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The future of mutual recognition in criminal matters in the European Union / L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne

EDITED BY GISELE VERNIMMEN-VAN TIGGELEN, LAURA SURANO AND ANNE WEYEMBERGH

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Foreword

This book is based on a study entitled *Analysis of the future of mutual recognition in criminal matters in the European Union*. The Institute for European Studies of the Université Libre de Bruxelles (ULB) was selected by the European Commission * to carry out the study and the research was done with the support of the academic network ECLAN (*European Criminal Law Academic Network*, www.eclan.eu) throughout the year 2008. Updates to contributions to this volume were made up until March 2009.

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Introduction

Gisèle Vernimmen-Van Tiggelen et Laura Surano

1. L'émergence de la reconnaissance mutuelle

La coopération judiciaire pénale n'était pas d'emblée au cœur de la construction européenne. Sa première apparition dans les traités ne date que de 1992[1]. Jusque-là les Etats membres collaboraient entre eux sur la base de traités bilatéraux, de conventions multilatérales, comme les conventions élaborées dans le cadre du Conseil de l'Europe, ou d'accords régionaux, comme les accords nordiques.

Le besoin de raffermir les relations entre Etats membres dans ce domaine s'est progressivement fait sentir et s'est d'abord traduit, à partir des années soixante-dix, par une série de cinq conventions et accords conclus dans le cadre de la coopération politique[2], qui ont cependant connu un succès limité. Le principal instrument améliorant la coopération judiciaire classique reste la convention d'application de l'accord de Schengen (CAAS)[3], qui fait depuis partie de l'acquis de l'UE. La

[1] Traité de Maastricht du 7 février 1992, entré en vigueur le 1er novembre 1993.

[2] Convention du 25 mai 1987 entre les Etats membres des Communautés européennes relative à l'application du principe *non bis in idem*, accord du 25 mai 1987 relatif à l'application, entre les Etats membres des Communautés européennes, de la convention du Conseil de l'Europe sur le transfèrement des personnes condamnées, accord du 26 mai 1989 entre les Etats membres des Communautés européennes relatif à la simplification et à la modernisation des modes de transmission des demandes d'extradition, accord du 6 novembre 1990 entre les Etats membres des Communautés européennes relatif à la transmission des procédures répressives, convention du 13 novembre 1991 entre les Etats membres des Communautés européennes sur l'exécution des condamnations pénales étrangères.

[3] Convention d'application de l'accord de Schengen du 14 juin 1985 entre les Gouvernements des Etats du Benelux, de la République fédérale d'Allemagne et de la

convention d'entraide judiciaire pénale entre Etats membres de 2000[4], qui n'est toujours pas ratifiée par quatre d'entre eux[5], relève de cette même démarche.

Ces textes venaient compléter les mécanismes de coopération en place, et surtout les moderniser, les rendre plus fluides, par exemple en prévoyant des modes de transmission plus directs, en limitant les motifs de refus, en réduisant les possibilités de faire des réserves. Sur le fond, ils ne se départaient pas toutefois de la conception traditionnelle, marquée par le principe de souveraineté territoriale. Ceci explique, notamment, le rôle significatif joué par l'exécutif, et la discrétion très large laissée à l'Etat requis, non seulement dans l'entraide judiciaire primaire, là où cet Etat est invité à jouer un rôle essentiel dans le procès pénal[6], où le mécanisme repose sur un consensus, mais également dans l'entraide judiciaire secondaire, là où l'Etat requérant reste maître du procès, où les motifs de refus demeurent nombreux et encore formulés de manière générale[7].

Avec le traité d'Amsterdam, la création d'un espace de liberté, de sécurité et de justice est devenu l'un des objectifs de l'UE[8]. Les trois concepts sont intrinsèquement liés, dans le sens où il n'y a pas de liberté sans sécurité, ni de sécurité sans justice, encore moins de justice sans liberté. Par ailleurs comme on le voit à l'article 2 UE, le lien entre espace de liberté, de sécurité et de justice et la libre circulation des personnes est très fort[9]. La lutte contre la criminalité ne justifie pas d'entraver la libre circulation des personnes. Mais aussi, l'exercice de cette liberté doit pouvoir compter sur la certitude qu'au sein de l'UE l'exercice efficace de la justice est assuré en même temps que la protection des droits fondamentaux des personnes affectées, sans distinction.

République française relatif à la suppression graduelle des contrôles aux frontières communes, *JO*, n° L 239, 22 septembre 2000, p. 19.

[4] Convention du 29 mai 2000 relative à l'entraide judiciaire en matière pénale entre les Etats membres de l'UE, *JO*, n° C 197, 12 juillet 2000, p. 3.

[5] L'Irlande a mis la convention en application mais ne l'a pas formellement ratifiée.

[6] Comme dans les conventions sur la transmission des procédures répressives (convention STCE n° 073 du 15 mai 1972 sur la transmission des procédures répressives et accord du 6 novembre 1990 entre les Etats membres relatif à la transmission des procédures répressives) ou sur le transfèrement des personnes condamnées (convention STCE n° 112 du 21 mars 1983 sur le transfèrement des personnes condamnées, accord du 25 mai 1987 relatif à l'application, entre les Etats membres des Communautés européennes, de la convention du Conseil de l'Europe sur le transfèrement des personnes condamnées, et convention du 13 novembre 1991 entre les Etats membres des Communautés européennes sur l'exécution des condamnations pénales étrangères).

[7] Tel l'article 2(b) de la convention STCE n° 030 du 20 avril 1959 d'entraide judiciaire en matière pénale.

[8] Article 2, 4e tiret du traité sur l'Union européenne, introduit par le traité d'Amsterdam du 2 octobre 1997, entré en vigueur le 1er mai 1999.

[9] « L'Union se donne pour objectifs : (…) − de maintenir et de développer l'Union en tant qu'espace de liberté, de sécurité et de justice au sein duquel est assurée la libre circulation des personnes, en liaison avec des mesures appropriées en matière de contrôle des frontières extérieures, d'asile, d'immigration ainsi que de prévention de la criminalité et de lutte contre ce phénomène ».

A peu près au même moment, et de manière significative, sous présidence britannique, à partir du Conseil européen de Cardiff en juin 1998 [10], la coopération judiciaire pénale a connu une inflexion substantielle. Cette nouvelle approche s'est vue consacrée l'année suivante, au Conseil européen de Tampere, puisque ce dernier a fait du principe de reconnaissance mutuelle la « pierre angulaire » de la coopération judiciaire, tant civile que pénale, au sein de l'Union européenne [11].

2. Le concept de reconnaissance mutuelle : ce qu'il signifie et ce qu'il implique

A vrai dire, ce concept n'était pas inconnu, puisqu'il était à la base de la coopération judiciaire civile avec la convention de Bruxelles de 1968 sur la compétence et l'exécution des décisions civiles et commerciales [12], et qu'il avait également joué un rôle moteur dans la réalisation du marché intérieur depuis les années 1980. En droit pénal, il s'agissait de concrétiser la notion d'un espace pénal européen au sein duquel les décisions judiciaires rendues dans un Etat membre « circuleraient » elles aussi librement, c'est-à-dire qu'elles seraient reconnues et exécutées dans n'importe quel autre Etat membre. La reconnaissance mutuelle est indissociable de l'idée d'un espace commun. Mais elle ne va pas nécessairement de pair avec une politique pénale commune, elle devrait surtout aider à dépasser les divergences d'approche entre Etats membres à l'égard des phénomènes criminels.

La volonté de dépasser les anciens concepts se révèle d'emblée dans la terminologie : il n'y a plus d'Etat requérant ou requis, mais un Etat membre d'émission et un Etat membre d'exécution d'une décision. On ne parle plus d'extradition mais de remise, on n'émet pas une commission rogatoire internationale ou une demande, mais un mandat ou une décision. Sur le plan de la procédure, on assiste à une judiciarisation, presque complète, de l'entraide. On allège les formalités, ou du moins, on les standardise grâce à des formulaires qui constituent, soit la décision à exécuter elle-même, soit un certificat qui l'accompagne et dispense de traduire la décision. On encadre l'exécution dans des délais (sans cependant en sanctionner directement le respect). Enfin, on énumère limitativement les motifs de refus.

Mais s'agit-il vraiment d'une approche révolutionnaire de la coopération judiciaire pénale ? Ou seulement d'un pas de plus dans la voie de la simplification ? Et surtout, la reconnaissance mutuelle est-elle exclusive d'autres mesures de coopération judiciaire, permet-elle de renoncer à l'harmonisation, est-elle la seule méthode de réalisation d'un espace de justice ?

On oublie souvent de citer la phrase qui précède, dans les conclusions de Tampere, la formule régulièrement reprise et reproduite ci-dessus. Aux termes de ce passage :

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[10] Conseil européen de Cardiff des 15 et 16 juin 1998, conclusions de la présidence, par. 39 (SN 150/1/98 REV1).

[11] Conseil européen de Tampere des 15 et 16 octobre 1999, conclusions de la présidence, par. 33 (Document Presse 200/1/99).

[12] Convention du 27 septembre 1968 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, *JO*, n° L 299, 31 décembre 1972, p. 32.

> « Le renforcement de la reconnaissance mutuelle des décisions judiciaires et des jugements et le rapprochement nécessaire des législations faciliteraient la coopération entre autorités et la protection judiciaire des droits des personnes ».

La Cour de justice, dans l'arrêt du 11 février 2003 [13] qui a marqué le départ d'une abondante jurisprudence sur l'application de l'article 54 de la CAAS sur le *non bis in idem*, explique par ailleurs, dans son par. 33, que

> « (…) le principe *ne bis in idem* (…) implique nécessairement qu'il existe une confiance mutuelle des Etats membres dans leurs systèmes respectifs de justice pénale et que chacun de ceux-ci accepte l'application du droit pénal en vigueur dans les autres Etats membres, quand bien même la mise en œuvre de son propre droit national conduirait à une solution différente ».

On pourrait donc, à la lumière des citations qui précèdent, résumer de la façon suivante les contours de la reconnaissance mutuelle, et en déduire les paramètres qui devraient guider la négociation, la transposition et l'application des instruments de reconnaissance mutuelle :

- la reconnaissance mutuelle repose sur la confiance mutuelle, laquelle est le corollaire d'un espace commun de justice ;
- la reconnaissance mutuelle ne se résume pas à une simplification de la coopération, mais en tout cas elle ne peut qu'aller dans le sens de faciliter cette coopération ;
- elle n'exclut pas le rapprochement des législations s'il s'avère nécessaire pour faciliter la coopération entre autorités et la protection judiciaire des droits de la personne ;
- la reconnaissance mutuelle devrait garantir non seulement que les jugements seront appliqués, mais aussi qu'ils le seront de manière à protéger les droits des personnes [14].

3. L'état des lieux

La reconnaissance mutuelle a immédiatement mobilisé les institutions : la Commission a présenté en juillet 2000 une communication centrée sur les décisions finales [15], et en novembre de la même année fut adopté un premier programme déclinant vingt-quatre mesures à prendre, accompagnées d'orientations générales et affectées d'un indice de priorité, pour mettre en œuvre ce principe [16].

Cinq ans après, la même thématique figurait à l'ordre du jour du Conseil européen de La Haye [17]. Il s'agissait de faire le point, de mettre l'accent sur certains aspects (par exemple, la coordination des poursuites) et de relancer les travaux sur d'autres (comme

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[13] CJ, 11 février 2003, aff. C-187/01 et C-385/01, *Gözütok et Brügge*.

[14] Voy. sur ce dernier point la communication de la Commission, *Reconnaissance mutuelle des décisions finales en matière pénale*, COM (2000) 495, 26 juillet 2000.

[15] *Ibid.*

[16] Programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales, *JO*, n° C 12, 15 janvier 2001, p. 10.

[17] Conseil européen des 4 et 5 novembre 2004, conclusions de la présidence, annexe I (14292/1//04 REV1).

les garanties procédurales). Un nouveau programme [18], puis un plan d'action [19], dressaient la liste des actions à entreprendre pour la réalisation de l'espace de liberté, de sécurité et de justice en ce compris, bien entendu, le renforcement de la justice et la poursuite de la mise en œuvre du principe de reconnaissance mutuelle.

Malgré l'instauration d'un mécanisme de rapport annuel par la Commission (le « *scoreboard plus* »), la dynamique s'est quelque peu essoufflée. Au 31 mars 2009, le seul instrument qui soit réellement opérationnel dans tous les Etats membres est la DC sur le mandat d'arrêt européen (MAE) [20]. Le délai de transposition est expiré pour trois autres DC, dont aucune n'est toutefois transposée dans tous les Etats membres : la DC « gel » du 22 juillet 2003 [21], la DC « sanctions pécuniaires » du 24 février 2005 [22], et la DC « RM des décisions de confiscation » du 6 octobre 2006 [23]. Trois autres DC ont été adoptées dans les derniers mois de 2008 : la DC « RM des peines privatives de liberté » [24], la DC « RM des décisions probatoires, avec sursis ou alternatives » [25], et la DC sur le mandat d'obtention de preuves (MOP) [26]. En 2009, une DC sur les jugements par défaut a été adoptée [27], qui modifiera la plupart

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[18] Programme de La Haye : renforcer la liberté, la sécurité et la justice dans l'UE, *JO*, n° C 53, 3 mars 2005, p. 1.

[19] Plan d'action du Conseil et de la Commission mettant en œuvre le programme de La Haye visant à renforcer la liberté, la sécurité et la justice dans l'UE, *JO*, n° C 198, 12 août 2005, p. 1.

[20] Décision-cadre 2002/584/JAI du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres, *JO*, n° L 190, 18 juillet 2002, p. 1.

[21] Décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve, *JO*, n° L 196, 2 août 2003, p. 45. EL, IT, LU et PT ne l'avaient pas encore transposée au 1er mars 2009.

[22] Décision-cadre 2005/214/JAI du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, *JO*, n° L 76, 22 mars 2005, p. 16. BE, BG, CY, DE, EL, IE, IT, LU, MT, PT, SE et SK ne l'avaient pas encore transposée au 1er mars 2009.

[23] Décision-cadre 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation, *JO*, n° L 328, 24 novembre 2006, p. 59. Seuls AT, CZ, DK, FI, IE, PL, RO et SI l'avaient transposée au 1er mars 2009.

[24] Décision-cadre 2008/909/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution dans l'UE, *JO*, n° L 327, 5 décembre 2008, p. 27.

[25] Décision-cadre 2008/947/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements et aux décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution, *JO*, n° L 337, 16 décembre 2008, p. 102.

[26] Décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves tendant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

[27] Décision-cadre 2009/299/JAI du 26 février 2009 portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès, *JO*, n° L 81, 27 mars 2009, p. 24.

des DC de RM en circonscrivant de manière uniforme le motif de refus facultatif lorsque l'intéressé n'a pas comparu en personne. Une DC sur le contrôle judiciaire présentenciel a, elle aussi, bénéficié d'un accord politique en novembre 2008 [28] mais reste en attente d'une adoption formelle.

Des progrès ont été faits en ce qui concerne la prise en compte des condamnations antérieures [29], mais il reste encore beaucoup à faire sur l'accès aux casiers judiciaires, et depuis la communication de la Commission sur les déchéances [30], la problématique des interdictions n'a pas vraiment connu de suite.

D'autres chantiers importants sont toujours en friche, comme le livre vert de la Commission de 2006 sur la présomption d'innocence [31]. La proposition de DC sur les garanties procédurales [32] est confrontée à un blocage depuis juin 2007. Sur le thème des conflits de compétence, la Commission avait soumis un livre vert en 2005 [33], et le Conseil a marqué en avril dernier son accord sur une approche fédérale au sujet d'un projet de décision-cadre relative à la prévention et au règlement des conflits de compétence dans le cadre des procédures pénales [34].

4. L'étude sur l'avenir de la reconnaissance mutuelle en matière pénale

Dans la perspective du prochain rendez-vous quinquennal, lors du futur Conseil européen de Stockholm qui devrait réactualiser le programme dans le deuxième semestre 2009, la Commission a publié en 2006 une communication sur la mise en

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[28] Conseil du 28 novembre 2008 (16325/1/08 REV1) ; proposition de la Commission de décision-cadre du Conseil relative à l'application du principe de reconnaissance mutuelle des décisions concernant le contrôle judiciaire comme alternative de détention provisoire (COM (2006) 468 du 29 août 2006, dernière version 17506/08 COPEN 261 du 6 mars 2009).

[29] Décision-cadre 2008/675/JAI du 24 juillet 2008 relative à la prise en compte des décisions de condamnation entre les Etats membres de l'Union européenne à l'occasion d'une nouvelle procédure pénale, *JO*, n° L 220, 15 août 2008, p. 32 ; décision-cadre 2009/315/JAI du 26 février 2009 concernant l'organisation et le contenu des échanges d'informations extraites du casier judiciaire entre les Etats membres, *JO*, n° L 93, 7 avril 2009, p. 23 et décision 2009/316/JAI du 6 avril 2009 relative à la création du système européen d'information sur les casiers judiciaires (ECRIS), en application de l'article 11 de la DC 2009/315/JAI, *JO*, n° L 93, 7 avril 2009, p. 33.

[30] Communication de la Commission, *Les déchéances de droits consécutives aux condamnations pénales dans l'UE*, COM (2006) 73, 21 février 2006.

[31] Livre vert de la Commission, *sur la présomption d'innocence*, COM (2006) 174, 26 avril 2006.

[32] Proposition de décision-cadre du Conseil relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'UE (COM (2004) 328 du 28 avril 2004, dernière version 10287/07 DROIPEN 56 du 5 juin 2007).

[33] Livre vert de la Commission, *sur les conflits de compétences et le principe ne bis in idem dans le cadre des procédures pénales*, COM (2005) 696, 23 décembre 2005.

[34] Projet de DC sur la prévention et le règlement des conflits de compétence dans les procédures pénales (accord politique le 6 avril 2009 (8478/09 (Presse 83), dernier état du texte Doc. 5208/09 COPEN 7 du 20 janvier 2009). Une initiative EL concernant le principe *non bis in idem* avait été soumise en février 2003 (6356/03 COPEN 11 du 13 février 2003), mais n'avait pas abouti.

œuvre du Programme de La Haye [35] où elle annonçait la présentation d'une étude sur l'avenir de la reconnaissance mutuelle en matière pénale dans l'UE. L'objet de cette étude était de fournir une analyse descriptive et globale des problèmes horizontaux existants dans la mise en œuvre du principe de reconnaissance mutuelle en matière pénale, et cela à trois niveaux différents : la négociation des textes législatifs au sein du Conseil de l'UE, la transposition de l'instrument dans la loi nationale et enfin, la mise en œuvre pratique par les autorités judiciaires et administratives compétentes.

Suite à l'appel d'offre publié dans le courant de l'été 2007, l'étude a été attribuée à l'Institut d'Etudes européennes de l'Université libre de Bruxelles. Les travaux, qui s'appuyaient tout spécialement sur le réseau académique ECLAN (European Criminal Law Academic Network) dont l'Institut assure la coordination, ont débuté à la fin du mois de décembre 2007.

D'une durée totale de onze mois, l'étude a couvert les vingt-sept Etats membres et a suivi deux approches complémentaires. D'une part, les correspondants du réseau ECLAN ont rédigé, à l'aide d'un questionnaire commun, un rapport national relatif à l'Etat couvert, basé sur des recherches et sur des entretiens avec des experts et praticiens compétents. D'autre part, une approche analytique transversale de la problématique a été menée par l'équipe de coordination basée à Bruxelles [36]. En partant de l'analyse de publications académiques ainsi que de documents pertinents issus des institutions de l'UE (comptes rendus de réunion, rapports d'évaluation, communications, etc.) et d'autres enceintes (Conseil de l'Europe, GAFI, etc.), l'équipe de coordination a dégagé un certain nombre de questions et de problèmes horizontaux qui ont été développés et approfondis au cours d'entretiens avec plus de 170 experts et praticiens tels que fonctionnaires des ministères de la Justice chargés de la négociation et de la transposition des instruments de RM, juges, procureurs, avocats, magistrats de liaison, académiques, etc., à Bruxelles mais aussi à La Haye, Amsterdam, Paris, Prague, Rome, Dublin, Londres, Luxembourg (Cour de justice), Madrid, Berlin, Varsovie, Copenhague, Budapest et Stockholm.

Deux réunions informelles avec des membres du Parlement européen ont été organisées à Bruxelles par le Secrétariat du Comité LIBE aux mois de juin et septembre 2008.

Enfin, un rôle clé a été joué par le Comité d'experts restreint constitué autour de l'équipe de coordination. Ce comité, composé d'un petit nombre d'experts provenant de différents horizons, du point de vue tant de la culture juridique que de l'expérience professionnelle, s'est réuni deux fois, en mai et en septembre 2008. Ces réunions ont permis d'explorer plus avant les problèmes et difficultés que rencontre la mise en œuvre du principe de reconnaissance mutuelle, et d'approfondir la réflexion sur les solutions envisageables, avant de remettre les projets de rapport intérimaire et de rapport final.

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[35] Communication de la Commission, *Mise en œuvre du programme de La Haye : la voie à suivre*, COM (2006) 331, 28 juin 2006.

[36] Composée de la coordinatrice Gisèle Vernimmen-Van Tiggelen et de la chercheuse Laura Surano.

Le rapport intérimaire, remis à la Commission au début de juin 2008, a été présenté et discuté lors de la première réunion plénière d'experts, qui a eu lieu le mois suivant à Bruxelles dans le cadre du Sous-groupe Justice pénale du « Forum Justice » récemment constitué [37]. Cette réunion, consacrée à la discussion sur les thématiques horizontales et aux premières conclusions du rapport intérimaire, a rassemblé un grand nombre d'experts, praticiens et représentants des Etats membres.

Une deuxième réunion plénière d'experts, à laquelle ont été invités tous les rapporteurs nationaux ayant participé à l'étude ainsi que des représentants des Etats membres, a été organisée par la Commission fin octobre 2008. Les rapports nationaux y ont été présentés et examinés, de même que le projet de rapport final, nourri en partie des résultats dégagés des rapports nationaux, et en partie de la vision générale des problématiques abordées au cours des entretiens conduits par l'équipe tout au long de l'étude [38]. Le rapport final, dans ses versions française et anglaise, est disponible sur le site web de la Commission européenne [39].

Le présent ouvrage reprend l'essentiel de cette étude. Il comprend la plupart des contributions mises à jour par les rapporteurs nationaux [40], ainsi qu'une conclusion qui correspond largement au contenu du rapport final.

[37] Communication de la Commission *relative à la création d'un forum de discussion sur les politiques et les pratiques de l'UE en matière de justice* (COM (2008) 38, 4 février 2008).

[38] Au cours de l'étude, le modèle de la coopération judiciaire en matière civile a été aussi exploré et approfondi en tant que source d'inspiration pour la matière pénale.

[39] http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/doc_criminal_recognition_en.htm.

[40] Pour les autres contributions, il est renvoyé au site du réseau ECLAN : www.eclan.eu.

The implementation and application of mutual recognition instruments in Austria

Robert Kert

1. Introduction

With the adoption of the Framework Decision on the European Arrest Warrant of 13 June 2002 (FD arrest warrant) [1] the first instrument based on the principle of mutual recognition (MR) in criminal matters was introduced. The following study deals with the negotiations, implementation and application of the MR instruments introduced by this Framework Decision as well as the follow-up Framework Decisions on the execution of orders freezing property and evidence, on the application of the principle of mutual recognition to financial penalties and on the application of the principle of mutual recognition to confiscation orders [2]. In the first part (2), this text deals with the evaluation of the principle of mutual recognition according to the Austrian doctrine and by practitioners who have to implement or apply mutual recognition instruments in Austria. In the second part (3), certain aspects of the implementation of the framework decisions on mutual recognition instruments are examined. The third

[1] FD 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[2] FD 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*, no. L 337, 16 December 2008, p. 102; FD 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ*, no. L 327, 5 December 2008, p. 27; and FD 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*, no. L 350, 30 December 2008, p. 72, are not topics of this study, since they were adopted after its end.

part (4) deals with the application of these instruments in practice. Finally, the last part contains some concluding remarks (5).

The information is based on interviews with several persons dealing with MR instruments [3], and on Austrian literature and jurisprudence concerning these instruments.

2. Perception of the principle of mutual recognition in Austrian doctrine and practice

A. The principle of mutual recognition

In 1998, the Austrian Presidency of the EU began to deliberate on what measures would be possible under the new principle of MR. At that time one of the conclusions of the Austrian Presidency was that in many cases MR would only be possible if common procedural standards were developed [4]. In 1999, the European Council in Tampere decided that the principle of MR should become the cornerstone for judicial cooperation in civil and criminal matters. After the terrorist attacks in the USA on 11 September 2001, a proposal for a Framework Decision on the European Arrest Warrant, which actually had a longer drafting history, was presented, and in June 2002 this first instrument based on the MR principle was formally adopted.

The principle of MR in criminal matters is seen as a way of cooperating in criminal matters. The central feature is that one Member State accepts a decision issued in another Member State without any new formal decision. The genesis, and the basis, of the decision of the issuing State shall not be checked by the executing State [5].

In Austrian doctrine, most of the authors [6] see the principle of MR as a "logical" development in a common Area of Freedom, Security and Justice. A big practical advantage of legal MR instruments is that courts no longer have to search for the law to be applied in the many different legal provisions (conventions, bilateral and multilateral treaties) [7]. This makes proceedings easier and faster.

Policymakers involved in the negotiations do not regard the MR as a completely new concept, since there continues to be, as was the case in the past, a decision made by the executing State before the issuing State's decision is executed or recognised.

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[3] My thanks go to Dr. Roland Kier, Defense Lawyer; Dr. Johannes Martetschläger, Federal Ministry of Justice, Department for International Criminal Cases; Dr. Peter Seda, Public Prosecutor at the Regional Court Vienna; Mag. Albert Steinhauser, Politician (Die Grünen); Mag. Elisabeth Ströbl, Federal Chancellary, Department for Constitutional Legislation and Administrative Proceeding; and Hon.-Prof. Dr. Fritz Zeder, Federal Ministry of Justice, Department for Criminal Legislation.

[4] See F. Zeder, "Europastrafrecht zwischen Angleichung im materiellen Recht, gegenseitiger Anerkennung und Angleichung im Strafverfahren", *in* R. Moos, *Strafprozess im Wandel: Festschrift für Roland Miklau,* Innsbruck – Wien, Studienverlag, 2006, p. 641.

[5] See e.g. V. Murschetz, "Der Rahmenbeschluss über den Europäischen Haftbefehl und seine Umsetzung im EU-JZG", *Österreichische Juristen-Zeitung*, 2007, p. 98 (99).

[6] See e.g. F. Zeder, "Europastrafrecht – Aktueller Stand", *in* Bundesministerium für Justiz (ed.), *Vorarlberger Tage 2007,* Wien – Graz, Neuer Wissenschaftlicher Verlag, 2008, p. 51 (70).

[7] *Ibid.*, p. 87; L. Sautner, "Die Vollstreckung eines Europäischen Haftbefehls nach dem EU-JZG", *Österreichische Juristen-Zeitung*, 2005, p. 331 (328).

Moreover, there are still grounds for refusal. Of course, some of the traditional grounds for refusal have been dropped, e.g. the prohibition of extradition of own nationals or the prohibition of extradition in respect of political, military or fiscal offences. Respectively [8], most of these grounds for refusal have become obsolete in the European Union and are not needed anymore. It was right that they were abolished in the EU. However, MR does not mean that there is an automatic mechanism for execution. Instead, the proceedings are still more comparable to a form of intergovernmental cooperation than to the execution of a decision by another court in the same State.

Zeder [9] thinks that the term "mutual recognition" is primarily a "marketing measure": in principle, in his opinion, there is no big difference between this and traditional judicial assistance. This can be seen in the large number of grounds for refusal still provided for in MR framework decisions. And these grounds for refusal can only be claimed by the competent authorities in the State (the executing State) but not by the person concerned by the restraints. This is similar to the traditional mutual legal assistance (MLA), which primarily governs the relationship between the requesting and the requested State, whereas the rights of the individual are barely regulated [10].

B. Criticisms of the principle of mutual recognition

1. Repressive system versus procedural rights

The main problem with MR is seen as being that, within the Third Pillar, up until now no provision has been made for procedural minimum standards as flanking measures in a binding way. There has been criticism that many legal acts of a repressive nature have been passed, but that there are only a few measures which regulate procedural standards in a criminal procedure; and up until now, none of them have yet come into force [11]. Moreover, there is criticism that there is no provision in the framework decisions that would deem the surrender or recognition inadmissible if *ordre public* had been violated. Instead of such a limiting principle, the framework decisions only contain some general reference to the respect of the fundamental rights reaffirmed in Art. 6 EU [12].

Several authors [13] express criticism that the principle of MR, which had been developed in the Single Market, has now been transferred to the criminal procedure. Their argument was that this principle, which makes the free movement of goods and services possible, would not fit in with the criminal procedure since a criminal

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[8] When this chapter was being edited (early 2009), the moratorium which the Austrian government had reached with regard to the surrender of own nationals (see *infra* 3.D.3) had expired. Whereas there were many discussions at the time of the negotiations on the European Arrest Warrant, there have been no practical problems on the issue until now.

[9] F. Zeder, in Bundesministerium für Justiz (ed.), *op. cit.*, p. 88.

[10] *Ibid.*, p. 89.

[11] V. Murschetz, *op. cit.*, p. 99.

[12] *Ibid.*, p. 99.

[13] F. Zeder, in Bundesministerium für Justiz (ed.), *op. cit.*, p. 88; see also B. Schünemann, "Grundzüge eines Alternativ-Entwurfs zur europäischen Strafverfolgung", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, p. 376 (383).

procedure is completely different from the movement of goods and services. It consists of coercive measures by the State which serve the prosecution and punishment of suspects or offenders but not to the free movement of goods and services. Therefore the transfer of this principle was wrong and brought with it the danger that the balance between repression and moderation would be lost.

Fuchs [14] sees in the MR of judicial decisions the problem that all general rules of a State, which the decision in a single case is based upon, must always be recognised, too. This means that, with the recognition of a single criminal decision the criminal policy of another Member State must also be approved. In the core sector of criminal law, where there is accordance between the States, this might not be so problematic. But it can be a problem with offences of an ideological nature such as abortion, euthanasia, adultery or some sexual offences. And even in the core sector, the dividing line between legal and illegal behaviour can be different, e.g. in connection with fraud or money laundering. Since there is no complete harmonisation of these offences, there may be little margin between an offence being punishable or not punishable. In a system of MR, these differences would lead to a situation in which the executing State must assist in the execution of a punishment which this State would not accept as legitimate.

There is criticism that the framework decisions that have been passed up until now only provide for measures for an effective fight against crime but that they do not harmonise the procedural guarantees of individuals in the Member States. It was emphasised that the MR of arrest warrants, evidence warrants and judgements is only acceptable if the fundamental principles which they are based upon are comparable [15].

2. Abolition of dual criminality

Parts of the doctrine have seen difficulties in the abolition of dual criminality of the act [16]. Especially the list of offences (e.g. Art. 2, para. 2 FD arrest warrant) which enables a surrender without verification of dual criminality has been criticised. The description of the categories of offences has been criticised as partly too indefinite (e.g. "computer-related crime", "environmental crime", "sabotage" or "racism and xenophobia", which in many countries are not criminal offences) [17] and partly as

[14] H. Fuchs, "Bemerkungen zur gegenseitigen Anerkennung justizieller Entscheidungen", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2004, p. 368 and f.

[15] F. Zeder, in R. Moos (ed.), *Festschrift für Roland Miklau, op. cit.*, p. 645 and f.; V. Murschetz, *Auslieferung und Europäischer Haftbefehl,* Wien – New York, Springer, 2007, p. 304.

[16] See F. Zeder, in R. Moos (ed.), *Festschrift für Roland Miklau, op. cit.*, p. 644; H. Fuchs, "Europäischer Haftbefehl und Staatensouveränität", *Juristische Blätter*, 2003, p. 405 (407 f.).

[17] H. Fuchs, *Juristische Blätter*, *op. cit.*, 2003, p. 407 and f.; F. Zeder, "Der Europäische Haftbefehl: Das Ende der Auslieferung in der EU?", *Anwaltsblatt*, 2003, p. 376 (381); U. Medigovic, "Der Europäische Haftbefehl in Österreich. Eine Analyse der materiellen Voraussetzungen für eine Übergabe nach dem EU-JZG", *Juristische Blätter*, 2006, p. 628; E. Wiederin, *Die Zukunft des Verwaltungsstrafverfahrens,* Gutachten zum 16. Österreichischen Juristentag, Vol. III/1, Wien, Manz, 2006, p. 134.

surprisingly narrow (especially the acts against property are limited to "fraud" and "organised or armed robbery", but do not contain peculation or betrayal of confidence) [18]. There is doubt as to whether this system is compatible with the legality principle in criminal law since it is not clear enough which behaviour is covered by the list of offences [19]. For example, according to the Framework Decision, it is not clear how a court should handle a case when the classification by the issuing State is doubtful. Austrian legislation has found a pragmatic solution: if the legal classification is obviously wrong or if the person concerned has raised well founded objections, the court has to ask for additional information from the issuing authority (Section 19, para. 3 EU-JZG).

There were concerns that this system leads to a dominance of the most repressive criminal law system, which mostly extends the area of punishability [20]. Circumstances which would exclude punishability in the executing Member State cannot be respected. This is not only because definitions of offences differ but also because general rules cannot be applied. In Austria, there is a far-reaching possibility to become exempt from punishment for offences against property if the perpetrator makes good the damage completely or comes to an agreement with the injured person before the prosecution authorities have learnt about his/her fault (active repentance/*Tätige Reue*) [21]. The abolition of dual criminality for the offences on the list has made it impossible to respect such an active repentance; the decision must be executed [22].

C. Evaluation of the principle of mutual recognition

This leads in general to an ambivalent evaluation of the principle of MR in criminal matters.

At the moment, only the FD arrest warrant is applied all over Europe. There is no question that the EAW has increased the number of extraditions (surrenders). The duration of the proceedings has been shortened, particularly through the abolition of the political proceedings in the extradition process. Therefore the EAW is seen as a successful instrument, which has a positive effect on the length of surrender procedures and as a consequence leads to a significant shortening of the duration of the arrest pending extradition. But there are worries that it leads to a more repressive system and that procedural guarantees of the individual are not being sufficiently

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[18] F. Zeder, *Anwaltsblatt*, 2003, *op. cit.*, p. 381.

[19] *Ibid.* Compare ECJ, 3 May 2007, Judgement C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Minsterraad*, *ECR*, p. I-3633.

[20] F. Zeder, in R. Moos (ed.), *op. cit.*, p. 645; H. Fuchs, *Juristische Blätter* 2003, *op. cit.*, p. 407; L. Sautner, *Österreichische Juristen-Zeitung* 2005, *op. cit.*, p. 338; K. Schwaighofer, "Die Neuordnung des Auslieferungsrechts durch den Europäischen Haftbefehl", *in* Ch. Grafl and U. Medigovic (ed.), *Festschrift für Manfred Burgstaller*, Wien – Graz, Neuer Wissenschaftlicher Verlag, 2004, p. 433 (444).

[21] F. Höpfel, "Die strafbefreiende tätige Reue und verwandte Einrichtungen des österreichischen Rechts", *in* A. Eser, G. Kaiser and K. Madlener (ed.), *Neue Wege der Wiedergutmachung im Strafrecht,* 2nd ed., Freiburg i. Br., Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht, 1992, p. 171 (181 and f.).

[22] H. Fuchs, *Juristische Blätter*, 2003, *op. cit.*, p. 408.

respected. Even the abolition of the political proceedings is seen as a weakening of the position of the person concerned [23].

Problems are seen in the fact that some of the legal instruments (e.g. the FD on the European Evidence Warrant or on freezing orders) do not cover all cases, but only provide for regulations for some of the cases and exclude others. It is expected that this will lead to a lack of clarity and make application difficult [24]. It is seen as another problem that the various framework decisions contain different provisions dealing with analogous questions, and this leads to a situation which will complicate the practical application of these instruments.

Another disadvantage lies in the fact that the framework decisions are not directly applicable, but imply a transposition into national legislation. Since the Member States use the scope of discretion to different extents and interpret the provisions in the framework decisions differently, provisions in national laws differ [25]. For instance, Member States have used the facultative grounds for refusal in Art. 4 FD arrest warrant in very different ways [26].

A fundamental problem is seen in the situation in which the EU pursues several concepts at the same time: on the one hand the MR, on the other hand the harmonisation of substantive law and thirdly, in a rudimentary way, the harmonisation of procedural law. There is no clear strategy between these three aspects and this leads to problems.

D. Limits of the principle of mutual recognition

The framework decisions on MR instruments provide for limits to the principle of MR by offering grounds for refusal. The Austrian Ministry of Justice and also the Federal Chancellery pursue the strategy that all grounds for refusal provided for in the framework decisions are transposed into national law to the full extent and as obligatory grounds for refusal.

From the policymakers' point of view, the protection of fundamental rights is a necessary limit to the principle of MR. Fundamental rights are regarded as so important that their infringement should always exclude the recognition or execution of a foreign decision. Therefore there is criticism that most grounds for refusal in the framework decisions are only provided for as facultative grounds. For the protection of fundamental guarantees, the framework decisions should provide for obligatory grounds for refusal unless strict requirements are fulfilled. Particularly, it is demanded that judgements *in absentia* should be obligatory grounds for refusal. The FD on decisions *in absentia* [27], which was adopted in February 2009, is not regarded as

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[23] F. Zeder, *Anwaltsblatt*, 2003, *op. cit.*, p. 380.

[24] F. Zeder, in Bundesministerium für Justiz (ed.), *op. cit.*, p. 88.

[25] *Ibid*., p. 88.

[26] See Report from the Commission based on Art. 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, COM (2006) 8 and SEC (2006) 79.

[27] Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition

sufficient [28]. The aim should be to raise the level of protection of fundamental rights in the Member States.

E. Mutual recognition of final judgements and pre-trial decisions

The framework decisions on MR instruments are now providing for the recognition of final judgements and pre-trial decisions and treat them more or less in the same way. Although there are, in principle, differences between pre-trial decisions and final judgements with regard to MR, policymakers in Austria do not see any fundamental differences between these two groups. It cannot be said which one of these decisions is more severe for the person concerned and interferes more intensively with their individual rights. The relevant aspect is not whether they are pre-trial or final, but how intensive the interference with fundamental rights is. The enforcement of a financial penalty as an execution of a final judgement is for the person concerned normally less severe than the execution of an arrest warrant, which often is a pre-trial decision.

F. Reasons not to recognise and execute a decision

1. Differences in substantive law

A central question is whether differences in substantive law should be a reason not to recognise or execute a foreign decision.

If MR is realised in a pure form, differences in substantive law should be no reason for not executing foreign decisions. But it is seen as a problem that a State shall recognise and execute a measure or a sanction in a single case which does not correspond with the legal conception of this State. It is seen as one of the crucial points that the principle of MR obliges the Member States to execute special provisions in the criminal law of another Member State over the frontiers of this State [29]. For example, in some countries negligent money laundering or gross negligent subsidy fraud is punishable. Other States are strictly against a criminalisation of such behaviour. In these countries the execution of the foreign decision would be against the criminal policy of this State but, within the framework of MR, their authorities must execute the decision.

Also a consistent application of the lists of offences which enable a recognition without verification of dual criminality will be difficult, if there are differences in substantive law. Only in areas where there are European or international minimum standards for statutory definitions is a consistent application guaranteed, as far as they are correctly implemented into national law [30].

Policymakers and civil servants see these lists of offences as an interim solution, which is not ideal. The problem of this list also appears with the European Evidence Warrant (EEW), where the unclear definition of some categories of offences has been criticised and has led to Germany being given a limited opt-out-possibility (Art. 23,

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to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

[28] See *infra* 4.B.6.

[29] H. Fuchs, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, *op. cit.*, p. 368.

[30] F. Zeder, *Anwaltsblatt*, 2003, *op. cit.*, p. 381.

para. 4 FD EEW), which, *inter alia*, will lead to an inconsistent application of this Framework Decision.

Differences in substantive law can also cause insecurities about the foreign legislation and consideration should be given as to how to avoid them, as long as there is no harmonisation. However, with respect to the abolition of dual criminality, a database containing national definitions of offences is not seen as helpful to ensure equivalence. When Austrian judges receive an EAW in which a certain group of offences listed in Art. 2 of the FD is declared, it is not provided for that they examine whether the act is in fact punishable in the other State, but they have to accept this qualification, unless there are serious doubts about it. When there are serious doubts, the judges have to ask the issuing Member State for more information.

Beyond the group of offences where dual criminality is not necessary, a database containing national definitions of offences may be helpful. But such a database would never be able to solve all problems, since it would always be questioned as to whether the database is up to date. And then it is necessary to ask in the issuing State if the statutory definition is still applicable. Moreover, the statutory definitions of offences alone are not enough, since an evaluation is only possible, if the general part (e.g. the legal provisions on attempt or on active repentance [*Tätige Reue*]) and the jurisprudence are also taken into account. It is not enough to compare single statutory definitions: comparing law makes it necessary to look at the whole criminal law system.

Knowing that the abolition of dual criminality could lead to a dominance of the most severe criminal system, in the proposal for a FD on an arrest warrant, the Commission had suggested that every Member State could make a list of acts for which execution could be refused. This suggestion was rejected, since drawing up such a list would have required the knowledge of the criminal law systems of all other Member States [31]. A list of offences excluded from MR (negative list) would be a collection of curious definitions of offences. There is doubt as to whether anyone would be able to choose the offences that should be put on that list. It is nearly impossible to find all these offences in about 30 legal systems. Even in the core sector of criminal law the establishment of such a list would not be easy, since there are acts which are punishable in one State, but not in other States (e.g. adultery on the one hand, euthanasia or abortion on the other hand).

It is seen as a problem that all measures of harmonisation of substantive law have been minimum standards. This means that the Member States have to implement these European provisions into their national legislation, but they can also introduce far-reaching criminal provisions, e.g. penalise other behaviour patterns or also penalise the negligent commission of an offence, although the framework decision (or convention) only requires the penalisation of intentional behaviour. This problem will not be solved by the Treaty of Lisbon either since it only provides for a minimum harmonisation. However, MR would cause fewer problems if differences in the implementation of European legal acts were to be avoided. Therefore, if at European level an agreement on a definition of crime is reached, this should be binding on the Member States and should not enable Member States to introduce more severe provisions.

[31] *Ibid.*, p. 376 and f.

2. Differences in procedural law

In practice, differences in procedural law are seen as a greater problem than differences in substantive law. Significant differences should be a reason not to recognise and execute a decision if fundamental rights are violated in the procedure. The main problem of MR is seen in the circumstance that procedural law as a whole should be fair, which must be evaluated from an overall view of all procedural stages in the overall national system. But MR takes certain single procedural steps out of that system and shall make them exchangeable. This can lead to the result that, in the issuing State, the procedure is undoubtedly fair, whereas in the executing State it becomes unfair because there are guarantees in the issuing State which do not exist in the executing State.

MR of procedural decisions should therefore not be limited to single procedural acts, but it is necessary to comprehend the whole system of criminal procedure. It was – according to this opinion – not the right way to begin with the arrest warrant before creating an effective and comprehensive mutual legal assistance within the EU [32].

These problems make harmonisation of national procedural laws necessary for the functioning of MR. It is interesting that the principle of MR, which should have allowed the harmonisation of law to be avoided, now shows the necessity of harmonisation of substantive as well as of procedural law.

3. Control of fundamental rights and guarantees

The reference to the fundamental rights in the MR instruments (e.g. Art. 1(3) of FD arrest warrant, Art. 1 of FD freezing orders, Art. 3 of FD financial penalties) does not mean that the executing authority has to check in every case, if the procedural guarantees and the respect of the rights of defence in the issuing Member State have been safeguarded.

However, in Austrian legislation, the references to fundamental rights in the framework decisions were transposed as grounds for refusal into Austrian legislation (Sections 19, para. 4; 52a, para. 1 fig. 10; 53a, fig. 11 EU-JZG). According to the prevailing opinion in Austria, the violation of fundamental rights in the procedure in the issuing State should be an obligatory ground for refusal and should always lead to the refusal of recognition.

But even the understanding of fundamental procedural guarantees differs between Member States and that makes MR more difficult. For example: in the one and only case in which an EAW issued by an Austrian court was not executed, the Belgian authority saw a violation of the right to be heard, since the person concerned had not been heard before the issuance of the EAW. In Austria, this reason was not understood, because according to the Austrian understanding it is not useful and necessary to ask the suspected person before issuing an arrest warrant [33].

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[32] H. Fuchs, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, *op. cit.*, p. 369.

[33] See the contribution of A. Weyembergh and V. Santamaria in this book.

4. Territoriality clause

Another central question is whether it is compatible with the principle of MR to refuse to recognise and execute a decision issued for an offence wholly or partly committed on the territory of the executing State. This touches on the question of concurrent jurisdiction, which is a core problem of MR. If every Member State can define its jurisdiction autonomously, this brings about the possibility of arbitrariness and can be in conflict with the "right to a lawful judge" [34]. Practitioners applying MR instruments lack definite criteria to decide where a procedure should be conducted if there is a jurisdiction of several States, particularly if the act has taken place in various Member States. For the accused person it is unsatisfactory if it cannot be foreseen which State has jurisdiction, and if the State which leads the proceeding is selected as a matter of convenience. The problem of such considerations of convenience is that also deliberations (of a political nature) are made which should be irrelevant. The circumstance that it is easier to get a telephone tap or that more severe penalties are provided for, for example, should not be criteria. Moreover it is regarded as a problem that a system of automatic recognition enables every State to expand its national criminal law far over its State frontiers and gives the possibility of abitrariness and for the prosecutor and the accused the possibilty of manipulation.

Therefore the opinion in Austria is that it would be necessary to set up a clear jurisdiction regulation [35]. Particularly with regard to crossborder crime, rules for the coordination and transfer of proceedings should be found since it is not useful to conduct proceedings in several countries without coordination of the investigations. This is a problem which the EU should regulate.

The question is how to solve this problem. Judges and public prosecutors are very sceptical as to whether this can be regulated by law, because all efforts to find criteria and guidelines for this problem have not led to any result up until now. The right balance must be struck between the necessary flexibility, which enables the many different constellations to be handled, on the one hand and strict regulation on the other hand. This ambivalence makes it difficult to create general criteria and find a satisfactory solution to this problem. For instance, in one case it is the place where the accused person or the witnesses are found that is important, whereas, in another case, it is the place where the offence was committed or where certain evidence can be collected that is essential.

Among practitioners the prevailing opinion is that such legal provisions can only give indications, but, in the end, where the procedure has to be conducted must be decided on a case by case basis. A system of non-binding guidelines for practitioners is preferred. The efforts of Eurojust to find solutions and to coordinate in such conflicts of jurisdiction are evaluated in a positive light.

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[34] H. Fuchs, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, *op. cit.*, p. 368.

[35] See e.g. *Ibid.*, p. 370.

G. Consistency between the existing instruments of legal assistance

The instruments of MR have not completely replaced the traditional instruments of MLA.Various legal assistance and extradition instruments are currently available. In practice, both sorts of instruments – based on MR or on traditional international instruments – are used side by side[36]. This brings about the danger of a lack of consistency.

Significant problems in the application of MR instruments are due to the circumstance that the framework decisions do not cover the whole area of a topic, but that in one case an instrument of MR is applicable, whereas for the other traditional MLA must be applied. The provisions for a European Evidence Warrant are especially criticised since only a part of the relevant areas are governed by the FD and – according to the wording of the FD – even within the scope of the FD, issuing authorities may use the traditional MLA to obtain objects, documents or data if they form part of a wider request for assistance or the issuing authority considers in the specific case that this would simplify cooperation with the executing State. It is expected that in practice traditional MLA will be used instead of the EEW.

There are also inconsistencies between the various MR framework decisions. The framework decisions diverge in several details. One important point is the difference about grounds for refusal. Particularly the requirements for MR of decisions rendered *in absentia* differ: only in the FD arrest warrant is a guarantee to apply for a retrial of the case in the issuing Member State and to be present at the judgement, explicitly provided for. In the other framework decisions the possibility of a retrial is not referred to; instead of that a refusal of recognition is not possible if the person concerned has indicated that he or she does not contest the case. Moreover, according to some provisions, it is enough that the person is informed via a "representative, competent according to national law", but it is not clear if this representative must be appointed by the person concerned or must be at least in contact with her/him[37]. Whereas, in the FD arrest warrant, grounds for refusal are partly mandatory, partly facultative, the other framework decisions only provide for facultative grounds for refusal.

H. Necessity of flanking measures

MR instruments are seen – as mentioned above – as instruments of a repressive nature. Therefore it is argued that the creation of legal instruments of a repressive nature makes the establishment of standardised procedural guarantees for accused and concerned people absolutely necessary. Whereas in the Member States there would be a balance between repressive measures and procedural guarantees, such a system of "checks and balances" would be missing in the EU due to different procedural guarantees[38]. There are States with far-reaching possibilities of invasive action, e.g. the power to wiretap or of supervision, on the one hand, but also far-reaching

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[36] See e.g. *infra* 4.F.

[37] See F. Zeder, "Abwesenheitsurteil als Auslieferungs- und Vollstreckungshindernis: Neues vom OGH – und von der EU", *Journal für Strafrecht*, 2008, p. 92 and 135. But see the FD on decisions rendered *in absentia* (see footnote 27).

[38] V. Murschetz, *Österreichische Juristen-Zeitung*, 2007/10, *op. cit.*, p. 100.

guarantees for the accused, e.g. rights to refuse to give evidence or the prohibition to use evidence, on the other hand. Then there are States which only provide for little possibilities of invasive action, but also little rights of the accused. It is seen as problematic that those different systems are equalised by the system of MR, since this has the consequence that a judicial decision of a country with far-reaching possibilities of invasive action must be executed, although in the executing State the rights of the accused are more limited than in the issuing State.

Therefore common standards of procedural guarantees are demanded. It is not regarded as sufficient that the EU Member States are all signatories of the European Convention on Human Rights (ECHR), since the ECHR does not provide for a comprehensive system of procedural law and the guarantees of the ECHR are only minimum guarantees. With reference to the different state of ratification of the protocols to the Convention and to the decisions of the European Court for Human Rights, it is argued that there are still different levels of procedural guarantees within the EU.

As already pointed out, according to some authors the recognition of decisions requires the harmonisation of substantive law[39]. Therefore, the recognition should, to start with, be limited to the core sector of criminal law, in which certain behaviour is declared punishable in all Member States. According to this opinion, mutual recognition should only be possible if a behaviour is punishable in all Member States. Fuchs therefore emphasises a harmonisation of substantive law by European legal instruments, especially in the area of economic criminal law. Harmonisation would be the essential condition for mutual recognition of criminal decisions in single cases. However, harmonisation of the definition of crimes alone can only solve parts of the problems, because the general presumptions for criminal liability (as for example the punishability of an attempt, the participation in criminal offences or grounds for impunity) also differ in the Member States.

3. Transposition of mutual recognition instruments

A. Mutual recognition instruments transposed in Austrian law

In Austria the FD arrest warrant was implemented on 1 May 2004 by the introduction of a new act, the *Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union* (EU-JZG; Federal Act on the judicial cooperation in criminal matters with the Member States of the European Union)[40]. In this act, all framework decisions on MR instruments shall be implemented. Simultaneously, the FD on the execution of orders freezing property or evidence[41] (FD freezing orders) was implemented in the same act, but this part came into force on 1 January 2005 (Section 77, para. 7 EU-JZG). The FD on the

[39] H. Fuchs, *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116, 2004, *op. cit.*, p. 370.

[40] *Bundesgesetzblatt* I 2004, 36.

[41] FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, no. L 196, 2 August 2003, p. 45.

application of the principle of MR to confiscation orders[42] (FD confiscation orders) was implemented on 1 July 2007 by an amendment of the EU-JZG[43], in which a new chapter was introduced.

The FD on the application of the principle of MR to financial penalties[44] (FD financial penalties) was implemented in several legal acts: for decisions of other Member States' courts imposing a financial penalty the implementation was also made by introducing a new chapter in the EU-JZG[45]. For decisions of other Member States' administrative authorities the FD was transposed by the *Bundesgesetz über die Vollstreckung von Geldstrafen und Geldbußen von Verwaltungsbehörden im Rahmen der Europäischen Union* (*EU-Verwaltungsstrafvollstreckungsgesetz* – EU-VStVG/Federal Act on the execution of financial penalties imposed by administrative authorities of other EU Member States[46])[47]. The implementation in the EU-JZG came into force on 1 July 2007. The EU-VStVG came into force on 1 March 2008.

The EU-VStVG explicitly excludes decisions of tax and customs authorities (Section 1 EU-VStVG). To implement the FD financial penalties also with regard to fines imposed by tax and customs authorities, in October 2008 the Federal Ministry of Finance presented a ministerial draft bill for an Act to implement the Framework Decision on the application of the principle of MR to financial penalties in the area of administrative fiscal penal law (*Bundesgesetz zur Durchführung des Rahmenbeschlusses über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen im Bereich des verwaltungsbehördlichen Finanzstrafverfahrens – EU-Finanzvollstreckungsgesetz*)[48]. In January 2009 the bill had not yet been passed in the parliament.

