishability as well in order to assess whether the offender would have been punishable in the requested State, had the offence been committed there): thus, for instance, an act of taking someone else’s property fulfils *in abstracto* the criteria of theft, but the perpetrator might be convinced it is his own property (therefore

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<sup>15</sup> They are the following: participation in a criminal organisation; terrorism; trafficking in human beings; sexual exploitation of children and child pornography; illicit trafficking in narcotic drugs and psychotropic substances; illicit trafficking in weapons, munitions and explosives; corruption; fraud; laundering of the proceeds of crime; counterfeiting currency, including of the euro; computer-related crime; environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties; facilitation of unauthorised entry and residence; murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage-taking; racism and xenophobia; organised or armed robbery; illicit trafficking in cultural goods, including antiques and works of art; swindling; racketeering and extortion; counterfeiting and piracy of products; forgery of administrative documents and trafficking therein; forgery of means of payment; illicit trafficking in hormonal substances and other growth promoters; illicit trafficking in nuclear and other radioactive materials; trafficking in stolen vehicles; rape; arson; unlawful seizure of aircraft/ships; sabotage.

lacking *mens rea*)<sup>16</sup>. Secondly, in an extradition request the *nomen iuris* (i.e. the qualification of the act) is normally irrelevant. As a result, double criminality was based on “acts”, rather than “offences”: surrender took place even if the same behaviour was qualified as, say, embezzlement in State A and theft in State B, or robbery in the first and aggravated theft in the second<sup>17</sup>. The elimination of dual criminality goes further, as, at least in theory, the court is no longer required to look at the material act, as long as this is identified by the requesting authority as one of the “Article 2 list” offences. The question is therefore: does this achieve the objective of simplifying cooperation?

If we look more closely at the listed categories of offences, it is possible to highlight significant legal as well as extra-legal issues deriving from the practice. The main problem is that the list offences are couched in vague terms. While this may provide them with a higher degree of flexibility, it is also a source of potential conflicts. In most cases the way a crime definition is conceived and relied upon by courts and legislators is peculiar to the society in which that definition operates. The following sections offer a concise overview of some of the list crimes from a comparative perspective and attempt to explore both converging and diverging points. The terms “harmonisation” and “approximation” will be used indistinctly, although, as clarified in chapter two<sup>18</sup>, the former should be *stricto sensu* intended as the creation of a homogeneous system with no differences between legal systems, whereas the latter consists in the setting up of common minimum elements relating to offences and penalties. Third Pillar measures have focused so far on approximation as a tool to facilitate the implementation of mutual recognition, thus leaving Member States free to pursue their own policies beyond the minimum standard agreed at the EU level. This chapter aims to show that, while full harmonisation is currently unworkable, the approximation path should be followed more decisively, by adopting at the same time a more careful approach on the complex issues related to double criminality.

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<sup>16</sup> On double criminality in general, see M. Plachta, ‘The Role of Double Criminality in International Cooperation in Penal Matters’ in N. Jareborg (ed.), *Double Criminality Studies in International Criminal Law* (Iustus Förlag, Uppsala 1989).

<sup>17</sup> S. Gafner D’Aumerie, *Le principe de la double incrimination. En particulier dans le rapport d’entraide judiciaire internationale en matière pénale entre la Suisse et les Etats-Unis* (Helbing and Lichtenhahn Basle 1992).

<sup>18</sup> See *supra* chapter 2, p. 55-57.

#### 4.1.1 Crimes not subject to harmonisation

A first group embraces crimes that have not been harmonised. Examples are: theft, organised or armed robbery, arson, all the “trafficking offences” except those related to drugs (in stolen vehicles, weapons, nuclear or other material, hormonal substances, human organs, cultural goods, fake administrative documents). While most of these crimes do not pose significant definitional problems, some delicate issues might emerge in relation to two groups of offences: on the one hand, murder and rape and, on the other, a “special” group including racism and xenophobia, racketeering and extortion, swindling, sabotage and trafficking in stolen vehicles. In the latter case some obstacles can be identified to a proper functioning of the EAW.

##### 4.1.1.1 Murder and rape

Murder and rape are often labelled as “crimes against the person”. It will be shown in this section that, although they qualify as *mala in se*, they have peculiar features depending on the legal system in which they are conceived. Nevertheless, this does not constitute a major problem in most cases.

The first of the two offences appears on the EAW list as “murder, grievous bodily injury”. Normally legal systems distinguish (according to the degree) between two or more forms of homicide: for instance, UK law has murder and manslaughter (culpable homicide in Scotland)<sup>19</sup>; French law has *meurtre* (roughly equivalent to voluntary manslaughter) and *assassinat* (murder with premeditation)<sup>20</sup>; German law has *Totschlag* (again, voluntary manslaughter) and *Mord* (murder)<sup>21</sup>; Italian law has *omicidio volontario* and *omicidio colposo*, respectively the more and the less serious form of crime<sup>22</sup>. In general terms, the *actus reus* is the same: the killing of a person by another person. However, the categorisations within each system differ. For

<sup>19</sup> A.P.Simester, G.R.Sullivan, *Criminal law: theory and doctrine*, supra 323.

<sup>20</sup> See Article 221-1 and 221-3 respectively of the *Code pénal*.

<sup>21</sup> See section 212 and section 211 respectively of the *Strafgesetzbuch* (StGB).

<sup>22</sup> See Article 575 and 589 respectively of the *Codice penale*.



instance, German law has additional forms of voluntary homicide: “less serious case of manslaughter” (*minder schwerer Fall des Totschlags*) and “killing on demand” (*Tötung auf Verlangen*)<sup>23</sup>; Italy too has a series of autonomous crimes, such as “killing on demand” (*omicidio del consenziente*) or “injury resulting in death” (*omicidio preterintenzionale*), apart from specific aggravating circumstances<sup>24</sup>; France does not have “killing on demand” but has a series of aggravated forms and a separate offence of “poisoning”<sup>25</sup>. Regarding the *mens rea*, the intention in murder is elaborated in various ways. On the one hand, in France, differently from England and Wales, “murder” only includes acts committed with the intention of causing death<sup>26</sup> and all *general* defences may apply in principle<sup>27</sup>. On the other hand, intention in German and Italian law is wider than in English or French law, as it embraces *dolus eventualis*<sup>28</sup>. This may determine different results and in fact it has been pointed out that there are cases in either of these jurisdictions in which a person would be convicted of wounding or intentionally causing physical injury rather than murder or attempted murder<sup>29</sup>. Arguably cases like this could fall within the EAW label “serious bodily injury”, which certainly recalls the English requirement of an intention to kill or intention to cause grievous bodily harm to any person<sup>30</sup>. However, it should be observed that the penalties vary considerably: to give some examples, in France, unlike England/Wales and Germany, “murder” does not involve a mandatory

<sup>23</sup> See section 213 and section 216 respectively of the StGB.

<sup>24</sup> See Article 579 and 584 respectively, as well as 576 *et seq.* of the *Codice penale*.

<sup>25</sup> See Articles 221-2 *et seq.* of the *Code pénal*.

<sup>26</sup> All acts intended to cause harm but not death are covered by one of the aggravated forms provided for by the French code.

<sup>27</sup> J. Spencer, ‘Intentional Killings in French Law’ in J. Horder (ed.), *Homicide Law in Comparative Perspective* (Hart Publishing Oxford 2007) 39, 42. The author (*ibid.* 48) also points out that in France, in a case equivalent to the English *Martin* [2001] EWCA Crim 2245 [2003] QB 1 (where a farmer who shot a burglar in the back when he was escaping saw his conviction reduced from murder to manslaughter not on the grounds of “legitimate defence”, but of the partial defence called “diminished responsibility”), the perpetrator would be more likely to be acquitted by using self-defence, unless the prosecution could prove that he is not acting for the safety of himself or of his family.

<sup>28</sup> For German law, see A. du Bois-Pedain, ‘Intentional Killings: The German law’ in J. Horder (ed.), *supra* 55, 57; R. Maurach, F.C. Schroeder, M. Maiwald, *Strafrecht, Besonderer Teil 1* (3<sup>rd</sup> ed. C.F. Müller Heidelberg 2003) 11. For Italian law, see e.g. Cassaz. Sez. I 27 February 1998 n. 2587 (1999) *Cassazione penale* 1111 and also G. Fiandaca, E. Musco, *Diritto penale, Parte speciale* Vol. 2 t. 1 (2<sup>nd</sup> ed. Zanichelli Bologna 2007) 10. In Scotland, it is not necessary that the death of the victim is intended (although “wicked intent” seems to be required), as “wicked recklessness” is sufficient: see V. Tadros, ‘The Scots Law of Murder’ in J. Horder (ed.), *supra* 187, 189.

<sup>29</sup> A. du Bois-Pedain, ‘Intentional Killings: The German law’ in J. Horder (ed.), *supra* 55, 57-58.

<sup>30</sup> On this requirement Smith and Hogan, *Criminal law* (*supra* note 4) 349.

life sentence; the German offence of “killing on demand” carries a punishment of imprisonment between six months and five years, while the Italian equivalent carries a minimum of six years and a maximum of fifteen years’ imprisonment, but a higher punishment, including life sentence, may apply due to aggravating circumstances<sup>31</sup>. It follows that where, for instance, a German authority issues an EAW for the purposes of prosecuting B, a British citizen accused of killing G, a German citizen for an act of murder which would not be qualified as such under UK law, the request should of course be satisfied. Although, from a “Euro-phile” perspective, purists in favour of full harmonisation might find it an unjust and non-uniform treatment<sup>32</sup>, one could argue here that the disparities are not significant and that the offence is so serious as to render them irrelevant in practical terms. The *ratio* is indeed to punish the perpetrator under the law of the place where the crime was committed, no matter how this is done. However, why should there be such diverse penalties?

Another issue is related to those acts that are not included in the definition of murder by some States, such as abortion and euthanasia. The question of whether or not the State should criminalise these acts invades a number of extra-legal fields and is certainly topical. Regarding euthanasia, as is well known, within the European Union two countries in particular have been in the spotlight recently: Belgium and the Netherlands, which allow it in specific circumstances from 2002 and 2001

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<sup>31</sup> See for “murder” Article 221-1 of the *Code penal*, section 211 of the StGB, Murder (Abolition of death penalty) Act 1965 c. 71; for “killing on demand”, section 216 of the StGB and Article 579 of the *Codice penale*.

<sup>32</sup> Interestingly, there has been a debate in England and Wales about the possibility of modifying the law of murder and some suggestions have been put forward: see e.g. A. Pedain, ‘Intention and the Terrorist Example’ [2003] *Criminal Law Review* 579. The UK Law Commission, after analysing other jurisdictions, has proposed to replace the distinction murder/manslaughter with first degree murder/second degree murder/manslaughter. The first would carry a mandatory life sentence and would include intentional killing as well as killing with an intention to do serious injury in the awareness that there is a serious risk of causing death; the second would include killing with an intention to do serious injury or to cause injury or a fear or risk of injury, in the awareness that there is a serious risk of causing death, as well as cases where a partial defence has been recognised. One of the reasons is that, since the use of the term “intention” now prevails over the previous “malice aforethought”, this has led to a very narrow definition of murder and, by contrast, a very broad definition of manslaughter. See Law Commission for England and Wales, *Murder, Manslaughter and Infanticide*, Law Com No 304 (London 2006) and J. Horder, ‘The Changing Face of the Law of Homicide’ in J.Horder (ed.), *supra* 19.

respectively<sup>33</sup>. Regarding abortion, it is equally well known that Ireland prohibits it at the constitutional level, unless the medical practitioner reasonably believes that it is necessary in order to prevent a real and substantial risk of loss of the woman's life<sup>34</sup>. These delicate issues were considered by the drafters of the EAW, who intended initially to apply the "negative list system", allowing each country to establish of list of offences for which a request for surrender would always be refused<sup>35</sup>. The system now is different (being based on a "positive" list), but the issue stays the same: would Dutch authorities be prepared to surrender a doctor practising an "intentional destruction of unborn human life after implantation in the womb of a woman" to Ireland? It must be added that the contours of what is meant by euthanasia and the circumstances in which it is allowed are not always clear<sup>36</sup>. For instance, in the UK "active euthanasia", meaning taking active steps to hasten another person's death, is criminalised<sup>37</sup>, but cases of "passive euthanasia" may be tolerated<sup>38</sup>. The Ms Pretty case brought the issue to the public's attention (although "assisted suicide" should be as a matter of principle different from "murder"). The applicant, paralysed and terminally ill, requested that her husband be allowed to help her to commit suicide, arguing, *inter alia*, that human dignity and freedom as

<sup>33</sup> Loi du 28 mai 2002 relative à l'euthanasie, *Moniteur Belge*, 22 juin 2002; The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, 10 April 2001, available at <http://www.nvve.nl/assets/nvve/english/euthlawenglish.pdf>.

<sup>34</sup> Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy) Bill, 2001.

<sup>35</sup> Draft Framework Decision on the European arrest warrant and the surrender procedures between the Member States, Brussels, 25/09/2001, COM (2001) 522 final/2 16.

<sup>36</sup> An overview of the legislation on euthanasia in Belgium and the Netherlands is given by a Report of the French Senate (since in France a similar reform was considered by Parliament): [www.senat.fr/lc/lc109/lc109.html](http://www.senat.fr/lc/lc109/lc109.html). For an overview of the legislation of other countries, see <http://www.senat.fr/lc/lc49/lc49.html>. For discussions on euthanasia, see e.g. C. André, 'Euthanasie et droit pénal: la loi peut-elle définir l'exception?' (2004) 1 *Revue de science criminelle et de droit pénal comparé* 43, who argues *inter alia* that euthanasia should be viewed as an autonomous justification.

<sup>37</sup> In *R v. Cox* [1992] 12 BMLR 38 a terminally ill patient repeatedly requested her doctor to terminate her life. The doctor decided to inject a lethal dose of potassium chloride and was eventually convicted of attempted murder.

<sup>38</sup> In England and Wales, since the Suicide Act 1961 (section 1) suicide has no longer been a crime, although aiding, abetting, counselling or procuring the suicide of another is punishable by up to fourteen years' imprisonment; helping someone to die may also be punishable under the common law of murder by a mandatory life sentence. In Scotland attempting suicide is not a crime. In this broad context, the case law has evolved considerably. In *Airedale NHS Trust v Bland* [1993] AC 789 the Lords (referring to the "best interest test") recognised that withholding life sustaining treatment is not unlawful when the patient has been in a persistent vegetative state for a long time. In *B v. an NHS Hospital Trust*, B (Adult: refusal of medical treatment) 2002 EWHC 429 AER 499 it was held that a patient has the right to refuse treatment (in that case, the right to ask that the ventilator keeping her alive be switched off) knowing that this would result in death. The courts tend to distinguish between passively allowing death and active assistance in suicide (which is unlawful). It is important to note that in B it was the patient herself, rather than a hospital trust or relatives, who refused treatment.

protected by the ECHR should include the right to self-determination in deciding how and when to die. However, neither the House of Lords nor the European Court on Human Rights, to which she turned, recognised such a right<sup>39</sup>. The debate has since intensified and a recent Bill (inspired by Oregon legislation) was put forward to allow in some circumstances physician-assisted suicide for competent adult patients who suffer unbearably from a terminal illness<sup>40</sup>. Similar debates continue in other European countries. In Italy, in a case similar to the British *B v. an NHS Hospital Trust*, it was held that a doctor could not be prosecuted for the crime of “killing on demand” because, although both the material and the psychological elements were deemed to exist, the defence named “performing a duty” excluded punishability (the patient asked the doctor to switch off the ventilator that allowed him to live)<sup>41</sup>. In a recent case the Italian Supreme Court held that a life-support system may be discontinued when there is no doubt about the patient’s persistent vegetative state and as long as there is clear evidence (deduced from his lifestyle, personality, past opinions, etc.) that had he been conscious he would have requested it<sup>42</sup>.

Concern for these issues is confirmed by the Belgian implementing law, which explicitly states that the offences of abortion and euthanasia are not considered to be covered by the concept of voluntary homicide<sup>43</sup>.

The degree of ambiguity and the lack of a common view on what exactly murder is, *at least* in some borderline cases, urge us to question both the coherence and the

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<sup>39</sup> *Pretty v. Director of Public Prosecutions* [2001] UKHL 61; ECtHR *Pretty v. United Kingdom* (Application no. 2346/02). Ms. Pretty claimed before the ECtHR that Articles 2 (right to life), 3 (prohibition on inhuman and degrading treatment), 8 (right to private life), 9 (freedom of conscience) and 14 (prohibition on discrimination) of the Convention had been violated.

<sup>40</sup> See the Assisted Dying for the Terminally Ill Bill (10/11/2005) HL, available at <http://www.publications.parliament.uk/pa/ld200304/ldbills/017/2004017.htm>.

<sup>41</sup> Tribunale di Roma, sentenza GIP n. 2049/07 23 July 2007 (“Welby case”). See also Article 51 of the *Codice penale*. The court held on that occasion that the act could not be defined as “euthanasia” or “assisted suicide”. It must be observed that euthanasia is still forbidden by Italian law. The Supreme Court has held in the past that extenuating circumstances having a social or moral value (normally applicable under Italian law when a conduct is performed out of purely altruistic reasons) cannot apply in the case of “killing on demand” when this takes the form of euthanasia, as the latter does not represent a conduct generally approved by Italian society. See e.g. Cassaz. sez. I pen. n. 2501/90 7 April 1989 in *Cassazione penale* (1991) 1778.

<sup>42</sup> Cassaz. sez. I civ. n. 21748/07 16 October 2007 (“Eluana case”). See also Cassaz. S.U. civ. n. 27145/08 13 November 2008 (idem).

<sup>43</sup> Article 5 (4) Belgian law implementing the European Arrest Warrant, published on 22/12/2003, *Moniteur Belge*, 2<sup>nd</sup> ed.

effectiveness of the EAW procedure as far as this type of offences is concerned. As observed earlier, this is due not only to purely legal considerations, but also to a broader analysis of social, cultural and moral aspects intimately connected to each country's criminal law system.

The second of our two examples is rape. Definitions of rape throughout Europe have varied considerably in the past years, reflecting changes in attitudes and policies. A rough distinction could be made between consent-based and force-based definitions. The former (mostly belonging to common law systems) focus on the victim's lack of genuine consent as the act in itself is viewed as a deprivation of sexual autonomy: this is the case e.g. of England/Wales and Scotland<sup>44</sup>. The latter (mostly belonging to civil law jurisdictions) are based essentially on the concept of force/threat of violence (although the will of the victim is to some extent taken into account) and consider the act as reflecting unequal relationships of power: this is the case, for instance, in Spain<sup>45</sup>. In practice, this determines differences in the evidentiary requirements, as the absence of consent needs to be proved by the presence of a series of circumstances (which may include force or threat of force) and this is not always easy. To be sure, it is hard to find a catch-all notion of rape. On the one hand, consent-based definitions risk encouraging an analysis of the conduct of the victim (in particular, the sexual history) which might make it easier for the defence to exploit loopholes and ambiguities; moreover, these definitions fail to incorporate the element of physical violence and might pose difficulties, for instance whenever the victim was not able to communicate with the aggressor during the intercourse<sup>46</sup>. On

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<sup>44</sup> For England and Wales, see the Sexual Offences Act 2003: "A person (A) commits an offence if (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) does not consent to the penetration and (c) does not reasonably believe that B consents"; for Scotland, see Lord Advocate's Reference of 2001, 2002 SLT 466, Lord Justice-General Cullen 475F [39] and 476A [44].

<sup>45</sup> According to Article 178 of the *Código penal*: "El que atentare contra la libertad sexual de otra persona, con violencia o intimidación, será castigado como responsable de agresión sexual con la pena de prisión de uno a cuatro años." (Whoever commits an assault on another person's sexual liberty, with violence or intimidation, will be punishable for sexual aggression by a penalty of one to four years' imprisonment" [my translation]). Actual rape is defined by Article 179. On the other hand, the crime of sexual abuse of minors is defined in terms of lack of consent: see Article 181 *et seq.* For more details, see *infra* p. 125.

<sup>46</sup> For criticism on the consent-based definitions, see V. Tadros, 'Rape Without Consent' (2006) 26 *Oxford Journal of Legal Studies* 515. The author suggests elaborating a single offence of rape, which should be differentiated into different parts in order to adapt to different situations and should concentrate on the conduct of the defendant.

the other hand, force-based definitions do not embrace all cases where neither violence nor threats of violence occur (such as where the victim is deceived or is unconscious, mentally incapable or under age or simply does nothing to resist)<sup>47</sup>.

The uncertainty as to the exact qualification of rape is confirmed at the international level, where the conduct only matters in the context of war crimes, genocide or crimes against humanity<sup>48</sup>. The first definition was elaborated by the ICTR in *Akayesu*<sup>49</sup>: “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive” and which do not need to be proved but may be inferred from the context (e.g. an armed conflict)<sup>50</sup>. This is clearly a force-based approach. However, the ICTY, after initially endorsing it<sup>51</sup>, developed its own theory starting from *Furundžija*<sup>52</sup>. The Tribunal, after finding that sometimes the same act (in the case at issue, forced oral penetration) is criminalised as sexual assault in some States and rape in others, argued that this did not breach the principle of legality, as the question was only about how harsh the penalty should be, as opposed to whether or not there was a crime<sup>53</sup>. In the end, the *actus reus* of rape was defined in rather broad terms<sup>54</sup>. A further step was made in *Kunarac*<sup>55</sup>, where the Tribunal argued that the common feature of both common law and civil law jurisdictions is the

<sup>47</sup> See, among many, Smith and Hogan, *Criminal law*, *supra* 455.

<sup>48</sup> See Articles 4 and 5 ICTY as well as Articles 2, 3, and 4 ICTR.

<sup>49</sup> *Prosecutor v. Akayesu* (Case No. ICTR 96-4-T), Judgement, 2 September 1998 par. 688.

<sup>50</sup> On the other hand “sexual violence” (embracing rape) may include, apart from the physical invasion of the human body, “(...) acts which do not involve penetration or even physical contact”. *Ibid.*

<sup>51</sup> *Prosecutor v. Delalić et al.*, *supra* par. 478-479.

<sup>52</sup> *Prosecutor v. Furundžija* (Case No. IT-95-17/1-T), Judgement, 10 December 1998 par. 185.

<sup>53</sup> *Prosecutor v. Furundžija*, *supra* par. 182-184.

<sup>54</sup> “... (i) the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; (ii) by coercion or force or threat of force against the victim or a third person”. See *Prosecutor v. Furundžija*, *supra* par. 185.

<sup>55</sup> *Prosecutor v. Kunarac a.o.* (Case No. IT-96-23-T and IT-96-23/1-T), Judgement, 22 February 2001 par. 457-460. The Trial Chamber also interpreted Rule 96 of the Rules of Procedure and Evidence (according to which “consent shall not be allowed as a defence”) as an indication of lack of consent rather than as a reference to a defence in technical terms (as this would shift the burden of proof to the defendant). *Ibid.* par. 463. Force is therefore evidence of lack of consent, rather than an element of rape: *ibid.* par. 458. Although in some particularly coercive circumstances (such as when the victims are held in special detention centres) lack of consent may be presumed (see *Prosecutor v. Kunarac a.o.* (Case No. IT-96-23 and IT-96-23/1-A) Appeals Judgement, 12 June 2002), the consent-based approach is still followed by the ICTY: see e.g. *Prosecutor v. Zelenović* (Case No. IT-96-23/2-S), Judgement, 4 April 2007, par. 36 (in this case a series of rapes were committed *inter alia* to obtain information or as a form of punishment or intimidation) and *Prosecutor v. Zelenović* (Case No. IT-96-23/2-A), Appeals Judgement, 31 October 2007.

criminalisation of the violation of sexual autonomy: as a result, the *actus reus* would necessarily have to be based on lack of consent, whereas the *mens rea* would consist in the intention to commit the act and the knowledge of such lack of consent. The ICTR at one point seemed to be following this approach in *Semanza*<sup>56</sup>, but thereafter tried to combine the two definitions in *Muhimana*<sup>57</sup>. This compromise is not convincing, as it leaves aside all the evidentiary issues outlined above and does not take a clear, explicit stance in favour of either view.

Despite what has been said above, there is certainly, at least in Europe, a trend towards widening the scope of this offence. Indeed, in the last twenty years, many countries have repeatedly adopted a number of reforms, which shows a form of bottom-top approximation (which started with criminalising rape within marriage)<sup>58</sup>. For instance, in Germany the Criminal Code's force-based definition was amended in order to create a gender-neutral offence and to include cases where the victim is unprotected and at the mercy of the offender as well as rape in marriage; this definition is very broad as the Code refers to a vague term: "sexual acts"<sup>59</sup>. In Spain the whole area of sexual offences has been modified several times, and revolves now around the concept of "offences against sexual freedom", with a basic crime having a general scope, called "sexual aggression" (when the victim's sexual freedom is compromised by violence or threat of violence) and an aggravated form, called "rape" (including any type of penetration, which can be committed by either a male or a female perpetrator)<sup>60</sup>. However, the distinction between these crimes is blurred

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<sup>56</sup> *Prosecutor v. Semanza* (Case No. ICTR 97-20-T), Judgement, 15 May 2001 par. 346.

<sup>57</sup> *Prosecutor v. Muhimana* (Case No. ICTR 95-1B-T), Judgement, 25 April 2005 Summary par. 32-35: "(...) the Chamber takes the view that the *Akayesu* definition and the *Kunarac* elements are not incompatible or substantially different in their application".

<sup>58</sup> See e.g. Rape Crisis Network Europe 'Rape: Still a forgotten issue', September 2003, available at [www.rene.com](http://www.rene.com).

<sup>59</sup> "sexuelle Handlungen". The change surprisingly occurred only in 1997: see section 177 of the StGB as amended by the Criminal Law Amendment Act 1997. Violence is evidence of lack of consent. See also R. Maurach, F.C. Schroeder, M. Maiwald, *Strafrecht, Besonderer Teil supra* 187. The minimum sentence of imprisonment is one year in less serious cases, and two, three or five years (depending on the circumstances) in more serious cases (e.g. when there is sexual intercourse).

<sup>60</sup> See Articles 178 and 179 of the *Código penal* and the recent laws 11/2003 29 September and 15/2003 25 November. The aggravated form is punished by six to twelve years' imprisonment. Parallel forms of offence are provided for by Articles 181-183 as "sexual abuses": they are characterised by lack of violence/threats or consent and may be committed against both sexual liberty and integrity (which applies to minors below thirteen or persons who are unsound of mind or deaf: for

and is criticised by Spanish scholars<sup>61</sup>. Italy too has a force-based, gender-neutral definition, which, like in Germany, encompasses all “sexual acts” and refers to a concept of exploitation of physical and psychological inferiority of the victim; moreover, deception is included<sup>62</sup>. However, ambiguities remain<sup>63</sup>: this legislative choice is criticised because it might implicitly require a “duty of resistance” on the part of the victim, which is not always present<sup>64</sup>. In England and Wales the crime has been re-defined in 1994 and in 2003<sup>65</sup>: following these changes, it now extends to all types of penetration with a penis (including forced oral sex), which means that the (principal) offender must be a man or a transsexual. At the same time, consent is now defined by statute and it is necessary to prove that the victim does not consent and that the perpetrator does not reasonably believe that he or she consents. Recklessness as to the fact that the victim was not consenting no longer needs to be proved<sup>66</sup>. The

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these categories the presumption of non-consent is non-rebuttable). Cases of deception may only occur when the victim is between thirteen and sixteen.

<sup>61</sup> M.G.Tomillo, ‘Derecho Penal Sexual y Reforma Legal’ (2005) *Revista Electrónica de Ciencia Penal y Criminología* 07-04 at <http://criminet.ugr.es/recpc>, who also thinks that the *mens rea* of “sexual aggression” should not include a lascivious intention, contrary to what asserted by courts; C. Lamarca Pérez, *Manual de Derecho Penal. Parte especial* (2nd ed. Colex Madrid 2004) 134.

<sup>62</sup> See Article 609bis of the *Codice penale* (“sexual violence”), as modified by Article 3 law 66/1996 15 February, which moved the offence from the category of “crimes against sexual liberty” (within the so-called “crimes against public morality”) to that of “crimes against the person”, by merging the two previous offences of “carnal violence” and “libidinous acts”. Violence, threats or “abuse of authority” are required. The penalty is established between five and ten years’ imprisonment (save aggravating or extenuating circumstances). A separate crime of rape committed by a group of people is provided for by Article 609octies (six to twelve years’ imprisonment, save aggravating or extenuating circumstances).

<sup>63</sup> G. Fiandaca, E. Musco, *Diritto penale, Parte speciale supra* 207. Case law has considered as “sexual violence” even the mere touching of another person’s face with one’s own lips: Cassaz. sez. III pen. n. 549/2006 11 January 2006 *CED* (2006) 233115. Lack of consent is presumed, although it does not have to exist from the outset.

<sup>64</sup> G. Fiandaca, E. Musco, *Diritto penale, Parte speciale, supra* 211-212. According to the Supreme Court, when the defendant insists that there was consent, the victim’s statements need to be carefully examined (Cassaz. n. 1636/98 10 February 1999 (1999) *Cassazione penale* 2194, in which the appeal was accepted on the grounds that the woman was wearing jeans and it would be normally very difficult to take them off without the cooperation of the victim; for a contrary ruling, see Cassaz. n. 40542/2007 15 November 2007).

<sup>65</sup> See Sexual Offences Act 1956 and Section 142 Criminal Justice and Public Order Act 1994; Section 1 of the Sexual Offences Act 2003. The latter has also re-defined other similar sexual offences, such as: “assault by penetration”, which sometimes overlaps with rape; “sexual assault”; “causing sexual activity”. Rape and assault by penetration are punishable by imprisonment for life.

<sup>66</sup> Lack of consent may be proved through a series of conclusive or, in alternative, rebuttable presumptions. Where this is not possible, a definition of consent is given as a last resort: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. See sections 74, 75, 76 of the Sexual Offences Act 2003. On the other hand, lack of reasonable belief must be ascertained having regard to all the circumstances, including any steps the accused has taken to make sure that there was consent. See section 1(2) of the Act.



previous approach, relying on the distinction between consent and mere submission<sup>67</sup> was much criticised and in the end rejected<sup>68</sup>. However, some authors still point out a few problems<sup>69</sup>. In Scotland, the definition of rape is rather narrow, as it only refers to a vaginal sexual intercourse between a man and a woman without her consent<sup>70</sup>. It therefore includes recklessness and excludes either anal or oral sex; moreover, consent is not formally qualified. This is a modification of a previous more restrictive view, requiring evidence of resistance and corresponding force<sup>71</sup>. Finally, in France, as a result of amendments in 1980, the offence of rape has been elaborated as penetration committed by violence, constraint, threat or abuse (“surprise”)<sup>72</sup>. Consent can only be argued from the existence of these situations. The new definition covers any form of penetration (not only by the penis), although sometimes the presence of a sexual motive is required<sup>73</sup>.

Concluding, despite a few undeniable differences, European countries seem to converge towards a “lack of consent” definition and this has been confirmed by the European Court of Human Rights (ECtHR). In *MC v. Bulgaria* (a case concerning the alleged rape of a young girl by private individuals) the Court found that States have a positive obligation (under Articles 3 and 8 ECHR) to identify as a crime all

<sup>67</sup> *Olugboja* [1981] 3 AER 1382.

<sup>68</sup> A.P.Simester, G.R.Sullivan, *Criminal law: theory and doctrine*, supra 418.

<sup>69</sup> The new approach is still blamed for not being capable of dealing with some situations, for instance where the accused person’s belief in consent is determined by his level of culture or stereotypes: J. Temkin, A. Ashworth, ‘The Sexual Offences Act 2003: Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 342. It has surprisingly been argued in the past that rape by omission can never occur, so that, if the defendant has penetrated the victim with consent and this is withdrawn, or he realises there has never been consent, he does not commit rape if he goes on: Smith and Hogan, *Criminal law*, supra 457. For other criticism, see V. Tadros, ‘Rape Without Consent’ supra 515.

<sup>70</sup> Lord Advocate’s Reference of 2001, 2002, supra. Male rape is prosecuted as “sodomy”.

<sup>71</sup> T.H. Jones, M.G.A. Christie, *Criminal law* (3<sup>rd</sup> ed. W. Green Edinburgh 2003) 253. The previous force-based notion dated back to Baron Hume’s 1797 definition. In 2001, Lord Abernethy’s ruling was overruled by Lord Advocate’s Reference. The case caused widespread scandal and, as a result, a reform towards the consent-based notion is in progress. See ‘The Legal Definition of Rape’ at [www.scottish.parliament.uk](http://www.scottish.parliament.uk); Scottish Law Commission News Release ‘Justice, Clarity and Consent: New Sex Laws for Scotland’, 19 December 2007.

<sup>72</sup> See Article 222-23 of the *Code pénal* and Law 23 December 1980. A maximum penalty of fifteen years’ imprisonment is provided for (save aggravating factors, in which case the penalty may reach a maximum of twenty or thirty years, depending on the circumstances; in case of torture or inhumane acts the punishment is life imprisonment: Articles 222-24 to 222-26). All other sexual aggressions are punished by Article 222-27.

<sup>73</sup> It may therefore be committed by a woman as a principal offender. For more details, see C. Elliott, *French criminal law* supra 174.

non-consensual sexual acts, even where there is no (proof of) physical resistance by the victim<sup>74</sup>.

#### 4.1.1.2 Some special cases

Unlike murder and rape, particularly serious issues emerge with regard to a number of non-harmonised offences: racism and xenophobia, racketeering and extortion, swindling, sabotage and trafficking in stolen vehicles<sup>75</sup>.

The first one was the object of a Joint Action in the nineties<sup>76</sup>, but this did not alter the existing landscape, characterised by enormous differences in the Member States' legislation: in some countries either racism or xenophobia are not defined at all, or merely constitute aggravating circumstances; conduct may be aimed at groups of persons, but sometimes these are described very broadly; some legal systems do not provide for incitement to hatred or violence against foreigners<sup>77</sup>. The classification of racism and xenophobia as an offence involves a host of thorny issues related to social and moral values, apart from obvious political considerations. It relies on an appropriate balance between freedom of expression and criminal punishment. Given its complexity, it is surprising that such a category has been inserted in the EAW list. The Belgian Constitutional Court recently had to deal with one of these delicate issues, when it partially annulled a few provisions of a domestic law, incriminating *inter alia* any individual that proclaims his intention to discriminate or to practice hate or violence against another individual based on racial/xenophobic motives, as it

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<sup>74</sup> ECtHR *MC v. Bulgaria*, Application no. 39272/98, 4 December 2003, par. 166.

<sup>75</sup> It is particularly significant that, in the course of the negotiations on the Framework Decision on the European Evidence Warrant, Germany insisted on an opt-out for a list of 6 types of offences, which roughly corresponds to the one mentioned above: racism and xenophobia, computer-related crime, sabotage, racketeering and extortion, swindling and terrorism. See Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 30/12/2008.

<sup>76</sup> Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K3 of the Treaty on European Union, concerning action to combat racism and xenophobia, OJ L 185 24/07/1996.

<sup>77</sup> EU Network of Independent Experts on Fundamental Rights, 'Combating racism and xenophobia through criminal legislation: the situation in the EU Member States' Opinion n. 5-2005. Disagreement between Member States is also evident in the Annex to the Joint Action, *supra*.

concluded that they were breaching freedom of expression<sup>78</sup>. Plans for a Framework Decision replacing the Joint Action were dropped in 2003 and again in 2005, only to be resumed in 2007: a final text was recently agreed upon<sup>79</sup>. The latest version restricts punishment to intentional conduct and criminalises also “publicly condoning, denying or grossly trivialising” genocide, crimes against humanity and war crimes only insofar as they are likely to incite to violence or hatred<sup>80</sup>. Despite this limitation, this is exactly one of the cases where national approaches vary considerably, from not punishing the act at all (e.g. UK, Sweden) to punishing it more or less extensively (e.g. Germany, Austria)<sup>81</sup>. However, a trend must be recognised at the international level towards the criminalisation of conducts falling in the area of “racism and xenophobia”<sup>82</sup>.

The other offences mentioned above raise many doubts as to their meaning and legal value. “Swindling”, for instance, can hardly be deemed compatible with the German or Dutch equivalent<sup>83</sup> or indeed with any other version. “To swindle” means “to cheat, defraud (a person) out of money or property” and “swindling” is intended as “fraud or imposition for purposes of gain”, but this is ordinary language rather than a rigorous legal definition<sup>84</sup>. A *corrigendum* of the proposed Framework Decision on the EAW gives some hints: "The Presidency noted that in the minutes of the Council a reference would be made to the offence of swindling indicating some of the possible constituent elements it might cover such as using false names, claiming a false position or using fraudulent means to abuse people's confidence or credibility in

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<sup>78</sup> *Cour d'Arbitrage* arrêt n. 157/2004 6 October 2004.

<sup>79</sup> See *inter alia* Council doc. 8405/05, 29 April 2005 and doc. 5118/07, 15 January 2007; for the final text, see Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 06/12/2008.

<sup>80</sup> See doc. 16771/07, 26 February 2008 and Article 1 Framework Decision, *supra*.

<sup>81</sup> EU Network of Independent Experts on Fundamental Rights, *supra* 78. In Italy, prosecution of “crimes of opinion” is rare, as freedom of speech tends to be interpreted very broadly (Article 21 Italian Constitution).

<sup>82</sup> See e.g. Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, Strasbourg, 28/1/2003, ETS n. 189. The European Court of Human Rights tends to exclude protection under Article 10 ECHR to cases of denial of holocaust: see e.g. *Garaudy v. France*, Application n. 65831/01; *Witzsch v. Germany* Application n. 7485/03.

<sup>83</sup> N. Keijzer, ‘The Double Criminality Requirement’ in R. Blekxtoon, W. van Ballegooij, *Handbook on the European Arrest Warrant* (TMC Asser Press The Hague 2005) 137, 157.