B. Reasons for late transposition

The FD arrest warrant was implemented some months too late, because there was a longer discussion on how to transpose this Framework Decision. The surrender of own nationals was particularly intensively discussed. Furthermore, implementation was made together with the FD freezing orders, which was implemented in time. The FD confiscation orders was also implemented in time.

The FD financial penalties, which had to be implemented by 22 March 2007, was implemented some months too late. Since two (or three) different ministries were competent for the implementation, the reasons for this delay are partly different depending on if financial penalties imposed by a court or financial penalties imposed by an administrative authority are concerned: whereas the Ministry of Justice was

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[42] FD 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[43] *Bundesgesetzblatt* I 2007, 38.

[44] FD 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16.

[45] *Bundesgesetzblatt* I 2007, 38.

[46] *Ibid.,* I 2008, 3.

[47] See N. Raschauer and W. Wessely, "Zum EU-Verwaltungsstrafvollstreckungsgesetz (EU-VStVG)", *Österreichische Juristen-Zeitung*, 2008, p. 167 and f.

[48] Ministerial draft bill, 232 BlgNR 23. GP p. 1.

competent for the drafting of the implementation legislation for the criminal penalties, the implementation act for financial penalties imposed by administrative authorities was drafted by the Federal Chancellery.

The reason for the (short) delay by the Federal Ministry of Justice was that both the FD on confiscation orders and the FD on financial penalties should be transposed together. Most delays are a consequence of the great number of new framework decisions which are passed within a short time and which must be implemented into national law. It is a problem that framework decisions often are not formally passed due to reservations of national parliaments. However, the implementation procedure can only be started when the framework decision is formally passed.

At the beginning of the transposition procedure it was not clear whether the FD financial penalties should be transposed for criminal fines and administrative fines together or separately. At first, it was planned to transpose them together in the EU-JZG and give the courts the competence to execute the administrative fines as well [49]. It was argued that a separate transposition would be more complicated and would bring with it the danger that decisions by foreign administrative authorities would be recognised more easily than court decisions in the same case. The courts would be more appropriate as authorities of legal assistance than administrative authorities. This solution was preferred by the federal provinces (*Bundesländer*) and by the constitutional office of the Federal Chancellery. Nevertheless, for political reasons finally the transposition was carried out separately. The reason given was that these administrative authorities are law enforcement authorities in administrative penal matters and are used to give legal assistance to foreign authorities.

The EU-VStVG was published on 4 January 2008 in the Federal Law Gazette. But it came into force on 1 March 2008, since the administrative authorities needed a certain amount of time to prepare themselves. This caused a delay of about one year in the transposition.

The reason for the late implementation of the FD on financial penalties imposed by fiscal administrative authorities is that it was originally planned to include these penalties in the EU-VStVG. During the discussion of the ministerial draft of the EU-VStVG it was decided to exclude them from the scope of the EU-VStVG due to the special competencies in fiscal penal law [50].

In December 2008 the Proposal for a FD of a European Evidence Warrant (EEW) was adopted by the Council [51]. This FD will raise the question as to whether Member States shall choose a dual system of coercive measures (system for domestic proceedings and system for MR of foreign decisions) or if they will adapt their legislation for domestic proceedings to the minimum standard provided for in the EEW.

At the moment there are no concrete deliberations as to how to implement the EEW into Austrian law. Up until now, the necessity has not been seen that standards

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[49] See E. Wiederin, *Die Zukunft des Verwaltungsstrafverfahrens, op. cit.*, p. 141 and f.

[50] See *supra* 3.C.

[51] FD 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*, no. L 350, 30 December 2008, p. 72.

in the criminal procedure must be raised to implement the EEW. If this should be necessary, a twin track system will probably not be chosen.

C. Difficulties during the transposition process

The technical transposition of framework decisions in general is not easy, as the framework decisions are very detailed and leave only little margin for the Member States. It is necessary to find a way in which to transpose the obligations, while fitting the provisions into the whole system of criminal law and procedure.

In the concrete transposition process of FD financial penalties there was some political pressure from representatives of drivers' associations, who wanted to prevent drivers having to pay the financial penalties imposed in other EU Member States. Especially in the area of traffic offences a typical problem of MR was discussed: whereas in Austria drivers who drive too fast are photographed from behind, in Germany a photo is taken from in front of the driver since in Germany it is necessary for the driver to be identified from this photo. During the implementation process it emerged that it could transpire that Austrian authorities would recognise and execute German decisions whereas German authorities would not execute the Austrian decisions, since the drivers cannot be seen in the photo.

During the legislation process of the EU-VStVG it was discussed whether decisions of tax and customs authorities should also be included in the scope of the EU-VStVG. Finally, the decisions of these authorities were not taken into the EU-VStVG (see Section 1 EU-VStVG), because in tax and customs law the authorities have a very special position and structure und penalties are imposed by special fiscal penal authorities (*Finanzstrafbehörden*). (Administrative) fines imposed due to fiscal offences therefore do not fall into the scope of application of the EU-VStVG [52].

Moreover, it was asked by some experts in the legislation process of the EU-VStVG that the Austrian executing authority issues an official notice (*Bescheid*) before executing the fine. Since this would be a new decision by an Austrian authority and therefore contravene the principle of MR, this idea was not put into law. It is now provided that, before the enforcement of the fine, the executing authority has to demand payment from the punished persons and give them the opportunity to comment on potential grounds for refusal of the execution of the decision. This duty is limited to cases in which the letter can be delivered within Austria (Section 5, para. 5, EU-VStVG).

According to Art. 10 FD on financial penalties, alternative sanctions, including custodial sanctions, may be applied by the executing State where it is not possible to enforce a decision. It was quite clear that the EU-VStVG would not provide for imprisonment in the event of default from payment, since this would have caused problems with Art. 6 ECHR. It would have been necessary to involve an independent tribunal, which would have caused competence problems between the State and the federal provinces due to the structure of the Austrian administrative penal procedure.

[52] See *supra* 3.A.

D. Specific issues related to transposition

1. Transposition of provisions on dual criminality

In traditional extradition and mutual legal assistance law, dual criminality is a necessary condition for extradition and mutual legal assistance (see Sections 11, para. 1 and 64, para. 1 fig. 2 *Auslieferungs- und Rechtshilfegesetz*). In principle, the MR framework decisions do not completely abolish this principle, but they provide that the punishability in the executing State is only relevant if the act does not fall under one of the offences listed in the EU instruments. These provisions have been completely transposed into Austrian legislation.

For the EAW, the provisions were transposed in the way that in principle for a surrender it is required that the act is punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least one year and that it is punishable in the executing State (Section 4, para. 1 EU-JZG). The dual criminality is not to be verified by the executing authority if the issuing authority classifies the punishable act which is the basis for the EAW as one of the offences listed in Art. 2, para. 2 FD arrest warrant and if the act is punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. The list of offences has been adopted in the annex of the EU-JZG without any modifications. This means that dual criminality is – apart from the list of offences – not only a facultative, but an obligatory condition for MR and the execution of a decision [53].

With regard to the MR of confiscation orders and of financial penalties, the provisions of dual criminality were transposed as reasons for refusal: the recognition and execution of other Member States' decisions are not admissible, if the act, which the decision of the issuing State is based upon, is not a criminal offence in Austria, unless the offence falls into one of the categories listed in the framework decisions' list of offences where a dual criminality is not necessary (Section 52a, para. 1 fig. 3 EU-JZG) [54]. The requirement provided for in the FD confiscation orders that the act must be punishable in the issuing State by a custodial sentence for a maximum period of at least three years (Art. 6, para. 1) was not implemented into Austrian legislation.

For the recognition of decisions imposing financial penalties it is not necessary that the act is punishable under Austrian law as criminal, but it can also be punishable as an administrative penal offence (Section 53a fig. 4 EU-JZG). For the seven "new" offences, which have not been provided for in former framework decisions, a new appendix B to the EU-JZG has been created. This means that Austria has implemented dual criminality in such a way that the lack of dual criminality is a ground for inadmissibility, if the offence does not fall into one of the categories of the list. Since all categories of offences listed in the framework decision have been taken over into the EU-JZG in the same way, Austria has transposed that provision completely.

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[53] See V. Murschetz, *Auslieferung und Europäischer Haftbefehl, op. cit.*, p. 321.

[54] See U. Medigovic, "Die gegenseitige Anerkennung von vermögensrechlichen Sanktionen innerhalb der EU und ihre Umsetzung im österreichischen Justizstrafrecht", *Juristische Blätter*, 2008, p. 69 (75).

In Austria, it has been criticised that these lists are too indefinite [55] and should have been made more concrete by the Austrian legislator. In particular, it is not clear whether also the infringement of tax codes (e.g. parking fees) or the refusal to give information about the identity of a car driver, which is an administrative offence in Austria, fall under the term "conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods" [56].

If the classification of an act as an offence of the list by the issuing State is obviously incorrect or if the person concerned raises well-founded objections against it, the Austrian executing judicial authority has a limited possibility to check. The issuing authority can be asked for clarification (Sections 52c, para. 2 fig. 3 and 53c, para. 3 fig. 3 EU-JZG).

In the EU-VStVG the dual criminality provisions are transposed in the same way as for criminal sanctions in the EU-JZG: the executing authority can refuse the execution of the decision if the decision refers to an act which is not punishable under Austrian legislation as far as it is not an offence of the list in the appendix. This list completely corresponds with the list in Art. 5, para. 1 FD financial penalties.

2. Transposition of the territoriality clause

Art. 4, fig. 7 FD arrest warrant, Art. 7, para. 2 lit. d FD financial penalties and Art. 8, fig. 2, lit. f FD confiscation orders provide that the executing State may refuse to recognise and execute the decision, if it is established that the decision relates to acts which

- are regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such, or
- have been committed outside the territory of the issuing Member State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory.

These provisions were transposed differently.

The first alternative (acts in whole or in part committed in the territory of the executing State) leads in principle to the inadmissibility of the recognition and execution of a decision (Sections 6; 52a, para. 1; 53a, fig. 2 lit. a EU-JZG). Referring to the EAW, Section 7, para. 3 EU-JZG makes an exception for non citizens. For them the execution of an EAW is admissible, if

- it is to be preferred that the criminal procedure is lead in the issuing State with regard to special circumstances of the case, in particular due to reasons of finding the truth and of a fair trial, of the protection of legitimate interests of the injured persons, of sentencing or execution of the penalty;
  or
- the case was dismissed in Austria due to the lack of evidence or due to a missing application of the injured person.

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[55] See *supra* 2.B.2.

[56] U. Medigovic, *Juristische Blätter*, 2008, *op. cit.*, p. 75.

This means that non-execution of an EAW is mandatory if it is directed against an Austrian citizen, but, for non citizens, execution is admissible, if there is one of these special grounds for execution.

For the EAW, the second alternative was transposed in a restrictive way. Contrary to the Framework Decision which does not limit the application to nationals, this ground for refusal is only provided for by Austrian law if the EAW is directed against an Austrian citizen (Section 5, para. 3 EU-JZG)[57]. The explanations to the draft bill give no reasons why this ground for refusal has been transposed in a restrictive way.

For the recognition of financial penalties and of confiscation orders, the Austrian legislator took over the provisions from the framework decisions completely as a ground for refusal. The execution of the decision of another Member State imposing a fine is not admissible if the decision relates to an act which has been committed in Austria or on board an Austrian ship or aircraft. Neither is it admissible if the act has been committed outside the territory of the issuing State, if prosecution according to the Austrian legislation would not be allowed for this kind of act when committed outside the Austrian territory (Section 53a, fig. 2 lit. a and b EU-JZG). The corresponding provision in Art. 8, para. 2, lit. f of the FD confiscation orders has been transposed in the same way in Section 52a, fig. 1, lit. a and b EU-JZG.

In the EU-VStVG the territoriality clause was also transposed as a ground for refusal. The wording of the provision only differs in details. The executing authority has to refuse the execution of the decision if the decision relates to an act which has been committed on Austrian territory or on board an Austrian ship or aircraft or which has been committed outside the territory of the issuing State and such kinds of acts committed outside the Austrian territory would not be punishable according to Austrian legislation (Section 5, para. 2, fig. 5 EU-VStVG).

3. Status of nationals and residents

Most MS have in the past endeavoured not to surrender/extradite own nationals. The surrender of own nationals therefore has been – also in Austria – one of the most intensively discussed and politically disputed points of the EAW[58]. The prohibition of extradition of nationals is part of the Austrian Constitution (Section 12 *Auslieferungs- und Rechtshilfegesetz*/Act on Extradition and Mutual Assistance in Criminal Matters). The FD arrest warrant does not provide for exceptions for nationals, but treats them and citizens of other Member States equally. Art. 33, para. 1 of the FD contains a special temporary provision for Austria which enables Austria to allow its executing judicial authorities to refuse the enforcement 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

[57] Critical V. Murschetz, *Auslieferung und Europäischer Haftbefehl, op. cit.*, p. 325.

[58] See H. Fuchs, *Juristische Blätter*, 2003, *op. cit.*, p. 411; K. Schwaighofer, in Ch. Grafl and U. Medigovic (ed.), *Festschrift für Manfred Burgstaller*, *op. cit.*, p. 441 and f.; F. Zeder, *Anwaltsblatt*, 2003, *op. cit.*, p. 384; L. Sautner, *Österreichische Juristen-Zeitung*, 2005, *op. cit.*, p. 333 and f.; U. Medigovic, *Juristische Blätter*, 2006, *op. cit.*, p. 635 and f.; V. Murschetz, *Österreichische Juristen-Zeitung*, 2007/10, *op. cit.*, p. 98.

under Austrian law. This provision was implemented in Section 77, para. 2 EU-JZG [59]. The provision of Section 77, para. 2 EU-JZG ceased to apply on 1 January 2009.

However, the surrender of own nationals can be refused in most cases. Implementing the EAW into national legislation, the Austrian legislator provided for a differentiated special system to protect Austrian citizens. These provisions have the status of constitutional law. The execution of an EAW against an Austrian citizen is not admissible because of offences which fall under the jurisdiction of Austrian criminal law (Section 5, para. 2 EU-JZG). In this case, the institution of the criminal procedure in Austria is not necessary (as distinct from the ground for refusal of Section 7 para. 2 EU-JZG). It is not necessary that the national is prosecuted or even punishable under Austrian law [60].

Moreover, the execution of an EAW against an Austrian citizen is not admissible if the person concerned has not committed any act in the territory of the issuing Member State and if, according to Austrian law, acts of the same kind committed beyond Austrian territory do not fall under the jurisdiction of Austrian criminal law (Section 5, para. 3 EU-JZG) [61].

The execution of an EAW against an Austrian citizen to enforce an imprisonment sentence or another detention measure is not admissible (Section 5, para. 4 EU-JZG). In this case the sentence imposed in the issuing Member State must be enforced in Austria without a separate request of the issuing Member State if in other respects the execution of the EAW would be admissible.

The surrender of an Austrian citizen for the use of criminal prosecution is only admissible under the condition that the person concerned, after having been heard, has the right to return to Austria for the execution of the imposed sentence (Section 5, para. 5 EU-JZG).

Another difference between nationals and non nationals is – as mentioned *supra* [62] – provided for in Section 7, para. 3 EU-JZG: whereas the commission of a criminal act in the Austrian territory by Austrian citizens always excludes the execution of an EAW, for non citizens the execution of an EAW in such cases is admissible under certain circumstances.

It is a question of whether this restrictive system for nationals is compatible with the Framework Decision since it does not fully correspond with the text and the intention of the Framework Decision [63]. Some experts expect that an amendment of these provisions will be necessary in future after a decision by the European Court of Justice concerning the surrender of nationals.

As to the MR of financial penalties and of confiscation orders, no special status for nationals and residents is provided for either in the EU-JZG or in the EU-VStVG. But – as mentioned above – the right to be heard before the enforcement of the fine

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[59] An explicit prohibition to surrender due to acts, which are punishable in Austria, was not necessary, since the prosecution of the person for the same act as that on which the EAW is based, is a ground for refusal (Section 7, para. 2 fig. 1 EU-JZG).

[60] See V. Murschetz, *Auslieferung und Europäischer Haftbefehl, op. cit.*, p. 361.

[61] In detail see U. Medigovic, *Juristische Blätter*, 2006, *op. cit.*, p. 627.

[62] See *supra* 3.D.2.

[63] V. Murschetz, *Auslieferung und Europäischer Haftbefehl, op. cit.*, p. 363 and f.

imposed by an administrative authority is limited to persons who have a mailing address in Austria. This is not a special status for nationals or residents, but it could be an advantage for someone who lives in Austria. The Framework Decision itself does not provide for such a right to be heard.

4. Other grounds for refusal and additional measures

Austrian legislation has transposed all grounds for refusal provided for in the framework decisions as mandatory grounds for refusal. But neither in the EU-JZG nor in the EU-VStVG have other grounds for refusal been added in the implementation laws apart from the violation of fundamental rights.

There can be a risk that a ground for refusal which has been abolished by the European framework decisions is reintroduced by the legislation implementing the framework decision or by the jurisprudence. Since the Austrian legislator has taken over the grounds for refusal quite strictly is not expected that jurisprudence will introduce other grounds.

However, there is a risk of impunity when the executing State makes use of an authorised ground for refusal (e.g. the territoriality principle) if the executing State does not punish the person. It could also be a problem that a condition under which a person is surrendered (e.g. the return of nationals or residents) is not kept. In both cases the Austrian legislator did not see the necessity to introduce any additional measures to avoid the risk of impunity or the risk that another Member State does not co-operate. According to persons competent for the drafting of laws, there were no deliberations about this problem.

5. Reciprocity between Member States

Traditional extradition and MLA law are characterised by the principle of reciprocity. A request by another State is only granted if the requesting State would also extradite or give MLA in a case of the same kind (see Section 3 *Auslieferungs- und Rechtshilfegesetz*)[64]. The framework decisions on MR do not provide for the principle of reciprocity, since this would be in conflict with the idea of MR.

In doctrine it has been discussed whether the principle of reciprocity is relevant, if the Member States use the margins left to them by the framework decisions in a different way. Particularly, if only one of the Member States has implemented the framework decision into national law, the principle of reciprocity could be relevant[65]. In the process of implementation of the framework decisions reciprocity was not an issue.

The EU-VStVG provides for that with regard to a declaration according to Art. 20 fig. 2 FD financial penalties the executing authority has to refuse the execution of the decision, if reciprocity is missing (Section 5, para. 3 EU-VStVG).

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[64] *Ibid.*

[65] F. Zeder, *Anwaltsblatt*, 2003, *op. cit.*, p. 381.

6. Transposition of the general provision on fundamental rights

The framework decisions do not provide that a violation of fundamental rights in the issuing Member State allows the executing Member State to refuse the recognition of a decision. In a very general way it is only noted that fundamental rights are respected and the framework decisions shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 EU (e.g. Art. 1, para. 3 FD arrest warrant; Art. 1 FD freezing orders).

The Austrian legislator transposed these general provisions as mandatory grounds for refusal. The recognition and execution of a decision must be refused when there are objective grounds that the decision has been passed in breach of fundamental principles or essential principles of law within the meaning of Art. 6 EU, especially if the arrest warrant, the confiscation order or the financial sanction is based on grounds of the concerned person's sex, race, religion, ethnic origin, citizenship, language, political opinion or sexual orientation and if the person had no possibility to claim that fact at the European Court of Human Rights or the European Court of Justice (Sections 19, para. 4; 52a, para. 1, fig. 10 ; 53a, fig. 11 EU-JZG; Section 5, para. 2, fig. 11 EU-VStVG).

Also for decisions rendered *in absentia* the Austrian legislator provides for stricter rules than provided for in Art. 5 FD arrest warrant. The surrender is in these cases only admissible if the person concerned was personally summoned for the trial or if the issuing justice authority has irrevocably assured that the application for a retrial of the case in the issuing State will be granted (Section 11 EU-JZG)[66]. It is not sufficient that the person concerned has the opportunity to apply for a retrial.

7. Transposition of confiscation orders

According to Art. 8, para. 2, lit. g FD confiscation orders, the judicial authority of the executing State may refuse to recognise and execute the confiscation order if it is established that the confiscation order, in the view of that authority, was issued in circumstances where confiscation of the property was ordered under the extended powers of confiscation referred to in Art. 2, lit. d (iv). In the case of an extended confiscation order according to Art. 3, para. 1 and 2 FD 2005/212/JHA, which falls outside the scope of the option adopted by the executing State, the confiscation order shall be executed at least to the extent provided for in similar domestic cases under national law.

The obligations of Art. 3 of FD 2005/212/JHA have been transposed into Austrian legislation in the provisions on skimming of profits (*Abschöpfung der Bereicherung,* Section 20 *Strafgesetzbuch* – Criminal Code) and forfeiture (*Verfall,* Section 20b *Strafgesetzbuch*). If a perpetrator has continuously or recurrently committed crimes gaining unlawful pecuniary benefits from or for the commission of which, and if during that time s/he has obtained further profits supposedly arising from crimes of the same kind and if the perpetrator is not able to provide *prima facie* evidence that the property assumed to be of criminal origin has been acquired lawfully, these assets

[66] V. Murschetz, *Auslieferung und Europäischer Haftbefehl, op. cit.*, p. 358.

are also to be skimmed off (Section 20, para. 2 *Strafgesetzbuch*)[67]. The perpetrator has to be convicted to pay an adequate amount of money, if s/he has gained pecuniary benefits during the period of her/his membership of a criminal organisation or of a terrorist association and if the perpetrator cannot show that these assets are of lawful origin (Section 20, para. 3 *Strafgesetzbuch*). Forfeiture is applied with regard to assets at the disposal of a criminal organisation or a terrorist association or which are used for financing terrorism and with regard to assets secured in Austria obtained from an offence committed abroad not being subject to Austrian jurisdiction, but being punishable under the law of the scene of crime.

Art. 8, para. 3 of FD confiscation orders has been implemented as a ground for refusal in Section 52a, para. 1 fig. 9 EU-JZG. The execution of a confiscation order by an Austrian court is inadmissible as far as the confiscation order comprises an extended confiscation, which falls outside the scope of Section 20, para. 2 and 3 or Section 20b *Strafgesetzbuch.* That means that a foreign confiscation order which comprises extended confiscation is executed as far as it is covered by the provisions on skimming off profits and on forfeiture.

E. Decentralised procedure

The framework decisions leave it up to the Member States to choose between a centralised and a decentralised procedure for the MR of decisions. Due to the federal structure of the Austrian constitution, in Austria the execution of a decision takes place via a decentralised procedure. In the scope of the EU-JZG all criminal courts are competent to recognise and execute other Member States' decisions. In the scope of the EU-VStVG all administrative district authorities (*Bezirksverwaltungsbehörden*) and federal police offices are competent for the execution of financial penalties imposed by an authority of another Member State. A centralised procedure would be an advantage for the issuing Member State which would have only one authority to contact. But a centralised system brings about the risk that bureaucratic ways take much more time and are more complicated. Practitioners see the problem that in countries with centralised systems sometimes the requests are not or not directly forwarded to the competent authorities and the execution of decisions takes much more time than in decentralised systems. Apart from constitutional reasons, a centralised system would have required the establishment of a big additional authority only for the coordination of MR. Such a central authority would have been in conflict with the Austrian judicial and administrative system.

4. Practical implementation of mutual recognition and other judicial cooperation instruments

A description of the application of MR instruments is more or less limited to the EAW because all other instruments of MR seem not to have any real practical relevance up until now.

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[67] H. Fuchs and A. Tipold, *in* F. Höpfel and E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch,* 2nd ed., Wien, Manz, 2004, para. 20 fig. 72 and f.

A. General opinion of practitioners on mutual recognition instruments

For judges, the essential basis for MR is seen in mutual confidence between the MS, i.e. that judicial decisions of other States have been issued in a due and fair process. Due to this confidence they recognise and execute the other Member States' decisions.

In principle, all interviewed practitioners regard the principle of MR as a good instrument as long as it facilitates an easier cooperation between the Member States' authorities. It is seen as a logical step in a common Area of Freedom, Security and Justice. Primarily, the abolition of the *exequatur* proceedings with many objections shortens the procedure significantly. The reduction of objections to the proceedings in the issuing State, as far as the merits of the case are regarded, is seen as a substantial progress, since this leads to a concentration of the appeals proceedings in one State only.

In spite of this positive general evaluation, there are some reservations: one of the problems practitioners are confronted with is the fact that MR instruments, which should simplify the crossborder prosecution of criminals, do not always work as well as traditional MLA instruments. Such traditional MLA usually works very well thanks to lengthy experience of it, whereas the use of MR instruments is more complicated and brings about new problems.

In the eyes of judges and prosecutors, MLA for the purpose of freezing property or evidence works far better than the FD on freezing orders. For instance, the freezing of bank accounts seems to be much more difficult with the MR instrument than by using classical MLA. It is predicted that, when the European Evidence Warrant will be introduced, this instrument will also be complicated and not practical enough.

Defence lawyers in principle regard the MR as positive, but the rights of the persons concerned in the issuing State needed to be observed. These lawyers' impression is that there are differences between the various Member States regarding the conditions under which people are surrendered (e.g. the Netherlands or the UK authorities would examine the requirements for a surrender or extradition much more accurately and strictly than Austrian authorities, particularly in respect of the ECHR). According to numerous lawyers, the observance of human rights in the issuing Member State should be verified more accurately in Austria.

B. Cooperation between different Member States on the basis of the mutual recognition instruments

1. General evaluation

In principle, cooperation between Member States on the basis of the current mutual recognition instruments is considered very positive. The EAW in particular is seen as a virtual track record. This instrument is very popular in practice. The elimination of ministries in the extradition process is seen as a positive development, the direct contact between the legal authorities seems to work well. The EAW has radically shortened the average duration of surrender proceedings, since they have become much easier. Even with States in which formerly the traditional MLA and extradition caused problems, the proceedings are regarded as being fast und uncomplicated. The main reason for this smooth functioning of the EAW is seen in the fact that the EAW is

the only instrument for surrender of accused persons in the EU, without any practical alternative. However, some countries tend also to issue EAWs in quite absurd or even ridiculous cases. The tool is not seen as a real gain when it is applied in order to get hold of perpetrators who have allegedly committed shoplifting or an act resulting in a low level of criminal damage.

Unlike the EAW, the execution of freezing orders has only been used in one case in Austria up until now. So there is not much practical experience with that instrument. The main reason is seen in the fact that the same purpose can be achieved by using the traditional instruments of MLA. Judges prefer this traditional and easier use of MLA, since in many cases in which the instrument of MR could be used the MLA must also be used [68].

Since the other instruments entered into force recently, there is no practical experience yet. It is expected that the MR of financial penalties will be used often.

At the moment, there is no concrete thinking about the way the EEW will be put into force, because it depends on how it is transposed into Austrian legislation. But there are considerable doubts about this instrument because the EEW is only provided for when evidence already exists. When the evidence still needs to be collected, classical MLA must be applied. The distinction of EEW and MLA appears to be problematic. This again may lead to some serious scepticism among practitioners. When they need both available evidence and evidence which must be searched for, they will prefer the existing MLA instruments, since this seems to be the easiest way. It is seen as a serious shortcoming of the provisions that they provide for the possibility to use MLA instruments instead of the EEW as soon as the request forms part of a wider need for assistance.

2. Dual criminality

There have been no problems in the application of the provisions regarding the dual criminality requirement. Practitioners would call it a "purely theoretical problem" since there has never been a difficulty arising out of the issue.

The verification of dual criminality is not seen as a problem in conjunction with the EAW, since there are hardly any problematic cases. As far as Austria is concerned as an executing State, the above mentioned cases of petty crime have never caused problems of dual criminality either.

But in cases of freezing orders and of the EEW, the verification of dual criminality could raise problems since these instruments might also concern acts which are petty crimes and which are not punishable in all Member States. Problems can also be imagined in the field of fiscal offences, since, according to Austrian fiscal penal law, only the evasion of Austrian taxes is punishable whereas foreign taxes are not protected by Austrian fiscal criminal law. Apart from this aspect, the verification of dual criminality generally seems to be more an academic problem which is only relevant in exceptional cases.

[68] See *infra* 4.F.

3. Territoriality principle

Referring to the provisions of territoriality, there was one problem in the application of the EU-JZG implementing the EAW. It was not clear whether the surrender of a person was generally (i.e. for nationals as well as non nationals) inadmissible, if the act had been partly committed in Austrian territory [69]. Originally, the Austrian provisions allowed for that interpretation. Meanwhile the legislator has clarified that there is only a bar to execution, if the person concerned is an Austrian citizen (Section 7, para. 3 EU-JZG) [70]. For the time being, no other problems with the territoriality principle have occurred.

4. Typical problems encountered in judicial cooperation

Most of the practitioners see language gaps as the biggest problem of judicial cooperation. This concerns MLA as well as MR. As long as requests for MLA or orders are made correctly and the facts are not too difficult, in the average case it seems possible to cooperate in spite of different languages. But when the facts of a case are more complicated and when it is necessary to ask for additional information, language problems make cooperation more difficult. In order to solve these problems professional interpretation on the one hand, and the intervention of the EJN or Eurojust on the other hand, are used.

Another problem, from the defence lawyers' point of view, is the lack of understanding of the different legal systems, in particular the understanding between common law countries and civil law countries. They think that it may be challenging for judges and public prosecutors in civil law countries to understand the relevance of defence rights in common law systems. Some have the impression that in common law countries there might be a different, i.e. more human rights friendly attitude concerning surrender and the grounds for refusal.

According to prosecutors and judges, the lack of knowledge about the legislation in other Member States sometimes causes problems, especially in cooperation with States that have a completely different legal tradition. To solve these problems, common seminars and confidence-building measures are regarded as necessary. From the point of view of practitioners, cooperation has changed for the better in the last few years since practitioners in the Member States seem to be more and more open-minded about judicial cooperation.

5. Differences in Member States' legislation with regard to the use of coercive/ investigative measures

Differences in Member States' laws with regard to the use of coercive and investigative measures do not really hamper cooperation in criminal matters. As long as the transposition of framework decisions is correct, no problems are observed. Practitioners only see it as unsatisfactory when they have to execute decisions which are completely contradictory to their own national law.

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[69] See *supra* 3.D.2.

[70] See Explanatory remarks to the governmental bill *(Erläuternde Bemerkungen zur Regierungsvorlage),* 299 BlgNR 23. GP p. 11.

However, in principle practitioners think that the proceedings in the other Member States are fair and that it is not the task of judges and public prosecutors to control the procedural provisions of other Member States.

6. Control of procedural safeguards in the issuing State by the executing authority

According to the EU-JZG the execution of a foreign decision is to be refused if there are objective indications that the procedure in the issuing Member State which led to the decision violated any fundamental rights or fundamental legal principles within the meaning of Art. 6 EU [71]. In practice, this means that there is a check on fundamental rights only when there are indications that such fundamental rights have been violated in the procedure or when the person concerned makes any objections referring to fundamental rights. Other checks on fundamental rights are not normally carried out, since they are not provided for in the EU-JZG.

Only when the decision is based on a judgement *in absentia,* is there a strict check on fundamental rights. As to EAWs, the guarantees provided for in Section 11 EU-JZG must be examined. It is necessary to check the procedural guarantees in the other Member State. When the law of the issuing State allows for a new procedure in every case of a judgment *in absentia* (e.g. in Romania), such judgments are not seen as problematic in practice. If only the pronouncement of judgments may take place *in absentia* (e.g. in Poland), but the accused must be present during the rest of the trial, such a judgment is not regarded as a conviction *in absentia* in the strict sense and it is not seen as a problem either. The main practical problem, however, is seen in the information about the legislation of other Member States. Practitioners often wish that on a European level a solution for the problem of judgments *in absentia* could be found, because the different standards in the Member States have led to problems [72].

The FD on decisions *in absentia,* which was adopted in February 2009, is not regarded as sufficient. In general, the new FD is not seen as appropriate to create procedural minimum standards. The possibility to execute a judgement *in absentia*, although the decision has not been delivered to the convicted person contradicts the Austrian understanding of procedural rights. It is worried about that the standards of the ECHR, which at the moment are applied on decisions *in absentia*, are higher than the standards of the new FD. Moreover it is not seen as justified that the new provisions of the FD may not be applied on Italian decisions *in absentia* before 2014. Also the reciprocity clause which has been introduced for the cooperation with Italy is criticised as not suitable for the principle of MR [73].

Defence lawyers would like that, in every case of an EAW, a verification of the protection of fundamental rights during the procedure in the issuing Member State were to take place and that this should already be provided for in the European legal instrument. There is criticism that the relevance of fundamental rights in the FD arrest warrant is very limited. In every case the competent authorities should verify whether,

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[71] See *supra* 3.D.6.

[72] See also F. Zeder, *Journal für Strafrecht*, 2008, *op. cit.*, p. 92 and 135 and f.

[73] *Ibid.*, p. 135 and f.

during the procedure in the issuing State, the right to a fair trial or other fundamental rights (e.g. Art. 8 ECHR) have been infringed.

7. Criteria for a decision on grounds for refusal which are optional for the executing judicial authority

In the Austrian transposition legislation the system of optional grounds for refusal has not been taken on. All grounds for refusal are obligatory. Therefore the executing authority does not have any discretion to refuse the execution. Practitioners see it as positive that the grounds for refusal are obligatory, as this would be a guarantee for their consistent application.

Practitioners do not see the risk of a hidden reintroduction of grounds for refusal which have been abolished by European legislation, since the transposition legislation in principle takes over the text of the framework decisions. An effort has been made to avoid this risk by a strict implementation of the framework decisions, particularly of the grounds for refusal, to prevent new grounds for refusal from being introduced in practice.

C. Information of practitioners on new mutual recognition instruments

The information of practitioners on MR instruments is a necessary condition for a frequent and correct application of these instruments. This is confirmed by the interviews with practitioners. Judges and public prosecutors who work with the EAW are well informed about this instrument. The other instruments of MR seem to be known only to few of them. Training courses and seminars are held, MR instruments are part of the education of young judges. The most important instruments of information are introductory regulations ("*Einführungserlässe*") which are issued by the Austrian Ministry of Justice. Moreover the contact points of the European Judicial Network (EJN) and the Austrian members of Eurojust can be contacted when questions on the MR instruments arise.

A major problem is pointed out, however, regarding the fact that a specialisation of judges and public prosecutors on MR is only possible within larger courts and offices of prosecutors. It would work better if, in every court district, there were specialised judges and prosecutors.

Whereas judges and prosecutors are quite well informed, most of the defence lawyers seem not to know much about the MR instruments. Many of them are not interested in information about these instruments and do not know about the opportunities to defend a person concerned by the MR of another Member State's decision.

All practitioners praise the information and means which are given to them for the application of the EAW on the European level. But they report that this information is not given for the other instruments based on MR. For instance, it is difficult to find out which Member States have already transposed the FD financial penalties.

Moreover, forms as pdf-files are available on the internet only for the EAW, whereas for other instruments of MR, especially the freezing orders, such forms are missing. This means that public prosecutors and judges must copy the forms from the *Official Journal*. Such conditions discourage the use of instruments.

As flanking measures, an improvement in the information about the MR instruments is requested. Particularly the information on the internet should be more comprehensive and up to date. Good information on the instruments would also improve acceptance by the practitioners. Tools that facilitate a better use should be placed at the disposal of practitioners not only for the EAW, but for all MR instruments.

D. Role of practitioners at the stage of implementation

The Ministry of Justice usually tries to involve practitioners at the stage of drafting implementing legislation, and even during negotiations at European level. They have the possibility to comment on the ministerial draft of an implementation law, but in practice this possibility is used only rarely. In many cases only the Supreme Court and the Austrian Bar Association (*Österreichischer Rechtsanwaltskammertag*) have made statements on ministerial drafts.

E. Record of single cases and feedback mechanisms

There is no organised feedback system in Austria which would allow practitioners to report about their experiences with MR instruments. This is regretted by civil servants working in the Federal Ministry of Justice. It is rather the informal way which is used. When there are difficulties or when the application of legal provisions seems not to work, judges and public prosecutors would contact the competent persons in the Ministry of Justice directly. An important form of feedback on the EAW was the questionnaire of the "mutual evaluation exercise" on the application of the EAW.

In Austria a nationwide record of the public prosecution's offices exists, however, in which all cases pending at a public prosecution's office or at a court are introduced, and to which all judicial authorities have access. In this record every act of MLA or MR is also noted. By this means it is possible for every judge and public prosecutor to check whether any other judicial authority is concerned with the same case. Cases of MLA are recorded in the same way as cases of MR. It is not possible to distinguish if it is a case of MR or of MLA.

There are only few published decisions of Austrian courts on the EAW [74]. Normally the Regional Appeals Courts are competent to decide as appeals authorities in cases of EAWs. But the decisions of these courts are usually not published. The Supreme Court, whose decisions are published on a public database, is only exceptionally competent.

F. Application of the Framework Decision on mutual recognition of freezing orders in practice

As already mentioned above, the mutual recognition of freezing orders is rarely used. Up until now, this instrument has been used only once by the Austrian judicial authorities. In this only case, the real estate of a suspected person was seized by French authorities executing an Austrian order freezing property, and the execution was successful. When the bank accounts of this suspect were also to be frozen, this did not work because it was not known which specific accounts were supposed to be

[74] Oberster Gerichtshof, 22 June 2005, 13 Os 56/05t ; Oberster Gerichtshof, 7 November 2007, 13 Os 109/07i, 13 Os 110/07m.

frozen. Therefore it would have been necessary to make a MLA request to find the accounts before issuing an order freezing any bank accounts. That is why it was easier to use MLA only, as both – the search for the accounts and the freezing – could be done in one step. The order freezing property only would not have worked. In this area MLA seems to be easier for practitioners who are used to this traditional instrument. Unlike the EAW the form of MR is regarded to be too complicated.

5. Conclusions

There has been considerable scepticism about MR instruments, particularly about the EAW, in politics and doctrine. In practice, today the EAW is seen as a successful instrument which is working well and has shortened surrender proceedings. The reasons for this are twofold, as the EAW is the only instrument for surrender of accused and convicted persons within the EU and this instrument can be used easily by practitioners.

However, there are several demands for an improvement concerning all MR instruments:

- One important point for policymakers as well as for defence lawyers has been the guarantee of fundamental rights in the procedure. For the protection of fundamental guarantees the framework decisions should clearly provide obligatory grounds for refusal. The aim should be to raise the level of protection of fundamental rights in the Member States. The requirements for MR of decisions rendered *in absentia* are particularly criticised: there should be strict requirements under which such judgments may be executed. The Framework Decision on decisions *in absentia*, adopted in February 2009, is not seen as sufficient.
- Jurisdiction should be regulated. There should be common jurisdiction criteria and rules for the coordination of the exercise of concurrent jurisdictions.
- In the comparison between the different legal orders, harmonisation of substantive law is also seen as necessary in order to avoid a practical dominance of the most severe criminal provisions in every single case. EU legal acts with the purpose of such harmonisation should not always provide for minimum rules only, as they are completely open to the creation of harsher criminal laws.
- Concerning the conditions for investigative measures, a harmonisation of the term of a "suspect/accused" would be desirable. A person should be regarded and treated as an accused and have the rights of an accused, not only of a witness, as soon as he/she is treated as a suspect.
- The separate negotiation of several different framework decisions brings with it the risk of inconsistencies. There is ambivalence about whether a codification of the various instruments based on the MR principle would be useful: a satisfactory way would be to create a general part for all MR instruments followed by specific provisions for each area. However, judges and public prosecutors are wary about this idea, since they see the great number of legal instruments issued by the European Union as a problem and are afraid that a new legal act will again complicate the application of MR instruments. On the other hand, defence lawyers think that a codification would be useful in order to have a consistent regulation of all MR instruments.

- Before the issuing of new legal instruments it should be carefully examined whether they would be really necessary in practice. When new instruments based on the principle of MR are introduced, it must be checked that there are no inconsistencies between the framework decisions.
- A further problem is seen in the situation in which some framework decisions – particularly the FD on the EEW or the FD on freezing orders – do not cover the whole area of a topic, but are only applicable to certain cases, whereas for others the use of traditional MLA is required.

La reconnaissance mutuelle en matière pénale en Belgique

Anne Weyembergh et Veronica Santamaria [1]

1. Introduction

La première concrétisation du principe de la reconnaissance mutuelle, à savoir la DC relative au MAE et aux procédures de remise entre EM, a non seulement été négociée mais a aussi fait l'objet d'un accord politique pendant le second semestre de l'année 2001, sous Présidence belge du Conseil de l'UE [2]. Il est dès lors permis de conclure à l'existence d'un lien particulier entre la reconnaissance mutuelle, d'une part, et la Belgique, de l'autre.

De fait, cette relation particulière paraît pouvoir être confirmée si l'on a égard au fait que la Belgique fait partie des EM qui non seulement ont transposé ladite DC dans les délais impartis mais a en outre procédé à une transposition assez fidèle et conforme aux exigences européennes. Il suffit d'examiner la loi belge du 19 décembre 2003 relative au MAE [3] pour s'en rendre compte.

Si, au départ, la Belgique a ainsi fait figure de « bon élève », elle s'est montrée moins appliquée par la suite. Certes, elle a transposé la DC du 22 juillet 2003 relative

[1] La présente contribution est basée sur les recherches menées par les auteurs mais également sur une série d'interviews. Les auteurs remercient vivement toutes les personnes interviewées pour le temps qu'elles leur ont consacré et la richesse de leurs contributions. Ils expriment en particulier leur reconnaissance à Daniel Flore (conseiller général au SPF Justice), Marie-Hélène Descamps (attachée au SPF Justice), Erik Verbert (attaché au SPF Justice), Stefaan Guenter (avocat général au Parquet général de Gand), Jan Van Gaever (substitut du procureur général au Parquet général de Bruxelles), Thomas Lamiroy (magistrat fédéral au Parquet fédéral), Juan Castiaux et Pierre Monville (avocats, Barreau de Bruxelles).

[2] DC 2002/584/JAI, *JO*, n° L 190, 18 juillet 2002, p. 1 s.

[3] *MB*, 22 décembre 2003.

à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve [4] par sa loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les EM de l'UE [5]. Cette loi de transposition se révèle relativement conforme au texte européen mais elle a été adoptée avec un an de retard, l'échéance fixée par la DC étant le 2 août 2005. Par ailleurs, à la date du 31 mars 2009, la Belgique n'a toujours pas transposé les deux autres instruments de reconnaissance mutuelle censés être en vigueur, à savoir les DC du 24 février 2005 relative à la reconnaissance mutuelle des sanctions pécuniaires [6] et du 6 octobre 2006 relative à l'application du principe de la reconnaissance mutuelle aux décisions de confiscations [7].

Après s'être penchée sur la perception de la reconnaissance mutuelle (2), la présente contribution présentera successivement quelques considérations générales sur la transposition (3) et sur la mise en œuvre pratique (4) des instruments de reconnaissance mutuelle en Belgique. Des réflexions communes à la transposition et à la mise en œuvre pratique porteront ensuite sur certains motifs de refus, à savoir l'exigence de la double incrimination, la clause de la territorialité, la nationalité et la résidence et le respect des droits fondamentaux (5).

2. Perception générale de la reconnaissance mutuelle

Dans les travaux préparatoires des deux lois belges de transposition précitées – à savoir celles du 19 décembre 2003 relative au MAE et du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les EM de l'UE –, le principe de la reconnaissance mutuelle est défini comme suit : « [Il] découle de l'idée d'un espace de justice commun, englobant le territoire des EM de l'Union et dans lequel les décisions de justice circuleraient librement. Traduit en des termes plus concrets, il consiste en ce que, dès lors qu'une décision est prise par une autorité judiciaire qui est compétente en vertu du droit de l'Etat membre dont elle relève, en conformité avec le droit de cet Etat, cette décision ait un effet plein et direct sur l'ensemble du territoire de l'Union et que les autorités compétentes de l'Etat membre sur le territoire duquel la décision peut être exécutée prêtent leur concours à l'exécution de cette décision comme s'il s'agissait d'une décision prise par une autorité compétente de cet Etat » [8].

Bien qu'il y ait une certaine « rupture » entre les instruments de coopération relevant de la reconnaissance mutuelle et ceux relevant de la coopération judiciaire plus classique, la reconnaissance mutuelle n'est généralement perçue ni comme un mécanisme radicalement « neuf » (A) ni comme un mécanisme qui serait d'application automatique ou sans limite (B). Par ailleurs, la reconnaissance mutuelle ne se suffit pas à elle-même, dans la mesure où sa réalisation nécessite des mesures d'accompagnement (C). Enfin, la question se pose de savoir si, tel qu'il a été mis en

[4] DC 2003/577/JAI, *JO*, n° L 196, 2 août 2005, p. 45 s.
[5] *MB*, 7 septembre 2006.
[6] DC 2003/577/JAI, *JO*, n° L 76, 22 mars 2005, p. 16 s.
[7] DC 2006/783/JAI, *JO*, n° L 328, 24 nov. 2006.
[8] Chambre des Représentants de Belgique, Doc. 51-279/001, p. 7.

œuvre jusqu'ici dans les instruments adoptés par l'UE, le principe de reconnaissance mutuelle en matière pénale est cohérent (D).

A. Un concept dont il ne faut pas surestimer l'originalité

Si l'idée de départ était de faire de la reconnaissance mutuelle un processus très novateur, une réflexion approfondie contraint à nuancer cette conception.

Tout d'abord, et même si son application pratique était quasi inexistante à cause du manque de ratifications des textes concernés, la reconnaissance mutuelle préexistait en matière pénale dans la réalité juridique [9].

Ensuite, il faut évidemment soigneusement faire la différence entre, d'une part, les descriptions initiales générales et « théoriques » de la notion de reconnaissance mutuelle sur le « papier », telles qu'elles apparaissent dans les premiers documents de réflexion ou dans les textes de nature programmatoire [10], et, d'autre part, la concrétisation subséquente de la reconnaissance mutuelle dans les instruments européens après l'« épreuve » des négociations, après celle des transpositions nationales et celle de la mise en œuvre pratique, autant de « chocs » entre l'idée de départ et les différentes perceptions dans les EM et parmi les autorités nationales compétentes.

Si l'on s'en tient à une analyse approfondie des négociations des instruments adoptés jusqu'ici et de leurs résultats, il en ressort que la perception de la reconnaissance mutuelle et de son caractère plus ou moins novateur varie considérablement selon l'instrument envisagé [11]. La DC du 13 juin 2002 sur le MAE constitue un acte tout à fait particulier, qui a entraîné un véritable « saut qualitatif » : il a en effet profondément transformé le système extraditionnel qui relevait pour l'essentiel du politique en le judiciarisant. Il n'est toutefois pas représentatif du processus de la reconnaissance mutuelle dans son ensemble. En effet, l'impact de celui-ci en matière d'entraide judiciaire mineure est nettement moins évident car une certaine judiciarisation des procédures d'entraide préexistait déjà. En outre, la judiciarisation est moindre en ce qui concerne certains textes portant sur l'exécution des peines, le domaine couvert relevant plutôt des autorités exécutives de nature administrative. Par ailleurs, une comparaison des différents instruments de reconnaissance mutuelle adoptés jusqu'ici fait apparaître qu'ils ne témoignent pas tous d'un même niveau de reconnaissance mutuelle. En ce qui concerne les négociations, on constate en effet un retour vers les réflexes classiques de souveraineté et vers une logique de plus en plus « nationale ».

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[9] Il suffit à cet égard de songer par exemple à la convention européenne sur la transmission des procédures répressives du 15 mai 1972.

[10] Par exemple dans les documents de la Commission (entre autres la communication de la Commission intitulée « Reconnaissance mutuelle des décisions finales en matière pénale », COM (2000)495 final, 26 juillet 2000) et dans le programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales (*JO*, n° C 12, 15 janv. 2001, p. 10 s).

[11] Pour une comparaison des instruments à cet égard, voy. A.Weyembergh, « Le mandat d'arrêt européen : vers un espace pénal européen cohérent ? », *Les Petites affiches*, 31 juillet 2008, p. 7 et s.

Par ailleurs, même les changements apportés par la DC sur le MAE ne doivent pas être exagérés. Certes, elle transforme la procédure extraditionnelle telle qu'elle fonctionnait auparavant entre les EM de l'UE. Toutefois, à bien des égards, la nouvelle procédure applicable n'est pas si différente de l'ancienne. C'est en tout cas ce qui se constate en Belgique, si bien que la question se pose de savoir si le processus de la reconnaissance mutuelle peut se prévaloir d'une réflexion conceptuelle approfondie et si le MAE lui-même a créé une réelle « rupture » par rapport à l'extradition [12]. Cette interrogation revêt une acuité particulière en ce qui concerne le traitement des motifs de refus. En effet, les négociations semblent s'être concentrées sur certains d'entre eux, comme la problématique de la « double incrimination » et celle des infractions politiques, mais en avoir négligé d'autres, pourtant fondamentaux, comme l'exception classique de la « nationalité » [13].

Parmi les raisons qui seraient susceptibles d'expliquer l'absence d'une réelle « rupture conceptuelle » figure sans doute le fait que l'« élévation » de la reconnaissance mutuelle au rang de « pierre angulaire » de la coopération judiciaire au sein de l'UE ne résulte pas d'un choix positif mais plutôt d'un choix négatif, en tout cas dans le chef d'un certain nombre d'Etats membres qui refusent d'améliorer la coopération en recourant à d'autres moyens, comme l'harmonisation ou le rapprochement des législations internes.

B. Une coopération qui n'est ni automatique ni sans limites

Bien que les systèmes juridiques des vingt-sept EM répondent tous à certaines garanties fondamentales minimales équivalentes, le principe de la reconnaissance mutuelle n'est pas « absolu ». Dès l'origine, la nécessité de maintenir certaines conditions ou certaines garanties et un contrôle minimal dans l'Etat d'exécution a été admise. Parmi les principaux éléments justifiant ces limites figurent, d'une part, les divergences entre systèmes juridiques – tant au plan du droit pénal matériel que procédural –, et, d'autre part, la nature particulière du pénal, et tout spécialement son rapport complexe à la protection des droits fondamentaux. Ainsi, même au sein de l'UE où l'on vise à mettre sur pied un véritable espace pénal européen, l'établissement de limites s'avère nécessaire et l'existence de certains contrôles se justifie afin de savoir s'il est légitime de coopérer ou pas. Toutefois, l'étendue de telles limites et de tels contrôles mériterait de faire l'objet d'une réflexion substantielle, réflexion qui n'a jusqu'à présent manifestement pas encore été menée de manière suffisamment approfondie.

Au plan du droit matériel, certaines divergences constitueront nécessairement un motif de non-reconnaissance et de non-exécution. Pareille affirmation apparaît en pleine lumière si l'on songe au principe de l'existence même de certaines sanctions.

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[12] Le débat sur la question de savoir si le nouveau système mis en place par la DC de 2002 sur le MAE relève encore ou ne relève plus de l'extradition a donc toute sa place (à ce sujet voy. entre autres A. Weyembergh et J. Castiaux, « Le mandat d'arrêt européen : deux années de jurisprudence nationale », *JTDE*, 2006, p. 225 et s.).

[13] Le régime a, dans une très large mesure, été déterminé par celui qui préexistait dans la convention d'extradition de l'UE de 1996 (article 7). Le système des réserves mis en place dans cette convention a « simplement » été levé.

Il va de soi que le fait qu'un ou plusieurs Etat(s) membre(s) ne connai(ssen)t pas un type de sanction est un obstacle, difficilement contournable, à la reconnaissance et à l'exécution de pareille sanction [14].

En ce qui concerne la compatibilité de l'exigence de la double incrimination avec la reconnaissance mutuelle, il va de soi que, dans un système où la reconnaissance mutuelle serait complètement automatique, aucun contrôle de la double incrimination ne devrait plus être autorisé. Toutefois, l'automaticité de la reconnaissance mutuelle n'ayant pas été retenue, un certain contrôle de double incrimination a été maintenu.

Quant au droit procédural, les divergences s'avèrent à certains égards problématiques au plan de la mise en œuvre pratique de la reconnaissance mutuelle. La relation entre reconnaissance/exécution mutuelle et divergences entre procédures pénales des EM doit être envisagée en faisant certaines distinctions car les problèmes, les difficultés et les obstacles posés par les divergences en question ne sont pas nécessairement toujours de même nature.

Pour réfléchir à cette relation, il convient surtout de raisonner en fonction de ce sur quoi portent les divergences, et plus précisément en fonction de la question de savoir si celles-ci portent sur la mesure qui est à exécuter elle-même ou, au contraire, simplement, sur les règles organisant l'émission d'une mesure ou d'une décision. Si l'Etat membre d'émission demande à l'Etat d'exécution de reconnaître et d'exécuter une mesure qui est totalement inconnue dans l'ordre juridique de ce second Etat, la reconnaissance/exécution mutuelle sera bloquée non pas par un problème d'ordre subjectif de confiance mutuelle mais bien par un obstacle juridique d'ordre objectif, de praticabilité. Au contraire, si l'Etat membre d'émission demande à l'Etat d'exécution de reconnaître et d'exécuter une mesure qui est connue dans l'ordre juridique de ce second Etat mais qui n'y est pas soumise aux mêmes règles procédurales, les difficultés sont de nature plus subjective et renvoient à la confiance mutuelle. Certes, de ce point de vue, les choses ne sont pas simples non plus : la problématique des limites de la confiance mutuelle est évidemment très délicate et susceptible de faire l'objet d'approches fort variées.

C. Un principe qui ne se suffit pas à lui-même : de la nécessité de mesures d'accompagnement

Ce dont l'UE a profondément besoin pour la réalisation de la reconnaissance mutuelle, c'est d'un langage commun. Restent à définir, en fonction des secteurs, le contenu, le mode, le degré du langage commun à établir.

Si elle apparaît aux yeux de certains comme une véritable condition de la RM [15], l'harmonisation ou le rapprochement des législations apparaît à tout le moins comme un facteur « facilitateur » du développement et du bon fonctionnement de la reconnaissance mutuelle [16]. En aucune manière, la reconnaissance mutuelle ne doit en

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[14] A cet égard, voy. par exemple le cas de certaines peines alternatives.

[15] A cet égard, voy. entre autres A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Editions de l'Université de Bruxelles, 2004.

[16] A cet égard, et pour bien comprendre ce rôle du rapprochement des législations en tant que facilitateur de la reconnaissance mutuelle, il est extrêmement enrichissant de se pencher sur

tout cas être perçue comme une alternative au rapprochement des législations pénales. Harmonisation et reconnaissance mutuelle sont complémentaires.

Une harmonisation utile et efficace requiert un travail ambitieux de grande ampleur auquel il faut consacrer du temps [17]. Une réflexion est avant tout nécessaire quant aux secteurs dans lesquels il conviendrait d'y procéder. Parmi les domaines prioritaires figure le droit procédural. Viendrait ensuite l'harmonisation des sanctions, en ce qui concerne surtout l'existence de modes ou de types de sanctions ; quant aux niveaux des sanctions, la question se pose de savoir si ceux-ci ne relèveraient pas plutôt de la logique interne aux Etats et d'un débat plus large sur les « valeurs ». En ce qui concerne le rapprochement des incriminations, les avis sont partagés entre ceux qui considèrent que l'exigence de la double incrimination n'entraîne, dans la pratique, que des problèmes limités et symboliques et ceux qui soulignent qu'un travail de rapprochement aiderait à résoudre les problèmes qui subsistent.

Il faut par ailleurs prendre en compte les difficultés que rencontrent les travaux d'harmonisation eux-mêmes [18]. A cet égard, parmi les secteurs symptomatiques, l'on rappellera entre autres les heurs et malheurs de la proposition de DC sur les garanties procédurales ou les difficultés dans le secteur des déchéances, où l'établissement d'un langage commun n'a manifestement pas été possible.

Parmi les autres mesures accompagnatrices nécessaires de la reconnaissance mutuelle figure la détermination de règles ou de critères de répartition des compétences [19]. A l'heure actuelle, il n'existe aucun instrument de l'UE qui détermine, sur un mode contraignant, les critères de compétence dans le domaine pénal. Toutefois, cela ne signifie pas que la question n'a pas du tout été abordée. Il y a quelques instruments de rapprochement sectoriels épars qui, soit appellent à une coordination ou à une centralisation des poursuites mais sans l'organiser [20], soit l'organisent [21]. Le rôle d'Eurojust mérite également d'être mentionné puisque la décision du 28 février 2002 qui l'institue lui a entre autres assigné comme objectifs

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d'autres expériences de reconnaissance mutuelle menées dans l'UE (la nouvelle approche et le secteur de la coopération judiciaire en matière civile et commerciale) ou sur des expériences proches de la reconnaissance mutuelle empruntées à d'autres cadres juridiques. Toutefois, lors de cet exercice, il ne faut pas perdre de vue les spécificités de la matière pénale (*ibid.*).

[17] A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, *op. cit.*

[18] *Ibid*.

[19] De ce point de vue également, l'examen de certaines expériences comparées précitées, surtout de la reconnaissance mutuelle en matière civile et commerciale s'avère particulièrement enrichissant (*ibid.*).

[20] Voy. notamment Conseil UE, convention du 26 juillet 1995 relative à la protection des intérêts financiers des Communautés européennes, *JO*, n° C 316, 27 novembre 1995, p. 48 et s., article 6, par. 2 ; Conseil UE, DC 2000/383/JAI du 29 mai 2000 sur la lutte contre les contrefaçons de l'euro, *JO*, n° L 140, 14 juin 2000, p. 1 s., article 7, par. 3.

[21] A cet égard, la DC sur la lutte contre le terrorisme mérite d'être mentionnée puisqu'elle énumère des critères devant aider à déterminer l'Etat auquel sera donnée la préférence pour poursuivre et juger l'affaire et leur fixe un ordre de priorité (Conseil UE, DC 2002/475/JAI du 13 juin 2002 relative à la lutte contre le terrorisme, *JO* n° L 164, 22 juin 2002, p. 3 et s., article 9, par. 2.)

de promouvoir et d'améliorer la coordination entre les autorités compétentes des EM concernant les enquêtes et les poursuites dans ces Etats [22].

Si certains appellent de leurs vœux la fixation de règles répartitrices de compétences contraignantes, pour d'autres, la fixation de telles règles est illusoire. Selon les tenants de cette seconde approche, même si l'Etat sur le territoire duquel les faits se sont produits est en principe le mieux placé pour entamer les poursuites et juger, la pratique montre que les autorités judiciaires prennent en compte d'autres facteurs selon les circonstances particulières du cas comme l'endroit où se trouvent les victimes, l'endroit où se situe le besoin concret de justice, etc. Il faut par ailleurs également tenir compte de ce que la charge de travail des autorités judiciaires susceptibles de se saisir d'une affaire est, elle aussi, de nature à entrer en ligne de compte et à influencer substantiellement leurs priorités. L'établissement de critères généraux s'avérerait ainsi difficile : la souplesse et la flexibilité devraient être préservées autant que possible dans ce domaine et les décisions en la matière devraient être prises « au cas par cas ». La création d'un éventuel mécanisme de coordination pourrait se fonder sur une « liste des critères » et sur une « instance de dernier ressort » qui pourrait décider dans chaque cas d'espèce quel Etat est le mieux placé pour poursuivre et juger. Certes, d'un côté, l'on peut se dire qu'un organe tiers est sans doute plus apte que les autorités compétentes elles-mêmes à prendre en compte tous les intérêts en présence, à en faire la synthèse et à dégager la « solution idéale ». Toutefois, d'un autre côté, pareille solution peut apparaître difficilement envisageable. En effet, est-elle en prise avec les exigences de la réalité de terrain, où la décision de poursuite relève bien souvent d'une question d'opportunité dans le chef des autorités judiciaires ? Il n'est pas du tout certain qu'un organe tiers et indépendant arriverait à dégager la meilleure solution. Il est en effet indispensable que les autorités nationales compétentes soient convaincues du bien-fondé de la solution à appliquer ; si ledit organisme tiers arrivait à une solution qui ne correspond pas au souhait des autorités judiciaires concernées, les résultats pourraient être pervers [23].

D. La reconnaissance mutuelle en matière pénale au sein de l'UE : un principe cohérent ?

L'UE n'a pas soumis « d'un coup » toute la coopération judiciaire existante en matière pénale au principe de la RM. Pareille approche se serait d'ailleurs plus que probablement soldée par un échec [24]. Fidèle à sa technique « des petits pas », l'Union a privilégié une démarche progressive. Celle-ci présente d'indiscutables avantages. Il

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[22] Conseil UE, décision 2002/187/JAI, *JO*, n° L 63, 6 mars 2002, p. 1 s., article 3, par. 1er, a) et surtout ses articles 6 et 7 ainsi que la décision du 16 décembre 2008 sur le renforcement d'Eurojust et modifiant la décision 2002/187/JAI instituant Eurojust afin de renforcer la lutte contre les formes graves de criminalité, Conseil UE, 14927/08, 24 novembre 2008.Voy. également la réflexion d'Eurojust sur les critères en question, figurant dans l'annexe de son rapport annuel 2003.

[23] Manque de motivation dans le chef des autorités désignées ou déception dans le chef des autorités écartées et donc éventuel manque de collaboration de leur part.

[24] De ce point de vue, le peu de succès de la convention européenne de 1970 sur la validité internationale des jugements répressifs est riche d'enseignements.

n'en demeure pas moins qu'elle comporte aussi un certain nombre d'inconvénients et qu'elle aurait en tout cas pu être mise en œuvre avec davantage de cohérence. En effet, un examen comparé des différents instruments de reconnaissance mutuelle adoptés jusqu'ici fait apparaître certains aspects qui posent à tout le moins question en termes de cohérence.

Trois éléments méritent d'être mis en exergue à cet égard.

1. La relation entre les nouveaux instruments de reconnaissance mutuelle et les instruments de coopération judiciaire préexistants

A cet égard, trois observations s'imposent. Tout d'abord, ce rapport est loin d'être géré de la même manière par tous les instruments de reconnaissance mutuelle. Tandis que la DC sur le MAE remplace purement et simplement les instruments extraditionnels préexistants et qu'elle exclut expressément en principe l'application des instruments qu'elle énumère (article 31 DC), la DC sur le gel ne prend pas explicitement position sur le sujet [25] et la DC sur le MOP laisse un certain choix aux autorités concernées de recourir aux anciens mécanismes ou au nouveau système qu'elle met en place. Ensuite, la mise en œuvre des nouveaux mécanismes fait parfois apparaître de sérieuses difficultés quant à leur coexistence avec les mécanismes « ancienne mouture ». Ces difficultés sont liées au « choc » que suscite la rencontre entre des mécanismes qui répondent en principe à des logiques différentes [26]. Enfin, il importe de relever que le succès du MAE et le fait qu'il soit « en avance » sur la reconnaissance mutuelle dans le secteur de l'entraide judiciaire mineure paraissent avoir des conséquences pratiques « perverses » [27]. Des cas sont en effet relatés où des autorités judiciaires n'ont pas, à l'heure actuelle, la possibilité de contraindre des témoins se trouvant à l'étranger à comparaître devant elles et délivrent alors un MAE à leur encontre. La question se pose de savoir si un tel usage de l'instrument concerné correspond encore à ses objectifs ou s'il s'agit d'un usage abusif, de nature à mettre en péril la cohérence de l'espace pénal européen. Dans ce contexte, on notera une décision intéressante d'avril 2007 de la Cour de cassation italienne à propos d'un MAE décerné par des autorités judiciaires belges à l'encontre de deux citoyens italiens. La Cour de cassation casse

[25] Elle ne règle en quelque sorte son rapport avec les instruments préexistants qu'en ce qui concerne la détermination du régime ultérieur du bien gelé, c'est-à-dire le raccordement du gel à ses suites : voy. article 10 DC.

[26] En témoigne par exemple la relation entre, d'une part, la DC MAE et plus particulièrement ses dispositions sur les nationaux et résidents et, d'autre part, les instruments de coopération censés organiser leur retour vers leur Etat d'origine ou de résidence. Le premier aspect relevant de la RM, le national ou le résident sera donc remis sur la base d'un mécanisme de coopération judiciarisé où le ministère de la Justice n'intervient plus ; mais tant que le second aspect n'est pas soumis en pratique à la RM, le transfèrement de ladite personne sera, quant à lui, encore géré par l'ancien système de la convention européenne de 1983, où ledit ministère, qui n'a pas été en principe impliqué dans la remise, a encore un rôle à jouer. La situation changera lorsque la DC du 27 novembre 2008 concernant l'application du principe de la RM aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution dans l'UE sera d'application (*JO*, n° L 327, 5 décembre 2008, p. 27 et s.).

[27] A ce sujet, voy. A. Weyembergh, « Le mandat d'arrêt européen : vers un espace pénal européen cohérent ? », *op. cit.*

la décision qui concluait à l'exécution du mandat au motif que celui-ci a été émis pour contraindre les sujets à prendre part à des actes d'instruction (interrogatoire et confrontation) concernant une procédure pénale à l'encontre d'une autre personne, sans qu'il y ait des indices graves de culpabilité en ce qui les concerne, et que ce but n'est prévu ni par la loi de transposition italienne ni par la DC elle-même [28]. De tels problèmes d'abus devraient logiquement disparaître au fur et à mesure que les mécanismes de coopération classique et améliorée sont remplacés par des mécanismes relevant de la RM. Toutefois, plus grandes seront les différences de degré de RM selon les instruments adoptés et les pans de la coopération envisagés, plus grand sera le risque de voir de tels abus se maintenir.

2. L'articulation des nouveaux instruments de reconnaissance mutuelle entre eux

Un deuxième élément posant question en termes de cohérence concerne le rapport des nouveaux mécanismes de reconnaissance mutuelle les uns par rapport aux autres : certes les nouveaux mécanismes sont établis et gérés par différentes DC mais, dans la pratique, les instruments, ou à tout le moins certains d'entre eux, sont intimement liés les uns aux autres [29]. Il faut donc veiller à coordonner leur mise en œuvre. Or pareille coordination fait parfois défaut.

3. Des solutions différentes pour régler une même problématique

Des solutions divergentes ont été dégagées sur certains aspects transversaux ou communs aux différents instruments de reconnaissance mutuelle. Ces divergences sont évidemment principalement dues à ce que chaque négociation est « habitée » par sa logique propre ; le compromis trouvé étant dès lors logiquement lui aussi différent, les solutions sont susceptibles de varier. Les difficultés croissantes auxquelles sont confrontées les négociations ne sont bien entendu pas non plus étrangères aux variations constatées. Parfois, la différence d'approche est explicable et n'est pas problématique mais parfois elle pose question. Parmi les aspects dont le traitement est variable, on relèvera le cas de certaines causes de refus ou d'exécution sous conditions. Certains motifs de refus, comme par exemple celui concernant les droits fondamentaux, le cas du jugement par « défaut » ou encore la clause de la territorialité sont articulés et fonctionnent de façon différente selon les instruments. Des initiatives ont toutefois heureusement été prises pour tenter d'accroître la cohérence et réduire les inconvénients résultant de telles variations : à cet égard, on renverra à la DC sur les procédures par défaut [30].

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[28] Cour de cassation italienne, Section VI, arrêt n° 15970, 17-19 avril 2007.

[29] Voy. par exemple les liens étroits entre, d'une part, la DC MAE, et surtout ses dispositions relatives aux nationaux et résidents, et, d'autre part, celle sur le transfèrement, entre la DC gel des avoirs et des preuves et celle sur la confiscation ou encore entre celle sur le transfèrement et celle relative à la probation.

[30] DC 2009/299/JAI du Conseil du 26 février 2009 portant modification des DC 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès.

Par ailleurs, et de manière plus générale, comme on l'a vu plus haut, une comparaison des différents instruments fait apparaître des niveaux de reconnaissance mutuelle variables, la DC sur le MAE se montrant la plus ambitieuse dans la mise en œuvre de ce principe et exigeant, en conséquence, le niveau de confiance mutuelle le plus élevé. Bien sûr, rien n'exige que le principe de la reconnaissance mutuelle soit appliqué avec la même intensité par tous les instruments qui le concrétisent [31]. Mais la cohérence implique que cette différence de degré soit (au minimum) objectivement justifiable. Or ce n'est pas toujours le cas. Cette différence de degré est même parfois paradoxale si l'on songe par exemple au MAE, d'une part, et aux DC sur le gel des avoirs et des preuves et sur le MOP, d'autre part. Le fait que les EM se fassent moins confiance et soient plus circonspects quand il s'agit d'appliquer la reconnaissance mutuelle relativement à des avoirs ou des éléments de preuve que lorsqu'il s'agit de la remise de personnes laisse évidemment songeur quant aux valeurs de l'UE [32].

3. Considérations générales sur la transposition du principe de la reconnaissance mutuelle en Belgique

A. Bilan général

A la date du 31 mars 2009, la Belgique n'a transposé que deux DC qui mettent en œuvre le principe de la reconnaissance mutuelle. Elle a transposé la DC du 13 juin 2002 relative au MAE et aux procédures de remise entre EM par sa loi du 19 décembre 2003 relative au MAE [33]. Dans ce premier cas, l'échéance prévue par la DC a donc été respectée. Quant au second, celui de la transposition de la DC du 22 juillet 2003 relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve, la transposition a eu près d'un an de retard puisqu'elle a été réalisée par la loi belge du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les EM de l'UE [34].

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[31] C'est ce qui ressortait d'ailleurs du programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales lui-même *JO*, n° C 12, 15 janvier. 2001, p. 10 et s.

[32] A ce sujet, voy. A. Weyembergh, « Le mandat d'arrêt européen : vers un espace pénal européen cohérent ? », *op. cit.*

[33] *MB*, 22 décembre 2003. Pour un commentaire, voy. entre autres P. Monville, « Le mandat d'arrêt européen : remise en cause du mécanisme de la simple remise », *JTDE*, 2003, p.168 et s. ; B. Dejemeppe, « La loi du 19 décembre 2003 relative au mandat d'arrêt européen », *JT*, 2004, p. 112 et s ; G. Stessens, « Het Europees aanhoudingsbevel : De wet van 19 december 2003 », *Rechtskundig Weekblad*, 15, 2004-2005, 11 december ; D. Van Daele, « België en het Europees aanhoudingsbevel : een commentaar bij de wet van 19 december 2003 », *Tijdschrift voor strafrecht*, 2005, p. 151.

[34] *MB*, 7 septembre 2006 ; pour un commentaire, voy. entre autres G.-F. Ranieri, « L'émission et l'exécution, dans les relations entre la Belgique et les autres EM de l'UE des décisions de saisie de biens ou d'éléments de preuve. Présentation de la loi du 5 août 2006 », *Revue de droit de l'Université de Liège,* 2007, p. 49 et s ; V. Franssen et F. Verbruggen, « Europees bevriezingsbevel omgezet in Belgische wet », *Juristenkrant*, 2 sept. 2006, p. 7.

Ces deux instruments ont également fait l'objet de circulaires : la circulaire ministérielle relative au MAE du 8 août 2005 [35] et la circulaire commune de la ministre de la Justice et du Collège des procureurs généraux concernant l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale – exécution des décisions de saisie [36].

Malgré quelques écarts qui seront identifiés dans la suite de cette contribution, il ressort des évaluations réalisées que ces deux lois belges de transposition sont globalement conformes aux DC concernées [37]. Lors de cet exercice de mise en œuvre, le législateur belge s'est largement appuyé sur le droit procédural interne en vigueur dans les matières concernées. Sa volonté était en effet de coller autant que possible à la procédure suivie en droit national. Le droit interne apparaît ainsi comme une réelle source d'inspiration. La procédure applicable en ce qui concerne le MAE s'appuie largement sur la procédure interne applicable en matière de détention préventive conformément à la loi de 1990, et celle sur le gel des avoirs et des preuves s'appuie dans une large mesure sur la loi du 20 mai de 1997 [38].

Au 31 mars 2009, ni la DC du 24 février 2005 relative à la reconnaissance mutuelle des sanctions pécuniaires ni celle du 6 octobre 2006 relative à l'application du principe de la reconnaissance mutuelle aux décisions de confiscations n'ont été transposées en Belgique. Les mesures de transposition de la DC du 24 février 2005 relative à la reconnaissance mutuelle des sanctions pécuniaires auraient dû être adoptées pour le 22 mars 2007 au plus tard. L'avant-projet de loi de transposition avait été déposé au cabinet de l'ancienne ministre de la Justice, L. Onkelinx, juste avant les échéances électorales du printemps 2007. Toutefois, malgré le dépassement du délai de transposition, la ministre a jugé inopportun de saisir le Conseil des ministres de cet avant-projet en fin de législature. La situation de crise politique interne qui a fait suite aux élections pendant plusieurs mois a encore considérablement retardé les choses. Il a par ailleurs été jugé préférable de joindre à l'avant-projet en question la transposition de la DC du 6 octobre 2006 relative à l'application du principe de la reconnaissance mutuelle aux décisions de confiscations, laquelle devait être mise en œuvre par les EM pour le 24 novembre 2008. Cette décision était motivée par le souhait de faciliter le travail d'intégration législative et d'assurer une plus large cohérence. Un seul avant-projet de loi modifiant la loi du 5 août 2006 devrait donc assurer la transposition des deux DC précitées. Il semble qu'à la date du 31 mars 2009, l'avant-projet ait été finalisé mais doive encore être déposé en Conseil des ministres puis transmis à la section de législation du Conseil d'Etat et finalement envoyé au Parlement. Si cet envoi était initialement prévu pour le début de l'été 2008, il a fait l'objet de reports successifs.

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[35] Cette circulaire a été publiée au *MB*, 31 août 2005. Elle remplace la circulaire ministérielle provisoire relative au mandat d'arrêt européen du 23 décembre 2003, qui est abrogée.

[36] COL. 5/2007, datée du 14 mars 2007.

[37] Pour une évaluation de la loi de décembre 2003 sur le MAE, voy. notamment l'évaluation de la Commission (surtout son premier rapport de février 2005, COM (2005) 63 et SEC (2005) 267, 23 février 2005).

[38] A cet égard, voy. d'ailleurs l'exposé des motifs de la loi du 5 août 2006.

Outre les motifs précités liés à la crise politique interne et à la volonté de joindre la transposition des DC sanctions pécuniaires et confiscation, d'autres raisons sont susceptibles d'expliquer le retard accumulé, entre autres l'absence de pression exercée sur les EM en ce qui concerne la mise en œuvre des instruments de reconnaissance mutuelle qui ont suivi la DC sur le MAE [39].

B. Difficultés particulières rencontrées

1. La loi du 19 décembre 2003 sur le MAE

Des travaux parlementaires il ressort qu'aucun problème juridique de fond ou de « principe » n'a été rencontré lors de l'adoption de la loi belge du 19 décembre 2003 sur le MAE. Celle-ci a néanmoins donné lieu à certains débats et discussions au sein du Parlement [40] : il s'agissait, en effet, d'un texte perçu comme symboliquement important puisqu'il s'agissait non seulement de la première concrétisation du principe de reconnaissance mutuelle mais en outre de l'extradition. Les débats sont néanmoins demeurés limités.

Après son adoption, la loi de transposition de décembre 2003 a été confrontée à certaines difficultés vu le recours en annulation introduit contre celle-ci devant la cour constitutionnelle belge par l'asbl « Advocaten voor de wereld ». Ce recours s'articulait en cinq moyens. Selon le premier, une DC est destinée au rapprochement des législations (article 34 du TUE). Le MAE ne répondant pas à cette définition, ce mécanisme aurait dû être organisé par convention. Selon le deuxième moyen, il existerait une différence de traitement injustifiée entre les inculpés arrêtés sur la base d'un MAE et les inculpés « de droit commun » qui seuls bénéficient des garanties prévues par la loi belge du 20 juillet 1990 relative à la détention préventive. En outre, en prévoyant qu'un MAE s'applique aussi bien aux personnes poursuivies qu'aux personnes condamnées, la loi belge traiterait abusivement des situations différentes de manière identique. Le troisième moyen concerne les garanties que peut exiger l'autorité judiciaire belge qui exécute un MAE fondé sur une décision prononcée par défaut (article 7 de la loi du 19 décembre 2003). Suivant ce moyen, des cas identiques sont traités différemment puisque le jugement par défaut et les garanties relatives au caractère contradictoire de la procédure pénale sont organisés de manière très différente selon les EM. Selon le quatrième moyen, la suppression de l'exigence de la double incrimination pour une série de trente-deux infractions, alors que cette exigence est maintenue pour les autres infractions, n'est pas raisonnablement justifiée. Selon le cinquième moyen, la liste figurant à l'article 5, par. 2 de la loi litigieuse n'énumère pas des infractions accompagnées de leur définition légale mais des catégories génériques

[39] De ce point de vue, le contraste avec la DC sur le mandat d'arrêt européen est frappant. L'on pense notamment ici au groupe de suivi qui avait été créé au niveau de l'Union afin de faciliter la transposition en droit interne et d'analyser les questions liées à la mise en œuvre de cette DC. Ce groupe s'est révélé un lieu de discussion très utile, un outil précieux d'échanges d'information mais aussi de pression pour une transposition conforme et une bonne mise en œuvre de la DC du 13 juin 2002.

[40] Voy. surtout Chambre des Représentants de Belgique, projet de loi relative au mandat d'arrêt européen, Doc. 51, 279/001 à 012 et Sénat de Belgique, doc. 3-395/1 à 6.

de comportements indésirables décrits de manière très vague. Il en résulterait donc une violation du principe de légalité.

Dans son premier arrêt rendu le 13 juillet 2005[41], considérant que les premier, quatrième et cinquième moyens touchent à la validité de la DC elle-même, la Cour constitutionnelle a saisi la CJ de deux questions préjudicielles : l'une sur la question de savoir si la DC relative au MAE est compatible avec l'article 34, par. 2, point b) UE, selon lequel les DC ne peuvent être arrêtées qu'aux fins du rapprochement des dispositions législatives et réglementaires des EM, et l'autre tendant à déterminer si l'article 2, par. 2 de cette DC, en tant qu'il supprime le contrôle de l'exigence de la double incrimination pour les infractions qui y sont mentionnées, est compatible avec l'article 6, par. 2 UE, et plus spécifiquement avec le principe de légalité en matière pénale et avec le principe d'égalité et de non-discrimination garantis par cette disposition. On connaît la suite réservée à ces questions par la CJ dans son arrêt en date du 3 mai 2007, dans l'aff. C-303/05, *ASBL Advocaten voor de wereld*.

A la suite de cette décision de la CJ, la Cour constitutionnelle a rendu une seconde décision le 10 octobre 2007[42]. Se fondant sur l'arrêt de la Cour de justice, la Cour constitutionnelle rejette les premier, quatrième et cinquième moyens avancés par la requérante. Elle rejette en outre également les deuxième et troisième moyens.

2. *La loi du 5 août 2006 et les travaux de transposition en cours en ce qui concerne les sanctions pécuniaires et la confiscation*

Comme l'intitulé de la loi du 5 août 2006 « relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les EM de l'UE » l'indique, le législateur belge a fait le choix d'adopter une loi globale destinée à transposer la DC sur le gel mais également d'autres instruments de reconnaissance mutuelle à venir. Cette loi est en tout cas censée servir de loi cadre pour les DC sanctions pécuniaires et confiscation actuellement en cours de transposition, et probablement aussi pour le MOP. Mais elle ne le sera vraisemblablement pas pour les instruments de reconnaissance mutuelle qui portent sur les personnes, comme les DC sur le transfèrement ou la probation. Cette option d'une loi générale a été retenue afin d'éviter l'éparpillement et d'assurer une structure rationnelle.

Cette loi d'août 2006 et les travaux de transposition actuellement en cours relativement aux sanctions pécuniaires et à la confiscation témoignent de ce que, de manière générale, le législateur belge tente d'assurer, dans la mesure du possible, une certaine cohérence et continuité entre les transpositions successives. A cet égard, on mentionnera par exemple le « traitement » qu'il a réservé aux clauses de refus fondées sur les droits fondamentaux ou la double incrimination, sur lesquelles la présente contribution reviendra plus loin. Les personnes en charge de ces transpositions en Belgique ont toutefois relevé que leur tâche est compliquée à cet égard vu les problèmes de cohérence entre les DC de l'UE relevés précédemment.

Aucun problème juridique de fond ou de « principe » n'a été rencontré lors de l'adoption de la loi du 5 août 2006 qui a transposé la DC sur le gel. Les débats – entre

[41] Arrêt n° 124/2005 (www.arbitrage.be).

[42] Arrêt n° 128/2007.

autres parlementaires [43] – dont elle a fait l'objet se sont révélés plus restreints que pour la loi de transposition précédente, la charge symbolique étant moindre. Certains points n'ont fait l'objet d'aucune difficulté alors qu'ils avaient rencontré des oppositions dans le cas de la loi sur le MAE [44].

Bien que la notion de gel de biens ne soit pas inconnue en droit interne belge [45], la loi du 5 août 2006 emploie exclusivement la notion plus classique en droit belge de « saisie ». Le législateur belge explique cette substitution terminologique par la circonstance que la référence au concept de gel était nécessaire en vue de surpasser les différences entre législations nationales des EM en matière de mesures conservatoires [46] et que, telle que définie par la DC concernée, cette notion correspond à celle de saisie conservatoire figurant aux articles 35, 35*bis* et *ter* du CIC, à savoir une mesure d'immobilisation des avoirs à caractère provisoire qui peut viser un bien susceptible de confiscation ou un élément de preuve [47]. Cette substitution n'est toutefois pas totale puisque la notion de gel apparaît encore dans le certificat. A cet égard, l'article 9 de la loi 2006 précise que la notion de gel dans le certificat s'entend de la « saisie » au sens des articles du CIC précités [48].

C. Le choix de la décentralisation

Tant la loi du 19 décembre 2003 relative au MAE que la loi du 5 août 2006 pour les décisions de saisie ont retenu une procédure d'exécution des décisions étrangères décentralisée. Cette option a été choisie car elle a été perçue comme la formule qui correspond le mieux à l'esprit de la reconnaissance mutuelle, et au souhait de privilégier autant que possible les contacts directs entre autorités judiciaires. Par ailleurs, une centralisation des procédures d'exécution des décisions étrangères fondées sur la reconnaissance mutuelle aurait été difficilement conciliable avec la législation interne et difficilement réalisable au plan pratique vu la charge de travail considérable que pareille centralisation aurait entraînée pour les autorités compétentes. Elle comporte par ailleurs le risque de voir se développer des positions rigides, statiques, sans évolution ni changement de mentalité. De ce point de vue, la diversité qu'entraîne la décentralisation constitue une richesse ; elle permet une discussion plus large et plus riche quant à la manière de résoudre certaines difficultés rencontrées en pratique.

Ce choix de la décentralisation n'en présente pas moins certains inconvénients. Parmi ceux-ci, deux méritent d'être mis en exergue. Il s'agit, d'une part, du manque de visibilité et, d'autre part, des difficultés rencontrées pour centraliser les

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[43] Chambre des Représentants de Belgique, Doc. 51, 2106/001 à 3 et Sénat de Belgique, Doc. 3-1672/1 à 4.

[44] Ainsi, alors que la possibilité d'utiliser l'anglais avait été refusée dans le cas de la transposition du mandat d'arrêt européen, elle a été retenue dans le cas de la transposition du gel sans susciter aucun débat (à ce sujet, voy. la circulaire de mars 2007 p. 3).

[45] Elle y est cependant de création récente et isolée. C'est ainsi qu'on la trouve à l'article 22, al. 2 11° de la loi 29 mars 2004 concernant la coopération avec la CPI et les Tribunaux pénaux internationaux.

[46] Chambre des Représentants de Belgique, Doc. 51, 2106/001, p. 14.

[47] A ce sujet, voy. la circulaire de mars 2007 p. 2, par. 2 et G.F. Ranieri, *op. cit.*, p. 56.

[48] Pour d'autres commentaires à ce sujet, voy. *ibid.*

informations ou les faire remonter vers l'autorité centrale, à savoir le SPF Justice. Les autorités judiciaires compétentes ne s'acquittent correctement ni de l'obligation qui leur est faite aux termes de la circulaire ministérielle de 2005 d'informer le SPF justice de toute procédure d'exécution ou d'émission d'un MAE [49] ni de l'obligation consacrée par l'article 5, par. 1er de la loi du 5 août 2006 de lui transmettre toute décision judiciaire de saisie transmise ou reçue par une autorité judiciaire belge en vertu de cette loi. En raison de cette transmission défaillante de l'information, il est extrêmement malaisé de réaliser une évaluation représentative, fiable et complète de la pratique [50]. Ce sont également ces difficultés qui expliquent que la Belgique est un des seuls Etats membres à n'avoir pas remis les chiffres nécessaires au Secrétariat général du Conseil pour la publication de son document annuel sur les statistiques du MAE [51]. La « responsabilité » de pareille situation n'est toutefois pas uniquement imputable aux autorités judiciaires compétentes. Il convient en effet de noter qu'il n'existe à l'heure actuelle toujours pas de système informatique général performant [52] et que le SPF Justice n'est pas doté des ressources humaines pour encoder et traiter toutes ces informations.

En ce qui concerne l'avant-projet à venir, il devrait, quant à lui, également maintenir l'approche décentralisée en ce qui concerne les sanctions pécuniaires et les décisions de confiscation.

4. Considérations générales sur la mise en œuvre pratique

Les considérations qui suivent ne concerneront bien sûr que les deux DC de reconnaissance mutuelle d'application en Belgique à l'heure actuelle, à savoir la DC sur le MAE et celle sur le gel des avoirs et des preuves.

A. Bilan général

Le MAE est très fréquemment appliqué en pratique. Il a été reçu avec enthousiasme par les praticiens, qui de manière générale estiment que ce nouveau mécanisme fonctionne bien et se félicitent des progrès et améliorations apportées, entre autres de ce que, alors qu'auparavant deux demandes étaient nécessaires, l'une pour l'arrestation et l'autre pour l'extradition, le MAE couvre désormais les deux. Ils saluent également la judiciarisation de la procédure, l'instauration de délais obligatoires et la réduction du nombre de causes de refus. Certaines difficultés sont toutefois identifiées, lesquelles seront précisées dans les développements qui suivent.

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[49] Voy. par. 1.6 de la circulaire ministérielle relative au mandat d'arrêt européen du 8 août 2005 : « les autorités judiciaires compétentes veillent à informer le service public fédéral Justice de toute procédure d'exécution ou d'émission d'un mandat d'arrêt européen en Belgique ».

[50] Cette faiblesse a déjà été dénoncée à de multiples reprises à propos de la Belgique, voy. entre autres à cet égard, le rapport d'évaluation par « les pairs » relatif à la Belgique, doc. 16454/1/06 REV 1, 3 janvier 2007, p. 7, 9 et s.

[51] Pour l'année 2006, voy. le doc. COPEN 106 IGN20 11371/5/07.

[52] Voy. depuis des années le fameux projet « Phoenix ».

Quant aux dispositions de la loi d'août 2006 qui transposent la DC sur le gel des avoirs et des preuves, elles ne sont que très rarement appliquées [53]. Les raisons de cet insuccès sont diverses. Parmi les magistrats, la connaissance de la DC concernée et de la loi interne de transposition du 5 août 2006 est très faible. Et, parmi ceux qui connaissent les textes, il y a manifestement un manque de volonté de les appliquer. Un tel manque d'intérêt peut tout d'abord s'expliquer par analogie au niveau interne, où la saisie n'est pas non plus caractérisée par un franc succès [54] mais il est, en outre et sans doute surtout, dû au manque de plus-value [55] et au morcellement du nouveau système mis en place. Celui-ci est trop complexe. Les instruments juridiques de coopération ont été « morcelés » tandis qu'en pratique, le procès pénal constitue une « unité » dont les différents éléments (une perquisition, une audition de suspect, une saisie…) constituent un tout. Soumettre chacun de ces éléments à des instruments distincts conduit à un morcellement ou à une décomposition de la coopération judiciaire et de la procédure et rend la tâche des praticiens trop ardue.

Bien que les travaux pour sa transposition n'aient même pas encore été lancés, les mêmes critiques se font d'ores et déjà entendre par rapport au MOP [56], lequel ne sera vraisemblablement pas ou très peu appliqué vu le peu d'intérêt qu'il paraît revêtir aux yeux des praticiens. Le MOP est en effet généralement perçu comme étant beaucoup trop compliqué, et ce surtout en raison du « saucissonnage » de l'entraide auquel il procède et du choix qu'il laisse aux autorités de continuer d'appliquer les mécanismes préexistants. Un tel instrument est manifestement de nature à décrédibiliser le principe de la reconnaissance mutuelle : si le processus se poursuit de la sorte, on risque d'arriver à une « impasse » et de voir les praticiens, en particulier les autorités judiciaires, devenir de plus en plus circonspects par rapport aux instruments adoptés au sein de l'Union et au mode de coopération mis sur pied…

B. Difficultés particulières rencontrées

Dans l'application des instruments de RM, les praticiens sont confrontés à certains problèmes de nature transversale. Parmi eux figurent les difficultés d'interprétation des textes applicables. Les DC ne sont en effet accompagnées d'aucun exposé des

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[53] Seuls quelques cas nous ont été rapportés. Toutefois, comme nous l'avons précédemment mentionné, les informations sur l'application pratique des instruments de reconnaissance mutuelle ne remontent pas au SPF Justice, ce qui rend les chiffres à disposition non fiables. Il y a donc peut-être davantage d'usages de la loi du 5 août 2006 qu'il n'y paraît à première vue.

[54] La technique pour « geler les biens » est en effet compliquée et requiert un certain nombre d'efforts (préparer la demande, localiser les biens, problèmes liés aux intérêts légitimes des tiers…).

[55] Une comparaison de la loi du 20 mai 1997 sur la coopération internationale en ce qui concerne l'exécution des saisies et de confiscations et celle du 5 août 2006 qui transpose la DC sur le gel des avoirs et des preuves donne l'impression que la première était d'application plus simple que la seconde alors qu'en principe ce devrait être l'inverse, l'objectif du principe de la reconnaissance mutuelle étant précisément de simplifier les choses.

[56] A cet égard, voy. en particulier J. Van Gaever, « Nieuwe regels voor de bewijsverkrijging in strafzaken binnen de Europese Unie », *Tijdschrift voor Strafrecht*, 5, 2007.

motifs [57] ou rapport explicatif. De telles explications sur l'intention des auteurs des textes, sur leurs objectifs, sur leur esprit s'avéreraient pourtant tout à fait essentielles pour aider les praticiens à les appliquer [58]. Ceux-ci rencontrent en outre de sérieuses difficultés pour accéder aux textes de transposition des différents EM. Or pareil accès est primordial vu les divergences parfois profondes qui existent entre les lois de transposition nationales. Cette géométrie variable complique, elle aussi, la tâche du praticien. La DC sur le MAE a ainsi par exemple fait l'objet de vingt-sept transpositions distinctes témoignant d'approches nationales fort variées ; il existe vingt-sept procédures de remise différentes. Or un élément essentiel pour le bon fonctionnement de la reconnaissance mutuelle est l'application de règles aussi semblables que possible, même si celles-ci se déclinent différemment au niveau interne. Il faut donc espérer qu'après l'entrée en vigueur du traité de Lisbonne et bien que l'article 86, par. 2 du TFUE soit silencieux à cet égard, ce soit le « règlement » qui sera choisi pour développer le principe de la reconnaissance mutuelle [59].

1. L'application du MAE

Parmi les problèmes rencontrés dans l'application du MAE, nous examinerons successivement ceux liés aux faits pour lesquels un MAE peut être émis ou plus exactement au seuil de la peine prévu (a), ceux liés à la minorité de la personne (b), au principe de la spécialité (c), à l'arrestation de la personne et à sa remise (d), aux limites et aux conséquences de la confiance mutuelle (e), ceux rencontrés par la défense (f) et ceux liés à l'absence de disposition dans la DC d'une disposition relative à la remise accessoire/complémentaire (g). Les problématiques liées à la double incrimination, à la clause territoriale, aux nationaux et résidents et aux droits fondamentaux, seront examinées dans la partie suivante de cette contribution.

a) En ce qui concerne les faits pour lesquels un MAE peut être émis

Deux difficultés sont à relever en ce qui concerne le seuil de la peine prévu.

Aux termes de la DC et de la loi belge de transposition, peuvent donner lieu à remise les faits punis par la loi de l'Etat d'émission d'une peine privative de liberté ou d'une mesure de sûreté d'au moins 12 mois ou, si une condamnation est déjà intervenue ou une mesure de sûreté infligée, pour des sanctions ou mesures de sûreté d'au moins 4 mois. Ce dernier seuil prévu pour les remises aux fins d'exécution d'une condamnation se révèle extrêmement bas et donc problématique au regard de la politique belge en matière d'exécution des peines [60]. C'est la raison pour laquelle

[57] Des explications peuvent être trouvées dans la communication de la Commission qui contient la proposition initiale quand l'initiative vient d'elle. Mais bien souvent ces indications sont brèves et ne correspondent plus au texte tel que finalement adopté après négociations.

[58] Pareille nécessité a été exprimée tant par des praticiens nationaux que par des juges à la CJ.

[59] A cet égard, voy. A. Weyembergh, « Bilan et perspectives du pôle « justice pénale », *in* C. Kaddous (dir.), *Bilan et perspectives de l'espace de liberté, de sécurité et de justice*, 2008, à paraître.

[60] A cet égard, voy. les directives générales figurant dans la circulaire ministérielle n° 1771-Sl du 17 janvier 2005.

il est généralement recommandé de n'émettre des mandats d'arrêt européen et de ne procéder à un signalement qu'en cas de condamnation à une peine de minimum 2 ans (après soustraction de la peine déjà purgée). Certaines exceptions sont toutefois admises comme en cas d'évasion du détenu, en cas de directives particulières concernant des phénomènes criminels spécifiques… Les divergences entre politiques criminelles des différents EM apparaissent ici en pleine lumière puisque les autorités belges reçoivent parfois et exécutent des mandats émis par leurs homologues étrangers pour des condamnations à des peines nettement moins élevées que deux années.

Outre la peine privative de liberté, la Belgique connaît également les « internements » pour les personnes ayant des problèmes de santé mentale. L'internement est par nature à durée indéterminée, ce qui est susceptible de poser problème au regard du seuil précité : ainsi les autorités belges qui demandent la remise à la France d'une personne ayant fait l'objet d'une décision d'internement en Belgique se la voient refuser parce qu'on ne sait pas combien de temps durera l'enfermement et si le seuil de 4 mois exigé est satisfait.

b) Difficultés liées à la minorité de la personne

L'article 4, 3° de la loi belge du 19 décembre 2003 dispose que l'exécution d'un MAE est refusée lorsque la personne qui fait l'objet du MAE ne peut encore être, en vertu du droit belge, tenue pénalement responsable des faits à l'origine du MAE en raison de son âge. Pour bien comprendre l'application de cette disposition, quelques mots d'explication sont nécessaires quant à la loi belge sur la protection de la jeunesse du 8 avril 1965. L'âge de la responsabilité pénale est en principe fixé à 18 ans en Belgique mais la loi précitée prévoit malgré tout que les tribunaux de la jeunesse peuvent se dessaisir en ce qui concerne les mineurs qui ont commis certaines infractions entre 16 et 18 ans et renvoyer l'affaire au ministère public aux fins de poursuites devant les juridictions de droit commun. La loi en question a été modifiée le 13 juin 2006 : le dessaisissement n'est désormais plus possible que dans les cas limitativement énumérés dans la loi, c'est-à-dire uniquement lorsque certaines infractions listées ont été commises. Selon les praticiens [61], ce régime conduit à devoir faire une distinction selon que les autorités belges interviennent en tant qu'autorités d'émission ou d'exécution du MAE. Dans le premier cas, les autorités belges peuvent émettre un MAE concernant un mineur âgé d'au moins 16 ans au moment de la commission des faits si les circonstances permettent un dessaisissement en vertu de la loi belge. Dans le second cas, les autorités belges ne peuvent en principe pas refuser l'exécution d'un MAE concernant un mineur âgé d'au moins 16 ans au moment de la commission des faits puisque les poursuites à son encontre et son jugement à l'étranger ne seraient pas contraires à l'ordre public belge, et ce, que les faits concernés fassent partie ou pas de ceux qui, en vertu de la loi de 1965 telle que modifiée, permettent un dessaisissement des tribunaux de la jeunesse. La circulaire ministérielle du 8 août 2005 stipule d'ailleurs expressément que « la Belgique ne peut refuser la remise d'un mineur de plus de 16 ans car la poursuite et la condamnation d'un tel mineur à l'étranger n'est pas contraire à l'ordre public belge ».

[61] Voy. le mémo 90, rédigé par le Parquet général de Gand.

Sur la base de l'article 4, 3° de la loi belge du 19 décembre 2003, l'exécution de MAE a parfois été refusée par les autorités belges [62]. On relèvera, par exemple, une décision de la chambre des mises en accusation de Gand du 5 février 2008. Se fondant sur l'article 4, 3° de la loi de décembre 2003, elle refuse l'exécution du mandat qui avait été émis par les autorités roumaines pour exécution d'une peine de prison de 5 ans à l'encontre d'une personne pourtant âgée de 16 ans au moment des faits. Au vu des explications qui précèdent, cette décision a fait l'objet de certains commentaires critiques [63].

c) Le principe de la spécialité

Ce principe se révèle problématique dans le cas de concours d'infractions [64].

Pareil concours est visé par l'article 65, al. 1 CP, aux termes duquel lorsqu'un même fait constitue plusieurs infractions ou que différentes infractions soumises simultanément au même juge du fond constituent la manifestation successive et continue de la même intention délictueuse, la peine la plus forte sera seule prononcée.

La pratique fournit divers exemples d'application ou de non-application du principe de la spécialité par les autorités judiciaires compétentes en cas de concours d'infraction, et ce tant lorsque la Belgique est Etat d'exécution que lorsqu'elle est Etat d'émission. Pour un exemple d'application du principe de la spécialité lorsque la Belgique est Etat d'exécution, on mentionnera un cas où les Pays-Bas avaient demandé la remise pour exécution d'une condamnation à une peine unique de prison de trois ans et six mois pour trois infractions distinctes. Les autorités belges ont refusé la remise pour les deux premières infractions, et ce sur la base de la prescription. Elles ont demandé aux Pays-Bas de garantir que l'exécution de la peine ne concerne que la troisième et dernière infraction. Ceux-ci n'ont toutefois pu que déclarer en termes généraux qu'ils respectaient le principe de la spécialité, que le ministère public décide de l'exécution des sanctions et qu'il n'y aurait qu'une exécution partielle. Par un arrêt du 30 novembre 2007, la Chambre du Conseil de Bruges a refusé l'exécution du MAE pour manque de certitude à cet égard [65]. Pour des exemples où la Belgique est Etat d'émission et a appliqué le principe de la spécialité, on se référera à un cas où la remise de l'intéressé avait été demandée pour exécution d'une condamnation par défaut à une peine de 4 ans de prison pour association de malfaiteurs et recel et où l'individu avait été remis par les Pays-Bas mais uniquement pour recel [66]. Sur opposition, la Cour d'appel de Gand a décidé par son arrêt du 23 octobre 2007 que, sur la base du principe de la spécialité, l'individu ne pouvait plus être poursuivi que pour recel. La prévention pour association de malfaiteurs a donc été déclarée irrecevable, celle pour

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[62] Voy. par exemple la décision de la Chambre des mises en accusation de Bruxelles du 1er juillet 2005 de refuser l'exécution d'un MAE émis par la Suède concernant une personne ayant 15 ans au moment de la commission de l'infraction (cas cité entre autres dans le rapport d'évaluation par les pairs en ce qui concerne la Belgique, p. 36).

[63] Voy. le mémo 90, rédigé par le Parquet général de Gand.

[64] A cet égard, voy. le mémo 84, rédigé par le Parquet général de Gand.

[65] A notre connaissance cette décision n'a pas été publiée.

[66] La remise avait été refusée pour association de malfaiteurs sur la base de l'exigence de la double incrimination.

recel recevable et l'individu a été condamné à une peine de 1 an [67]. Au contraire, pour un cas de non-application de ce principe, on renverra à un arrêt du 8 mai 2008 de la Cour d'appel de Gand. Un des intéressés avait été remis par l'Espagne à la Belgique mais dans le cadre d'une autre affaire ; la remise n'avait été ni demandée ni effectuée concernant les faits soumis à la Cour d'appel. Selon la Cour, en ayant dès son arrivée en Belgique fait opposition au jugement par défaut pour lequel il n'avait pas été remis, l'intéressé a renoncé implicitement au principe de la spécialité [68]. Cette décision a toutefois fait l'objet de critiques dans la mesure où elle est difficilement conciliable avec le texte même de l'article 37, par. 2, 6°, 1er al. de la loi du 19 décembre 2003 qui fait exception au principe de la spécialité lorsqu'après sa remise, l'intéressé renonce *expressément* à la possibilité de faire appel au principe de la spécialité concernant des faits spécifiques commis avant sa remise.

d) Arrestation et remise

Aux termes de l'article 11, par. 4 et 5 de la loi du 19 décembre 2003, le juge d'instruction peut laisser la personne en liberté sous certaines conditions ou moyennant le paiement d'une caution jusqu'au moment de la décision définitive sur l'exécution du mandat. L'autorité d'émission doit en être informée (article 11, par. 6). Quant à l'article 20, par. 4, al. 2, il stipule que la décision définitive d'exécuter le mandat peut prévoir la mise en liberté sous conditions ou sous caution de la personne concernée jusqu'à la remise effective de la personne. Les autorités belges ont parfois recours à cette possibilité, ce qui peut poser problème lorsque la mise en liberté se poursuit jusqu'à la remise et que l'individu concerné ne se présente pas à la date prévue alors que les autorités étrangères compétentes sont spécialement venues pour se le faire remettre. Afin d'éviter une telle situation, certains recommandent de ne pas faire usage de la possibilité prévue par l'article 20, par. 4 précité de la loi belge du 19 décembre 2003. Deux autres solutions sont évoquées : l'une consiste à arrêter la personne un peu avant la date de la remise mais, en l'absence de disposition légale spécifique à cet égard, pareille arrestation ne peut intervenir que 24 heures avant la remise [69], l'autre solution consiste à ce que ce soient les autorités policières belges qui se déplacent pour remettre la personne aux autorités étrangères.

Par ailleurs, quant à l'usage ou pas de cette possibilité de mise en liberté, la question se pose de savoir comment l'autorité belge peut effectivement évaluer la

[67] Par ailleurs, et de manière plus générale, sur la question de savoir ce qu'il convient de faire dans l'hypothèse où la Belgique demande et obtient la remise d'un individu qui a été condamné à une seule peine pour diverses infractions si l'autorité d'exécution précise que la remise ne vaut pas pour une des charges qui ne constitue pas une infraction dans son droit national, voy. le mémo 84, *op. cit*.

[68] Voy. spéc. par. 16 de l'arrêt en question (à notre connaissance non publié). A son propos, voy. le mémo 102, rédigé par le Parquet général de Gand.

[69] Cette difficulté avait entre autres été mentionnée dans le rapport d'évaluation par les pairs sur la Belgique. Il y était recommandé de « préciser et de compléter le dispositif interne en identifiant le titre juridique permettant d'incarcérer la veille de la remise la personne dont la remise a été accordée mais qui a été laissée en liberté ». Voy. recommandation n° 9.

« dangerosité » de la personne concernée. Tels qu'ils sont le plus souvent libellés, les mandats ne comportent en effet pas suffisamment d'éléments à cet égard.

e) Les difficultés liées aux limites et aux conséquences de la confiance mutuelle

En principe, les autorités belges ne contrôlent pas la légalité et la régularité d'un MAE émis par une autorité étrangère [70], l'idée de base étant que l'essentiel des contrôles doivent être effectués dans l'Etat d'émission du mandat et non pas dans l'Etat d'exécution.

La question des limites et des conséquences de la confiance mutuelle apparaît en pleine lumière si l'on songe à l'affaire *Praczijk*. En l'espèce, un MAE avait été émis par l'Italie à l'encontre d'un certain Praczijk. Sur cette base, un ressortissant belge dénommé Praczijk a été arrêté par les autorités belges et placé en détention. En dépit des doutes manifestes quant à son identité, aucune demande d'information supplémentaire ne semble avoir été adressée par les autorités belges à leurs homologues italiens et la personne a été effectivement remise [71]. A son arrivée en Italie, les autorités italiennes se sont très vite rendu compte qu'il ne s'agissait pas de la bonne personne et l'ont remise en liberté. Questionnée par un parlementaire sur la perspective d'indemnisation de Praczijk, la ministre de la Justice L. Onkelinx a déclaré que les autorités belges n'avaient pas à payer d'indemnité puisqu'elles n'avaient pas commis d'erreur, n'ayant fait que s'acquitter de leur obligation de confiance mutuelle… [72]. Cette affaire, qui demeure heureusement isolée, témoigne des risques qu'entraîne une trop grande confiance voire une « confiance aveugle » et des conséquences pour les justiciables. Elle soulève la question de l'indemnisation d'une personne qui a fait l'objet d'une détention préventive aux fins de remise, qui s'est par la suite révélée inopérante. Certes, la problématique de l'indemnisation pour détention inopérante aux fins extraditionnelles devrait être traitée dans le cadre du Conseil de l'Europe. La question se pose toutefois de savoir si l'UE ne devrait pas, elle aussi, s'en préoccuper dans le contexte particulier de la DC sur le MAE [73].

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[70] Dans ce sens, voy. entre autres Cass., 25 janvier 2005, P.05.0065.N, www.cass.be et Cass., 21 Septembre 2005, P.05.1270.F, *RDP* 2006, p. 302 et s. : le juge belge n'a pas à apprécier la légalité et la régularité du MAE, missions qui incombent à l'autorité judiciaire d'émission. Voy. aussi Cass., 25 janvier 2005, P050065N, www.cass.be ; Cass., 21 août 2007, P071268N, *Tijdschrift voor strafrecht*, 2008, p. 103 et s. ; Cass., 25 mars 2008, P08451F.

[71] Voy. la décision du 19 mai 2006 de la Chambre du Conseil de Tongres (non publiée) et celle de la Chambre des mises en accusation d'Anvers en date du 2 juin 2006, *Tijdschrift voor strafrecht*, 2006, p. 346 et s. (Note P. De Hert et J. Millen, « Ontvankelijkheidstoetsing en onschuldverweer bij het Europees aanhoudingsbevel », p. 347-348).

[72] Voy. la question de M^me^ Annemie Roppe sur l'incarcération abusive de Pascal Praczijk (n° 12334), Chambre des Représentants de Belgique, CRIV 51 COM 1041.