<sup>84</sup> The Oxford English Dictionary. 2nd ed. 1989, OED Online, Oxford University Press. 4 Apr. 2000.

order to appropriate something belonging to another person"<sup>85</sup>. However, this is clearly insufficient and no further explanation is given. Would it include a conduct of circumvention of persons of unsound mind<sup>86</sup>? Similar concerns arise in relation to "racketeering and extortion" or "sabotage"<sup>87</sup>. In particular, as to the former, the relationship between the two terms is not clear cut. Also, what should the scope of extortion be? The Italian Criminal Code distinguishes between "extortion" and "kidnapping for extortion purposes": should the second conduct be covered as well<sup>88</sup>? Finally, should "trafficking in stolen vehicles" include parts of them as well?

#### 4.1.2 Crimes subject to harmonisation

A second group of crimes in the EAW list consists of those which have been harmonised to some extent at the European level. These are offences which are deemed as particularly serious from the point of view of the European Union. The following pages will analyse the extent to which the EAW may be deemed applicable to them.

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<sup>85</sup> Council doc. 14867/1/01, 11 December 2001.

<sup>86</sup> Article 643 of the Italian *Codice penale*.

<sup>87</sup> N. Keijzer, 'The Double Criminality Requirement' *supra* 150-151 points out that, for instance, "*racket et extorsion de fonds*" (relating to financial items) and "*Erpressung und Schutzgelderpressung*" (referring to protection money) seem more restrictive than the EAW category. On the other hand, "sabotage" is not further specified: should it include only wartime sabotage, or peacetime sabotage as well? Should it only refer to public or also private victims?

<sup>88</sup> See Articles 629 and 630 of the *Codice penale*. Interestingly, these issues were not ignored. In Council doc. 9958/02, 16 July 2002, "(...) [t]he Council states that in particular for the following offences (...) there is no completely harmonised definition at Union level (...). Member States are requested to be guided by the following definitions of acts in order to make the arrest warrant operational throughout the Union (...). Racism and xenophobia as defined in the Joint Action (...). Sabotage: 'Any person who unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss'. Racketeering and extortion: 'Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge''. Despite their obvious lack of legal value, it is curious that no explanatory report mentions these guidelines.

#### 4.1.2.1 Terrorism, organised crime, drug trafficking, money laundering, trafficking in human beings, facilitation of unauthorised entry and residence

Concerning the crimes of terrorism, organised crime, drug trafficking, money laundering, trafficking in human beings and facilitation of unauthorised entry and residence. It might be argued that there should not be too many problems in defining these offences for two reasons: one is that they are severely punished in all legal systems; the other is that a substantial number of international and European instruments have already been adopted. This is the case of terrorism. The definition of this offence has been subject to debate for a long time and partial solutions have been found in a great variety of international Conventions and Resolutions, which have grown since 9/11<sup>89</sup>. Within the European Union, approximation has been pursued through a 2002 Framework Decision<sup>90</sup>. Nevertheless, unanimous agreement is far from being reached, as confirmed at the institutional level by recent attempts to conclude a further Convention<sup>91</sup>. The dispute concerns both the objective and the subjective elements of the offence. As for the former, the question is whether or not (and to what extent) the definition should cover, for instance: armed conflict, acts of violence against oppressive or colonialist regimes, State terrorism, use of the internet for the purpose of propaganda, activities of organised groups rather than of single individuals. As for the latter, the intent is normally to commit an ordinary crime (assault, murder, etc.): this is coupled with the “special intent” of terrorising the population as well as with a political, ideological or religious motive<sup>92</sup>. Some authors

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<sup>89</sup> See, among the most recent: European Convention on the Prevention of Terrorism, 16/05/2005, ETS n. 196,; International Convention for the Suppression of Acts of Nuclear Terrorism, GA Res. 59/290, 13/04/2005 (not yet in force); International Convention for the Suppression of the Financing of Terrorism, GA Res. 54/109, 10/01/2000. See also the European Convention on the Suppression of Terrorism, 27/01/1977, ETS n. 90, which abolished the political offence exception for a few terrorism-related offences. Among the UN Resolutions, see e.g. UN Security Council Resolution S/RES/1373 (2001).

<sup>90</sup> Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism OJ L 164 22/06/2002.

<sup>91</sup> Draft Comprehensive Convention against International Terrorism, UN Doc. A/59/894 App. II, which *inter alia* contains an obligation to exclude any justification of terrorist acts on political, philosophical, ideological, racial, ethnic, religious or other grounds (Article 6). As has been observed, “(...) [t]he world’s uniform opposition to “terrorism” is dependent on its open-endedness, the degree to which it allows everyone to fill the category of “terrorist” with one’s preferred adversary”: see M. Koskeniemi, ‘International law and Hegemony: A Reconfiguration’ (2004) 17 *Cambridge Review of International Affairs* 198.

<sup>92</sup> For this, see A. Cassese, *International Criminal Law* (OUP 2003) 129.

maintain that an international definition of terrorism now exists under customary law<sup>93</sup>; some others point out that there is no need to rely on a single statutory definition and believe that a more effective way of dealing with this matter is to take into account different factors on a case by case basis<sup>94</sup>; it has even been suggested to restrict the subjective element to the mere intent to commit a terrorist act, in order to avoid abuse of the terrorist formula<sup>95</sup>. The Framework Decision attempts to solve some of these problems, as it qualifies in Article 1 (1) as terrorist offences a series of serious acts that, from an objective point of view, “given their nature or context”, “may seriously damage a country or an international organisation” and, from a subjective point of view, aim at “i) seriously intimidating a population, ii) unduly compelling a government or international organisation to perform or abstain from performing any act, or iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation”<sup>96</sup>. It then refers to offences relating to a terrorist group (such as directing or participating), offences linked to terrorist activities (i.e. aggravated theft, extortion, drawing up fake administrative documents) as well as inciting, aiding or abetting, and attempting<sup>97</sup>. Although some ambiguities are avoided<sup>98</sup>, some problems still remain. Apart from the question of what is meant by “serious acts”, “structured group” or “terrorist group” (which may pave the way for abuses)<sup>99</sup>, doubts may arise as to the requirement of liability of legal persons (which is not established in all EU

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<sup>93</sup> *Ibid.* 120; A. Cassese, ‘The Multifaceted Notion of Terrorism in International Law’ (2006) 4 *Journal of International Criminal Justice* 933. This definition would include, as *dolus specialis*, violence or threat with the aim of intimidating the population or a group of persons and, as a result, forcing a public or prominent private authority to do or abstain from doing something; as to the motive, the author admits that it is difficult to prove: *ibid.* 941.

<sup>94</sup> G. Fletcher, ‘The Indefinable Concept of Terrorism’ (2006) 4 *Journal of International Criminal Justice* 894. The factors should be eight: violence, intentions, victims, perpetrators, just cause, organisation, need to publicise the event, lack of guilt or regret.

<sup>95</sup> T. Weigend, ‘The Universal Terrorist’ (2006) 4 *Journal of International Criminal Justice* 912.

<sup>96</sup> A similar definition was adopted within the Second Pillar. See Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism.

<sup>97</sup> Articles 2, 3 and 4 of the Framework Decision on combating terrorism, *supra*.

<sup>98</sup> For instance, actions by armed forces during an armed conflict as well as actions by armed forces in the exercise of their official duties are explicitly excluded: see point 11 of the Preamble to the Framework Decision, *supra*. On the controversy surrounding acts of freedom fighters in armed conflict, see A. Cassese, ‘The Multifaceted Notion of Terrorism in International Law’ *supra* 950.

<sup>99</sup> E. Symeonidou-Kastanidou, ‘Defining Terrorism’ (2004) 12 *European Journal of Crime, Criminal Law and Criminal Justice* 14, 28 and 30.

countries)<sup>100</sup>. Moreover, criminalising acts linked to terrorist activities (whenever they are performed with a view to committing terrorist offences) as well as preparatory acts on purely subjective terms broadens considerably the scope of terrorist offences<sup>101</sup>. This leads to the risk that (as a result of the emphasis put on the subjective elements) borderline actions are caught within the net even where the purpose of the perpetrator is not clear. In this respect, it is curious that a number of ordinary offences that might potentially be qualified as terrorist (as well as organised crime) offences are included within the EAW list: murder, arson, illicit trafficking in weapons/munitions/explosives, computer-related crime, kidnapping and hostage-taking, illicit trafficking in nuclear and other radioactive materials, unlawful seizure of aircraft/ships, sabotage. Some of them, i.e. theft, extortion and creating false administrative documents, as already seen, may also be identified as linked to terrorist activities. One may therefore wonder whether one of the reasons for drawing up such a large list of offences for which dual criminality does not need to be checked is that many of them may be in some “borderline” cases connected to terrorism and even when this is not possible (as sometimes it may be hard to qualify a conduct as terrorist or to provide sufficient evidence) they still make it possible to trigger the EAW mechanism. The effect is an enlargement of the scope for prosecution and punishment: this may be problematic, also in view of the elasticity with which the speciality rule may be applied (for instance, speciality is waived whenever the executing judicial authority gives its consent<sup>102</sup>). This area of concern extends to cases where membership of a terrorist organisation or any type of direct or indirect involvement in its activities cannot be proved clearly. For instance, a few issues may arise as to the definition of “supporting”, “recruitment”, “training”, “propaganda” or “public provocation to commit a terrorist offence”. Recent German

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<sup>100</sup> Articles 7 and 8 of the Framework Decision on combating terrorism, *supra*. On the different regimes of liability of legal persons, see J. Clough, ‘Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability’ (2007) 18 *Criminal Law Forum* 267; S. Mir Puig, ‘Una tercera vía en materia de responsabilidad penal de las personas jurídicas’ (2004) *Revista Electrónica de Ciencia Penal y Criminología* 06-01 at <http://criminet.ugr.es/recpc>; J. Pradel, *Droit penal comparé supra* 351. Liability of legal persons was established in the 1997 Second Protocol of the Convention on the Protection of the European Communities’ Financial Interests, OJ 221. Note, however, that in all these cases liability may be either criminal or non-criminal, thus leaving the choice to domestic legislation (as long as penalties are established in an “effective, proportionate and dissuasive manner”).

<sup>101</sup> For instance, neither inciting, aiding, abetting nor attempting are explicitly defined.

<sup>102</sup> Article 27 (3) (g) of the Framework Decision on the European arrest warrant.

legislation and case law seem to show a trend towards restricting the meaning of “lobbying” to recruiting members or supporters and not criminalising the mere promotion of the ideology of a terrorist organisation as “supporting” (when it only amounts to lobbying for general sympathy)<sup>103</sup>. The terms mentioned above are not contained in the original text of the Framework Decision on combating terrorism: this is why an amendment has made public provocation, recruitment and training punishable<sup>104</sup>. It is interesting to observe that, just as with the EAW Framework Decision (as will be seen in chapter 6), so the anti-terrorism Framework Decision has been challenged (albeit indirectly) in relation to the principles of legality and equality. Indeed, a number of Belgian NGOs brought recourse for annulment of the domestic implementing law before the *Cour d'Arbitrage*: although their arguments were all rejected, some of them correctly pointed out the lack of precision in the description of both the material and the subjective element of the conduct<sup>105</sup>.

The crime of terrorism is often intimately linked to a number of other serious offences. The classic examples are: money laundering, drug trafficking and trafficking in human beings. Indeed, the term “serious” is key to the definition of all of them and this can be found in the corresponding international and European instruments<sup>106</sup>. More generally, the definitions contained in the most recent

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<sup>103</sup> As a result, justifying the aims or glorifying the acts of Al-Qaida would not qualify as “supporting”. See T. Gut, ‘Case Note on BGH Decision of 16 May 2007, Case No. AK 6/07 and StB 3/07’ (2007) 72 *The Journal of Criminal Law* 491.

<sup>104</sup> These offences would be identified as “linked to terrorist activities” under Article 3. See Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 09/12/2008. See also UN Security Council Resolution S/RES/1624 (2005); UN Global Counter-Terrorism Strategy A/RES/60/288 8 September 2006; Decision No. 7/06 “Countering the use of the Internet for Terrorist Purposes” of the Ministerial Council of the OSCE, 5 December 2006; European Convention on the Prevention of Terrorism, *supra* note 89.

<sup>105</sup> For instance, the parties questioned the clarity of such terms as “serious” or “with the aim of unduly compelling (...) to perform or abstain from performing”. They express their concern that anti-global or anti-war demonstrations might be criminalised where acts of vandalism are committed. See *Cour d'Arbitrage* Arrêt n. 125/2005 13 July 2005 available at [www.arbitrage.be](http://www.arbitrage.be).

<sup>106</sup> See e.g. Framework Decision on combating terrorism, *supra*; Council Joint Action 98/733/JHA on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L351 21/12/1998; Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L335 25/10/2004; European Parliament and Council Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ L309 26/10/2005. See also United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances available at [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf).



international Conventions have exercised a strong influence over European countries' legislation. This is particularly true of the United Nations Convention on Transnational Organised Crime (TOC)<sup>107</sup>. Such terms as “organised criminal group”, “structured group”, “period of time” and so on have been utilised not only in the recently adopted Framework Decision on organised crime<sup>108</sup>, but also, for instance, in the Framework Decision on terrorism<sup>109</sup>. The negotiations of the TOC Convention led to a notion which shows a balance between the civil law and the common law approach<sup>110</sup>. To be sure, similar terms were adopted in the 1998 Joint Action on organised crime<sup>111</sup>. Lack of clarity and vagueness to a certain extent had already been highlighted with regard to this measure and, not surprisingly, the concerns were similar to those relating to the definition of terrorism, as mentioned above (including the issue of the liability of legal persons)<sup>112</sup>. Among the main problems, one can refer to: the meaning of “structured group”, which seems rigid and therefore at odd with many modern criminal “networks”<sup>113</sup>, the use of extra-legal terms, which are not always easy to prove<sup>114</sup> and (just as with the TOC Convention) the combination of

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<sup>107</sup> United Nations Convention Against Transnational Organised Crime, adopted by GA Resolution 55/25 of 15 November 2000, A/RES/55/25 and the three Protocols on Trafficking in Persons, Smuggling of Migrants and Trafficking in Firearms.

<sup>108</sup> See Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300 11/11/2008, which replaces the Council Joint Action, *supra* note 106. The Council reached a common position on 27 April 2006 (Bulletin EU 4-2006).

<sup>109</sup> See Article 2 of the Framework Decision on combating terrorism, *supra*.

<sup>110</sup> For a full account, see D. McClean, *Transnational Organised Crime, A Commentary on the UN Convention and its Protocols* (OUP 2007).

<sup>111</sup> Council Joint Action, *supra* note 106, whose Article 1 defines a criminal organisation as: “A structured association, established over a period of time, of more than two persons, acting in concert with the view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities”.

<sup>112</sup> V. Mitsilegas, ‘Defining organised crime in the European Union: the limits of European criminal law in an area of freedom, security and justice’ (2001) 26 *European Law Review* 565. Liability of legal persons is provided for by Article 3 of the Joint Action.

<sup>113</sup> P. Williams, ‘Organising Transnational Crime: Networks, Markets and Hierarchies’ in P. Williams, D. Vlassis (eds.), *Combating Transnational Crime: Concepts, Activities and Responses*, (1998) 4 *Transnational Organised Crime* 57.

<sup>114</sup> One of the main models has been the Italian definition of mafia-type association (see Article 416-bis of the Italian *Codice penale*). On the limits of this definition, including its difficult application to non-classical forms of mafia, see e.g. G. Fiandaca, E. Musco, *Diritto penale Parte speciale* Vol. 1(4<sup>th</sup> ed. Zanichelli Bologna 2007) 479.

the civil law notion of “criminal association” with the common law notion of “conspiracy”<sup>115</sup>.

These divergences have been particularly problematic in extradition law in the past. For instance, back in 1984 a high-ranking Sicilian mafia boss, who had been arrested in Spain following investigations in the so-called “Pizza Connection” case, was extradited to the US rather than to Italy, as a result (*inter alia*) of the incompatibility between the definitions of organised criminal group in the two European countries<sup>116</sup>. After being tried and convicted in the US for drug trafficking conspiracy and continuing criminal enterprise, and having served his sentence there, he died just before the extradition proceedings back to Italy could be completed<sup>117</sup>. It may be argued that it is in order to avoid such troubles that the Italy-Spain fast-track surrender Treaty eliminated dual criminality for cases of organised crime<sup>118</sup>. Apparently problems are still faced by judicial authorities in the implementation of the EAW scheme. In this context, to give an example, it is theoretically possible that, were an EAW issued in relation to a crime of mere membership of a mafia group (i.e. purely on the basis of elements such as intimidation or “criminal silence”), the judicial authority would find it difficult to execute the warrant whenever that conduct is not identified as an offence under its own criminal law. The United Kingdom case law shows examples of this. In *La Torre*, one of the appellant’s grounds was that the request was based on an offence (participation in a camorra-type association) which

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<sup>115</sup> See Article 2 of the Council Joint Action, *supra* note 106, criminalising the participation in a criminal organisation. The civil law version (relying on active membership) is combined with the common law version (relying on mere agreement between two or more persons). See V. Mitsilegas, ‘Defining organised crime’ *supra* 571-572. For conspiracy in general, see A.P. Simester, G.R. Sullivan, *Criminal law: theory and doctrine supra* 271; J. Pradel, *Droit pénal comparé supra* 275.

<sup>116</sup> The case concerned an international heroin trafficking network. The boss was extradited to the US on the condition that he would not be re-extradited to Italy. See *Mafia: Badalamenti, è ancora in carcere negli Stati Uniti*, ANSA 20 April 2002; *Extraditado a EEUU el mafioso italiano Badalamenti*, El País 17 November 1984; *La policía investiga las conexiones de la delincuencia italiana en España*, El País 11 April 1984. For an overview of Spanish debate on organised crime, see J.L. De la Cuesta, ‘Organised Crime Control Policies in Spain: A ‘Disorganised’ Criminal Policy for Organised Crime’ in C. Fijnaut, L. Paoli (eds.), *Organised Crime in Europe: concepts, patterns and control policies in the European Union and beyond* (Springer Dordrecht 2004) 795.

<sup>117</sup> Indeed, the “non re-extradition clause” no longer applied. See ‘Family Affairs’, Time 14 October 1985. Badalamenti was sentenced to fifteen years for conspiracy to import and distribute narcotics and forty-five years for continuing criminal enterprise, although Spain had received the assurance that the term of imprisonment would not exceed thirty years. See *United States v. Badalamenti*, 614 F. Supp 194 (S.D.N.Y. 1985) and *United States v. Casamento*, 887 F.2d 1141 (2<sup>nd</sup> Cir. 1989), at 1185.

<sup>118</sup> On the Italy-Spain Treaty, see *supra* chapter 3 p. 70-71.

does not exist in Scotland: however, the High Court argued that, in light of the 2003 Extradition Act, by looking at the substance of the conduct as described in the warrant (rather than the legal definition), it was possible to refer to the Scottish offence of conspiracy<sup>119</sup>. The problem is that in this case a number of activities had been specified by the requesting authority, such as threatening witnesses, extortion, drug trafficking and control and acquisition of public contracts and works. Further difficulties could arise if the EAW were simply to mention the offence of “being a member” of a mafia group. There is however a trend towards finding better solutions, as may be seen in the above-mentioned Framework Decision, although this is not immune from criticism<sup>120</sup>. The same can be said of the recent approximating instruments on drug trafficking, money laundering and trafficking in human beings<sup>121</sup>. Here again, the degree of common understanding on minimum standards is sufficiently high, although there is some divergence, e.g. as for the classification of irregular migration as a crime or as an administrative infringement<sup>122</sup>. It should be observed that the crime of assisting irregular migration is defined in a Directive and the corresponding penalties are prescribed in a Framework Decision<sup>123</sup>. Facilitation of unauthorised entry and residence is however included in the EAW list, which means that the material act would in any case be covered by either classification. As for drug trafficking, Member States’ approaches are substantially similar, although some variations may be observed as to the criminalisation of possession, use, production, cultivation and consumption, or the type of penalties adopted. As a general feature, alternative measures (such as administrative or social measures)

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<sup>119</sup> *Antonio La Torre v. Her Majesty’s Advocate* [2006] HCJAC 56, par. 19 and 122-124.

<sup>120</sup> E. Symeonidou-Kastanidou, ‘Towards a New Definition of Organised Crime in the European Union’, (2007) *European Journal of Crime, Criminal Law and Criminal Justice* 83, 97.

<sup>121</sup> On the plethora of instruments in this field, see at least V. Mitsilegas, B. Gilmore, ‘The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards’ (2007) 56 *International and Comparative Law Quarterly* 119; M. Ventrella McCreight, ‘Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration in a Comparative Perspective’ (2006) 12 *European Law Journal* 106.

<sup>122</sup> M. Ventrella McCreight, ‘Smuggling of Migrants’ *supra* 121.

<sup>123</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328 05/12/2002; Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328 05/12/2002.

apply to personal consumption *per se*, i.e. not connected to actual trafficking<sup>124</sup>. Indeed, the United Nations Conventions on Drugs, while prohibiting non-medical or non-scientific use, do not explicitly outlaw mere drug use and leave States free to do so; moreover, they seem to allow States to choose how to punish drug use offences (such as possession or cultivation) as long as the only purpose of the conduct is personal use<sup>125</sup>.

Finally, a few differences still exist in the criminalisation of money laundering, for instance in relation to negligent money laundering, self-laundering and corporate criminal liability for laundering<sup>126</sup>.

#### *4.1.2.2 Corruption, fraud, euro counterfeiting, computer-related crime, sexual exploitation of children and child pornography, environmental crime*

Fraud and corruption were included in the *Corpus Juris* project a few years ago<sup>127</sup>. The *rationale* of this was to elaborate a number of substantive and procedural law basic principles which could represent a platform for further steps. Although the project was ultimately not put into practice, there is now an impressive amount of harmonising measures, covering also euro counterfeiting and including

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<sup>124</sup> Criminal prosecution tends to be disregarded in most cases, when the conduct merely consists of use or possession of small quantities for personal use when no aggravating circumstances can be identified. See legal reports at <http://eldd.emcdda.europa.eu>.

<sup>125</sup> UN Single Convention on Narcotic Drugs, at [http://www.incb.org/incb/convention\\_1961.html](http://www.incb.org/incb/convention_1961.html); UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at [http://www.unodc.org/pdf/convention\\_1988\\_en.pdf](http://www.unodc.org/pdf/convention_1988_en.pdf). See also the two Commentaries on the Conventions, United Nations Publications, New York 1973 and 1998 respectively, and N. Boister, *Penal Aspects of the UN Drug Conventions* (Kluwer Law 2001).

<sup>126</sup> Italy, Denmark, Spain and Sweden do not prosecute self-laundering (i.e. when the offence of money laundering is committed by the author of the predicate offence: in the first two cases non-prosecution is due to fundamental principles of the domestic legal system – *ne bis in idem* in Italy and the principle according to which no one can be convicted of two crimes concerning the same assets in Denmark). For other examples, see FATF Working Group on Evaluations and Implementation. FATF/WGEI (2007) 3; G. Stessens, *Money laundering: a New International Law Enforcement Model* (Cambridge University Press, Cambridge-New York 2000), esp. 287-298, where he supports the abolition of double criminality for money laundering offences.

<sup>127</sup> M. Delmas-Marty, J.A.E. Vervaele (eds.), *The Implementation of the Corpus Juris in the Member States* (Intersentia, Antwerp-Groningen-Oxford 2000).

Conventions<sup>128</sup>. Indeed, approximation has been particularly intense in this area and this should not be a surprise, as these are viewed as crimes that seriously affect the core interests and values of the European Union.

However, a few substantive law issues stand in the way of effective cooperation in the case of computer-related crime, as it is not clear what type of conduct this should cover and potential difficulties might arise in relation to language versions and identification of different elements of the conduct in the Member States' legal systems. This has been pointed out as far as the Dutch and the French versions are concerned, but may of course be generally applicable<sup>129</sup>. Despite this, a recent Framework Decision has attempted to provide a basis for approximation (with useful definitions, such as "illegal access to information systems", "illegal system interference" and "illegal data interference")<sup>130</sup>. It has also limited the scope for prosecution, as the act must be committed "intentionally" and "without right" and penalty thresholds have been established; however, further steps are needed to complete the approximation process<sup>131</sup>.

Concerning sexual exploitation of children and child pornography, the corresponding Framework Decision has considerably reformed the approach followed by previous instruments<sup>132</sup>. Clear offences have been identified<sup>133</sup>, broadening the area of

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<sup>128</sup> See e.g. Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 31/07/2003; Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149 02/06/2001; Council Framework Decision 2000/383/JHA of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140 14/06/2000; Convention drawn up on the basis of Article K3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 25/06/1997; Convention drawn up on the basis of Article K3 of the Treaty on European Union, on the protection of the European Communities' financial interests, OJ C 316 27/11/1995. This list is not exhaustive and does not include United Nations or Council of Europe instruments.

<sup>129</sup> N. Keijzer, 'The Double Criminality Requirement' *supra* 155 and, more in general, P. De Hert, G. González Fuster, B. Koops, 'Fighting Cybercrime in the Two Europes. The Added Value of the EU Framework Decision and the Council of Europe Convention', (2006) 77 *International Review of Penal Law* 503.

<sup>130</sup> Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems, OJ L 69 16/03/2005, Articles 2-4. See also Council of Europe Convention on Cybercrime, Budapest, 23/11/2001 ETS n. 185.

<sup>131</sup> P. De Hert, G. González Fuster, B. Koops, 'Fighting Cybercrime in the Two Europes' *supra*.

<sup>132</sup> Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 20/01/2004.

punishability (which includes even “realistic images of a non-existent child” as child pornography); a wide range of sanctions is also provided for, affecting legal persons as well<sup>134</sup>. Nevertheless, it has been observed that the use of the term “age of sexual consent” (“*majorité sexuelle*” in French) maintains significant differences in the legal value, scope of the offences and age limit in a number of countries<sup>135</sup>. Finally, rules on environmental crime are being re-defined, after the recent famous judgements of the Court of Justice<sup>136</sup>. Two new measures, which add up to the current ship-source pollution Directive<sup>137</sup>, have taken into account the Court’s ruling: the first amends the Directive and requires enactment of “effective, proportionate and dissuasive” penalties, extending punishment to conduct performed not only with intent, but also recklessly or with serious negligence (thus reflecting a particularly repressive attitude, as a result of the stigma attached to it); the second adopts a similar view with regard to the protection of environment<sup>138</sup>. Therefore, both refrain from harmonising penalties, which opens up complex implications in light of the future Lisbon Treaty<sup>139</sup>.

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<sup>133</sup> *Ibid.* Article 2-3. The first requires a conduct with “intention”, whereas the second also requires it to be performed “without right”.

<sup>134</sup> *Ibid.* Articles 1 and 5-7 respectively.

<sup>135</sup> *Ibid.* Articles 3 (2) (b), 5 (2) (b) and 5 (2) (c). See I. Wattier, ‘La lutte contre l’exploitation sexuelle des enfant et la pédopornographie et la majorité sexuelle: la consecration d’une disparité’ (2006) 77 *International Review of Penal Law* 223, 229.

<sup>136</sup> ECJ C-176/03 *Commission v. Council* (Environmental Pollution case) [2005] ECR I-7879; ECJ C-440/05 *Commission v. Council* (Ship-Source Pollution case) [2007] ECR I-9097.

<sup>137</sup> Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255 30/09/2005.

<sup>138</sup> See the two proposals COM (2008) 134 final; COM (2007) 51 final. The second has been recently adopted: Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328 06/12/2008.

<sup>139</sup> M. Hedemann-Robinson, ‘The EU and Environmental Crime: The Impact of the ECJ’s Judgment on Framework Decision 2005/667 on Ship-Source Pollution’ (2008) *Journal of Environmental Law*.

## 4.2 General assessment of the partial abolition of double criminality

In light of the brief analysis conducted above in relation to the issues related to the definition of crimes in the European Union Member States, a few conclusions may be drawn on the innovation contained in Article 2 (2) of the Framework Decision on the EAW. These conclusions broadly cover extraterritoriality, the Pinochet case and harmonisation.

First of all, as is well known in the practice of extradition, States often extend their jurisdiction over crimes committed beyond the boundaries of their territory. More generally, jurisdiction is established on the basis of a series of principles: territoriality (when the crime is committed on the State's territory); protection (when security or a national interest in general are violated); active personality or nationality (when the sought person is a national of the requesting State); passive personality (when the victim is a national of the requesting State); universality (when the nature of the offence is such that any State may claim criminal jurisdiction)<sup>140</sup>. However, there are further aspects that are not apparent from the mere listing of such principles, as for instance floating and aerial territoriality or the law of the flag<sup>141</sup>. Territoriality and extra-territoriality are linked to dual criminality, as both contribute to deciding where an individual is going to be prosecuted or punished<sup>142</sup>. In most cases countries that apply the active personality principle refuse extradition of their

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<sup>140</sup> C. Shachor-Landau, 'Extra-Territorial Penal Jurisdiction and Extradition' (1980) 29 *International and Comparative Law Quarterly* 274.

<sup>141</sup> M. Bassiouni, *International Extradition: United States Law and Practice* (5<sup>th</sup> ed. Oceana Publications New York 2007) 313.

<sup>142</sup> Under the subjective approach, territorial jurisdiction covers crimes which are commenced within the State, but carried out or completed abroad; under the objective approach, territorial jurisdiction is exercised where any essential element of the crime is committed on the State's territory. Territoriality is normally applied by the United Kingdom, except for some serious crimes for which extraterritoriality applies (e.g. murder, bigamy, treason). See e.g. 2001 UK International Criminal Court Act (c. 17). See also I. Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed. Clarendon Press Oxford 1990) 300-301.

nationals, whereas Anglo-American countries normally do the opposite<sup>143</sup>. What are then the consequences of the suppression of the dual criminality requirement and of the nationality exception in the European context? For instance, let us imagine that A, a citizen of State X, working and living in State Y (possibly even a citizen of it), is accused of a crime. However, it turns out that this conduct is not punishable under the latter State's law and has been committed in a third State Z. State X (the State of nationality) applies active personality but State Y has not implemented Article 4 (7) (b) of the Framework Decision (which would allow it to refuse execution if it cannot prosecute the sought person for the same offence when committed outside its territory)<sup>144</sup>. Would it be fair to surrender A? Other possible scenarios could be imagined. First, what if A ignored, at the time of the commission, that his conduct was criminal as he was not aware of a recent piece of legislation enacted in State Z? Second, what if that State is a non-Member State? This question touches upon the very principle of legality and the way it should be understood in the European Union. It therefore relates to the more general issue of the shape and structure of the European Union.

The relationship between double criminality and extra-territoriality is expressed also in terms of rule/exception. As has been noted, under Article 4 (7) (a) of the Framework Decision a State may refuse surrender even where the act may be included in one of the list categories, provided that the act has been committed, in whole or in part, in the requested State's territory<sup>145</sup>. Moreover, the applicability of the "conditional return" clause under Article 5 (3) (allowing the requested State to subject surrender to the condition that the person is returned to serve the sentence in

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<sup>143</sup> See G. R. Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction' (1992) 17 *Yale Journal of International Law* 41; C. Shachor-Landau, 'Extra-Territorial Penal Jurisdiction and Extradition' *supra* 294 (who both support the nationality principle).

<sup>144</sup> Article 4(7) (b) of the Framework Decision has been transposed by 22 States, but only 9 of them have qualified it as a mandatory ground. See Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States in 2005, 2006 and 2007, Brussels, 11/07/2007, COM (2007) 407 final and Annex to the Report, Brussels, 11/07/2007, SEC (2007) 979 final, 13.

<sup>145</sup> N. Keijzer, 'The Double Criminality Requirement' *supra* 161.



its territory) depends on the qualification of the act as a crime in both States concerned<sup>146</sup>.

The residual element of the dual criminality requirement in Article 2 (4) provokes questions about the relevance of a potential Pinochet-like situation<sup>147</sup>, in which a *temporal aspect* was also considered, i.e. that the conduct should have constituted a crime in England at the time it occurred, rather than at the time of the extradition request. The wording of Article 2 (4) (although the verb “constitute” refers to the present and not to the past) does not entirely solve these problems.

Concluding, a final evaluation of the impact of the removal of dual criminality is not possible, as that would require collection of data from all twenty-seven countries. However, a general overview, in light of the analysis carried out above, may help outline a few questions. At least with regard to the legal systems that we have taken into account, there are certainly many common points but many differences as well. This can be easily observed in the case of non-harmonised offences: even those having an immediate impact on peoples’ ordinary life (such as murder), despite their “instinctive” similarities, present diverging features in some limited circumstances. This is due to the fact that each of them reflects social, cultural and political perceptions that inevitably vary in space and time. A certain degree of “disharmony” may be identified in the group of harmonised offences as well, either because some issues have not been clarified (e.g. in the case of terrorism) or because the approximation process has not been completed or is flawed (e.g. sexual exploitation of children). As will be shown in the next chapter, the influence of socio-economic factors in the identification of offences is such that many EAWs have actually been issued for facts that are considered “serious” in some Eastern European countries and “minor” in Western Europe<sup>148</sup>.

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<sup>146</sup> N. Keijzer, *ibid.* 162; Council of Europe Convention on the Transfer of Sentenced Persons, Strasbourg, 21/03/1983, ETS n. 112; Council of Europe Convention on the Validity of Criminal Judgements, The Hague, 28/05/1970, ETS n. 70.

<sup>147</sup> *Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)* [1999] 2 WLR 827. See C. Warbrick, ‘Extradition law aspects of Pinochet 3’, (1999) 48 *International and Comparative Law Quarterly* 958.

<sup>148</sup> See *infra* chapter 5 p. 190.

In this context, the removal of dual criminality might, from a purely theoretical point of view, serve as a basis for more effective cooperation. However, this surgical operation has been performed without adequate preparation. A correct and rational strategy should have included a feasible and “minimal” programme of harmonisation. Instead, the EAW has been introduced as a “Trojan horse” of mutual recognition, on the wrong presumption that the latter should be viewed as a radical alternative to harmonisation. A sufficient degree of harmonisation is essential for a uniform perception of fairness and legality among European Union citizens. Furthermore, the mutual recognition agenda has been developed on the basis of a not properly defined mutual trust, without any normative grounds and without verifying whether this concretely exists. As has been seen, the long-lasting negotiations for the adoption of a Framework Decision on racism and xenophobia prove that, *at least as far as substantive law is concerned*, a common ground on which mutual trust can truly blossom is still lacking<sup>149</sup>. The EAW list ignores this reality: the broad definitions on which it relies carry the risk of conferring too many discretionary powers to the judicial authorities, without taking into account the importance of clear legal standards.

Mutual trust appears therefore to be more like a declaration of intent, i.e. the result of a top-bottom approach while the opposite should be the case. As the Hague Programme confirms, mutual trust still needs to be “built” or “strengthened”<sup>150</sup>. In light of these considerations, it is suggested here that the list of crimes contained in Article 2 (2) be reduced to a few core offences, i.e. those for which common criteria for definition and punishment can be more easily found. It is more likely that the

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<sup>149</sup> See the recent case of Mr. Töben, a German citizen who was accused of holocaust denial by publishing anti-Semitic material on the Internet. The act was considered to have been committed in Germany, where it is qualified as an offence (section 130 of the German criminal code) and an EAW request was sent to the UK, where the accused was. However, the British authorities rejected the request as the warrant was considered vague and imprecise. The German prosecutors initially appealed to the High Court but then withdrew their request. See *Holocaust denier Fredrick Töben wins German extradition fight*, The Times, 20 November 2008.

<sup>150</sup> European Council Presidency Conclusions, Brussels, 4-5 November 2004- Annex I, The Hague Programme, Strengthening Freedom, Security and Justice in the European Union, par. 3.2; Communication from the Commission to the Council and the European Parliament, The Hague Programme: Ten priorities for the next five years, COM (2005) 184 final, par. 2.3; Communication from the Commission to the Council and the European Parliament, Implementing the Hague Programme: the way forward, COM (2006) 331 final, par. 2.5.

application of the surrender procedure to acts such as drug trafficking, terrorism, participation in a criminal organisation, trafficking in human beings, fraud, money laundering and a few others (including theft and murder with the exception of abortion and euthanasia) will prove more effective<sup>151</sup>. In these cases, the seriousness of the offences and (for some of them) their cross-border character, the violation of shared common values and the existing degree of harmonisation will all encourage (rather than threaten) cooperation at the EU level. This does not exclude frictions in residual cases, but arguably the strengthening of the procedural guarantees and the use of a clear human rights exception would provide an adequate safety net. In this regard, it is worth mentioning that this view was reflected in the initial mutual recognition project *prior to 9/11*, which limited approximation of the constituent elements and penalties to a few areas of crime<sup>152</sup>.

A last remark involves an assessment of the harmonisation process as a whole. As can be observed, this process has taken place through non-EU Conventions which are considered to be part of the EU *acquis* in the JHA field. As a result, they establish criteria for the determination of both penalties and constituent elements of offences which have often been diluted and do not reflect the degree of mutual trust that should exist between the Member States.

### 4.3 *Ne bis in idem* and mutual trust

The issues of crime definition and mutual trust lead us to the analysis of *ne bis in idem* (or double jeopardy). As pointed out earlier in this work, this principle aims to protect individual rights, as it forbids prosecuting and/or punishing the same person

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<sup>151</sup> This amendment will be possible pursuant Article 2 (3) FD, which confers such power on the Council. After all, this would be more in line with the categories for which approximation is encouraged under Article 31 (e) TEU. Furthermore, Article III-271 of the Draft EU Constitution clarifies that European framework laws may establish minimum rules on the definition of criminal offences and sanctions in areas of serious crime having a cross-border dimension, such as terrorism, organised crime, money laundering and drug trafficking.