[73] Indépendamment de l'indemnisation pour détention inopérante aux fins d'une remise, d'autres questions se posent également relativement à la répartition des frais entre Etat d'émission et Etat d'exécution comme en témoigne l'affaire suivante qui nous a été rapportée : une personne est remise par les autorités italiennes compétentes aux autorités belges suite à un mandat d'arrêt européen émis par ces dernières mais les autorités italiennes réclament ensuite le retour de la personne en question sur la base du fait que la Cour de Cassation italienne avait

f) Les difficultés rencontrées par la défense

Le nouveau mécanisme laisse peu de place pour faire valoir des arguments en faveur de la défense. En effet, non seulement en tant qu'autorités d'exécution, les autorités judiciaires belges ne contrôlent en principe pas la légalité et la régularité d'un MAE étranger mais elles se montrent en outre de manière générale très peu formalistes [74].

g) L'absence dans la DC d'une disposition relative à la remise accessoire/ complémentaire

La DC ne comporte aucune disposition relative à la remise accessoire/ complémentaire. Une disposition comparable à l'article 2.2 de la convention européenne d'extradition – aux termes de laquelle « si la demande d'extradition vise plusieurs faits distincts punis chacun par la loi de la Partie requérante et de la Partie requise d'une peine privative de liberté ou d'une mesure de sûreté privative de liberté, mais dont certains ne remplissent pas la condition relative au taux de la peine, la Partie requise aura la faculté d'accorder également l'extradition pour ces derniers » – aurait dû être introduite, ce qui aurait permis d'éviter bien des problèmes et interrogations.

2. L'application de la loi du 5 août 2006

La mise en œuvre pratique des dispositions sur le gel de cette loi s'est trouvée confrontée à certaines difficultés dans les relations avec les autorités étrangères – entre autres néerlandaises – qui continuent de travailler avec des demandes d'entraide classiques. Alors que, conformément à l'article 8 de cette loi, les autorités belges devraient refuser d'exécuter les demandes présentées sous la forme de commissions rogatoires classiques, la circulaire commune à la ministre et au Collège des procureurs généraux stipule, quant à elle, qu'il reste possible d'accepter des commissions rogatoires traditionnelles en vue d'une saisie à l'égard de pays ayant déjà transposé la DC sur le gel des avoirs et des preuves. Certes, cet « arrangement » n'est pas comme tel contraire au texte de la DC elle-même mais il conduit à l'application d'un système différent selon que l'autorité belge est celle d'émission (elle est alors contrainte d'utiliser le nouveau mécanisme) ou celle d'exécution (elle peut dans ce cas continuer d'accepter les demandes classiques provenant d'un autre Etat membre). Cette situation paraît relativement mal perçue par les autorités judiciaires et provoque en tout cas l'incompréhension. La crainte existe que les autorités néerlandaises réagissent de la même manière avec la DC relative aux décisions de confiscation et que, comme pour le gel, elles résistent au passage à la reconnaissance mutuelle.

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annulé la décision antérieure. Dans pareil cas, la question se pose notamment de savoir qui doit payer les frais de ce retour.

[74] Dans ce sens, voy. entre autres les décisions reprises en ce qui concerne les questions de forme dans A. Weyembergh et J. Castiaux, *op. cit.*, et bien d'autres, comme par exemple Cass., 21 septembre 2005, P.05.120.F, Cass., 7 mars 2007, P.07.0259.F, Cass., 25 mars 2008, P.08.451.F. (www.cass.be).

C. L'implication et l'information des praticiens

1. L'implication des praticiens dans les négociations et la transposition

Le rôle premier dans les négociations revient au ministère belge de la Justice – ou SPF Justice. Les praticiens sont toutefois généralement impliqués dans la négociation des instruments.

Certains d'entre eux participent en tout cas à la préparation des positions belges de départ. La procédure se déroule comme suit : lorsqu'une nouvelle proposition d'instrument est déposée, une réunion de coordination est organisée au plan national avec tous les acteurs identifiés par le SPF Justice comme étant susceptibles d'être intéressés. Ce sont principalement les autorités judiciaires qui sont convoquées et, en particulier, le Ministère public. Sont en tout cas présents le Parquet fédéral – dont une des quatre missions principales est de faciliter la coopération internationale [75] – et le procureur général de Gand – qui s'est vu chargé des relations internationales par l'article 3, 2° de l'arrêté royal du 6 mai 1997 attribuant des tâches spécifiques aux membres du Collège des procureurs généraux et qui coordonne le réseau d'expertise en matière de coopération internationale [76]. En fonction des dossiers, d'autres acteurs, comme d'autres procureurs généraux, les juges d'instruction, les établissements pénitentiaires ou les services de police, sont également susceptibles d'être invités et représentés lorsque les textes recouvrent des aspects relevant de leurs compétences ou fonctions. La défense et donc les barreaux ou les avocats ne sont que très rarement impliqués, en raison notamment de la difficulté d'identification des interlocuteurs [77] et de l'absence d'interlocuteur susceptible de faire valoir une position commune [78]. Sur la base de la réunion de coordination précitée, la position belge de départ, tant générale que « article par article », est établie. Elle vise entre autres à tenter d'identifier les problèmes potentiellement soulevés par la proposition dans l'ordre interne belge. Par la suite, le groupe est tenu informé du développement des négociations.

Quant à la transposition des textes européens en droit interne belge, les praticiens, ou du moins certains d'entre eux, y sont étroitement associés. Ainsi en ce qui concerne par exemple la DC sur le gel, ils ont été associés à la préparation du projet de loi qui est entre-temps devenu la loi du 5 août 2006. Ils ont également été impliqués dans la rédaction de la circulaire commune de la ministre de la Justice et du Collège des

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[75] Le « Parquet fédéral » fut établi par la loi du 22 décembre 1998, modifiée et complétée en 2001. A son sujet, voy. notamment article 144*bis* du Code judiciaire, la circulaire commune du ministre de la Justice et du Collège des procureurs généraux, *MB*, 25 mai 2002. Voy. aussi entre autres A. Masset, « Le parquet fédéral est arrivé : plus-value pour le ministère public ? », *JT*, 2002, p. 121 ; C. Visart de Bocarmé, « La parquet fédéral », *Actualités de droit pénal et de procédure pénale*, 69, 02/2004, p. 293 et s.

[76] Conformément à l'article 143*bis*, par. 2 du Code judiciaire, de tels réseaux d'expertise sont institués par le collège des procureurs généraux dans les matières qu'il détermine. Ces réseaux fonctionnent sous l'autorité du collège ainsi que sous la direction et la supervision du procureur général désigné à cette fin. L'objectif de ces réseaux est de promouvoir l'échange et la circulation des informations et de la documentation parmi les membres du ministère public.

[77] Le service du ministère de la Justice n'a pas de relation directe avec les Barreaux.

[78] En Belgique, il n'existe pas de groupement « formel » représentant de manière globale les intérêts de la défense en matière pénale.

procureurs généraux concernant l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale – exécution des décisions de saisie. Les praticiens ont aussi été associés à la préparation de la transposition des DC relatives aux sanctions pécuniaires et aux décisions de confiscation. Pareille association est essentielle puisque les gens de terrain sont évidemment parmi les mieux placés pour identifier les éventuelles difficultés d'application susceptibles de se manifester et, le cas échéant, pour trouver des solutions pratiques.

2. L'information des praticiens

Parmi les praticiens qui sont le plus souvent impliqués dans les négociations et/ou au stade de la transposition en droit belge, le niveau des connaissances est très bon ; il n'est toutefois pas représentatif de ce qu'il est ailleurs. Parmi les autres praticiens, le degré de connaissances et la perception des enjeux sont fort variables et dépendent évidemment de l'habitude de traiter des cas liés à la coopération au sein de l'UE. Les différents types d'acteurs – autorités judiciaires (ministère public, juges d'instruction, autres magistrats) et avocats – ne nous semblent pas à « armes égales » quant à l'accès à l'information en la matière. Il apparaît en effet que ce sont les membres du parquet qui sont les mieux informés, et ce notamment à travers la diffusion de l'information via les réseaux d'expertise [79], des autorités de référence et du parquet fédéral, qui s'efforcent notamment de recueillir et diffuser un maximum de décisions rendues en matière de MAE. L'accès à l'information et surtout sa diffusion nous paraissent bien plus limités et embryonnaires parmi les autres types d'acteurs, en particulier parmi les juges d'instruction, les autres magistrats et surtout la défense.

Quant au niveau de la formation en la matière, il est également variable, et ce doublement : au plan des acteurs concernés et au plan des pans de la reconnaissance mutuelle couverts. Outre que tous les praticiens de la justice (autorités judiciaires, d'une part [80], et avocats, de l'autre) ne sont pas « logés à la même enseigne », la quantité et le niveau de formation nous paraît fortement varier selon l'instrument de reconnaissance mutuelle envisagé. Les efforts en termes de formation sont nettement plus développés relativement au MAE qu'en ce qui concerne les autres instruments de reconnaissance mutuelle.

5. Considérations transversales relatives à quelques motifs de refus

A. L'exigence de la double incrimination

En ce qui concerne tout d'abord la loi du 19 décembre 2003 relative au MAE, elle consacre en principe le maintien du contrôle de la double incrimination [81]; alors que la DC maintenait ce motif de non-exécution fondé sur la double incrimination à titre facultatif, la Belgique fait partie des EM qui en ont fait un motif de refus

[79] A ce propos, voy. entre autres le système des « mémos » rédigés par le Parquet général de Gand et auxquels la présente contribution fait parfois référence.

[80] Les magistrats bénéficient en tout cas en principe d'un « background » minimal commun puisqu'ils suivent une formation sommaire dans le cadre de leur formation générale (séances organisées par le Conseil supérieur de la Justice), qui aborde – à tout le moins – certains aspects de la reconnaissance mutuelle.

[81] Aricle 5, par. 1er de la loi du 19 décembre 2003.

contraignant [82]. Pour des raisons de sécurité juridique, le législateur belge n'a en effet pas jugé approprié de laisser les autorités judiciaires décider à ce sujet au cas par cas [83]. Comme la DC sur le MAE, la loi du 13 décembre 2003 soumet le principe précité à une exception : l'article 5, par. 2 supprime ledit contrôle pour les trente-deux infractions énumérées dans la liste pour autant que les faits soient passibles dans l'Etat d'émission d'une peine privative de liberté d'au moins trois ans. Toutefois, l'article 5, par. 4 de la loi du 19 décembre 2003 introduit une exception à l'exception : il dispose en effet que les faits d'avortement et d'euthanasie ne sont pas considérés comme couverts par la notion d'homicide volontaire reprise dans la liste des trente-deux infractions pour lesquelles le test de la double incrimination est aboli. De tels faits seront donc, quant à eux, encore soumis à pareil contrôle [84].

Lorsqu'il s'agit d'un cas visé par l'article 5, par. 2 de la loi du 19 décembre 2003, le contrôle de l'exigence de la double incrimination ne peut être réalisé en tant que tel et ne peut en principe pas fonder un refus d'exécution. Toutefois, tout contrôle par les autorités d'exécution ne disparaît pas pour autant. Un contrôle marginal subsiste puisque les autorités belges vérifient en principe si les faits décrits dans le formulaire du MAE correspondent bien à la catégorie de comportement indiqué dans le mandat pour lequel le contrôle de la double incrimination a été supprimé [85]. Pareil test s'avère parfois problématique en raison du caractère vague et flou de certaines infractions génériques reprises dans la liste (par exemple, le cas des « crimes contre l'environnement ») et de l'interprétation parfois trop stricte qui est donnée de certaines d'entre elles (par exemple, l'interprétation restrictive de la « participation à une organisation criminelle »). Des divergences assez nettes apparaissent entre Etats : tandis que, dans certains EM, comme en Belgique, la simple soustraction d'enfants à l'autorité parentale peut être constitutive d'un rapt parental, lequel peut être considéré comme relevant de la case « enlèvement » de la liste des trente-deux infractions, dans d'autres Etats comme la France, ce n'est pas le cas.

En ce qui concerne le gel des avoirs et des preuves, la loi du 5 août 2006 relative à l'application du principe de reconnaissance mutuelle des décisions judiciaires en matière pénale entre les EM de l'UE comporte un article 6 identique à l'article 5 précité de la loi du 19 décembre 2003 relative au MAE. La circulaire commune à la ministre et au Collège des procureurs généraux de mars 2007 précise que l'exigence de la double incrimination s'apprécie non pas par rapport à la qualification retenue par le droit de l'Etat d'émission mais bien par rapport aux faits. Pour les cas où le contrôle

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[82] *Ibid*.

[83] Dans ce sens, voy. Doc. Parl. Chambre 2003-2004, n° 279/001, p. 13.

[84] A ce sujet, voy. la clarté des termes de la circulaire ministérielle de 2005, p. 9 : « (…) la remise ne pourra en aucun cas avoir lieu lorsque ces faits ne sont pas incriminés en droit belge ».

[85] A cet égard, la circulaire ministérielle de 2005 précise que « les infractions contenues dans la liste ne sont pas qualifiées pénalement, mais sont visées de façon générique et recouvrent des champs de la criminalité (…) Il appartiendra dès lors à l'autorité judiciaire d'exécution de contrôler que, sur le plan générique, le fait qui est à la base du mandat d'arrêt est un de ceux contenus dans la liste. Elle procédera à cet examen sur la base de l'exposé des faits contenu dans le formulaire du mandat d'arrêt européen ».

de la double incrimination est supprimé, cette circulaire renvoie à celle de 2005 sur le MAE [86].

B. La clause de territorialité

En ce qui concerne la loi du 19 décembre 2003 relative au MAE, son article 6, 5° dispose que l'exécution du mandat *peut* être refusée lorsqu'il porte sur des infractions qui ont été commises

– en tout ou en partie sur le territoire belge ou en un lieu assimilé à son territoire,
– hors du territoire de l'Etat membre d'émission et que le droit belge n'autorise pas la poursuite des mêmes infractions commises hors du territoire belge.

A ce sujet, la circulaire ministérielle de 2005 précise que cette double clause de territorialité revêt toute son importance dans le contexte de la double incrimination, qu'elle s'applique à toutes les infractions, celles pour lesquelles le contrôle de double incrimination a été supprimé et celles pour lesquelles il a été maintenu. Si le MAE porte sur un fait contenu dans la liste et ne constitue pas une infraction dans l'Etat membre d'exécution, il y a donc toujours une possibilité de refuser l'exécution du mandat *sauf* lorsque les faits ont été commis sur le territoire de l'Etat d'émission [87]. Il convient par ailleurs de relever qu'en ce qui concerne la deuxième hypothèse visée par l'article 6, 5° précité, il est précisé dans l'exposé des motifs du projet de loi belge que « dans la mesure où elle ne s'applique que pour autant qu'un critère de compétence extraterritoriale identique existe dans le droit de l'Etat d'exécution à l'égard de cette infraction, son application réintroduit nécessairement la double incrimination, puisque les critères de compétence extraterritoriale se définissent par rapport à des infractions » [88].

Il ressort de la pratique que les autorités judiciaires belges paraissent tenir compte de l'existence ou de l'inexistence de poursuites en Belgique dans l'usage qu'elles font du motif de refus facultatif prévu par la première hypothèse de l'article 6, 5°– à savoir lorsque le MAE porte sur des infractions qui ont été commises en tout ou en partie sur le territoire belge ou en un lieu assimilé à son territoire. A cet égard, il convient de se référer à un arrêt de la Cour de cassation du 25 mars 2008 concernant un MAE français délivré à l'encontre d'un Belge du chef de complicité d'escroquerie en bande organisée et de blanchiment, dans lequel la Cour déclare que « l'arrêt attaqué décide qu'il n'y a pas lieu d'appliquer cette cause de refus facultative, aux motifs que les infractions paraissent avoir été commises essentiellement sur le territoire français et qu'aucune poursuite n'est engagée en Belgique. La constatation par la juridiction d'instruction que l'ordre public belge ne paraît intéressé que de manière adventice par la poursuite des infractions visées dans le MAE justifie légalement la décision de ne pas en refuser l'exécution » [89].

Pareille clause de refus n'apparaît pas dans la version actuelle de la loi du 5 août 2006 en ce qui concerne les décisions de saisie. L'avant-projet de loi à venir devrait

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[86] Circulaire de 2007, p. 5.
[87] Voy. circulaire ministérielle de 2005, p. 14.
[88] Doc. Parl. Chambre, 2003-2004, n° 279/001, p. 16 et 17.
[89] Cass., 25 mars 2008, P.08.451.F.

toutefois l'y insérer en ce qui concerne les sanctions pécuniaires et les décisions de confiscation. Mais en ce qui concerne ces dernières, ce motif de refus ne devrait pas s'appliquer aux infractions de blanchiment.

C. La nationalité et la résidence

La loi du 19 décembre 2003 relative au MAE ne prévoit plus de cause générale de refus en raison de la nationalité mais celle-ci continue d'être prise en compte, et ce conformément à la DC de juin 2002. Les dispositions relatives à la nationalité sont élargies aux personnes qui résident sur le territoire belge.

L'article 6, 4° de la loi relative au MAE dispose que l'exécution du mandat *peut* être refusée s'il a été délivré aux fins d'exécution d'une peine ou d'une mesure de sûreté lorsque la personne concernée est belge ou réside en Belgique et que les autorités compétentes s'engagent à exécuter cette peine ou mesure de sûreté conformément à la loi belge. Pendant un certain temps après l'entrée en vigueur de la loi du 19 décembre 2003, ce motif de refus ne pouvait pas être appliqué parce qu'il n'y avait pas de base juridique interne pour que la Belgique puisse reprendre l'exécution des peines privatives de liberté prononcées par une autorité étrangère. Ce problème a été résolu suite à l'introduction et à l'entrée en vigueur de l'article 18, par. 2 de la loi du 26 mai 2005 modifiant la loi du 23 mai 1990 sur le transfèrement [90]. La pratique belgo-néerlandaise a toutefois connu certaines difficultés lorsque les autorités belges émettent des mandats d'arrêt européens relatifs à des nationaux néerlandais. Les autorités néerlandaises ont en effet refusé de remettre leurs ressortissants à la Belgique en faisant application du motif de refus fondé sur la nationalité, sans exécuter par ailleurs les décisions judiciaires belges de condamnation, et ce en arguant du fait qu'il n'y a pas de base juridique précise pour ce faire. En effet, contrairement à la Belgique, les Pays-Bas ont estimé que la DC ne constitue pas une base légale suffisante à cet égard, qu'il faudrait une base conventionnelle/textuelle spécifique, que pareille base légale n'existe pas à l'heure actuelle étant donné que les Pays-Bas ont ratifié la convention de 1970 sur la valeur internationale de jugements répressifs mais pas la Belgique. Cette interprétation a entraîné d'importants problèmes dans la pratique, vu le nombre élevé de nationaux hollandais condamnés en Belgique pour des infractions liées à la drogue [91].

Le motif de refus de l'article 6, 4° de la loi belge de décembre 2003 a donné lieu à d'autres difficultés encore : la question de son application s'est ainsi posée lorsque les autorités belges ne peuvent plus exécuter la peine concernée pour cause de

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[90] Aux termes de cette disposition, « la décision judiciaire prise en application de l'article 6, 4° de la loi du 19 décembre 2003 (…) emporte *la reprise* de l'exécution de la peine ou de la mesure privative de liberté visée dans ladite décision judiciaire (…) » (sur l'application de cet article 18, par. 2, voy. av. général D. Vandermeersch et Cour de cassation, 18 octobre 2006, *RDPC*, 2007, p. 259 et s.).

[91] Des pistes existent toutefois pour pallier ces difficultés, comme la ratification par la Belgique de la convention de 1970 (processus en cours), le recours à l'article 68 de la convention d'application de l'accord de Schengen ou à l'article 2 du protocole additionnel du 18 décembre 1997 à la convention européenne sur la transmission des procédures répressives.

prescription selon le droit belge. Un arrêt de la Cour de cassation du 7 novembre 2007 est venu trancher la controverse dans un tel cas en faveur de la remise [92].

Quant à l'article 8 de la loi relative au MAE, il précise que lorsque la personne concernée est belge ou réside en Belgique, la remise peut être subordonnée à la condition qu'après avoir été jugée, elle soit renvoyée en Belgique pour y subir la peine ou la mesure de sûreté qui serait prononcée à son encontre dans l'Etat d'émission. A ce propos aussi, la circulaire ministérielle de 2005 contient d'utiles précisions, entre autres que le recours à cette condition doit faire l'objet d'une mention dans la décision de l'autorité d'exécution et que, vu la responsabilité particulière de l'exécutif dans le cadre du transfèrement ultérieur, la décision de l'autorité belge d'exécution devra faire l'objet d'une notification spéciale auprès du SPF Justice. On relèvera qu'une question préjudicielle à propos de cet article 8 a été posée à la Cour constitutionnelle par la Chambre du Conseil de Nivelles en date du 22 juillet 2008 [93].

Aucun statut particulier bénéficiant aux nationaux ou résidents n'est prévu dans la version actuelle de la loi du 5 août 2006 en ce qui concerne le gel des avoirs et des preuves. L'avant-projet de loi à venir ne devrait pas changer cet état de choses.

D. Le respect des droits fondamentaux

L'article 4, 5° de la loi du 19 décembre 2003 relative au MAE comporte un motif de refus obligatoire fondé sur les droits fondamentaux. Bien que ce motif de refus n'apparaisse pas expressément dans la DC elle-même, les fonctionnaires belges chargés des négociations et de la transposition de même que le législateur ont toujours

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[92] Dans cette affaire, un pourvoi avait été introduit par la défense contre un arrêt rendu le 24 octobre 2007 par la Chambre des mises de Bruxelles qui concluait à l'exécution du mandat d'arrêt européen polonais pour exécution d'une condamnation de juillet 2000 par un tribunal de district de Bielsk Podlaski à un emprisonnement de trois ans. Le premier moyen avancé par la défense faisait grief à l'arrêt de violer l'article 6, 4° qui permet de refuser l'exécution du mandat s'il a été délivré aux fins d'exécution d'une peine lorsque la personne est belge ou réside en Belgique et que les autorités belges s'engagent à exécuter cette peine conformément au droit belge. Ce moyen est rejeté par la Cour de cassation : selon elle, après avoir constaté que la peine précitée ne pouvait plus être exécutée en Belgique car elle est prescrite selon la loi belge, les juges d'appel ont, sans violer l'article 6, 4°, décidé qu'il n'y avait pas lieu de refuser la remise (à ce sujet, voy. J. Van Gaever, « De toepassing van de facultatieve weigeringsgrond van artikel 6, 4° Wet Europees Aanhoudingsbevel : geen opportuniteit zonder draagvlak », Noot onder Cass., 7 novembre. 2007, *Tijdschrift voor strafrecht*, 2008, p. 108 et s.).

[93] La question posée est la suivante : « L'article 8 de la loi du 19 décembre 2003 relative au mandat d'arrêt européen, interprété comme ne s'appliquant qu'au mandat d'arrêt européen émis aux fins de poursuite par opposition à celui émis aux fins d'exécution d'une peine ou d'une mesure de sûreté privative de liberté, viole-t-il les articles 10 et 11 de la Constitution, en ce qu'il empêcherait que la remise à l'autorité judiciaire d'émission d'une personne de nationalité belge ou d'une personne résidant en Belgique et faisant l'objet d'un mandat d'arrêt européen aux fins d'exécution d'une peine prononcée par une décision rendue par défaut à son égard soit subordonnée à la condition qu'après avoir exercé le recours et bénéficié de la nouvelle procédure de jugement sur lesquels l'autorité judiciaire d'émission aura fourni des assurances considérées comme suffisantes au sens de l'article 7 de ladite loi, cette personne soit renvoyée en Belgique pour y subir la peine ou mesure de sûreté qui serait prononcée à son encontre dans l'Etat d'émission ? » (Cour constitutionnelle, n° de rôle 4503).

été d'avis qu'il est parfaitement compatible avec la DC en question [94], celle-ci ne l'ayant pas aboli comme en attestent ses considérants et l'article 1, par. 3 de son dispositif. L'article 7, par. 1, 3° de la loi du 5 août 2006 reprend ladite clause dans des termes quasiment identiques. Cette disposition s'appliquera également aux sanctions pécuniaires et aux décisions de confiscation.

Quant à la manière dont il convient d'interpréter ce motif de refus, la lecture des circulaires de 2005 et 2007 s'avère particulièrement intéressante. Elles insistent toutes les deux sur la nécessité d'une interprétation restrictive. Celle de 2005 s'exprime en ces termes

> « L'autorité judiciaire belge chargée de statuer sur l'exécution du mandat ne se voit pas confier une mission d'appréciation politique de la situation dans les autres EM. Le contrôle sera strictement limité à l'appréciation de circonstances concrètes relatives au cas donnant lieu au MAE (…). L'autorité judiciaire belge n'a pas non plus pour tâche de procéder à un examen systématique du degré de protection des droits fondamentaux dans l'Etat d'émission. Un tel contrôle serait contraire au principe de reconnaissance mutuelle que la loi met en œuvre. Il existe une présomption de respect des droits de l'homme en faveur de l'Etat d'émission. La cause de refus pour atteinte aux droits fondamentaux sera utilisée lorsque la personne visée par le mandat d'arrêt fait état de motifs sérieux et avérés (basés sur des éléments concrets), laissant croire que sa remise à l'Etat d'émission mettrait ses droits fondamentaux en danger, notamment ceux contenus à l'article 6 de la convention européenne des droits de l'homme. Si l'intéressé ne soulève pas d'initiative cette situation, la cause de refus ne sera utilisée par l'autorité judiciaire belge que lorsque des éléments dont elle a connaissance indiquent un danger manifeste pour les droits de cet individu. L'existence d'un recours de l'intéressé devant la Cour européenne des droits de l'homme et le fait qu'une mesure ait été imposée au titre de l'article 39 du règlement de procédure de la Cour sont, par exemple, des circonstances qui pourraient être dûment prises en compte par l'autorité judiciaire d'exécution. Ce motif englobe la clause humanitaire ou de non-discrimination » [95].

Quant à la circulaire de 2007, elle renvoie à l'exposé des motifs [96] mais aussi à la circulaire de 2005 précitée [97].

Les juridictions belges tendent manifestement à suivre la présomption de respect des droits de l'homme en faveur de l'Etat d'émission telle qu'elle est consacrée dans la circulaire ministérielle du 8 août 2005 et à interpréter le motif de refus en question de manière restrictive. Elles témoignent ainsi d'un degré très élevé de confiance mutuelle vis-à-vis de leurs homologues des autres EM, comme l'illustre une décision de la Chambre des mises en accusation de Bruxelles du 8 février 2005 qui se prononçait sur un appel introduit contre une décision de la chambre du Conseil de Louvain

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[94] Voy. à ce sujet l'exposé de motifs de la loi du 19 décembre 2003 relative au mandat d'arrêt européen.

[95] Circulaire ministérielle relative au Mandat d'arrêt européen du 8 août 2005, p. 11, par. 3.2.1.5.

[96] Doc. 51 – 2106/001, p. 13.

[97] Voy. circulaire commune à la ministre de la justice et au Collège des procureurs généraux, p. 7, note 6.

qui concluait à l'exécution d'un MAE émis par la Slovaquie pour exécution d'une condamnation à une peine de 2 ans et demi de prison à l'encontre d'un demandeur d'asile slovaque d'origine tzigane résidant en Belgique [98]. Nous n'avons par ailleurs connaissance que d'un seul cas de refus d'une remise fondé sur les droits fondamentaux. Il s'agit d'une décision de la Chambre des mises en accusation de Bruxelles du 8 décembre 2006 quant à un MAE délivré à l'encontre d'un individu pour viol par un juge du tribunal de grande instance de Linz en Autriche. La Chambre y conclut que l'exécution du MAE doit être refusée dans la mesure où il y a de sérieuses raisons de croire qu'elle aurait pour effet de porter atteinte aux droits fondamentaux. Pour ce faire, elle fait valoir trois arguments. Elle se prévaut tout d'abord de ce que l'intéressé, qui n'avait pas été placé sous MAE par le juge d'instruction autrichien, n'a pas été convoqué dans le cadre de la procédure introduite devant la Cour d'appel de Linz qui devait statuer sur l'appel formé par le ministère public le 12 août 2003 contre la décision de mise en liberté rendue le même jour par ledit juge d'instruction. Certes cette absence de convocation se justifiait par le fait que la législation de l'époque ne prévoyait pas pareille obligation. Il n'en demeure pas moins que le droit du justiciable d'être entendu par le juge qui doit se prononcer sur son dossier, notamment en ce qui concerne la détention préventive, constitue un droit fondamental et que la législation autrichienne a d'ailleurs été modifiée sur ce point depuis – de sorte que l'intéressé devrait désormais être convoqué dans le cadre d'une telle procédure d'appel. La Chambre des mises relève ensuite qu'il ressort de l'arrêt autrichien constituant la base du MAE que le principe de la présomption d'innocence n'a pas été respecté, dans la mesure où certains passages de la motivation préjugent de la culpabilité de l'intéressé et de la peine qui sera infligée. Elle soutient enfin que le juge d'instruction en cette cause a également exercé la fonction de ministère public, ce qui va à l'encontre des principes d'impartialité et d'indépendance.

6. Conclusion

De manière générale, le principe de la reconnaissance mutuelle est perçu de manière positive en Belgique. Le MAE donne satisfaction ; et la mise en œuvre des DC sur l'exécution des sanctions pécuniaires ou des décisions de confiscation est attendue par beaucoup avec impatience car ces nouveaux mécanismes sont généralement perçus comme venant combler un vide juridique et venant satisfaire

[98] Dans son arrêt, la Chambre des mises déclare que « *(...) in tegenstelling hetgeen de betrokkene voorhoudt, er geen ernstige redenen bestaan te denken dat de tenuitvoerlegging van het Europees aanhoudingsbevel afbreuk zou doen aan de fundamentale rechten van de betrokken persoon, (...), dat immers uit de algemene overwegingen betreffende het gebeurtelijk bestaan van bepaalde discriminaties van de Roma-minderheid in verschillende landen van Centraal-en Oost-Europa (waaronder Slovakije) met betrekking tot onderwijs, geneeskundige verzorging of tewerkstelling, geenszins kan afgeleid worden dat in casu de fundamentele rechten van de bettrokene, die vervolgd wordt voor duidelijk omschreven strafbare feiten, geschonden zouden worden* » (arrêt publié *in Tijdschrift voor strafrecht*, 4, 2006, p. 224 ; pour un commentaire critique, voy. P. de Hert, « Het Europees aanhoudingsbevel en de overlevering van Roma door België", *Tijdschrift voor strafrecht*, 4, 2006, p. 225 et s). Voy. aussi Cass., 26 mai 2004 (*Ugarte Lopez*), *Rev. dr. pén.,* 2004, p. 1253).

une réelle nécessité. En revanche, la DC sur le gel des avoirs et des preuves de même que le MOP[99] sont ouvertement considérés comme étant passés à côté de l'objectif poursuivi par la reconnaissance mutuelle, à savoir la facilitation, la simplification et l'accélération de la coopération judiciaire. Malgré ces critiques en ce qui concerne ces deux instruments, le sentiment général est que le processus de la reconnaissance mutuelle doit se poursuivre : la solution n'est en effet ni de « tout arrêter » ni de faire « marche arrière ». Le principe de la RM est généralement considéré comme étant d'intérêt pour toute la coopération en matière pénale, y compris la coopération dans la phase présentencielle. Mais la technique législative devrait être révisée. A cet égard, le « morcellement » ou « saucissonnage » de la coopération devrait être évité autant que possible et la « production » législative au niveau de l'UE devrait être « rationnalisée » et précédée d'une réflexion approfondie quant au but et à l'utilité réelle des textes.

[99] A cet égard, voy. en particulier J. Van Gaever, « Nieuwe regels voor de bewijsverkrijging in strafzaken binnen de Europese Unie », *op. cit*.

L'application du principe de la reconnaissance mutuelle en matière pénale en Bulgarie[1]

Margarita CHINOVA et Mila ASSENOVA

1. Introduction

Le principe de reconnaissance mutuelle en matière pénale est appliqué par les autorités judiciaires bulgares depuis deux ans. Malgré la brièveté de la période d'application, les organes compétents ont déjà établi une certaine conception du contenu du principe et de sa réalisation en pratique. Les contours des problèmes concrets liés à son application sont déjà bien définis.

En effet, l'expérience des praticiens en Bulgarie dans le domaine de la reconnaissance mutuelle est liée surtout à l'application de deux décisions-cadres qui sont transposées dans l'ordre juridique interne, notamment la décision-cadre 2002/584/JAI relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres[2] (la DC sur le MAE) et la décision-cadre 2003/577/JAI relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve[3] (la DC sur le gel).

Il y a lieu d'observer que les fonctionnaires, responsables de la négociation politique comme du processus de transposition des instruments de reconnaissance

[1] Les auteurs de ce texte tiennent à remercier Madame Pavlina Panova, juge à la Cour de cassation et Madame Atanaska Koleva, expert à l'Assemblée nationale, d'avoir accepté de contribuer par leurs idées et leur soutien à la rédaction de l'étude. Les auteurs remercient également les experts du ministère de la Justice et les magistrats pour leur importante collaboration et leurs critiques constructives qui ont permis d'améliorer le contenu de l'article.

[2] Décision-cadre 2002/584/JAI du Conseil du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres, *JO*, n° L 190, 18 juillet 2002, p. 1.

[3] Décision-cadre 2003/577/JAI du Conseil du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve, *JO*, n° L 196, 2 août 2003, p. 45.

mutuelle, ainsi que les magistrats en Bulgarie sont très favorables à l'application de ce principe dans le cadre de la coopération judiciaire pénale.

Les problèmes rencontrés lors de son application en pratique ne sont en aucun cas dus à des contradictions insurmontables avec la législation interne ou à des difficultés d'ordre politique. Ils sont surtout de nature technique et peuvent être résolus, d'une part, par la formation complémentaire des organes compétents, portant sur les instruments de reconnaissance mutuelle de l'UE et, d'autre part, par le perfectionnement de la législation interne et l'adoption de mesures pour l'amélioration de l'organisation du travail des organes judiciaires.

Le présent texte analyse successivement la perception générale du principe de reconnaissance mutuelle dans la législation bulgare et les questions relatives à l'application du principe par les autorités judiciaires.

2. Perception générale du principe de reconnaissance mutuelle

A. L'absence de définition du principe de reconnaissance mutuelle

1. Le contenu du principe

Le principe de reconnaissance mutuelle n'est pas défini dans les actes internes de transposition des décisions-cadres. Les magistrats en Bulgarie ne sont pas enclins à donner une définition de la notion de « reconnaissance mutuelle » en matière pénale, parce qu'ils considèrent qu'une telle définition aurait pour effet de limiter le champ d'application des formes de coopération, qui ne seraient pas toutes incluses dans la définition si un cas particulier se présente. Cependant, les magistrats se fondent souvent sur ce principe lorsqu'ils appliquent des instruments de reconnaissance mutuelle en matière pénale [4].

La perception du principe de reconnaissance mutuelle des experts et des magistrats en Bulgarie coïncide à bien des égards.

Les experts du ministère de la Justice soutiennent largement l'application du principe de reconnaissance mutuelle en matière pénale. Ils partagent l'opinion selon laquelle la reconnaissance mutuelle constitue la pierre angulaire de la coopération judiciaire, comme il est prévu dans le programme de La Haye du 10 mai 2005 [5]. En effet, les fonctionnaires observent que la reconnaissance mutuelle crée une obligation pour les organes nationaux de reconnaître et d'exécuter la décision émise par une autorité judiciaire d'un autre Etat membre. Le contrôle exercé sur la décision étrangère devrait être très limité. Ainsi la procédure de reconnaissance est simplifiée et accélérée, pour permettre aux autorités de combattre de manière adéquate la criminalité organisée en Europe. Le principe est conforté par la confiance mutuelle réciproque des Etats membres dans leurs systèmes judiciaires et l'établissement de contacts directs entre les organes judiciaires compétents.

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[4] Voy. Cour d'appel de Sofia, 19 mars 2007, *Konrad Reizmund*, aff. n° 205/2007.

[5] Communication de la Commission au Conseil et au Parlement européen, Le programme de La Haye : dix priorités pour les cinq prochaines années. Un partenariat pour le renouveau européen dans le domaine de la liberté, de la sécurité et de la justice, COM (2005) 184 final, 10 mai 2005.

Les magistrats sont unanimes pour considérer que la reconnaissance mutuelle devrait être basée sur le respect à l'égard du droit national de l'autre, mais aussi sur la confiance en la capacité de chaque Etat membre d'atteindre le seuil minimal de protection des droits fondamentaux et de respecter les principes de l'état de droit qui constituent le fondement de l'Union européenne en tant qu'espace de liberté, de sécurité et de justice.

La confiance mutuelle est basée sur la présomption que les décisions devant être reconnues et exécutées sont toujours prononcées, dans chacun des vingt-sept Etats membres, dans le respect des principes de légalité et de proportionnalité. Ce n'est qu'en présence d'une telle certitude, reposant sur la confiance entre l'autorité d'émission et l'autorité d'exécution, que cette dernière peut accepter la décision comme un acte qu'elle aurait elle-même rendu et prendre alors des mesures pour assurer son exécution.

2. Les limites du principe

Le principe de reconnaissance mutuelle n'est pas absolu. Il comporte toute une série de limitations sous forme de motifs de refus obligatoires et facultatifs de reconnaître et d'exécuter une décision étrangère. D'après les experts qui participent à la négociation des instruments, les motifs de refus obligatoires sont pleinement justifiés. La position de la Bulgarie est que les motifs de refus devraient être interprétés de manière stricte. Lors de la transposition des différents instruments de reconnaissance mutuelle, les experts veillent en général à ce que la transposition des dispositions des décisions-cadres soit correcte pour éviter de créer des motifs de refus complémentaires ou de conférer un caractère obligatoire à des motifs de refus facultatifs.

Ils estiment que le fait que les motifs de refus dans les instruments de l'UE sont très limités, par rapport à ceux qui existent dans les conventions du Conseil de l'Europe régissant la coopération et l'entraide judiciaire en matière pénale, constitue un progrès considérable.

En outre, selon les praticiens, les différences en matière de droit substantiel et procédural ne devraient pas constituer une limite à la reconnaissance et à l'exécution des décisions judiciaires, étant donné qu'en général, les systèmes juridiques des Etats membres de l'Union sont assez comparables.

Dans le même ordre d'idées, les experts considèrent qu'il faudrait appliquer le principe de reconnaissance mutuelle aussi bien aux jugements définitifs qu'aux décisions présentencielles, puisque la confiance mutuelle devrait s'étendre sur l'ensemble du système juridique de l'Etat membre d'émission. En revanche, ils sont conscients de la nécessité de prendre en compte la spécificité de chaque phase de la procédure pénale et des organes compétents intervenant lors de l'émission et de l'exécution des actes. Ainsi, on observe l'existence de différences importantes concernant les pouvoirs des organes policiers et judiciaires dans les différents Etats membres. En outre, en ce qui concerne les décisions définitives, elles jouissent de l'autorité de la chose jugée et l'autorité d'exécution les reconnaît en connaissance de cause.

Il est à noter que les praticiens sont en général favorables à l'adoption d'instruments juridiques dans le domaine de la reconnaissance des décisions présentencielles.

Ils considèrent que l'adoption de la décision-cadre relative au mandat européen d'obtention de preuves [6] (la DC sur le MOP) va contribuer à l'amélioration de l'échange d'informations entre les autorités bulgares et celles des autres Etats membres, ce qui aura pour effet de rendre la coopération judiciaire pénale plus efficace.

B. Le mécanisme d'élaboration de la position nationale dans le cadre des négociations

La Bulgarie participe pleinement aux négociations depuis son entrée dans l'Union en 2007. En fait, depuis la signature du traité d'adhésion le 25 avril 2005 jusqu'à l'entrée dans l'Union, les représentants du pays participaient d'une certaine manière au processus de prise de décision, puisque durant cette période la Bulgarie bénéficiait d'un statut d'observateur actif au sein des diverses institutions européennes. Malgré cela, l'expérience des organes bulgares en matière de négociation d'actes européens portant sur la coopération judiciaire en matière pénale est relativement modeste et récente.

A cet égard, il est à noter que la Bulgarie n'a pas participé à la négociation des décisions-cadres appliquées actuellement par les autorités judiciaires, en particulier celles sur le MAE et sur le gel et qu'elle est intervenue un peu tard dans la discussion des autres instruments pour pouvoir effectivement exprimer sa position.

Au Conseil JAI (Justice et Affaires intérieures) et au sein des différents groupes de travail sur la coopération judiciaire en matière pénale, la Bulgarie est représentée respectivement par le ministre de la Justice et par des experts de la direction « Coopération internationale et intégration européenne » du ministère de la Justice. L'élaboration et l'adoption des positions dans ce domaine, présentées par les organes bulgares au Conseil, sont confiées au ministère de la Justice, assisté par un groupe de travail interministériel traitant des questions relatives à la coopération judiciaire et policière pénale, créé spécialement à cette fin. Ce groupe inclut non seulement des experts du ministère de la Justice, mais aussi des experts du ministère de l'Intérieur. Une fois élaborées par le ministère de la Justice, ces positions sont transmises au Conseil des affaires européennes [7] qui doit les approuver. Les positions nationales ainsi approuvées font l'objet d'un contrôle parlementaire.

On constate que durant la première année suivant l'adhésion de la Bulgarie à l'Union, l'avis des praticiens n'était pas pris en compte lors de la formation des positions nationales en matière de coopération judiciaire pénale. La plupart des praticiens estiment qu'ils n'ont pas été bien informés sur les instruments de reconnaissance mutuelle et que le processus de négociation était assez peu transparent.

Il est donc apparu nécessaire de consulter les magistrats dans la phase de négociation de ces instruments. Ainsi, par circulaire du ministre de la Justice [8] on

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[6] Décision-cadre 2008/978/JAI du Conseil du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p.72.

[7] Il s'agit d'un organe spécialisé, créé auprès du Conseil des ministres et dirigé par le ministre des Affaires européennes.

[8] Circulaire LS-04-173, 21 février 2008.

a créé un groupe interdépartemental de coopération en matière pénale auprès du ministère de la Justice, dans lequel figurent des représentants du pouvoir judiciaire (des membres du Conseil supérieur de la magistrature, des juges et des procureurs), des experts du ministère de l'Intérieur, du ministère des Finances et du ministère de la Justice. Ce mécanisme de consultation permet de prendre en compte l'avis des représentants du pouvoir judiciaire lors de l'élaboration de la position nationale. Ce groupe de travail est chargé de discuter et de coordonner les positions présentées par la Bulgarie lors de la négociation des propositions d'actes en matière de coopération judiciaire pénale, de veiller à la transposition correcte des actes dans l'ordre juridique interne, ainsi qu'à l'application correcte par les autorités compétentes.

C. La transposition des instruments de l'UE relatifs à la reconnaissance mutuelle

1. Le processus de transposition

Il est utile de préciser en quelques mots le déroulement du processus de transposition de la législation européenne, y compris des décisions-cadres du Conseil. En effet, le ministère de la Justice charge un groupe de travail, composé de fonctionnaires dudit ministère, de magistrats, d'experts du ministère de l'Intérieur, ainsi que d'autres experts en la matière, de l'élaboration d'un projet de loi de transposition d'une décision-cadre. Ensuite, le projet de loi est présenté au Conseil des ministres qui prend la décision de le déposer à l'Assemblée nationale.

Le projet de loi est alors renvoyé à une commission permanente principale (en général, c'est la Commission des Affaires juridiques) et à la Commission des Affaires européennes. Cette dernière est compétente pour apprécier la compatibilité du projet de loi avec la décision-cadre. Elle se prononce uniquement avant la première lecture en session plénière. Dans son avis, elle peut faire des propositions pour améliorer le texte afin d'assurer une transposition correcte des instruments de l'UE. Ses observations sont en général prises en compte par la commission sectorielle compétente.

La pratique relative au processus de transposition des instruments européens dans l'ordre juridique interne indique que, contrairement au processus de négociation, les praticiens sont mieux consultés dans le cadre de l'élaboration des lois de transposition des décisions-cadres. Ainsi, les premières tentatives d'impliquer les magistrats dans l'élaboration de propositions législatives, transposant les normes européennes basées sur le principe de reconnaissance mutuelle, étaient celles liées au projet de loi sur l'extradition et le mandat d'arrêt européen[9], ainsi qu'au projet de loi relatif à la reconnaissance, l'exécution et l'émission de décisions de gel de biens ou d'éléments de preuve[10]. La pratique montre que lorsque les magistrats participent aux groupes de travail, créés pour contribuer à l'élaboration de la législation interne, les actes adoptés fonctionnent sans trop de difficultés et sont mieux acceptés par les praticiens. Cela s'explique principalement par le fait que les participants aux groupes de travail disposent d'une expérience professionnelle importante et connaissent les aspects pratiques des avantages et des inconvénients d'un mécanisme juridique.

[9] Projet de loi, nº 502-01-9, 21 janvier 2005.

[10] Projet de loi, nº 602-01-36, 10 mai 2006.

2. L'état de la transposition des instruments de reconnaissance mutuelle

Comme il a été mentionné précédemment, il n'y a que deux instruments, basés sur le principe de reconnaissance mutuelle, transposés jusqu'à présent, à savoir la DC sur le MAE et la DC sur le gel de biens. Les deux décisions-cadres ont été transposées avant l'adhésion de la Bulgarie à l'Union européenne, et les dispositions nationales sont entrées en vigueur dès le 1er janvier 2007.

En effet, la DC sur le MAE a été transposée dans l'ordre interne en 2005 par la Loi sur l'extradition et le mandat d'arrêt européen (la loi sur le MAE) [11] qui codifie en quelque sorte cette forme de coopération judiciaire. La première partie de la loi régit la procédure d'extradition vers les pays tiers, alors que la seconde partie est consacrée à la procédure d'émission et d'exécution du mandat d'arrêt européen dans le cadre de l'Union européenne.

L'adoption d'une loi spécifique régissant la matière est le fruit d'une nouvelle approche du législateur. En effet, jusqu'à l'adoption de cette loi, l'extradition figurait dans un chapitre du Code de procédure pénale consacré à la coopération judiciaire internationale en matière pénale [12]. L'approche suivie lors de la transposition de cet instrument a eu une influence sur le développement ultérieur du processus de transposition des décisions-cadres dans ce domaine, puisqu'on a admis l'extraction d'une matière relative à la coopération judiciaire pénale du Code de procédure pénale ; on a ainsi marqué le début d'une tendance à transposer des décisions-cadres par une loi séparée, même si la matière en question se trouve ainsi codifiée.

La Commission européenne n'a pas constaté d'incompatibilité lors de l'évaluation de la transposition de la DC sur le MAE dans l'ordre juridique interne [13]. Cependant, certaines difficultés ont été rencontrées durant la première année d'application du MAE par les autorités bulgares compétentes, ce qui a nécessité de préciser et d'améliorer la législation en la matière. En conséquence, le Gouvernement a élaboré un projet de loi, modifiant la loi sur le mandat d'arrêt qui a été adopté par l'Assemblée nationale au mois de mai 2008 [14].

La DC sur le gel de biens a été transposée dans la législation interne en 2006 par une loi spécifique, intitulée Loi sur la reconnaissance, l'exécution et l'émission de décisions de gel de biens ou d'éléments de preuve (la loi sur le gel) [15]. Le fait de choisir d'adopter une loi spécifique en la matière n'a pas été salué par les praticiens. Dans le cadre de l'enquête, les magistrats ont indiqué qu'ils ne connaissent pas très bien la loi, notamment parce qu'elle est en dehors du Code.

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[11] Loi sur l'extradition et le mandat d'arrêt européen (Закон за екстрадицията и Европейската заповед за арест), *Journal officiel*, n° 46, 3 juin 2005.

[12] Chapitre 36 du Code de procédure pénale (Наказателно-процесуален кодекс), *Journal officiel*, n° 86, 28 octobre 2005, modifié le 23 décembre 2008.

[13] COM (2007) 407. A noter que le premier exercice d'évaluation mutuelle de l'application du MAE en Bulgarie a été mené en octobre 2008, mais le rapport n'est pas encore publié.

[14] *Journal officiel*, n° 52, 6 juin 2008.

[15] Loi sur la reconnaissance, l'exécution et l'émission de décisions de gel de biens ou d'éléments de preuve (Закон за признаване, изпълнение и постановяване на актове за обезпечаване на имущество или доказателства), *Journal officiel*, n° 59, 21 juillet 2006, en vigueur depuis le 1er janvier 2007.

On peut mentionner ici que les lois précitées n'ont pas été déférées à la Cour constitutionnelle et n'ont donc pas fait l'objet d'un examen de sa part.

Les instruments qui n'ont pas encore fait l'objet d'une transposition dans l'ordre interne sont la décision-cadre sur la reconnaissance mutuelle des sanctions pécuniaires [16] et la décision-cadre sur la reconnaissance mutuelle des décisions de confiscation [17]. Selon l'information obtenue du ministère de la Justice, un groupe de travail a été créé en son sein pour l'élaboration d'un projet de loi, transposant la décision-cadre sur la reconnaissance des sanctions pécuniaires. En ce qui concerne la décision-cadre sur la reconnaissance mutuelle des décisions de confiscation, le processus d'élaboration d'un projet de loi ne fait que commencer. Un groupe de travail chargé de proposer un projet de loi a été formé, mais la discussion sur des questions concrètes n'a pas encore eu lieu. On peut noter ici que la transposition de la DC sur la confiscation ne devrait pas poser de problèmes en principe. En effet, la règlementation interne se rapproche des dispositions de la DC sur la confiscation, puisque la Bulgarie reconnaît et exécute des décisions étrangères, y compris des décisions de confiscation des produits du crime [18].

3. La méthode de transposition

En principe, lors de la transposition le législateur essaye de suivre strictement les textes des DC, mais cette méthode est parfois à l'origine de difficultés, liées à l'application des dispositions en question.

On peut citer ici l'exemple de la transposition littérale de l'article 4, par. 6, de la DC sur le MAE, concernant l'engagement de l'Etat à exécuter la peine en cas de refus d'exécution d'un MAE, émis à l'encontre d'un de ses ressortissants ou résidents. Initialement, la disposition correspondante dans la législation interne ne donnait pas d'indication sur la détermination de l'organe qui devait prendre la décision d'exécuter la peine en Bulgarie, ni sur la procédure à suivre, ce qui a créé des difficultés en pratique [19]. Ce problème a été éliminé par la modification de l'article 40, point 4, de

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[16] Décision-cadre 2005/214/JAI du Conseil du 24 février 2005, concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, *JO*, n° L 76, 22 mars 2005, p. 16.

[17] Décision-cadre 2006/783/JAI du Conseil du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation, *JO*, n° L 328, 24 novembre 2006, p. 59.

[18] Voy. notamment l'article 469 du Code de procédure pénale. Cette disposition résulte de la ratification par la Bulgarie de la convention du Conseil de l'Europe sur la valeur internationale des jugements répressifs, Strasbourg, 28 mai 1970, et de la convention du Conseil de l'Europe relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime, Strasbourg, 8 novembre 1990.

[19] Le même problème s'est posé lorsque l'Etat d'exécution acceptait d'effectuer la remise d'une personne, mais la subordonnait à la condition du retour de la personne pour qu'elle puisse purger sa peine en Bulgarie. L'avis des praticiens sur la procédure à suivre était partagé. Certains considéraient que l'organe d'exécution devrait décider d'office d'entamer la procédure d'exécution de la décision étrangère, alors que d'autres estimaient que l'initiative appartient à l'autorité d'émission qui devrait faire une demande en ce sens. Il n'y avait pas non plus d'accord sur la question de savoir comment exécuter la décision étrangère, et plus précisément,

la loi sur le MAE qui prévoit que le juge qui se prononce sur la reconnaissance du MAE doit aussi, en cas de refus, prendre la décision d'exécuter la peine en Bulgarie. Toutefois, il faut observer que les dispositions de la loi, telle qu'elle a été modifiée en 2008, prévoient une procédure complémentaire d'adaptation de la peine à celle encourue pour une infraction similaire selon le Code pénal bulgare. Les nouvelles dispositions renvoient à la procédure du Code de procédure pénale relative au transfèrement des personnes condamnées, calquée sur la convention du Conseil de l'Europe de 1983. En conséquence, le juge bulgare ne va pas exécuter directement la peine, telle qu'elle a été prononcée par la juridiction d'un autre Etat membre, mais va l'adapter suivant la législation interne.

Un autre exemple de transposition littérale incohérente concerne la loi sur le gel de biens et est lié à l'exigence de la double incrimination pour les infractions en dehors du catalogue en tant que motif de refus obligatoire, qui en même temps apparaît plus loin comme motif de refus facultatif[20].

Les praticiens soulignent que ces difficultés n'auraient pas surgi si la Bulgarie avait participé aux négociations des instruments avant leur adoption.

4. Le principe de reconnaissance mutuelle et l'exigence de la double incrimination

L'exigence relative à la double incrimination est présente dans les deux textes législatifs, transposant la DC sur le MAE et la DC sur le gel. Dans les deux cas de figure, la Bulgarie exige l'existence d'une double incrimination uniquement pour les crimes qui n'entrent pas dans la liste des trente-deux catégories d'infractions. La double incrimination n'est pas vérifiée pour les infractions énumérées dans la liste, si elles sont punies dans l'Etat membre d'émission d'une peine ou d'une mesure de sûreté privatives de liberté d'au moins trois ans[21].

En effet, en vertu de la loi sur le MAE, la double incrimination des infractions en dehors de la liste constitue une condition obligatoire d'exécution d'un mandat d'arrêt. Ainsi l'article 36, al. 2, de la loi prévoit une règle de principe, selon laquelle la remise de la personne recherchée est effectuée si l'infraction visée dans le mandat d'arrêt constitue une infraction au regard de la législation de la Bulgarie. L'absence de vérification de la double incrimination pour le catalogue des trente-deux infractions n'est que l'exception à cette règle.

Une approche analogique a été utilisée lors de la transposition de la DC sur le gel. L'article 5, al. 2, de la loi sur la reconnaissance des décisions de gel pose, en tant que condition impérative, le principe suivant lequel la reconnaissance des actes, émis par des organes judiciaires d'un Etat membre, n'intervient que si le comportement visé est incriminé par la législation bulgare. Par dérogation à ce principe, la loi énumère les infractions pour lesquelles il n'y a pas d'exigence de double incrimination.

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s'il était nécessaire d'adapter la peine, prononcée à l'encontre de la personne, conformément à la convention sur le transfèrement des personnes condamnées ou s'il fallait l'appliquer telle quelle.

[20] Voy. l'article 5, al. 2 et article 9, al. 1, point 4, de la loi sur le gel.

[21] Voy. l'article 36, al. 2 et 3, de la loi sur le MAE.

Le contrôle de la double incrimination est effectué par le juge compétent d'abord, avant d'engager la procédure de placement en détention de la personne et ensuite, au cours de la procédure d'exécution de la décision.

La position du ministère de la Justice sur la double incrimination est plus libérale. Les experts du ministère de la Justice notent la tendance de limitation du principe de la double incrimination, observée lors de la négociation et l'adoption des instruments de reconnaissance mutuelle et soutiennent qu'il faudrait interpréter les incriminations, contenues dans la liste de manière plus large, de façon à englober presque toutes les infractions graves. Les différences en matière de droit substantiel ne devraient pas constituer une entrave à la reconnaissance et à l'exécution des décisions judiciaires, étant donné qu'en général, les comportements incriminés sont assez comparables dans les Etats membres de l'Union. Les experts soulignent que l'essence même de la coopération judiciaire réside dans l'élargissement du champ d'application de ladite coopération. Eu égard à la position qu'ils soutiennent, les experts ne pensent pas que l'élaboration d'une liste négative, contenant des infractions exclues de la reconnaissance mutuelle représenterait une vraie alternative.

En revanche, l'idée de créer une base de données, contenant les définitions nationales des infractions, mériterait d'être débattue et soutenue par les Etats membres, puisqu'elle pourrait faciliter le travail des magistrats, en apportant plus de transparence et de prévisibilité. En même temps, ceci aurait pour effet de renforcer la confiance mutuelle entre l'autorité d'émission et l'autorité d'exécution.

5. La clause de territorialité

La clause de territorialité est introduite en tant que motif de refus facultatif. Le législateur bulgare a suivi strictement la rédaction de l'article 4, par. 7, de la décision-cadre, en introduisant les deux hypothèses dans l'article 40, point 5, de la loi sur le MAE. L'exécution peut donc être refusée lorsque le mandat porte sur une infraction ayant été commise en tout ou en partie sur le territoire national, ainsi que lorsqu'elle a été commise en dehors de la Bulgarie et que le droit bulgare n'autorise pas la poursuite de la même infraction commise hors du territoire national.

En général, d'après les experts, la clause de territorialité n'est pas vraiment compatible avec le principe de reconnaissance mutuelle. Le principe de territorialité est limité dans le cadre de l'espace de liberté, de sécurité et de justice, et la clause en question constitue toujours un motif de refus facultatif.

En cas de conflit de juridictions, les praticiens observent que la question de l'exercice de la compétence doit être réglée par la communication directe entre les autorités. La coordination pourrait être effectuée également par Eurojust ou le Réseau judiciaire européen. On pourrait songer à insérer une disposition sur la coordination en matière de conflit de compétence dans les décisions-cadres pour parvenir à une solution efficace en cas de problème. L'on pourrait par exemple établir des critères pour définir quelle serait la juridiction la mieux placée pour traiter de l'affaire.

6. Le statut des ressortissants bulgares et des résidents

Lors de la transposition de la décision-cadre sur le MAE, aucun problème d'ordre politique ou juridique n'a été rencontré, concernant la remise des ressortissants

bulgares pour l'exercice de poursuites pénales ou pour l'exécution d'une peine ou d'une mesure de sûreté privative de liberté. Ceci a été rendu possible grâce à la révision de la Constitution avant l'adhésion de la Bulgarie à l'UE [22]. En vertu de l'article 24, al. 5, « Nul citoyen de la République de Bulgarie ne peut être extradé vers un autre pays ou vers un tribunal international en vue de poursuites pénales, sinon en application d'un traité international régulièrement ratifié par la République de Bulgarie, publié et entré en vigueur ».

Même si l'exception ne vise pas expressément la décision-cadre sur le MAE, elle s'applique dans le cadre de la procédure de remise, puisque la décision-cadre a été prise sur la base du traité UE.

La Bulgarie a transposé les dispositions de l'article 4, par. 6, de la décision-cadre en tant que motif de refus facultatif. Ainsi, en vertu de l'article 40, point 4, de la loi sur le MAE, la juridiction compétente peut refuser d'exécuter le mandat d'arrêt si la personne recherchée est de nationalité bulgare ou réside en Bulgarie et que cette dernière s'engage à ce que la peine ou la mesure de sûreté privative de liberté, imposée par l'autorité de l'Etat d'émission soit exécutée par le procureur. En outre, conformément à l'article 5, par. 3, de la DC sur le MAE, l'article 41, al. 3, de la loi, prévoit que lorsque la personne qui fait l'objet d'un mandat d'arrêt européen aux fins de poursuite est ressortissante bulgare ou réside en Bulgarie, la remise est effectuée à condition que la personne, après avoir été entendue, soit renvoyée en Bulgarie afin d'y subir la peine ou la mesure de sûreté privative de liberté, prononcée à son encontre dans l'Etat membre d'émission.

7. Le principe de reconnaissance mutuelle et le respect des droits fondamentaux

Selon les praticiens, les références aux droits fondamentaux contenues dans les instruments basés sur la reconnaissance mutuelle ne devraient pas être interprétées comme impliquant la possibilité pour l'autorité d'exécution d'exercer un contrôle sur le respect des garanties procédurales et des droits de la défense dans le cadre de la procédure pénale engagée dans l'Etat d'émission. Au contraire, cette référence constitue plutôt une affirmation que ces droits fondamentaux sont également respectés dans les instruments du troisième pilier et les Etats membres ne pourraient pas se soustraire à leurs obligations.

Tous les Etats membres sont parties à la convention européenne des droits de l'homme et se plient à la jurisprudence de la Cour européenne des droits de l'homme de Strasbourg en la matière pour assurer le respect des droits procéduraux des parties au litige.

La confiance mutuelle dans les systèmes juridiques exclut donc la possibilté d'introduire un contrôle sur le respect des droits de la défense en tant que motif de refus pour la reconnaissance et l'exécution d'une décision judiciaire émise dans un autre Etat membre.

C'est la raison pour laquelle la disposition de la DC sur le MAE, indiquant que cette dernière ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux et les principes juridiques fondamentaux tels qu'ils sont consacrés

[22] Voy. la loi modifiant la Constitution, *JO*, n° 18/2005.

par l'article 6 UE[23] n'est pas transposée dans la législation interne. Le non-respect des droits fondamentaux ne constitue donc pas un motif de refus d'exécuter un mandat d'arrêt. Le législateur national a admis que la législation pénale matérielle et procédurale des autres Etats membres correspond aux standards de protection des droits fondamentaux, prévus à l'article 6 UE, en se fondant sur la confiance mutuelle entre les Etats membres et l'introduction d'un motif de refus supplémentaire n'est pas nécessaire.

Le texte de la loi sur la reconnaissance des décisions de gel ne prévoit pas non plus de disposition correspondante à l'article 1 de la DC sur le gel de biens.

8. Autres motifs de refus d'exécution

La législation nationale, transposant les décisions-cadres ne prévoit pas de motifs de refus complémentaires en dehors de ceux qui sont expressément mentionnés dans les instruments de reconnaissance mutuelle. Les motifs de refus d'exécution qui sont prévus en tant que motifs facultatifs ne sont pas rendus obligatoires, à l'exception de l'exigence de double incrimination pour les infractions en dehors de la liste des trente-deux infractions.

La transposition des motifs de refus obligatoires n'a posé aucun problème particulier.

En ce qui concerne la transposition des motifs de refus facultatifs, l'on observe la présence de certaines spécificités.

Initialement, les dispositions de l'article 4, par. 2 et 3, de la DC sur le MAE ont été introduites dans l'article 40, point 1, par une formulation assez large, selon laquelle le juge peut refuser d'exécuter un mandat d'arrêt lorsqu'il porte sur une infraction qui tombe dans le champ de compétence des juridictions bulgares. Cette décision du législateur a été en quelque sorte influencée par l'analogie avec un motif de refus similaire, utilisé dans le cadre de l'extradition. Le motif de refus ainsi rédigé a largement ouvert la possibilité aux autorités judiciaires de refuser l'exécution d'un MAE, contrairement aux exigences du principe de la reconnaissance mutuelle. C'est la raison pour laquelle la loi sur le MAE a été modifiée dans le sens où l'exécution ne pourrait être refusée que lorsque la personne est déjà poursuivie en Bulgarie avant la réception du mandat d'arrêt, pour le même fait que celui qui est à la base du MAE.

En ce qui concerne la loi sur l'exécution des décisions de gel, les dispositions prévues à l'article 7 de la DC sur le gel sont transposées en tant que motifs de refus facultatifs.

9. L'autorité judiciaire compétente

Le choix du législateur national lors de la transposition de la décision-cadre sur le MAE a été opéré en faveur d'un système décentralisé d'émission et d'exécution du mandat d'arrêt. L'organe compétent pour exécuter le mandat d'arrêt est le tribunal de district du lieu où se trouve la personne recherchée[24]. L'organe compétent pour délivrer un mandat d'arrêt européen dans la phase présentencielle est le procureur en charge.

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[23] Voy. article 1 (3) de la décision-cadre sur le MAE.

[24] Voy. l'article 38, al. 1, de la loi sur le MAE.

Dans la phase de jugement, l'organe compétent est le tribunal de district. Lorsque la personne condamnée est recherchée aux fins d'exécution d'une peine ou d'une mesure de sûreté, l'organe compétent pour émettre le mandat est le procureur [25].

En vertu de l'article 38, al. 2, de la loi sur le MAE, l'autorité centrale est le ministre de la Justice, mais, contrairement aux procédures d'extradition où ses fonctions sont plus larges, comprenant la transmission et la réception de la demande, le contrôle de son contenu, ainsi que la vérification de la réciprocité, dans le cadre de la procédure d'exécution du MAE son pouvoir est fortement limité [26]. En effet, il doit seulement assister les autorités judiciaires compétentes.

Une approche différente a été suivie lors de la transposition de la DC sur le gel concernant l'autorité judiciaire compétente. L'organe compétent pour reconnaître une décision de gel, émise par un autre Etat membre est uniquement le Tribunal de Sofia [27]. En l'absence de motifs de refus justifiés, le Tribunal de Sofia renvoie la décision de gel à l'organe judiciaire compétent pour l'exécuter.

Concernant l'émission des décisions de gel, l'autorité compétente est en principe le tribunal compétent, ou dans certains cas le procureur lorsqu'une autorisation du juge n'est pas nécessaire pour effectuer la collecte des preuves [28]. Les actes relatifs au gel sont transmis à un autre Etat membre par le procureur général auprès de la Cour de cassation dans le cadre de la phase présentencielle et par le Tribunal de Sofia, dans le cadre de la phase de jugement. En d'autres termes, il n'y a pas de contact direct entre l'organe d'émission bulgare et l'autorité d'exécution d'un autre Etat membre, ce qui ralentit la procédure d'exécution.

Le choix du Tribunal de Sofia en tant qu'organe central pour l'émission et la reconnaissance de décisions de gel est dicté par le fait que cette juridiction a une compétence exclusive pour certaines formes de coopération judiciaire internationale (comme par exemple le transfert des personnes condamnées). En conséquence, le législateur a admis que ce tribunal dispose de la capacité nécessaire pour appliquer également la loi sur la reconnaissance des décisions de gel.

En effet, la centralisation du système présente plusieurs avantages comme par exemple celui de clarifier la question de la détermination de l'organe compétent dans l'Etat d'exécution et d'éviter ainsi le risque d'envoyer la décision de gel à un organe qui n'est pas compétent pour l'exécuter. En outre, l'on évite ainsi l'apparition d'une jurisprudence divergente sur la reconnaissance des décisions émises par d'autres Etats membres. Toutefois, dans un tel système centralisé, il existe le risque de ralentissement de la procédure en raison du manque de contact direct entre les autorités d'émission et d'exécution.

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[25] Voy. l'article 56 de la loi sur MAE.

[26] A titre d'exemple, le ministre de la Justice est compétent pour informer le Conseil de l'UE quant à l'évaluation de l'application de la décision-cadre sur le MAE en cas de retards constatés dans le cadre de l'exécution de MAE émis par la Bulgarie (article 59 de la loi sur le MAE).

[27] Voy. l'article 6, de la loi sur le gel.

[28] Voy. l'article 19, de la loi sur le gel.

3. La mise en œuvre pratique du principe de reconnaissance mutuelle

A. L'application de la décision-cadre sur le MAE

Suite à l'adhésion de la Bulgarie à l'Union européenne, le mandat d'arrêt européen est devenu en peu de temps la forme de coopération judiciaire la plus utilisée. Selon les statistiques, trente-quatre personnes ont été remises par la Bulgarie et quatre-vingt-treize ont été remises à la Bulgarie sur la base d'un MAE en 2007. Pour la même période, les refus d'exécution sont assez limités, puisqu'ils sont au nombre de dix[29]. Selon les statistiques, les motifs de refus d'exécution les plus fréquents sont les suivants : l'existence d'un jugement définitif pour la même infraction contre la même personne ; la personne qui fait l'objet du mandat d'arrêt européen est déjà poursuivie en Bulgarie pour le même fait ; l'Etat d'émission ne donne pas de garanties suffisantes que la personne aura la possibilité de demander une nouvelle procédure de jugement en cas de décision rendue par défaut ; le MAE ne contient pas d'informations sur l'existence d'un mandat d'arrêt ou d'un jugement définitif et, même après une demande en ce sens, ces derniers ne sont pas présentés.

Les praticiens considèrent que le mandat d'arrêt constitue un pas en avant, en tant qu'il contribue à l'élimination des problèmes qui existaient et qui continuent à exister lors de l'application des conventions du Conseil de l'Europe de coopération judiciaire en matière pénale. L'un des aspects positifs de la coopération sur la base des instruments de reconnaissance mutuelle est l'abandon de tout formalisme inutile dans la communication entre l'autorité d'émission et l'autorité d'exécution, ce qui diminue, par exemple, le risque de ralentissement de la procédure. La possibilité de contacter directement l'autorité d'un autre Etat membre pour demander des informations supplémentaires ou des éclaircissements concernant le contenu du formulaire, contribue à finaliser la procédure dans les plus brefs délais (très souvent, en moins de soixante jours).

En pratique, les magistrats observent que les problèmes qui ont surgi durant la période d'application du MAE en Bulgarie résultent du fait que la procédure d'exécution du mandat est limitée à deux instances. La juridiction compétente en première instance est le tribunal de district, avec la possibilité de recours devant la cour d'appel, en tant que dernière instance. Il n'est donc pas prévu que la Cour de cassation exerce un contrôle sur les affaires dans ce domaine. Or, les magistrats considèrent qu'il s'agit là d'un inconvénient considérable, puisqu'il n'y a pas de juridiction chargée de veiller à l'uniformité et à la cohérence de la jurisprudence sur l'application du MAE.

1. L'interprétation de la double incrimination et de la clause de territorialité

Les dispositions relatives à la double incrimination s'appliquent en Bulgarie conformément à ce qui a été prévu dans la DC sur le MAE. En pratique, le contrôle de la double incrimination de l'infraction ne pose pas de difficultés, dans la mesure où les magistrats bulgares l'examinaient déjà lors de l'application des actes du Conseil de l'Europe.

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[29] Voy. le rapport du Parquet général de la Cour de cassation (2007).

Ce qui représente vraiment un enjeu majeur, ce sont les hypothèses dans lesquelles le contrôle de la double incrimination est supprimé. Les magistrats se félicitent de l'abandon du contrôle de la double incrimination pour les trente-deux infractions de la liste, puisque l'invocation de ces infractions par l'organe d'émission leur permet d'économiser des efforts pour vérifier les exigences auxquelles devrait répondre l'infraction en question. Beaucoup de magistrats estiment qu'ils pourraient accepter un élargissement de la liste d'infractions et montrer ainsi en pratique leur volonté de coopérer avec l'autorité d'émission. Ceci contribuerait à reconnaître plus facilement la décision provenant d'un autre Etat membre et permettrait d'aller jusqu'au bout de l'idée de la reconnaissance mutuelle.

Contrairement aux magistrats, les avocats ne sont pas favorables à l'abandon de la double incrimination. Ils plaident pour le contrôle de la double incrimination même dans le cas d'un mandat d'arrêt émis pour des faits constituant une infraction entrant dans le champ des trente-deux catégories énumérées à l'article 2, par. 2, de la DC sur le MAE. En effet, en Bulgarie on observe souvent des cas où le MAE avait été émis pour un crime qui selon tous les critères pourrait être considéré comme entrant dans la liste des trente-deux infractions, mais l'autorité d'émission aurait manqué de mentionner ce fait dans le formulaire. Dans cette hypothèse, certaines juridictions admettent que si l'autorité d'émission n'invoque pas l'abandon du contrôle de la double incrimination ou si elle n'indique pas ceci dans le formulaire, l'organe d'exécution devrait vérifier si les faits constituent une infraction au regard du droit interne.

La pratique relative à l'application du mandat d'arrêt européen montre que la suppression de l'exigence de la double incrimination n'est pas toujours correctement interprétée par les autorités d'exécution en Bulgarie. Il y a des cas, même s'ils sont rares, dans lesquels le juge admet que le mandat d'arrêt est émis pour une infraction, appartenant à l'une des trente-deux catégories, mais il se permet de faire des commentaires sur la qualification juridique des faits opérée par l'autorité d'émission [30]. Il y a là un contournement des dispositions de la décision-cadre et de la loi de transposition, puisque l'autorité d'exécution rétablit la vérification des faits, ce qu'elle devrait effectuer uniquement dans les cas en dehors du champ d'application de l'article 2, par. 2, de la DC. Toutefois, il ne s'agit que d'une pratique isolée, apparue dans les premiers mois de l'application de la loi sur le mandat d'arrêt. Elle a été abandonnée, suite à l'organisation de séminaires de formation et aux explications fournies à ce sujet.

Il est intéressant d'évoquer ici l'interprétation de l'exigence de la double incrimination et la clause de territorialité par certaines juridictions pendant les premiers mois d'application du mandat d'arrêt. Dans une décision du 11 mai 2007, le Tribunal de district de Pazardzhik admet que si le MAE porte sur l'une des infractions de la liste des trente-deux catégories, le juge bulgare ne peut en aucun cas contrôler la double incrimination. Il poursuit son raisonnement en disant que de ce fait, les autorités bulgares ne peuvent pas non plus refuser l'exécution au motif que l'infraction soit commise en tout ou en partie sur le territoire bulgare. Ce raisonnement indique

[30] Voy. Cour d'appel de Sofia, 14 février 2008, *D.I.*, aff. n° 114/08.

qu'en l'espèce, le juge n'a pas interprété correctement le rapport entre la double incrimination et la clause de territorialité [31].

La clause de territorialité est transposée dans l'ordre juridique interne en tant que motif de non-exécution facultative. L'avis des praticiens est partagé sur ce point. Certains d'entre eux estiment que ce motif de refus peut être invoqué uniquement dans des circonstances particulières, faisant l'objet d'une appréciation *in concreto* par les juges.

D'autres, parmi lesquels figurent les avocats, considèrent que la clause de territorialité représente une « clause de protection » des ressortissants de l'Etat d'exécution. En effet, dans la plupart des cas où on invoque ce motif de refus, l'infraction ayant donné lieu à l'émission d'un mandat d'arrêt a été commise par des ressortissants bulgares. Les partisans de cette conception sont inconsciemment influencés par l'idée de la coopération judiciaire pénale s'appliquant en matière d'extradition, sans vraiment prendre en considération le principe de reconnaissance mutuelle et la nécessité d'une confiance mutuelle.

Il faut cependant noter qu'il y a quelques affaires, dans lesquelles les personnes, faisant l'objet d'un mandat d'arrêt, se rendent à la police dans l'Etat d'exécution (la Bulgarie), en indiquant que leur activité criminelle a eu lieu sur le territoire bulgare. Ces personnes entendent ensuite se prévaloir de la clause de territorialité permettant à l'autorité d'exécution de refuser un mandat d'arrêt européen lorsque les infractions ont été commises en tout ou en partie sur son territoire. On constate que certains procureurs ont même engagé des poursuites pénales à l'encontre des personnes en question pour la prétendue infraction. Il s'agit là d'une dérive préoccupante, puisque le mandat d'arrêt est ainsi considéré comme un motif légal et contenant suffisamment d'information pour justifier l'engagement de poursuites pénales, alors même que les organes bulgares n'avaient pas pris des mesures pour établir l'infraction avant la réception du mandat d'arrêt. Or, si l'Etat d'exécution n'avait pas jusqu'alors engagé des poursuites pénales à l'encontre de la personne pour un crime, commis sur son territoire, c'est parce que dans la plupart des cas il ne dispose pas d'éléments de preuve. Ces derniers se trouvent le plus souvent sur le territoire de l'Etat d'émission, ce qui fait que les poursuites pénales, engagées à ce titre par les autorités de l'Etat d'exécution, ne peuvent pas aboutir de manière efficace.

Cette approche n'est pas en conformité avec les principes de confiance mutuelle et de reconnaissance mutuelle, puisqu'elle donne l'impression que l'autorité d'exécution domine les rapports avec l'organe d'émission et que sa décision est cruciale pour l'enquête, menée dans l'Etat d'exécution. Lorsque le juge se fonde sur la clause de territorialité pour refuser d'exécuter un mandat d'arrêt, mais que la personne n'est pas poursuivie pour les mêmes faits en Bulgarie, il ne pourrait pas, par sa décision, obliger le procureur à engager des poursuites dans l'Etat d'exécution. Ainsi, sans le vouloir, le juge pourrait contribuer à ce que la personne, faisant l'objet d'un mandat d'arrêt européen, reste impunie.

En raison de ces dérives, les motifs de refus ont été précisés dans la loi de modification de la loi sur le MAE et désormais l'exécution du mandat pourrait être

[31] Voy. Tribunal de district de Pazardzhik, 11 mai 2007, *P.M.V.*, aff. n° 370/2007.

refusée uniquement lorsque la personne est déjà poursuivie en Bulgarie pour le même fait, avant la réception du mandat d'arrêt européen. Or, même dans ce cas de figure, ceci ne devrait être qu'une étape du raisonnement du juge qui devrait décider dans quel pays la procédure pénale aura plus de chances d'aboutir. En effet, il n'est pas logique de refuser l'exécution du mandat d'arrêt, alors que tous les éléments de preuve se trouvent sur le territoire de l'Etat d'émission. A son tour, l'autorité d'exécution devrait utiliser d'autres instruments de coopération judiciaire (par exemple pour demander l'exécution des commissions rogatoires aux fins de perquisition ou de saisie d'objets) qui pourraient non seulement ralentir la procédure inutilement, mais aussi faire obstacle au déroulement de la procédure. C'est la raison pour laquelle l'autorité d'exécution devrait prendre en compte tous les aspects de la procédure, tant d'ordre temporel que d'ordre qualitatif, avant d'invoquer un motif de refus comme la clause de territorialité.

2. Le respect des droits fondamentaux

Les magistrats considèrent que si une décision a été émise dans un Etat membre de l'UE, en conformité avec sa législation nationale, les droits de la défense, ainsi que les droits fondamentaux de la personne ont été respectés. Le juge bulgare ne pourrait donc pas exercer un contrôle sur la façon dont la décision (mandat d'arrêt ou décision de gel) a été émise. En plus, dans toutes les décisions-cadres on prévoit une possibilité de faire appel devant les autorités de l'Etat d'exécution.

Cette affirmation devrait être valable également pour les décisions, émises par les autorités bulgares. L'idée de « l'exercice d'un contrôle » par l'organe d'exécution, même en ce qui concerne une question aussi importante que les droits de l'homme, n'est pas appropriée en l'espèce. La confiance mutuelle exclut la conception, selon laquelle les Etats membres devraient « se contrôler » mutuellement. L'on présume, en effet, que dans chaque Etat membre il existe des mécanismes, garantissant le respect des droits fondamentaux, sinon l'Etat en question n'aurait pas respecté ses obligations découlant de la CEDH et de l'article 6 UE.

Lorsque dans le cadre d'une procédure d'exécution d'un MAE, l'intéressé invoque l'argument que ses droits procéduraux ont été violés dans l'Etat membre d'émission, le juge bulgare accepte d'exécuter la décision étrangère, en se fondant sur la confiance mutuelle entre les Etats membres et sur le fait que ces derniers sont tous parties à la CEDH. On peut citer ici l'exemple de la décision de la Cour d'appel de Sofia du 8 mars 2007 [32]. En l'espèce, la décision attaquée était celle du Tribunal de Sofia, acceptant de reconnaître et exécuter le mandat d'arrêt émis à l'encontre du ressortissant polonais Konrad Reizmund. Ce dernier soutenait, devant le juge d'appel, que le tribunal de première instance n'avait pas pris en considération les arguments de la défense, qu'il s'agissait d'un crime politique, et que la situation politique en Pologne donnait lieu à penser que la personne recherchée serait poursuivie pour ses convictions politiques. Il invoquait aussi l'argument, selon lequel les règles de procédure pénale en Pologne ne correspondaient pas au principe du procès équitable, consacré par la CEDH. Cette affirmation aurait été confirmée par les dernières décisions de condamnation de la

[32] Voy. Cour d'appel de Sofia, 8 mars 2007, *Konrad Reizmund*, aff. n° 205/2007.

Pologne, prononcées par la Cour européenne des droits de l'homme en relation avec la présomption d'innocence. La Cour d'appel rejette ces arguments, puisque la Pologne est membre de l'UE et du Conseil de l'Europe. La Pologne est aussi partie à la CEDH et il n'y a donc pas de raison pour le juge bulgare de considérer que les autorités judiciaires polonaises auraient commis une violation des droits fondamentaux, qu'elle s'est engagée à respecter.

Cependant, lorsque les pièces qui accompagnent le dossier démontrent une violation évidente des droits de la défense, l'autorité de l'Etat d'exécution ne pourrait pas l'ignorer. La question qui se pose est de savoir si l'organe d'exécution peut refuser d'exécuter le MAE en se fondant sur les droits fondamentaux. Tous les magistrats considèrent que la réponse à la question devrait être positive. En effet, dans une décision du 27 février 2007 [33], la Cour d'appel de Sofia a refusé d'exécuter un mandat d'arrêt, émis par une juridiction roumaine en considérant que les règles procédurales qui avaient été suivies violaient la CEDH. En effet, la Cour d'appel a souligné que les règles procédurales en question ont été abrogées avant l'adhésion de la Roumanie à l'UE, notamment parce qu'elles avaient été déclarées contraires à la CEDH.

3. Les difficultés rencontrées dans la pratique

Les nouvelles formes de coopération judiciaire en matière pénale, fondées sur le principe de reconnaissance mutuelle de décisions étrangères et sur la confiance mutuelle entre l'autorité d'émission et l'autorité d'exécution sont bien acceptées, avec la volonté de les appliquer correctement.

Les problèmes qui se dessinent depuis un peu plus d'un an sont liés plutôt à des questions d'ordre pratique. Tout d'abord, même si les magistrats sont en général favorables à l'idée d'entrer en contact avec leurs homologues des Etats membres de l'UE, ils ne se sentent pas encore prêts à communiquer directement avec ces autorités. La *barrière linguistique* est souvent un problème sérieux, puisque tous les magistrats n'ont pas une connaissance suffisante en la matière, étant donné que le niveau devrait être assez élevé pour établir un dialogue avec un professionnel d'un autre Etat membre. Il s'agit de maîtriser un langage technique, et il faut à tout prix éviter les malentendus. Les magistrats s'accordent sur le fait qu'ils devraient améliorer leurs connaissances linguistiques.

Ensuite, la plupart des magistrats ont constaté que la *traduction du contenu* des mandats d'arrêt, transmis aux autorités bulgares n'était pas correcte. Dans certains cas, en lisant la traduction il devient évident qu'elle a été effectuée par une personne qui n'a pas de connaissance en droit, ce qui fait que des termes spécifiques, liés aux éléments constitutifs de l'infraction, ne sont pas clairs et rendent difficile la vérification de la double incrimination. Les magistrats proposent, pour éviter les demandes de clarification et les retards dans l'exécution, que ce soit des juristes linguistes qui assurent la traduction dans la langue de l'Etat d'exécution.

L'autre problème qui s'est révélé en pratique est l'envoi du mandat d'arrêt par les autorités étrangères dans une langue *autre que le bulgare*, alors que la Bulgarie a indiqué qu'elle acceptait des traductions uniquement en bulgare.

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[33] Voy. Cour d'appel de Sofia, 27 février 2008, *M.G.A*, aff. n° 1283/2007.

B. L'application de la décision-cadre sur le gel

La coopération judiciaire, basée sur la décision-cadre sur le gel de biens ou d'éléments de preuve, n'est pas très développée. Jusqu'à maintenant il n'y a pas d'exécution d'actes, en application de ses dispositions. A cet égard, on peut noter qu'aucune demande, basée sur la DC en question n'est enregistrée, alors qu'il y a deux ou trois cas dans lesquels une demande d'exécution a été faite par un Etat membre, sur le fondement d'un autre instrument juridique – la convention du Conseil de l'Europe relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime. Ainsi, les demandes d'exécution ont été examinées par le Tribunal de Sofia en application des dispositions de cette convention. L'inapplication de la décision-cadre en l'espèce résulte du choix de procédure, opéré par l'autorité d'émission qui n'avait pas rendu une décision de gel, en préférant un instrument de coopération parallèle, mais plus incertain. En d'autres termes, l'autorité judiciaire n'a pas émis une décision de gel, susceptible d'être reconnue et exécutée par une juridiction bulgare, mais a demandé l'adoption d'une telle décision en Bulgarie.

Il faut reconnaître que jusqu'à présent il n'y a pas eu de demandes de reconnaissance de décisions de gel des avoirs et des preuves émises par les autorités judiciaires bulgares non plus.

La raison de la non-application réside, d'une part, dans le manque d'information concernant la possibilité pour les magistrats d'utiliser cet instrument, et d'autre part, dans le fait qu'elle a été transposée récemment. En effet, on observe que le mandat d'arrêt a remplacé l'extradition qui était une pratique bien établie depuis des années et les Etats membres ne devaient que continuer leur coopération, en utilisant un instrument juridique plus efficace, ce qui n'était pas le cas pour les décisions de gel.

4. Conclusions et perspectives

Selon les praticiens en Bulgarie, le principe de reconnaissance mutuelle contribue indéniablement à l'amélioration de la coopération judiciaire en matière pénale. En effet, grâce à la reconnaissance mutuelle, la bureaucratie est réduite au minimum, les motifs de refus sont clairs, ou du moins prévisibles et les délais d'exécution sont relativement courts. La procédure est facilitée de manière significative par l'introduction d'un formulaire unique pour la décision de l'autorité d'émission, ce qui simplifie au maximum la vérification et l'exécution d'un point de vue technique et donne la possibilité aux magistrats de se concentrer sur les aspects purement juridiques de la question. Dans cet ordre d'idées, les praticiens se félicitent de l'adoption d'autres instruments dans ce domaine, comme par exemple le MOP[34] ou encore la DC sur la prise en compte des décisions de condamnation[35].

En outre, les praticiens constatent qu'il y a un manque de cohérence entre les différents instruments existants, ce qui implique automatiquement un risque

[34] Décision-cadre 2008/978/JAI, 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

[35] Décision-cadre 2008/675/JAI, 24 juillet 2008 relative à la prise en compte des décisions de condamnation entre les Etats membres de l'Union européenne à l'occasion d'une nouvelle procédure pénale, *JO*, n° L 220, 15 août 2008, p. 32.

d'incohérence de la jurisprudence. Ils considèrent donc qu'il faudrait procéder à une codification des différentes formes de coopération judiciaire ou au moins à l'unification des motifs de refus d'exécution des décisions étrangères. Toutefois, en considérant les différences dans les systèmes juridiques des Etats membres, les différentes traditions et même parfois l'absence de confiance mutuelle réelle, il est peu probable de codifier la matière, malgré les avantages que cela représente.

On peut souligner que l'adoption de mesures d'accompagnement pour conforter le principe de reconnaissance mutuelle est fortement recommandée. La formation complémentaire des magistrats non seulement en droit pénal européen, mais aussi en langues étrangères est d'une importance cruciale selon les experts. A cet égard les praticiens se félicitent des efforts du Réseau européen de formation judiciaire et des initiatives bilatérales qui contribuent à renforcer les connaissances des magistrats en droit européen et leur permet de mieux connaître les différents systèmes juridiques au sein de l'Union.

En conclusion, les praticiens affirment que la transposition correcte des normes européennes et leur interprétation par les autorités judiciaires dans un esprit de confiance mutuelle contribuent de manière considérable à l'application du principe de reconnaissance mutuelle dans l'espace de liberté, de sécurité et de justice.

Criminal law and mutual recognition in the Czech Republic

Ivo Šlosarčík [1]

1. Introduction: Czech Republic, Presidency and mutual recognition

The purpose of this text is to demonstrate the constitutional and legal framework for mutual recognition in the Czech Republic as well as the inherent limits for its acceptance by Czech authorities.

The Czech Republic started 2009 in a paradoxical situation. As the chair of the European Council and the Council of the EU, it was expected to provide momentum, set priorities and search for compromises within the EU decision-making process. At the same time, the Czech Republic was labelled as one of the most eurosceptic Member States of the European Union for a number of reasons, ranging from its non-ratification of the Lisbon Treaty to some radically eurosceptic statements made by the Czech President Václav Klaus.

Police and judicial cooperation in criminal law is one of the most rapidly developing fields in European integration and the principle of mutual recognition has been described as *"*the motor of European integration in criminal law in recent years" [2]. However, the priorities of the Czech EU Presidency in the area of justice and police cooperation focus on different elements of cooperation, such as the European Justice Portal, cross-border videoconferencing and the proposal for a regulation on successions and wills. These priorities leave the principle of mutual recognition slightly outside the Presidency's focus. The principle of mutual recognition is only

[1] The author would like to thank Světlana Kloučková from the Supreme Public Prosecutor's Office in Brno for her helpful comments. All errors and omissions are attributable to the author.

[2] V. Mitsilegas, "The constitutional implications of mutual recognition in criminal matters in the EU", *CMLRev.*, 43, 2006, p. 1277.

indirectly tackled by the proposal for a Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, presented by Czech Presidency in January 2009 [3], as a response to the implication of the *non bis in idem* principle in the European Union law [4].

2. EU law in the Czech Republic

The Czech Republic has a constitutional text that can only be amended by explicit constitutional amendment approved by three fifths majorities in both parliamentary chambers. As part of its preparation for EU accession, the Constitution of the Czech Republic was amended to prevent potential conflicts between EU law and the Czech constitutional order. In general terms, the so-called "European amendment" opened the Czech legal system up to external sources of law (both international and EU law) and provided an explicit constitutional basis for the transfer of powers to any international organisation or institution [5]. The major elements of the European constitutional amendment are as follows:

a) A new constitutional clause declaring the state's respect for obligations arising from international law has been added to the traditional status of the Czech Republic as a "sovereign, unitary, democratic and law-abiding country" [6]. According to the interpretation of the Czech Constitutional Court (CCC), this clause requires that Czech authorities, including the CCC itself, interpret Czech domestic legal norms in accordance with international and European law that is binding on the Czech Republic. As described later in this text, this clause "saved" the constitutionality of the European Arrest Warrant (EAW) mechanism in the Czech Republic.

b) International treaties approved by the Parliament and ratified by the President are considered an integral part of the Czech legal order and can be directly applied by the Czech executive and judiciary. In case of conflict with domestic legislation, the international treaties are applied instead of domestic law(s) [7]. However, the constitutional amendment is silent about the position of international customary law and about secondary EU legislation such as directives, regulations and framework decisions.

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[3] Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings (doc. 5208/09 COPEN 7).

[4] For general overview of the *non bis in idem* principle in the EU law, see e.g. E. Sharpston and J. M. Fernández-Martín, "Some Reflections on Schengen Free Movement Rights and the Principle of *Ne Bis In Idem*", *in* C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies*, 10, 2007-2008, Oxford, Hart Publishing, 2008, p. 413-448.

[5] For instance, the procedure introduced by the "European amendment" will be used as the constitutional basis for Czech ratification of the Statute of the International Criminal Court (ICC). The ratification procedure has not been completed yet as the ICC Statute is likely to be referred to the Constitutional Court for review of its compatibility with the Czech constitutional order.

[6] Constitution of the Czech Republic, no. 1/1993 Coll. (as amended), Art. 1.

[7] *Ibid*., Art. 10.

c) Explicit constitutional authorisation that an international treaty can transfer powers that were originally vested in the Czech authorities (both central and regional) to an international organisation or institution was inserted into the constitutional text as a new Art. 10a[8]. For approval of this treaty, either parliamentary ratification by qualified 60% majorities (in contrast to ratification of ordinary treaties, which require simple majorities in the Parliament) or approval by referendum is required[9]. This constitutional provision was used for the Czech Republic's accession to the EU and is intended to provide a basis for the Czech Republic's ratification of the Lisbon Treaty[10] and the Czech Republic's participation in the International Criminal Court (ICC)[11]. However, as declared by the CCC in its opinion on the Lisbon Treaty, the transfer of powers under Art. 10a does not constitute a tacit constitutional amendment and must, therefore, remain within constitutional boundaries.

d) "Soft" parliamentary control of governmental activity in the Council of the EU has been established as the parliamentary chambers are informed about the government's position on EU norms that are currently being negotiated. Parliamentary bodies are also authorised to issue non-binding opinions and instructions to the executive[12].

e) The Constitutional Court is vested with powers to review the compatibility of international agreements with the constitutional order of the Czech Republic[13]. This abstract preliminary control of the constitutionality of international treaties can be triggered by the President, the Senate or the Assembly of Deputies and, when initiated, prevents the ratification process from being concluded until the CCC reaches a final decision on the constitutionality of the international treaty in question[14]. The Constitution, however, does not (explicitly) provide for constitutional review of secondary EU legislation and the CCC itself declared (in the *sugar quotas* case[15] and in the *EAW* case[16]) that it is not competent to review the (abstract) constitutionality of regulations and framework decisions. So far, the

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[8] Art. 10a: (1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution. (2) An approval of the Parliament is required to ratify an international agreement stipulated in Subsection 1 unless a constitutional law requires an approval from a referendum.

[9] Constitution of the Czech Republic, no. 1/1993 Coll. (as amended), Art. 10a.

[10] The Government asked the Parliament to approve the Lisbon Treaty according to the Art. 10a but no parliamentary chamber had made a decision as of mid-January 2009.

[11] The ICC Treaty has been approved by both parliamentary chambers but not ratified by the President yet. In the academic sphere, there is no consensus as to whether the President can or cannot refuse to ratify a treaty approved by both chambers of the Parliament.

[12] Constitution of the Czech Republic, no. 1/1993 Coll. (as amended), Art. 10b.

[13] *Ibid*., Art. 87, para. 2.

[14] If the CCC decides that the treaty is unconstitutional, the treaty concerned cannot be ratified unless a constitutional amendment addressing the issue is adopted.

[15] I. Šlosarčík, "The Czech Republic and European Union law in 2004-2006", *European Public Law*, 13/3, 2007, p. 367-378.

[16] Constitutional Court, 3 May 2006, Decision no. Pl. ÚS 66/04.

CCC has substantially [17] used this power only in the case of review of the Lisbon Treaty (see *infra*).

f) The powers and reference framework of the ordinary (i.e. non-constitutional) judiciary have been modified so that the ordinary courts are bound not only by Czech legislation but also directly by international treaties. In case of conflict between the Czech Republic's ordinary law and an international treaty, the court itself is authorised to decide on the (in)compatibility between the Czech and the international legal norm and, in the event that it is found to be incompatible, the international treaty should be applied [18].

No specific constitutional amendment has been adopted with regard to the ratification of the Lisbon Treaty in the Czech Republic. Instead, the "European constitutional clause", i.e. Art. 10a, has been used as the constitutional basis for ratification [19]. After delays caused by the review procedure before the CCC, the ratification process has continued in the Parliament in 2009 [20].

The principle of mutual recognition in the EU is not explicitly mentioned in the Czech Republic's constitutional text. No constitutional provision has been changed specifically as a reaction to European Community/European Union cooperation in criminal law beyond the general European constitutional clause (e.g. in contrast to the Polish Constitution, which was amended in response to the EAW judgment of the Polish Constitutional Tribunal). However, several "horizontal" constitutional provisions (or their absence) are of special importance for the position of mutual recognition instruments in the Czech Republic. Art. 38, para. 1 of the Charter of Fundamental Rights and Freedoms [21] [*Listina základních práv a svobod* in Czech], which is an integral part of the Czech Republic's constitutional order, states that "no one may be removed from the jurisdiction of his lawful judge. The jurisdiction of courts and the competence of judges shall be provided for by the law" but without specifying

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[17] Before the Lisbon Treaty, constitutional review of international treaties produced only very limited results. The CCC had refused to deal with all previous requests for review for procedural reasons. A particularly interesting situation occurred in the context of the "pseudo-motion", formulated by the President of the Republic, Václav Klaus, in a letter sent to the chairman of the Constitutional Court, regarding the constitutionality of the Treaty establishing the Constitution for Europe. This question of (un)constitutionality was neither answered by the Constitutional Court nor by its chairman in his individual capacity.

[18] Constitution of the Czech Republic, no. 1/1993 Coll. (as amended), Art. 95, para. 1.

[19] With regard to the ratification of the Treaty establishing the Constitution for Europe, an intensive debate emerged as to whether an explicit constitutional amendment is required or whether ratification based on the constitutional Art. 10a or even Art. 10 is sufficient. With regard to the Lisbon (Reform) Treaty, parliamentary ratification based on Art. 10a has been chosen. For deeper analysis, see J. Komárek and Z. Kühn, *National Report. Topic 1: preparing the European Union for the future? Necessary revisions of primary law after the non-ratification of the Treaty establishing the Constitution for Europe*, FIDE XXIII Congress, Linz, 2008, p. 5-6.

[20] Since the CCC has not ruled out the possibility of an additional constitutional review, it is generally expected that the President of the Republic will, after approval of the Lisbon Treaty by the Parliament, request the CCC to review the document again.

[21] Constitutional act on the Charter of Fundamental Rights and Freedoms no. 2/1993 Coll. (as amended).

the institutional affiliation of the judge (i.e. whether this constitutional clause also covers the judges of EU courts or domestic courts of other EU Member States). In January 2009, the CCC ruled (in a non-criminal law case with a European element) that the absence of referral to the European Court of Justice by the Czech Supreme Administrative Court constituted a violation of this constitutional principle [22].

Moreover, Art. 39 of the Charter of Fundamental Rights and Freedoms contains the principle of legality of the criminal offences and sanctions and Art. 40 establishes the constitutional rule that only a judicial body can decide on the guilt and penalty for criminal offences. No explicit constitutional amendments have been adopted with regard to the privileges and immunities of holders of several constitutional positions in the Czech Republic (President, members of Assembly of Deputies, senators, constitutional judges, judges) and regarding the right of clemency vested in the President of the Republic after the Czech Republic's accession to the EU. Therefore, academic and practitioners opinion is split on the question of whether the presidential right of clemency can be executed only in relation to sanctions imposed by the Czech judiciary or can also cover sanctions imposed by foreign judicial bodies [23].

EU MR instruments have been transposed via ordinary legislative amendments (a proposal for a constitutional amendment transposing the EAW Framework Decision was rejected by the Parliament in April 2004). Major changes resulted from the "European amendments" to the Code of Criminal Procedure [24] (CCP, *zákon o trestním řízení soudním* in Czech) and to the Criminal Code [25] (CC, *trestní zákon* in Czech). The CCP also contains an important horizontal clause restricting the recognition and execution of foreign decisions, including decisions of judicial authorities from the EU States, as para. 377 of the CCP bans the execution of requests from a foreign institution/body if "handling the request would violate the Constitution of the Czech Republic or any provision of Czech Law that must be applied unconditionally or if handling the request would damage some other significant protected interest of the Czech Republic". The CCP does not provide a more elaborate definition of the "interests" protected by para. 377. The potential importance of that rule is emphasised by the fact that it is explicitly referred to as one of the reasons for non-execution of a confiscation order or a financial penalty imposed by a judicial authority from another EU State [26].

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[22] Constitutional Court, 8 January 2009, Decision II. ÚS 1009/08.

[23] Typically, when a Czech citizen has been sentenced to a custodial punishment by a foreign court but he/she is spending his/her sentence in a Czech penitentiary. See V. Bílková, "V roli unijního solitéra? Česká republika a Mezinárodní trestní soud", *in The Role of the EU Solo-Player? The Czech Republic and the International Criminal Court*, Praha, Institute for International Relations, 2007. V. Sládeček, V. Mikule and J. Syllová, *Ústava České republiky – Komentář* [The Constitution of the Czech Republic – Commentary], Praha, C.H.Beck, 2007, p. 444-446.

[24] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961 Coll., as amended.

[25] *Trestní zákon* [Criminal Code/Penal Code], Act no. 140/1961 Coll., as amended.

[26] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961 Coll., as amended, para. 460r, para. 3 i and para. 460zd, para. 3 k.

The major amendments to the CCP triggered by the EU mutual recognition instruments are the following: Act no. 539/2004 Collection of Laws and Regulations (effective since 1 November 2004) transposing (only partially and with delay of several months after the transposition deadline) the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States [27]; Act no. 253/2006 Coll. (effective since 1 July 2006) transposing the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Act no. 345/2007 Coll. (effective since 1 January 2008) transposing the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and Act no. 547/2008 Coll. (effective from 1 January 2009) transposing the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. In 2004, the CCP also extended the *non bis in idem* principle to decisions of judicial bodies from other EU Member States [28].

However, there is an exception to the relatively smooth, albeit sometimes delayed, formal transposition of the majority of the EU legal instuments in the Czech legal system and this omission seems to be of a structural nature. The criminal or quasi-criminal responsibility of legal persons does not exist in the Czech Republic and, consequently, the Czech Republic is, in principle, not able to recognise and enforce decisions imposing criminal or quasi-criminal sanctions against legal persons issued by those EU Member States where criminal responsibility of legal persons exists [29].

The Czech Republic accepted the jurisdiction of the ECJ to answer preliminary questions on the interpretation and validity of Third Pillar legislation. The declaration on the acceptance of the ECJ's jurisdiction was made within the text of the Accession Treaty (Act on Accession). There is no restriction on the category of Czech courts that may refer a preliminary question to the ECJ. The CCP contains only a very brief comment on the preliminary questions procedure with a general reference to the relevant European Community/European Union rules. The CCP also contains a

[27] The EAW FD was not transposed within the deadline set by the accession *acquis* and the transposition did not (originally) cover offences committed before transposition in the Czech Republic. The practical effect of the transposition was further delayed by the obligation to terminate multilateral (Council of Europe) treaties on extradition in relation to other EU Member States which the Czech Republic made as late as in 2005. In 2006 (effective from 1 July 2006), the CCP was amended again and the majority of temporal restrictions contained in the original transposition norm were removed. However the CCP still contains several temporal restrictions regarding offences committed by Czech citizens before the Czech Republic's accession to the EU.

[28] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961 Coll., as amended, para. 411, para. 6 c. See also M. Tomášek, *Europeizace trestního práva* [*Europeanisation of criminal law*], Praha, Linde, 2009, p. 180-181.

[29] In November 2004, the Czech Parliament rejected a proposal of a law on criminal responsibility of legal persons. See also M.Tomášek, *op. cit.*, p. 280.

declaration that the ECJ's decision is binding for all the authorities active in a criminal proceeding [30].

3. The *EAW* judgment of the Czech Constitutional Court

The transposition and consequent judicial review of the EAW FD provides an in-depth and, so far, the most elaborate analysis of the Czech judiciary's approach to MR and, to some extent, also of the Czech political elite's approach to MR. In contrast to, for example, Germany and Poland [31], the constitutionality of the EAW transposition was not triggered by a concrete case of surrender of a Czech citizen, but the EAW was challenged *in abstracto*. And regardless of the fact that the transposition of the EAW in the Czech Republic "survived" the (abstract) constitutional test, the Czech *EAW* judgment delivered by the CCC also implies limits to mutual recognition in the future in the Czech Republic.

The transposition of the EAW FD in the Czech Republic was based only on the amendment of the Czech CC and the CCP while the original government proposal to adopt the "tailored" constitutional amendment [32] was rejected by the Czech Parliament in April 2004. The original transposition was only partial (regarding the temporal scope of the EAW mechanism and its application to Czech citizens) and has been "healed" only by additional amendments to the CCP. Moreover, the Parliament had to overcome, by a vote, the veto of the President of the Republic, who considered the EAW scheme to be unconstitutional. Consequently, a group of MPs and senators challenged the constitutionality of the legislative transposition at the Czech Constitutional Court. The Constitutional Court was asked to declare void several sections of the CC and CCP [33] transposing the EAW mechanism for an alleged violation of the constitutional ban to "force (any Czech citizen) to leave his/her country" [34]. Furthermore, the para. 412, para. 2 of the CCP (cancellation of the dual

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[30] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961 Coll., as amended, para. 9a.

[31] See, regarding Poland, A. Łazowski, "Poland – Constitutional Tribunal on the surrender of Polish citizens under the European Arrest Warrant. Decision of 27 April 2005", *European Constitutional Law Review*, 1, 2005, p. 569-581; K. Kowalik-Banczyk, "Should we Polish it up? The Polish Constitutional Tribunal and supremacy of the EU law", *German Law Journal*, 6/10, 2005, p. 1355-1366; A. Nussberger, "Poland: the Constitutional Tribunal on the implementation of the European Arrest Warrant", *International Journal of Constitutional Law*, 6, January 2008, p. 162-170. Regarding Germany, N. Nohlen, "Germany: the European Arrest Warrant case", *Ibid.*, p. 153-161; H. Satzger and T. Pohl, "The German Constitutional Court and the European Arrest Warrant – "Cryptic signals" from Karlsruhe", *Journal of International Criminal Justice*, 4/4, 2006, p. 686-701.

[32] The Government proposed to amend Art. 14 of the Charter of Fundamenal Rights and Freedoms so that it would explicitly authorise the surrender of a Czech citizen in cases where the surrender were to be unconditionally required by EU law.

[33] *Trestní zákon* [Criminal/Penal Code], Act no. 140/1961 Coll., as amended, para. 21, para. 2 and *zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961 Coll., as amended, para. 403, para. 2, para. 411, para. 6 e and para. 411, para. 7.

[34] Art. 14, para. 4 of the Charter of Fundamental Rights and Freedoms. The Charter of Fundamental Rights and Freedoms, an integral part of the Czech constitutional order, prohibits

criminality rule for listed criminal activities) was challenged for an alleged violation of Art. 39 of the Charter of Fundamental Rights and Freedoms, which formulates the *nullum crimen sine lege* principle.

After a relatively long delay, the Constitutional Court delivered its decision in May 2005[35]. The CCC reviewed the constitutionality of the Czech transposition measures only. The Constitutional Court both rejected, in rather vague terms, the possibility of referral to the European Court of Justice and declared that the CCC itself has no capacity to review the constitutionality of the EU Framework Decisions. The CCC further developed its approach from its earlier decision in the *Sugar quotas*[36] case where it confirmed its competence to (limited) review of the constitutionality of Czech laws implementing European Community/European Union secondary law.

In its review of the Czech laws implementing the EAW FD, the Constitutional Court based its argumentation on Art. 1, para. 2 of the Constitution of the Czech Republic which declares the respect due to the international obligations of the Czech Republic. In the opinion of the Constitutional Court, this constitutional provision obliges the Czech authorities, including the Constitutional Court itself, to an EU-consistent interpretation of the Czech constitutional order as far as this "EU-friendly" interpretation is allowed by the constitutional text(s)[37]. The terms used by the Charter of Fundamental Rights do not explicitly ban extradition or surrender of Czech nationals abroad. Instead, the constitutional clause protects Czech citizens from being "forced to leave the country". In the Court's view, this constitutional provision is not absolutely precise but can be interpreted in several ways – from an absolute ban on any transferring, regardless how short, of Czech nationals abroad within a criminal prosecution to a constitutional ban on the permanent discontinuation of legal links between a Czech citizen and the Czech State.