<sup>152</sup> See e.g. 'Mutual recognition of judicial decisions and judgements in criminal matters', Paper submitted by the United Kingdom Delegation to K4 Committee, March 1999 (which referred to trafficking in human beings, sexual exploitation of children, drug trafficking, corruption, computer fraud, terrorism, environmental crime, internet crime, money laundering, Euro counterfeiting and fraud involving non cash payments).

for the same acts<sup>153</sup>. The Framework Decision left the classical questions of interpretation of this principle open to debate. For instance, concerning the “*idem*” (i.e. the same act), the European Court of Justice has rejected the option adopted by the International Covenant on Civil and Political Rights and Protocol number 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (respectively, Articles 14 (7) and 4)<sup>154</sup>. These international treaties, by adopting the term “offence” rather than “act”, refer to the legal classification rather than the identity of the material act. However, the first option not being in line with the notions of mutual trust and mutual recognition as elaborated by the Court<sup>155</sup>, “*idem*” in the sense of Article 54 of the Schengen Convention<sup>156</sup> is to be intended as the existence of a set of facts or concrete circumstances inextricably linked together, irrespective of the legal classification given to them or the legal interest protected (so-called *Van Straaten* principle)<sup>157</sup>. In this sense, prosecution against e.g. ancillary acts in another Member State may be barred, even if they were not initially known, or were not taken into account in the course of the proceedings. The building of mutual trust in the “European judicial space” presupposes that national courts follow these guidelines when issuing or executing an EAW; on the other hand, they must be free to decide, on a case-by-case basis, whether the links among the facts effectively exist as to time, space and subject-matter<sup>158</sup>. The reason is that a rigid application of the *Van Straaten* principle could dismantle that very mutual trust: were criminal proceedings in one Member State to be stopped for an “inextricably linked” ancillary act of drug trafficking, despite a much larger quantity being traded or totally different accomplices being involved, the feeling of cooperation in the prosecution and in enforcement of sentences would risk to fade away. A common intention may of course serve as an element of connection of the various acts, but should not be used

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<sup>153</sup> See *supra* chapter 1 p.18.

<sup>154</sup> International Covenant on Civil and Political Rights, 23/03/1976, 999 UNTS 171; Protocol n. 7 to the ECHR, 22/11/1984, as amended by Protocol n. 11, ETS n. 155.

<sup>155</sup> ECJ Joined Cases C-187/01 and C-385/01, *Gözütok and Brügge* [2003] ECR I-01345, par. 33.

<sup>156</sup> Article 54 Schengen Convention reads: “A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.”

<sup>157</sup> ECJ C-436/04 *Van Esbroeck*, [2006] ECR I-2333 par. 42, confirmed by C-150/05 *Van Straaten* ECR I-9327 and C-467/04 *Gasparini and others* ECR I-9199.

<sup>158</sup> *Van Esbroeck*, *supra*, par. 38.

as the sole criterion to determine the “*idem*”<sup>159</sup>. Concerning, more in particular, drug trafficking offences, the Court of Justice correctly excluded from the scope of *ne bis in idem* the application of the general obligation to punish all these acts as distinct offences, whenever they are committed in different countries<sup>160</sup>. In all its cases, the Court expressed an analogous view: disparities between the criminal law systems of the Member States regarding the definition of drug trafficking crimes (*Van Esbroeck, Van Straaten*) or regarding prescription periods (*Gasparini*) cannot preclude the principle of mutual recognition from playing its role<sup>161</sup>.

Another question has arisen as to the interpretation of “finally judged”. Again, the case-law of the European Court of Justice provides useful guidelines. One might expect that national criminal sovereignty prevails as long as Member States have not harmonised their national laws in this respect. Such a view does not fit into the Courts’ integration policy, thus the Court rejected it by arguing that nowhere in Title VI of the EU Treaty nor in the Schengen Agreement nor in the Schengen Convention itself, is the application of Article 54 made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States relating to procedures whereby further prosecution is barred.<sup>162</sup> The Court deduced that this necessarily implies that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.<sup>163</sup>. As a result, the *ne bis in idem* rule does not require the issuing of a formal judicial decision: the trial is finally disposed of even in the case of an out-of-court settlement with the public prosecutor. However, the relationship between Article 54 and the Framework Decision is not entirely solved. The question whether “finally judged” is

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<sup>159</sup> In this sense, I agree with the Opinion of Advocate-General Sharpston, 5 December 2006 Case C-288/05 *Kretzinger*, par. 39 and Case C-367/05 *Kraaijenbrink*, par. 28 and 36. It is to be pointed out that in these Opinions the principle of “set-off” has been for the first time mentioned in this area. According to this principle, periods of detention pending trial or in police custody are to be taken into account when enforcing the custodial sentence for the same offence.

<sup>160</sup> *Van Esbroeck*, *supra*, par. 40.

<sup>161</sup> *Van Esbroeck*, *supra*, par. 29-31; *Van Straaten*, *supra*, par. 44; *Gasparini and others*, par. 29-30. For other cases on *ne bis in idem*, see ECJ C-288/05 *Kretzinger*, [2007] ECR I-6441 ECJ C-367/05 *Kraaijenbrink* [2007] ECR I-6619, ECJ C-297/07 *Bourquain*, 11 December 2008, ECJ C-491/07 *Turanský*, 22 December 2008.

<sup>162</sup> *Gözütok and Brügge*, *supra*, par. 32.

<sup>163</sup> *Gözütok and Brügge*, *supra*, par. 33.

equivalent to “finally disposed of” as interpreted by the Court is open. This is further complicated by the former expression being repeated in different contexts: Article 3 (2), Article 4 (3) and Article 4 (5). While a formal interpretation would perhaps make more sense in the third case (as mutual trust only applies within the EU), problems remain in the first two cases. If Article 3 (2) only covers formal judicial decisions, one should conclude that mutual trust is limited in this specific situation (which is not necessarily negative; furthermore, it would not make sense to have such wording repeated in Article 4 (3)). In this context, if a person requested by one Member State for importing a certain amount of hashish has reached a settlement with the public prosecution of another Member State concerning the offence of exporting the drug (which would amount to an “*idem*”), then the latter State may still execute the EAW (since *ne bis in idem* would function in this case only as an optional ground of refusal). A reasonable conclusion is that it is up to the national court to decide how to apply double jeopardy, in the balance between “freedom”, “security” and “justice”. Indeed, free movement should not always prevail and mutual recognition should be applied in a reasonable way. In the same line of thought the Court underlined in *Miraglia* that the purpose of Article 2 TEU, namely to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured, must be worked out in conjunction with appropriate measures with respect to prevention and combating of crime.<sup>164</sup> Other questions left open to debate are whether acquittal at first instance can work as a bar or decisions taken by administrative authorities having a punitive character may also prevent further prosecution.

The condition for the applicability of the mandatory ground of refusal under Article 3 (2) is that, where there has been sentence, this sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. This wording covers cases where the statute of limitation prevents a sentence from being executed or the requested person has been freed on probation or

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<sup>164</sup> ECJ C-469/03, *Miraglia*, par. 34.

parole, has been pardoned or has been subject to a suspended custodial sentence<sup>165</sup>. Periods of detention arising from the execution of a EAW must be deducted from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed (Article 26): this is a specific application of the principle of “taking into account” (also known as “*Anrechnungsprinzip*” or “set-off”).

The relationship between Article 54 and the Framework Decision, mentioned above, concerns also the enforcement condition under the former: it may be argued that, if a EAW is issued for the purpose of enforcing a sentence, then “the enforcement condition in Article 54 of the CISA is, by definition, not met”, as underlined by Advocate-General Sharpston in the *Kretzinger* case<sup>166</sup>.

#### 4.4 Conclusion

This chapter has shown that the partial elimination of dual criminality, despite being one of the most important innovations of the Framework Decision on the EAW, has not been properly conceived both in itself and within the more general context of the mutual recognition policy. It seems that certain fundamental features of national legal systems have been neglected or underestimated. The potential disputes arising from this considerable fallacy have perhaps been underestimated as well. It is argued that the reason for these flaws is the rush in the adoption of the Framework Decision as a result of the international pressure towards stepping up the fight against terrorism (and organised crime). This has prompted Member States to remove dual criminality in relation to a long list of categories of offences, which are often closely

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<sup>165</sup> H. van der Wilt, ‘The European Arrest Warrant and the Principle *Ne bis in idem*’, in R. Blextoon, W. van Ballegooij (eds.), *supra*, 99; Opinion of Advocate-General Sharpston, *Kretzinger*, *supra* par. 43.

<sup>166</sup> Opinion of Advocate-General Sharpston, *Kretzinger*, *supra* par. 88. For more on double jeopardy, see R. Lööf, ‘54 CISA and the Principles of *ne bis in idem*’ (2007) *European Journal of Crime, Criminal Law and Criminal Justice* 309.

related to terrorism and organised crime, without reflecting on the consequences deriving from using some of these categories (due to their vagueness and imprecision). One necessary change would therefore be to expunge from the list the most controversial offences (such as racism and xenophobia) and define some exceptions (such as in the case of abortion and euthanasia in relation to murder) and to pursue an appropriate approximation of the other offences and related penalties<sup>167</sup>.

Issues of definition also involve the application of *ne bis in idem* to EAW cases, although the Court of Justice has provided some guidelines in this field.

Finally, it should be observed that the problems connected to the Framework Decision list and the definition of crimes are all the more significant in light of the diverging implementation in the domestic systems and the pressing need to strengthen the protection of human rights, as will be seen in the following two chapters.

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<sup>167</sup> It should be borne in mind that some offences can be punished by a criminal sanction in one State and by an administrative sanction in another State.



## **5. The implementation of the European Arrest Warrant in the EU Member States: general overview and two case studies**

### **Introduction**

Many Member States did not consider it necessary to amend their Constitution in order to allow the surrender of nationals<sup>1</sup>. This did not create problems at the constitutional level. An analysis of the degree of implementation of the Framework Decision in the Member States however stresses some limits of the EAW at a lower level, i.e. the different statutes adopted across Europe.

This chapter will single out the somewhat bizarre contradiction lying in the fact that the same Member States that agreed to adopt an instrument modifying substantially the traditional principles of judicial cooperation failed to transpose it correctly or to amend their national legal systems accordingly beforehand. This occurred at all levels in the domestic legal systems hierarchy of norms. First of all, the Constitutional Courts in Germany, Poland, Cyprus, Czech Republic and a few other countries were called upon to rule on the conformity of the Framework Decision and/or the implementing statute with the national Constitution. Secondly, many of the domestic “versions” diverge considerably from the model approved by the Council and this results in a patchy and non-uniform system. The purpose of this chapter is to examine the extent to which the existing disharmony may lead to ineffective implementation of the EAW from a practical point of view. As it is not possible to analyse in detail the procedural and constitutional hurdles faced by all Member States, this work will first of all touch upon the judgements of the Constitutional Courts mentioned above (seen as a “physiological” reaction to the removal of the nationality exception and as a test of mutual trust) and will then focus on two countries: United Kingdom and Italy. Finally, a non-legal notion of mutual trust will be elaborated within the peculiar context of cooperation in criminal matters.

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<sup>1</sup> See for instance, regarding France, *Avis du Conseil d'Etat n. 368-282* 26 September 2002.

## 5.1 The removal of the nationality exception and the reaction of the national Constitutional Courts

This section will demonstrate that there is no real rational consideration on the basis of which a State can deny the surrender of a national. As observed elsewhere in this work<sup>2</sup>, many arguments may be put forward in favour of the nationality exception. We shall reflect on them more in detail below<sup>3</sup>. Of course, the risk is that citizens may use their own country as a “refuge”. This is why there are some safeguards. States refusing extradition of their nationals often (but not always) leave to their domestic courts the task to prosecute or convict the individual (principle of *aut dedere aut judicare*) and establish extraterritorial, *personal* jurisdiction over acts committed by their nationals in another country<sup>4</sup>. On the other hand, generally those countries that allow for the extradition of their citizens apply *territorial* jurisdiction<sup>5</sup>. Non-extradition of nationals is therefore justified on the grounds of the principle of active personality (according to which a State has jurisdiction over its citizens)<sup>6</sup>, which makes it more likely that the offender goes unpunished. This can be illustrated by way of a (perhaps extreme) example.

Let us suppose that X has dual nationality (State A and State B). He has lived in State A for a substantial number of years. He then participates in a criminal organisation together with other people. Thereafter he flees to State B, which only recognises one single nationality. Following a request for extradition, State B denies surrender because of the nationality rule. However, it turns out that it is not possible to prosecute X because the act he has committed in State A cannot be qualified as “organised crime” or any other offence in State B; furthermore, let us assume that for practical reasons the collection and analysis of evidence proves an impossible task in

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<sup>2</sup> See *supra*, chapter 1 p. 23. On the history of the nationality exception, see e.g. I.A. Shearer, *Extradition in International Law* (Oceana Publications, Manchester University Press 1971) 94-131.

<sup>3</sup> See *infra*, p. 1139-141.

<sup>4</sup> See *supra*, chapter 1 p. 12.

<sup>5</sup> I.A. Shearer, *Extradition in International Law* (Oceana Publications Inc., Manchester University Press 1971) 96-97; C. Shachor-Landau, ‘Extra-territorial Penal jurisdiction and extradition’ (1980) 29 *The International and Comparative Law Quarterly* 274-295.

<sup>6</sup> For a critique of the active personality principle, see M. Plachta, ‘(Non-)Extradition of Nationals: A Neverending Story?’, (1999) 13 *Emory Int’l Law Rev* 121-123.

a State other than the *locus commissi delicti* (i.e. the State where the offence has been committed)<sup>7</sup>.

Despite the risks that the application of the nationality exception implies, the latter has had a “sentimental” or “patriotic” value in many civil law countries. For instance, the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters contains an absolute prohibition on the extradition of nationals (Article 5) and *aut dedere aut judicare* does not apply<sup>8</sup>. In Italy the exception was formally adopted as early as 1889<sup>9</sup>.

We may observe that the nationality exception can be seen in general terms as an expression of both State sovereignty and individual rights. On the one hand, State authorities claim the right to judge their citizens for acts committed by them. On the other hand, an individual is entitled not to be removed from his natural judge (*ius de non evocando*) but he also has the right to be protected from the over-reaching jurisdiction of another State, especially for acts the criminal nature of which he ignored at the time of their commission<sup>10</sup>. Common law countries which do not apply this rule traditionally have imposed other guarantees, such as the need to make a *prima facie* case of guilt (i.e. the need to provide sufficient evidence to support the request for extradition)<sup>11</sup>.

Concerning more in particular the association of non-extradition of nationals with individual rights, it is possible to distinguish different approaches. While the

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<sup>7</sup> It is interesting to observe that nationality is not a ground for refusal in the field of mutual legal assistance. See European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20/04/1959, ETS n. 030; Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12/07/2000.

<sup>8</sup> Treaty on Extradition and Mutual Assistance in Criminal Matters, 1962, *Moniteur Belge*, October 24, 1964.

<sup>9</sup> C. Ghisalbetti, *La codificazione del diritto in Italia 1865/1942* (Laterza Roma-Bari 2000). See Article 9 Italian Criminal Code R.d. 30 giugno 1889, n. 6133.

<sup>10</sup> Z. Deen-Racsmany, R. Blekxtoon, ‘The Decline of the Nationality Exception in European Extradition?’ (2005) 3 *European Journal of Crime, Criminal Law and Criminal Justice* 317, 319, citing other authorities; M. Plachta, *supra*, 77-158; I.A. Shearer, *supra*, 98 and 105, where he clarifies that this is an application by German scholars of the principle of *Treupflicht* (i.e. the duty of the State to protect all its citizens). See also *infra*, p. 143 on the German Constitutional Court’s decision.

<sup>11</sup> I.A. Shearer, *supra*.

application to extradition of any justification of refusal on grounds of the freedom of movement in the European Community (Articles 39, 43 and 49 TEC) has been rightly denied in some national case law, as doing otherwise “would emasculate the entire process of extradition”<sup>12</sup>, a few authors have suggested in the past to rely on Article 3(1) of Protocol 4 of the European Convention on Human Rights<sup>13</sup>. Indeed, this provision refers to the notion of expulsion of nationals, which, if interpreted broadly, might include extradition. This is why the Explanatory Report specifies that “(...) it was understood that extradition was outside the scope of this paragraph”<sup>14</sup>. Despite this clarification, some authors still raise doubts as to the correct interpretation of Article 3(1). They believe that the clear and unambiguous wording of this Article precludes the use of the Explanatory Report as interpretative tool, in application of the general principles under Article 31 of the Vienna Convention on the Law of the Treaties; as a result, extradition of nationals would not be permitted<sup>15</sup>. Others argue more reasonably that, although the reference to expulsion of nationals is unclear, the interpretation given by the Explanatory Report should be taken into account: therefore the approach of the 1957 European Convention (which does not prohibit extradition of nationals but allows State Parties to refuse it) should be preferred<sup>16</sup>.

As far as the duty of protection owed by the State is concerned, this seems to be more a political than a legal principle<sup>17</sup>, hardly justifiable if only applied to nationals and not lawful residents. Similarly, the case for the right not to be withdrawn from one’s own natural judge and all similar arguments make little sense in a world in

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<sup>12</sup> See *Regina v. Secretary of State for the Home Department, ex parte Launder* [1997] 1 W.L.R. 839; and also, e.g., *Regina v. Governor of Pentonville Prison ex parte Budlong* [1980] W.L.R. 1110. These cases referred to pre-Amsterdam Articles 48, 52 and 59 TEC.

<sup>13</sup> Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS n. 46, available at <http://conventions.coe.int/>. Article 3 (1) states that “No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national”.

<sup>14</sup> Explanatory Report to Protocol n. 4, *ibid*.

<sup>15</sup> F. Jacobs, R. White, *European Convention on Human Rights* (3<sup>rd</sup> ed. OUP 2002) 343; Vienna Convention on the Law of the Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>16</sup> J. Merrills, A. Robertson, *Human Rights in Europe* (Manchester 2001) 256; P. van Dijk, G. van Hoof et al., *Theory and Practice of the European Convention on Human Rights* (4<sup>th</sup> ed. Intersentia Antwerpen-Oxford 2006) 947; for the 1957 European Convention, see *supra*, chapter 1 p.14.

<sup>17</sup> I.A. Shearer, *supra* 119.

which moving from one territory to another (and committing a crime there) is far easier than in the past. We can conclude that a more pragmatic solution is therefore that of prosecuting and punishing an individual in the place where the crime was committed, because the values of *that* society have been violated.

The 1996 EU Convention attempted to adopt a flexible approach<sup>18</sup>. While leaving to the Member States the choice of whether or not to authorise the surrender of a national under certain conditions, it established a number of limits to the period of validity, the renewal and the expiration of the prohibition to surrender. The idea was to “keep the door open” and pave the way for a slow removal of this old-fashioned requirement. Although that “soft” approach failed, as we have seen<sup>19</sup>, only a few years later the ground was ready for a more courageous step, with the Framework Decision on the EAW<sup>20</sup>.

The nationality rule, when applied, has traditionally been coupled with an extension of States’ jurisdiction to a large number of extraterritorial offences committed by their nationals. It is therefore interesting to verify whether Member States that previously refused to surrender their nationals will still exercise that jurisdiction to the same extent. Leaving this aside at the moment, signs of change were already visible in 2000, when the German Basic Law was amended in order to comply with the obligations deriving from the Statute of the International Criminal Court (ICC)<sup>21</sup>. The general prohibition of extradition of nationals was replaced with a system providing for an exception in case of extradition to a Member State of the EU or to an international Court of Justice, “as long as constitutional principles are respected”<sup>22</sup>. Therefore, the new system was tailored not only to the ICC surrender scheme, but also to the new cooperation mechanisms within the EU. These include

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<sup>18</sup> Article 7 (3) Convention drawn up on the basis of Article K 3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C 313 23/10/1996.

<sup>19</sup> See *supra*, chapter 1 p. 24-25.

<sup>20</sup> See *supra*, chapter 3.

<sup>21</sup> Statute of the International Criminal Court, Rome, (17/07/1998) UN Doc. A/CONF. 183/9\*, 37 ILM 999 (1998), amended by UN Doc, PCNICC/1999/INF/3\*. See also the obligation to surrender as established by the Rwanda and former Yugoslavia courts, UN Doc. S/RES/808 (1993) and UN Doc. S/RES/827 (1993), as well as Annex and S/RES/955 (1994) and subsequent amendments UN Doc. S/RES/1329 (2000) and S/RES/1503 (2003).

<sup>22</sup> “*soweit rechtsstaatliche Grundsätze gewahrt sind*”, Article 16 (2) sentence 2 German Constitution (*Grundgesetz*).

the EAW, which to German eyes is a form of extradition. On the other hand, the French *Conseil d'Etat* did not believe it would be necessary to modify the Constitution in order to allow the surrender of nationals (although the EAW was still to be regarded as extradition)<sup>23</sup>.

Soon after the Framework Decision entered into force, three Constitutional Courts in Europe, in Poland, Germany and Cyprus respectively, challenged the compatibility of this measure with national constitutions. This is evidence of some degree of ambiguity in the relationship between State sovereignty and mutual recognition/mutual trust. On the one hand, Member States approve by unanimity a Framework Decision with some important changes to their system of judicial cooperation; on the other, at the moment of testing it against their own Constitutions or (as will be better seen later in this chapter) when implementing it, they show reluctance and uncertainty.

The Polish Court was called upon to decide whether the surrender of a Polish citizen to the Netherlands for the purposes of prosecution (under Article 607t of the Code of Criminal Procedure) was in line with the provision of the national constitution prohibiting extradition of nationals<sup>24</sup>. It concluded that “extradition” and “surrender”, involving the handing over of a prosecuted or convicted person to a foreign country, should not be understood as distinct categories in their substance and, as a result, surrender is also prohibited<sup>25</sup>; the obligation of Poland to interpret domestic law in a manner consistent with EU law is limited by cases where this may determine the introduction or aggravation of criminal liability; moreover, EU citizenship cannot result in the diminishment of the guarantee functions of the provisions of the Constitution concerning the rights and freedoms of the individual. The consequence

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<sup>23</sup> Avis du Conseil d'Etat, *supra*.

<sup>24</sup> Judgement of the Polish Constitutional Tribunal, P 01/05 27 April 2005. The provision is Article 55 (1) of the Polish Constitution. See K. Beni, ‘The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005’, in E. Guild (ed.) *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers Nijmegen 2006) 125-139; K. Kowalik-Bańczyk, ‘Should We Polish it Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law’, (2005) 6 *German Law Journal* 1355-1366.

<sup>25</sup> The distinction between the two concepts was one of the arguments used before the judgement by those who believed that an amendment of the constitution was not necessary. See K. Kowalik-Bańczyk, *supra*, 1359.

of this was that Article 607t(1) of the Polish Code of Criminal procedure was declared incompatible with the Polish constitution. However, the legal force of this provision was extended for eighteen months: in light of the obligations of Poland towards the EU, an appropriate amendment of the constitution was suggested by the Court in order to allow a correct implementation of the Framework Decision. A new law was finally approved in November 2006 and entered into force in December, although in the meantime the new constitutional provision was directly applied<sup>26</sup>.

The German Federal Constitutional Court (*Bundesverfassungsgericht*) declared the whole German implementing law incompatible with Article 16 (2) of the German constitution (despite the amendment mentioned above)<sup>27</sup>. The Court argued that extradition of a German would run counter the principles of legality enshrined in the constitution, as citizens cannot be handed over against their will to a legal system which they are not familiar with and do not have confidence in. The Court stressed that the German implementing law had not, *inter alia*, incorporated Article 4 (7) (a) and (b). Article 4 indeed contains a number of optional grounds for refusal and its paragraph 7 deals with the territoriality and extraterritoriality principles. A new law was issued in July 2006, taking into account this decision<sup>28</sup>. According to this law, German citizens can only be extradited for the purposes of prosecution if the criminal act shows a genuine link (“*maßgeblicher Bezug*”) to the territory of the requesting Member State. Where a national link to the German territory exists, a mandatory ground for refusal is provided for; where a foreign link exists, surrender is mandatory. In “mixed cases” the law requires that a check is made of double criminality and that the court weigh up the effectiveness of the prosecution, the alleged offence and the guarantee of fundamental rights. In any case, return after sentence must be guaranteed. This reflects some concerns of the Court in relation to the principle of non-retroactivity: it may occur that an act committed in another EU

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<sup>26</sup> The constitutional amendment occurred on 7 November 2006 and entered into force on 26 December 2006. See Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States in 2005, 2006 and 2007, Brussels, 11/07/2007, COM (2007) 407 final and Annex to the Report, SEC (2007) 979 final.

<sup>27</sup> BVerfG, 18 July 2005 2 BvR 2236/04. See F. Geyer, ‘The European Arrest Warrant in Germany- Constitutional Mistrust towards the Concept of Mutual Trust’, in E. Guild (ed.) *supra* 101-123; S. Mölders, ‘European Arrest Warrant is Void- The Decision of the German Federal Constitutional Court of 18 July 2005’, (2005) 7 *German Law Journal* 45-58.

<sup>28</sup> *Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 36 p.1721, 25 Juli 2006.*

Member State by a German citizen is criminalised by way of a subsequent amendment of the law of that State. In such cases it seems absurd to the Court to consent to surrender if the act in question was not considered a crime in Germany at the time of its commission and if there is no relevant link to the foreign territory. It is worth pointing out that reference in the decision was made to “extradition” (*Auslieferung*) rather than “surrender” (*Übergabe*)<sup>29</sup>.

The Supreme Court of Cyprus also stated that the surrender of a Cypriot citizen is unconstitutional<sup>30</sup>. However, although Article 14 of the constitution prescribes that no citizen shall be banished or excluded from the Republic under any circumstance, there was no direct decision on the compatibility of the Cypriot implementing statute with this provision. Rather, the Court argued that the constitution only allows the arrest of a Cypriot citizen on the grounds mentioned by Article 11 (2), which prescribes that a person can be deprived of his liberty only in a limited set of circumstances, such as detention following conviction or on reasonable suspicion of having committed an offence<sup>31</sup>. An amendment occurred in June 2006, although surrender of nationals is only possible for acts committed after the accession to the EU, i.e. on 1 May 2004<sup>32</sup>.

One of the main points stressed by these constitutional decisions is the lack of certainty of law as an effect of the application of the EAW: as observed by some scholars, since within the EU it is not possible to make use of common procedural and substantive standards and the division of powers is rather unclear, the very confidence in the functioning of the EAW is undermined<sup>33</sup>. The German Court relied

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<sup>29</sup> The same occurs in the implementing law. Austria too adopts the first term and reserved until 31 December 2008 the right to refuse execution of an EAW if the requested person is an Austrian citizen and if the act for which the EAW has been issued is not punishable under Austrian law (Article 33 of the Framework Decision).

<sup>30</sup> Judgement of the Supreme Court of Cyprus n. 295/2005, Council Document n. 14281/05, 11/11/2005.

<sup>31</sup> Art. 11 Cypriot Constitution, at [http://servat.unibe.ch/icl/cy00t\\_.html](http://servat.unibe.ch/icl/cy00t_.html) (last visited on 5 November 2008). On the EAW implementation in Cyprus, see E.A. Stefanou, A. Kapardis, ‘The First Two Years of Fiddling with the Implementation of the European Arrest Warrant in Cyprus’, in E.Guild (ed.), *supra* 75-88.

<sup>32</sup> Cypriot Law 18 June 2006 amending Article 11 of the Constitution. See Report from the Commission, *supra*.

<sup>33</sup> E. Guild, ‘Introduction’, in E.Guild (ed.), *supra*.



more on legality and non-retroactivity, arguing that they are applicable to extradition because this, despite its procedural features, has a punitive nature<sup>34</sup>. However, curiously enough it decided to restrict its limitation of mutual recognition to cases concerning nationals, excluding long-term residents. Its approach is very traditional and partly recalls the *Solange* jurisprudence<sup>35</sup>. Contrary to what may appear superficially, by tying the notion of citizenship to that of nationality and by endowing them with a special protection, the Court defines the boundaries of judicial cooperation in terms of State sovereignty, rather than in terms of defence rights. The Polish Court took a less radical approach and paid tribute to the principle of supremacy of EC law, although it did not go as far as proclaiming the prevalence of Third Pillar law over national law (a move left to the European Court of Justice, which decided *Pupino*<sup>36</sup> shortly afterwards).

However, other constitutional challenges to the Framework Decision, brought in Greece and Czech Republic, did not create obstacles to its implementation<sup>37</sup>. The Czech judgement is particularly interesting as it developed in detail the concept of mutual trust, explicitly relying on *Gözütok and Brügge*<sup>38</sup>, and made use of it in its arguments. The Court rejected the proposal put forward by a group of parliamentarians to annul the Czech implementing statute. There were two main complaints. The first was the incompatibility of the statute with Article 14 (4) of the Czech constitution, which prescribes that no citizen can be forced to leave his homeland; the second was the lack of clear definitions of the offence for which double criminality is lifted (which, it was asserted, would violate the principle *nullum crimen sine poena*). The reasoning of the Court was based on a teleological interpretation of the constitutional provisions. It argued that traditional extradition and surrender under the EAW are substantially different and it is therefore essential

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<sup>34</sup> BVerfG, 18 July 2005 2 BvR 2236/04, par. 97.

<sup>35</sup> Starting from BVerfG 29 May 1974 (*Solange I*) 37 BvR 271. See also *infra*, note 54.

<sup>36</sup> ECJ C-105/03 *Pupino* [2005] ECR I-5285.

<sup>37</sup> (*inter alia*) Decision n.591/2005 of the *Areios Pagos*, Council Document n. 11858/05, 09/09/2005; Decision of the Czech Constitutional Court, 3 May 2006, No.PI.ÚS 66/04, available at <http://www.law.uj.edu.pl/~kpk/eaw>

<sup>38</sup> ECJ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-01345.

to make a distinction between them<sup>39</sup>. In particular, while the former had its *ratio* in the mutual distrust between European countries (which justified the non-extradition of nationals as an expression of the sovereignty of the State over its citizens), nowadays this is no longer the case, in times of high mobility of European people across the EU and increasing inter-state cooperation. As far as the “right of citizens not to be forced to leave their homeland” under Article 14 (4) is concerned, it simply reflects experience with the Communist regime, which often expelled “undesired” people against their will and for purely political reasons. This provision has therefore a different meaning if viewed in the light of contemporary society. Moreover, the Czech Court did not restrict the scope of its judgement only to citizens of its country, as “(...) the Czech constitution does not protect only the trust of Czech citizens in the Czech law, but also protects the trust and the legal certainty of other persons that are lawfully residing in the Czech Republic (e.g. foreign nationals who are permanently resident in the Czech Republic)”<sup>40</sup>. Concerning the exclusion of double criminality for the list of offences mentioned by the Framework Decision, the Court held that the principle of legality is not violated because the degree of proximity reached by the EU Member States is so high that they all share the same values and are bound by the “rule of law”. The Court also established that territoriality applies in this context. Indeed, although Article 4 (7) of the Framework Decision was not incorporated by the Czech implementing statute, Section 377 of the Code of Criminal Procedure was interpreted by the judges in the light of that provision: as a result, a Czech citizen will not be surrendered to another Member State if he is suspected of a crime committed in his own country, unless, in view of the special circumstances in which the crime was committed, it is necessary to give priority to conducting the criminal prosecution in the requesting State.

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<sup>39</sup> Decision of the Czech Constitutional Court, *supra*, par. 48. Here too, the problem of the distinction between extradition and surrender is analysed. See *supra*, p.161.

<sup>40</sup> Decision of the Czech Constitutional Court, *supra*, par. 113.

## 5.2 The implementing legislation in the UK and Italy: divergence and convergence

### 5.2.1 Introduction

As will be better seen in the last section of this chapter, the implementation of the Framework Decision is fragmented: sometimes incomplete, some other times beyond the boundaries set out by the European instrument. The following sections will look in detail at two legal systems in particular: Italy and the United Kingdom. While the analysis below does not claim to be indicative of the multi-faceted reception of the EAW in all of the twenty-seven Member States, it is nonetheless an attempt to give an idea of how the new system is being applied in a civil law-type and in a common law-type of jurisdiction. This will be done by an overview of both legislation (current section) and case law (following section).

### 5.2.2 The Italian system

The surrender procedure as applied in Italy presents some peculiarities in respect of all other countries. This is due both to a very critical and sceptical attitude that a number of experts showed from the outset and to an uncertain and cumbersome approval of the national Act. The next sections offer an account of the main issues and of the rather ambiguous “creature” that was born following this criticism.

#### 5.2.2.1 The transposition of the Framework Decision in the Italian system

As mentioned earlier in this work<sup>41</sup>, the transposition of the Framework Decision in Italy proved to be very problematic. The Italian Government initially refused any support to the proposal of introducing the Article 2(2) list<sup>42</sup>, unless the offences were reduced to six, namely terrorism, organised crime, drug trafficking, trafficking in

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<sup>41</sup> See *supra*, chapter 3 p.71.

<sup>42</sup> This occurred at the JHA Council in December: see JHA Conclusions 6-7 December 2001 and L. Salazar, ‘Il mandato d’arresto europeo: un primo passo verso il mutuo riconoscimento delle decisioni penali’ (2002) 8 *Diritto penale e processo* 1042.

human beings, sexual abuse of minors and illegal arms trafficking: certainly corruption, money laundering and fraud would have to be left out<sup>43</sup>. The Italian representatives eventually had a change of mind on 11 December 2001, following intense negotiations with the Belgian Presidency (in particular, the Belgian Prime Minister)<sup>44</sup>. However, a statement was made at the Laeken European Council on 14-15 December, in which Italy specified that the implementation of the Framework Decision would make it necessary to adapt it to the fundamental principles of the Italian Constitution, while at the same time modifying the domestic legal system to bring it closer to the European models<sup>45</sup>.

The ambiguity of Italy in relation to the EAW persisted after political agreement was reached at the EU level. During the phase of transposition of the Framework Decision a number of draft Bills were proposed by different parliamentary groups, while the Government refrained from any legislative initiative<sup>46</sup>. In particular, three draft Bills were initially proposed by the opposition: one of them contained a limited number of grounds for refusal and did not create obstacles to the removal of double criminality<sup>47</sup>. The other two were more restrictive, as they mentioned a series of conditions for the surrender to take place. For instance, the requesting State's legislation had to provide for maximum terms of custodial detention, and surrender for a political crime could not be performed (save for a few exceptions, including e.g. cases of terrorism provided for by Article 1 of the 1977 Convention and Article 11 of

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<sup>43</sup> The reduced list corresponds to that included in the Italy-Spain Treaty on extradition, see *supra*, chapter 3 p.80. See e.g. V. Grevi, 'Il mandato d'arresto europeo tra ambiguità politiche e attuazione legislativa' (2002) *Il Mulino* 122.

<sup>44</sup> L. Salazar, *supra* 1043. See also *Berlusconi urged to support Europe-wide arrest warrant*, The Observer, 9 December 2001; *Italy U-turn on arrest warrant*, BBC News, 11 December 2001 <http://news.bbc.co.uk/1/hi/world/europe/1704168.stm>. The Italian Government backed down gradually, first by accepting a list of 16 instead of 6 categories, then by agreeing on all 32, provided that half of them would be applicable immediately and the other half from 2007 onwards. See La Repubblica, 8 December 2001, interview with A. Vitorino.

<sup>45</sup> Laeken European Council (14-15 December 2001) Presidency Conclusions, at [http://europa.eu/european\\_council/conclusions/index\\_en.htm](http://europa.eu/european_council/conclusions/index_en.htm). See e.g. E. Selvaggi, 'Il mandato d'arresto europeo alla prova dei fatti' (2002) 10 *Cassazione penale* 2979; E. Bruti Liberati, I. Juan Patrone, 'Sul mandato di arresto europeo' (2002) *Questione giustizia*, at [www.forumcostituzionale.it](http://www.forumcostituzionale.it). They both question the legal value of such statement, included in the minutes of the meeting.

<sup>46</sup> For a detailed analysis see A. Mastromattei, 'La decisione quadro dell'Ue relative al mandato d'arresto europeo davanti al Parlamento italiano' (2004) 3 *I Diritti dell'Uomo, cronache e battaglie* 60-66; A. Mastromattei, 'La fase finale dei lavori parlamentari per l'attuazione in Italia della decisione quadro sul mandato d'arresto europeo' (2005) 2 *I Diritti dell'Uomo, cronache e battaglie* 34-43.

<sup>47</sup> *Proposta di legge* n. 4246 (Kessler), 30 July 2003. See [www.camera.it](http://www.camera.it).

the 1997 Convention)<sup>48</sup>. In addition, EAWs for crimes included in the Article 2(2) list had to comply with a few minimum requirements established by Italian legislation<sup>49</sup>. In the end a new draft Bill was introduced, merging the previous ones<sup>50</sup>. This limited considerably the application of the principle of mutual recognition, as it can be clearly argued from its Article 2 (1) (b), according to which Italy would comply with surrender requests only from those Member States that respected “(...) the principles and the provisions of the Constitution, including those referring to the judiciary as an autonomous and independent power (...)”. However, this and other rather paradoxical restrictions were abolished in the final version of the law, which was approved in April 2005 in the final debate in the lower House with 191 votes in favour, 13 against and 185 abstentions<sup>51</sup>. Italy was the last country to introduce the EAW in its legal system, sixteen months after the deadline<sup>52</sup>.

There are many political reasons why the implementing procedure was so long. From a legal viewpoint, the difficulties were due to the intense debate which started in Italy following the approval of the Framework Decision. Many academics and practitioners strongly criticised the new instrument<sup>53</sup>. Their objections stemmed from a deep concern for the respect of the principle of legality and other fundamental principles. Such concern is due to the specific features of the Italian constitutional and penal system (which explains the past reluctance of the Italian Constitutional

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<sup>48</sup> *Proposta di delega* al Governo n. 4431 (Buemi), 28 October 2003 and n. 4436 (Pisapia), 29 October 2003, at [www.camera.it](http://www.camera.it). These two Bills were different from the previous one in that they related to a delegating statute which would only list general principles and guidelines to be followed by the Government. On the terrorist Conventions, see *supra* chapter 1 p. 19-20.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Proposta di legge* n. 4246-4431-4436-A (Pecorella).