Czech citizens from being "forced to leave the country" (Art. 14, para. 4). The rationale behind this constitutional prohibition was the practice of the Communist police of the former Czechoslovakia to force leading dissidents to leave the country (e.g. police action *Asanace*, i.e. "clearance" in English). However, the Charter, adopted shortly after the fall of Communism, did not explicitly prohibit the extradition of Czech citizens abroad but the pre-accession practice has adhered to this interpretation and did not permit Czech citizens to be extradited to another country.

[35] Constitutional Court, 3 May 2006, Decision No. Pl. ÚS 66/04. The quotations of the CCC decision in this article are based on the unofficial English translation of the judgment on the webpage of the CCC http://angl.concourt.cz/angl_verze/doc/pl-66-04.php (last visited 15 December 2008).

[36] In the *Sugar quotas* case (sometimes referred to as the *Sugar quotas II* or *III* case, Constitutional Court, 8 March 2006, Decision Pl. ÚS 50/04), the Constitutional Court reviewed the constitutionality of the government regulation (different from the European Community regulation) implementing the Community regulation on sugar quotas. The Constitutional Court applied the "constitutional review in the context of EU membership" while in practice it strongly adhered to ECJ case law and interpretation of the EU legal instrument when interpreting the Czech Republic's constitutional rules in conformity with the ECJ's interpretation practice.

[37] J. Zemánek, "The emerging Czech Constitutional doctrine of European law", *European Constitutional Law Review*, 3, 2007, p. 418-435; M.Tomášek, *op. cit.*, p. 348-351.

In the opinion of the Constitutional Court, the link between the Czech Republic and its citizens is not disconnected by the simple fact of their being surrendered to other EU Member States. The Czech Republic shall continue to protect its citizens by means of international and EU law. This approach of the CCC was further supported by the fact that the Czech legislators used (almost) all options contained in the EAW FD to minimise the impact of the EAW mechanism on the continuation of the factual links between the Czech Republic and its citizens transferred abroad under the EAW. In particular, Czech criminal procedural law permits Czech citizens who have been sentenced abroad (after being surrendered) to decide to spend their term of imprisonment in the Czech Republic.

The Constitutional Court also emphasised that the obligation to extradite one's citizens under the EAW is not unconditional. Cooperation can be rejected in a situation where there would be a serious risk that the requesting State would not guarantee a fair trial for the Czech citizen surrendered. Therefore, the Constitutional Court declared its readiness to hear future constitutional complaints of individuals who question the constitutionality of surrender under the EAW in his/her individual case [38].

There was much less detailed argumentation by the Constitutional Court in terms of assessing the constitutionality of the fact that the EAW mechanism partially disregards the dual criminality principle. In the Court's view, the legality principle as contained in the Czech constitutional order concerns substantive law only (i.e. the definition of a criminal offence and the respective sanctions must be defined by a legislative instrument of the Czech Republic) while the EAW rule abolishing the double criminality requirement (and Czech transposition thereof) is of a procedural nature. Therefore, there is no constitutional conflict, at least in the opinion of the CCC.

The Constitutional Court produced also several dissenting opinions. In particular, justices Eliška Wagnerová and Vlasta Formánková [39] criticised the majority opinion both for a lack of deeper analysis of the nature of Third Pillar legislation and the interpretation of the constitutional clause banning Czech citizens from being "forced" to leave the country as well as the absence of an explicit reflection of the "territoriality clause" of the EAW FD in the text of the CCP. The dissenting judge stated that "(…)the Euro-warrant itself is undoubtedly a very necessary and desirable legal measure (…) despite that, however, I believe that the implementation of the Euro-warrant was carried out in a careless way in the Czech Republic" [40].

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[38] One such constitutional complaint (regarding a Czech citizen subjected to an EAW issued by a Belgian court) was already filed before the start of the abstract constitutional review but the CCC stayed the procedure for procedural reasons (Constitutional Court, October 2005, Decision Pl. ÚS 44/05).

[39] Another dissenting opinion was formulated by Justice Stanislav Balík, who focused primarily on the practical problems, including language and financial issues, of a person surrendered.

[40] Constitutional Court, 3 May 2006, Decision No. Pl. ÚS 66/04, dissenting opinion by Eliška Wagnerová and Vlasta Formánková, conclusions, last paragraph (paragraphs in the dissenting opinions are not, in contrast to the majority opinion, formally numbered).

The CCC does not restrict the principle of loyalty to the international obligations in the criminal law domain to the cooperation within the European Union. In its decision of February 2007, the CCC rejected a constitutional complaint of a Czech citizen who was transferred, under the terms of bilateral Czech-Thai international treaty [41], from Thailand to a Czech prison to serve more than forty years of a custodial sentence imposed by Thai court for illegal trade in drugs committed within Thai territory. The CCC did not accepted the argument that the recognition of the Thai criminal sanction constituted an unconstitutional discrimination and unconstitutionally cruel punishment because the length of imprisonment significantly exceeded the maximum sanctions that could be imposed by a Czech court for the same offence. In the court's opinion, the Art. 1, para. 2 requires, in principle, to respect the sanction regime included in the international document [42].

4. Problems of mutual recognition in criminal matters in the Czech Republic

The following aspects of the EU's mutual recognition mechanism may face a specific opposition in the Czech Republic:

A. the legality of penal sanctions and the double criminality test,
B. territoriality,
C. language accessibility,
D. absence of special protection of Czech citizens (and residents).

A. The legality of penal sanctions and the double criminality test

The Czech Constitutional Court has approached the legality and dual criminality argument against domestic instruments transposing the EAW FD similarly to the way in which the ECJ reviewed the validity of the EAW FD in the *Advocaten voor de Wereld case* [43]. In its ruling, the ECJ rejected the argument of the applicants that the lack of a dual criminality check in (some) surrenders under the EAW violated the constitutional principle of legality and the principle of non-discrimination. Instead, the ECJ declared that the EAW does not harmonise the criminal law of Member States as the substantive definitions of crimes are to be governed by the criminal law of the Member State issuing the EAW. Therefore, the ECJ considers an EAW-based surrender as a procedural measure, facilitating international cooperation, and not a genuine criminal prosecution and punishment [44].

The Czech Constitutional Court explicitly declared that the EAW is a procedural rule, that a surrender under the EAW does not constitute the imposition of the

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[41] *Dohoda mezi Českou republikou a Thajským královstvím o předávání pachatelů a o spolupráci při výkonu trestních rozsudků, uveřejněná pod č. 107/2002 Sb.m.s.* [Agreement between the Czech Republic and the Kingdom of Thailand on cooperation in the execution of criminal sanctions, published as no. 107/2002 Coll. of international treaties].

[42] Constitutional Court, 21 February 2007, Decision I.ÚS 601/04.

[43] ECJ, 3 May 2007, Judgment C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*.

[44] F. Geyer, "European Arrest Warrant. Court of Justice of the European Communities, Judgment of 3 May 2007, Case C-303/05, Advocaten voor de Wereld VZW v. Leden van de Ministerraad", *Constitutional Law Review*, 4, 2008, p. 155-156, 159.

punishment and that the EAW is not an instrument of substantive criminal law [45]. The Constitutional Court remains (rather) silent on the question of who is responsible for compliance with the principle of legality since, in spite of the declared trust and shared values of the EU's Member States, the Constitutional Court also forbids the Czech Republic from cooperating with and surrendering persons to a State that does not respect the legality principle [46].

The most interesting comment of the Czech Constitutional Court on the principle of legality is perhaps a small statement in which the Court declares that there is a presumption that, in general, the behaviours included in the EAW FD catalogue listing the offences that do not require the dual criminality (test) constitute a crime in all EU Member States regardless of their name or classification in the criminal codes of other Member States. The Court's statement that, "in adopting this Framework Decision each EU Member State expressed its agreement that all criminal conduct falling within the categories defined in this way will also be criminally prosecuted" [47], could be of particular importance for the Lisbon Treaty since that "tacit approval" of the Member States cannot be taken for granted in the post-Lisbon EU using the ordinary legislative procedure in the criminal law domain (i.e. without the Czech Republic having a possible veto power).

B. Territoriality

The traditional concept of territorial sovereignty is rather cautious or even hostile to the idea of accepting that one State can have a legitimate interest in regulating and punishing behaviour on the territory of another State. However, such situations emerge frequently, not only regarding criminal behaviour crossing State borders, but also as the result of the concurrent jurisdiction claimed by several States regarding the same offence. The expansion of the mutual recognition principle in combination with the lack of EU rules on criminal jurisdiction makes the possibility of the emergence of this type of conflict even more likely and the very concept of mutual recognition "challenges the traditional concepts of territoriality and sovereignty" [48].

These concerns are reflected in (some) mutual recognition instruments by the insertion of a "territoriality clause". The territoriality exception means, in practice, that a) Members States refuse to exercise requests from other EU States regarding activities which have no link to (the territory of) the requesting State, and b) Member States refuse to exercise requests regarding the activities which occurred within their territory. The rationale behind the territoriality clause is, obviously, to prevent a Member State to "fish" in the jurisdictional waters of the other EU States and "export" its criminal law principles to the rest of the EU.

With regard to the (non)application of the territoriality (exception) clause in the Czech Republic, the situation is rather unclear. The Czech Republic has not always used the possibility of inserting the territoriality clause, provided for by the EU MR instruments, in Czech legislation. The most visible omission of this kind is the non-

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[45] Constitutional Court, 3 May 2006, Decision no. Pl. ÚS 66/04, para. 101.

[46] *Ibid*., para. 105.

[47] *Ibid*., para. 103.

[48] V. Mitsilegas, *op. cit.*, p. 1282.

transposition into the Czech CCP of the possibility envisaged in Art. 4, para. 7 of the EAW FD, enabling an issuing Member State not to execute an EAW for offences which "are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State (…) or have been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory".

However, the territoriality (exception) clause contained in the EAW FD may, according to expert opinion, still be interpreted as a reason for refusal of the execution of an EAW despite the lack of explicit transposition. There are two possible lines of argumentation supporting this statement. The first is the subsidiary application of general procedural rules for the extradition procedure to cases of application of the EAW. The CCP section on extradition claims that "a person may not be extradited to a foreign State if (…) the offence was committed on the territory of the Czech Republic, except for cases in which in view of the particular circumstances of the commission of the offence preference must be given to conducting the criminal prosecution in the requesting State in order for the facts of the case to be duly established and for reasons relating to the extent of the punishment or its enforcement". As the specific section of the CCP on the EAW surrender procedure is silent on this problem, it could be argued that the general procedural rule for non-extradition is applicable also to EAW cases. In contrast to this interpretation, it can be argued that the CCP section on the EAW procedure is *lex specialis* to the general procedural rules on extradition and, as such, contains an explicit and exclusive catalogue of reasons for refusal to execute the EAW ("The court shall refuse to surrender the requested person *only* if…") which does not include the territoriality clause. The second and, in my opinion, more convincing argumentation supporting the application of the territoriality principle regarding the EU MR instruments can be derived from the (already mentioned) para. 377 of the CCP. This rule of the Czech criminal law enables Czech authorities to refuse international cooperation which would damage the significant protected interest of the Czech Republic. Since there is no explicit definition on what a "significant protected interest" is, this clause can be interpreted as guaranteeing the trust of Czech citizens that their conduct within the territory of the Czech State, including their illegal activities, shall be decided exclusively by Czech authorities. The *EAW* judgment of the Constitutional Court also seems to support this interpretation as the CCC stated that "(…) according to para. 377 of the CCP, interpreted in the sense of Art. 4, para. 7 of the EAW Framework Decision, a Czech citizen will not be surrendered to another EU Member State on suspicion of a crime that is alleged to have been committed on the territory of the Czech Republic, except for cases where, in view of the special circumstances under which the crime was committed, it is necessary to give precedence to conducting the criminal prosecution in the requesting State (…)" [49].

In its *EAW* judgment, the Czech Constitutional Court also gave considerable attention to the information element of the mutual recognition mechanism in the EU, which it considers as an inseparable element of the legality principle. It enables

[49] Constitutional Court, 3 May 2006, Decision no. Pl. ÚS 66/04, para. 112.

individuals to understand the scope of the conduct prohibited by criminal law, to foresee the consequences of their possible violation and consequently to adapt their behaviour. In the Court's opinion, this general requirement of foreseeability covers both the aspect of a clear and public definition of the prohibited conduct by public authorities and the existence of the link between the territory of the State and its interest which the authority claims to punish – so that the person concerned can predict that he/she can fall within the State's jurisdiction [50].

A possible solution to tackle this (potential) problem would be the use of the EU legal basis to establish EU-wide rules on jurisdiction in criminal law, including the power vested by the Lisbon Treaty in the Council and the European Parliament to adopt rules to "prevent and settle conflicts of jurisdiction between Member States" [51].

C. Language accessibility

The linguistic heterogeneity of the EU creates another challenge to the full acceptance of mutual recognition in the Czech Republic. The new Member States are particularly cautious about barriers to access the relevant rules on the required behaviour in their own language. The *Skoma-Lux* case [52], on the (non)application of European Community customs rules not published in the Czech language provides a very good example of Czech sensitivity to this problem. In this dispute, the Czech customs authorities imposed an administrative penalty (a fine of 3,000 Czech crowns, i.e. slightly over 100 euros) on the the company Skoma-Lux, which was importing wine into the Czech Republic, for violation of European Community customs legislation in the period from May to June 2004. Skoma-Lux challenged the penalty, arguing that the European Community legislation (directly applicable regulations) was not correctly published (i.e. was not published in the Czech language in the EU *Official Journal*) in the period concerned, i.e. May 2004. In its judgment, the ECJ rejected the arguments based on the fact that the relevant regulations were available in other EU official languages, that the Czech language version was available on the EU internet page and that the Skoma-Lux company should be aware of EU legislation due to its position as a professional importer of wine. Instead, the ECJ stated that the validity of the European Community regulation is not endangered by the fact that it is not published in all EU languages in the *EU Official Journal*. However, if a directly applicable European Community norm is not published in the official language of a particular Member State, that State cannot enforce the European Community norm concerned against (local) individuals and companies (nor can the unpublished legal norm be used as a legal basis for penalties) [53]. The approach of the ECJ in the *Skoma-*

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[50] *Ibid*., para. 99.

[51] TFEU, Art. 82, para. 1 b.

[52] ECJ, 11 December 2007, Judgment C-161/06, *Skoma-Lux s.r.o. v. Celní ředitelství Olomouc*.

[53] See K. Lasinski-Sulecki and W. Morawski, "Late publication of EC law in languages of new Member States and its effects: obligations on individuals following the court's judgment in Skoma-Lux", *CMLRev.*, 45, 2008, p. 705-725. For broader context, see M. Bobek, "The binding force of Babel: the enforcement of EC law unpublished in the languages of the new Member

Lux case could be extended, *a fortiori* (due to their more intensive severity, to penalties of a criminal nature).

D. Special protection of Czech citizens (and residents)

There is a special relationship of loyalty and protection between the State and its citizen, which is given practical effect by the refusal to exercise criminal law requests from other States and penalties imposed by foreign judiciaries which are targeted against one's own nationals. This special protection is frequently reflected in international instruments of criminal law – e.g. in the refusal to extradite one's own citizens. The EU's instruments of mutual recognition are rather hostile to the idea of special protection of a State's own nationals since this privileged treatment goes directly against the logic of mutual recognition and the principle of non-discrimination in the EU.

However, the citizenship-neutral position of the EU instruments has been disregarded in several cases by the Czech Republic and the transposition of mutual recognition instruments provides for special and additional protection for Czech citizens and for persons with permanent residence in the Czech Republic (regardless of their citizenship). The transposition of the EAW specifically regulates the position of Czech citizens or persons with permanent residence in the Czech Republic.

Czech citizens cannot be surrendered for offences committed before the date of the transposition of the EAW FD by the Czech Republic. Czech citizens and persons with permanent residence within the Czech Republic have the option to return to the Czech Republic to undergo their custodial punishment after being surrendered from the Czech Republic to another EU State, and sentenced there, under the EAW mechanism [54].

Moreover, Czech courts will also refuse to execute an EAW when it is issued for the execution of a custodial sentence or a detention order against a Czech citizen or a person with permanent residence in the Czech Republic if the person concerned refuses to be surrendered [55]. This Czech procedural rule, combined with the European *non bis in idem* principle [56], could prevent the Czech authorities from an autonomous prosecution of the person concerned in the future. However, a Czech court can recognise the already existing foreign judgment in this situation but the sanction recognised cannot exceed the possible sanction (potentially) imposed by the Czech court for the same offence [57].

States", *in* C. Barnard (ed.), *The Cambridge Yearbook of European Legal Studies,* 9, 2006-2007, Oxford, Hart Publishing, 2007, p. 43-80.

[54] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961, as amended, para. 411, para. 7.

[55] *Ibid*., para. 411 para. 6 e.

[56] As mentioned above, the *non bis in idem* principle is also included in the CCP. See *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961, as amended, para. 411, para. 6 c.

[57] *Zákon o trestním řízení soudním* [Code of Criminal Procedure], Act no. 141/1961, as amended, para. 417.

It should be also emphasised that para. 377 CCP (state interest clause), which could significantly constrain the execution of mutual recognition instruments, covers all criminal procedures in the Czech Republic, and not only cases involving Czech citizens or residents.

5. Conclusion: Awaiting case law?

Criminal law is in a transition phase in the Czech Republic. The transition not only includes the criminal law opening itself up to external influences, but primarily a general re-codification of Czech criminal law. The current Criminal Code and Code of Criminal Procedure should be replaced by newly structured legislation. The future Criminal Code declares its full compatibility with European Union law and its major features relevant for mutual recognition within the EU are as follows: full respect of the international-based and EU law-based obligations of the Czech Republic is declared as one of the objectives of the recodification; an explicit guarantee of the possibility of surrendering Czech citizens to another EU State combined with the explicit ban of the extradition of Czech citizens to non-EU States is another. With regard to the re-codification of criminal procedural law, the major change expected is that the rules for the international cooperation, including the EU cooperation, will be dealt with in a separate legislative document (today, these are integral part of the CCP).

Broadly speaking, the mutual recognition mechanism is accepted by the Czech Republic but must remain within the State's constitutional limits. The CCC is ready to exercise constitutional control in both an abstract and concrete manner. The fact that the transposition of the MR instrument into Czech legislation survived an abstract judicial review does not make its application to a concrete case immune from additional constitutional review. Up until now, the CCC's approach has been based on the principle of an "EU-friendly" or "EU-conformist" interpretation of the Czech Republic's constitutional provisions and generally stated trust in the legal and judicial systems of other EU States. However, this "EU law friendly" approach may change in the future, depending on the particularities of concrete cases, including the reputation of requesting States.

Another challenge to the CCC's "EU-friendly approach" can be triggered by the Lisbon Treaty. In contrast to the present situation when any Member State posses a veto power in the decision making process producing new MR instruments, the individual Member States will lose their power of veto in the post-Lisbon European Union where the ordinary legislative procedure expands also in the criminal law domain. In a situation, where the Czech Republic will be defeated in the Council, the Czech authorities may be forced to rely primarily on the judicial obstacles to the transposition or application of the EU rules in the Czech Republic. And the CCC and general courts may respond by more strict reading of the Czech constitutional and legislative rules.

At legislative level, the constitutional limits of the MR are set out in rather enigmatic para. 377 of the CCP, which bans the Czech authorities from executing requests for cooperation when the fulfilment of the request would "(…) violate the Constitution of the Czech Republic or any provision of Czech law that must be applied

unconditionally or if handling the request would damage some other significant protected interest of the Czech Republic". And even if the traditional interpretation of this procedural rule has been rather narrow, there is the potential to expand it to the MR domain as well. Therefore, an emergence of a critical mass of new Czech relevant case law will be necessary for the next phase of the assessment of the future of mutual recognition in the Czech Republic.

The perception of the principle of mutual recognition of judicial decisions in criminal matters in Germany

Thomas Wahl*

1. Introduction

Germany is quite possibly one of the 27 European Union (EU) Member States in which the implementation of the principle of mutual recognition of judicial decisions in criminal matters at the EU level has faced the most criticism. In the meantime, a remarkable "*acquis*" of critical legal literature on the principle of mutual recognition in criminal matters has appeared [1]. In particular, the European Arrest Warrant sparked hot debates among scholars who attack the fundaments of mutual recognition in the criminal law field [2]. It is mainly put forward that the transfer of a principle relating economic freedoms to the criminal law field is not justified and destroys the balance

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[1] German criminal law scholars discussed European criminal law issues and the principle of mutual recognition in-depth at a conference in 2003 in Dresden, Germany. The presentations of this conference are published in: *Zeitschrift für die Gesamte Strafrechtswissenschaft* (ZStW), 116, 2004, p. 275 and f. As regards discussions on the mutual recognition principle, see, above all, the contributions of C. Nestler, S. Gless, H. Fuchs, and Y. Buruma as well as the summary of the discussion by C. Kress in this law journal.

[2] An international project group of academics, under the leadership of Prof. Dr. Bernd Schünemann from the University of Munich, developed an alternative draft against the principle of mutual recognition as implemented by the European Union. See: B. Schünemann (ed.), *A Programme for European Criminal Justice*, Köln-Berlin-München, Carl Heymanns Verlag GmbH, 2006.

of power between the State (for criminal prosecutions) and civil liberties[3]. The abolition of the dual criminality check in the EU instruments is a further subject of disagreement. It is first argued that, since every Member State of the European Union can enforce and have recognised what it deems criminally liable, the principle of mutual recognition automatically leads to the principle of "maximum punitivity" at the level of the European Union[4]. Second, the abolition of the requirement that the offence also be punishable in the domestic State breaches the principle of democracy since the person prosecuted may face punishment for offences which he – "as an active citizen" – had no influence on[5]. In this context, it is further argued that the principle of mutual recognition in criminal matters paves the way for every Member State to "take coercive measures at the highest level of encroachment (such as deprivation of liberty or confiscation of assets)" since domestic criminal law is applied to circumstances to which it could never have been applied in a similar purely national case, for instance, because of a lack of appropriate legislation or due to the lack of criminal liability on the part of legal entities[6].

Other authors believe that the principle of mutual recognition is "a neutral procedural model" that entails an adequate further development of mutual legal assistance in the European Union, which also reflects the integration of the European Union in the criminal law field, at least as far as *final* decisions are concerned, such as extradition orders or final convictions[7].

Hopes on the part of opponents attacking the mutual recognition principle were nourished on the occasion of the proceedings before the German Federal Constitutional

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[3] B. Schünemann, "Fortschritte und Fehltritte in der Strafrechtspflege der EU", *GA*, 2004, p. 193; S. Braum, "Das Prinzip der Gegenseitigen Anerkennung – Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung", *GA*, 2005, p. 681.

[4] B. Schünemann, "Europäischer Haftbefehl und EU Verfassungsentwurf auf schiefer Ebene", *ZRP*, 2003, p. 185; M. Juppe, *Die gegenseitige Anerkennung strafrechtlicher Entscheidungen in Europa*, Frankfurt a.M. et al., Peter Lang, 2007, p. 136.

[5] B. Schünemann, *op. cit.*, footnote 4.

[6] M. Kaiafa-Gbandi, "Recent Developments in Criminal Law in the EU and Rule-of-Law Deficits", *in* B. Schünemann (ed.), *A Programme for European Criminal Justice*, *op. cit.*, footnote 2, p. 317 (327). The contribution also summarises well the arguments against the mutual recognition principle. See also C. Nestler, "Europäisches Strafprozessrecht", *ZStW*, 116, 2004, p. 333 and f.

[7] S. Gless, "Zum Prinzip der gegenseitigen Anerkennung", *ZStW*, 116, 2004, p. 353 (356), argues that the main problem of the extension of national criminal law to other Member States is the consequence of a lack of European provisions on criminal law jurisdiction; this position is also followed by M. Deiters, "Gegenseitige Anerkennung von Strafgesetzen in Europa", *ZRP*, 2003, p. 319.

See also M. Böse, "Das Prinzip der gegenseitigen Anerkennung in der transnationalen Strafrechtspflege in der EU", *in* C. Momsen, R. Bloy, P. Rackow (eds.), *Fragmentarisches Strafrecht*, Frankfurt a.M., Peter Lang, 2003, p. 233 and f. Böse admonishes that the principle of mutual recognition must be implemented carefully in view of the intensive encroachment of criminal law into civil liberties and human rights. Therefore, a principle of recognition based on an "automatic" execution of a foreign decision without reservations is excluded as long as a guarantee for a certain standard of human rights is not guaranteed.

Court concerning the legitimacy of the (first) European Arrest Warrant Act because the Federal Constitutional Court in the hearings of the case intensively examined the deficits of the European Arrest Warrant Act and the Framework Decision regarding democratic legitimisation, conflicts of the Act with the rule of law, and the risk of losing the core elements of statehood (*Entstaatlichung*) because of a too far-reaching transfer of core competences to the European Union, which would collide with Art. 23, para. 1 of the (German) Basic Law (*Grundgesetz*) and the principle of subsidiarity as limits on European integration [8]. However, the majority of the Senate of the Federal Constitutional Court followed a more moderate stance and clarified that the institution of the European Arrest Warrant itself does not contradict the German Constitution, but that the German legislator had failed when it did not fully exhaust the scope afforded by the Framework Decision, in particular the territoriality clause, in order to protect the fundamental right to freedom from extradition (Art. 16, para. 2 of the Basic Law) [9]. The Court stated that "the cooperation that is put into practice in the "Third Pillar" of the European Union (police and judicial cooperation in criminal matters) in the shape of limited mutual recognition, which does not foresee a general harmonisation, is a way of preserving national identity and statehood in a single European judicial area, in particular with a view to the principle of subsidiarity" [10]. As a result, the Federal Constitutional Court, on the one hand, accepts the way in which international cooperation in criminal matters is fostered by the principle of mutual recognition. On the other hand, the Federal Constitutional Court also makes clear that the principle of mutual recognition should have limits. In this context, the Court maintains a problematic reservation: the denial of a breach of the principle of democracy is justified by the statement that the national legislative institutions "retain

[8] BVerfG, judgment of 18 July 2005 – 2 BVR 2236/04, mn. 20 and f.; the judgment is available online at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20050718_2bvr223604.html (last visited Mar-09). An English translation of the press release and further background information on the case is available online at: www.eurowarrent.net. The English summary of the judgment is also published at: Schomburg/Lagodny/Gless/Hackner, *Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters*, München, C.H. Beck, 2006, p. 423-425. For the arguments see also B. Schünemann, "Die Entscheidung des Bundesverfassungsgerichts zum europäischen Haftbefehl: markiges Ergebnis, enttäuschende Begründung", *StV*, 2005, p. 691; C. Tomuschat, "Ungereimtes / Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl", *EuGRZ*, 2005, p. 453. Indeed, Judge Broß, in a dissenting vote, concluded the unconstitutionality of the European Arrest Warrant Act because it violates the existing limits on integration (judgment, as cited, mn. 132 and f.).

[9] Beyond Art. 16 of the Basic Law, the Court also found that the exclusion of legal action against the decision to grant extradition breaches the right to judicial remedy (Art. 19, para. 4 of the Basic Law), and it declared the German implementation law on the EAW void in its entirety. For an analysis of the judgment in English, reference is made to H. Satzger, T. Pohl, "The German Constitutional Court and the European Arrest Warrant", *Journal of International Criminal Justice*, 4, 2006, p. 686; S. Mölders, "European Arrest Warrant Act is Void", *German Law Journal*, 2005, p. 45.

[10] Judge Lübbe-Wolff disagreed with this view in her dissenting vote; judgment of the BVerfG, footnote 8, mn. 160.

the power of drafting in the context of implementation, *if necessary, also by denying implementation*" [11].

A second strand of discussion in German legal literature is the application of the mutual recognition principle to *preliminary* decisions, in particular regarding the free circulation of evidence in transnational proceedings. The debate was essentially triggered by the considerations of the European Commission regarding the establishment of a European Public Prosecutor [12]. The majority of scholars rejects the idea that evidence lawfully gathered by one Member State's authorities should be automatically admissible before the courts of other Member States. The main argument is that the import of evidence gathered abroad would introduce an alien element into the procedural criminal law systems of the Member States. It would have the consequence that the well balanced domestic procedural systems be disturbed which duly take account of the procedural rights of the defendant and provide for a delicate balance of interests as to the use of coercive measures. It is further argued that the free transfer of evidence does not take into consideration the distinction between the admissibility of evidence and the use of evidence in the trial – a distinction which is inherent to most procedural criminal legal orders of the EU Member States [13]. This assessment generally addresses the discrepancy between the transnational validity of evidence orders and the maintenance of certain criminal procedural rules in the executing State. Thus, the concept of the European Evidence Warrant is assessed more leniently because it maintains the principle that the necessary measures for executing an order are enforced by an own decision of the executing authority [14]. Points of

[11] BVerfG, judgment of 18 July 2005 – 2 BVR 2236/04, mn. 81. For a critical opinion, see K.M. Böhm, *NStZ*, 2005, 2588, who suggests that the Court should have conferred the right of the German Parliament to influence negotiations of the framework decisions instead of claiming a retroactive denial of implementation. The view of the Federal Constitutional Court is based on a clear distinction between Community (EC) law and Union law; Union law is considered having the same legal effects than "traditional" international public law. See C. Lebeck, "National Constitutionalism, Openness to International Law and the Pragmatic Limits of European Integration – European Law in the German Constitutional Court from EEC to the PJCC", *German Law Journal*, 2006, p. 907. Critical to this view of the Court: J. Vogel, "Europäischer Haftbefehl und deutsches Verfassungsrecht", *JZ*, 2005, p. 801 (805).

[12] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM (2001) 715 final.

[13] Fundamentally, S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, Baden-Baden, Nomos Verlag, 2006, with a proposal for a framework act for the transfer of evidence in criminal matters in the EU, p. 435; S. Gless, *op. cit.*, footnote 7, p. 365; C. Nestler, *op. cit.*, footnote 6, p. 346; B. Hecker, *Europäisches Strafrecht*, Berlin-Heidelberg, Springer, 2007, para.12 mn. p. 58 and f.; H. Satzger, "Gefahren für eine effektive Verteidigung im geplanten europäischen Verfahrensrecht – eine kritische Würdigung des Grünbuchs zum strafrechtlichen Schutz der finanziellen Interessen der Europäischen Gemeinschaften und zur Schaffung einer europäischen Staatsanwaltschaft", *StV*, 2003, p. 137 (141).

[14] Art. 11 of the 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*, no. L 350, 30 December 2008, p. 72. See also T. Wahl, S. Staats, "The European Evidence Warrant", eucrim 1-2/2008, p. 40 and f.

criticism against the European Evidence Warrant are mainly that the minimum guarantees for defendants are insufficient to counterbalance lower standards for law enforcement and that clear regulations on legal remedies are lacking [15].

This paper does not seek to reiterate the discussion in German legal literature on the mutual recognition principle in criminal matters, but rather questions how the instruments conveying the principle are perceived in practice. Hence, this paper summarises [16] the replies to interviews that the author conducted with German legal practitioners from April – July 2008 [17]. Their experience is mainly based on the European Arrest Warrant since this is the only instrument which is being fully used in practice in Germany. Relevant case law is also considered. The following considerations largely follow the structure of the final report on the study on the future of mutual recognition in criminal matters in the European Union [18].

2. The current application of mutual recognition instruments

A. Implementation

Germany is certainly not a model student concerning the timely implementation of the instruments on mutual recognition in criminal matters. The first law which implemented the Framework Decision on the European Arrest Warrant (hereinafter: FD EAW) entered into force on 23 August 2004, i.e., Germany did not meet the deadline of 31 December 2003 (Art. 34 FD EAW) [19]. The law had been in effect for 11 months when it was declared void by the judgment of the Federal Constitutional Court on 18 July 2005 (see 1). The second European Arrest Warrant Act entered into force on 2 August 2006 [20]. During the interim phase between the judgment of the

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[15] S. Gless, "Kommentar zum Vorschlag für einen Rahmenbeschluß über eine Europäische Beweisanordnung", *StV*, 2004, p. 679; H. Ahlbrecht, "Der Rahmenbeschluss-Entwurf der Europäischen Beweisanordnung – eine kritische Bestandsaufnahme", *NStZ*, 2006, p. 70. Both commentaries relate to the draft EEW based on the Commission proposal (COM (2003) 688).

[16] This is a summary of a much longer country report that includes an introduction to German mutual legal assistance law and contains replies to a questionnaire designed by the project coordinators at ECLAN.

[17] In total, 42 persons were interviewed: 8 judges and 7 public prosecutors at higher regional courts, 6 public prosecutors at regional courts, 11 defence lawyers, 10 civil servants at justice ministries at the federal and state level. From a territorial point of view, regions were selected with experience in transnational cooperation, i.e., regions near German borders with other EU Member States or locations with bigger airports. The following federal States (*Länder*) were involved: Baden-Württemberg, Bavaria, Hesse, Rhineland-Palatinate, Lower-Saxony, Saxony, and North Rhine-Westphalia. The author would like to thank all interviewees for their willing cooperation and productive discussions. The author would also like to thank the Federal Ministry of Justice for its support.

[18] G. Vernimmen, L. Surano, Analysis of the future of mutual recognition in criminal matters in the European Union, Final Report, 2008, available at: http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf (last visited Mar-09).

[19] Europäisches Haftbefehlsgesetz – EuHbG of 21 July 2004, *BGBl*, I, 1748. For its implementation, see P. Pfützner, Country Report Germany, www.eurowarrant.net.

[20] Europäisches Haftbefehlsgesetz – EuHbG of 20 July 2006, *BGBl*, I, 1721. An overview of its implementation in English is provided by A. Sinn, L. Wörner, "The European Arrest Warrant

Constitutional Court and the entry into force of the new legislation, Germany accepted incoming European Arrest Warrants but applied the traditional extradition law to them, notably the Council of Europe extradition conventions, the EU extradition conventions, and the Convention Implementing the Schengen Agreement. The extradition of own nationals was inadmissible. German authorities could continue to issue European Arrest Warrants [21].

The law implementing the Framework Decision on the execution of orders freezing property or evidence entered into force on 30 June 2008, i.e., with a delay of nearly 3 years (implementation date of the FD: 2 August 2005) [22]. Germany also did not meet the deadlines for the implementation of the Framework Decision on the application of the principle of mutual recognition to financial penalties (deadline: 22 March 2007) and the Framework Decision on the application of the principle of mutual recognition to confiscation orders (implementation requested by 24 November 2008). As to the FD on confiscation orders, the federal government officially tabled a draft implementation law on 21 January 2009 [23]. As regards the FD on financial penalties, the Federal Ministry of Justice has finalised a draft [24].

The question on the reasons for the delays must be considered with differentiation when referring to the different instruments of mutual recognition. In general, the reasons are the lack of capacities in the ministries, the complexity of the matter (which quite often fundamentally alters the existing legal system and therefore makes intensive adaption efforts necessary), and the structure of the legislation process in Parliament. The first European Arrest Warrant Act was delayed mainly because of political debate on individual points between the federal states (*Länder*) and the federation (*Bund)* and among the political parties [25]. The implementation of the Framework Decision on the orders freezing property was postponed since the effects on this matter had to be assessed in view of the Federal Constitutional Court's decision on the EAW. The implementation of the Framework Decision on financial penalties has been delayed since the matter is very complex and involves the resolution of a lot of practical issues in terms of administration and procedure (in particular as regards traffic offences).

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and its implementation in Germany – its constitutionality, laws and current developments", *ZIS*, 2007, p. 204; A. Sinn, L. Wörner, "Country Report Germany", in A. Górski, P. Hofmanski (eds.), *The European Arrest Warrant and its implementation in the Member States of the European Union*, Warszawa, Wydawinchwo C.H. Beck, 2008, p. 244.

[21] For the transitional period, see T. Hackner, in Schomburg/Lagodny/Gless/Hackner, *op. cit.,* footnote 8, vor para. 78, mn. p. 14 and f. See also Council doc. 11600/05 of 29 July 2005.

[22] Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 22. Juli 2003 über die Vollstreckung von Entscheidungen über die Sicherstellung von Vermögensgegenständen oder Beweismitteln in der Europäischen Union of 6 June 2008, *BGBl*, I, 995.

[23] The draft is available at: http://www.bmj.bund.de/files/-/3455/RegE%20Umsetzungsgesetz%20Rahmenbeschluss%20Einziehung.pdf (last visited Mar-09).

[24] A public document of the draft was not available at the time of writing. In August 2008, the German Bar Association (*Deutscher Anwaltsverein*) published an opinion on the draft law (EuGeldG). The opinion is available at:http://anwaltverein.de/downloads/Stellungnahmen-08/SN43.pdf?PHPSESSID=82a8559f5dd6b11b3d96e93b197ac6a8 (last visited Mar-09).

[25] See H. Seitz, "Das Europäische Haftbefehlsgesetz", *NStZ*, 2004, p. 546.

Interestingly, the federal structure of Germany is generally not seen as being a problem, i.e., the involvement of the *Länder* in the legislation process. Cooperation with the federal states functions well. One reason may also be that deadlines for statements by the federal states are rather short.

B. General perception of the principle of mutual recognition in criminal matters

Nearly all interviewees argued that the new instruments based on the mutual recognition principle (in particular the EAW) can be considered a further development of the classical scheme of judicial cooperation in criminal matters, but not as something completely new because an automatic recognition is not even contained in the framework decisions. As in the traditional judicial cooperation system, official acts of a foreign State are examined and it is asked whether these acts can be executed in the German State territory, whereby a national decision of a German judicial authority (e.g., national arrest warrant) forms the basis of the execution. In this context, civil servants stressed that discussions often reduce mutual recognition to the principle, but the essential supplement is that we deal with the mutual recognition of *judicial decisions* in criminal matters. This means that the executing State does not recognise the law of a foreign State, but rather it carries out a procedure of recognition of a foreign decision. With the new instruments, only the examination itself is less intensive due to the limited grounds for refusal. All in all, the majority of the persons interviewed were of the opinion that the notion of "mutual recognition in criminal matters" has no practical relevance. Most of them do not perceive mutual recognition as a principle but rather as a working method instead.

In particular, judges are very resistant to the idea that the instruments on mutual recognition should be a kind of "black box" (including a form) which must automatically be executed under all circumstances. Being only a "minor administrator" or "automatic executor" does not, as was argued by judges, correspond to the self-perception of judges who are used to making their own decisions on a particular case and who need to justify their decisons. In this context, the strong *formalisation* brought about by the EU instruments on mutual recognition is seen critically: because the minimum descriptions in the standard form (often description of the facts in few words, often no citation of legal provisions, etc.) do not allow a judge to make up his own mind. As a result, certain frustrations are felt, so that the system of mutual recognition finds little acceptance by the judiciary. Judges believe that better insights into the proceedings of the requesting State could help them to take a well-deliberated, proper decision. At least the national decision upon which the request is based should be provided for – as it is the case in the traditional system of judicial cooperation in criminal matters [26].

Defence lawyers argued in a similar way that full insight into the proceedings of the foreign State by the executing judges is indispensable so that they are enabled to convey the feeling to the citizen that the decision of the issuing authority came about in accordance with legal regulations. In this context, they stressed that the instruments based on mutual recognition entailed two grave implications: first, arguments of the

[26] See, for instance, Art. 12, para. 2, European Convention on Extradition (ETS no. 24); Art. 3, para. 3, European Convention on Mutual Assistance in Criminal Matters (ETS no. 30).

citizens are no longer heard in the executing State, since requests are simply executed in a stereotypical manner; second, the citizen is asked (by the executing judge) to put forward his/her arguments in the issuing State. This leads to a high level of frustration on the part of the citizen who is used to putting forward his/her arguments at the very beginning of his/her arrest and seeks legal remedies in the country where he/she resides or, in other words, within the legal culture he/she is familiar with. As a consequence, the "mutual recognition principle" brings about a citizen's feeling of not being heard, of being the subject of unfair proceedings, and of being powerless in the face of the almightiness of law enforcement.

C. Mutual recognition and harmonisation of substantive law

The official position in Germany is that the principle of mutual recognition of *judicial decisions* can only function if *common standards* are set. As to substantive criminal law, Germany advocated a clearer definition, on a horizontal level, of some offences in the list for which the check of double criminality was abolished, in order to achieve a higher level of legal certainty. The discussions were initiatied in the context of negotiations on the Framework Decision on the European Evidence Warrant, but Germany expected the clearer horizontal definition to have a "spill-over effect" to other EU instruments on mutual recognition. Nevertheless, the other EU Member States did not follow Germany's approach putting forward the argument of lacking practical relevance [27].

Another area in which common standards should be set is the observation of the *principle of proportionality* as it was done in the Handbook on the European Arrest Warrant [28]. As long as common standards on the proportionality principle are not set, Germany is not in favour of letting only the issuing State determine whether an order is necessary and proportionate for the purpose of proceedings as it was stipulated in the Framework Decision on the European Evidence Warrant [29].

D. Mutual recognition and approximation of procedural law

As to procedural law, the German government has been a strong proponent of setting common standards in the field of trials *in absentia* and of taking up the issue of procedural rights. In this context, civil servants pointed out that the need for rectification by setting certain standards for mutual recognition has also been observed

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[27] Germany maintained an opt-out clause for six offences for which double criminality checks have actually been abolished in the European Evidence Warrant; see Art. 23, para. 4 and the respective Declaration of Germany in the Council Framework Decision 2008/978/JHA of 18 December 2008, *OJ*, no. L 350, 30 December 2008, p. 72 and 92. Germany did not stipulate the opt-out as defined in the European Evidence Warrant for other framework decisions conveying the mutual recognition principle in criminal matters. The main reason for stipulation in the European Evidence Warrant seems to be pressure on the federal government from the German Parliament in the aftermath of discussions during the Federal Constitutional Court's proceedings on the European Arrest Warrant. For Germany's position regarding the EEW, see also T. Wahl, "The European Evidence Warrant", *eucrim*, 1-2/2007, p. 39 and 1-2/2008, p. 40 and f.

[28] See Council of the European Union, doc. 8216/2/08 of 18 June 2008.

[29] Art. 7 and recital 11 of the Framework Decision 2008/978/JHA, footnote 14.

by other Member States and results by means of "*indirect harmonisation*" since some Member States may be required to adapt their procedural criminal law. One example is the agreed standards regarding trials *in absentia* where Italy, for instance, may adapt its law in order to be able to get other Member States to agree to the recognition of Italian decisions taken *in absentia*. Other areas in which common standards should be set must be determined in the future after practical experience has been gathered, according to the Ministry of Justice. Strong harmonisation as to the conditions of coercive measures as well as more precise rules on conflicts of jurisdiction are considered indispensable if the second stage of the European Evidence Warrant were to be realised in which minimum rules on the gathering/handling of evidence and mutual admissibility of evidence are envisaged [30].

When questioned as to the issue of harmonisation, nearly all practitioners interviewed thought that the mutual recognition principle, as designed by the Commission in 2000 [31], can only work if the criminal law of the Member States is comprehensively harmonised (both substantive and procedural law). However, interviewees considered this level of harmonisation to be (1) politically unfeasible and (2) legally not possible, since principles of national constitution would collide. The collision with national constitutional standards becomes particularly obvious when conditions for coercive measures are discussed since the standards of German procedural criminal law in this field are very much influenced by the case law of the Federal Constitutional Court. Hence, "European rules", which should ideally apply alongside national procedural law rules, will not fit into the current domestic procedural criminal law system. Prosecutors, in particular, advocated alternative ways and pleaded, for example, for a guarantee or agreement among the EU Member States that certain coercive measures can be carried out for (certain) serious crimes.

Nearly all respondents argued that the executing State must be conferred certain rights in order to be able to rectify decisions of the foreign State so long as a comprehensive harmonisation is not achieved. Restrictions are found to be especially necessary, since all legal orders claim that certain conditions be met, which are equally valid in relation to foreign States. The majority found, that, as a consequence, the existing – even limited number of – grounds for refusal must be upheld, such as double criminality, the territoriality clause, ordre public, *in absentia* trials, *non bis in idem*, etc. Others took a more moderate stand and were of the opinion that the requested State must at least have the possibility to deny cooperation in evident cases. Evident cases could be (1) a lack of full knowledge of the facts on the part of the issuing authority, e.g., when the allegations are obviously unfounded since the accused proved his *alibi*, or (2) when criminal law investigations are misused against a person (e.g., politically motivated prosecutions), or (3) when information on the case is obviously being withheld by the foreign authority. In addition, "emergency

[30] Green Paper, The presumption of innocence, COM (2006) 174, 26 April 2006, p. 4 and 6.

[31] See Commission Communication, Mutual recognition of final decisions in criminal matters, COM (2000) 495, 26 July 2000. See also G. Vernimmen, L. Surano, *op. cit.*, footnote 18, p. 23; K. Ligeti, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*, Berlin, Duncker & Humblot, 2005, p. 126.

brakes" are considered especially necessary if the citizen's rights are at stake, since exceptional cases occur in practice.

E. Grounds for refusal (I): the absence of double criminality

From an official standpoint, dual/double criminality is considered compatible with the mutual recognition of judicial decisions. The double criminality principle is founded on the observation that a State should neither provide legal assistance in foreign proceedings nor enforce a sovereign act in its territory if the act in question is not punishable under its law or the measure is not allowed in a corresponding national proceeding. The States should retain the possibility to refuse a request for an act whose punishability by the foreign State the person concerned could not have had knowledge of (e.g., computer-related crimes). From a legal policy perspective, consideration may be given to whether nationals should enjoy protection by their home State if they have been living in the requesting State for a long time and should have known the criminal law there. As to the question of whether the principle of double criminality can be renounced, Germany takes a different and flexible approach. Regarding the Framework Decision on the mutual recognition of financial penalties, Germany has been open to a broader approach of renunciation of the dual criminality principle (recognition also of the punishment of acts relating to traffic offences which would be treated differently under German law) whereas it advocated stricter provisions concerning the enforcement of custodial sentences because, in general, Germany sees tensions with its doctrine to execute a sentence where the act upon which the sentence is based is not punishable in German law [32].

Germany implemented the respective provisions relating to the abolition of double criminality in line with the Framework Decisions on the European Arrest Warrant and the freezing orders. The "Law on International Assistance in Criminal Matters" (hereinafter: LIACM; *Gesetz über die Internationale Rechtshilfe in Strafsachen – IRG*) refers directly – as a blanket – to the catalogue of the 32 crimes for which double criminality checks were abolished [33]. The principle of double criminality is also used in order to protect the surrender of own nationals (and residents) if the act in question has no essential relationship to the foreign or domestic territory ("mixed cases") [34]. If double criminality is not given in "mixed cases", the surrender is to be refused [35]. The second European Arrest Warrant Act now also provides that double criminality is

[32] It is therefore likely that Germany will make use of the "opt-out" of Art. 7, para. 4 of Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ*, no. L 327, 5 December 2008, p. 27.

[33] See Art. 81 of the LIACM as to the EAW; Art. 94 of the LIACM as to the freezing orders.

[34] See *infra* G.

[35] See Art. 80, para. 2 (German nationals) and Art. 83b, para. 2 (persons with usual place of residence in Germany) of the LIACM.

no longer required in case of a return of own nationals who were extradited upon an EAW and against whom a foreign sentence should be enforced [36].

However, double criminality does not hamper cooperation in criminal matters in practice, as far as the German perspective is concerned. Nearly all persons interviewed confirmed this assessment, not only for extradition but also for other forms of mutual legal assistance and assistance in the execution of judgments in criminal matters [37]. The following reasons are put forward. First, there is a broad understanding of the principle of double criminality in German law: it is not necessary that the act in question contains the elements of a criminal offence under German law, but it is sufficient if, after analogous conversion of the facts, the act would constitute an offence under German law. Thus, the legal interpretation of the offence must not be identical, but the act needs to be punishable as a criminal offence under German law in any case [38]. Practitioners confirmed that only a marginal number of cases remains where the act in question could not be subsumed under a German criminal law provision. Under this premise, it was suggested that it could be advisable to discuss a common definition of "double criminality" at the European level and align Member States' judicial cooperation law in this regard. Second, respondents from judicial authorities thought that the lack of relevance of double criminality is the result of a wide consensus within the EU as to which behaviour should be punishable by criminal law or not. In addition, it was pointed out by prosecutors that the term for the criminal act is not decisive for mutual legal assistance but rather the description of the criminal act/the behaviour itself. Prosecutors reported that, even in complex areas, such as the German criminal law definition of embezzlement (*Untreue*), other EU Member States have not rejected assistance to Germany, which indicates that all EU Member States recognise criminal liability for this behaviour. The abolition of the verification of double criminality for offences falling under the list of Art. 2, para. 2 of the FD EAW is therefore not seen as the most important advancement of the new extradition system within the EU. A database containing national definitions of the offences listed in the instrument with respect to the abolition of dual criminality was widely turned down.

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[36] For the former legal solution, see M. Böse, *in* Grützner, Pötz, Kreß, (eds.), *Internationaler Rechtshilfeverkehr in Strafsachen*, Heidelberg, C.F. Müller, 3rd edition, para. 80 IRG, mn. 30 and f.

[37] For the minor practical relevance see also H. Seitz, "Mildeste versus punitivste Strafrechtsordnung", in H. Schöch, R. Helgerth, D. Dölling, P. König (eds.), *Festschrift für Reinhard Böttcher*, Berlin, De Gruyter, 2007, p. 675 (680). In only a few cases to date, has jurisprudence had to carry out more in-depth assessments, since German substantive criminal law contains special characteristics. See OLG Düsseldorf, decision of 14 March 2005, 4 Ausl 68/03: production of counterfeit documents – extradition to the Netherlands insofar not admissible as double criminality was not given for falsification of documents. Schleswig-Holsteinisches OLG, decision of 25 April 2007: double criminality approved in case of abetting for theft. OLG Köln, decision of 5 February 2007, 6 Ausl.A 94/06: EAW request must contain information on whether the "financial capability" (*Leistungsfähigkeit*) of the person wanted is given (necessary element of the German offence of violations of maintenance obligations, Art. 170 of the Criminal Code).

[38] O. Lagodny, *in* Schomburg, Lagodny, Gless, Hackner, *op. cit.*, footnote 8, para. 3 IRG, mn. 2 and f.

In addition, defence lawyers admitted that the introduction of the EAW has not entailed a fundamental change in view of the results of extradition in comparison to the traditional extradition scheme of the Council of Europe. However, they pointed out that the abolition of the verification of double criminality according to the list of Art. 2, para. 2 of the FD weakens the position of the defence considerably, since the double criminality check often implies further indications, such as verification of the basis of the suspicion, allegations, or other specific circumstances of the case. Since legal access to these issues is now barred by the abolition of double criminality checks, it has become very difficult to find arguments that might convince courts to enter into a more in-depth examination of an EAW request. As mentioned above, defence lawyers feel that the EAW system resulted in stereotypical court decisions in which the circumstances of the individual case are no longer taken into consideration. This impression was confirmed in several interviews with the judiciary conducted by the author.

As indicated above and with regard to incoming requests, problems with double criminality arise for the judiciary in connection with the strong degree of *formalisation* which has been introduced by the EAW. Often, the facts of the case are described so briefly that it is not comprehensible why the facts justify one of the offences listed. Most higher regional courts take the view that an examination of the request is warranted in certain exceptional cases, although the issuing authority took the view that the criminal act constitutes one of the offences of Art. 2, para. 2 of the FD. Examinations are carried out, for example, if the issuing authority (obviously) falsely marked the criminal act as an offence from the list[39]. Furthermore, double criminality is verified if the information of an SIS entry does not contain a sufficient description that the act in question constitutes one of the offences of Art. 2, para. 2 of the FD[40]. Courts also require that the EAW is *plausible and conclusive* to the extent that the description of the circumstances under which the criminal act was committed (Art. 83a, para. 2 no. 5 of the LIACM and Art. 8, para. 1(e) of the FD EAW) and the marked listed offence(s) correspond[41].

The practice of the higher regional courts (*Oberlandesgerichte*) and State Attorneys (*Generalstaatsanwälte*) seems to differ, however, as to the circumstances under which requests based on Art. 2, para. 2 of the FD can be verified. It seems that some higher regional courts and State Attorneys even accept short descriptions and execute the request without any reservations. They back their opinion up with the principle of mutual recognition and argue that they are bound to the request according to the obligation to execute as described in the Framework Decision. They also argue

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[39] OLG Düsseldorf, decision of 14 March 2005, 4 Ausl 68/03.

[40] OLG Karlsruhe, decisions of 26 October 2004, 1 AK 20/04, wistra 2005, p. 40; 10 February 2005, 1 AK 4/05, *StraFo*, 2005, p. 165-166; 31 August 2006, 1 AK 39/06, *NStZ*, 2006, p. 691. Respondents also reported discrepancies between the SIS entry and the requirements of the EAW.

[41] OLG Karlsruhe, decision of 10 August 2006 1 AK 30/06, *NJW*, 2006, p. 3509-3510 = *StV*, 2007, p. 139; see also OLG Stuttgart, decision of 26 October 2006, 3 Ausl. 52/06, *NJW*, 2007, p. 613-615.

that, if they examined the request, they would examine double criminality via the "backdoor".

Other higher regional courts apply stricter yardsticks as to the plausibility and conclusiveness of the EAW request. If it is held to be insufficient, they order a query for the issuing State to explain or supplement the facts. This naturally leads to a delay in the proceedings, and the time limits foreseen in the Framework Decision can hardly be maintained. Nevertheless, the delay is accepted because they consider the obligation to execute to be irreconcilable with the position of a judge to put a person in jail although the judge is not able to justify the decision (see also 1). Judges justified their position in that they do not doubt the legal assessment of the issuing authority but must understand whether the offence is punishable according to the law of the issuing State. Indeed, not fewer cases were reported in which the issuing authority did not respond to the query or withdrew the EAW after the query.

It should be emphasised, however, that, even in doubtful or inconclusive cases, EAWs have not been refused entirely if the issuing State could substantially argue that the facts justified one of the offences in the catalogue of Art. 2, para. 2 of the FD. The courts merely issued orders for clarification. In some cases, a provisional extradition detention could be maintained, in other cases, an extraditon detention was temporarily suspended, but in most cases, surrender could not be avoided.

F. Grounds for refusal (II): the territoriality clause

German policy considers the territoriality clause, which enables a Member State to refuse to recognise and execute a decision issued for an offence wholly or partly committed on its territory, to be compatible with the mutual recognition principle. It opens the possibility for the States to allocate prosecution to the particular country in which the seriousness of the offences can be best assessed. It should not be accepted that a person is prosecuted in Member State A for a minor offence (e.g., negligent discharge of chemicals or driving without a license) if the more serious part of the offence was committed in Member State B (e.g., environmental damage or severe car accident).

Nevertheless, the German legislator did not implement the territoriality clause of Art. 4, para. 7(a) of the FD EAW as such. The legislator obviously considered sufficient the implementation of Art. 4, para. 2 and 3 of the FD for solving problems with conflicting jurisdictions. However, the territoriality clause of Art. 4, para. 7(a) of the FD was used in connection with the surrender of own nationals and residents in accordance with the above-mentioned Federal Constitutional Court's judgment in the EAW case (see 1 *supra* and G *infra*). No use was made of Art. 4, para. 7(b) of the FD (disparity in extraterritorial jurisdiction).

After the implementation of Art. 4, para. 2 and 3 of the FD EAW into Art. 83b, para. 1 a) and b) of the LIACM, it was feared that the clauses could be misused in order to bypass the obligation to surrender[42]. Notwithstanding, the prosecutors and judges interviewed seem to apply the provisions carefully, and they do not play that

[42] E. Von Bubnoff, *Der Europäische Haftbefehl*, Heidelberg, C.F. Müller Verlag, 2005, p. 78.

much of a role in practice as was presumed beforehand. Most higher regional courts take the view that possibilities to conduct own preliminary proceedings in Germany do not lead to the obligation to affirm a hindrance to extradition [43]. Other case law, by contrast, tends to acknowledge a hindrance if the case demands prosecution under German jurisdiction since the prosecutor must initiate investigations under the principle of mandatory prosecution; in this context, it is not even required that formal proceedings have already been opened at the time of the EAW, but rather the facts of the EAW provided the reasons for initiating proceedings in Germany [44]. In the regular run of prosecutions, the cases seem very clear. Conflicts of jurisdiction rarely arise. None of the interviewees declared that he/she felt forced to introduce own proceedings in order to avoid surrender upon an "unpopular" EAW submitted by another EU Member State.

G. Treatment of nationals and residents

Initially, the first European Arrest Warrant Act allowed the surrender of German nationals with few restrictions: for the purposes of prosecution, the surrender was admissible if it was ensured that the issuing Member State offered the return of the accused to serve the sentence in Germany, if the accused so wished. The surrender for the purpose of executing a sentence was dependent on the consent of the German national. Certain foreigners were treated in the same way as nationals. The equal treatment of foreigners with German nationals was dependent on criteria which related to their residential status or family links [45].

This previous regulation on the surrender of own nationals was considered a breach of Art. 16, para. 2 of the Basic Law by the Federal Constitutional Court. Art. 16, para. 2 sentence 1 prohibits extradition of German nationals to a foreign country and is interpreted as "liberty right to protection from extradition" [46]. Although the Federal Constitutional Court further admits that this right is not unrestrictedly guaranteed and that the extradition of a State's own nationals corresponds to a general development at the supranational and international level, the Court considers the principle of the rule of law to require a special protection of the prosecuted person's confidence in his or her own legal system [47]. On this basis, the Court developed three categories of cases which were taken up by the legislator in the second European Arrest Warrant Act in a rather complicated provision (Art. 80 of the LIACM). The main idea behind the categories is the foreseeability of punishment by the State. As a result, the possibilities of Art. 4, para. 7 of the FD EAW are exhausted and combined with double criminality and criteria of weighing up the interests at stake. The difference between extradition for the purpose of criminal prosecution and extradition for the purpose of execution of a sentence is maintained.

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[43] OLG Stuttgart, *NJW*, 2007, p. 613; Saarländisches OLG, decision of 1 December 2006, Ausl. 48/06 (29/06).

[44] OLG Karlsruhe, *NJW*, 2007, p. 2567 and *NJW*, 2007, p. 617.

[45] See in detail P. Pfützner, Country Report Germany, www.eurowarrant.net, 6.6.4.1.

[46] BVerfG, footnote 8, mn. 65.

[47] *Ibid*., mn. 71 and f.

In essence, Art. 80 of the LIACM stipulated that a German national cannot be extradited *for the purpose of criminal prosecution* if the offence has a significant reference to German territory (*Inlandsbezug*), i.e., if the main parts of the place of commission and of the effects of the crime are located in Germany. Extradition of German nationals is admissible if the offence has a significant connecting factor to the requesting Member State (*Auslandsbezug*), i.e., (1) if the act constituting the offence has been committed entirely or in essential parts in the territory of the requesting EU Member State and if the criminal results have occurred there, or (2) if the offence has a typical cross-border dimension and shows a corresponding gravity [48].

If a significant connecting factor to neither the foreign State nor the German State territory can be identified in the case (so-called "*mixed cases*"), the extradition of nationals is dependent on three prerequisites [49]: (1) the transfer of the accused back (to Germany) to serve a foreign sentence is ensured; (2) the act is punishable under German law (at least after analogous conversion of the facts) – thus, a double criminality check is necessary regardless of the regulation in Art. 2, para. 2 of the FD, and (3) after specific weighing up of the conflicting interests; the confidence of the prosecuted person in his/her non-extradition, meriting protection, does not predominate [50].

Extradition of nationals *for the purpose of executing* a custodial sentence or detention order are only possible if the person concerned consents. If he/she does not consent, the requesting Member State can ask Germany to take over the execution of the sentence imposed abroad. Then, double criminality needs not to be proved [51].

The legislator also introduced a new solution with regard to the surrender of *residents* and structured their extradition as a facultative ground for refusal, i.e., as a hindrance to approval of extradition. Foreigners who have their usual place of residence in Germany are privileged [52].

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[48] Art. 80, para. 1 no. 2 of the LIACM. A prerequisite is that the transfer of the accused back (to Germany) to serve the sentence handed down in the requesting State is ensured should the accused so wish (Art. 80, para. 1 no. 1 of the LIACM).

[49] Art. 80, para. 2 of the LIACM.

[50] As regards the latter condition, the circumstances of weighing up are listed in Art. 80 para. 2 sentences 3-5 and offer certain discretionary powers for the courts or State Attorneys, respectively.

[51] Art. 80, para. 3 and 4 of the LIACM. After first reluctance, the abolishment of double criminality checks in this regard was introduced by the second European Arrest Warrant Act. The German legislator felt obliged to make German law conform to the requirements of the FD EAW (Art. 4, para. 6). Legal literature does not follow this viewpoint and argues that the new law contradicts the obligation to protect German citizens as expressed in the Federal Constitutional Court's judgment if the citizen does not consent (Böhm, Rosenthal, *in* Ahlbrecht, Böhm, Esser, Hugger, Kirsch, Rosenthal, *Internationales Strafrecht in der Praxis*, Heidelberg, C.F. Müller Verlag, 2008, mn. 810). See also *supra*. E on the general German doctrine regarding double criminality in the field of assistance in the execution of judgments in criminal matters.

[52] Art. 83b, para. 2 of the LIACM. Opinions differ on the question of whether a stay in Germany must be lawful/legal. For references, see M. Böse, *in* Grützner, Pötz, Kreß, *op. cit.*, footnote 36, para. 83b IRG, mn. 10.

The new regulation of Art. 80 of the LIACM is widely considered to be unclear, complicated, and confusing [53]. Since double criminality generally does not entail a hindrance to refusal (see *supra*), this requirement does not – in most cases – protect German citizens. More problems in practice arise as regards the determination of to which country a significant connecting factor is given and the weighing up of all circumstances. Here, the courts can exhaust more possibilities to refuse the extradition of Germans [54]. Sometimes the assessment is questionable, e.g., when the case of a car theft that was committed abroad, with the car owner located in Germany, is determined to have a significant connecting factor to the domestic State (Germany) [55]. Other recent case law has found that the place the offence was committed in the territory of the requesting State is only an indication of a significant connecting factor in the respective Member State, and the request may be refused if other circumstances of the individual case, such as an interest to prosecute in Germany and social links of the person being prosecuted, contradict the first assessment [56]. Nevertheless, replies to the interviews confirmed that, in most cases in practice, assessment is rather clear.

As regards the extradition of residents, problems in practice have mainly arisen in connection with the general term "*usual place of residence*", which also triggered the reference to a preliminary ruling by the Higher Regional Court of Stuttgart to the European Court of Justice [57]. First, the general term has not been defined [58]. The European Court of Justice ruled now that German domestic law – without requiring amendment – must be interpreted in conformity with the Framework Decision and that the executing authority must determine, as a first step, whether the person in question is "residing" or "staying" in Germany by taking into account a uniform interpretation of the terms [59]. Second, the circumstances advocating the "usual place of residence" are often not clear. Therefore, the State Attorney often needs to determine the facts which justify a "usual place of residence". This is problematic for two reasons: first, the determination of facts by the executing Member State is usually excluded in the EAW regime. Second, determination can take a long time, so that it is difficult to keep to the time limits envisaged for the EAW. In the case of an EAW *for the purpose of execution* of a sentence towards a resident, in practice it is difficult to assess whether

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[53] M. Böse, *Ibid*., para. 80 IRG, mn. 17.

[54] See, for example, OLG Naumburg, decision of 12 March 2007, 1 Ausl 2/07: No extradition of a German to Spain because of alleged child abduction since the confidence of the prosecuted person in Germany's protection predominates.

[55] OLG Köln, decision of 26 January 2007, 6 Ausl A 69/06; disagreed with by M. Böse, *in* Grützner, Pötz, Kreß, *op. cit.*, footnote 36, para. 80 IRG, mn. 17.

[56] OLG Karlsruhe, *NJW*, 2007, p. 617.

[57] OLG Stuttgart, *NJW*, 2008, p. 1184.

[58] It was left to the jurisprudence to develop criteria. See, for a definition, for instance, OLG Braunschweig, decision of 4 December 2006, Ausl. 9/05: the minimum stay in Germany should be six months (in the present case, it was only five months and, therefore, extradition was possible).

[59] ECJ, 17 July 2008, Judgment C-66/08, *Kozlowski*; T.Wahl, S.Staats, *eucrim*, 1-2/2008, p. 36 and f.; K. M. Böhm, "Die Kozlowski-Entscheidung des EuGH und ihre Auswirkungen auf das deutsche Auslieferungsrecht – Kein 'Strafvollstreckungstourismus' innerhalb Europas", *NJW*, 2008, p. 3183.

the interests of the resident affected by its execution in Germany predominate [60]. The crucial issue is to determine to what extent the person has social connections to Germany. Case law seems to have established rather high hurdles, i.e., extradition only fails if the person in question has rather exceptional ties to Germany in terms of family or business [61].

H. The defence lawyers' position

As regards the current application of mutual recognition instruments in Germany, defence lawyers reported that they have to struggle with several problems. The main issues are summarised in the following [62]. As indicated in the preliminary remarks, the replies refer to experiences with the European Arrest Warrant, but most concerns are general problems that may be valid for other matters of mutual recognition as well.

1. Acceleration

Defence lawyers see a great risk in the acceleration of the proceedings. They feel that most higher regional courts decide incoming requests too quickly and superficially although an examination of the grounds for suspicion would have been appropriate in some cases [63]. The acceleration of the proceedings due to time limits, as well as the seemingly superficial examination of a foreign EAW request, naturally leads to *a race against time* for the defence. Arguments which would justify a halt in the extradition procedure are very difficult to put forward within the limited time. In this context, defence lawyers believe that the weighing up of interests in the German procedure of approval is regularly in favour of extradition in forensic practice [64].

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[60] Art. 83b, para. 2 b of the LIACM.

[61] See, e.g., OLG Braunschweig, decision of 15 November 2006, Ausl 5/06; see also U. Schmidt, "Die Auslieferung nichtdeutscher Staatsangehöriger nach der Neufassung des Europäischen Haftbefehlsgesetzes", *StraFo*, 2007, p. 7 (10). M. Böhm, *op. cit.*, footnote 59, concludes from the judgment of the ECJ that the German practice as to the surrender of residents for the purpose of execution must be changed in the future to the extent that German authorities must offer the execution of the foreign judgment towards the resident in Germany with less restrictions if there are reasonable grounds for rehabilitation/resocialisation and family ties in Germany. Following this line, see now OLG Karlsruhe, decision of 16 December 2008, 1AK 51/2007, *WStZ-RR*, 2009, p. 107.

[62] See also *supra* B.

[63] Although the FD EAW does not foresee a review in this regard, Art.10, para. 2 of the LIACM remains applicable, in which it is stipulated that – as an exception – a review as to whether there are reasonable grounds to believe that the accused committed the offence he is charged with can be carried out by the court if special circumstance justify it. See Böhm, Rosenthal, *op. cit*., footnote 51, mn. 668 and f., 767.

[64] For the division into the procedure of judicial admissibility and approval in German extradition law, See T. Wahl, "Study on the future of mutual recognition in criminal matters in the European Union, Country Report Germany", 2008, Introduction, p. 9; P. Pfützner, Country Report Germany, www.eurowarrant.net, p. 3.

2. "Double defence"

Since the EAW abolished many grounds for refusal and the courts of the executing State (Germany) have only few possibilities to check an EAW request, all interviewees admitted that objections of the defence in the executing State are almost futile and regularly unsuccessful. Defence lawyers, in particular, complained that the EAW system has abolished nearly all (subjective) legal positions in favour of the individual (especially the abolishment of double criminality checks in a vast field of criminality) and, therefore, defence in the executing State can no longer work effectively and successfully. As a consequence, the main part of the defence has shifted to the issuing State, and *double defence*, i.e., establishing defence both in the executing and issuing State, has become essential after the introduction of the system of mutual recognition.

The necessity, however, of establishing a double defence in transnational cases is accompanied by a number of problems on the side of the defence. Practitioners admitted that double defence is expensive and can only be afforded by "rich" defendants, which naturally leads to discrimination. Another problem is seen in the fact that there is no institutionalised exchange of information on the side of the defence. Each exchange of information must involve the accused who, in most cases, is not able to organise a proper defence in the foreign State, since he/she lacks – beyond financial means – the necessary languages skills or simply personal contacts (e.g., relatives, friends, etc.). Defence lawyers further pointed out that support of the accused is difficult, since *structural deficits* still exist: there is no transnational network among defence lawyers as is the case on the side of law enforcement. Communication with defence lawyers is often difficult. Language problems are one reason. Another reason is that it is often even impossible to find an appropriate defence lawyer in the foreign State or in the foreign region concerned, since lawyers are organised differently in the various EU Member States and carry out different tasks. In some EU Member States, lawyers who are specialised in criminal defence do even not exist.

3. Involvement of defence in EAW proceedings

Furthermore, defence lawyers find it essential that the person concerned be supported by a defence lawyer *at the very beginning of the extradition proceedings* in the executing State. In Germany, this would be the first appearance before the magistrate of the closest local court after apprehension/arrest. However, in practice, defence lawyers reported that they are regularly not present at this stage, although the accused is advised that he may be represented by counsel at any time during the proceedings[65]. In this context, it should be mentioned that Art. 40, para. 2 of the LIACM, which foresees the mandatory assignment of defence lawyers by the courts if the accused does not privately appoint counsel, plays a highly minor role in practice. Defence lawyers were of the opinion that involvement of the defence should not be dependent on the German judicial authorities which – as in the current

[65] Appropriate advice by a defence lawyer at this stage is considered particularly necessary because the accused can consent to the simplified extradition procedure, which entails far-reaching legal consequences for him.

system – implement the request of the accused for defence. They suggested automatic involvement of the defence at the very beginning of the proceedings, directly after apprehension of the accused. According to the defence lawyers, their early involvement could be one measure by which to increase acceptance of the new EU instruments, and it would not thwart the acceleration of the procedure.

4. Formalisation

As mentioned above, the formalisation which is inherent to the mutual recognition instruments, particularly the fact that the national order (e.g., national arrest warrant) no longer needs to be transmitted, leads to a worsening of the position of the accused. Since EAWs now only contain a condensed description of the facts, less information and evidence are provided. As a result, it has become more difficult for the accused to put forward arguments against the allegations, since he/she no longer has in his/her favour the more extensive information contained in the national arrest warrant. Due to the formalisation of the EAW, the short description of the facts and criminal act is deemed a step backwards as regards legal standards in Europe. The accused is cut off from information which he/she normally has at his/her disposal in national proceedings, which, in turn, leads to disparate treatment: a judge in Hamburg, for instance, who decides on the detention of an accused whose arrest was ordered by a judge in Munich will always take the arrest warrant from Munich as a basis for the detention decision. This should also be the case in a "European criminal law area". It was argued that the more quickly detention of the person wanted can be ordered – as it is the case by the EAW – the more appropriate it is to provide detailed information on the grounds for the commission of the criminal act by the person in question. However, regrettably, the EU Member States decided to the contrary in the Framework Decision.

5. Procedural safeguards/fundamental rights issues

Germany implemented the general provision on fundamental rights, which refers to Art. 6 EU, into national law as the so-called "European *ordre public*". The "European *ordre public* clause" is a general ground for refusal covering all present and future requests in all areas of legal assistance [66]. Objections relating to infringements of procedural safeguards or to the rights of defence must generally be based on the *ordre public* clause [67], but are very rarely successful in practice. This assessment is confirmed not only by the interviewees but also by an analysis of published case law. Although Art. 73 sentence 2 of the LIACM may, at first glance, be suggestive of a "eurosceptic" norm [68], it is interpreted in quite an "extradition-friendly" way by the

[66] Art. 73 sentence 2 of the LIACM. Detailed information is provided for by J. Vogel *in* Grützner, Pötz, Kreß, "Internationaler Rechtshilfeverkehr in Strafsachen", *op. cit.*, footnote 36, para. 73 IRG mn. 131 and f.

[67] If not, a maintained and separate ground for refusal relating to procedural rights is relevant, e.g., life sentences (Art. 83 no. 4 of the LIACM), *non bis in idem* (Art. 83 no. 1 of the LIACM), or trials *in absentia* (Art. 83 no. 3 of the LIACM).

[68] J. Vogel, *op. cit.*, footnote 66, mn. 134.

courts[69]. Others suggest that the core sphere (*Kernbereich*) of a fundamental rights guarantee (ECHR or EU Charter of Fundamental Rights) must be infringed, in order to recognise a hindrance for assistance upon *ordre public*[70]. The main arguments of the interviewees for the minor relevance of the *ordre public* clause as a ground for refusal within the EU can be summarised as follows:

- For objections against breaches of *ordre public*, it is the defence that is obliged to present the underlying facts to the court (onus of presentation); in this context, it is very difficult to gather substantiated information for the defence[71].
- Tight time limits which are foreseen in the new surrender procedure make it even more difficult for lawyers to report the breach of procedural safeguards or disrespect for the rights of defence.
- Often, the person concerned is not able to complain about breaches against procedural rights in the issuing State at the stage of the (surrender) procedure in the requested/executing State; breaches are often only revealed after the person has been surrendered and proceedings continue in the requesting/issuing State.
- Often, the accused is not well advised by his/her defence lawyer about the possibility of making objections in view of Art. 73 sentence 2 of the LIACM.
- In forensic practice, most higher regional courts do not verify objections on breaches of procedural safeguards and respect for the rights of defence in the issuing State; they argue that they have to apply the principle of mutual trust and advise the person concerned to make objections in the course of the proceedings/ trial in the issuing State.
- Since the *ordre public* clause has a political connotation, judges are very careful about identifying procedures in another EU Member State that are contrary to the rule of law.
- The scope of application of the "European *ordre public* clause" is still unclear, as a result of which it is difficult for the defence or courts to apply the provision.

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[69] However, OLG Celle (decision of 20 May 2008 – 1 ARs 21/08), *StV*, 2008, p. 431, recently denied extradition to Greece for the purpose of execution of a sentence if the sentence foresaw life-long imprisonment for possession of small quantities of (soft) drugs. Other higher regional courts ruled out a disproportionality of punishment, e.g., OLG Stuttgart, *NStZ*, 2005, p. 47: Extradition admissible although serious drug offences can be punished with life imprisonment; OLG Hamburg, decision of 22 January 2007, Ausl 70/06: No breach of Art. 73 if attempted homicide can be punished by life imprisonment in the issuing state. See also: OLG Köln, decision of 24 October 2006, 6 AuslA 84/06: Unfounded claims about the detention situation in the issuing state cannot lead to a hindrance to extradition; Saarländisches OLG, decision of 23 January 2007, Ausl 49/06 (3/07): Torture or inhuman treatment in the requesting EU Member State must be likely and supported by facts; unsubstantiated claims by the accused are not sufficient.

[70] OLG Karlsruhe, decision of 26 June 2007, 1 AK 16/06; Böhm, Rosenthal, *op. cit*., footnote 51, mn. 829.

[71] The possibilities for the defence are rather limited. Regularly, defence will not stand any chance other than to refer to general reports by Amnesty International or Committees of the Council of Europe or the European Commission.

- Exceptional cases, in which the application of the *ordre public* clause would be more or less clear (e.g., torture, death penalty, judgments by military tribunals), do not occur in relation to EU Member States.
- In practice, most cases in relation to EU Member States concern *in absentia* judgments and lifelong sentences, but these issues are stipulated in separate provisions if it comes to EAWs.

If the issue of *ordre public* plays a role in a case, the practice of the higher regional courts is to regularly ask the issuing EU Member State to maintain certain standards instead of denying the surrender. Example: If the accused claims degrading conditions of detention in the issuing Member State, German courts let it be guaranteed that the accused is placed into certain jails of that particular country or is medically supervised. The most important feature of the *ordre public* clause in practice is that it relates to the principle of proportionality for incoming EAW requests, i.e., requests concerning minor or petty offences or offences committed a long time ago [72]. Also here, however, the authorities attempt to clarify the situation with the requesting State's authorities before denying the request because of a lack of proportionality.

3. Areas for other EU instruments

A. The rights of defence

Defence lawyers, in particular, advocated putting on track a legal instrument to guarantee a minimum standard of procedural rights and safeguards for the defendant. However, they are of the opinion that a proposal that only provides for minimum standards in an inchoate way is insufficient – which was the case in the latest draft of the Framework Decision on procedural safeguards within the European Union. The following three issues are considered most significant for the contents of the legal instrument on procedural safeguards.

First, every accused person must be sure that the proceedings are fair and that he/she is advised properly. Thus, there should be rules on mandatory participation of defence council at the earliest moment if the accused is to be put into detention in a foreign country. It was proposed that a European-wide "*emergency service*" provided by defence lawyers should be introduced. Emergency services which are already in place on the national level in some EU Member States could serve as an example.

Second, every accused person should have equal access to defence council. An essential condition is the guarantee of financial support. In this respect, a European system of legal aid must be provided for.

Third, every accused person must be able to exercise his/her rights effectively. It is therefore essential that a letter of rights is agreed upon, which informs the accused in detail about his/her rights at the beginning of the proceedings. The letter of rights should be provided in the native language of the defendant.

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[72] See also Böhm, Rosenthal, *ibid.*, mn. 779, who point out that it is easier today to surrender a suspect via a European Arrest Warrant instead of letting interrogate him or delivering documents to him by means of other legal assistance instruments.

B. Collection of evidence

As regards the question of whether mutual recognition should be extended to the collection of evidence, the position of German practitioners is concluded from the assessment of those difficulties typically encountered in judicial cooperation as regards matters of evidence abroad [73]. Prosecutors responsible for mutual legal assistance (MLA) are of the opinion that judicial cooperation runs very well in the European Union, in particular as regards serious offences. They pointed out that, even in difficult or complex cases, MLA is working, under the conditions that MLA is well prepared and requests are drafted respectfully. As one reason, the interviewees mentioned that Germany, as the requested State, provides assistance to the greatest possible extent in the interest of receiving equal assistance from foreign States in similar cases. Assistance to the greatest possible extent is considered an underlying principle of the German law on mutual legal assistance.

In general, practitioners do not believe that legal reasons hamper judicial cooperation among EU Member States. It is regretted that requests still remain unanswered for a long time or a reply is never given by the requested foreign authorities. In nearly all cases, reasons are not given by the requested State for why nothing happens: the reason is often seen in *structural problems* in the judicial system of the foreign country and in the *lack of human resources*. According to the view of practitioners, a solution must therefore be found at the national level as the problem cannot be solved by a European instrument. Another solution is seen in the obligation of the foreign authority to decide upon a request within a certain time limit as it is foreseen in most instruments of mutual recognition already in place. This improvement is considered the most essential one in the practice of prosecution.

For defence lawyers, the most significant difficulties in MLA seem to be that they are in a "race against time" with law enforcement. Often, the defence is cut off from sufficient information or does not have timely access to the file, which is nevertheless necessary to understand the background of requests. Defence lawyers complained that requests are often executed even though the defence had not previously received any information about the request (problem of "*fait accompli*"). They pointed out that the execution of a measure regularly leads to material or non-material damage to the persons concerned as he/she was not able to defend himself/herself in the run-up to the measure. It was proposed that the defence should be enabled to take part in the MLA procedures at an early stage. In this context, defence lawyers emphasised that the defence should be considered a principal supporter of the transnational proceedings rather than an obstructer by the law enforcement authorities [74].

These general assessments are also reflected when it comes to the European Evidence Warrant (EEW). The practical effects of EU instruments on mutual recognition in the field of MLA are considered limited. Most prosecutors and judges interviewed see no problem in applying two potential instruments to mutual legal

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[73] This falls under the category of "other assistance" in Germany, Art. 59 and f. of the LIACM.

[74] See also in this context the considerations on the role of "Eurodefence" in: B. Schünemann (ed.), *A Programme for European Criminal Justice*, *op. cit.*, footnote 2, p. 301-307.

assistance if the Framework Decision on the European Evidence Warrant with its limited scope of application is implemented and used in practice. The difficulty is rather seen in convincing practitioners of the advantages of the new instrument, especially since the instruments from Brussels are fragmentised and come into force in a highly successive way. The number of cases involving EEWs, in which the request forms part of a wider request, are expected to be few since only specific pieces of evidence are normally sought in the foreign State.

Some judges, but also a number of prosecutors and defence lawyers, feared that the application of the EEW, with its limited scope of application, might lead to an increased transfer of records of interrogation or other reports instead of the direct testimonies of witnesses or experts [75]. This is considered dangerous for a due process of law since the records do not reveal the circumstances of a testimony and, consequently, are of a different quality than the personal interrogations of witnesses or experts. Even more problematic are those records that contain only an excerpt of the testimony.

Defence lawyers thought that the EEW will face two major problems: First, the questions on legal remedies need to be regulated, when the gathering of the evidence would have been inadmissible under national law. Second, the provisions must stipulate how objections of the defence can be put forward if legal privileges, such as the rights of relatives or certain professions to withhold information, were not observed during the course of gathering evidence in the foreign State.

In general, defence lawyers are concerned that the acceleration of the procedure by the EEW would considerably increase the problem of *fait accompli*. This would result, again, in a lack of acceptance at the level of citizens who feel powerless in the face of state authorities. Some defence lawyers thought that, again, the organisation of double defence is pivotal if the EEW is put into force. Other defence lawyers even thought that the implementation of the EEW should be suspended entirely until uniform European rules on the gathering and use of evidence have been adopted.

C. Coordination of prosecutions

Practitioners reported that there are rather few cases of conflicting jurisdictions. The German Ministries of Justice advocate maintaining a flexible approach. In practice, either a foreign State does not carry out its own investigations if it knows that investigations are already being conducted in another State or – if conflicting interests, in fact, occur – prosecutors solve the conflict by communicating with their colleagues in the foreign State and finding appropriate agreements. The main criteria are where witnesses and other means of evidence are located. Furthermore, it is important which languages the evidentiary material is available in. Another aspect is the availability of human resources and capacities in the judicial authorities. Often, prosecution continues in the State which first issued a European Arrest Warrant against the accused if a lot of investigations have already been carried out there. The route via

[75] Although hearings are excluded from the scope of the EEW, the FD EEW (*op. cit.*, footnote 14) offers the possibility to receive pre-existing objects, documents or data in Art. 4, para. 4, to which increased use may be made. See also H. AHLBRECHT, *op. cit.*, footnote 15, p. 71.

Eurojust is considered to be too long from the German perspective if the case does not have an exceptional character.

An EU instrument which would stipulate rules for conflicts of jurisdiction is widely turned down. The majority argued that it would not be proportional to the practical relevance and risks to lift the current flexible approach. If cases are really at stake that affect more than two Member States, prosecutors advocate a system of trilateral or even quadrilateral, etc. agreements among the Member States concerned. In this context, the improvement of communication structures that allow direct contacts is considered essential. Some interviewees pointed out that it could be reasonable, in the long term, to establish EU-wide rules on the venue, such as is provided for in national procedural legislations [76]. Guidelines could be that the prosecutor or court in whose district the criminal offence was committed is responsible. Alternatively, the venue could be established at the domicile or place of residence of the accused and/or at the place of apprehension.

4. Methodology. Horizontal problems

A. Negotiations

A formal procedure of participation of German practitioners or a survey in the negotiation phase of framework decisions is not foreseen. However, practitioners have the possibility to give statements at any time. These statements are taken into account by the Federal Ministry of Justice. The Ministry tries, as far as possible, to gather relevant information from practice during the negotiation phase. It should further be pointed out that the representatives of the German government who are responsible for the negotiations regularly come from a practical legal background. In addition to the representative of the federal government, one representative of the federal states (*Länder*) is present during the negotiations [77]. He/she is a civil servant from the Ministry of Justice of one of the federal states. This civil servant cooperates closely with the judicial authorities. Nevertheless, the judges and lawyers interviewed have a critical perception as to the negotiations since the practical suitability of the new mutual recognition instruments is flawed. Therefore, they surmise that the new instruments on mutual recognition are the result of the will of civil servants, a viewpoint which is shared by defence lawyers.

Although defence lawyers participate – in an informal way – in legal drafts at the stage of negotiations via the bar associations, they feel that they have no influence on the political decision-making process. Most defence lawyers also feel that their statements have little or no effect on the negotiations of the new instruments. They think that issues of defence or the rights of the individual have not been taken seriously by the governments during the negotiations of the new instruments. For example, detailed provisions on the rights of the accused were already proposed for insertion into the FD EAW but their introduction failed. Defence lawyers wish for a more formal participation in the negotiation phase, but consultation should not have a

[76] See for Germany Art. 7-21 of the Criminal Procedure Code.

[77] Which federal state delegates a representative to the negotiations depends on the type of the Council working group.

token function. Some defence lawyers also proposed that research institutes or NGOs should be consulted in the negotiation phase because they would have the possibility of presenting positions in a more detailed way.

B. Transposition

The federal government asks for statements of judges and prosecutors after a first draft of the implementation law by the Federal Ministry of Justice has been submitted. The requests of the federal government are forwarded to judges and prosecutors via the Ministries of Justice of the federal states. The Ministries of Justice of the various federal states are responsible for compiling a report that summarises the given statements, together with an opinion of the respective Ministry of Justice of the federal state. Expert hearings on the draft implementation legislation in the German Parliament (*Bundestag*) are not regularly carried out (an exception was the draft legislation on the second European Arrest Warrant Act). Defence lawyers participate in the implementation phase via the bar associations. However, consultation is not formal and is very much dependent on the initiative of defence lawyers themselves.

Judges, but also the Ministries of Justice of the federal states themselves, complained about the short deadlines for providing statements. For the Framework Decision on mutual recognition of financial penalties, for instance, the time period for statements was 4-5 weeks, i.e., including the statements of the judicial authorities and the final report of the Ministries of Justice. All in all, practitioners felt that, at the time they are invited to give statements, they can no longer influence the implementation law. Because of this perception and the short deadlines, most practitioners on the level of judges and prosecutors are rather reluctant to draft statements on the implementation law.

C. Application in practice

As far as methods relating to the application of the instruments on mutual recognition in German practice are concerned, different aspects must be distinguished.

1. Guidelines

For daily work on mutual legal assistance, the "Guidelines for relations with foreign countries in criminal matters" (*Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten – RiVASt*) are of great importance for practitioners. In particular, the guidelines provide information about the way in which requests are transmitted, the requirements as to the formalities of the requests, and their correct contents. However, the Guidelines had been adapted to judicial assistance with EU Member States with delay; only an updated version of October 2008 added guidelines regarding the EAW[78]. Beyond the RiVASt, the Ministries of Justice of the federal states drew up special decrees that regulate specific situations as regards MLA. The decrees instruct prosecutors when dealing with relevant MLA requests.

[78] The RiVASt is accessible via the website of the Federal Ministry of Justice (www.bmj.bund.de).

2. Information

In general, the Ministries of Justice of the federal states (*Länder*) inform their judicial authorities (judges and prosecutors) about the new instruments. For the most part, information is officially provided if the instrument has been adopted or is in the implementation phase. Some Ministries (e.g., of Bavaria and North Rhine-Westphalia) even compiled detailed information papers on the EAW, which served as an example for other federal states. The Ministries of Justice of the federal states also forward the most important case law on the EAW to the judicial authorities. In addition, the Ministries of Justice of the federal states regularly offer training courses for the prosecutors responsible for international judicial cooperation, which introduce the new instruments. As to legal instruments in the process of being negotiated at the European level, prosecutors and judges reported that they must often inform themselves on their own initiative if they are interested in the subject matter. The bulk of EU actions make it nearly impossible for practitioners to stay up-to-date on all new instruments of judicial cooperation within their capacities. In this context, a lot of practitioners welcomed sources of information that summarise European criminal law topics, such as the online journal *eucrim* [79].

Opinions differ as regards the subjective perception of information. As to the EAW, the majority of State Attorneys at the higher regional courts feel that they are well informed by the Ministries of Justice. By contrast, the opinions of prosecutors at the regional courts were mixed: while some noted that they are well informed by their Ministries of Justice and receive all relevant information for their daily work on the EAW, others articulated that they had to become familiar with the EAW more or less on their own initiative. This may also be the reason that it sometimes takes a long time for some prosecutors, who do not deal specifically with international/European judicial cooperation only, to become aware of the new instrument and the methods of how to apply it in concrete situations.

In contrast to prosecutors, the majority of judges interviewed feel poorly informed. Most judges reported that they got to know the new instruments on their own. One reason may be that judges do not feel bound to guidelines or decrees that are issued by the ministries and usually addressed to the executive powers, i.e., prosecutors. As regards defence lawyers, their degree of knowledge is generally dependent on whether they are members of associations or working groups. Access to information at the level of defence lawyers is very much dependent on personal commitments.

3. Feedback mechanisms

As to the question of feedback mechanisms, rather good structures exist among civil servants at the level of ministries and among State Attorneys at the various higher regional courts. Incoming requests, which have been decided upon on the basis of EAWs, are passed on by the State Attorney to the Ministry of Justice of the respective federal state, which itself forwards the decision to the Federal Office

[79] See http://www.mpicc.de/eucrim.

of Justice (*Bundesamt für Justiz*)[80]. Prosecutors who have problems with issuing requests (outgoing requests) have the possibility to address the Ministry of Justice of their federal state or a State Attorney at the closest higher regional court, both of which support the prosecutor in an informal manner. Most Ministries of Justice in the federal states are in close contact with the State Attorney or prosecutors dealing with EAWs or MLA, respectively, in their jurisdictions. Each federal state has an EJN contact point at the level of the State Attorneys at the higher regional court and is able to provide support for prosecutors via the EJN in criminal matters.

The judges interviewed communicated that there is no feedback mechanism among judges. The same is true for the defence lawyers interviewed.

4. Best practices

Best practices have neither been compiled at the level of the judicial authorities (prosecutors, judges) nor at that of the (defence) lawyers. The development of best practices at the level of the judiciary is seen as being difficult because of the federal structure of Germany and the decentralised application of the EAW.

5. Fora

The establishment of *fora* is strongly dependent on which group of practitioners is involved. Regular and/or established *fora* are rather rare: at the ministerial level, the experts responsible for mutual legal assistance in the Ministries of Justice of the federal states, the Federal Ministry of Justice, the Federal Office of Justice, and the Federal Foreign Office, convene every two years (so-called *Rechtshilfereferententagung*). Recent agendas include issues on mutual recognition, such as the European Arrest Warrant, and cases for which a coherent or uniform application had to be considered. At the level of State Attorneys, the different EJN contact points meet regularly; problems in relation to EAWs are regularly on the agenda. At the district level of the federal states, prosecutors responsible for outgoing EAWs and filling in the EAW form organise meetings. Regular meetings are organised, for instance, in the federal state of Baden-Württemberg among the prosecutors dealing with international judicial cooperation. The practice differs from federal state to federal state.

Other *fora* are more or less *ad hoc*, informal, and privately organised. As an example, State Attorneys at the higher regional courts of South-Western Germany met, for the first time in 2008, on the initiative of the State Attorney at the Higher Regional Court of Koblenz/Rhineland-Palatinate. The intention is for such meetings to become a regular *forum* where issues on the EAW and other problems with mutual legal assistance can be discussed. An informal exchange of expertise is the main method of communication at the level of judges, e.g., within the framework of training courses or conferences. At the German Judicial Academy (*Deutsche Richterakademie*), an annual meeting dealing with mutual legal assistance in criminal matters takes place, which

[80] The Federal Office of Justice is a subordinate authority of the Federal Ministry of Justice. It is an authority which provides central judicial services in the name of the Federation and serves as a contact point for matters of international legal assistance. The Office was established in 2007. Details at: www.bundesjustizamt.de.

interested judges can attend; approximately one fourth of the meeting programme contains topics on extradition. At the level of defence lawyers, institutionalised *fora* dealing with the EAW or MLA have not been established. Some defence lawyers reported on private networks which exchange expertise on EAWs.

5. Mutual trust. Practical flanking measures

A. Mutual trust: myth or reality?

Aspects of this paper revealed that German courts already apply the principle of mutual trust for many issues, such as (non-)verification of double criminality or the very reserved application of the *ordre public* vis-à-vis other EU Member States. Nevertheless, it is very much dependent on in which district the person concerned is apprehended, since some higher regional courts seem to apply stricter yardsticks to requests than others.

The vast majority of respondents explained that mutual trust has not been fully established in MLA matters within the EU, and they identified three main reasons which currently hamper the building of mutual trust. First, the instruments on mutual recognition resulted in a shortening of information, compared to traditional treaty-based solutions on mutual legal assistance. As a result, insufficient background information on the request leads to a lack of understanding, which itself leads to a lack of mutual trust. Second, the extension to less serious offences by the new instruments on mutual recognition (an aggravation of this aspect is especially expected from the new Framework Decision on the mutual recognition of financial penalties), while maintaining differences in substantive and procedural criminal law, cannot lead to the creation of mutual trust. The result is a poor acceptance of the new instruments, notably at the level of citizens, since they are designed in favour of prosecution, by which tabs are kept on citizens by the police quickly and easily. Third, a lack of mutual trust is increased as long as citizens are treated differently in transnational proceedings than in national ones, several examples being given by the EAW (e.g., as regards legal aid, the length and conditions of detention, the application of defence rights, etc.).

B. Flanking measures

Based on this analysis of mutual trust, respondents made a wide range of proposals on flanking measures to support and facilitate mutual recognition. Proposals can be divided into those requiring legal activities and those concerning more or less practical or technical measures.

1. Harmonisation

In order to overcome constellations in which the defendant is treated inconsistently if purely national criminal procedures are compared to criminal procedures with transnational contexts, a lot of interviewees reiterated that further harmonisation of law is deemed essential for a proper application of the mutual recognition principle. In this regard, they found that harmonised rules on the prerequisites for detention and the suspension of extradition detention are most urgent in view of a better functioning of the EAW. All defence lawyers advocated making politically indispensable the creation

of minimum standards, especially as to (1) rules on mandatory participation of defence council at the earliest moment combined with a European-wide "emergency service"; (2) a European system of legal aid; and (3) an agreement on a letter of rights (see *supra* 3.A).

2. Transparency

The aspect of the lack of understanding was generally linked to the demand to increase the transparency and acceptance of the instruments based on the mutual recognition principle. Therefore, tendencies must be avoided that discourage an understanding of the proceedings in the issuing State, and better insight into the proceedings of the issuing State should be guaranteed. Beside the three above-mentioned minimum standards for defence (see 1), practitioners proposed a *comprehensive database* with *systematic* information on the criminal procedure and criminal law principles of the various EU Member States [81]. The database should be in a commonly used language, such as English, and include sound information about the criminal law framework for certain situations in criminal procedure. The project should equally include interpretation of the law by courts and, where appropriate, legal literature. Although it is estimated as being a "mammoth project", the database is felt to be necessary, not only to provide more appropriate advice and promote better understanding, but also to reveal the different criminal law standards among the EU Member States and thus the limits of mutual recognition for each Member State [82].

3. Networks

Most practitioners also deemed it necessary to strengthen personal contacts with colleagues in the EU Member States. In particular, prosecutors argued that a direct exchange of views with counterparts in other EU Member States is not only important in order to solve the individual problems of a case, but also to evaluate whether similar solutions are possible for similar problems, since common yardsticks apply despite the differing legal structures of the States.

Defence lawyers strongly advocated an institutionalised network for the organisation of double defence. The vast majority of lawyers are of the opinion that there should be one network instead of different ones that would be established in parallel. However, views differ as to whether a network of defence lawyers should be organised by the defence lawyers themselves (e.g., with the means of the ECBA or

[81] See, in this regard, the project of the International Max Planck Information System for Comparative Criminal Law, http://www.mpicc.de/ww/de/ext/forschung/forschungsarbeit/strafrecht/vi.htm (last visited Mar-09) and U. Sieber, "Strafrechtsvergleichung im Wandel", *in* U. Sieber, H.J. Albrecht (eds.), *Strafrecht und Kriminologie unter einem Dach*, Berlin, Verlag Duncker Humblot, 2006, p. 131 and f.

[82] Example: Germany would not recognise evidence that did not respect the defendant's right to silence or self-incrimination or made negative inferences from the defendant's silence. This issue is considered "tabu" in German law. See F. Meyer, "Opinion of the Max Planck Institute for Foreign and International Criminal Law on the Green Paper on the Presumption of Innocence", available at: http://ec.europa.eu/justice_home/news/consulting_public/presumption_of_innocence/contributions/mpi_en.pdf (last visited Mar-09).

CCBE) or originate with the support of the EU Member States. Defence lawyers who argued for a network initiated and supported by the States put forward that defence lawyers in Europe are not able to manage and administer such a network and that, in some EU Member States, defence lawyers are not even able to participate in the network because they lack the financial means or infrastructure. Defence lawyers agree that a future network for double defence must be flanked with a proper European legal aid system that guarantees financial support for the defendant.

4. Training measures

As important practical measures, increased efforts in the training of practitioners are considered necessary. Here, two areas were identified: better vocational training and the improvement of language skills. Experts in the prosecutorial services pointed out that the awareness of prosecutors must be raised about the new EU instruments that are in place and to come, since, at present, it still takes a long time until the new EU instruments on judicial cooperation are properly and fully applied in the practice of prosecutors, although every prosecutor today is likely to be confronted with judicial cooperation in the EU in his or her daily work. According to the majority of defence lawyers, the matter of judicial cooperation within the EU should play a major role in the course of the vocational training of lawyers specialising in criminal law. Nearly all interviewees thought that a better command of languages is essential for an improved functioning of judicial cooperation in the EU. Better language skills could also be a means to reduce translation efforts and expenditure.

6. Conclusions

None of the EU instruments conveying the principle of mutual recognition of judicial decisions in criminal matters has been implemented in time so far by Germany. However, the underlying national policy is that the German legislator tries to comply with the provisions of the framework decisions to the greatest possible extent. "Mutual recognition" is not considered an entirely new or even revolutionary approach in judicial cooperation in criminal matters, but an advanced form of international judicial cooperation among the European Union's Member States. This perspective is also reflected in German law, which is embedding the instruments on mutual recognition into the existing system of international assistance in criminal matters. Connections with the general provisions on international extradition are maintained; the legislator adheres to the traditional terms used, such as "extradition" or "requesting and requested State" instead of "surrender" or "issuing and executing Member State". Furthermore, it is emphasised that the current mutual recognition regime actually does not alter the traditional approach of examining and recognising a foreign judicial decision by a separate procedure carried out by the requested State.

Problems which were identified by the EU institutions at the horizontal level have only a minor practical relevance in German practice. Nearly no request has failed in practice because of lack of double criminality as regards the traditional assistance system already. The introduction of the non-verification of double criminality by the mutual recognition instruments did not bring about an essential change in this regard, compared to traditional treaty-based solutions. The main reason is seen in the rather

broad understanding of German law on international assistance in criminal matters as to double criminality, which does not necessitate that the act in question contain the same elements of the corresponding criminal offence under German law; instead it is sufficient that, after analogous conversion of the facts, the act would constitute an offence under German law. Although the territoriality clause is maintained to a certain extent in the mutual recognition instruments, conflicting interests because of the committal of the offence partly on German territory occur very rarely in practice. Positive rather than negative conflicts of jurisdiction are rare in practice. Mostly only two or three States, with which bilateral agreements have been concluded, are involved. Nearly all interviewees favour maintaining this flexible approach. No added value is seen involving Eurojust in the majority of cases in connection with conflicting interests. Of similar minor practical relevance is, in principle, the reference to the principles contained in Art. 6 EU, which was implemented in German international assistance law as the so-called "European *ordre public* clause". An exception is requests which – from the German view – do not consider the principle of proportionality. However, objections relating to procedural rights or the rights of defence are very rarely successful.

By letting cooperation increase within the EU for less serious offences instead of focusing on serious ones (which is the current tendency) and by not providing transparency in the system, the acceptance of mutual recognition instruments will continue to be low at the level of judges, defence lawyers, and also citizens. Three main reasons for this perception are put forward.

First, mutual recognition entails a fundamental shift since the person concerned is always referred to the issuing State to put forward arguments against his criminal allegations. This does not correspond to the natural understanding of the accused who is used to seeking guidance at the initial stage of proceedings in his/her usual legal environment, i.e., before the executing authority. It is therefore deemed essential to establish and strengthen double defence, i.e., quickly organise defence support for the person concerned in both the executing and issuing State. Double defence should be flanked with: (1) a letter of rights for effective exercise of the defendant's rights, (2) a legal aid system for equal access to defence council, and (3) an early mandatory involvement of defence lawyers at the very beginning of the procedure in order to provide proper legal advice.

Second, mutual recognition entails that persons are treated differently in transnational cases as compared to purely national ones. As to the EAW, for instance, there is differentiation between poor and rich defendants; differentiation in treatment as to extradition of nationals and residents; different durations and conditions of extradition detention; different applications of defence rights among the courts, etc. Hence, it is deemed necessary to set common standards, such as taking into account the social environment and the social rehabilitation of persons when executing requests, EU-wide grounds for detention, or common rules on the suspension of arrest warrants, including a European system of bail.

Third, the mutual recognition regime entails a strong formalisation of the procedure with very concise information, which leads to the effect that judges and defendants are cut off from essential information that they normally have access to in the traditional

system of international cooperation in criminal matters. This also leads to frustration on the part of judges, who need this information in order to take a well-deliberated decision (which corresponds to their professional self-perception), and on the part of defence lawyers, who should be enabled to advise the client appropriately.

On balance, the challenge of the EU will be to counterbalance the citizens' feeling that the system is not understandable and that they are an object of the omnipotent State authorities. This can be achieved by a further alignment of differing national legal standards by common EU rules – which, however, should go beyond mere minimum standards. Beyond that, practical measures are needed, such as the establishment of institutionalised networks of defence lawyers and increased information between judges and prosecutors that provide for better insight into the proceedings of the issuing State. An increased exchange of information on the unfamiliar criminal law and criminal procedural law of the EU Member States by means of a systematic and comprehensive database could mark the top of the development of improved transparency.

Mutual recognition in criminal matters: the Danish experience

Jørn Vestergaard and Silvia Adamo

1. Introduction

The study reported in the following is in part based on information provided by a comprehensive sample of legal practitioners possessing extensive experience within the field of international criminal law cooperation [1]. Before turning to an account of the experts' evaluation regarding the implementation of mutual recognition instruments, an overview of the relevant legislation will be presented.

Denmark joined the EEC in 1973. In the wake of a rejection by public referendum of accession to the Maastricht Treaty in 1992, a so-called "national compromise" was struck between a majority of political parties. As a consequence, the Maastricht Treaty was supplemented by the Edinburgh Agreement between Denmark and the then 11 other Member States, providing Denmark with a number of opt-outs from participation in EU policies in the areas of union citizenship, monetary policy, the defence dimension, and Justice and Home Affairs. Subsequently, an additional referendum was conducted in 1993, this time concluding in an approval. Thus, Denmark participates fully in the intergovernmental cooperation on Justice and Home Affairs under the Third Pillar, for

[1] All respondents are prominent legal experts who are currently or have recently been involved in the negotiation, transposition or application of the framework decisions at focus in the study. In Denmark, the administration of international criminal matters is concentrated in Government agencies well represented by the public servants among the respondents. The authors are grateful for the courteous co-operation of afdelingschef Jens Kruse Mikkelsen, kontorchef Jens-Christian Bülow, fuldmægtig Rikke Freil Laulund, kontorchef Christina Toftegaard Nielsen, fuldmægtig Jakob Kamby, politidirektør Johan Reimann, statsadvokat Jesper Hjortenberg, chefanklager Carsten Egeberg Christensen, vicepolitimester Tomas Frydenberg, chefjurist Lykke Sørensen, statsadvokat Lennart Hem Lindblom, advokat Jakob Juul, advokat Jakob Lund Poulsen.

instance in the fight against terrorism, but is in general not a party to supranational cooperation under the First Pillar. Denmark also participates in the Common Foreign and Security Policy except for decisions and actions with defence implications.

Danish legislation on mutual recognition in criminal matters is subsumed into two major acts:

- *The 1967 Extradition Act*, as amended in 2003 and subsequently [2].
- *The 2004 Act on Execution of Decisions in Criminal Matters in the European Union* [3].

2. The two major acts implementing mutual recognition in Denmark

A. The 1967 Extradition Act, as amended in 2003 and subsequently

1. Legislation preceding transposition of the EAW FD, including the 1960 Nordic Act

Prior to the transposition of the Council Framework Decision on the European Arrest Warrant (herinafter: the EAW FD), Danish extradition law encompassed two separate acts [4]. The first legislation on extradition matters to be enacted in Denmark was the 1960 *Act on Extradition of offenders to other Nordic countries* (the Nordic Extradition Act). By 1967, a common *Act on Extradition of offenders* (the common Extradition Act) was at long last passed, thus implementing the European 1957 Convention on Extradition while upholding the above mentioned Nordic Extradition Act.

Compared to the provisions in the 1967 common Act, the legislation regulating extradition relations between the Nordic countries is characterized by less restrictive conditions for extradition and more simplified procedures. This is a reflection of the mutual confidence and trust between these neighbouring countries as a result of a relatively high degree of similarity in terms of cultural and legal traditions. From a Danish perspective, relations between the Nordic countries, as well as the broader activities of the Council of Europe, have been important preludes to the recent efforts in judicial cooperation under the Third Pillar on the extradition of suspects, defendants and convicts.

Both of the two mentioned acts were amended for the implementation of the EAW FD.

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[2] 1967 common Extradition Act 249 of 9 June 1967 [*Lov om udlevering af lovovertrædere*]. The current consolidation of the Extradition Act is Consolidation Act [*lovbekendtgørelse*] 833 of 25 August 2005.

[3] Act 1434 of 22 December 2004.

[4] See also J. Vestergaard *in* A. Górski & P. Hofmanski (eds.), *The European Arrest Warrant and its Implementation in the Member States of the European Union*, Wydawnictwo C.H.Beck, 2008, p. 47-53 and 189-232. International Conference, Krakow, 9-12 November 2006. For a more elaborate account of the state of legislation in Denmark with regard to extradition, see J. Vestergaard (article in Danish): "Den europæiske arrestordre. Udlevering til strafforfølgning mv.", *Tidsskrift for Kriminalret*, 9/2004, p. 555-567.

2. The 2003 transposition Act and other amendments to the Extradition Act, including those related to the Nordic cooperation

The process of transposing the EAW FD into Danish law was completed by the end of May 2003, Denmark being one of the first Member States to complete implementation. This early implementation by means of legislative action undoubtedly had the effect of rendering the EAW the mutual recognition instrument that is most commonly known and practised by Danish authorities to date [5].

The passing of the Government's bill signified Parliament's consent to the Government's participation, on Denmark's behalf, in the adoption of the EAW FD [6]. Before political agreement is concluded in the Council, the Danish Government will in general ensure that a sufficient negotiation mandate has been obtained from the legislature, i.e. the Parliament of Denmark, *Folketinget* [7]. If domestic legislation needs amendment, a bill will often be introduced at an early stage.