<sup>51</sup> A. Mastromattei, ‘La fase finale dei lavori parlamentari’, *supra* 43. See Italian law 22 April 2005, n.69 (hereinafter Italian law), published in *Gazzetta Ufficiale* 29 April 2005 n. 98.

<sup>52</sup> The Italian law was notified to the Commission on 14 June 2005, while the deadline for the transposition was 1 January 2004. See for this the revised first Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States as well as its Annex, COM (2006) 8 and SEC (2006) 79.

<sup>53</sup> See, e.g., V. Caianiello, G. Vassalli, ‘Parere sulla proposta di decisione-quadro sul mandato di arresto europeo’ (2002) 2 *Cassazione penale* 462, whose legal opinion was requested by the Italian Prime Minister on 11 December 2001. They are former presidents of the Constitutional Court. Concerns were also expressed by the Committee for Constitutional Affairs of the Parliament: see e.g. E. Marzaduri, sub Article 1-2, in M. Chiavario et al. (ed.) *Il mandato d’arresto europeo. Commento alla l. 22 aprile 2005 n. 69* (UTET Milano 2006).

Court to accept the supremacy of EC law<sup>54</sup>). Indeed, their main arguments were two: first, a few provisions in the Italian Constitution set out clear guarantees for individual liberty, which can only be limited by law; second, any measure restricting individual liberty must be reasoned and can always be appealed against before the Supreme Court (*Corte di Cassazione*) on points of law<sup>55</sup>. On the one hand, no one can be withdrawn from his natural judge and can be punished by a law which has entered into force after the commission of the offence<sup>56</sup>. On the other hand, the Constitution forbids extradition of foreigners and citizens for political offences and, in general, allows extradition of the latter only where this is expressly provided for in international Conventions: this is why it was suggested that the political offence exception should still apply<sup>57</sup>.

Some authors expressed their concern that one particular aspect of the principle of legality, namely the principle of specificity, would be violated. More precisely, they argued that, from the substantive law point of view, the categories of offences listed in Article 2 (2) were too generic and vague. Their abstract formulation would not take into account the variety of models which can be identified in each Member State; moreover, the long list would not comply with Article 31 (e) TEU, which limits the adoption of minimum rules to the fields of organised crime, terrorism and illicit drug trafficking<sup>58</sup>. From the procedural point of view, the Framework Decision would harm both the constitutional principle that makes prosecution compulsory and the rights of the defence, as the accused person would have to face an imprecise and

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<sup>54</sup> The Italian Constitutional Court recognised explicitly the principle of supremacy of EC law only in 1973 (Corte Cost. Case 183/73, *Frontini*) although this was limited by the respect for human rights and fundamental constitutional principles (“dottrina dei controlimiti” or theory of counterlimits). See also *inter alia* Corte cost. Case 170/84 *Granital*; Case 117/94 *Giurisprudenza costituzionale* 994; Case 73/01 *Giurisprudenza costituzionale* 428. A similar approach is followed in Germany: see BVerfG 29 May 1974 (*Solange I*) 37 BvR 271; 22 October 1986, (*Solange II*) 73 BvR 339; 12 October 1993 (*Maastricht*) 89 BvR 155; 7 June 2000 (*Banana Dispute/Bananen-Entscheidung*) 102 BvR 147.

<sup>55</sup> See Articles 13, 104 and 111 of the Italian Constitution.

<sup>56</sup> See Article 25 of the Italian Constitution.

<sup>57</sup> See Articles 10 (4) and 26 (1) and (2) of the Italian Constitution, as well as Article 698 Italian Code of Criminal Procedure; see for this opinion P. Gualtieri, ‘Mandato d’arresto europeo: davvero superato (e superabile) il principio di doppia incriminazione?’ (2004) 1 *Diritto penale e processo* 115, 121.

<sup>58</sup> V. Caianiello, G. Vassalli, *supra*; N. Bartone, *Mandato d’arresto europeo e tipicità nazionale del reato* (Giuffrè Milano 2003); P. Gualtieri, *supra* 117 suggested that the implementing law should confer upon the judge the power to check whether an EAW could be executed in line with the principles of legality and fair trial.

ambiguous accusation<sup>59</sup>. Finally, the principle of equality would be breached because the implementation of the EAW would discriminate between Italian citizens who have committed a crime in Italy and those who have committed it in the territory of another Member State, as the latter would have to be surrendered even where the special conditions justifying a restriction of individual liberty do not exist (i.e. the possibility that the sought person flees, destroys the evidence or commits another crime) or where the penalty threshold justifying detention is lower than in Italy<sup>60</sup>. In light of all these objections, it was suggested that, where refusal had to be motivated by diplomatic reasons, a communication should be sent to the requesting authority; moreover, a ground for refusal to States applying the death penalty should be explicitly introduced<sup>61</sup>. It must be pointed out here that these opinions clearly contradict the spirit of the Framework Decision and of the “European legal area” as a whole.

Some authors objected to this negative approaches and, in relation to the issue of double criminality, argued that, although the executing judicial authority is not required to verify if the material conduct corresponds to one of the thirty-two categories as defined in the domestic legislation, it still has to make sure that such conduct has been correctly identified in light of the *nomen iuris* included in the list (in other words, if the right box has been ticked). This opinion is based on the interpretation of the expression “The following offences (...) as they are defined by the law of the issuing Member State” in Article 2 (2) of the Framework Decision as referring to the conduct as qualified in the EAW, rather than in the list. This would be confirmed by Article 8 of the Framework Decision, which requires the issuing authority to include in the request a description of the circumstances in which the offence was committed, including the time, place and degree of participation in the same offence, as well as the nature and legal classification of the offence,

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<sup>59</sup> V. Caianiello, G. Vassalli, *supra*; See Articles 112 and 24 of the Italian Constitution. The Italian public prosecutor cannot refuse to put before the judge any allegations of which he is informed, whenever they refer to the commission of an offence as defined in the Criminal Code.

<sup>60</sup> G. Vassalli, ‘Il mandato d’arresto europeo viola il principio di uguaglianza’, (2002) 28 *Dir. e giust.* 8; G. Vassalli, ‘Mandato d’arresto e principio di uguaglianza’ (2002) *Il Giusto Processo* 129; G. Frigo, ‘Uno strumento senza efficacia diretta’ (2005) 19 *Guida al Diritto* 69; T. E. Frosini, ‘Subito una procedura penale comune’ (2005) 19 *Guida al Diritto* 74.

<sup>61</sup> See, e.g., M. Chiavario, ‘Appunti “a prima lettura” sul mandato di arresto europeo’ (2003) *Questione giustizia, supra*.

particularly in respect of Article 2. It follows that, for instance, an Italian judge would still be able to refuse to surrender a person accused of homicide, where it could be argued from the description of the circumstances that the conduct actually amounted to abortion; or, similarly, a Dutch colleague would deny execution of an EAW if it were evident that the fugitive “merely” assisted the suicide of an Italian citizen (euthanasia not being punishable under Dutch law)<sup>62</sup>. This is not entirely convincing, as it is not in keeping with the essence of mutual recognition as conceived by the Commission: this principle clearly requires a radical abolition of dual criminality in respect of a limited number of cases and its application does not seem to admit exceptions. Moreover, this risks being counter-productive and could undermine smooth cooperation between the Member States unless explicit derogations are established in the Framework Decision.

Other authors insisted that the Framework Decision list was not too problematic, as the majority of the categories of offences are not unknown to Italian criminal law or have already been harmonised at the European and international level; in any case fair trial and protection of human rights are ensured by point 12 of the Preamble<sup>63</sup>. As to the offences which still need to be harmonised, the Council of the European Union has already pledged to adopt the necessary measures<sup>64</sup>. Moreover, the principles of cooperation in criminal matters imply that Italian authorities should not refrain from surrendering fugitives for offences committed in another State, as long as this is not the result of an arbitrary measure<sup>65</sup>. Concerning the fears of a discriminatory treatment, it was rightly pointed out that the European Convention on Human Rights (ECHR) provides for guarantees in cases of arrest or detention which

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<sup>62</sup> E. Selvaggi, O. Villoni, ‘Questioni reali e non sul mandato d’arresto europeo’ (2002) 2 *Cassazione penale* 445; E. Selvaggi, ‘Il mandato europeo di arresto alla prova dei fatti’ (2002) 10 *Cassazione penale* 2978; A. Mambriani, ‘Il mandato di arresto europeo. Adeguamento dell’ordinamento italiano e diritti della persona.’, in M. Pedrazzi (ed.), *Mandato d’arresto europeo e garanzie della persona* (Milano, 2004) 69.

<sup>63</sup> L. Salazar, *supra* 1048; V. Grevi, ‘Mandato d’arresto europeo, ecco i vantaggi e le garanzie’, *Corriere della Sera* 7 August 2002; M. Bargis, ‘Analisi della decisione quadro sul mandato d’arresto europeo: aspetti processuali e garanzie fondamentali’, (2004) *Diritti e giustizia* 8.

<sup>64</sup> See Doc.9958/02 ADD1 REV1 JAI 138, in which the Council stated that it would “continue, in accordance with Article 31(e) TEU, the work on approximation of the offences contained in Article 2(2)”, e.g. in the fields of counterfeiting, illicit arms trafficking, fraud, especially tax fraud and identity theft, environmental crime, racketeering and extortion. On the issue of double criminality, see *supra*, chapter 4.

<sup>65</sup> A. Cassese, ‘Mandato d’arresto europeo e Costituzione’ (2004) *Questione giustizia, supra*.



can be considered substantially similar to those established by Italian law; in any case, an Italian national committing a crime in another country violates the values of that society and should therefore be punished according to that country's law<sup>66</sup>. Finally, as regards the prohibition of extradition for political offences, since all Member States' legal systems are based on the rule of law, there should be no problem in surrendering the sought person for any of the crimes to which the EAW applies<sup>67</sup>.

### 5.2.2.2 The EAW in Italy: the main features

The Italian transposing legislation presents a number of remarkable differences with the model forged by the Framework Decision. This largely reflects the criticisms outlined in the previous section.

Some interesting peculiarities can be traced first of all in Articles 1 and 2, which recall a series of general principles inspiring the operation of the surrender mechanism, i.e. those established by the ECHR and by the Italian Constitution, with particular emphasis to personal freedom, equality, defence rights and criminal liability. Therefore, even if Article 6 TEU and point 12 of the Preamble of the Framework Decision are mentioned<sup>68</sup>, the explicit reference to the national principles and fundamental rights confers upon them a particular significance as a tool of

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<sup>66</sup> A. Cassese, *supra*. Article 5 ECHR states that "no one shall be deprived of his liberty save in the following cases (...) c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". See Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended), Rome, 4/11/1950, ETS n. 5.

<sup>67</sup> A. Cassese, *supra*, who points out the difference between the constitutional provisions (which were inspired by a concern for personal freedom) and Article 8 (3) of the Italian Criminal Code (elaborated during the period of Fascism), whose definition of political offence had a repressive purpose and was broad enough to encompass common offences committed for political reasons and, in general, offences committed abroad.

<sup>68</sup> Article 6 (1) TEU states that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". The following paragraphs subordinate the EU action to the respect of the ECHR and of the national identities of the member States. Point 12 of the Framework Decision refers to both this Article and the EU Charter of Fundamental Rights (OJ C 303 14/12/2007) and contains the so-called *non-discrimination clause*.

interpretation guiding the judicial authorities<sup>69</sup>. Although some authors believe that this is necessary, as the ECHR framework does not ensure a uniform protection of human rights throughout Europe<sup>70</sup>, this excessive concern must be viewed as an obstacle to the promotion of mutual trust.

In addition, and more importantly, Article 1 (3) makes it clear that surrender to another State for the purpose of prosecution is subject to the condition that the custodial measure on which the EAW is based is reasoned and has been signed by a judge. One may wonder whether the term “judge” can be interpreted as covering cases where the issuing authority is a public prosecutor. Moreover, where the EAW has been issued for the purpose of executing a custodial sentence the same Article requires that the latter be final. This may create problems as it could potentially constitute a ground for refusal in the event that the issuing State’s legal system considers even non-final judgements as enforceable.

The domestic legislation lists a very high number of grounds for refusal<sup>71</sup>. All of them (including those provided for by Article 3 and 4 of the Framework Decision) are mandatory. They can be divided in categories and sub-categories. First of all, 20 of them are contained in Article 18. Within this provision, a further distinction can be drawn between those that roughly reflect the original list and those that have been inserted in addition to it or modify it significantly.

The latter apply: where there are objective reasons to believe that a EAW has been issued for discriminatory purposes (so-called *non-discrimination clause*), where the act has been committed exercising freedom of association, freedom of the press as well as of expression in other media, or where the EAW is based on a final decision which has been issued without respecting the rules relating to due process<sup>72</sup>; where there is a serious risk that the sought person may be subject to death penalty, torture

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<sup>69</sup> See in general M. Chiavario et al. (ed.) *supra*.

<sup>70</sup> See e.g. G. Frigo, ‘Uno strumento senza efficacia diretta’, *supra*.

<sup>71</sup> A table of grounds for refusal can be consulted in the Appendix, *infra* p. 235.

<sup>72</sup> See Article 18 (1) (a), (d) and (g) of the Italian law. These grounds reproduce point 12 of the Preamble of the Framework Decision: their inclusion in this provision reflects in our view a deep mistrust of the Italian legislative authorities towards the other States’ legal systems.

or other inhuman or degrading treatment or punishment<sup>73</sup>; where the victim has given his/her consent to the act or where the facts relate to the exercise of a right or a duty or if the offence was committed as a result of fortuitous events or *force majeure* (“caso fortuito” or “forza maggiore”)<sup>74</sup>; in cases of *non lieu* decided by an Italian judge or where the requested person is pregnant or is the mother of a child less than 3 years old, except when the trial is still pending and there are serious reasons justifying detention<sup>75</sup>; where the suspect or the accused was less than 14 when he committed the offence or less than 18 and the maximum penalty is less than 9 years of imprisonment; where the issuing State’s legal system does not provide for special treatment for minors or for special means to verify whether the fugitive is fit to plead or in any case where the person cannot be held criminally responsible under Italian law<sup>76</sup>; where the request concerns a political offence (save for crimes of terrorism under Article 11 of the United Nations Convention for the Suppression of Terrorist Bombings and Article 1 of the European Convention for the Suppression of Terrorism)<sup>77</sup> or where immunity applies<sup>78</sup>; finally, where the requesting State’s legal system does not provide for maximum terms of preventive custody or where the custodial measure on which the EAW is based is not reasoned<sup>79</sup>.

In relation to such detailed description of circumstances requiring refusal, it can be easily seen the extent to which the domestic system differs from the EU system. For instance, the requirement of maximum terms of preventive custody, which is perfectly understandable to an Italian lawyer (as it is in line with the general provisions under Article 13 (5) and 27 (2) of the Constitution) sounds unfamiliar if not unfriendly to the lawyers of most Member States<sup>80</sup>.

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<sup>73</sup> See Article 18 (1) (h) of the Italian law, which reproduces point 13 of the Preamble.

<sup>74</sup> See Article 18 (1) (b) and (c) of the Italian law, which reproduce typical defences in Italian criminal law (Articles 50, 51 and 54 of the Criminal Code).

<sup>75</sup> See Article 18 (1) (q) and (s) of the Italian law.

<sup>76</sup> These cases of non-surrender are provided for by Article 18 (1) (i) and broaden considerably the scope of application of Article 3 (3) of the Framework Decision

<sup>77</sup> See Article 18 (1) (f) of the Italian law as well as UN 1998 Convention for the Suppression of Terrorist Bombings 389 U.N. GA Res. 164 and 1977 European Convention on the Suppression of Terrorism, Strasbourg, 27/01/1977 ETS n. 90.

<sup>78</sup> See Article 18 (1) (u) of the Italian law.

<sup>79</sup> See Article 18 (1) (e) and (t) respectively of the Italian law.

<sup>80</sup> However, on the interpretation of this requirement by the Italian courts, see *infra*, p. 173-174.

In addition to the grounds mentioned above, Article 18 mentions all those that have been included in the Framework Decision, namely amnesty (provided that the State has jurisdiction to prosecute the offence under its own criminal law)<sup>81</sup>, *ne bis in idem* (which is however made mandatory not only in relation to final judgements –as it is in the EU provisions- but also when the EAW is issued pending trial in the executing State)<sup>82</sup>, statute of limitation (i.e. where the criminal prosecution or punishment of the requested person is statute-barred and the acts fall within the Italian jurisdiction)<sup>83</sup>, as well as the principles of territoriality and extra-territoriality<sup>84</sup>.

This “personalised” list ends with a somewhat pleonastic “safeguard clause”, forbidding surrender whenever the sentence on which the request is based contains provisions which are deemed contrary to the fundamental principles of the Italian legal system, which interestingly reintroduces an expression used in Article 27 of the draft Framework Decision (subsequently amended)<sup>85</sup>.

Another category of cases of mandatory non-execution is provided for by the Italian law. They relate to both substantive and procedural aspects. First of all, a judicial authority is allowed to deny surrender where the Council of the European Union has verified a serious and persistent breach by the requesting Member State of one of the principles set out in the ECHR, and in particular Articles 5 (right to freedom and security) and 6 (right to fair trial)<sup>86</sup>. The need for such provision may be questioned, as it reproduces point 10 of the Preamble to the Framework Decision. Furthermore, the latter allows the application of the procedure that the Council may follow under

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<sup>81</sup> See Article 18 (1) (l) of the Italian law and Article 3 (1) of the Framework Decision (which makes it a mandatory ground for refusal).

<sup>82</sup> See Article 18 (1) (m) and (o) of the Italian law as well as Articles 3 (2) and 4 (2) (3) and (5) of the Framework Decision. On *ne bis in idem*, see more in detail *supra*, chapter 4 p. 131.

<sup>83</sup> See Article 18 (1) (n) of the Italian law and Article 4 (4) of the Framework Decision. Under the territoriality principle, the requested State may refuse execution if the offence is regarded by its law as having been committed in whole or in part in its territory or in a place treated as such; under the extra-territoriality principle, the same occurs when the offence has been committed outside the territory of the requesting State and the requested State cannot prosecute that offence under its domestic law when it is committed outside its territory.

<sup>84</sup> See Article 18 (1) (p) of the Italian law and Article 4 (7) (a) and (b) of the Framework Decision.

<sup>85</sup> See Article 18 (1) (v) of the Italian law and Article 27 of the Proposal, *supra* chapter 3 p. 77.

<sup>86</sup> See Article 2 (3) of the Italian law.

Article 7 (1) and (2) TEU whenever Article 6 (1) TEU is violated and *does not* mention Article 6 (2) TEU (referring to the ECHR). Point 10 of the Preamble is based on the presumption that these principles are common to the Member States, and therefore contemplates the violation thereof as an exceptional event<sup>87</sup>. This is why no explicit mention of this is made within the actual text of the Framework Decision. Elaborating a further ground for refusal is a clear sign of misunderstanding of its *ratio*.

A second form of refusal is due to the complex procedure provided for by Article 6 (6) and 16 (1). As we will see later, Article 6 requires a series of documents to be attached to the EAW. The Italian Court of Appeal may ask for additional information where it believes that the documents sent by the issuing authority are not sufficient and establish a time limit of no more than thirty days for the request to be satisfied. As a result, Article 6 (6) allows it to refuse surrender where the time limit is not respected.

A third group of grounds for non-execution follows from the application of dual criminality, which applies to both non-listed offences (Article 7 (1)) and, to a certain extent, listed offences as well (Article 8). Concerning the former, an exception is provided for in Article 7 (2) in relation to offences having a fiscal nature, where domestic law does not impose the same kind of taxes or duties, customs or exchange or does not contain the same type of rules as the law of the issuing State. However, it is required for this exception to apply that taxes and duties be comparable by analogy to taxes and duties for which the law provides, in case of violation, a penalty of a maximum of at least three years' detention (with the exclusion of aggravating circumstances). This can be considered a remnant of the fiscal offence exception, a classical case of refusal in extradition law<sup>88</sup>.

Concerning the listed offences, Article 8 (1), while recalling the general provision of Article 2 (2) of the Framework Decision, adapts it to the domestic features and in so doing alters its essence. Firstly, aggravating circumstances are not taken into account

<sup>87</sup> See also *infra* chapter 6 p. 175-176.

<sup>88</sup> See e.g. Article 5 of the European Convention on Extradition ETS n. 24, Paris 13/12/1957.

when considering the penalty threshold of three years (something which is not mentioned in the Framework Decision). Secondly, while for some offences (such as organised crime, corruption or murder) the Italian list corresponds to Article 2 (2), this is not the case *from a substantive point of view* for a number of other offences (such as various types of fraud and falsification of documents or slavery). More generally, the EU *categories* of offences are converted into concrete offences, with a detailed description of their constituent elements. The Italian judge is required to verify if the act as defined in the request corresponds to any of those crimes<sup>89</sup>. In addition, where a EAW is issued against a citizen for an act which does not constitute an offence under Italian law, surrender can be refused if the defendant can prove that he ignored without fault that he had committed an offence under the law of the issuing State<sup>90</sup>. Finally, an aspect of dual criminality can also be found in Article 17 (4), which permits surrender of the suspect (for the purpose of prosecution) only where there is adequate evidence of the crime. The term “serious evidence of guilt” replaced the previous “sufficient evidence of guilt” in the draft Bill, as it was believed to avoid abuse of process<sup>91</sup>.

It can be observed here that, although a similar requirement of dual criminality is set out in both the Italian Criminal Code and Criminal Procedure Code<sup>92</sup>, there is no mention in the Constitution, contrary to other principles in the area of extradition. Its reintroduction in the implementing Act is rather curious, if one takes into account Italy’s most recent bilateral extradition arrangements, in which this requirement has been abolished<sup>93</sup>. It must be added that Article 705 (1) of the Code of Criminal Procedure (referring to extradition) requires the Court of Appeal to assess whether there is serious evidence of guilt (which necessarily implies a reference to the

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<sup>89</sup> See Article 8 (2) of the Italian law.

<sup>90</sup> See Article 8 (3) of the Italian law.

<sup>91</sup> A. Mastromattei, ‘La fase finale dei lavori parlamentari’, *supra*, 39. Article 17 (4), which applies *prima facie* (or probable cause) to the EAW, has been interpreted more flexibly by the Italian courts: see *infra*, p. 198-199.

<sup>92</sup> See Article 13 (2) of the Criminal Code and Article 705 of the Criminal Procedure Code.

<sup>93</sup> Extradition Treaty between the Government of the United States of America and the Government of the Republic of Italy (USA-Italy Treaty) Rome 13/10/1983 991 UNTS 285; Treaty between the Italian Republic and the Kingdom of Spain on the prosecution of serious offences without the need for extradition in a common area of justice, Brussels, 15 December 2000, Council Document 14643/00 COPEN 85.

offence as defined in Italian law) only in the absence of a Convention or where this does not provide differently .

The high level of distrust by the Italian system is not only towards foreign legal systems, but also (perhaps more reasonably) towards the so-called “democratic deficit” of the Third Pillar. Article 2 (3) of the Framework Decision confers upon the Council the power to extend or shorten the list, acting unanimously and merely consulting the European Parliament: the Italian law shifts the balance back towards the legislative, as it obligates the Government to seek the consent of Parliament in order to approve any such modification<sup>94</sup>.

As far as the guarantees mentioned by Article 5 of the Framework Decision are concerned, they have been inserted in Article 19 of the Italian Act. Consequently, where the EAW is based on an *in absentia* decision and the person has not been summoned in person or otherwise informed of the date and place of the hearing, surrender is subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee that the person will be allowed to apply for a retrial of the case in the issuing Member State and to be present at the judgement. Similarly, where the offence at issue is punishable by a custodial life sentence or life-time detention order, execution is subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or within twenty years, or for the application of measures of clemency which the fugitive is entitled to apply for under the law or practice of the issuing Member State, in order to allow non-execution of such penalty or measure. Finally, where the person concerned is an Italian national or resident subject to a EAW issued for the purpose of prosecution, execution is only possible if there is a guarantee that the person, after being heard, will be returned to Italy in order to serve the custodial sentence or detention order passed against him. In all these cases, however, contrary to what the Framework Decision prescribes, there is no discretion in allowing surrender or not, as can be argued by the use of the expression “(...) is subject” rather than “(...) may be subject”.

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<sup>94</sup> See Article 3 of the Italian law.

In conclusion, the Italian system creates a very high level of barriers and obstacles which seriously impairs the functioning of the new mechanism of surrender. Interestingly, this version of EAW is much more restrictive than traditional extradition was. As a result, the Italian laws shape a very different procedure, depending on whether the request comes from a Member State or from a non-Member State.

It is interesting to analyse the stages of the surrender. Concerning passive surrender (i.e. when Italy is executing another State's request), the surrender of an accused or convicted person occurs following a decision of the Court of Appeal<sup>95</sup>. The competent judicial authority must verify that the EAW contains all information required<sup>96</sup>. Most of this information is considered essential: where this is missing or is not considered adequate, the Court of Appeal may request further details either directly or through the Minister of Justice<sup>97</sup>. However, the Italian authority is not obliged to refuse the surrender, for instance where a minimum penalty is not indicated (whenever it is an offence which is punished by a custodial sentence or detention order for a maximum period of at least twelve months)<sup>98</sup>. Concerning active surrender (i.e. when Italy is the issuing State), the Italian implementing Act identifies two competent issuing authorities: the judge that has imposed the pre-trial detention or house arrest, where the purpose is to prosecute a fugitive<sup>99</sup>; the public prosecutor that has issued an enforcement order for a custodial measure (for at least twelve months) or a detention order, where the purpose is to enforce a final

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<sup>95</sup> See Article 5 of the Italian law, which reproduces almost entirely Article 701 of the Code of Criminal Procedure, relating to extradition. It is important to observe that the competence of the Court of Appeal is determined on the basis of a few criteria, such as the residence of the fugitive at the moment of reception of the EAW. Where these criteria are not applicable, the Court of Appeal of Rome is competent; where an alert has been inserted in the Schengen Information System (SIS), the competence is determined on the basis of the place where the person has been arrested. See E. Marzaduri, sub Article 5, in M. Chiavario et al. (ed.) *Il mandato d'arresto europeo supra* 105.

<sup>96</sup> See Article 6 (1) of the Italian law, reproducing Article 8 (1) of the Framework Decision.

<sup>97</sup> See Article 6 (2) and 16 of the Italian law.

<sup>98</sup> This was established by Cassaz. Sez. VI 21 November 2006 n. 40614 (Arturi) (2007) *Cassazione penale* 2912.

<sup>99</sup> This will be the judge in charge of preliminary investigations (“*giudice per le indagini preliminari*”) in most cases, as well as any other judge, including the Court of Appeal. See minutes of the meeting of *Procura generale della Repubblica presso la Corte d'Appello di Roma*, 5 April 2007 Prot. 124/07 Prot. Gab., at [www.giustizia.lazio.it](http://www.giustizia.lazio.it).



decision<sup>100</sup>. The defendant may request that the EAW issued by the public prosecutor for the enforcement of a custodial measure is revoked, where there are no grounds for enforcing the latter. However, if the public prosecutor rejects this request, no appeal is allowed<sup>101</sup>. Interestingly, where the judge in charge of preliminary investigations has rejected a request for a precautionary measure and a “Tribunal for the re-examination” has instead imposed it, following appeal by the public prosecutor, the competence to issue an EAW is conferred upon the Tribunal<sup>102</sup>.

This work will not deal with the procedural rules in detail<sup>103</sup>. Suffice it to say that different rules apply depending on whether the location of the requested person is known or unknown. In the second case, he or she is arrested by police following a request sent through the Schengen Information System (SIS)<sup>104</sup>. This system was set up by the Schengen Convention<sup>105</sup> in order to facilitate operational cooperation between police and judicial authorities in criminal matters. According to Article 9 (3) of the Framework Decision, an alert in the SIS, effected in accordance with Article 95 of the Schengen Convention, is to be considered equivalent to an EAW

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<sup>100</sup> See Article 28 (1) of the Italian law. It must be observed that, concerning the first type of measures, Article 280 of the Code of Criminal Procedure bites. This Article limits the application of all measures restricting personal freedom to offences punishable by life sentence or a maximum of at least three years of imprisonment. Moreover, pre-trial detention can only refer to offences punishable by a maximum of at least four years of imprisonment. This is a much higher threshold than the “minimum maximum” penalty threshold provided for by Article 2 (1) of the Framework Decision for these cases. In addition, concerning the enforcement order for a custodial measure issued by the public prosecutor, Article 28 (1) states that an EAW cannot be issued if a reason for suspending the enforcement order exists.

<sup>101</sup> Cassaz. Sez. VI n. 9273 5 February 2007 ( Shirreffs Fasola) *CED Cassazione* n. 235557.

<sup>102</sup> Cassaz. Sez. I n. 16478 19 April 2006 (Abdelwahab Guerni) *CED Cassazione* n. 233578. The “Tribunal for the re-examination” is competent to decide whenever the decision of a court applying a measure restricting liberty is appealed (so-called *de libertate* appeal) The hearing takes place in chambers. See for more information A. Perrodet, ‘The Italian system’, in M. Delmas-Marty, J. Spencer (eds.) *European Criminal Procedures* (Cambridge University Press 2006) 348-412.

<sup>103</sup> For more information, see e.g. A. Scafati, ‘La procedura passiva di consegna’ (2005) *Diritto penale e processo* 948; G. De Amicis, G. Iuzzolino, ‘Al via in Italia il mandato d’arresto UE’ (2005) 19 *Diritto e Giustizia* 11; R. Bricchetti, A. Barazzetta, ‘Misure cautelari: rinvii al rito da decifrare’ (2005) 19 *Guida al Diritto* 84; R. Bricchetti, A. Barazzetta, ‘Procedura passiva con termini da ricavare’ (2005) 19 *Guida al Diritto* 90; M. Bargis, ‘Il mandato d’arresto europeo: aspetti processuali problematici della normative di attuazione italiana’ (2005) 2 *I Diritti dell’Uomo, cronache e battaglie* 44.

<sup>104</sup> See Article 11 of the Italian law, which reproduces Article 9 (3) of the Framework Decision.

<sup>105</sup> Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 22/09/2000 as amended by EC Regulation n. 1160/2003 of the European Parliament and of the Council, OJ L 191 22/07/2003.

accompanied by the information indicated by Article 8 of the same Decision<sup>106</sup>. This has been confirmed by the recent Council Decision establishing a second generation SIS II<sup>107</sup>, whose Article 31 (1) states that an alert has the same effect as an EAW. According to the new system, such alert will include the personal data of the fugitive as well as a copy of the original of the EAW, or of its translation in one or more of the official languages of the EU institutions (Articles 26 and 27 of the Council Decision).

### 5.2.3 *The UK system*

As far as the United Kingdom's attitude towards the EAW is concerned, it is perhaps possible to distinguish two phases. During a first phase, which corresponds to the drafting of the proposal at the EU level, the Government showed a considerable enthusiasm and was even the principal promoter of mutual recognition among the Member States<sup>108</sup>; in a second phase, i.e. the transposition into national law, a number of practical problems arose. The latter will be the focus of our discussion in the next pages.

#### 5.2.3.1 *The transposition of the Framework Decision in the UK system*

The reform of extradition law in the UK<sup>109</sup> was not as smooth as the Government would have probably preferred. The transposition of the Framework Decision could be seen as a gentle tug-of-war between the executive and the legislative power. The Government made the first move when it passed an Anti-terrorism, Crime and Security Act which gave it *inter alia* the power to implement Framework Decisions by regulation rather than by primary legislation, in much the same way as it is

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<sup>106</sup> See also similarly Article 13 (3) of the Italian law recalling Article 6 (1) of the same law.

<sup>107</sup> Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System OJ L 205 07/08/2007.

<sup>108</sup> See *supra* chapter 1 p. 8 and chapter 3 p. 74.

<sup>109</sup> Extradition Act 2003 (c. 41) and Explanatory Notes, available at [http://www.opsi.gov.uk/acts/acts2003/ukpga\\_20030041\\_en\\_1](http://www.opsi.gov.uk/acts/acts2003/ukpga_20030041_en_1), replacing Extradition Act 1989 (c. 33).

allowed to do when transposing EC Directives into domestic law and this was not appreciated by the House of Lords: a further move was the approval of a Draft Extradition Bill, which was formally presented in the House of Commons on 14 November 2002<sup>110</sup>. The back-and-forth journey between the House of Commons and the House of Lords took some time until the Royal Assent was given on 20 November 2003, meeting the established deadline (31 December 2003)<sup>111</sup>. The debate focused considerably on the issue of protection of British citizens<sup>112</sup>.

More accurately, criticism, both in Parliament and in the civil society at large was directed against a number of delicate aspects of the EAW as conceived by the European institutions. Even during the negotiations at the EU level, the earlier version of the Framework Decision had already come under attack by the House of Lords, as it seemed “(...) likely to have a substantial impact on [UK] domestic criminal laws and procedure, involving the abandonment of some longstanding safeguards for the individual”<sup>113</sup>. The arguments were many: there was no explicit right to refuse execution where a serious and persistent violation of human rights occurred; no rule of speciality, except for offences not included in the positive list and offences relating to abortion, euthanasia, morals and sexuality and freedom of expression and association; a limited availability of bail. In general, there were hints that legislation was being strongly pushed by the Government<sup>114</sup>. A particular question related to judgements *in absentia*. Since UK criminal procedure does not recognise them, the House of Lords EU Committee insisted that a right to re-trial in

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<sup>110</sup> J. Spencer, ‘The European Arrest Warrant’ (2003-4) *Cambridge Yearbook of Legal Studies* 201.

<sup>111</sup> See Article 34 (1) of the Framework Decision.

<sup>112</sup> S. Alegre, ‘The shifting face of extradition’ (2004) 156 *New Law Journal* 1022; N. Padfield, ‘The European Arrest Warrant: England and Wales’ (2007) 3 *European Constitutional Law Review* 244.

<sup>113</sup> Letter from the Lord Brabazon of Tara to Mr Bob Ainsworth, MP, Parliamentary Under Secretary of State, Home Office, in UK House of Lords European Union Committee ‘Counter-Terrorism: The European Arrest Warrant’ Report n. 6 HL (2001-02) 34 Appendix 3.

<sup>114</sup> Letter from the Lord Brabazon of Tara *supra*; see also UK House of Lords European Union Committee Report n. 6 *supra* Examination of Witnesses, in particular Question 4 (Viscount Bledisloe): “I confess to a sneaking suspicion that the events of 11<sup>th</sup> September are being used as an excuse for rail-roading us through over-rapidly” and Question 66 (Viscount Bledisloe): “We have before us a French text which many of us cannot understand, we are told by Mrs. Taylor that that has been revised; we are told by you that there are a number of points which you are minded to improve; and there have been put to you by the Committee a number of points which also need to be improved. Is this all not a manifest demonstration that this kneejerk haste is wholly undesirable, and that the whole matter should be dealt with at a somewhat more measured pace?”. The concern about human rights protection, in particular with reference to Articles 5 and 6 ECHR, was repeated in the House of Lords EU Committee Report n. 16 HL (2001-2002).

the issuing State should be granted for each case and not only where the person has not deliberately absented himself from the proceedings<sup>115</sup>.

Objections came from non-governmental organisations as well. It was observed, for instance, that innocent citizens from EU countries would risk being sent to a foreign prison for questioning for months<sup>116</sup>. The “negative list” mechanism as set out in Article 27 of the proposed Framework Decision (that is a list of conducts for which a State makes it clear that it is not prepared to extradite) was criticised because it would have allowed Member States to modify their criminal law (and extend the number of exceptions) without the other States knowing it enough in advance<sup>117</sup>.

Curiously, the removal of dual criminality was opposed even after the “negative list” was replaced by the current “positive list”. It was argued for instance that the new mechanism would prevent UK newspapers editors criticising the European Union by threatening them with prosecution and punishment; according to this view, abolishing dual criminality would be particularly dangerous in light of the manifestly low quality of continental criminal law and the bad faith and incompetence of European public prosecutors, who would issue EAWs without supporting them with an adequate amount of evidence<sup>118</sup>.

This form of legal xenophobia was seen as non sense and narrow-minded by those who pointed out that the UK system was not immune from scepticism and irony on the other side of the Channel<sup>119</sup>.

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<sup>115</sup> UK House of Lords European Union Committee Report n. 6 *supra* Examination of Witnesses, Questions 76-84. The question was examined in the House of Lords EU Committee Report n. 16 HL (2001-2002) as well.

<sup>116</sup> *Ibid.*, Submission from Fair Trials Abroad.

<sup>117</sup> *Ibid.*, Submission from Statewatch.

<sup>118</sup> Reported by J. Spencer, *supra*.

<sup>119</sup> J. Spencer, *supra*.

### 5.2.3.2 *The EAW in the UK: the main features*

The UK Extradition Act 2003 is made up of five parts, covering: extradition to “category one territories”; extradition to “category two territories”; extradition to the UK; police powers in relation to extradition requests; miscellaneous and general. It strikes immediately that the EAW is treated not separately, but as a special form of simplified extradition, operating in the territory of the European Union. More precisely, the Member States are defined as “category one territories”. The Act replaced the previous 1989 Act<sup>120</sup>: it is fair to believe that this choice of the Government reflects the intention not to present this as a significant evolution of extradition law to the public.

Extraditable offences are listed in great detail, depending on whether the person has been sentenced for an offence or not. Concerning the latter category<sup>121</sup>, it covers either fugitives who are accused of an offence or those who have been convicted but are alleged to be unlawfully at large and have not been sentenced. It includes five sub-categories: a) conduct included in the Framework Decision list (therefore not subject to double criminality) and punishable under the law of the issuing State by at least three years’ imprisonment or another form of detention, provided that they occurred in the territory of the issuing State and no part of them occurred in the UK; b) conduct which would constitute an offence under UK law if it occurred in the UK and which is punishable under the law of the issuing State by at least one year’s imprisonment or another form of detention, provided that it occurred in the territory of the issuing State; c) conduct which occurred outside the territory of the requesting State, is punishable under the law of that State by at least one year’s imprisonment or another form of detention, provided that in corresponding circumstances the UK would also assume extra-territorial jurisdiction; d) conduct which occurred outside the territory of the requesting State, is punishable by at least one year’s imprisonment or another form of detention under the law of that State (however described) and would constitute an offence under UK law punishable by the same penalty, provided that the conduct did not take place in the UK; e) conduct which took place outside

<sup>120</sup> UK Extradition Act 1989 (c. 33).

<sup>121</sup> See section 64 of the 2003 UK Act.

the territory of the requesting State, is punishable by at least one year's imprisonment or another form of detention under the law of that State (again, however described) and constitute certain specific international crimes as listed by the Act (such as genocide, crimes against humanity and war crimes), provided that the act was not committed in the UK. Sub-categories c) and d) seem to introduce a sort of dual criminality requirement which is not provided for by the Framework Decision, as it is necessary for the conduct to meet some specific criteria which the UK normally applies in cases of extraterritoriality.

Concerning the second category of persons<sup>122</sup>, the Act includes in it those who, following conviction in a court of an issuing State, are alleged to be unlawfully at large and have been sentenced. The sub-categories listed here are substantially similar to those mentioned above, although the conditions are: a sentence of imprisonment or another form of detention for at least one year, where a Framework list offence has been committed; a similar sentence for at least four months, in the other cases. Therefore, the penalty threshold for conviction cases relating to conduct not subject to the double criminality test is lower than prescribed by the Framework Decision<sup>123</sup>.

These complex provisions are apparently quite different from the concise corresponding provisions of the Framework Decision, and sections 64 and 65 of the Act do not correspond exactly to the distinction between EAWs issued for the purpose of prosecution and those issued for the purpose of enforcement. However, in both of them the fiscal offence exception has been eliminated<sup>124</sup>.

Another important feature of the UK mechanism is the long list of grounds for refusal, defined as "bars to extradition"<sup>125</sup>. They are: a) double jeopardy or *ne bis in idem*, which applies if, had the conduct taken place in the UK, the person would be discharged by reason of a previous acquittal or conviction for the same act; b)

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<sup>122</sup> See section 65 of the UK Act.

<sup>123</sup> See Article 2 (2) of the Framework Decision.

<sup>124</sup> See section 64(8) and 65 (8) respectively.

<sup>125</sup> See sections 11-21 of the UK Act. A table of grounds for refusal can be consulted in the Appendix, *infra* p. 234.

extraneous considerations, i.e. where the EAW has been issued for discriminatory purposes or there is a risk that the trial will be biased or the person will be punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions; c) passage of time, where extraditing the person appears unjust or oppressive; d) age, where the conduct was committed by a person who would not be criminally liable under UK law; e) hostage-taking considerations, where the conduct constitutes an offence under the International Convention against the Taking of Hostages<sup>126</sup> as well an offence or an attempt to commit such an offence under domestic law<sup>127</sup> and the person might, if extradited, be prejudiced at his trial because he would not be allowed to communicate with the appropriate authorities; f) speciality, where there are no specific arrangements between the UK and the issuing State; g) earlier extradition to the UK from another State and consent to re-extradition has not been given by that State, as required by specific arrangements; h) the case where the person was convicted *in absentia*, did not deliberately absent himself from the trial and would not be entitled to a retrial or a review equivalent to a retrial in which he would be granted the right to a legal counsel, to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; i) human rights, where the surrender would not be compatible with the rights established by the ECHR<sup>128</sup>.

Two further bars were introduced in 2006. Firstly, if a person has been transferred to the UK by the International Criminal Court to serve a sentence imposed by it is requested by a Member State, surrender is not permitted where the Presidency of the Court has not given his consent, as required by earlier arrangements with the UK Government. An exception is provided for where, after serving the sentence, the person has remained voluntarily in the UK territory for more than thirty days or returned to it<sup>129</sup>. It is clear that nothing similar can be found in the Framework

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<sup>126</sup> International Convention against the Taking of Hostages (1979, entered into force 03/06/1983) 1316 UNTS 205.

<sup>127</sup> Taking of Hostages Act 1982 (c. 28), section 1.

<sup>128</sup> See for this last bar section 21, which also refers to the Human Rights Act 1998.

<sup>129</sup> Sections 11 (1) (i) and 19A of the UK Act as inserted by the Police and Justice Act 2006 (c.48) Schedule 13- Extradition.

Decision, although the Act has been amended to comply with international obligations<sup>130</sup>. Secondly, refusal may occur in relation to the *forum*, i.e. where a significant part of the conduct is conduct in the UK and, having regard to this and other circumstances, surrender to the requesting country would be against the interests of justice. A factor relevant for the decision will be the fact that a UK prosecuting authority has decided not to take proceedings against the person in respect of that offence. However, execution will still be possible where the person is alleged to be unlawfully at large following conviction<sup>131</sup>. This reproduces Article 4 (7) (a) of the Framework Decision, which had been (oddly) left out in the original version.

In addition to this, surrender may also be refused where the offence for which the request was made is punishable by death in the issuing State<sup>132</sup> as well as where the physical or mental condition of the sought person is such that it would be unjust or oppressive to surrender him<sup>133</sup>.

It is noteworthy that the Act does not simply reproduce the grounds for non-execution as set out by the Framework Decision. On the one hand, it does not limit itself to the mandatory grounds, i.e. amnesty, *ne bis in idem* (in cases in which a final judgement has been passed in the issuing State) or age: all other optional grounds are included. On the other hand, some of them have been transposed quite broadly. This is the case with passage of time<sup>134</sup>. The ground based on “extraneous considerations” recalls point 12 of the Preamble to the Framework Decision, which was not meant to be included explicitly among the reasons to refuse surrender. Similarly, the reference to the death penalty was only listed in point 13 of the Preamble. Moreover, the case of trials *in absentia* is described as a very strict bar to execution (unless specific

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<sup>130</sup> Indeed, Article 4 of the Agreement between the UK and the International Criminal Court on the enforcement of sentences imposed by the International Criminal Court (adopted 8 November 2007) Treaty series n. 1 (2008) prescribes that the Presidency of the ICC may authorise the temporary extradition of the sentenced person to a third State for prosecution only if there are assurances that the person will be kept in custody there and transferred back to the UK after the trial.

<sup>131</sup> Sections 11 (1) (j) and 19B of the UK Act, as inserted by the Police and Justice Act, *supra*.

<sup>132</sup> See section 1 (3) of the UK Act.

<sup>133</sup> See section 25 of the UK Act.

<sup>134</sup> See instead Article 4 (4) of the Framework Decision. Clearly, the UK Act instead requires the judicial authority to look at the merits of the case.



conditions are met), whereas in the European instrument it was listed among the guarantees to be given by the issuing Member State in particular circumstances<sup>135</sup>. This obviously reflects the concerns expressed by the Lords during the Parliamentary consideration, as mentioned above.

There is a further group of bars that cannot be found at all in the Framework Decision: hostage-taking considerations, human rights and physical and mental conditions. In the last case, the judge can either adjourn the extradition hearing or order the person's discharge. This is not in line with the corresponding provision of the Framework Decision, which does not qualify it as a ground for non-execution and allows it even *after* the extradition hearing. More precisely, it includes such circumstances within the "serious humanitarian reasons" permitting the surrender to be postponed but only in exceptional cases: where this occurs, execution must take place as soon as is practicable and a new surrender date must be agreed<sup>136</sup>.

While the first of the bars mentioned above is clearly not envisaged by the Framework Decision, the second (human rights) might be somewhat reconnected to point 12 and Article 1 (3)<sup>137</sup>. However, the circumstance of breach of human rights is not considered an exceptional event which would permit refusal. The judicial authority is required to verify on a case by case basis whether or not the surrender is compatible with the ECHR. We have therefore an explicit ground for refusal<sup>138</sup>. It follows that the extent to which this clause is applied in practice will also measure the degree of trust that UK authorities have towards their colleagues in the other European countries.

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<sup>135</sup> See Article 5 (1) of the Framework Decision.

<sup>136</sup> See Article 23 (4) of the Framework Decision. This was provided for by the previous legislative regime and was taken into account in the *Pinochet* case: see House of Commons Hansard Written Answers for 2 March 2000.

<sup>137</sup> According to point 12 "This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof(...)". Article 1 (3) states that "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

<sup>138</sup> See *infra*, chapter 6 p. 195-197.

Another special feature of the UK Act is represented by the “national security provisions”. Indeed, the person may be acting for the purpose of assisting in the exercise of a function conferred or imposed by or under an enactment (i.e. he is acting in the interests of the UK), or may not be liable for his conduct as a result of an authorisation given by the Secretary of State. In these cases the person’s discharge must be ordered for reasons of national security<sup>139</sup>. This is a further explicit bar, although it might be considered a stricter interpretation of the provision on immunities and privileges set out by the Framework Decision<sup>140</sup>.

The number of grounds for refusal is therefore higher than it should have been. It is arguable that the Government attempted to amend the more radical changes introduced by the new system in order to make it more acceptable to critics and meet the deadline for the implementation of the Framework Decision.

Considering the UK Act as a whole, we may therefore conclude that its main features are not diverging significantly from the model EAW as drawn by the Council of the European Union. However, some of these features are quite “original” and it is remarkable that extradition and EAW have been merged in the same piece of legislation.

This can be partly explained by the peculiarities of the UK system. This is the case for the additional requirements established in the case of judgements *in absentia*, as mentioned above. In addition, the fact that an EAW relating to extra-territorial offences can only be executed if the conduct is punishable by at least one year’s imprisonment under UK law is simply due to the circumstance that the UK does not

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<sup>139</sup> See section 208 of the UK Act.

<sup>140</sup> According to Article 20 (1) of the Framework Decision “Where the requested person enjoys a privilege or immunity regarding jurisdiction or execution in the executing Member State, the time limits referred to in Article 17 shall not start running unless, and counting from the day when, the executing judicial authority is informed of the fact that the privilege or immunity has been waived. The executing Member State shall ensure that the material conditions necessary for effective surrender are fulfilled when the person no longer enjoys such privilege or immunity.”

normally exercise extra-territorial jurisdiction, save for some serious offences<sup>141</sup>. Finally, amnesty is not included among the grounds for refusal.

As already mentioned, the Commission has issued a series of Reports evaluating the implementation of the EAW. The 2006 Report (a revised version, following the transposition of the Framework Decision in Italy) contained a few remarks to the UK authorities<sup>142</sup>. The Home Office responded on each point by submitting an Explanatory Memorandum to the House of Lords<sup>143</sup>. Thus, it argued that the lowering of penalty threshold for conviction cases for Framework offences (one year instead of three years) does not violate the provisions of the Framework Decision<sup>144</sup>; section 12 does not require that the conduct be an offence under UK law (i.e. double criminality) in order for *ne bis in idem* to apply, but instead that the judge must verify that double jeopardy would apply if the conduct had occurred in the domestic territory<sup>145</sup>; the hostage-taking considerations are necessary in order to comply with international obligations<sup>146</sup>.

The characteristics of the UK penal system are certainly different from those of most European countries. This may be a continuous source of friction, even in relation to what should be basic and common concepts. It has been observed that the definition of “finally judged” in the UK has changed because it is possible to have a retrial before a court in England and Wales for serious offences, where new and compelling evidence emerges<sup>147</sup>.

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<sup>141</sup> This feature was present in the 1989 Extradition Act as well. Concerning extra-territorial jurisdiction, see *supra* Chapter 4 p.127-128.

<sup>142</sup> Report from the Commission based on Article 34 of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (revised version), COM (2006) 8 final.

<sup>143</sup> UK House of Lords European Union Committee ‘European Arrest Warrant- Recent Developments’ Report n. 30 HL (2005-06) 156, Explanatory Memorandum submitted by the Home Office on 20 February 2006.

<sup>144</sup> *Ibid.* Explanatory Memorandum 2.

<sup>145</sup> *Ibid.* The Explanatory Memorandum to the UK Act, *supra*, seems to confirm this.

<sup>146</sup> *Ibid.* 3

<sup>147</sup> Section 75 Criminal Justice Act 2003. See M. Mackarel, ‘The European Arrest Warrant- The Early Years: Implementing and Using the Warrant’ (2007) *European Journal of Crime, Criminal Law and Criminal Justice* 37, 53.

As was the case for Italy, no analysis of the procedural part will be carried out<sup>148</sup>. However, it is interesting to observe that the traditional distinction between extradition from the UK and to the UK applies in the new system as well. There are some differences between the four jurisdictions of England, Wales, Scotland and Northern Ireland<sup>149</sup>.

As far as passive surrender is concerned, competence to receive EAWs is conferred upon an authority designated by the Home Secretary. The relevant central authorities are the Serious and Organised Crime Agency (SOCA) (the Crown Office in Scotland), which replaced the previous National Criminal Intelligence Service (NCIS)<sup>150</sup>, and the Crown Prosecution Service (CPS), which represents the requesting judicial authority before the court<sup>151</sup>.

Concerning active surrender, the competent judicial authority is: a District Judge (Magistrate's Court), a justice of the peace or a judge entitled to exercise the jurisdiction of the Crown Court (in England and Wales); a sheriff (in Scotland); a justice of the peace, a resident magistrate or a Crown Court judge (in Northern Ireland)<sup>152</sup>.

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<sup>148</sup> For an overview of the UK procedure, see e.g. A. Jones, A. Doobay, *Extradition and Mutual Assistance* (3<sup>rd</sup> ed. Sweet and Maxwell London 2005) as well as the Crown Prosecution Service website, [www.cps.gov.uk](http://www.cps.gov.uk) and M. Jimeno-Bulnes, 'The Enforcement of the European Arrest Warrant: A Comparison between Spain and the UK' (2007) *European Journal of Crime, Criminal Law and Criminal Justice* 263; Council of the European Union, Evaluation Report on the Fourth Round of Mutual Evaluations "The Practical Application of the European Arrest Warrant and Corresponding Surrender Procedures between Member States", Report on the United Kingdom, Doc. 9974/2/07 REV 2 EXT 1, Brussels, 7 December 2007 27.

<sup>149</sup> See A. Jones, A. Doobay, *Extradition and Mutual Assistance supra*.

<sup>150</sup> See par. 2 The Extradition Act 2003 (Part 1 Designated Authorities) Order 2003 (SI 2003) No. 3109) as amended by section 39 of The Serious Organised Crime and Police Act 2005 (Consequential and Supplementary Amendments to Secondary Legislation) Order 2006. The new agency took over the relevant functions on 1 April 2006.

<sup>151</sup> On the procedure in England and Wales, see N. Padfield, 'The European Arrest Warrant: England and Wales' *supra*.

<sup>152</sup> See section 149 of the UK Act.

## 5.3 Practice at national level

### 5.3.1 Italy

In Italy the provision of additional grounds for refusal in the implementing statute has created a few problems of interpretation. The Italian *Corte di Cassazione* has shown a changing attitude. In particular, concerning the provision of a ground for refusal where the law of the requesting Member State does not provide for maximum terms of pre-trial detention and preventive custody in general (Article 18(e) of the Italian law), the approach was initially very formalistic. The Court held that this is a mandatory ground, although it conceded that it cannot be required as a condition for the validity of the warrant that the issuing judicial authority (in that case, a Belgian authority) transmit the relevant national provisions to the executing judicial authority<sup>153</sup>. The judge recognised that such a ground is not included in the Framework Decision and not even in the 1957 Convention; that the European Court of Human Rights in its case law has deemed those systems that do not include limits to pre-trial detention compatible with Article 5(3) ECHR<sup>154</sup>; that what counts is that the rights of defence are protected. Despite these considerations, the national provision had to be respected, because it reflected the principle of the presumption of innocence, enshrined in Article 13(5) of the Italian Constitution<sup>155</sup>. This prevented the application of the EU law principle of consistent interpretation, as doing otherwise would amount to a *contra legem* interpretation of national law<sup>156</sup>. It was clearly a dangerous application of the surrender procedures: there was an evident risk that Italy could be used as a “State of refuge” for criminals, who might be almost

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<sup>153</sup> Cassaz., Sez. VI penale n. 16542 8 May 2006 (Cusini), par. 9. As a result, an Italian citizen charged with fraud in Belgium was released.

<sup>154</sup> See e.g. ECtHR *Letellier v. France* 26 June 1991, n. 12369/86; *W. v. Switzerland* 26 January 1993, n. 14379/88.

<sup>155</sup> This provision prescribes that the maximum terms of preventive custody are established by law. In Italy the time limits for preventive custody are binding until the final judgement (which only occurs once all avenues of appeal have been utilised). See Constitutional Court n. 64 23 April 1970 par. 3, which refers to the principle of presumption of innocence established by Article 27 of the Constitution.

<sup>156</sup> ECJ C-105/03 *Pupino* [2005] ECR I-5285.

certain that custodial measures adopted in other countries could not be enforced<sup>157</sup>. This is why, in a subsequent judgment, the Court adopted a contrary, more “Europhile” view. The case concerned a Serbian citizen, who was suspected by the German authorities of attempted murder. The German system does not pre-determine once and for all limits to pre-trial detention: its length can be extended after a periodical review of the necessary conditions. The sixth chamber of the *Corte di Cassazione*, to which appeal had been made, referred the question to the *Plenum* for an interpretation of Article 18(e): in its view the high level of trust among Member States implies that all systems of pre-trial detention should be considered equivalent. The *Plenum* saved the provision, arguing that the inclusion of such ground for refusal, although it is not expressly provided for in the Framework Decision, is in line with its *ratio*, which is the guarantee of a fair trial<sup>158</sup>. The high level of trust existing in the European Union does not exclude a minimum degree of control by the executing judicial authority as to the protection of the fundamental rights of the defence. On the other hand, the provision of limits to pre-trial detention can be interpreted broadly, so as to include also mechanisms of periodical review of the conditions for extending such detention. The appeal was therefore rejected<sup>159</sup>.

In any case, any period of time that the person has spent in custody abroad following the issuing of an EAW will have to be taken into account when determining the time he has to spend in Italy<sup>160</sup>.

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<sup>157</sup> The Supreme Court held in two other cases that it is up to the requested person to produce all the evidence that individual rights as provided for by Article 5 ECHR are not protected in the issuing State. See Cassaz. Sez. VI 7 April 2006 *CED Cassazione* n. 233544 (Cellarosi); Cassaz. Sez. VI 3 March 2006 *CED Cassazione* n. 233706 (Napoletano). The Supreme Court has taken a different view in other cases, holding that it is the duty of the Court of Appeal to request for additional elements deemed to be relevant for the decision: see *infra*, note 165.

<sup>158</sup> However, some scholars believe that Article 18 (e) is unconstitutional as it would violate the obligation imposed by Article 117 (1) of the Constitution upon the Italian legislative power to respect the limits established by EC and international law. As a result, the “theory of counter-limits” (see *supra* p. 169 note 505) should be readapted. See E. Aprile, ‘Mandato di arresto europeo e presupposti per l’accoglimento della richiesta di consegna: alcuni chiarimenti ad ancora qualche dubbio’ (2007) *Cassazione penale* 115.

<sup>159</sup> Cassaz. Sezioni Unite 5 February 2007 n. 4614 (Ramoci) *CED Cassazione* n. 234272, par. 7-10. This also reflects the interpretation of the ECtHR in the cases mentioned above, note 143. The Italian Constitutional Court (Case 109/08 18 April 2008) ruled that the question of the compatibility of Article 18 (1) (e) of the Italian law with the Constitution (*inter alia* for breach of the principle of “reasonableness”) is inadmissible.

<sup>160</sup> Italian Constitutional Court Case 143/08 7 May 2008, which declared Article 33 of the Italian law partially unconstitutional.

The two decisions mentioned above (*Cusini* and *Ramoci*) also rejected another formalistic interpretation of the Framework Decision, according to which only the transmission of the original warrant or an authenticated copy would be admissible: mutual recognition and free movement of judicial decisions imply that even a transmission by fax is allowed<sup>161</sup>.

Indeed, the Italian legislation requires that the EAW be accompanied by additional documents, including a copy of the applicable provisions, the decision of the issuing authority on which the EAW is based, all available personal data, and information on the sources of evidence. However, the executing judicial authority does not need to assess the existence of serious evidence of guilt<sup>162</sup>: a clear and coherent description of the facts (and the indication of any element relating to the conduct) by the requesting authority will be sufficient. It cannot request of the foreign authority new sources of proof, as this would run contrary to the sovereignty of each State and would slow down the whole proceedings<sup>163</sup>. This interpretation certainly improves the relationship between judicial authorities and must be welcomed<sup>164</sup>. It is sure that

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<sup>161</sup> Cassaz., sez. VI (*Cusini*), *supra*, par. 6; Cassaz., Sezioni Unite (*Ramoci*), *supra*, par. 2.

<sup>162</sup> Indeed, Article 17 (4) of the Italian law prescribes that the Court of Appeal decides the surrender where serious evidence of guilt exists. On the face of it, this looks like a very strict *prima facie* requirement. However, case law has apparently “softened” this provision.

<sup>163</sup> See Cassaz., Sez. VI n. 34355 23 September 2005 (*Ilie Petre*), par. 11; and also e.g. Cassaz., Sez.feriale penale, n. 33642 13-14 September 2005 (*Hussain*); Cassaz., Sez. VI (*Cusini*), *supra*, par. 8; Cassaz. Sez. VI 13 October 2005 *CED Cassazione* n. 232584 (*Pangrac*); Cassaz. Sez. VI 3 April 2006 n. 7915 (*Nocera*); Cassaz. Sez. VI 12 June 2006 *CED Cassazione* n. 234166 (*Truppo*); Cassaz. Sezioni Unite (*Ramoci*), *supra*; Cassaz. Sez. feriale penale, 13 September 2007 n. 35000 (*Hrita*). This interpretation is based on the fact that Article 17 (4) of the Italian law, while requiring that “serious evidence of guilt” is assessed, must be connected with Article 9 (5), which excludes explicitly those provisions of the Italian Code of Criminal Procedure prescribing such requirement : see Articles 273 (1), 273 *bis*, 274 (1) (a) and (c) and 280. From these provisions it also follows that the Court of Appeal (when adopting a coercive measure) and the President of the Court (when he validates an arrest performed by the police) do not need to verify either that there is a risk that evidence may be altered or that the offender may commit the same or other serious crimes, or that the maximum term of imprisonment provided for by Italian law for that specific offence is respected. Of course, the risk that the fugitive flees will still have to be assessed: otherwise the person will be released (Cassaz. Sez. VI n. 42803 10 November 2005 (*Fuso*) par. 4). This confirms that, despite the interpretative efforts of the Supreme Court, the Italian EAW system is stricter than the domestic extradition procedure, in which, when validating the arrest, the President of the Court does not have to assess this element.

<sup>164</sup> Article 17 (4) of the Italian law can be considered one of the most evident signs of the Italian “phobia” towards foreign models. While some cautiousness is always necessary when dealing with individual rights, a zealous protection of domestic values can lead to distorted results. It has been argued that it is not clear whether the criteria to be used in line with Article 17 (4) must refer to the domestic criminal system, the foreign one or both and that the Court’s control is even harder in

the notion of “reason behind” a request for surrender does not have to be equivalent to what is usually intended under Italian law. It will be enough that the issuing authority gives a reasoning that is deemed to be adequately argued by the domestic authority<sup>165</sup>. However, it is not yet clear to what extent this “sufficient control” of the contents of the EAW should be effected<sup>166</sup>.

The issue is indeed rather delicate and should not be overlooked. In one case an Italian citizen was sought by the German authorities for the purposes of prosecution in relation to a fraud offence (she was accused of having purchased together with her husband 16 cars using bad cheques). The Court of Appeal of Venice, after applying a precautionary measure (house arrest) decided upon her surrender. She argued on appeal that, although the company created by her husband was registered with her name, she was not actually managing it and this could be proved by a series of documents that had been ignored by the first instance Court (for example, the cheques had not been signed by her). The Court of Cassation quashed the decision of that Court, as it did not find any relevant evidence against the sought person. This did not imply, in its view, an assessment of the quality of the investigations carried out by the German authorities, but was merely based on an analysis of the documents. Therefore, although reasoning is given here, this is not detailed<sup>167</sup>. This shows however that the idea of a purely formal surrender procedure totally abolishing *exequatur* is illusory, as a minimum level of judicial control will always be necessary, provided that this is performed following objective criteria.

The main reference point for this control will necessarily have to be represented by the guidelines offered by the ECHR. In the *Melina* case an Italian citizen had been

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relation to the offences for which double criminality is lifted. See E. Aprile, ‘Note a margine delle prime pronunce della cassazione in tema di mandato d’arresto europeo: dubbi esegetici e tentative di interpretazione logico-sistematica della materia’ (2006) *Cassazione penale* 2515, 2522.

<sup>165</sup> See e.g. Cassaz. sez. VI (Pangrac) *supra*. In this view, Articles 18 (1) (t) and 1 (3) of the Italian law must not be interpreted as obliging the foreign authority to provide a reasoned account of the exact meaning and implications of the evidence collected. The Court of Appeal must however request for any additional information when necessary.

<sup>166</sup> The question is whether the control under Articles 18 (t) and 1 (3) should be formal or rather assess the facts. See E. Aprile, ‘Note a margine delle prime pronunce della cassazione in tema di mandato d’arresto europeo: dubbi esegetici e tentative di interpretazione logico-sistematica della materia’ *supra* 2525.

<sup>167</sup> Cassaz. Sez. feriale penale, n. 34999 11 September 2007 (Nonnis).



convicted of a drug trafficking offence based *inter alia* on the statements of a police officer who had been informed by another person. Although that person refused to repeat those statements during the trial, this did not prevent the surrender, as it is enough that the criteria of fair trial as envisaged by Article 6 ECHR are respected<sup>168</sup>.

In the famous *Osman Hussain* case one of the authors of the London bombing attacks on 21 July 2005 was sought by the British authorities. The defendant argued *inter alia* that he was being persecuted on one of the grounds mentioned by recital 12 of the Framework Decision (reproduced as grounds for refusal by the Italian law). The Court replied that a violation of the fundamental rights of a person must be deduced from objective circumstances and the tradition of the requesting State excludes the existence thereof. This is a very important judgement. As opposed to the *Cusini* case, mentioned above, it demonstrates that mutual trust can be found at least in certain circumstances (where delicate and highly political issues are at stake). British authorities were indeed pleased that the surrender procedure could be concluded so quickly.<sup>169</sup>

Concerning the SIS alert, which is considered equivalent to an EAW provided that the elements indicated in Article 6 of the Italian law are contained in it, the Supreme Court has specified that these elements are those referred to in the first paragraph (i.e. details of the person, classification of the offence etc.) and not also the more detailed provisions in the fourth paragraph (i.e. the text of the applicable norm, a description of the facts, the indication of the sources of evidence, etc.)<sup>170</sup>. One case concerned the issuing of a SIS alert together with a request for the arrest of a Romanian citizen before the accession of Romania to the EU and the entry into force of the EAW system ( 1 January 2007). The defendant argued that this should be governed by the rules on extradition and the Court of Appeal accepted this view,

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<sup>168</sup> Cassaz. Sez. VI, n. 17632 3 May 2007 (Melina), recalling Cassaz. sezioni unite (Ramoci), *supra*.

<sup>169</sup> Cassaz., Sez.feriale penale, 13-14 September 2005 n. 33642 (Hussain). Hussain was arrested in Italy one week after the attempted bombings, lost his appeal on 15 September 2005 and returned to the UK on 22 September. See also comment in *Bomb suspect arrested on British soil*, The Independent, 22 September 2005, as well as UK House of Lords European Union Committee Report n. 30 Explanatory Memorandum *supra* 9-10, which also mentions both terrorist cases in which the procedure was slow and the issuing of a UK EAW against a Portuguese national accused of murder, in which instead the surrender was very swift (seven days after arrest).

<sup>170</sup> Cassaz., sez. VI, 12 December 2005 n. 46357.

annulling the procedure. On appeal by the *Procuratore generale*<sup>171</sup>, the Supreme Court held that the search of an individual through a SIS alert (as well as through the Interpol system) does not yet trigger the surrender procedure, as the actual arrest of the fugitive is necessary. As a result, since the EAW was only issued on 16 February 2007, the new system applied<sup>172</sup>.

### 5.3.2 United Kingdom

UK courts tend to stress the need to comply with the procedural requirements set out in the Framework Decision. The first question of general interest to be brought before the House of Lords, was in *Cando Armas*<sup>173</sup>. The Lords had to decide whether “conduct” under section 65 of the Act constitutes an extraditable offence where the offence takes place partly in the issuing State and partly in the UK. Belgian authorities had appealed against the decision of the District Judge to discharge the defendant and the High Court had argued that section 65(2) to (6) was applicable<sup>174</sup>. The House of Lords did not entirely agree and observed that subsection (2) could not be intended as covering the conduct at issue, as the requirement in (2)(a) is that no part of the conduct occurs in the UK. By way of contrast, under subsection (3)(a), it is enough if *some* (rather than all) of the conduct complained of or relied on occurs in the issuing State, or its effects are intentionally felt there<sup>175</sup>. In the same case it was also decided (adopting a purposive interpretation of the domestic provisions) that the statement referred to in subsection (5) that the sought person must be “unlawfully at

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<sup>171</sup> The *Procuratore generale della Repubblica* acts as the representative of the prosecuting authority in the Court of Appeal. He coordinates the relations between the public prosecutors and the police as well as between Italian and foreign authorities. See A. Perrodet, ‘The Italian system’, in M. Delmas-Marty, J. Spencer (eds.) *European Criminal Procedures supra*.

<sup>172</sup> Cassaz. Sez. V n. 40526 24 October 2007 (Stuparu).

<sup>173</sup> *Office of the King’s Prosecutor, Brussels v. Armas a.o.* [2005] UKHL 67. Mr. Cando Armas, an Ecuadorian citizen, was sought by the Belgian authorities after conviction *in absentia* to five years’ imprisonment for human trafficking, facilitation of unauthorised entry and residence and forgery of administrative documents.

<sup>174</sup> This conclusion was reached through an interpretation of “conduct” as “such of the conduct as constitutes a criminal offence (under the law of the category 1 territory)” (par. 30).

<sup>175</sup> *Cando Armas*, par. 17 *per* Lord Bingham and par. 35 *per* Lord Hope.

large” does not necessarily have to be included in the warrant (indeed, no such requirement is mentioned in Article 8 of the Framework Decision)<sup>176</sup>.

In *Dabas*<sup>177</sup> a similar issue relating to the form of the warrant was dealt with. The appeal was against a decision of the District Judge to surrender Mr. Dabas pursuant to a request from the High Court of Justice of Madrid for the purpose of prosecution for the crime of complicity in the terrorist bombings of 11 March 2004. One of the grounds was that the warrant was invalid because the separate certificate required by section 64(2)(b) and (c) was missing. Again, the Lords opted for a purposive interpretation of the Act<sup>178</sup>. Neither Article 8 of the Framework Decision nor the Annex to the Framework Decision mention a separate certificate and this cannot be said to infringe the right of liberty or the principle of legality as this “would be inconsistent with the trust and respect assumed to exist between judicial authorities” (par. 8). As a result, the EAW itself can be intended as the “certificate” required by the Act. Furthermore, the national judge does not need to examine the foreign law to verify whether the requirements of section 64 (3) have been met, as the provisions of the Act offer sufficient protection of the defence rights under Articles 5 and 6 of the European Convention on Human Rights<sup>179</sup>. In this regard, it seems that, in exceptional cases, where the applicant is able to clearly demonstrate that his detention is unlawful, he or she may rely on *habeas corpus* in addition to the statutory appeals procedure<sup>180</sup>. However, in *Hilali* an important aspect of mutual recognition was addressed on appeal. It was clarified by the House of Lords that an application for *habeas corpus* is not admissible where there is no case to answer. In particular, the sought person was accused of participation in a terrorist organisation, murder of persons and destroying, damaging or endangering the safety of aircraft, in connection with the 9/11 attack. He had argued that the grounds on the basis of

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<sup>176</sup> *Cando Armas*, par. 41-48 *per* Lord Hope, who also refers to *R (Bleta) v. Secretary of State for the Home Department* [2004] EWHC 2034 (Admin) [2005] 1 WLR 3194 (i.e. an extradition case). However, see contrary opinion of Lord Scott of Foscote, *id.*, par. 56. See also *infra* p.204 for the amendments to the 2003 Act.

<sup>177</sup> *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6 WLR (D) 39.

<sup>178</sup> *Dabas*, par. 8 *per* Lord Bingham and par. 44 *per* Lord Hope. This is the first decision in the UK in which the *Pupino* guidelines are taken into account. Lord Scott (par. 68) believes instead that this requirement compensates for the lack of precision of the Framework offences and the removal of double criminality.

<sup>179</sup> *Dabas*, par. 54-55 *per* Lord Hope.

<sup>180</sup> *Hilali v. Governor of HMP Whitemoor a.o.* [2007] EWHC 939 (Admin.) par. 38.

which a EAW had been issued in Spain were no longer valid<sup>181</sup>. The Lords did not agree and, recalling *Armas*, concluded that it is not up to the requested State to examine the merits of the case<sup>182</sup>.

Another ground in *Dabas* relied on the temporal element of double criminality as understood in *Pinochet*<sup>183</sup>. The offence of conspiracy to support terrorism is provided for by section 12 of the UK Terrorism Act 2000, which came into force on 19 February 2001. The conduct on issue in this instance is said to have been commenced some time before 2000 and continued until 12 March 2004. The House of Lords however dismissed the ground: the conduct taking place before 2000 was part of a separate range of activities not related to the actual preparation of the Madrid bombings<sup>184</sup>.

In *Parasiliti-Mollica v. The Deputy Public Prosecutor of Messina Italy*<sup>185</sup>, neither of the two options indicated in the warrant, i.e. surrender for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order, had been deleted by the competent authority. Furthermore, in the box relating to the description of the circumstances in which the offence or offences were committed, the total number of offences had not been specified. However, from the context of the warrant and the rest of the description it was possible to conclude that the warrant had been issued for the purposes of prosecuting the sought person. He was not merely suspected of an offence but described as the “co-author in complicity with an armed organisation for drug trafficking”. The court could not help however but point

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<sup>181</sup> Indeed, the request for his surrender had included a long description of the circumstances of the offence, including a number of intercepted telephone conversations between him and a central suspect. However, the latter was acquitted of some crimes, and the Spanish Supreme Court quashed the remaining convictions, as the telephone intercept evidence was not relevant and had been in any case unlawfully obtained.

<sup>182</sup> *In re Hilali (Respondent) (application for a writ of Habeas Corpus)* [2008] UKHL 3, in particular opinion of Lord Hope of Craighead, par. 13-15, recalling Lord Scott of Foscote in *Armas, supra*, par. 50-51. Interestingly, in that case participation in a terrorist organisation was not considered an extraditable offence, as not included in the Framework decision list and therefore subject to the dual criminality test.

<sup>183</sup> *Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (No.3)* [1999] 2 WLR 827. See C. Warbrick, ‘Extradition law aspects of Pinochet 3’ (1999) 48 *International and Comparative Law Quarterly* 958.

<sup>184</sup> *Dabas*, par. 46-48 per Lord Hope.

<sup>185</sup> *Parasiliti-Mollica v. The Deputy Public Prosecutor of Messina Italy*, [2005] EWHC 3262 (Admin).

out that both “the expense and time” taken for this matter to be investigated before the District Judge could have been saved if the words “sought in order to face trial in Italy” had been added in the warrant<sup>186</sup>.

Adopting appropriate terms often proves essential, as the meaning of an expression or the relevance of a concept in one legal context can lead to misunderstandings in another. This can be observed in two judgements. In the first one (*Caldarelli v. The Court of Naples*<sup>187</sup>) an Italian citizen was sought by the Italian authorities for mafia and drug offences. He had been tried at first instance *in absentia* in Italy. Was he therefore “unlawfully at large” following conviction or was he simply an accused person? The crux of the matter is related to the consequences of an affirmative answer to the former question. Indeed, according to Italian law a judgement is not final and not enforceable until the appeal process is completed. Where appeal occurs, the Court can only deal with the issues that specifically refer to the grounds of appeal. It follows that evidence (either obtained in the first instance or new) can only be heard or reviewed in the second instance if one of the parties specifically requires it: where this occurs, the judge may order the reopening of the trial phase when he believes that he is not able to decide on the basis of the available evidence. He may do so *ex officio* if he considers it essential. In this context, a person who has been tried *in absentia* at first instance does not enjoy an unqualified right to a fresh hearing on the merits outside those cases<sup>188</sup>. The main argument of the appellant in *Caldarelli* was therefore that, since no party had requested new evidence to be heard, it was entirely left to the discretion of the Court whether or not to reconsider the merits: this was clearly a conviction case. As a result, the EAW should have contained the statement provided for by section 2 (5) of the UK Act, rather than the

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<sup>186</sup> *Parasiliti-Mollica*, par. 15.

<sup>187</sup> *Raffaele Caldarelli v. The Court of Naples* [2007] EWHC 1624 (Admin).

<sup>188</sup> He has to prove that he failed to appear because of a fortuitous event or *force majeure* or because he did not have knowledge of the writ of summons, provided that this is not due to him. If the writ of summons for the first instance trial was delivered to his lawyer, he has to prove that he did not deliberately refuse to take cognisance of the procedural steps. See Articles 597 and 603, as well as 159, 161 (4), 169 and 175 (2) and (3) of the Italian Code of Criminal Procedure. Interestingly, Italy has been repeatedly condemned by the ECtHR in cases where a person convicted *par contumace* was unable to obtain a fresh determination of the merits and it was not possible to ascertain beyond a reasonable doubt that he had unequivocally waived his right to appear at the trial. See e.g. ECtHR *Colozza v. Italy*, Application no. 9024/80, 12 February 1985; *T v. Italy*, Application no. 14104/88, 12 October 1992.

statement included in section 2 (3). It is true that in *Migliorelli*<sup>189</sup> (which was a case under Part three of the 1989 Extradition Act) and in *La Torre*<sup>190</sup> (which was under Part two of the 2003 Act), dealing with a similar situation, the decision was that the person should be considered “accused” rather than “unlawfully at large”. However, the choice in both cases was only between these two terms and, as a result, the scope of the first had to be extended to cover also “half-way” situations, typically when the requesting State was a civil law country. The dilemma is no longer relevant, as the 2003 Act has been amended to the effect that the alternative is now between “accused” and “convicted”<sup>191</sup>.

Lord Justice Laws instead agreed with the Crown Prosecution Service (CPS)<sup>192</sup> (acting on behalf of the respondent) that, although, following the amendment mentioned above, section 2 (5) (a) of the Act no longer contains a reference to “unlawfully at large”<sup>193</sup>, this only matters as to the statement that should be contained in the warrant. Instead, the role of the judge under section 11 stays the same and the distinction is still between “accused” and “unlawfully at large”<sup>194</sup>. The spirit of this judgement closely followed *In Re Ismail*<sup>195</sup>, in which it was stated by Lord Steyn that “(...) a purposive interpretation of ‘accused’ ought to be adopted in order to accommodate the differences between legal systems. In other words, it is necessary for our courts to adopt a cosmopolitan approach to the question whether as a matter of substance rather than form the requirement of there being an ‘accused’ person is satisfied” and this because “(...) there is a transnational interest in the achievement of this aim”, namely to facilitate extradition of fugitives.

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<sup>189</sup> *Migliorelli v. Italy*, unreported, 28 July 2000 CO/4188/99.

<sup>190</sup> *Antonio La Torre v. HM Advocate* [2006] HC IAC 56.

<sup>191</sup> See par. 1 (1) of Schedule 13 to the 2006 Police and Justice Act.

<sup>192</sup> The CPS represents the requesting judicial authority before the court.

<sup>193</sup> In section 2 (5) (a) the expression “is alleged to be unlawfully at large after conviction” has been replaced by “has been convicted”, as opposed to “is accused” in section 2 (3) (a), in order to distinguish between conviction cases and accusation cases. The amendment is an effect of what was decided in *Cando Armas*, *supra* p. 178.

<sup>194</sup> Moreover, section 68A as inserted by the 2006 Act could not be relied on, as the sentence is not enforceable.

<sup>195</sup> *In Re Ismail* [1998] UKHL 32.

In the second case (*Pilecki*<sup>196</sup>) another question relating to different terminology was addressed. This time two EAWs were issued against a Polish citizen for a conviction case and, as the requirement is that the custodial sentence to be served must be no less than four months, this has to be indicated in the information attached to the warrant, under section 2 (6) (e) of the Act, as amended by the Extradition Act 2003 (Multiple Offences) Order 2003<sup>197</sup>. Does this mean that, in case of multiple offences, where an aggregate sentence has been imposed, the requesting authority must show that the sentence imposed for each offence is at least four months or is it enough that the *cumulo* sentence is of at least four months? The appellant argued that the EAWs did not comply with the requirements mentioned above and, as a result, the definition of “extradition offence” in section 65 (3) of the Act was not satisfied. This is because section 10 (2) of the Act, as modified<sup>198</sup>, requires the judge to verify whether, in relation to each of the offences specified in the warrant, the requirements of section 65 (3), in particular (c)<sup>199</sup>, are met. Since this was not the case here, the judge should have ordered the person’s discharge.

The Lords argued that, while looking at each of the offences separately, in order to be satisfied that they can be qualified as extraditable offences, is certainly necessary in accusation cases, this is not always true in conviction cases. Once again, following *Pupino*, the House of Lords concluded that mutual recognition does not require the national judge to inquire into the sentencing method of other States<sup>200</sup>. Therefore all the provisions at issue must be interpreted in light of the wording and purpose of the Framework Decision. In particular this refers to paragraph 5 of the Preamble (which

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<sup>196</sup> *Pilecki v. Circuit Court of Legnica, Poland* [2008] UKHL 7.

<sup>197</sup> See Article 2 (2) and Schedule par. 1 (1) of the Extradition Act 2003 (Multiple Offences) Order 2003 (SI 2003/3150): according to section 2 (6) (e) as modified, the EAW must contain “particulars of the sentence which has been imposed under the law of the category 1 territory in respect of the offences, if the person has been sentenced for the offences”.

<sup>198</sup> Section 10 (2) of the UK Act provides that “The judge must decide whether any of the offences specified in the Part 1 warrant is an extradition offence”.

<sup>199</sup> The condition to be satisfied under this provision is indeed that “a sentence of imprisonment or another form of detention for a term of 4 months or a greater punishment has been imposed in the category 1 territory in respect of the conduct”.

<sup>200</sup> In Poland, like in other Member States such as, for instance, Italy, in multiple offences cases the sentences imposed for each crime are aggregated and an overall sentence is determined by reducing the total of the individual sentences. In Italy it has been suggested to subdivide the *cumulo* sentence on which the request for surrender will be based and, if necessary, extend the request once the other sentences will have been issued. See minutes of the meeting of *Procura generale della Repubblica presso la Corte d’Appello di Roma*, 5 April 2007 Prot. 124/07 Prot. Gab. at [www.giustizia.lazio.it](http://www.giustizia.lazio.it).

enshrines the principle of free movement of judicial decisions) and Article 8 (1) (f) as well as letter c of the form as included in the Annex, from which it can be deduced that the requested State only needs to verify the length of the custodial sentence or detention order.

The passage of time issue has been often dealt with by British courts. A landmark judgment which they refer to is *Kakis* (an old extradition case), where the scope of the powers of judge when determining that it would be unjust or oppressive to extradite the appellant was clarified<sup>201</sup>. Normally what matters is not passage of time itself, but rather the effect that this has on the person, as confirmed for instance in the Scottish cases *Campbell* and *Fasola*<sup>202</sup>. In *France v. Welsh* (another Scottish case) the defendant was sought by French authorities for the offence of possession of LSD: he had been acquitted at the first instance in 1992, while one of his accomplices had been convicted<sup>203</sup>. However an appeal was made by the public prosecutor and in 1993 a domestic warrant had been issued against him, although by then he had already moved to Scotland. He argued that the absence of his former co-accused, who could testify as defence witnesses, would render the trial unfair. He added that no attempt had been made to seek his surrender before 2006 and that he had not tried to hide away from the authorities since he moved to Scotland, where he had established businesses: as a result, it would be unjust to accede to the EAW request. The judge, while dismissing the first argument by pointing out that France is a signatory to the ECHR, accepted the second argument, in light of the considerable lapse of time and the “substantial degree of culpability on the part of the French authorities”<sup>204</sup>.

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<sup>201</sup> *Kakis v. Government of the Republic of Cyprus* [1978] 1 WLR 779 pages 782-783 per Lord Diplock. The old discipline has been reproduced in sections 11 (1) (c) and 14 of the 2003 Act. See also *inter alia* *Goodyer, Gomes v. Government of Trinidad and Tobago* [2007] EWHC 2012 (Admin) par. 19 per Sedley LJ.

<sup>202</sup> *Alistair Iain Campbell v. HMA* [2008] HCJAC 11 par. 42-48 per Lord Nimmo Smith; *Dorothy May Fasola v. HMA* [2009] HCJAC 3 par. 38 per Lord Nimmo Smith. The appeal was dismissed in both cases.

<sup>203</sup> *France v. Welsh*, 15 February 2008 (Edinburgh Sheriff Court).

<sup>204</sup> *Ibid.* par. 31.



## **5.4 The general attitude of Member States towards the Framework Decision and the concept of mutual trust**

The UK and Italy legal systems have certainly enacted two different pieces of legislation and reacted in their own way to the adoption of the new model of surrender. However, they present some common features. In both cases the EAW has been treated as a form of extradition and a number of guarantees for the protection of individual rights have been incorporated in the national Act. This is the result of some degree of uneasiness in the actual implementation of the mutual recognition scheme, which is why the European instrument met with considerable scepticism at the outset. It is noteworthy that criticism, which was expressed by parliamentarians and legal experts (as well as NGOs and other non-profit organisations in the UK) and reported by newspapers, never actually came from the public opinion at large: ordinary people were and are mostly unaware of the main issues related to the EAW and have been rather witnessing a media campaign focusing on the negative aspects at the expense of clarity and objectivity. Only a few commentators pointed out what was really at stake. Some striking divergences between the two countries can be highlighted here.

The first relevant difference is linked to the political environment in which the EAW was introduced. The UK Government, traditionally stronger than its Italian counterpart, succeeded in pushing the Act through by watering it down with some compromises in order to make it more acceptable to Parliament. On the other hand, the Italian Government showed, perhaps not surprisingly, little interest in transposing the Framework Decision into national law. This situation, coupled with the intense debate that lasted longer than expected, explains the failure to comply with the deadline. In the former case, the outcome was a product which, although labelled differently from what would be desirable, is in the substance “surrender”; in the latter case, the term “EAW” instead refers to a system which is nothing but a very traditional extradition. There is a cultural reason for this: Italian criminal law is very concerned with the rights of the defendant at each stage of the proceedings. On a

more prosaic tone, a political reason can also be identified: a large part of the Italian Parliament at that time was composed of lawyers, who by nature tend to prioritise the role of the defence.

The second relevant difference is due to the very high number of grounds for refusal and guarantees that are available under the Italian law. This is of hindrance to smooth judicial cooperation, by enhancing the discretionary power of the executing judge who is therefore able to almost replace his foreign colleague and dictate his own standards. One may wonder whether this element of “disharmony” in the functioning of the EAW may trigger negative reactions in some delicate cases and exacerbate the relationship between judicial authorities (thus producing the exact contrary outcome of what initially aimed for). This attitude is rather curious, in light of the high number of decisions of the European Court of Human Rights against Italy (indeed the highest in Europe in the period 1999-2006)<sup>205</sup>. On the other hand, the British judge has been provided with a less rich panoply but still has some significant powers, especially in relation to the assessment of human rights or “national security” issues.

A third difference is due to the procedural steps in the executive phase. It seems, at least by analysing the time limits and the appeal options, that the British mechanism is more in compliance with the requirements of urgency and streamlining. The risk is again that a slower surrender paves the way for controversies and possible reprisals between States. One of the main type of problems in the UK relates to the passage of time: some prosecutors have issued EAWs for old cases, for which extradition could have been used before. In these cases, if the person has been residing in the UK for a long time, and the issuing State knew it, he is unlikely to be surrendered<sup>206</sup>.

Concerning the case law, while Italian judicial authorities adopted a very formalistic approach at the beginning, a more open attitude has been prescribed by the Supreme Court in more recent decisions, in which the national provisions have been

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<sup>205</sup> Mostly violations of Article 6 ECHR (fair trial). See table on violations by Article and by Country 1999-2006, at [www.echr.coe.int](http://www.echr.coe.int).

<sup>206</sup> Information obtained by interviews with practitioners. See also *supra*, p. 167.

interpreted more in conformity with the European Court of Justice's guidelines. The UK House of Lords, on the other hand, has been rather flexible from the outset and its decisions have prompted important legislative changes.

It follows from all this that cooperation in criminal matters, pursued through mutual recognition, does not operate uniformly. This is certainly due to the nature of Framework Decisions, which have a less binding force than the two classical First Pillar instruments, i.e. the Directive and the Regulation<sup>207</sup>. However, a relevant factor stems from the characteristics of criminal law, which is intimately connected to the national context in which it has been shaped and developed. This is all the more evident if common law and civil law substantive and procedural aspects are compared.

More generally, one may observe however that the non-uniform implementation of the surrender scheme is not a peculiarity of the United Kingdom and Italy. Similar discrepancies exist to different degrees in many, if not all, Member States. This must be one of the reasons why a EAW standard form was put on the website on the European Judicial Network and may be easily downloaded<sup>208</sup>.

To begin with, it is curious that Article 1 (2), according to which the EAW must be executed on the basis of the principle of mutual recognition, has only been explicitly mentioned by six Member States. It seems that this is indicative of the issues coming up at the implementation level. This section will highlight a few of them.

Firstly, concerning the double criminality requirement, the Netherlands does not extradite a national for the purpose of prosecution for an offence which is not punished under Dutch law<sup>209</sup>. The decisions of the national Constitutional Courts (which will be analysed later in this chapter) have not solved all problems. Germany has reintroduced double criminality in some specific cases. The new Polish

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<sup>207</sup> See *supra* Chapter 2 p. 56-57.

<sup>208</sup> <http://www.ejn-crimjust.europa.eu/forms.html> (last visited 14 February 2009).

<sup>209</sup> Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States in 2005, 2006 and 2007, Brussels, 11/07/2007, COM (2007) 407 final and Annex to the Report, Brussels, 11/07/2007, SEC (2007) 979 final.

legislation has not directly done away with this requirement as far as nationals are concerned and has not reproduced in its entirety the Article 2 (2) list. Moreover, Ireland applies double criminality whenever it issues an EAW, with reference to the return of its own nationals; Estonia adopts it in practice, although it is expected to abolish it explicitly soon. The question of whether the Framework Decision list includes attempt and complicity has not been entirely solved<sup>210</sup>.

Secondly, as far as reciprocity is concerned, the consequences of the decision of the German Constitutional Court<sup>211</sup> are a good example in this regard. The refusal of Germany to extradite applied to a German and Syrian national, Darkazanli, who was the subject of an EAW issued by Spanish authorities for the crime of membership of a terrorist organisation (in particular, he was accused of being a member of *Al-Qaida*). As a result, the Criminal Chamber of the Spanish *Audiencia Nacional* (which is the competent authority dealing with EAWs) declared that, as long as a change did not occur in the German legislation, it would treat German EAWs as traditional requests for extradition, therefore refusing the surrender of Spanish nationals to Germany on the basis of the international principle of reciprocity; similarly, the Regional Court in Szczecin in Poland refused the surrender of a Polish citizen to Germany and an analogous decision was taken by the Greek *Areios Pagos*<sup>212</sup>. It seems that Hungary too refused to recognise EAWs issued by Germany<sup>213</sup>. One can wonder whether reciprocity might be used again in the future in analogous cases with reference to this or other grounds for non-execution, as a sort of retaliation. For instance, the Czech Republic applies reciprocity to the surrender of nationals in the circumstances provided for by Article 4 (6) and 5 (3)<sup>214</sup>.

Thirdly, another question refers to the treatment of minors. Article 3 (3) of the Framework Decision specifies that minors cannot be held criminally responsible for the acts on which the EAW is based under the law of the executing State. However,

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<sup>210</sup> For all this, see Annex to the Report from the Commission, *supra*.

<sup>211</sup> See *supra*, p. 143.

<sup>212</sup> *Audiencia Nacional*, order of 20 September 2005; Decision of the Greek Supreme Court 2483/2005, *supra*; for the Polish decision, see K. Beni, *supra* 133.

<sup>213</sup> Annex to the Report from the Commission, *supra*.

<sup>214</sup> *Ibid.*

it is not clear whether this refers to full or limited responsibility. This may create difficulties of implementation in those countries in which minors have some form of criminal responsibility<sup>215</sup>.

Fourthly, concerning the grounds for refusal, many Member States put a number of barriers to the mutual recognition of an arrest warrant from other Member States. Some of them included grounds which were not listed by the Framework Decision or turned some or all of the optional into mandatory ones<sup>216</sup>. Estonian authorities are allowed to assess the merits of a case, although not by an explicit provision. The UK only applies *ne bis in idem* if the act is qualified as an offence also in its domestic legislation. Fifthly, concerning the time limits, not all the Member States respect in their statutes the time limit of ninety days within which the decision to execute the EAW must be taken and not all of them included the obligation to inform Eurojust in case of delay<sup>217</sup>.

Furthermore, regarding positive or negative conflicts of jurisdiction, i.e. when, respectively, more jurisdictions are asserted or denied simultaneously over the same offences, there is no guarantee that the chosen jurisdiction is the most appropriate<sup>218</sup>.

Concerning the definition of “competent judicial authority”, while the Framework Decision left the Member States free to establish it in accordance with their domestic law, some of them have interpreted it rather broadly. For instance, Denmark and Germany have referred to the Ministry of Justice, while Cyprus has conferred on the Office of the Attorney General the power to give consent in writing prior to the EAW

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<sup>215</sup> For instance, the age of criminal responsibility is 8 in Scotland, 10 in England and Wales, 12 in the Netherlands. See G. Maher, ‘Age and Criminal Responsibility’ (2005) 2 *Ohio State Journal of Criminal Law* 493.

<sup>216</sup> One may wonder whether the principle *pacta sunt servanda* might be applied in this context, in the sense of not allowing grounds for refusal which are only provided for in domestic law. This relates to the nature of a Framework Decision.

<sup>217</sup> Annex to the Report from the Commission, *supra*.

<sup>218</sup> There are no clear rules yet and a reference at least to territoriality would be welcome. The “first come first served” principle applies. However, see Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM (2005) 696 final and the recent Draft Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Doc. 5208/09, Brussels 20 January 2009.

being issued<sup>219</sup>. In relation to the additional requirements that some States have included, it is worth mentioning that not only British but also Irish authorities have provided for an additional certification that is necessary in order for the EAW to be valid<sup>220</sup>.

Another problem is that of proportionality in the phase of issuing an EAW. It has sometimes occurred that requests have been issued for minor offences such as the theft of a piglet<sup>221</sup>. This reflects the different values that can be accorded to certain crimes in less economically developed areas of the EU. A remedy could be that of requiring the issuing authority to assess whether the action is proportionate to the objective that it intends to achieve (namely, securing the offender to justice for an act which is deemed to be particularly harmful)<sup>222</sup>. However, although this principle could be considered a specific application of the more general principle established by Article 5 TEU, there is no explicit mention of it in the Framework Decision<sup>223</sup>.

If compared to the traditional European model of extradition, the surrender scheme has therefore in practice a fragmented nature and this raises legitimate doubts as to the extent to which it is sustainable. To this end, since mutual trust has been identified as the basis of cooperation in criminal matters under the EAW, it may be useful to develop a concept at the theoretical level and attempt to verify if it really exists. The starting point of the following analysis will be the distinction between trust and confidence drawn by Neil Walker: trust should therefore be viewed as an “active way of building confidence”<sup>224</sup>.

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<sup>219</sup> Annex to the Report from the Commission, *supra*. Information on the competent judicial authorities of each State can however be obtained from the European Judicial Network website, <http://www.ejn-crimjust.europa.eu> (last visited 14 February 2009). Some courts apply a flexible approach when deciding who the competent authority is. For instance, in Scotland the view is that the warrant is not invalid simply because the issuing authority would not be a judicial authority under Scottish law. See *Goatley v. HMA* [2006] SCCR 463 par. 25 per Lord Justice Clerk.

<sup>220</sup> *Ibid.* See, however, for the UK, *supra*, p. 179-180.

<sup>221</sup> M. Fichera, C. Janssens, ‘Mutual recognition of judicial decisions in criminal matters and the role of the national judge’, (2007) 8 *ERA Forum* 177, 188. Other examples have been detention of small amounts of drugs, driving a car under the influence of alcohol, where the limit was not significantly exceeded, theft of two car tyres.

<sup>222</sup> This was in fact the proposal of Portugal: see Doc. n. 10975/07 Brussels, 9 July 2007.

<sup>223</sup> On the criticism of this principle, see *infra*, chapter 6, p. 204-205.

<sup>224</sup> See *supra* chapter 1, p. 44.

There is a host of studies on the definition of (mutual) trust and in particular its relation to cooperation<sup>225</sup>. While some of them argue that cooperation may evolve without trust, I subscribe to those models postulating a degree of minimum trust in order for cooperation to function effectively, although they also refer to constraints (i.e. a set of rules aimed at increasing the predictability of a behaviour) and common interests towards achieving a specific goal as concurring factors that enhance cooperation between individuals and/or groups of individuals<sup>226</sup>. This can be also expressed in legal terms, as the basis of mutual trust and mutual recognition is to be located in the principle of loyal cooperation under Article 10 TEC, which operates in the Third Pillar as well<sup>227</sup>.

Consequently, mutual trust can be intended as the reciprocal belief that others' behaviour will not violate the basic common principles that lay at the heart of the EU legal systems. More particularly, as far as cooperation in criminal matters is concerned, mutual trust can be further refined in connection with both its *subjects* and its *object*. The subjects can be Member States or judicial authorities. The object will vary accordingly. In the first case, a State must trust another State's behaviour according to the agreed rules and the general principles of the EU. This form of trust is more significant in the context of intergovernmental cooperation (and, in particular, extradition and mutual legal assistance). In the second case (which is more relevant for our purposes), a judicial authority within a State will have to trust a foreign legal system and more specifically: a) the product of that legal system, i.e. the EAW and all additional information attached to it and, depending on the case, b) the capacity of either the issuing or the executing authority and all other competent authorities to perform their tasks in line with what is stated in the EAW and not radically differently from what would be done in analogous circumstances in its own legal system (in other terms, the implementation of the EAW according to the Framework Decision).

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<sup>225</sup> See e.g. in the social sciences J. Elster, *Explaining Social Behaviour* (Cambridge University Press, New York 2007) 344; G. A. Bigley, J. L. Pearce, 'Straining for Shared Meaning in Organisational Science: Problems of Trust and Distrust' (1998) 23 *Academy of Management Review* 405; D. Gambetta (ed.) *Trust: Making and Breaking Cooperative Relations* (Blackwell, Oxford 1988); R. Axelrod, *The Evolution of Cooperation* (Basic Books, New York 1984).

<sup>226</sup> D. Gambetta, 'Can We Trust Trust?' in D. Gambetta (ed.) *supra* 213.

<sup>227</sup> ECJ C-105/03 *Pupino* [2005] ECR I-5285.

From this it follows that trust in this case is not blind (“absolute trust”) but *conditional* upon the respect of the rules, such as, for instance, the absence of elements which would be deemed so extraneous as to oblige the executing authority to reject a request. However, because trust is mutual, it is necessary that the conditions are mutually agreed. Moreover, since trust presumes *good faith*, and its level is supposed to be sufficiently high, only exceptional cases would justify withdrawing it unilaterally or bilaterally. This implies, for instance, that a detailed examination of the facts of the surrender case should not be allowed, because *it should not be necessary*. Moreover, relative (cultural, legal, political) homogeneity and shared values are to be considered as preconditions of trust<sup>228</sup>.

As a result, the main parameters that can be used to assess whether mutual trust really exists are: compliance with agreed rules and common interests. I will assume as a starting point that the current EU Member States are sufficiently similar to each other from the legal, political and cultural point of view, although there are differences in relation to some specific aspects (e.g. of substantive criminal law<sup>229</sup>). A common interest in prosecuting certain types of crimes certainly exists, the more so in relation to terrorism or organised crime. As far as a set of agreed rules (especially at the procedural level) is concerned, as will be seen better in chapter six, they are still missing. Obviously, past experience is normally a relevant factor in building up trust: episodes of good practice with a particular State will reinforce the belief in that State’s trustworthiness and will result in a general improvement of cooperation. This is why anecdotal evidence is helpful. Interviews carried out with a small sample of practitioners from the United Kingdom and Italy (i.e. the countries on which this chapter has focused) have shown that, generally speaking, there is a higher degree of trust in the former, although judicial authorities normally expect a

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<sup>228</sup> Some comparative studies indeed show that trust is much higher in the Nordic European countries, i.e. Norway, Sweden, Denmark and Finland because of *inter alia* higher homogeneity. See J. Delhey, K. Newton, ‘Predicting Cross-National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?’ (2005) 21 *European Sociological Review* 311. It would be interesting to verify the extent to which this may be causally related to the adoption of their special surrender scheme: see *supra* chapter 3, p. 68.

<sup>229</sup> This is why, as argued *supra* chapter 4, p 130-131 the removal of dual criminality should be restricted to those categories of offences in relation to which a stronger common interest of Member States is more likely to coagulate.



very high standard in respect of EAWs issued by other States, which results in a high number of requests for additional information. Italian judges (sometimes regardless of past experience) tend to be wary of foreign judicial authorities irrespective of the nationality and type of legal system. On the other hand, UK judges tend to regard the EAW as a positive development in respect of extradition, although they point out frequent problems with Eastern European countries (in particular Poland), which do not always include all the required information when issuing a EAW or issue requests for trivial offences<sup>230</sup>.

The comparison of the UK and Italian system and the brief analysis of the legislation in the other Member States as conducted above demonstrate that, while a minimum degree of mutual trust exists, it is not evenly distributed in at least two States and there are elements indicating that the same could be said of the relationship between those States and other legal systems. It is therefore possible that repeated negative episodes in the implementation of the EAW between countries will prevent trust from being strengthened, thus undermining cooperation in criminal matters at a more general level.

This shows that despite the undeniable success of the first years of implementation, as indicated by the Commission statistics<sup>231</sup> a number of flaws can be detected which were most probably not expected by the original drafters of the Framework Decision. Appropriate solutions can only be found through an intense bottom-up process of exchange of information, best practices, training, mutual evaluation, practical guidelines, setting up of networks, and similar mechanisms.

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<sup>230</sup> Other problems with Poland arose from the lack of direct flights within a period of three weeks after the final decision to surrender was taken.

<sup>231</sup> Report from the Commission, *supra*. In 2005, 6900 EAWs were issued, mostly through Interpol or the SIS; more than 8500 were received; more than 1770 individuals were arrested and almost all of them (86%, i.e. 1532 persons) were surrendered. The average time for executing a request is 43 days, as opposed to one year in the case of old extradition. According to the Commission, there has been a significant improvement in respect of 2004.

## 6. Human rights, prosecution and related issues

### Introduction

The balance between the values/principles of freedom, security and justice is probably the main challenge facing the development of the Third Pillar. The EAW is not immune from this. However, as will be seen in this chapter, the concrete application of those principles highlights some tensions and potential conflicts. The EAW does not seem to be able to provide a satisfactory solution. On the contrary, it is actually the cause of some of those tensions. It is therefore argued that both the “prosecution” and the “human rights” sides should be reshaped, not only as far as the EAW itself is concerned, but also in relation to the whole Third Pillar context.

### 6.1 Security vs. freedom: the protection of human rights in the Framework Decision

As mentioned in the previous chapters, one of the main features of the EAW is the abolition or adaptation of a number of classical principles of extradition law, such as double criminality, the nationality and political offence exceptions, the rule of specialty and double jeopardy. It is not surprising that these fundamental changes have caused some criticism in many Member States because of their concern for human rights. The reasons for this concern are manifold. First, contrary to previous extradition treaties, there is no explicit ground for refusal based on human rights. Secondly, the surrender mechanism seems to have been construed with a particular focus on speed and efficiency: while this innovation can be praised and, as monitoring reports show, has undoubtedly improved cooperation<sup>1</sup>, on the other hand the defence rights scheme is neither coherent nor sufficiently developed. Finally, as will be demonstrated in the following pages, there are still too many examples of

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<sup>1</sup> Report from the Commission on the implementation of the European arrest warrant and the surrender procedures between Member States in 2005, 2006 and 2007, COM (2007) 407 final and Annex to the Report, SEC (2007) 979.

failure in the protection of ECHR standards, which means that sometimes a certain degree of mistrust between the Member States is actually justified.

A first issue relates to the lack of qualification of human rights as ground for non-execution. As mentioned in chapter one<sup>2</sup>, one of the classical features of the European extradition model in the second half of the last century was the fair trial clause (also known as the non-discrimination or asylum clause). This provision, which is still applicable outside the European Union (among the States parties to the 1957 European Convention) makes refusal possible whenever the requested State has substantial grounds for believing that a request relating to an ordinary criminal offence is biased by the purpose of prosecution or punishment by reason of race, religion, nationality or political opinion<sup>3</sup>. The Framework Decision drafters have kept the clause but have split it in three different recitals of the Preamble: 10, 12 and 13. According to the first recital, the implementation of the EAW may be suspended only in case of persistent and serious breach of the principles established by Article 6 (1) TEU<sup>4</sup>; the second makes it clear that nothing in the Framework Decision can be interpreted as preventing refusal when it can be objectively proved that an EAW has been issued for the purpose of prosecuting or punishing on discriminatory grounds; on a similar note, the third adds that no fugitive should be removed, expelled or extradited to a State in which he may be subject to the death penalty, torture or other inhuman and degrading treatment or punishment. Recital 10 also maintains a safeguard for the constitutional rules that each State may have established with regard to due process, freedom of association, freedom of the press and freedom of expression in other media. These provisions, taken together, suggest that the Framework Decision relies on the assumption that the degree of mutual trust at the EU level is such that there is no need for raising too many barriers to surrender (i.e. explicit grounds for non execution) based on human rights.

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<sup>2</sup> See *supra* chapter 1 p. 13-14.

<sup>3</sup> European Convention on Extradition, Paris, 13/12/1957, ETS n. 24, Article 3 (2).

<sup>4</sup> According to Article 6(1) TEU, "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

Obviously this open-ended approach leaves room for discretion and therefore for ambiguities. The following example may be useful for a clearer understanding. A journalist of one country publishes an editorial which is considered highly and unjustifiably offensive towards an individual in another country. Defamation is punished in the latter country by a custodial sentence for a maximum of more than one year (i.e. the threshold beyond which the EAW mechanism is triggered). Moreover, although double criminality applies<sup>5</sup>, there are no obstacles from this point of view, as the offence is punished in both countries. However, despite the fact that prosecution is initiated, the issue is more delicate than it appears on the surface, because the offended person is actually a prominent politician. Even where there are no objective elements supporting the belief that the request is discriminatory on grounds of political opinions, a national authority might still decide that its own Constitution, protecting freedom of the press, forbids surrender in this specific case. One might argue that there is no explicit clause allowing a Member State to deny surrender in such cases and that the requested State should trust that the legal system of the issuing State will be respectful of the rights of the defence and, in particular, of fair trial. Despite these arguments, it is perfectly imaginable that the case would generate friction. Additionally, the high profile of the politician might affect the “judicial” character of the surrender procedure, despite the spirit of the Framework Decision.

This matter is compounded by Article 1 (3) of the Framework Decision, according to which the implementation of the EAW does not modify “(...) the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union”. As already mentioned in a previous chapter, this non-regression clause could be interpreted in two ways: either as a general principle which the judicial authorities must rely on when surrendering or receiving a fugitive; or as a specific exception to the mutual recognition principle (which is stated in the preceding paragraph of the same Article), as has been done in eleven Member States<sup>6</sup>. Sometimes the human rights exception has been reinforced by reference to

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<sup>5</sup> The offence of defamation is not included in the “Article 2 list”. See Article 2(4) of the Framework Decision and *supra*, chapter 4 p. 129.

<sup>6</sup> See *supra*, chapter 3 p. 86.

other norms or concepts. For instance, a UK judge must order the person's discharge if his surrender is not compatible with the 1998 Human Rights Act (c. 42); an Irish judge will deny surrender also when it is contrary to the Constitution; Greek and Cypriot authorities must consider "activities for the cause of freedom" as a ground for non-execution in addition to those mentioned in the Framework Decision: this last definition could cover cases where the distinction between terrorists and freedom fighters is blurred, yet one might wonder whether it is in fact a *camouflage* of the old political offence exception<sup>7</sup>.

The second issue, as mentioned at the beginning of this section, concerns the extent to which human rights are recognised within the EAW mechanism. Given the importance of clear procedural rules guaranteeing the fair trial of the accused person or a fair execution of the sentence where a judicial decision has already been issued, it is striking that there are not many relevant provisions in the Framework Decision. Leaving aside the grounds for refusal (which are dealt with elsewhere in this work<sup>8</sup>), one may find some guarantees in Article 5 (1) and (2). First of all, if a decision has been made in the absence of the accused person and he has not been summoned or informed of the date and place of the hearing, the requested authority may demand that appropriate assurance be given by the issuing State that the person will be able to apply for a retrial. Secondly, if an offence is punished by custodial life sentence or life-time detention order, the requested State may demand that a review of the penalty or the application of measures of clemency be provided for by the issuing State. However, these provisions leave to the executing judicial authority room for discretion; moreover, they have been interpreted as optional by some Member States, which do not therefore require such guarantees, or require them only partially or impose additional conditions<sup>9</sup>. Human rights safeguards are also included in the provisions on double jeopardy, i.e. Article 3 (2) and Article 4 (2), (3) and (5)<sup>10</sup> as

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<sup>7</sup> See, respectively, section 21 UK Extradition Act 2003, section 37 Irish European Arrest Warrant Act 2003, Article 11 Greek implementing Law 3251/2004, Article 13 (d) Cypriot Law 5850/2004.

<sup>8</sup> See *supra*, chapter 5 p. 147 *et seq.*

<sup>9</sup> See Annex to the Report, *supra* 16. For instance, German law requires that the person has not been aware of the trial as a result of having fled the country.

<sup>10</sup> On this, see *supra*, chapter 3 p. 85.

well as in Article 3 (3), which forbids surrender of minors. As noted elsewhere<sup>11</sup>, the latter ground for refusal is flawed, as it does not specify the age which excludes criminal responsibility.

It has already been pointed out in a previous chapter, when dealing with the decision to execute in the EAW procedure, that Articles 11 and 12 provide for a number of rights following the arrest of the fugitive<sup>12</sup>. They are: the right to be informed of the EAW, of its content as well as of the possibility of giving consent to surrender<sup>13</sup>; the right to a decision on whether detention should continue; the right to be assisted by legal counsel and by an interpreter. The arrested person may be released provisionally, as long as all appropriate measures are adopted to prevent escape. It is evident that the protection offered by the above mentioned Articles is insufficient and fragmented, especially in light of the much more detailed provisions contained, for instance, in Article 6 and 5 (4) ECHR or 14 ICCPR, which explicitly mention, *inter alia*, the right to be presumed innocent until proved guilty as a matter of principle and, in addition, the right to have adequate time and facilities for the preparation of the defence and the right to challenge the lawfulness of the detention (*habeas corpus*)<sup>14</sup>.

The third issue worth considering is the actual level of protection of human rights throughout the EU. The Council of Europe Commissioner for Human Rights has had the opportunity to single out a few serious flaws not only in the newcomers, but also in many traditional Member States. Among these, he mentioned the overcrowding in the prisons and the living conditions of detainees (for instance in Latvia, Estonia and Poland, but also in Spain, France and Italy)<sup>15</sup> and the very low remuneration granted

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<sup>11</sup> See *supra*, chapter 5 p. 188-189.

<sup>12</sup> See *supra*, chapter 3 p. 91-92.

<sup>13</sup> If consent is not expressed, then a hearing is arranged, in accordance with the law of the executing Member State (Article 14): in this case, specific conditions are set out in order to ensure that consent is expressed voluntarily. See *supra*, chapter 3 p.104.

<sup>14</sup> See Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4/11/1950, as amended by Protocol n. 11, ETS n. 155; International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature, ratification and accession by GA resolution 2200A (XXI), 16/12/1966. The right to be presumed innocent is also envisaged by Article 48 (1) of the Charter of Fundamental Rights of the European Union, OJ C 364, 18/12/2000.

<sup>15</sup> See Memorandum to the Estonian Government, Assessment of the progress made in implementing the 2004 recommendations of the Commissioner for Human Rights of the Council of Europe, 11 July

to lawyers providing free legal aid (e.g. in Estonia and Poland)<sup>16</sup>. While in Poland pre-trial detention (which is normally two years before the first instance decision) has sometimes lasted for up to six years (thus in breach of Article 5 (3) ECHR), in France no legal assistance is given for a period of seventy-two hours in drug trafficking and terrorism cases<sup>17</sup>. In Spain for some offences (such as terrorism) a detainee may be held incommunicado for seventy-two hours, with a possible further extension of another forty-eight hours and sometimes up to eighteen days<sup>18</sup>. The length of proceedings is another frequently voiced concern of the Commissioner. However, here again, the “time limit issue” affects not only younger democracies, such as Poland, but also old and established ones, such as Spain and Italy<sup>19</sup>. In Italy, in particular, this is a structural problem that was addressed by the Committee of Ministers of the Council of Ministers as early as 1992<sup>20</sup>. Annual reports of the Council of Europe<sup>21</sup> and judgements of the European Court of Human Rights (ECtHR)<sup>22</sup> have repeatedly stressed the persistent violation of Article 6 (1) ECHR (right to a fair and public hearing within a reasonable time) by the Italian courts. Although new legislation was passed to provide a solution (following pressure by the Council of Europe), there seems to be no improvement at present. For instance, the *Pinto* law was designed to allow victims to apply for compensation to the Italian

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2007, par. 24 *et seq.*; Memorandum to the Polish Government, Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights, 20 June 2007, par. 29 *et seq.*; Report by Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Latvia (12 February 2004, par. 14 *et seq.*); to Spain (9 November 2005, par. 26 *et seq.*); to France (15 February 2006, par. 70 *et seq.*); to Italy (14 December 2005, par. 50 *et seq.*).

<sup>16</sup> Memorandum to the Estonian Government, *supra* par. 46 *et seq.*; Memorandum to the Polish Government, *supra* par. 41 *et seq.*

<sup>17</sup> Memorandum to the Polish Government, *supra* par. 36 *et seq.*; Report on France, *supra* par. 55.

<sup>18</sup> Report on Spain, *supra* par. 20 *et seq.* On the seventy-two hours limit in general and, in particular, in relation to the EAW (for which the additional extensions would not apply) see M.Jimeno-Bulnes, ‘Medidas cautelares de carácter personal’ in L.A. Zapatero, A.N. Martín (eds.), *La orden de detención y entrega europea* (Ediciones de la Universidad de Castilla-La Mancha, Cuenca, 2006) 363, 369.

<sup>19</sup> Memorandum to the Polish Government, *supra* par. 6 *et seq.*; Report on Spain, *supra* par. 56 *et seq.*; Report on Italy, *supra* par. 10 *et seq.* In all these countries domestic remedies have been introduced in an attempt to reduce the procedural delays, but the outcome has not been entirely satisfactory.

<sup>20</sup> Council of Europe Committee of Ministers Resolution DH(92)26, 15 June 1992.

<sup>21</sup> See for instance Council of Europe, Third Annual Report on the excessive length of judicial proceedings in Italy, CM/Inf/DH(2004)23 revised, 24 September 2004.

<sup>22</sup> ECtHR *Motta v. Italy*, 4/1990/195/255, 19 February 1991; ECtHR *Mattoccia v. Italy*, Application no. 23969/94, 25 July 2000. Italy is the country with the highest number of unfavourable decisions in Europe in the period 1999-2006, mostly for violations of Article 6 ECHR. See table on violations by Article and by Country 1999-2006, at [www.echr.coe.int](http://www.echr.coe.int). In 2004 the average length of proceedings, up to the appeal level, was eight years in civil cases and five years in criminal cases: Report on Italy, *supra* par. 12.

Court of Appeal, thus relieving the European Court of the considerable burden of cases that each year came from Italy: however, the source of the problem, which is, as already said, the structural deficiencies of the judicial system, has not been tackled<sup>23</sup>.

It is evident that the fact that the Member States of the European Union have signed the Convention is not a guarantee of uniform and sufficient standards of protection of individual rights. It must be added that, although, whenever a violation occurs, there are some remedies, each of them shows limits in its application. First, individuals may bring a complaint before national judges. Since national procedural rules governing the exercise of rights of action must be interpreted and applied in such a way as to allow natural and legal persons to challenge before a national court any decision or measure relating to the application to them of an EC act having general application (by pleading the invalidity of this act)<sup>24</sup>, this may be deemed possible for Third Pillar acts as well (including the Framework Decision on the EAW). However, this only occurs *a posteriori* and therefore does not prevent a breach of a fundamental right; moreover, it may sometimes require a lengthy procedure, as previously shown. Secondly, individuals may appeal before the ECtHR. However, this option is only available after having exhausted all internal remedies<sup>25</sup>. Thirdly, as will be better seen later in this chapter, the role of the European Court of Justice (ECJ) within the Third Pillar needs to be taken into account, although it is still too limited.

From what has been discussed above it follows that a closer analysis of the Framework Decision reveals an imbalance between the provisions that emphasise effectiveness and those that identify the rights of the defence. This reflects a pattern

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<sup>23</sup> See Legge “Pinto”, n. 89/2001 and Report on Italy, *supra* par. 23-25. It is worth mentioning that the Commissioner on Human Rights also pointed out that in Italy, contrary to many other member States, criminal proceedings may not be reopened as a result of a decision of the ECtHR finding a violation of Article 6 ECHR (par. 39 *et seq.*). Moreover, torture does not yet exist in the Criminal Code, although Italy ratified in 1988 both the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg 26/11/1987 ETS n. 126), amended by Protocols n. 1 ETS n. 151 and n. 2 ETS n. 152 and the United Nations Convention Against Torture (GA Res. 39/46 10/12/1984).

<sup>24</sup> See e.g. ECJ C-50/00, *Unión de Pequeños Agricultores v. Council*, [2002] I-06677 par. 42.

<sup>25</sup> C. Ovey, R. White, *Jacobs and White European Convention on Human Rights* (4<sup>th</sup> ed. OUP 2006).



which can be observed in the whole area of freedom, security and justice<sup>26</sup>. Obviously, what matters here is only the setting of common minimum standards of protection. Achieving the highest possible level of protection (in absolute terms) is unrealistic for two reasons. First of all, it is natural that each national legal system adopts its own criteria and this feature of State sovereignty cannot certainly (and indeed should not) be eroded by the current structure and functioning of the Third Pillar. Secondly, the scope of application of the EAW is rather wide, in relation both to substantive law (spanning between counterfeiting of products and forgery of administrative documents and terrorism and organised crime) and to procedural law (covering all offences for which the penalty threshold goes beyond the minimum maximum limit of one year): it follows that the degree of protection of individual rights will vary according to the seriousness of the offence. The need to facilitate prosecution and punishment of crimes must always be kept in mind. The EAW is not to be regarded as a punitive measure, but rather as an auxiliary mechanism designed to improve inter-State cooperation. This means however that, in balancing the values of freedom, security and justice, particular attention should be given to those cases where, due to the seriousness of the crime perpetrated, there is a higher risk of breaching fundamental rights<sup>27</sup>.

Strengthening the “defence rights” side of judicial cooperation (rather than presuming that sufficient safeguards already exist) is essential to build up mutual trust. While the European Commission was already aware of this issue in 1998 (the same year in which the debate on mutual recognition started<sup>28</sup>), when it stated that comparable procedural guarantees are necessary to ensure that “(...) greater efficiency can be reconciled with respect for human rights”<sup>29</sup>, a proper analysis was

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<sup>26</sup> R. Lööf, ‘Shooting From the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU’ (2006) 12 *European Law Journal* 421.

<sup>27</sup> On this issue in general, see e.g. S. Douglas-Scott, ‘The Rule of Law in the European Union- Putting the Security into the Area of Freedom, Security and Justice’ (2004) 29 *European Law Review* 219.

<sup>28</sup> See *supra* chapter 1 p. 8.

<sup>29</sup> Communication from the Commission: Towards an Area of Freedom, Security and Justice, Brussels, 14/07/1998, COM (1998) 459 final, p. 9. Such awareness is also evident in other official documents: see e.g. Tampere European Council, 15-16 October 1999, Presidency Conclusions, par.33 and 35; Communication from the Commission: Mutual Recognition of Final Decisions in Criminal Matters, Brussels, 26/07/2000, COM (2000) 495 final, p. 2; Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/02 15/01/2001, 2-3 and 10;

only conducted in 2003. In that year the Commission, after duly recognising in a Green Paper that divergences between the Member States could prevent a full development of mutual recognition, decided that action should be taken under Article 31 TEU<sup>30</sup>. A proposal for a Council Framework Decision on procedural rights was presented one year later<sup>31</sup>, but a final agreement on the text could not be reached, despite attempts by the Presidency of the Council to reduce the scope of the rights covered<sup>32</sup>. The main arguments put forward by several governments during the negotiation were that it would have compromised the balance already set up by the ECHR, that its adoption was outside the scope of Article 31 TEU and that in any case the principle of subsidiarity would not be complied with. This may only be regretted, as the proposal was put forward at the end of a long consultation process which followed the adoption of the Green Paper. It would have affected the functioning of the EAW, as it explicitly required Member States to ensure the provision of legal advice to suspected persons who are the subject of an EAW or extradition request or any other surrender procedure<sup>33</sup>. It should be noted however that the safeguards envisaged by the proposal, even in its original version, were still largely incomplete<sup>34</sup>, as they did not include, for instance, rules on the presumption of

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Communication from the Commission on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States, Brussels, 19/05/2005, COM (2005) 195 final, par. 18.

<sup>30</sup> European Commission Green Paper: Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union, Brussels, 19/02/2003, COM (2003) 75 final, p. 9-11.

<sup>31</sup> Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28/04/2004, COM (2004) 328 final. See R. Löff, 'Shooting From the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU' *supra*; M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings throughout the European Union' in E. Guild, F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, Aldershot 2008).

<sup>32</sup> See JHA Council, Luxembourg, 12-13 June 2007, Press release 10267/07 p. 37. It is noteworthy that the Brussels European Council, 4-5 November 2004 (which launched the Hague Programme), Bulletin of the EU n. 11/2004 9-12 and 15-32, par. 3.3.1, after pointing out that "(...) the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings (...)", had called for the adoption of the Framework Decision by the end of 2005.

<sup>33</sup> However, the proposal recognised at the same time the right to refuse legal advice or to represent oneself. See Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings, *supra* Article 3.

<sup>34</sup> The original proposal included: right to legal advice, right to free interpretation and translation, right to receive appropriate attention if not able to understand or follow the proceedings, right to communicate, *inter alia*, with foreign authorities in the case of foreign suspects, right to be notified of one's own rights by means of a written "Letter of Rights". Interestingly, during the consultation process preceding the adoption of the Green Paper, many more rights were considered. See M.

innocence, right to bail, double jeopardy, trials *in absentia*, admission of evidence<sup>35</sup>. Moreover, as pointed out by the European Union Committee of the House of Lords, no continuity in the provision of legal services during the surrender procedure (including, for instance, a liaison mechanism between the lawyer of the executing State and the lawyer of the issuing State) was ensured<sup>36</sup>.

This leads us to a fundamental question: to what extent can fair trial concerns affect the functioning of the EAW? One may recall the controversy as to whether Article 6 ECHR<sup>37</sup> should apply to extradition proceedings: while, in light of the *Soering* jurisprudence, it seems now accepted that extradition can only be refused “(...) where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country”, this does not exclude cases of unfairness before the national court of any Member State<sup>38</sup>. A similar reasoning may apply to the EAW, although, as argued in the past, proving the unfairness of a trial which took place or will take place in another State is difficult, especially in the second case<sup>39</sup>. This means that only in exceptional circumstances will such a claim be accepted. However, there is a further obstacle to the application of the fair trial principle: the lack of clear minimum standards concerning the rights of the defence. This hurdle may seriously

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Jimeno-Bulnes, ‘The Proposal for a Council Framework Decision on Certain Procedural Rights’ *supra* 174-175.

<sup>35</sup> The right to bail is supposed to be the subject of a future Green Paper. On the presumption of innocence, see European Commission Green Paper: The Presumption of Innocence, Brussels, 26/04/2006, COM (2006) 174 final. On double jeopardy, see European Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, Brussels, 23/12/2005, COM (2005) 696 final. A Green Paper on the handling of evidence and a Proposal on minimum standards relating to the taking of evidence were initially envisaged in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198 12/08/2005. On trials *in absentia*, see discussion below.

<sup>36</sup> House of Lords, European Union Committee, Report with Evidence, ‘Procedural Rights in Criminal Proceedings’, The Stationery Office, HL paper 28, 7 February 2005, 39-40.

<sup>37</sup> According to Article 6 (1), “(...) everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, whereas Article 6 (2) refers to the presumption of innocence and Article 6 (3) list the minimum rights which are to be ensured and which roughly correspond to those included in the original Proposal for a Framework Decision on procedural rights (although the right to cross-examination has been carefully excluded).

<sup>38</sup> ECtHR, *Soering v. United Kingdom*, Application no. 14038/88, 7 July 1989, par. 113. See C. Van Den Wyngaert, ‘Applying the European Convention on Human Rights to Extradition: Opening Pandora’s Box?’ (1990) 39 *International and Comparative Law Quarterly* 757, 770-772.

<sup>39</sup> J. Dugard, C. Van Den Wyngaert, ‘Reconciling Extradition with Human Rights’ (1998) 92 *American Journal of International Law* 187, 203-204. See also (by the same authors) Reports of the Committee on Extradition and Human Rights to the International Law Association, Buenos Aires, 1994, 214-246 and Helsinki, 1996, 142-170.

impair the functioning of the EAW and ultimately be fatal for the future of this instrument and for the whole system of mutual recognition which the Commission and the Council have been laboriously building up in the last years. The failure to adopt the Framework Decision on procedural rights is a warning the importance of which should not be underestimated. It should also not be forgotten that human rights standard should not only apply to extradition and surrender, but also to other areas, such as mutual assistance, for instance in relation to the obtaining of evidence<sup>40</sup>.

It follows that a silent enemy lurks behind the *façade* of the “smooth and effective cooperation” catch-phrase: the risk of misunderstandings in the application of rules on the rights of the accused person, in particular as regards the methods of investigation or the collection of evidence. The same trial can be fair according to one legal system and detrimental for human rights according to another. This risk is not theoretical but very much a practical one, since procedural divergences across EU Member States cannot be simply ignored<sup>41</sup>.

In classic extradition law, the ECHR is utilised to set a high threshold test to justify refusal, not only when a violation of fair trial is argued, but in relation to all human right matters. For instance, in *Launder v. United Kingdom* it is said that extradition will be deemed disproportionate to the legitimate aim of the “prevention of disorder or crime” only in exceptional circumstances<sup>42</sup>. Within the EAW system, the issue of proportionality was taken into account in *Jaso*, where Lord Justice Dyson refused to apply the *Launder* criteria (following *Huang*, a decision in the context of

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<sup>40</sup> On this view, see C. Gane, ‘Human Rights and International Cooperation in Criminal Matters’ in P.J. Cullen, W. C. Gilmore (eds.), *Crime sans frontières: International and European Legal Approaches* (Hume Papers on Public Policy: Volume 6 Nos. 1 and 2, Edinburgh University Press 1998) 161.

<sup>41</sup> See e.g. E. Cape, J. Hodgson, T. Prakken, T. Spronken (eds.) *Suspects in Europe, Procedural Rights at the Investigative Stage of the Criminal Process in the European Union* (Intersentia, Antwerpen-Oxford 2007).

<sup>42</sup> Eur. Comm. On Human Rights, *Launder v. United Kingdom*, Application no. 27279/75, 8 December 1997, par. 3 in relation to the right to respect for family life under Article 8 ECHR. Similarly, only a “near certainty” of loss of life can be a ground for denial of extradition on the basis of Article 2 ECHR (*Ibid.* par. 2). In the UK this principle was applied in *R (Birmingham a.o.) v. Director of the Serious Fraud Office; Birmingham a.o. v. Government of the United States of America* [2006] EWHC 200 (Admin), par. 118.

immigration), although it argued that a disproportionate interference with the right to respect for family life would have to be found whenever “striking and unusual facts” occur<sup>43</sup>. One may wonder what the difference between “exceptional circumstances” and “striking and unusual facts” is in practical terms. The “proportionality test” (as applied by the *executing* authority) might therefore prove useful in delicate cases. It should be noted that this type of proportionality is different from the analogous test whose application has been suggested in relation to the *issuing* authority to prevent the issuing of EAWs for minor offences<sup>44</sup>. In both cases it should be borne in mind that the inclusion of clearer legislative guidelines would provide better safeguards and avoid conferring too wide a discretionary power on judicial authorities.

It is essential that sufficient legal certainty is fostered: can this objective be achieved without altering the very nature of mutual recognition?

The rules governing trial in the absence of the accused are emblematic of this tension. As mentioned earlier in this chapter<sup>45</sup>, where a decision *in absentia* has been issued against the fugitive but the judicial authority has failed to summon him in person or inform him of the date or place of the hearing, Article 5 (1) of the Framework Decision provides for a guarantee. It allows the executing State to subject surrender to the condition that an assurance is given by the issuing State that the person, once delivered up to the latter, will be able to apply for a retrial and be present at the judgement. This is one of the most important guarantees stemming from the fair trial principle. As it happens, it is also a very delicate issue, as rules differ throughout the EU. This can be illustrated by the Spanish-Italian troubled relationship in extradition matters. The high number of rejected requests from Spanish authorities on the grounds that trials by default in Italy did not comply with the Spanish Constitution was one of the main reasons leading to the signing of the Italy-Spain Treaty on a procedure of fast-track surrender, which removed this ground

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<sup>43</sup> *Jaso, Lopez and Hernandez v. Central Criminal Court No. 2*, Madrid [2007] EWHC (Admin), par. 57. See also *Kucera v. The District Court of Karvina, Czech Republic* [2008] EWHC 414 (Admin) and (for the immigration case) *Huang v. Secretary of State for the Home Department* [2007] UKHL 11, par. 20.

<sup>44</sup> See *supra* chapter 5 p.215.

<sup>45</sup> See *supra* p. 224.

for refusal<sup>46</sup>. In this context, Italy has been repeatedly condemned by the ECtHR and has had to change its legislation accordingly<sup>47</sup>. This occurred recently in *Somogyi v. Italy*, where the Court found that the national authorities had failed to determine, beyond a reasonable doubt, that the person had unequivocally waived his right to appear at the trial<sup>48</sup>. However, problems with the Italian and other legal systems remain and this might make refusals more likely, due to the fact that Article 5 (1) states that the assurance given by the requesting authority must be “deemed adequate” by the requested one<sup>49</sup>. Furthermore, the normative scheme elaborated for similar situations by the other mutual recognition instruments seems to be remarkably different, as sometimes it is a sufficient condition for enforcement that the person, albeit absent, is represented by his lawyer whereas at some other times it is required that he be informed personally or via his representative of the proceedings: however, nothing is provided for in relation to the right to apply for a retrial<sup>50</sup>. These issues have been addressed by a group of Member States, which put forward an initiative aimed at amending the existing Framework Decisions<sup>51</sup>.

As far as the EAW is concerned, a new Article 4a replacing Article 5 (1) envisages a much more complex mechanism. No “adequate assurance” is required, in order to avoid ambiguities. Surrender is either allowed or not. The general rule is that non-execution is possible where a decision has been rendered in the absence of the sought person. This ground for refusal is not absolute, as four exceptions are provided for, with a view to balancing the need to ensure effective cooperation in enforcing

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<sup>46</sup> See *supra* chapter 3 p. 70.

<sup>47</sup> See e.g. ECtHR *Colozza v. Italy*, Application No. 9024/80, 12 February 1985.

<sup>48</sup> ECtHR *Somogyi v. Italy*, Application No. 67972/01, 18 May 2004, par. 73.

<sup>49</sup> Curiously, it has been observed that it may be possible that Italy applies a double standard, requiring “adequate assurance” from other States, but not being able to offer them in cases of passive surrender. See E. Selvaggi, G. De Amicis, ‘La legge sul mandato d’arresto tra inadeguatezze attuative ed incertezze applicative’ (2005) *Cassazione Penale* 1813. In Cassaz. Sez. VI n. 5400 30 January 2008 (*Salkanovic*) the Court accepted with no particular problems a EAW issued by French authorities on the basis of an *in absentia* judgement.

<sup>50</sup> See e.g. Article 8 (2) (e) Council Framework Decision 2006/783/JHA of 6/10/2006 on the application of mutual recognition to confiscation orders, OJ L 328 24/11/2006; Article 7 (2) (g) (ii) Council Framework Decision 2005/214/JHA of 24/02/2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76 22/03/2005.

<sup>51</sup> See, *inter alia*, Council of the European Union, Addendum to the Initiative presented by the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany for a Council Framework Decision on the enforcement of judgments *in absentia*, Brussels, 30 January 2008 Doc. 5213/08 ADD 1 COPEN 4.

judicial decisions and the concerns for fundamental rights and the principle of legal certainty<sup>52</sup>. The first exception is applied where the individual has been summoned in person and informed of the date and place of the hearing, or it is otherwise unequivocally proved that he was aware of the proceedings against him; moreover, it is required that he has been informed that a decision in his absence might be issued. This clearly reflects the approach normally followed by the ECtHR. A second exception is envisaged whenever the person is aware of the trial and a lawyer has been appointed either by him or the State. In a third case, if the person has been served with the decision and informed of his right to a retrial or to appeal allowing his participation as well as a fresh determination of the merits, surrender will be possible as long as he has made it clear that he does not contest the decision or has not exercised his right to request retrial or to appeal in due course. A final exception is provided for when the person has not been served with the decision nor informed of his rights, but this will nevertheless occur immediately after the surrender. Such exception relates obviously to a very delicate situation, in which all necessary guarantees must be ensured. First of all, if the person has not been informed of the trial, he may request, once he has been made aware of the content of the EAW, to receive a copy of the decision before the actual surrender takes place. However, this operation is not equivalent to a formal service and no time limits to exercise the right to request retrial or to appeal start running. It has only an information purpose and may not be utilised as a means to delay the surrender procedure<sup>53</sup>.

Secondly, if, once delivered up to the requesting State, he requests retrial or appeal, it is envisaged that his detention will be reviewed pending the request: as a result, his detention may be suspended or interrupted, as long as retrial or appeal take place in due time<sup>54</sup>.

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<sup>52</sup> See Article 2 (1) Initiative presented by the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany for a Council Framework Decision on the enforcement of judgments *in absentia*, Brussels, 7 July 2008 Doc. 11429/08 COPEN 136. A general approach on this Framework Decision has been reached in the Council on 6 June 2008. The whole provision is reproduced in the Annex to the Framework Decision on the EAW and the judicial authority is required to tick the box in correspondence with each of the situations described below.

<sup>53</sup> See Article 2 (2) Initiative, *supra*.

<sup>54</sup> See Article 2 (3) Initiative, *supra*.

The analysis carried out above shows that the tension between the values of security and freedom is particularly evident in the context of the EAW, due to the lack of sufficient guarantees for the accused or convicted person. It must be added that perhaps not enough attention has been paid to the issue of adequate training of counsel dealing with new procedural rules and new principles<sup>55</sup>. Hence the need for a thorough reshaping of the procedural rules governing the functioning of the EAW, so that they are more clearly focused on the protection of the rights of the sought person. Flaws can however also be verified in relation to the coordination of law enforcement and prosecution across the EU, as will be seen in the next section.

## 6.2 Security vs. freedom: Europol and Eurojust

Europol and Eurojust play a pivotal role in the development of the area of freedom, security and justice. The former was created in 1995 with the objective of improving police cooperation in the fight against terrorism, drug trafficking and all forms of serious transnational organised crime; its tasks include, among others, facilitating the exchange of information, collecting and analysing data and assisting member States in investigations<sup>56</sup>. However, the Commission has recently proposed to extend Europol's remit to all forms of serious cross-border crime, regardless of any connection to organised crime and to convert it into a Community agency; it will be financed from the Community budget rather than via contributions from the Member States and all amendments to its rules will be subject to the Community method<sup>57</sup>. These amendments, aiming at strengthening the powers of this body, confirm its importance in the coordination of law enforcement efforts and, as a result, its link

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<sup>55</sup> This problem seems to be felt in Scotland (as emerges from interviews carried out by the author), but it may presumably be evident elsewhere, e.g. in the new Member States.

<sup>56</sup> Convention based on Article K3 of the Treaty on European Union, on the establishment of a European Police Office, OJ C 316 27/11/1995.

<sup>57</sup> See Council of the European Union, Proposal for a Council Decision establishing the European Police Office (Europol), consolidated text, Brussels, 10 April 2008 Doc. 8296/08 EUROPOL 46. A political agreement was reached in April 2008: see JHA Council, Luxembourg, 18 April 2008, Press Release 8397/08 13.



with the functioning of the EAW: as explicitly recognised by the Commission, Europol's competence, in line with the principle of proportionality, will be limited to the categories of offences listed in the Framework Decision on the EAW<sup>58</sup>.

Eurojust is more directly related to the surrender mechanism. It is more recent than its law enforcement counterpart and aims at improving and simplifying cooperation between national prosecuting authorities<sup>59</sup>. It gathers prosecutors, judges and police officers of equivalent competence, appointed by their national authorities and has competence over a range of serious cross-border offences affecting at least two Member States, not necessarily involving organised crime<sup>60</sup>. As far as the EAW is concerned, Eurojust is entrusted with three essential tasks. First of all, it can give advice to governments in the case of conflicting warrants, i.e. when the same fugitive has been subject to EAWs issued by more than one State. Normally in such cases the choice of the most appropriate warrant is left to the discretionary power of the executing authority. This power is not entirely arbitrary, as the Framework Decision provides some criteria to establish priority: seriousness of the offence, place in which the crime was perpetrated, date of issuance, purpose of the EAW (i.e. prosecution or execution)<sup>61</sup>. When the case is particularly delicate, Eurojust may intervene, thus performing an important role of mediator<sup>62</sup>. Secondly, States are required to contact Eurojust whenever the time limits set out by the Framework Decision cannot be complied with. Moreover, they can report to Eurojust all cases where a particular State has repeatedly failed to execute an EAW in due course<sup>63</sup>. Thirdly, Eurojust may

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<sup>58</sup> Proposal for a Council Decision establishing the European Police Office (Europol), Brussels, 20/12/2006, COM (2006) 817 final, 7.

<sup>59</sup> Council Decision 2002/187/JHA of 28/02/2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 06/03/2002. This Decision was therefore adopted just a few months before the two 'sisters' Framework Decisions on terrorism and on the EAW.

<sup>60</sup> N. Thwaites, 'Eurojust: Beacon in EU Judicial Cooperation' (2006) 77 *Revue internationale de droit pénal* 293; see also House of Lords, European Union Committee, 'Judicial Cooperation in the EU: the role of Eurojust', Report with Evidence, HL Paper 138, 21 July 2004.

<sup>61</sup> See Article 16 (1) of the Framework Decision on the EAW. *Ad hoc* provisions on conflicts of jurisdiction can be found in other measures, such as e.g. Article 9 Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 22/06/2002.

<sup>62</sup> See Article 16 (2) of the Framework Decision on the EAW. This occurs relatively rarely: in 2007 four cases were dealt with by Eurojust under this provision (presentation by Pawel Zeman, CEPS Seminar "Still not resolved? Constitutional issues of the European Arrest Warrant", Brussels, 19 September 2008).

<sup>63</sup> See Article 17 (7) of the Framework Decision on the EAW. Twenty-five cases were reported to Eurojust in 2007 (presentation by Pawel Zeman, *supra*).

be helpful in facilitating contact between judicial authorities and solving potentially disrupting issues (language problems, legal disputes, requests for additional information)<sup>64</sup>.

It is evident that Eurojust may be very helpful in resolving potential disputes that may arise and in ensuring smooth cooperation. However, each of the provisions mentioned above fails to ensure the achievement of the very goal for which it was originally designed. Indeed, as regards the time limits issue, although the Framework Decision imposes an obligation to report, not all Member States have made this activity compulsory in their implementing legislation and only some of them state the reasons for the delay<sup>65</sup>. Concerning the other provision, i.e. multiple requests, it must be pointed out that the criteria on the basis of which the selection is made are not clear-cut and do not offer a satisfactory and comprehensive solution. National authorities enjoy too much discretion and, in addition, there is no obligation to consult Eurojust. More legal certainty should be guaranteed through new pieces of legislation, not only in relation to internal conflicts, but also to external ones, i.e. between a European and a non-European country<sup>66</sup>. Interestingly, during the negotiation of the EU-US Agreement on extradition and mutual legal assistance the discussion focused *inter alia* on the issue whether EAW requests should be prioritised over US extradition requests<sup>67</sup>. Article 10 (2) of the Agreement does not establish any precedence, although it was strongly opposed by the French government; eventually, it was agreed to allow the requested authority to adopt a final decision on the matter and it was suggested to revisit the issue in light of future developments of the EU, in particular with regard to the possibility of attributing primacy to EAW requests<sup>68</sup>.

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<sup>64</sup> See in general Eurojust Annual Report 2007, Doc. 6866/08, Brussels, 29 February 2008.

<sup>65</sup> Annex to the Report, *supra* 29-30. Some of them do not report all types of breach. Eurojust has complained that in 2007 only 8 Member States out of 27 have reported breaches: see Council of the European Union, Eurojust Annual Report 2007, Brussels, 29 February 2008, Doc. 6866/08 EUROJUST 17, 17.

<sup>66</sup> Indeed, Article 16 (3) of the Framework Decision reproduces the same criteria listed by paragraph 1 of the same article, although Eurojust in this case plays no role. The decision is taken by the competent executive authority.

<sup>67</sup> Articles 10 and 21 Agreement on extradition between the European Union and the United States of America, OJ L 181/27, 19/07/2003. A non-exhaustive list of criteria is included in Article 10 (3).

<sup>68</sup> The Agreement is supposed to be reviewed within five years of its entry into force. See House of Lords Select Committee on the European Union, 38<sup>th</sup> Report, Session 2002-03, HL Paper 153, 15 July

Furthermore, nothing is provided for in the case of accessory surrender, i.e. when the request refers also to offences for which the EAW does not apply<sup>69</sup>. Similar concerns may address the lack of rules on conflicts of jurisdictions, which has been addressed by the Commission in a Green Paper, where it noted that Eurojust (or an alternative body) could play a significant role in dispute resolutions, although it recognised at the same time that its powers should be extended<sup>70</sup>. On that occasion the Commission also observed that the identification of an effective mechanism to resolve conflicts of jurisdiction would make it possible to reduce the number of grounds for refusal applicable to the EAW and other mutual recognition instruments<sup>71</sup>. Discussions on strengthening the powers of Eurojust and amending its legal basis accordingly have also included proposals to confer upon it the power to initiate both investigations and prosecutions as well as to issue EAWs and letters rogatory<sup>72</sup>.

There is no doubt that Eurojust is an important key to the effective implementation of mutual recognition and that its competence should be widened. It has proved to be very active on the operational side in many EAW cases, especially in relation to terrorism, organised crime or trafficking in human beings<sup>73</sup>. Its assistance is appreciated by a number of practitioners<sup>74</sup>. However, the effort towards reviewing its scope for action should be accompanied by the establishment of a clear system for

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2003, 12; V. Mitsilegas, 'The new EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 *European Foreign Affairs Review* 515, 528.

<sup>69</sup> The Commission identifies this problem in Annex to the Report, *supra* 27-28, pointing out that, instead, the 1957 European Convention on Extradition did deal with it in its Article 2.

<sup>70</sup> Annex to the Green Paper on Conflicts of Jurisdictions and the Principle of *ne bis in idem* in Criminal Proceedings, Brussels, 23/12/2005 SEC (2005) 1767 11 and 23.

<sup>71</sup> Annex to the Green Paper on Conflicts of Jurisdictions, *supra* 63-64.

<sup>72</sup> Council of the European Union, 'Report of the seminar "A Seminar with 2020 Vision: The Future of Eurojust and the European Judicial Network", Vienna, 25-26 September 2006', Brussels, 19 October 2006, Doc. 14123/06, p.11. This has been confirmed in the Communication from the Commission to the Council and the European Parliament on the role of Eurojust and the European Judicial Network in the fight against organised crime and terrorism in the European Union, Brussels, 23/10/2007, COM (2007) 644 final. See also Initiative of the Kingdom of Belgium etc. on the strengthening of Eurojust and amending Decision 2002/187/JHA, OJ C 54 27/02/2008.

<sup>73</sup> Council of the European Union, Eurojust Annual Report 2007 *supra* 38-48 and in particular the reference therein to the Operation "Baltico" against a criminal organisation operating across many States, including Estonia, Italy and Germany.

<sup>74</sup> Interviews carried out by the author and information collected at the two ERA Conferences on Mutual Recognition of Judicial Decisions in Criminal Matters: The Role of the National Judge, Trier, Germany, 23-24 October 2006 and 21-23 November 2007.

the resolution of problems relating to jurisdiction and, in general, investigation and prosecution. At the same time, the expansion of both Europol and Eurojust has not been followed by the development of an equivalent system coordinating defence counsels and ensuring minimum rights (such as free legal aid, etc.). It must also be observed that there are no specific limits in this sense to the competence of the two bodies. While there was no mention to human rights in the Europol Convention, the proposed Europol Decision refers to them only in recital 25 of the Preamble and only in relation to the Charter of Fundamental Rights, which is at present not legally binding<sup>75</sup>. The Eurojust Decision contains analogous statements in its Preamble, referring to both the Charter and Article 6 (2) TEU<sup>76</sup>.

In this context, a more incisive control by the European Parliament and the European Court of Justice would necessarily have to be enforced. This would be certainly made easier in the new landscape of the Lisbon Treaty, in which the Third Pillar collapses into the First.

### **6.3 The role of the European Court of Justice in the balance of principles: the *Advocaten voor de Wereld* case and the *Kozłowski* case**

As mentioned in a previous chapter, the competence of the European Court of Justice (ECJ) is restricted in the Third Pillar<sup>77</sup>. Despite this, its role has become more and more important in identifying guidelines and in shaping the features of EU initiatives in criminal matters<sup>78</sup>. This has been confirmed in the context of the EAW, in which two decisions have already been issued in relation to both implementation and the nature of the surrender mechanism.

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<sup>75</sup> “This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union”: Council of the European Union, Proposal for a Council Decision establishing the European Police Office (Europol), consolidated text, *supra* recital 25 of the Preamble. However, many provisions herein refer to data protection.

<sup>76</sup> Council Decision 2002/187/JHA setting up Eurojust, *supra* recitals 2 and 18 of the Preamble.

<sup>77</sup> See *supra*, chapter 2 p. 56.

<sup>78</sup> See e.g. ECJ C-176/03 *Commission v. Council* (Environmental Pollution case) [2005] ECR I-7879; ECJ C-105/03 *Pupino* [2005] ECR I-5285.

A first decision was made on 13 July 2005 following a reference for a preliminary ruling by the Belgian Constitutional Court (“*Cour d’Arbitrage*”)<sup>79</sup>. The Court was asked, in line with Article 35 (1) TEU<sup>80</sup>, to rule on the validity of the Framework Decision. The questions were: a) whether a Framework Decision is the appropriate instrument or instead a Convention should have been adopted, in accordance with Article 34 (2) (b) and (d) TEU; b) whether Article 2(2) of the Framework Decision, which does not require verification of dual criminality for the list of offences included in the same article, is compatible with the principles of legality and equality under Article 6 (2) TEU. The former argument reflected the view of those who believe that, under Article 29, Article 31(e) and Article 34 (2)(b) TEU, Framework Decisions only have the purpose of adopting minimum rules relating to the constituent elements of criminal acts and penalties (and only in the fields of organised crime, terrorism and illicit drug trafficking)<sup>81</sup>. The non-profit association *Advocaten voor de Wereld*, in its *recours en annulation*<sup>82</sup>, had pointed out the fact that traditional cooperation between the Member States had always taken place through conventions that had to be ratified by national parliaments: this allowed effective democratic control.

Advocate-General Ruiz-Jarabo Colomer argued in his Opinion<sup>83</sup> that, although a Convention would have also been justified by the principle of subsidiarity, the *ratio* of this instrument is its effectiveness as opposed to international conventions, which

<sup>79</sup> ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, 3 May 2007.

<sup>80</sup> According to Article 35 TEU: “1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this article, to give preliminary rulings on the validity and interpretation of framework decision and decisions, on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them. 2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1”. Belgium made the declaration under par. 2, so that all its courts have the power to submit questions to the ECJ: see Information concerning the date of entry into force of the Treaty of Amsterdam, OJ L 114/56, 01/05/1999.

<sup>81</sup> G. Vermeulen, ‘Where do we currently stand with harmonisation in Europe?’, in A.Klip, H. van der Wilt (eds.), *Harmonisation and harmonising measures in criminal law* (Royal Netherlands Academy of Arts and Sciences Amsterdam 2002) 68-70.

<sup>82</sup> Belgian *Cour d’arbitrage*, arrêt n. 124/2005 13 July 2005. To be sure, the questions asked by *Advocaten voor de Wereld* were five, but two of them were not addressed by the *Cour d’Arbitrage* and another two were merged into one.

<sup>83</sup> Opinion of Advocate-General Ruiz-Jarabo Colomer, ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, 12 September 2006.

run the risk of not being ratified by all Member States. He added that equality is not violated for two reasons. First of all, the differences introduced by the new system are based on the nature of the facts (i.e. an *objective* parameter), rather than on individual circumstances. Secondly, they are reasonable because they are motivated by the need to combat crime in the area of freedom, security and justice (Article 2 and 29 TEU). Furthermore, legality is not infringed because this principle applies at national level, with reference to the definition of the offences, whereas the Framework Decision merely creates a mechanism of assistance between the judicial authorities of the Member States: accordingly, it is enough that *nullum crimen sine lege (certa)* is respected by the issuing State (and this is so because all Member States are signatory to the European Convention on Human Rights and are bound by Article 6 TEU). As the role of the executing State is limited to simple assistance, it cannot review the merits of the case, from which it would follow that the arrest and surrender procedures do not have a punitive nature.

The Court agreed with the Advocate-General. Concerning the argument *sub a*), after making it clear that the purpose of the Framework Decision is to replace extradition with a new system of surrender and that mutual recognition cannot be realised without approximation, it analysed the legal basis of the Framework Decision. Approximation can also be pursued through the EAW and the instruments that can be used in this specific context are either a Convention or a Framework Decision: the choice between these two is left to the Council<sup>84</sup>. As far as the argument *sub b*) is concerned, the Court's view was that the purpose of the Framework Decision list is not to harmonise criminal offences. The categories selected are those that are deemed so serious as to affect public order and public safety and this justifies the removal of double criminality.<sup>85</sup> This judgement leaves a few fundamental questions unsolved. The fact that an offence and the corresponding penalty are defined by the issuing State does not automatically create trust in the executing State: it risks being an imposition on another legal system of a parameter which is external to it. This is the case, unless there is a certain degree of compatibility between these two systems, which avoids excessive frictions.

<sup>84</sup> ECJ C-303/05, *supra*, par. 28-43.

<sup>85</sup> ECJ C-303/05, *supra*, par. 48-61.

Such compatibility must be both substantive and procedural. The Court does not address the question as to whether this condition really exists in the European criminal systems. Rather, it presumes the existence thereof and leaves each national court with the task of verifying on a case-by-case basis the minimum formal prerequisites for the execution of an EAW. As already mentioned, the Court justifies the choice of the thirty-two categories of offences for which double criminality does not apply in light of their “seriousness”, “in terms of adversely affecting public order and public safety”<sup>86</sup>. As we have previously seen, the existence of a sufficient degree of substantive compatibility may in some instances be questioned<sup>87</sup>. A related issue is whether harmonisation in these cases is feasible in the short term (or even necessary), in light of the cultural background of national criminal law systems. It is said that what matters is territoriality: if X commits an act which is regarded as a crime in one Member State, then he must be held responsible for that act, according to the law of that State, because he has violated the principles and the values of that society. As the Court puts it, “(...) the Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract”<sup>88</sup>. However, it must be observed that at the very core of the principle of legality lies the need to protect the individual *vis à vis* the State authority. This is so because of the special relationship between the former and the place in which he is born and has lived. The system of mutual recognition *without* harmonisation instead implies that the same individual faces more than one State authority, each one with its own criteria of punishment and its own criminal policy. We may wonder if this *relativisation* of crime and punishment is in line with the *nullum crimen* principle.

The Court repeats its arguments elsewhere when it states that Title VI of the TEU does not make “the application of the EAW conditional on harmonisation of the

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<sup>86</sup> ECJ C-303/05, *supra*, par. 57.

<sup>87</sup> See *supra*, chapter 4. It is all the more significant that, in the course of the negotiations on the Framework Decision on the European Evidence Warrant, Germany insisted on an opt-out for a list of 6 types of offences, which roughly corresponds to the one mentioned above: racism and xenophobia, computer-related crime, sabotage, racketeering and extortion, swindling and terrorism. See *supra* chapter 2 note 22.

<sup>88</sup> ECJ C-303/05, *supra*, par. 52.

criminal laws of the Member States within the area of the offences in question”<sup>89</sup>. This does not take into account the fact that, in any case, a certain degree of substantive and procedural approximation is necessary for an effective functioning of mutual recognition. The Court itself admits this when it states that Article 34 (2) TEU does not limit approximation to the areas mentioned in Article 31 (1) (e) and makes it applicable also to the EAW<sup>90</sup>.

It is interesting to observe that the Advocate-General, in addressing the issue of the distinction between extradition and surrender, reached a conclusion similar to the ruling of the Czech Constitutional Court on the compatibility between the national implementing statute and the Czech Constitution<sup>91</sup>. He too adopted a teleological interpretation and looked at the EAW as the effect not of the “coming together of separate interests”, but rather of a “common provision – the Framework Decision- which sets out the types of offence in respect of which assistance may be requested”<sup>92</sup>. Therefore, harmonisation does not concern national criminal laws but form and content of the decision, transmission and execution, grounds of refusal and “the rights which protect the arrested person during the procedure and for the purposes of surrender”<sup>93</sup>.

A second decision was made in the *Kozłowski* case, as a result of a request for interpretation of Article 4 (6) of the Framework Decision at the initiative of a German court<sup>94</sup>. The questions, again raised via the preliminary ruling procedure, were two: first, how should the terms “staying” and “resident” used in the Framework Decision be interpreted? Second, is the different treatment provided for by the implementing law in the case of nationals of the executing Member State and in the case of nationals of another Member State in line with the concept of

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<sup>89</sup> ECJ C-303/05, *supra*, par. 59.

<sup>90</sup> ECJ C-303/05, *supra*, par. 38. Advocate-General Ruiz-Jarabo Colomer in his Opinion argues that “legislative harmonisation is essential” (*supra*, par. 49).

<sup>91</sup> See *supra*, chapter 5 p. 164-165.

<sup>92</sup> Opinion of Advocate-General Ruiz-Jarabo Colomer, *supra*, par. 45.

<sup>93</sup> Opinion of Advocate-General Ruiz-Jarabo Colomer, *supra*, par. 49. The Advocate-General concluded that it is not national extradition laws, but the concepts of arrest and surrender which have been harmonised (par. 50). The Court of Justice instead excludes any reference to harmonisation.

<sup>94</sup> ECJ C-66/08 *Kozłowski*, 17 July 2008. See for more details M. Fichera, ‘Case C-66/08, Proceedings concerning Szymon Kozłowski’ (2009) 46 *Common Market Law Review* 241.



citizenship as derived from Articles 12 and 17 TEC and the principle of non-discrimination under Article 6 (1) TEU?

The Court availed itself of the urgent procedure which has been recently introduced in the area of freedom, security and justice, even though these new rules could not, strictly speaking, apply to the case at issue, because they entered into force after the questions were referred for a preliminary ruling: such a move was made upon request of the national judicial authority, in line with the new procedure<sup>95</sup>. The questions were referred by a German Higher Regional Court (*Oberlandesgericht*), which has the power under German law to rule on the admissibility of an extradition request<sup>96</sup>. The reason for the referral was that a Polish court had requested a German judicial authority the surrender of Mr. Kozłowski, a Polish citizen, for the purposes of execution of a sentence of five months' imprisonment for destruction of property. However, the same individual was already serving a sentence of three and a half years imprisonment in Stuttgart following conviction for several fraud offences. Since, prior to his arrest in Germany, he had been living for most of the time in that country, he challenged his surrender before the Stuttgart court (*Amtsgericht*), which in turn requested authorisation from the *Oberlandesgericht*. Indeed, Article 4 (6) of the Framework Decision provides, as noted elsewhere in this work<sup>97</sup>, for a residual element of the nationality exception, in the form of a ground of optional non-execution, whenever a person is subject to a EAW issued for the purposes of execution of a custodial sentence or detention order and he is "staying", or is a national or a resident of the executing State. The applicability of this exception is

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<sup>95</sup> *Ordonnance du Président de la Cour*, 22 février 2008 dans l'affaire C-66/08. See also Art. 23a Statute of the Court of Justice, as of March 2008, available at <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigueur/statut.pdf> and Art. 104b of the Rules of Procedure of the Court of Justice as amended, OJ 2008 L 24/39. The new procedure allows the Court to deal with a reference for a preliminary ruling (either at the request of a national court or tribunal or-exceptionally- *ex officio*) more expeditiously, as both statement of case and written observations have to be submitted within a shorter period. What is more, the written stage of the proceedings and the submission of the Advocate General (as it occurred in this case) may in the event of extreme urgency, be omitted.

<sup>96</sup> Articles 29-32 German law implementing the Framework Decision (*Bundesgesetzblatt Jahrgang 2006 Teil I Nr. 36 p. 1721 25 Juli 2006*), amending paragraphs 78-83k of the Law on international mutual legal assistance in criminal matters (*Gesetz über die internationale Rechtshilfe in Strafsachen, 1982 Teil I p. 2071, 23 Dezember 1982*).

<sup>97</sup> See *supra*, chapter 3 p. 83.

subject to the condition that the sentence or order is served in the latter State, in line with its domestic legal system.

Article 4 (6) was transposed into German law by the 2006 legislation, which, as a result of the decision of the German Federal Constitutional Court, had modified the previous implementing law<sup>98</sup>. In particular, the new Article 83b (2) (b) included the possibility of refusing surrender for the purpose of execution of a sentence in respect of a foreign national having *habitual residence* in Germany, under two conditions: first, that he does not consent after being informed of his rights; second, that he has an interest in the execution of the sentence in Germany which is worth protecting and prevails over the interests of the issuing State to have him surrendered. This provision is parallel to Article 80 of the same law, which allows surrender of German citizens only if there is evidence of a genuine link between the act and the territory of the requesting State, as long as return after sentence is guaranteed upon request of the person<sup>99</sup>.

Concerning the first question raised by the *Oberlandesgericht*, given that the Framework Decision does not offer guidelines to interpret the terms “staying” and “resident”, the German court asked the ECJ to clarify whether or not the particular situation of Mr. Kozłowski could be described in those terms. Obviously, an answer in the positive would entitle the German authorities to deny surrender if they believe it appropriate. Such decision would not be automatic, but would have to make sure that the interest of the sought person is really worth protecting. This exercise would entail a careful balance between the need to guarantee the effective functioning of the principle of mutual recognition, on the one hand, and the legitimate interests of the individual. What is at stake in this case is the right of the suspect or convicted person to be reintegrated into society after extinguishing his debt towards the community. It follows that, whenever such right can be better ensured in the executing State, surrender must be refused, even where the latter State is not the individual’s State of nationality.

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<sup>98</sup> *Bundesgesetzblatt Jahrgang 2004 Teil I Nr. 38 p. 1748, 26 Juli 2004.*

<sup>99</sup> See discussion *supra*, chapter 5 p. 143-144.

Hence the importance to define what is meant by “staying” and “resident”. Guidelines are necessary for two reasons. Firstly, it is not clear whether the former term should be qualified as a discrete criterion or should instead simply “integrate” the meaning of the latter; secondly, leaving the interpretation of those concepts to the Member States’ discretion carries the risk of a non-uniform application across the EU<sup>100</sup>. The Court was well aware of this. Its starting point was that the terms in question relate to autonomous concepts of EU law and Member States are not entitled to broaden their meaning<sup>101</sup>.

As a result, the above referred balance of interests on the one hand will have to avoid conferring upon the first term too broad a meaning, which would increase the possibility of refusal and on the other hand will have to ensure that the rights of those individuals that stay in a Member State for a reasonable period of time are adequately recognised<sup>102</sup>. The Court proceeded by dictating a two-steps procedure that the executing judicial authority must follow. First of all, it would have to verify whether or not the specific situation of the sought person is covered by those terms and only after making this assessment would it be allowed to ascertain that person’s legitimate interests to remain in the requested State<sup>103</sup>. The conclusion of the Court was that the sought person is “resident” when he has established his place of residence in the executing State; he is “staying” in that State if, after a stable period of presence, he has developed connections which are of a similar degree to those resulting from residence<sup>104</sup>.

In regard to this particular case, it could be safely said that Mr. Kozłowski was certainly not a resident. Could he be considered as “staying” in Germany? In the Court’s view, in order to establish whether his situation still fell within the scope of

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<sup>100</sup> As the Commission observed, there are linguistic differences in the various versions of Article 4 (6) FD. For instance, the Spanish version of “staying in” refers to “habite en él (...)”; the French version refers to “demeure dans l’Etat membre (...)”. They both seem to identify an autonomous concept having the same importance as the criteria of residence and nationality, while, in the Commission’s view, it is “(...) a necessary but not sufficient condition for invoking the ground for optional non-execution (...)”. See ECJ C-66/08, *supra* par. 35.

<sup>101</sup> ECJ C-66/08, *supra* par. 42-43.

<sup>102</sup> ECJ C-66/08, *supra* par. 36-37.

<sup>103</sup> ECJ C-66/08, *supra* par. 44.

<sup>104</sup> ECJ C-66/08, *supra* par. 46.

Article 4 (6), his connections with the hosting State must be assessed in light of a number of objective factors, such as the length, nature and conditions of his presence and the family and economic ties with that State<sup>105</sup>. Should all these factors be taken into account at once? The ECJ, while making it clear that the final decision should not rely simplistically on only one of them, distinguished between two categories of factors. On the one hand, the fact that the requested person's stay was not uninterrupted and did not comply with national legislation on residence of foreign nationals could be considered relevant for the purpose of deciding whether the person is actually "staying" the executing Member State (the first step of the procedure indicated above). On the other hand, committing crimes and being detained in the requested State are elements that can be useful (although, of course, not by themselves) for assessing whether or not the request should be refused (the second step)<sup>106</sup>.

Mr. Kozłowski's specific situation, as described by the German court, did not seem to comply with those criteria. His presence in Germany was not continuous, his German was poor, he did not have any family and, although working occasionally, he depended financially mostly on the proceeds deriving from the crimes he committed<sup>107</sup>. Therefore, the term "staying" did not apply in such case. As a result, there would be no need to answer the second question referred by the German court, i.e. whether the fact that, in transposing Article 4 (6), Germany allows a different treatment between the nationals of the executing Member State (who can never be extradited against their own will) and the nationals of other Member States (whose extradition is decided at the discretion of the competent authority)<sup>108</sup>.

In this second judgement, the ECJ applies, as seen, the balancing method between the interest in the prosecution of offenders and enforcement of sentences and the interests of the individual. This is not a unique example in the area of freedom, security and justice, as shown in previous cases<sup>109</sup>. What is worth noting here is that

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<sup>105</sup> ECJ C-66/08, *supra* par. 48.

<sup>106</sup> ECJ C-66/08, *supra* par. 50-51.

<sup>107</sup> ECJ C-66/08, *supra* par. 25-26.

<sup>108</sup> ECJ C-66/08, *supra* par. 56.

<sup>109</sup> See e.g. on *ne bis in idem* ECJ, C-469/03, *Miraglia*, [2005] ECR I-2009 par. 34.

for the first time the Court acts as a sort of third instance court, deciding how a particular provision of the Framework Decision must be interpreted with concrete reference to a request for surrender. It is however regrettable that the question of compliance of an implementing law with the principle of non-discrimination and with the concept of EU citizenship has not been analysed. It seems that, whenever the real impact of mutual recognition and of the EAW on State sovereignty and individual rights is at stake, any evaluation of the merits is carefully neglected.

In addition, it would be important to address the different wording of Article 4 (6) and Article 5 (3). The latter refers to the possibility to subject surrender to the condition that the person is returned to the executing Member State in order to serve there the custodial sentence or detention order. It is not clear why in this case (where the EAW is issued for the purposes of prosecution) no mention is made of the term “staying”. The Court did not intend to address this issue in this case<sup>110</sup>: it may be presumed that the *ratio* behind this provision is merely the result of a cost-benefit analysis, as returning an individual to the executing State after trial is generally more expensive and is thus perceived as not necessary for those who show weaker links with that State.

However, behind *Kozłowski* lies a more fundamental issue. What is at stake is the role of Member States in implementing the Framework Decision on the EAW. Since there are no legislative guidelines on the terms “staying” and “resident”, the risk is that this system might place too heavy a burden upon national judicial authorities’ shoulders. The application of the concepts of “staying” and “resident” in different contexts and legal systems may be potentially discriminatory. This also raises doubts as to whether the Court should be left alone in filling the gaps.

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<sup>110</sup> ECJ C-66/08, *supra* par. 40. It is worth mentioning that Article 19a and recital 6d of the Preamble of the proposed Framework Decision on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union state that the Framework Decision applies also to enforcement of sentences in the cases envisaged by Article 4 (6) and 5 (3), to the extent that they are compatible with the Framework Decision on the EAW. See Doc. 9688/07 COPEN 68, Brussels, 22 May 2007.

## 6.4 Conclusion

As shown in this chapter, the human rights perspective is certainly one of the mainstays on the basis of which the surrender mechanism works. The EAW is a concrete example of balance between the values of freedom, security and justice, which highlights the practical challenges facing such a delicate exercise. It is submitted that the bodies that are designed, depending on their role, as protectors of security or as guarantors of freedom and justice, have not been entrusted with sufficient powers to perform their task. For instance, Eurojust and the Court of Justice are very much in need of re-adjustment in this sense: the former's competences should be extended and the latter's control over Member States' action in criminal matters should be made more incisive (as the Lisbon Treaty would do if it entered into force). This "deficiency" is probably one of the reasons for the Court's careful approach in the two EAW cases mentioned above. From the analysis of *Advocaten voor de Wereld* and *Kozłowski*, it can be argued that in not addressing the core issues of the EAW and its implications for human rights, the ECJ avoided any potential domino effect on the compatibility of the whole mutual recognition agenda with the rule of law and with equal treatment. One may only expect that future rulings will shed more light on the "dark side" of the surrender mechanism.

At the same time, the Framework Decision should avoid the ambiguities deriving from the uncertain definition of the human rights clause. A clear set of rules defining the rights of the defence should be envisaged, either separately or by way of amendment to the Framework Decision. However, this operation should proceed hand in hand with a strengthening of the procedural rights in the whole area of freedom, security and justice. In this context, although any exercise of balance involving human rights must be carried out on the basis of proportionality criteria, the risk is that a lack of legislative guidelines would excessively widen the judicial authorities' discretionary powers. Finally, in order to ensure legal certainty, multiple requests, accessory surrender and conflicts of jurisdiction should be regulated.

The assessment carried out above is true not only in absolute terms, but also by way of a comparison. It is striking that the new system seems to offer a lesser degree of protection of fundamental rights than the previous extradition procedure as applied within the European Union. An overall analysis of the principles of dual criminality, speciality, double jeopardy, as well as the removal of the nationality and political offence exception (as seen in the previous chapters<sup>111</sup>), shows that their adaptation to the surrender mechanism, while justified on the basis of effectiveness, has not been accompanied by a thorough re-elaboration of the framework within which the EAW is supposed to function. These traditional rules were designed as safety nets to prevent abuses by governments<sup>112</sup>: it follows that a complete or partial removal of them makes it even more necessary to fill the existing “human rights” gaps.

It is apparent that further steps should be made in the direction of a coherent system of cooperation, where efficient prosecution and adequate guarantees are properly balanced. This is essential to the very legitimacy of the EAW: failure to ensure appropriate standards of protection in this area risks threatening mutual trust, thus triggering a self-destructive vicious circle. As mentioned in a previous chapter<sup>113</sup>, the idea that the individual is simply an object of extradition proceedings (which revolved around State sovereignty) has been in the second half of the twentieth century gradually replaced by a new conception, focusing more and more on the individual’s rights and needs. It is therefore unacceptable that the EAW mechanism (which derives from extradition) does not seem to be very concerned about them. On the other hand, a general obligation upon the executing State not to surrender should be subject to a high threshold (where there is a flagrant violation of human rights, i.e. the so-called *Soering* test). Such obligation should be strengthened by a detailed set of rules establishing at the European level which rights the individual is entitled to, in order to avoid disputes and uncertainties deriving from a subjective interpretation of these rights by the executing State. Taking this into account, a sufficient degree of

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<sup>111</sup> See *supra* chapter 3 p. 82 *et seq.*

<sup>112</sup> J. Dugard, C. Van Den Wyngaert, Report of the Committee on Extradition and Human Rights to the International Law Association, Helsinki, 1996, 142-170.

<sup>113</sup> See *supra* chapter 1 p. 14.

protection should be ensured by way of the non-discrimination clause, especially in all those borderline cases which were once caught by the political offence exemption<sup>114</sup>.

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<sup>114</sup> See *supra*, chapter 1. p. 16-17.



## 7. Conclusion

### 7.1 Overview of the findings of the thesis

The EAW seems to be a very effective tool for the prosecution and conviction of criminals across the EU. The creation of this mechanism of cooperation is to be viewed (from a purely theoretical perspective) as a clear improvement when compared to traditional extradition. If one looks at it using the standards of “effectiveness” adopted by the European Commission, one cannot help but welcome this change. Following those standards, the EAW is particularly effective because the average time required to surrender an individual upon request is much lower than under the earlier system. It must also be recognised that the removal of political checks and the establishment of a direct contact between European judicial authorities have contributed to the reduction of formalities. However, a less superficial analysis (which goes beyond the mere elaboration of statistics published in official reports so far) reveals a substantial number of gaps and flaws. They relate primarily to the fact that a suitable “safety net” for the defence is missing. This is not due simply to the lack of sufficient human rights guarantees in the body of the Framework Decision on the EAW. The hasty adoption of the EAW prevented a thorough reflection on the consequences of its introduction. Such reflection should have gone much deeper and should have been conducted from several viewpoints, such as for instance international law, criminal law and EU constitutional law. Instead the new mechanism (following a pattern similar to the whole Third Pillar in its early years) seems to be mainly modelled on the urge to fight terrorism and all main cross-border crimes.

First of all, the modification of classic extradition law principles such as dual criminality, nationality and the speciality rule (which can now be applied rather flexibly) should have been accompanied by a parallel setting up of an adequate

framework of protection of human rights<sup>1</sup>. Those principles had a sense not only as an upshot of the assertion of State sovereignty, but as a fundamental guarantee against potential abuses. This was part of the general trend towards conceiving the extraditee as a subject rather than an object of the proceedings. Turning to a depoliticised system does not absolve Member States from the duty to provide individuals with instruments to defend themselves. After all, the principle of “equality of arms” (according to which the defendant and the public prosecutor should be treated equally) still plays a pivotal role in the trial and an analogous reasoning should apply to the EAW, even if strictly speaking the latter cannot be considered as a “trial measure”. It has been shown in this work that the standards of protection of human rights within the EU are not uniform. In both new and old Member States there are numerous instances where the provisions of the ECHR are violated and this should be a warning sign in establishing the area of freedom, security and justice.

Second, although the “human rights” side is certainly defective, the “prosecution” side is not complete either. As this thesis has pointed out, the relatively weak role of Eurojust (despite recent amendments) and the lack of rules on conflicts of jurisdiction undermine considerably inter-State cooperation<sup>2</sup>. This means that even the perspective of “effectiveness”, mentioned earlier, has not been properly developed.

Third, in the general context of the passage from an international law to a EU law cooperation system, one could say that the Third Pillar has acquired a somewhat hybrid status, stemming from a combination of intergovernmental and supranational features. However, the outcome is not satisfactory, as demonstrated by the weak powers of the ECJ and the European Parliament as opposed to the strong influence that Member States can still exercise without the fear of sanction by the Commission<sup>3</sup>. One may therefore wonder whether such structure constitutes a fertile ground for a suitable European criminal law or if it would be more appropriate not to

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<sup>1</sup> See chapter 6, p. 194.

<sup>2</sup> See chapter 6, p. 208.

<sup>3</sup> See chapter 2 p. 56.

go off the beaten track of inter-State cooperation. Whatever option is chosen, the EAW could without doubt be viewed as the cornerstone of an incoherent system, which is very much in need of more legislative intervention to foster legitimacy and democracy.

It follows that the acclaimed principle of mutual recognition cannot be implemented on its own in the area of criminal matters. Approximation should be pursued more decisively, in order to make the product of a foreign legal system more “recognisable”. Some of the most striking paradoxes that can be observed in the functioning of the EAW are identifiable in the substantive law area. In a number of cases both penalties and offences can vary significantly<sup>4</sup>. Concerning penalties, as noted in the thesis, even in relation to murder (which is one of the crimes whose definition is roughly widely accepted throughout the EU Member States) a different criminal “stigma” can be attached depending on the legal system where the trial takes place. For instance, in the case of “killing on demand” a German judge may impose between six months and five years’ imprisonment whereas an Italian judge may establish a sentence of between six years and fifteen years’ imprisonment (as well as life imprisonment whenever aggravating circumstances have been determined). Concerning the constituent elements of the offences, problems may arise (and on some occasions have indeed arisen) in relation to cases of euthanasia, abortion as well as possession of drugs, racism and xenophobia, racketeering and extortion, swindling, sabotage (to indicate the most prominent examples). The reasons for these problems are twofold. First, some of these offences carry a strong value judgement and the criteria for criminalising a specific conduct and defining its elements are contingent upon various factors (not only legal, but also political, social, economic and so on). One of the consequences of this has been that some EAWs have been issued for offences which are considered “minor” in richer countries but are viewed as sufficiently serious in poorer countries. Second, the lack of definition of those offences in the Framework Decision undermines clarity and legal certainty and it seems that the potential risks of this approach have not been assessed thoroughly by the drafters of the Framework Decision.

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<sup>4</sup> See chapter 4 p. 98.

Moreover, the need for a common platform is essential to reinforce mutual trust, which goes hand in hand with legitimacy: if one is legitimate, then one is trusted and, at the same time, if one is trusted, then one is legitimate. This thesis has demonstrated that it is necessary to strengthen trust not merely through a top-bottom approach, but also through a bottom-top approach, which consists of exchange of information and best practices, mutual evaluation mechanisms, training, adoption of practical guidelines, setting up of networks, etc.<sup>5</sup> A step in the direction of developing trust and confidence would be to reduce the list of categories of offences for which double criminality has been removed to a few “core offences” for which approximation can be pursued more effectively<sup>6</sup>.

A possible scenario is the entry into force of the Treaty of Lisbon. In this case some of the obstacles that have been stressed in this thesis would be probably overcome by the merging of the First and the Third Pillar (most notably, the role of the European Parliament and of the Court of Justice would be enhanced). The Treaty also requires that within five years all Framework Decisions are turned into Directives (i.e. their equivalent in the First Pillar). Nevertheless, most of the problems mentioned above would still be evident and perhaps be even more acute, as there would be a higher demand for legitimacy and trust. This is of course a further variable that compounds the matter and one may even wonder whether an adequate system of European criminal law is feasible in the long term<sup>7</sup>.

In this regard, this thesis has also focused on the implications of the implementation of the EAW for the EU as a whole. This relates to the more general discourse on what is to be expected from the new developments of the Third Pillar. It is important in this context to define the contours of freedom, security and justice. Are Member States required to trust unconditionally each other’s freedom, security and justice? Although no clear answer can be obtained from the EU official documents, some reflections should be made.

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<sup>5</sup> See chapter 5 p. 193.

<sup>6</sup> See chapter 4 p. 130-131.

<sup>7</sup> See reflections at the end of these conclusions.

First of all, the brief analysis of the mutual recognition instruments carried out in this work has shown that the flaws of the EAW scheme have been unfortunately reproduced in all of them. None of the Framework Decisions has an adequate mechanism for safeguarding individual rights. The list of thirty-two categories of offences has been included in all of them and in one case (mutual recognition of financial penalties) has even been extended to thirty-nine. Their negotiation has been slower than with the EAW and has sometimes seemed to face insurmountable obstacles, as was the case for the adoption of the European Evidence Warrant: emblematic of this is the German reservation in respect of six offences (including swindling or racketeering and extortion)<sup>8</sup>.

Secondly, from a substantive criminal law point of view, this thesis has explored the extent to which mutual recognition and/or harmonisation can be viewed as credible options. The question is linked to the issues of identity and sovereignty. When mutual recognition operates, there is always at least one element of diversity, whereas harmonisation postulates no differences. Can the EU speak a common language in terms of crime and punishment? Or, alternatively, could one imagine a network-like system of reciprocal exchanges of rights and obligations between equal sovereigns, with no overarching authority and a plurality of monopolies on the use of force?<sup>9</sup> The latter option seems more realistic in the short term and would imply adapting principles of international law for the purposes of a unique experiment of integration within the EU. However, the two options are not necessarily mutually exclusive: one may argue even intuitively that a long-established practice of mutual recognition can eventually lead to harmonisation. As mentioned earlier, an essential condition for this is the combined development of mutual recognition and approximation, i.e. a step-by-step approach.

This work has sought to demonstrate that the EAW was instead introduced as a result of a strong political pressure deriving from 9/11 and that those circumstances have been exploited to push for a more radical approach (combining a limited number of

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<sup>8</sup> See chapter 2 p. 46-53.

<sup>9</sup> See chapter 2 p. 60-67.

grounds for refusal with a more extensive abolition of dual criminality)<sup>10</sup>. This would suggest that the *ratio* underlying the expansion of the Third Pillar has been the need to enhance security at the EU level, on the assumption that Member States are not able to achieve effective results on their own. There are indeed reasons for upholding this. It is commonly believed that, as a consequence of globalisation, growing interdependence and porous borders within the EU territory, classic nation-States are no longer able to guarantee a sufficient degree of security to their citizens. This may be true in the case of immigration, drug trafficking, terrorism and other cross-border offences, as well as in serious cases of murder or theft. However, is this enough to justify the building up of a procedural and substantive criminal law system?

It is argued here that the issues of identity, legitimacy, sovereignty should be taken much more seriously. The move from mere cooperation to effective integration needs to be supported by a constitutional discourse flowing from several areas (institutions, citizens, informal networks etc.). In this context, key concepts such as mutual recognition and mutual trust need to be more strongly associated with the rule of law, regardless of whether or not the ultimate aim is to achieve full harmonisation. This is why this thesis has also attempted to provide a definition of mutual trust as a starting point for future debate<sup>11</sup>. A fundamental assumption is that it is not useful to elaborate a concept of mutual trust from a purely legal perspective (which is the path followed by the Court of Justice). Instead, a sociological approach should be adopted. The notion and scope of mutual trust have therefore been analysed in line with the studies on the attitudes and behaviour of people in inter-personal relationships. Part of the social sciences literature has indeed identified a link between trust and cooperation and it is argued here that understanding the essence of trust will help to clarify the purpose and benefits of the EAW mechanism and European Criminal Law. Mutual trust is therefore viewed as the reciprocal belief that the common principles lying at the heart of the EU legal systems will not be breached. Its subjects can be Member States or judicial authorities. Moreover, trust will always be conditional on other factors, such as the lack of serious reasons that would justify refusal to cooperate. The definition of mutual trust has been used to

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<sup>10</sup> See chapter 3 p. 71-80.

<sup>11</sup> See chapter 5 p. 190-193.

verify, through a series of interviews conducted with practitioners, the extent to which it can be deemed to exist in two countries belonging to the common law and the civil law tradition: the United Kingdom and Italy. The conclusion has been that an adequate degree of trust does not yet exist and more should be done to promote it.

## 7.2 Policy recommendations

In the light of what has been said above, the following suggestions are made:

- Adopting a new Framework Decision on the rights of the defence, or (alternatively) incorporating a substantial number of provisions in the body of the Framework Decision on the EAW (and, similarly, of the other mutual recognition instruments)
- Strengthening the role of Eurojust in the context of the EAW, for instance by providing a system of sanctions for States that fail to cooperate
- Adopting clear rules on conflicts of jurisdiction: one of the relevant criteria could be territoriality (i.e. the place where the offence has been committed, unless its serious adverse effects are felt elsewhere)
- Restricting Article 2 (2) list to a few “core offences” for which an agreement on the definition of the act and the penalty to be imposed can be more easily found
- Further approximating both the substantive and procedural rules (i.e. on one hand the constituent elements of offences and penalties *when this is possible* and on the other hand rules ensuring adequate guarantees for the individual)

- Increasing the use of informal methods of evaluation, exchange of best practices and, more generally, adopting guidelines and soft law measures to promote awareness and mutual understanding

### 7.3 Areas of future research

It is important to clarify what the benefits of European Criminal Law are (if any). It is also necessary to find its justification and *telos*. Do we need more integration of our criminal legal systems and what are the normative claims of the emerging model? Is the main purpose of the EAW and all other mutual recognition instruments to facilitate cooperation or do they also constitute the basis for a more organic legislation which will be built up in the near future? The recent case law of the ECJ, the official documents of the Commission and the provisions of the Lisbon Treaty seem to show a trend in the second direction. It has been argued however by some scholars that the issues raised by the development of European Criminal Law (such as legitimacy, consensus, common public sphere etc.) are ethical and as such cannot be dealt with properly by the EU institutions<sup>12</sup>. The debate must therefore refer to the broader picture of the EU legal order, so as to assess the extent to which the EU should acquire the features of a State and whether our analysis of the future of EU criminal law should still be made on the basis of the classical State-centred paradigm of sovereignty<sup>13</sup>.

A further question is then what model of integration is being pursued. An essential condition for the legitimacy and the credibility of the European Criminal Law project of integration (if this is really the path that the EU is willing to follow) is the

<sup>12</sup> K. Nuotio, 'Criminal law of a transnational polity' in H. Müller-Dietz et al. (eds.), *Festschrift für Heike Jung* (Nomos 2007) 685, 698.

<sup>13</sup> The relevant literature is remarkably large. See e.g. J. Habermas, 'The Constitutionalisation of International Law and the Legitimation Problems of a Constitution for World Society' (2008) 15 *Constellations* 444; N. MacCormick, 'Beyond the Sovereign State' (1993) 56 *The Modern Law Review* 1.



guarantee of common standards. After all, this does not differ greatly from the real purpose of modern criminal law, which is to avoid abuses and distortion. A surrender scheme which is implemented in different ways across Europe is certainly not an ideal move in that direction. It is also necessary to clarify what we mean by freedom, security and justice. Do they matter as values, as general principles, as aspirations? Who are their beneficiaries and should they include the notion of freedom as self-determination, in the sense that there must be as little interference as possible in the constitutional sphere of Member States?

This shows that there are a few definitional issues within the EU that remain unresolved. Does the EU have a common notion of rule of law? Further research should be carried out in order to establish what the boundaries of crime and punishment are and whether it is possible or desirable to confer upon the EU a right to punish. Related to this, the concept of mutual trust should be further explored to verify whether it can apply not only to the area of judicial cooperation, but also to police cooperation and EU criminal law as a whole.

In this context, it would be of value to analyse the coordination between the emerging system of criminal law and procedure in the EU and the general principles of international law. It would also be interesting to ascertain how the EU model relates to other regional or institutional models, such as the US or the International Criminal Court, which *inter alia* rely on peculiar mechanisms of surrender (called “interstate rendition” or “interstate extradition” in the US<sup>14</sup>).

One final consideration at the end of this *excursus* is that there is something disquieting when even the slightest suspicion emerges that a polity seeks to enhance security in order to hide its weaknesses and failures.

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<sup>14</sup> On this, see e.g. R.J.Hardy, ‘Continuity or Change in Interstate Extradition? Assessing Puerto Rico v. Branstad’ (1991) 21 *Publius: The Journal of Federalism* 51 and chapter 3, p. 77 note 212.

## Appendix- Grounds for non-execution provided for in the implementing statutes of the United Kingdom and Italy

Table 1. United Kingdom

Statutory Reference	Ground for non-execution	Framework Decision provision
S.7(4)	Identity of the requested person	Not included
S.12	Double jeopardy	Articles 3(2), 4(5)
S.13	Extraneous circumstances (EAW issued for the purpose of prosecuting or punishing a person on the basis of race, religion, nationality, gender, sexual or political orientation)	Recitals in the Preamble
S.14	Passage of time	Not included
S.15	Requested person being under the age of criminal responsibility at the time of committing the offence	Article 3(3)
S.16	Hostage taking considerations	Not included
S.17	Specialty	Not included
S.18	Earlier extradition from Member State	Article 28
S.19	Earlier extradition from non Member State	Article 21
S.20	In absentia convictions	Subject to Article 5(1) conditions
S.21	Human rights	recitals/fundamental rights

S.25	Humanitarian Grounds	Not included
S.39	Surrender proceedings may be postponed pending claims for Asylum	Not included
S.208	National Security	Not included

Table 2. Italy

Statutory Reference	Ground for non-execution	Framework Decision provision
Article 18	<i>Not included in the Framework Decision</i>	
ibidem	objective reasons to believe that a EAW has been issued for discriminatory purposes where the act has been committed exercising freedom of association, freedom of the press as well as of expression in other media	

Statutory Reference	Ground for non-execution	Framework Decision provision
ibidem	where the EAW is based on a final decision which has been issued without respecting the rules relating to due process	
ibidem	where there is a serious risk that the sought person may be subject to death penalty, torture or other inhuman or degrading treatment or punishment	
ibidem	where the victim has given his/her consent to the act or where the facts relate to the exercise of a right or a duty or if the offence was committed as a result of fortuitous events or <i>force majeure</i>	
ibidem	in cases of <i>non lieu</i> decided by an Italian judge	

Statutory Reference	Ground for non-execution	Framework Decision provision
ibidem	where the requested person is pregnant or is the mother of a child less than 3 years old, except when the trial is still pending and there are serious reasons justifying detention	
ibidem	where the suspect or the accused was less than 14 when he committed the offence or less than 18 and the maximum penalty is less than 9 years of imprisonment	
ibidem	where the issuing State's legal system does not provide for special treatment for minors or for special means to verify whether the fugitive is fit to plead or in any case where the person cannot be held criminally responsible under Italian law	

Statutory Reference	Ground for non-execution	Framework Decision provision
ibidem	where the request concerns a political offence (save for crimes of terrorism under Article 11 of the United Nations Convention for the Suppression of Terrorist Bombings and Article 1 of the European Convention for the Suppression of Terrorism)	
ibidem	where immunity applies	
ibidem	where the requesting State's legal system does not provide for maximum terms of preventive custody or where the custodial measure on which the EAW is based is not reasoned	

Statutory Reference	Ground for non-execution	Framework Decision provision
ibidem	<i>Included in the Framework Decision</i> amnesty (provided that the State has jurisdiction to prosecute the offence under its own criminal law)	Article 3(1)
ibidem	<i>ne bis in idem</i> (which is however made mandatory not only in relation to final judgements but also when the EAW is issued pending trial in the executing State)	Articles 3 (2) and 4 (2), (3) and (5)
ibidem	statute of limitation	Article 4 (4)
ibidem	principles of territoriality and extra-territoriality	Article 4 (7) (a) and (b)
ibidem	“safeguard clause”, forbidding surrender whenever the sentence on which the request is based contains provisions which are deemed contrary to the fundamental principles of the Italian legal system	Article 27 draft Framework Decision (later amended)

Statutory Reference	Ground for non-execution	Framework Decision provision
ibidem	<p>“Other types” of grounds for refusal</p> <p>where the Council of the European Union has verified a serious and persistent breach by the requesting Member State of one of the principles set out in the ECHR, and in particular Articles 5 (right to freedom and security) and 6 (right to fair trial)</p>	Preamble
Articles 6 (6) and 16 (1)	<p>where the 30 days time limit in case of requests for additional information is not respected</p>	
Article 7 (2)	<p>offences having a fiscal nature, where domestic law does not impose the same kind of taxes or duties, customs or exchange or does not contain the same type of rules as the law of the issuing State</p>	



Statutory Reference	Ground for non-execution	Framework Decision provision
Article 8	double criminality	
Article 17 (4)	Lack of serious evidence of guilt	
Article 19 (however, as opposed to the Framework Decision, there is no discretion)	where the EAW is based on an <i>in absentia</i> decision and the person has not been summoned in person or otherwise informed of the date and place of the hearing, surrender is subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee that the person will be allowed to apply for a retrial of the case in the issuing Member State and to be	Article 5 (1)

<p>ibidem (however, as opposed to the Framework Decision, there is no discretion)</p>	<p>present at the judgement where the offence at issue is punishable by a custodial life sentence or life-time detention order, execution is subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or within twenty years, or for the application of measures of clemency which the fugitive is entitled to apply for under the law or practice of the issuing Member State, in order to allow non-execution of such penalty or measure</p>	<p>Article 5 (2)</p>
<p>ibidem</p>	<p>where the person concerned is an Italian national or resident subject to a EAW issued for the purpose of</p>	<p>Article 5 (3)</p>

<p>(however, as opposed to the Framework Decision, there is no discretion)</p>	<p>prosecution, execution is only possible if there is a guarantee that the person, after being heard, will be returned to Italy in order to serve the custodial sentence or detention order passed against him</p>	
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## 2) **European and International legislation**

### **a) Primary legislation**

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