The amended chapters in the 1967 common Extradition Act specifically concern relations with other EU Members States. The new rules concerning extradition from Denmark to another EU Member State on an EAW are contained in Chapter 2(a) (conditions for extradition) and Chapter 3(a) (procedures for dealing with such cases) of the Extradition Act.

The amended provisions of the common Extradition Act, enforced on 1 January 2004, apply to requests for extradition submitted after that date [8].

The Ministry of Justice stipulated that the new concepts used in the EAW FD do not differ substantively from the content of traditional terminology, so the previously used terms were retained in implementing the Framework Decision in Denmark. The EAW FD uses the term "surrender" instead of "extradition". As both terms involve the actual handing over of a wanted person to the requesting country, the term extradition is applied in the amended provisions of the Extradition Act too.

So far, extradition from Denmark to one of the other *Nordic countries* remains covered by the provisions under the amended 1960 Act on extradition of offenders to Finland, Iceland, Norway and Sweden. However, the provisions regarding extradition

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[5] The EAW-FD was implemented by means of Act 433 of 10 June 2003 amending the 1967 Act on Extradition of Offenders and the 1960 Act on the Extradition of Offenders to Finland, Iceland, Norway and Sweden (Transposition of the EU-Framework Decision on the European Arrest Warrant, etc.) [*Gennemførelse af EU-rammeafgørelse om den europæiske arrestordre mv.*]. The amended provisions came into force by 1 January 2004 and apply to arrest warrants presented after that date.

[6] In principle, Denmark follows a *dualist* doctrine of international law. Thus, under Danish law, international legal obligations are not binding in domestic law unless they have been specifically incorporated by way of legislation.

[7] Except with the approval of Parliament, *Folketinget*, the Danish Government may not enter into any obligation of major importance, e.g. a treaty requiring domestic implementation by law, see para. 19 (1) of the Danish Constitution.

[8] See para. 3 of the 2003 amendment Act. The Permanent Representative of Denmark informed the Secretary General of the Council of the European Union of the transposition by letter received 7 November 2003. Cover note to the General Secretariat, Brussels, 16 January 2004, 5348/04, COPEN 13, EJN 5, EUROJUST 5.

on the basis of an EAW are applicable in relation to Finland and Sweden insofar as those rules are more far-reaching[9]. The latter rule may have a particular impact in cases involving extradition of Danish nationals or extradition for political offences as the provisions in the 1960 Nordic Extradition Act might in such instances have a narrower scope in certain respects.

In order to harmonize specific Nordic extradition law with the EAW format and still preserve the particular features of the Nordic legislation, an international agreement on a Nordic Arrest Warrant was entered in 2005. Consequently, it has been decided to abolish the Act on Extradition of offenders to other Nordic countries and to amend the common Extradition Act accordingly. In November 2006, the Minister of Justice proposed a bill on a Nordic Arrest Warrant aimed at obtaining Parliament's consent to ratification of a convention signed by the Nordic countries. Legislation was accordingly passed in early 2007[10]. The purpose is to harmonize specific Nordic extradition law with the EAW format and still preserve the particular features of the Nordic legislation by covering all extradition issues in a comprehensive Act and annihilating the 1960 Nordic Extradition Act as an independent piece of legislation. The 2005 convention widens extradition conditions and further simplifies procedures and is in that respect even more far-reaching than the EAW. So far, these changes have not been enforced, as parallel legislation has not yet been fully implemented in all Nordic countries.

The impending amendments of the 1967 Extradition Act specifically concern relations with other Nordic countries. So far, the new rules concerning extradition from Denmark to another Nordic country on a Nordic Arrest Warrant have not yet been enacted. Eventually, they will be contained in a new Chapter 2(b) (conditions for extradition) and a new Chapter 3(b) (procedures for dealing with such cases) of the Extradition Act.

The amended provisions regarding extradition for prosecution or enforcement of a sentence in another EU Member State imply a number of significant alterations of the previously applicable modality of extradition under Danish law. Attention has mainly been focussed on the following points:

- Extradition may no longer be refused on the grounds that there is insufficient evidence to support the charge or conviction for an act for which extradition is sought.
- Issue of an EAW will in itself provide the basis on which to secure a person's extradition for prosecution or service of sentence, and it is no longer possible to demand that an underlying arrest or custody warrant be supplied.
- Danish nationals will basically be extraditable in the same way as foreign nationals, although a condition regarding re-transferral for serving the sentence in Denmark may be stipulated (see Article 5(3) EAW FD).

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[9] See the 1960 Nordic Extradition Act para. 1(2)(2).

[10] Act 394 of 30 April 2007 on the implementation of convention on surrender for criminal offences between the Nordic countries (Nordic Arrest Warrant etc.) [*Gennemførelse af konvention om overgivelse for strafbare forhold mellem de nordiske lande (nordisk arrestordre mv.*)].

- Extradition may no longer be refused on the grounds that the offences involved are of a political nature.
- Double criminality is no longer required for a number of offences, specified on the "positive list" (see Article 2(2) EAW FD).
- A number of new grounds for refusal have been introduced, some of which are mandatory (i.e. extradition has to be refused), while others are optional (i.e. extradition may be refused, following concrete assessment in the individual case).
- A European arrest warrant has to be dealt with within shorter time limits than in the past and the Act includes deadlines for processing time, for a decision on extradition and for a possible judicial review.

On 23 February 2005 the Commission issued its report on the Member States' implementation of the EAW FD [11]. In the report – and in the Commission staff working document annexed to it – the Commission concluded that Denmark had not implemented some of the provisions of the Framework Decision and had not fully implemented others. In Denmark's comments to the Commission report and the staff working document it is stated that in Denmark's view the EAW FD has been fully transposed into Danish law, and that Denmark therefore cannot understand the Commission's criticism [12].

3. About some of the main changes introduced and some of the choices made by the Danish legislator

a) Judicial Authority and available judicial remedies

Under the 1967 common Extradition Act, the role of issuing as well as executing judicial authority has been assigned to the Ministry of Justice. This arrangement might appear rather odd to someone from a country where such tasks have traditionally been a matter for the courts, or to someone who takes the wording of the Framework Decision very literally.

Clearly, this model does not completely remove the authority from the administration and the potential influence of the Government. Still, it is presumably a scheme that will work to the benefit of the individual, as it not only ensures a certain degree of uniformity and accountability, but ultimately furthers legality and independency too. The individual in question has full access to court review and even to subsequent appellate review of an initial court decision.

A possible flaw of this system, if any, would eventually be an inherent tendency towards reluctance to extradite rather than the opposite. All other things being equal, this means that the individual's rights are relatively well protected by checks and balances.

In the Commission report on the EAW it is stated that it is difficult to view the designation of the Ministry of Justice as being in the spirit of the Framework Decision.

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[11] COM (2005) 63 final and the annex SEC (2005) 267. A second report in 2007 contained similar remarks see COM (2007) 407 and the annex SEC (2007) 979.

[12] Regarding Member States' comments to the Report from the Commission on the EAW, see further 11528/05, COPEN 118, EJN 40, EUROJUST 44.

Furthermore, the Commission states that the designation of an organ of the state as a judicial body in this context impacts on fundamental principles upon which mutual recognition and mutual trust are based.

Denmark has commented that it disagrees altogether with the Commission's views concerning Denmark's designation of the Ministry of Justice as the competent judicial authority. The reasons for this are as follows: Article 6(1) EAW FD and Article 6(2) EAW FD state that the issuing judicial authority and the executing judicial authority shall be the judicial authority of the Member State which is competent respectively to issue or execute an EAW by virtue of the law of that State. Thus, under the Framework Decision it is for the individual Member State to decide who will issue and execute European Arrest Warrants, and designating the Ministry of Justice of a Member State as the competent judicial authority, assuming of course that the relevant ministry is a judicial authority under national law, in no way conflicts with the wording of the EAW FD.

Under Danish law, the concept of "judicial authorities" traditionally includes the courts and the prosecution authorities. According to the Danish law on the administration of justice, the prosecution authorities comprise the Ministry of Justice, the Attorney General (*Rigsadvokaten*), the regional public prosecutors (*statsadvokaterne*), and the Commissioners of Police (*politidirektørerne*) and their chief prosecutors. Furthermore, it follows directly from the Danish Penal Code that charges for crimes against national security may be brought only by the order of the Ministry of Justice.

Denmark maintains the position that there is no question of Denmark wishing to create some special arrangement for European Arrest Warrants by designating the Ministry of Justice as the judicial authority for the issue and execution of such warrants. Furthermore, under Danish law the Ministry of Justice has the central competence as regards extradition, and even before the adoption of the EAW FD, the Ministry dealt with cases involving the extradition of offenders to other EU Member States. Also, a decision taken by the Ministry of Justice to extradite a person could always unconditionally be brought before the Danish courts and tested by two instances. Among the reasons for this was the fact that this would result in the same allocation of authority and procedure for handling extradition requests on the basis of an EAW as applied for extradition requests on the basis of e.g. the European 1957 Convention on the Extradition of Offenders. Denmark also wanted to ensure uniform practice in the handling of European arrest warrants, and it was found this would best be achieved by giving authority to the Ministry of Justice.

b) Extradition of own nationals

Extradition of Danish nationals has not generally been possible under Danish law. However, this restriction is not prescribed by the Constitution. The 1960 Nordic Extradition Act permits extradition of Danish citizens in more serious cases as well as when the person has previously lived in the requesting country for at least two years. In 2002, the 1967 common Extradition Act was amended so that it became possible for the first time to extradite a Danish national to a State outside the Nordic countries. The amendment was part of a so-called antiterrorism bill presented soon

after September 11th, 2001 [13]. The double criminality requirement was still generally maintained. At the time when the bill was presented and enacted, the negotiations on the draft EAW FD had by and large been completed and, consequently, more far-reaching amendments were anticipated. The in-between initiative, however, might have facilitated the more far-reaching changes soon to come.

In accordance with the Framework Decision, extradition from Denmark to another Member State can no longer be refused for the reason that the person is a Danish national. However, Denmark has chosen to take advantage of the optional Article 5(3) EAW that makes the surrender of nationals subject to the condition that the person will be returned to the executing State to serve any custodial sentence or detention order passed in the issuing State. Furthermore, the execution of an arrest warrant in conviction cases may be refused if the judicial authority decides that the sentence should be executed in Denmark.

c) Political offence exception

Traditionally, extradition for political offences has not been permitted by Danish law. However, the 1960 Nordic Extradition Act limited this restriction solely to Danish nationals. The EU 1996 Convention requires that offences covered by the European 1977 Convention on Terrorism be removed from the remit of the political offence exception [14]. Consequently, the 1960 common Extradition Act was amended in 1997. As a result of the 2002 antiterrorism package mentioned above, two further modifications were added in the form of references to the UN conventions on suppression of terrorist bombing and financing of terrorism, respectively. In 2006, additional reference was made to the UN convention on the combat of nuclear terrorism.

According to the EAW FD, the political offence exception is no longer relevant. Thus, it is left out of the new provisions of the common Extradition Act [15]. However, execution of an arrest warrant shall continue to be refused if there is "a serious risk that the person will be persecuted for political reasons" [16].

d) Double criminality and territoriality clause

In Denmark, extradition without a double criminality requirement was partially authorized by the provisions of the 1960 Nordic Extradition Act [17]. The general requirement under the 1967 common Extradition Act was that the conduct for which

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[13] This revision of the common Extradition Act implemented the EU Extradition Convention of 1996 and allowed Denmark to withdraw a previous reservation regarding the extradition of its own nationals.

[14] Denmark had made a reservation to the 1977 Convention and thus maintained the right to refuse extradition for any kind of political offence. Furthermore, Denmark made reservations to Ch. 1 of the Additional Protocol 1975 to the European Convention on Extradition and so maintained the right to refuse extradition for offences covered by the Convention on Genocide and the Geneva Conventions.

[15] Similarly, military offences are no longer considered a valid bar to extradition.

[16] 1967 common Extradition Act para. 10(h)(1).

[17] Under the Nordic Extradition Act, there is a requirement of double criminality and of a maximum punishment of at least 4 years imprisonment in the case of Danish citizens who have

extradition was requested had to be punishable under Danish law by a maximum sentence of at least 4 years imprisonment. In accordance with the EAW FD, the double criminality requirement has now been abolished for the listed 32 offences[18]. The terminology of the common Extradition Act nonetheless indicates that there may be grounds for refusal in a specific case, for instance on grounds of human rights concerns, even where double criminality is not required. A maximum period of at least 3 years imprisonment under the law of the issuing State is now required.

For any offence not listed in the Framework Decision, double criminality remains a requirement under the 1967 common Extradition Act[19]. However, in accordance with the European 1957 Convention on Extradition, the maximum punishment may now be as low as 1 year's imprisonment under the law of the issuing State, a threshold Danish negotiators were reluctant to accept. There is no longer a punishment threshold in domestic law.

In several responses to the Danish Government's consultation on the draft EAW FD and the Extradition Bill, concern was expressed about the abolition of double criminality, not only from the Bar Association but also from police and prosecutors. In practice, the Framework Decision list does seem to present a real problem. So far, at least, no case has occurred to substantiate such worries. It is difficult to imagine that a European Arrest Warrant will be issued in ordinary criminal cases concerning minor offences. And naturally, the executing authority will be obliged to ensure that an act is not mislabelled in an attempt to run a smoother extradition business. Political propaganda within the usual boundaries accepted in democratic societies cannot be crudely termed as terrorism, sabotage or racism and xenophobia in order to secure extradition. Minor acts of shoplifting cannot arbitrarily be listed as organised theft.

For offences other than those covered by Article 2(2) EAW FD, surrender may be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described (see Article 2(4) EAW FD). Thus, an executing judicial authority may refuse to recognise a judicial decision issued in another Member State if, in one of the cases referred to in Article 2(4) EAW FD, the act on which the EAW is based does not constitute an offence under the law of the executing Member State (see Article 4(1) EAW FD). Denmark has made use of the option granted in the EAW FD to set up indispensable requirements regarding double criminality for certain categories of cases. The traditional requirement regarding double criminality has only been removed for conduct listed in Article 2(2) EAW FD. An EAW must, therefore,

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not for the previous two years been resident in the requesting State. In cases regarding political offences, there is also a requirement of double criminality.

[18] In English the text is "shall give rise to surrender". "without verification of the double criminality of the act". In French it reads "*donnent lieu à remise*". "*sans contrôle de la double incrimination du fait*". In the Danish Extradition Act the wording is that extradition "may be completed on the basis of an European Arrest Warrant, even though a similar act is not punishable under Danish law" (author's translation), see para. 10(a)(1).

[19] The requirement of double criminality implies that the act was considered a criminal offence under Danish law at the time of committing the act as well as at the time of trial.

be refused for all conduct falling outside the "positive list" where such conduct does not constitute an offence under Danish law[20].

An EAW regarding *prosecution* in another EU Member State may only be executed for acts not covered by Article 2(2) EAW FD[21], if the offence is punishable by imprisonment for at least 1 year under the law of the issuing State, and the act is considered an offence under Danish law[22]. An EAW regarding *enforcement of a sentence* in another EU Member State may be executed for acts not covered by Article 2(2) EAW FD, where a sentence has been passed or a detention order has been made, if the sanction is a sentence of at least four months, and the act is considered an offence under Danish law[23]. No particular requirements have been established concerning the level of punishment under Danish law in addition to the precondition regarding double criminality. Extradition for prosecution or enforcement of a sentence may be executed for multiple offences even though the conditions stipulated above only are met for one of the relevant offences[24].

Indeed, the EAW FD contains a territoriality clause allowing extradition to be refused, even for offences that fall within the Article 2(2) list, where the arrest warrant relates to offences that have been committed in the whole or in part of the territory of the executing State. Under the amended 1967 Extradition Act, this optional clause has been adopted as mandatory where the act is not a criminal offence under Danish law[25]. In cases of this sort it will not make any difference whether or not the act is covered by the Framework Decision list since the person cannot be extradited in either case.

e) Bars to extradition

The history of the EAW FD as well as that of the amended 1967 Extradition Act demonstrates that the Department of Justice fought vigorously to protect the traditional principles of Danish extradition law, while simultaneously acknowledging the need to develop good practice regarding mutual recognition. During the political negotiations, Denmark therefore argued against the initial proposal to abolish double criminality generally, preferring a "positive list" of specific offences. Similarly, Denmark supported the widest possible use of the reservation regarding constitutional and human rights. In the amended Extradition Act, all optional clauses in the Framework

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[20] In the *travaux préparatoires* of the amendment Act is was stated that the requirement regarding double criminality shall be administered in a flexible manner in accordance with Article 2(4) FD, so that the requirement is found to be fulfilled if an act described in an EAW in whole or in part correspond to an offence under Danish law. Regardless of legal classification, it shall be sufficient that the accusation, the indictment or the judgement concerns an act which would have been considered an offence if committed in Denmark.

[21] Article 2(2) EAW-FD has been transposed into para. 10(a)(1) of the amended 1967 common Extradition Act.

[22] See para. 10(a)(2) of the Extradition Act.

[23] See para. 10(a)(3) of the Extradition Act.

[24] See para. 10(a)(4) of the Extradition Act.

[25] See para. 10(f)(1) of the Extradition Act.

Decision have been incorporated as mandatory bars to extradition. The same is true of the optional provisions on guarantees to be given by the issuing State [26].

f) Human rights

In accordance with the EAW FD, extradition must be refused if the conduct for which the arrest warrant is issued is regarded by the Danish judicial authority as a lawful exercise of rights and freedoms of association, assembly or speech protected by the Danish Constitution or the ECHR [27]. By means of this "cat flap" clause, the executing authority is vested with sufficient discretionary power to avoid unreasonable classifications by the issuing authority within the Framework Decision list, for instance under the heads of organised crime, terrorism, racist and xenophobic offences. Naturally, the vague character of some of the terms included on the list may give rise to concern, and an executing authority cannot always be relied upon to activate the brake in politically sensitive cases. However, the existence of the human rights clause will minimise the risk of an arrest warrant being abused by an issuing authority or accepted by an executing authority for reasons of convenience or to maintain good international or inter-agency relations.

Under the Danish Extradition Act, therefore, the executing authority may refuse to execute an arrest warrant by reference to fundamental rights and freedoms if a case merely regards passive participation in a criminal organisation, since an offence with such a general scope does not exist in Denmark. Similarly, it is well known that the concept of terrorism is vague. Under Danish law, the definition in the Framework Decision on terrorism was adopted when enacting the earlier mentioned antiterror package in 2002 which gave rise to fierce discussions regarding the lack of precision in the amended provisions. It might be of some consolation for those of us who are still concerned on this issue, that the Council declaration regarding respect for fundamental rights has explicitly been mentioned in the Danish *travaux préparatoires*.

g) Torture and other inhuman or degrading punishment or treatment

As a supplement to the draft amendment to the Extradition Act, a provision was added that explicitly states that extradition shall be refused if there is a risk that the individual will be subjected to torture or to other inhuman or degrading treatment or punishment in the issuing State [28]. This initiative sent an encouraging, if redundant, message since the provision does not add anything to Article 3 ECHR [29].

h) Humanitarian considerations

Humanitarian reasons as a bar to extradition have been reduced to a less prominent position in the Extradition Act. Previously, the Extradition Act included non-compliance with humanitarian considerations as a general bar to extradition. Henceforth, even

[26] See 1967 common Extradition Act para. 10 (b) ff.
[27] See EAW-FD article 1(3) and preamble para. 12.
[28] See 1967 common Extradition Act para. 10(h)(2).
[29] The ECHR was specifically incorporated into Danish law in 1992.

serious humanitarian reasons may only temporarily postpone extradition [30]. However, since there is no fixed time limit for the postponement, it should not be difficult to strike a reasonable balance in individual cases, for instance by deferring extradition for an indeterminate period of time if necessary. It will therefore be possible to conduct mental examinations where appropriate. If a requested individual is seriously mentally ill, extradition would be barred by virtue of humanitarian considerations.

i) Overall account of the EAW FD transposition into Danish law

Quite understandably, the introduction of the EAW gave rise to profound concerns regarding the abolition of traditional principles and requirements under the law of extradition. The hectic political activities in the wake of September 11th gave good reason for worries in relation to civil rights. However, from a principled perspective the result of the legislative efforts became fairly balanced. As far as Danish extradition legislation is concerned, all available handles were pulled to ensure that an arrest order will not be executed unless it is reasonably fair and just. Legally, there is sufficient basis for defending the individual's relevant interests, and competent agencies and actors have been assigned the relevant tasks in safeguarding fundamental freedoms and rights properly.

B. The 2004 Act on Execution of Decisions in Criminal Matters in the EU

The Act of Execution of Decisions in Criminal Matters in the European Union [31] transposed in one single piece of legislation the Framework Decision 2003/577/JHA on the *freezing of assets and evidence*; the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties*; and the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to *confiscation orders*.

The Act entered into force on 1 January 2005, and the provisions in the Act apply to requests for execution submitted after that date [32].

The Act was amended in 2008 in order to pre-implement the proposal COM(2003)688 for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (hereinafter: the EEW FD) and the initiative JAI(2005)2 [33] with a view to adopting a Council Framework Decision on the deprivation of liberty and the transfer of sentenced persons between Member States of the European Union [34].

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[30] See 1967 common Extradition Act para. 10(i).

[31] Act 1434 of 22 December 2004 [*Lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union*].

[32] See Act 1434, 2004 para. 62.

[33] Doc. 5597/05, COPEN 13 of 24 January 2005 (*OJ*, no. C 150, 21 June 2005, p. 1).

[34] Act 347 of 14 May 2008 [*Lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*].

So far, the amended provisions of the Act have not been enforced, while the framework decisions have in the meantime been adopted [35].

A decision based on one of the mutual recognition instruments may be executed by the relevant authorities in Denmark without any requirement of double criminality if the offence is included in the particular "positive list" applicable to the specific type of decision and if it carries a sentence of minimum 3 years of imprisonment [36].

For offences other than those covered by Article 7(1) of the FD on deprivation of liberty and the transfer of sentenced persons between Member States [37], the executing State may make the recognition and enforcement of a European enforcement order subject to the condition that the order relates to acts which constitute an offence under the law of the executing State, whatever the constituent elements or however it is described (see Article 7(3)). Denmark has stipulated that the option granted in the FD may be used to establish a rule to the effect that execution of a decision regarding imprisonment may be refused if an offence not covered by the "positive list" set up under Danish law or not carrying a sentence of at least 3 years in the issuing State is not a criminal offence under Danish law [38]. Thus, an optional ground for refusal has been established in cases regarding offences outside of the "positive list" in domestic law, which do not have a corresponding offence under Danish law.

The possibility to enforce a double criminality requirement is intended to be optional and subject to limitations due to other considerations. In the *travaux préparatoires* of the amendment Act it was stated that the possibility to take over the serving of such a sentence in Denmark should not be excluded, even if the offence is not criminalised in Danish law, in those cases where 1) the individual in question so wishes and 2) considerations about his/her resocialization point in the same direction [39]. So even if a double criminality requirement is not met, refusal is optional with a view to the particular features of the case and the general aim of resocialization [40]. This can be seen as a further limitation of the requirement of double criminality which contributes to the advancing diminution of its importance.

The persons interviewed for the present study agreed that it is important to have an exemption from the basic principle regarding a double criminality requirement,

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[35] 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,* no. L 350, 30 December 2008, p. 72); Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ,* no. L 327, 5 December 2008, p. 27.

[36] See 1967 common Extradition Act para. 10(a) as amended by Act 433, 2004. See Act 1434, 2004 para. 6, para. 13(e), para. 19, para. 29(c), para. 32 as amended by Act 347, 2008.

[37] Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (*OJ,* no. L 327, 5 December 2008, p. 27).

[38] Act 347, 2007 para. 29(c)(2).

[39] Parliamentary Bill 2007-08 L 79, p. 49, part 3.2.1.

[40] Parliamentary Bill 2007-08 L 79, p. 72, commentaries ad para. 29(c).

even if the use of such an optional ground for refusal is considered as a somewhat remote contingency.

3. Transposition of mutual recognition instruments

A. Constitutional setting and parliamentary tradition

As may be noted from the above parts of the chapter, European law is sometimes implemented by the Danish Parliament on a pre-emptive basis, i.e. bills are introduced and legislation is passed and enacted while negotiations regarding draft instruments are still pending in the Council. This tradition reflects the constitutional framework.

The text of the Danish Constitution is rather brief. The relative vagueness of the statutes allows for a pragmatic and quite smooth development of democratic and legal traditions [41]. Basically, legislative powers are attributed to the national parliament, *Folketinget*, which has 179 seats. Typically, the country is run by a minority government based on party coalitions. In effect, opposition parties are sometimes able to exercise considerable influence within specific policy areas.

Important parliamentary activities are rooted in standing committees set up according to Parliament's Standing Order, i.e. rules of procedure [42]. The committees are composed by parliament members representing the various political parties on a proportional basis, typically consisting of 17 delegates and an equal number of substitutes. Any legislative bill is referred to the relevant committee for reading and submission of a committee report. Moreover, the committees actively participate in the checks and controls on government business in general. Within the area of penal and procedural law, the parliamentary Judiciary Committee, [43] *Retsudvalget*, has been vested the tasks of scrutinising pending legislation, posing written questions to the responsible minister, typically the Minister of Justice, consulting with ministers appearing in person before the Committee, etc. Within the area of Community law, the parliamentary European Affairs Committee, *Europaudvalget*, bears the responsibility for performing the relevant tasks [44]. A third standing committee, the Foreign Affairs Committee, *Udenrigsudvalget*, is dealing with matters regarding foreign, security and development policy in general.

In the area of foreign policy, there is to some extent an overlap between the areas of responsibility for the European Affairs Committee, the Foreign Affairs Committee and a committee of a somewhat different kind, the Foreign Policy Committee, *Det Udenrigspolitiske Nævn* [45]. A practice has been developed in which a parallel debate may take place in the Foreign Policy Committee and in the standing committees.

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[41] An English translation of the Danish Constitution may be found on the Parliament's website: www.ft.dk.

[42] For a brief account of the standing committees, see the Parliament's website.

[43] The Judiciary Committee, *Retsudvalget*, is sometimes referred to as The Legal Affairs Committee.

[44] Originally, the Committee was called the Common Market Committee, *Markedsudvalget*, but in 1994 it was renamed.

[45] See Constitution para. 19 (3), which further requires provisions applying to the Committee to be established by law, cf. Act no. 54 of 5 March 1954 on the Foreign Policy Committee.

A particular issue may sometimes be treated by more than one of the committees. In matters regarding the European Union, the European Affairs Committee plays a key role as the instance checking and debating the vast bulk of relevant initiatives, but as Home and Justice Affairs have come to play a rapidly increasing role in a Union context, the discussions and deliberations in the Judiciary Committee have become still more important too.

From a constitutional law perspective, conducting negotiations on the Community and Union level is an exercise of the Royal prerogative exercised by the Executive [46]. In practice, however, the Government will always seek to supply the European Affairs Committee and other relevant parliamentary committees with qualified information on pending initiatives at the earliest stage possible. In principle, neglect to obtain a proper parliamentary mandate would not involve any legal responsibility, but might very well imply a political problem for the responsible minister or for the Government as such. Besides issuing the committees relevant documents, the responsible minister will normally appear before the European Affairs Committee prior to Council meetings to brief the parliamentary members orally on the proposed Danish position and the expected negotiation eventualities. Typically, such a session will provide the minister with the necessary mandate for the upcoming negotiations in the Council. The mandate is not formally drawn up and might in some instances be of a more or less vague nature [47].

B. The transposition of mutual recognition instruments

It has been mentioned already that the process of transposing the EAW into Danish law was completed by the end of May 2003, Denmark being one of the first Member States to complete implementation. The amended provisions came into force by 1 January 2004 and apply to arrest warrants presented after that date.

Other instruments based on the principle of mutual recognition have been transposed within time limit too:

- Framework Decision 2003/577/JHA on the *freezing of assets and evidence*;
- Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties*;
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to *confiscation orders*.

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[46] In accordance with para. 19 (1) of the Constitution, the King (i.e. the Government) "shall act on behalf of the Realm in international affairs". Delegation of state powers to international authorities by mutual agreement with other States requires a majority of five-sixths of the members of parliament voting in favour of enacting legislation to the effect or a confirmation by public referendum of a bill adapted without obtaining the necessary qualified parliamentary majority, see Constitution para. 20. The said provision was introduced in 1953 and allows the current Constitution to provide a legal basis for accession to the European Communities.

[47] For further details on the procedures prior to Council negotiations, see the Ministry of Foreign Affairs website, where preparatory stages involving Government committees are described too: www.um.dk.

The Danish Parliament, *Folketinget*, gave its consent to the Government's participation in the negotiations of the framework decisions as early as of June 2003 [48]. This allowed preparation of the parliamentary bill for implementation of these instruments at the same time as the negotiations were conducted under the Council, and also led to the fact that the Act now implementing said framework decisions has been in force since 1 January 2005.

Since the procedure for implementation involves a parliamentary consent to negotiate at a very early stage of the drafting of the framework decisions, European legislation is implemented following the letter of the text. Therefore, at the time of the implementation the Danish Parliament respects the provisions laid down, even if they were originally pointing in a direction not favoured in the national context. To give an example, the creation of the "positive list" to revoke the requirement of double criminality was only reluctantly embraced by Danish authorities and politicians. Nevertheless, when the negotiations on this matter reached the point of agreement, there were no significant obstacles for accepting that the principle of mutual recognition requires to a large extent the abandonment of double criminality requirements. Consequently, the process of implementation is not an occasion for the reopening of previously settled issues, even if they were problematic to agree on.

C. Problems encountered concerning transposition

The issues that gave rise to problems during the transposition processes are mainly of legal nature, and neither political nor practical. The fact that a bill is prepared already under the process of negotiation at the European level may delay negotiations, but has the advantage of clearing the field (so to speak) for political misunderstandings at the time of implementation into national legislation.

The problems encountered are therefore mainly of legal character. It was noted by the interviewees that what represents a challenge is the transposition of the principle of mutual recognition so it fits the Danish rules for procedure and sentencing. To give an example, in the case of transfer of convicted persons, the question was raised of how to transfer the length of the conviction: if a certain offence gives for example a maximum of five years prison sentence in Denmark, but the criminal proceedings in another Member State led to a conviction of ten years, the debate was about how long then the convicted person should actually remain in custody. In these particular cases, if they arise in the future, the legislation provides for the Court to consider the matter and if estimated as appropriate to reduce the sentence in accordance with Danish sentencing standards.

It is therefore the clashing of different European legal traditions with regard to procedural and sentencing matters that can give rise to reflections during the process of implementation, as they directly challenge the national definition and content of rules and practices within such areas.

The legal problems encountered revolve solely around the optional grounds for refusal, and the solution indicated is to let the courts consider the concrete issues at

[48] Parliamentary consent given in accordance to the Constitution para. 19(1), see above.

stake. Matters related to the "positive lists" and directly addressed by the framework decisions were thus not cause for dispute during transposition into Danish Law.

D. Reciprocity and territoriality issues

Danish legislation based on mutual recognition instruments does not require reciprocity. In fact, the EAW-scheme has been applied even in an instance where, at the time of issue of an EAW, the issuing Member State had not transposed the Framework Decision into its national law, so that the issuing State would not itself be able to deal with an extradition request under the EAW rules.

The 1967 common Extradition Act addresses the issue of territoriality in para. 10(f)(2) which relates to the grounds for refusal of the execution of an EAW. Under said provision, a request may be rejected if it concerns an offence committed entirely or for a substantial part on Danish territory. Further, a request may be refused if the offence has been committed outside the issuing States territory and a corresponding act committed outside Danish territory would not be subject to Danish criminal jurisdiction.

The act on the execution of decisions in criminal matters in the European Union, in its latest version after the 2008 amendment, addresses the issue of territoriality in para. 13(h)(1) which relates to the grounds for refusal of the execution of an EEW. Under said provision, a request may be rejected if it concerns an offence committed entirely or for a substantial part on Danish territory. Further, a request may be refused if the offence has been committed outside the issuing States territory and a corresponding act committed outside Danish territory would not be subject to Danish criminal jurisdiction.

E. Procedures for executing a decision issued in another Member State

Under Danish law, the procedure for executing a decision issued in another Member State can be described as being a mixture of centralised and decentralised procedures. The explanation of this peculiarity lies in the structure of the Danish criminal justice system, in that the Minister of Justice is head of the police as well as the prosecution authorities [49].

For Denmark, the competent authority within the meaning of Article 6 EAW FD is the Ministry of Justice and as such the Ministry is the only authority with a competence to receive and execute EAWs [50]. The responsibility for initial examination of cases involving extradition on an EAW and the actual issuing of an EAW lies with the Ministry of Justice. Thus, the Ministry decides whether an EAW meets the necessary criteria for certification. The Ministry is the only designated judicial authority responsible for any official correspondence relating to extradition requests and competent to make decisions regarding execution of European Arrest Orders. The designation of the Ministry of Justice as the competent judicial authority means that

[49] See Appendix 1 for a diagram of the basic structure of the Police and the Prosecution Service.

[50] See Appendix 2 and 3 for diagrams explaining the procedure in the case of the executing and issuing an EAW, e.g. regarding the role of the Ministry of Justice in the processing of cases that fall within the framework of mutual recognition.

there has been no need to designate a central authority pursuant to Article 7(2) of the EAW FD [51].

The local police commissioner will inform the relevant district prosecutor and the Ministry of Justice of the need to issue an EAW for a wanted person. After being submitted to the relevant district prosecutor, the draft European arrest warrant is to be sent electronically to the Ministry of Justice, via the National Police Commissioner's Office for approval. Once the Ministry of Justice has approved and signed the European arrest warrant as issuing judicial authority, the original warrant is returned to the local police commissioner. A copy is also to be sent to the National Police Commissioner's Office (Communications Centre), for issue of an alert for the wanted person in SIS, the Schengen Information System, and of an internationally wanted person notice via Interpol.

With regard to the comprehensive Act on various matters regulated in European instruments, it is stated that the ordinary municipal courts shall decide on the execution of imprisonment sentences [52].

Decisions regarding the execution of decisions regarding fines or confiscation are vested with the Minister of Justice [53].

In the case of execution of certain decisions on *freezing* and *evidence* warrants, the comprehensive Act states that the competency to decide lies with the courts upon request from the prosecutor [54]. However, where the execution of EEW regards evidence material, which the prosecution authorities have already in its possession before the receiving of the warrant, the decision will be made by the prosecutor. The same holds true in instances where the relevant evidence could be produced without a warrant in a domestic case. In such cases the wanted evidence material will be produced in accordance with the normal requirements of the Procedural Code, and therefore there is no need to initiate court proceedings in order to verify the legitimacy of a transfer of evidence material to another Member State. With regard to instances where the prosecutor finds that the issued decision concerning freezing or evidence should not be executed, the Act states that the final decision lies with the Minister of Justice.

F. Issues regarding fundamental rights

According to the respondents, the protection of defendants' rights provided by the ECHR does not represent a problem, as the minimum standards for proceedings established by the Convention are generally complied with in the Danish criminal justice system.

Nonetheless, in the recent act of the execution of decision in criminal matters, an explicit reference to the preamble of the Framework Decision has been made. The Act establishes that a request for an evidence warrant should not be executed if "there is a reason to presume that the warrant was issued with the purpose of prosecuting a

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[51] See the previously mentioned Addendum to Cover note to the General Secretariat, Brussels, 16 January 2004, 5348/04 ADD 1, COPEN 13, EJN 5, EUROJUST 5.

[52] Act 347, 2008 para. 54(2).

[53] Act 347, 2008 para. 54(1).

[54] Act 347, 2008 para. 49.

person due to the person's gender, race, religion, ethnic origin, nationality, language, political beliefs or sexual orientation" [55].

4. Involvement of practitioners, their assessment of MR and practical application

A. Involvement of practitioners in negotiations and transposition

In Denmark the negotiations of new legal instruments are headed by the International Office under the Ministry of Justice. The International Office is the national central authority responsible for such negotiations, as its field of work is the international legal and police cooperation, mutual assistance cases, surrender cases, national and international drug-related questions, Schengen, Europol and European cooperation within the Third Pillar area.

Civil servants from the Ministry of Justice participate in negotiations, representing the position of the Danish Government. Practitioners from various other agencies are usually involved in the preparations, in that contributions are gathered from relevant professionals. Law enforcement officials and the prosecution issue information and opinions. This implies that the practitioners representing agencies that will be administrating the particular legal instruments are in fact involved in their negotiation. This procedure enhances the targeted adoption of efficient legal instruments since they have been immediately handled by the actors later to become responsible for their practical implementation.

As being the case with preparation and negotiations, practitioners are also involved during the implementation process. The parliamentary Bill is issued for a systematic hearing of relevant organisations and the agencies which will eventually be involved in the administration and enforcement of the final act. Inter alia, the Ministry of Justice addresses the Bar Association (*Advokatrådet*), the Court Presidents, the Court Administration Unit (*Domstolsstyrelsen*), the National Police (*Rigspolitiet*), The Danish Prison and Probation Service (*Kriminalforsorgen*), and the Data Protection Agency [56]. Occasionally, a draft bill is issued for hearing process prior to being revised and presented to Parliament.

B. Practitioners' general assessment of the mutual recognition instruments

The overall assessment by professionals involved in the negotiations on instruments regarding mutual recognition is generally positive. The assessment identifies the background for the development of the principle of mutual recognition in criminal matters as, on the one hand, the introduction of an area of freedom that formally and practically erased internal borders within the European Union, and, on the other hand, the high trust among Member States in the functioning of each others' legal system, that is the cornerstone upon which the principle of mutual recognition is

[55] Act 347, 2008 para. 13(f)(4).

[56] See materials presented to the Judiciary Committee, Parliamentary Bill 2007-08 L 79 – Annex 1, 27 February 2008. [*Kommenteret oversigt over høringssvar vedrørende udkast til forslag til lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om det Centrale Dna-profilregister*].

constructed. In this sense, the progression of mutual recognition in criminal matters is seen as a natural consequence of the general political developments in these areas.

The process initiated by the Tampere conclusions has defined the political goals and cleared the way for the introduction of legal instruments that are suitable to ease the promotion of the principle of mutual recognition. The most viable mode of progression, i.e. the most realistic way to concretize the political goals, is to align the various legal systems in Europe, and not necessarily to harmonise European penal systems completely. This standpoint was endorsed by other persons interviewed who were positive about not only the evolution of the principle of mutual recognition but also a more general rapprochement of legislation on criminal matters. Criminal law is especially arduous to harmonise completely since it represents a core aspect of the sovereignty of the national State. Alignment and approximation [Danish: *tilpasning* and *tilnærmelse*] are therefore preferred as good alternatives for the furthering of increased cooperation, which fits in well with a traditional Scandinavian pragmatic standpoint regarding policy matters.

The EAW is considered the most far-reaching and significant innovation in the European context, especially in light of the speedy adoption of the initial proposition for approval.

The introduction of the instruments of mutual recognition is viewed as an important symbolic step towards a certain degree of harmonisation of criminal law in Europe. Nevertheless, the situation before the principle of mutual recognition was established was also founded on trust and cooperation in the European context. The framework decisions have entailed an alignment and approximation of the national penal systems. They are founded on confidence among Member States that penal codes and procedures all across the Union have the same level of efficiency and respect for the rule of law. For this, the new instruments adopted are viewed by Danish civil servants and practitioners not as a total harmonisation but rather as a consolidation of the basic features of the different penal traditions in the various Member States. They represent the acknowledgement of the fact that as a starting point, efficient extradition/surrender to another European State must be facilitated by instruments based on the principle of mutual recognition, in that the national rules on procedure and evidence are recognised as being comparatively satisfactory.

It has been noted by the persons interviewed that the efficiency of the cooperation has increased after the adoption of EAW FD and other framework decisions. More specifically, the simplified proceedings are perceived as a notable advantage. The basic problem with the former system of legal assistance was the slowness of the process, which gave rise to a series of problems as regards the rule of law and the respect of due process for the parts involved in the proceedings.

Thus, the major improvement deriving from application of the principle of mutual recognition is the immediate recognition of requests of surrender, etc. This represents the crucial difference between the present legal instruments and the former systems with regard to extradition. Previously, the requirement of double criminality could potentially give rise to great encumbrance in the actual cooperation.

The concrete step forward in matters concerning legal cooperation is constituted by the level of efficiency and practical impact that the new instruments have carried

with them. The fact that the Member States could reach agreement on a "positive list" indicating in which cases an action is both allowed and required entails that there is no longer occasion for lengthy considerations on whether to send a request to another Member State or not. It has moreover been suggested that the partial abolition of the traditional requirement regarding double criminality might be interpreted as a political indication of an increased mutual trust regarding cooperation in criminal matters.

It is expected that the Framework Decision on Freezing Orders and the European Evidence Warrant will work in the same direction by facilitating improved cooperation and providing the formal conditions for a faster and smoother handling of cases.

C. Practical application

1. Introductory remarks

So far, the EAW is the only European instrument that has been widely utilized in practice, and in the respondents' experience with positive results. There are only few examples of case law or practical application of other instruments on the application of the principle of mutual recognition. This does not mean that these instruments are not applied as they should be, but merely indicates that it is too soon to evaluate their functioning. The Framework Decision on confiscation orders was introduced in 2006 and the Framework Decision on financial penalties in 2005, and even though they have been implemented within the time limit in Denmark, the practitioners interviewed could barely report any examples of their application so far (see the next section for one remarkable exception).

2. Practical problems and difficulties

Factors that tend to weaken or impair efficient cooperation in criminal matters are predominantly of a *practical* nature. Impediments or obstacles such as language differences and difficulties in communication might weaken the enhancement of cooperation.

In this respect, the persons interviewed could not recognise any particular problem with the current legal formulation of the instruments of mutual recognition. For instance, the theoretical possibility of hampering the traditional dual criminality clause by complying with the "positive lists" does not represent a practical problem as most offences on the lists are actually criminalized in all Member States.

Even with this fact in mind, examinations of whether the traditional double criminality requirement was actually met used to be rather time-consuming and potentially a barrier for transnational cooperation. In this respect, the creation of "positive lists" has helped a great deal in making this part of the process more effective.

The same rationale was applied in the drafting of the options regarding refusal, e.g. of a request for surrender of a suspect for prosecution. The justification for including both obligatory and optional grounds for refusal was the need for a balanced efficiency improvement and a politically acceptable solution. Having discussed and approved provisions on these matters, there is typically little reason to spend time and effort in investigating whether a request should be complied with or rejected. This arrangement created a transparent and simple instrument that encourages its actual use

since it demonstrates the ability to be an instrument that is respectful of the Member States' legal traditions and systems and that offers possibilities in borderline cases or controversial instances to pull the "emergency brake" or to leave by the "cat flap", e.g. if it is felt urgent to refuse surrender to another Member State.

Surrender of Danish nationals to another Member State has only taken place in a few instances and has not caused much concern among practitioners in the criminal justice system. This possibility is in general recognised as fair, as it is called for by common principles of constitutionality and justice; that criminals should be prosecuted. It is acknowledged that prosecution might subject Danish nationals to proceeding abroad, but such strain should not in itself preclude cooperation. Professionals involved in such cases have not had any serious concerns due to surrendering nationals to another Member State since the guarantees for a fair trial are perceived as sufficient all across the European Union.

The actual obstacles to efficient cooperation in criminal matters are not caused by differences between the substantive legislative systems of the Member States.

There are only expected to be a few cases where there could be uncertainty as regards the requirement of dual criminality. Theoretically, certain instances of abortion or expression of racism might be punishable in one legal system and not in Denmark, leaving practitioners with the ungrateful task of determining whether for instance an EAW should be executed in order to allow prosecution in another Member State. However, the scenario is regarded as being somewhat hypothetical. The actual cases do not generally pose any difficulty of similarity in definition.

The territoriality clause is not considered a problem for the practical application of the EAW. Even if, with the increasing mobility across borders and the potential for transnational criminality, it is theoretically possible to imagine that the territoriality clause may be used as a ground of refusal, it has been possible in practice to establish a certain connection with the State where the offence was in fact committed.

An important feature of cooperation is what can be called the "informal" side of cooperation between authorities which refers to the interpersonal communication and the practical conditions or framework for joined activities. More specifically, it was pointed out by several interviewees, that when a domestic authority is preparing the drafting of for instance an EAW, it is not uncommon to seek advice by the relevant authorities of the other Member State. The information gathered in that manner could for example revolve around assessing the definition of a particular offence in the penal system of the other Member State. As such, the transnational contact between authorities in charge of law enforcement is characterized by a great degree of informality that should not necessarily have a negative connotation.

The trust among police officers and other civil servants who meet on different occasions at venues for European cooperation should not be underestimated. The efficiency of cooperative activities increases with the opportunity to meet the respective colleagues from other Member States and fosters new cooperation mechanisms. A personal meeting with other colleagues, who work in the equivalent field in another Member State, can further transnational cooperation in criminal matters significantly as it offers the possibility to learn about each other's methods of investigation.

On the part of the defence lawyers, the main considerations refer to the legal position of defendants. In the case of confiscation for example, it was noted that there is a lack of regulation regarding provisional remedies to secure the economic interests of the individuals involved before a final judgement by the court is pronounced. From their point of view, it is regrettable that in the present formulation of the European instruments on mutual recognition, there is no possibility to protect the private legal interests at stake, the focus being entirely on countering alleged criminal activities.

The defence lawyers also maintain that in order to unite the efforts in the fight against crime, attention should not only be given to the material elements in the national penal systems, but also to the procedural rules. There is still from a defence lawyer's perspective need to protect the defendant against surrender to another Member State as this involves an evident strain as regards imprisonment conditions, language difficulties, displacement from family and known environment, etc.

3. Knowledge of legal instruments regarding mutual recognition

The EAW is incorporated in a very efficient way and is generally well-known among the relevant practitioners. Introduction courses and presentations have been established to inform the staff about rules and forms, so far mostly with regard to the EAW.

A set of Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW was issued in 2003 by the Ministry of Justice and circulated as binding instructions to the police and prosecution authorities [57]. Supplementary Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW were issued in 2004 by the Ministry of Justice [58].

The amended provisions regarding extradition based on an EAW do not require reciprocity. Thus, they are applicable even if, at the time of issue of an EAW, the issuing Member State had not transposed the Framework Decision into its national law, so that the issuing State would not itself have been able to deal with an extradition request under the EAW rules [59].

The defence lawyers interviewed would favour the compiling of a handbook or manual on the various criminal procedure laws in the European Member States.

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[57] *Justitsministeriets vejledning* 9498 *af 19. december 2003 om behandlingen af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre*. See Addendum to Cover note to the General Secretariat, Brussels, 16 January 2004, 5348/04 ADD 1, COPEN 13, EJN 5, EUROJUST 5.

[58] *Supplement til vejledning om behandling af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre*, *cirk.skriv*. 9678 of 14.12.2004. The Permanent Representative of Denmark informed the Secretary General of the Council of the European Union by letter received 14 January 2004. The letter included an addendum to the previous notification.

[59] Denmark has not made a statement under Article 32 of the Framework Decision relating to the date of the acts to which an extradition request relates. The 2003 amendment Act will apply to acts committed before as well as after it came into force, provided the request has been made after 1 January 2004. The only exceptions are in relation to France, Italy and Austria who have made declarations under Article 32 EAW-FD.

4. Cases and feedback

a) Execution of an EAW

As regards matters of executing an EAW, the legislation adopted has been clearly applied by the courts in the cases submitted up until now.

In 2004 the Supreme Court sustained a decision to surrender a Danish national to Great Britain for prosecution of alleged offences committed before the entering into force of the legislation implementing the EAW FD [60].

In a decision regarding a Danish citizen that was requested to be surrendered to Lithuania, the High Court recognised that the judicial review does not allow for an assessment of the evidence in the case [61]. The fact that only two of the five alleged offences were included in the "positive list", and that three other counts were either not criminal offences under Danish law or maybe statute-barred, did not impede the High Court from sustaining the Ministry of Justice's decision and consequently to execute the arrest warrant, just as the municipal court had concluded.

In a case from 2004, the Courts did not find the fact that Germany had not yet transposed the EAW FD to hinder the execution of an extradition request from the German authorities [62].

In a case regarding surrender to Hungary, the Copenhagen Municipal Court sustained the Ministry's decision to extradite, adding that "the obligatory and optional refusal grounds are exhaustively listed in the legislation [and] the Court cannot and shall not try any base of evidence in the arrest warrant" [63].

In a case regarding surrender of a Polish national for execution of an imprisonment sentence in Poland, the High Court found that the person had been adequately subpoenaed regarding the review of his indictment before a Polish appellate court, and that there were therefore no grounds for refusal to extradite [64].

In these cases and other examined for the purpose of this report, the courts were involved on behalf of defendants contesting decisions to extradite, not on behalf of Government authorities contesting an EAW. Even though the number of cases here presented is very limited, they show how effectively the EU regulation on the EAW has been received in Danish legislation, which can be a positive sign for the future implementation and use of other instruments on mutual recognition.

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[60] U 2004.2229 H. U = *Ugeskrift for Retsvæsen*, the standard journal reporting leading court decisions. H = *Højesteret*, The Danish Supreme Court.

[61] U 2006.7 V. V = *Vestre Landsret*, the Western High Court. An opinion from the Ministry of Justice explaining the extent of the rules in the Framework Decision and of their range of application was requested by the Prosecuting Authority and included in the case record. See the above mentioned U 2004.2229 H, in which case the matter regarding evidence was explicitly taken into account by the municipal court.

[62] *Københavns Byret* (Copenhagen municipal court), SS 1.10512/2004, 17/05/2004.

[63] *Københavns Byret* (Copenhagen municipal court), SS 23.18776/2005, 12/09/2005.

[64] TfK 2007.732 V. TfK = *Tidsskrift for Kriminalret*, a journal reporting leading court decisions in the penal area.

b) Issuing of an EAW

For years, there has been a great deal of public attention concerning a particular case regarding a killing that took place in Denmark during World War II. A group of Danish citizens collaborating with the German occupation forces abducted an editor of a Danish newspaper and shot him to death in a road side ditch. One of the perpetrators has been living in Germany for many years as a German citizen. An EAW was issued in 2006 aiming at prosecuting him for homicide before a Danish court. However, the Munich High Court refused to execute the EAW. The Danish issuing authorities had not produced sufficient evidence to prove beyond reasonable doubt that the killing was characterized by a particular mean motive (*niedrigen Beweggründe*) or an atrocious mode of acting (*heimtückischen Begehungsweise*). Thus, it was not possible to classify the offence as murder (*Mord*), in which case there would have been no statute-barred prescription. However, in this specific incidence the act of homicide (*Totschlag*) had since long been time prescribed under German law. Consequently, surrender was not an option under the German code on legal assistance (*Gesetz zur Internationalen Rechtshilfe in Strafsachen*, IRG) as recently amended with respect of the EAW FD[65]. According to Article 4(4) EAW FD, prescription is an optional ground for refusal in the sense that the individual Member State may decide the mode of implementation. Under German law, prescription has been made a mandatory ground for refusal.

c) Execution of fines

So far, only one case concerning execution of fines has come up, and it is still pending. This is probably due to the fact that the regulation has been adopted only recently.

d) Reporting

The Ministry of Justice has responsibility for establishing on a regular basis a survey of the cases and the application of the principle of mutual recognition. Until now, the only instrument covered in these summaries is the EAW.

The Criminal Law Office (*Strafferetskontoret*) at the Ministry of Justice is responsible for reporting to the Danish Parliament on the status regarding the administration of mutual recognition instruments.

5. Outlook for improvement

It has been brought up by some of the persons interviewed that "The Legal Atlas", which lists the name and contact numbers, e-mails and addresses of the relevant actors on issues of mutual recognition, is an important tool for mapping the different authorities in the Member States. It is very useful for officials dealing with European mutual recognition instruments to have an updated list with the names of individuals dealing with the same issues in all Member States. The Legal Atlas can

[65] *Oberlandesgericht München*, Beschluss 31.01.2007, OLG Ausl. 179/06. Previously, an EAW issued in Denmark had failed since the initial implementation of the EAW-FD has been declared unconstitutional by the German Constitutional Court, to the effect of which a German citizen could not be extradited as the legislation then in effect did not allow for this.

be found on the Eurojust website, under the European Judicial Network page. As a mutual assistance tool, it allows practitioners to find the locally competent body that can receive a request for mutual assistance and authorize a particular measure. It also provides an overview of some of the procedures for investigation which can be requested from another Member State, for example whether interception, recording and transcription of telecommunications is admissible, or whether another measure is possible under mutual judicial assistance. As it is, the major challenge is to keep the Legal Atlas updated so that the local authorities can use it as a starting point for requesting legal assistance.

There is also great support among the persons interviewed for Eurojust which, according to the respondents, should be used on a larger scale than it is nowadays.

It is seen as a positive rapprochement between the criminal European legal systems that the development is founded on a principle of mutual recognition and approximation instead of on a comprehensive harmonisation. Consolidation of the various texts in one single instrument is not considered as in itself an improvement for mutual cooperation initiatives. Regulation in detail does not necessarily provide a higher degree of transparency. The more legislation, the more attention will be required from a rule of law perspective. As far as Denmark is concerned, there is presently a high degree of coherency and consistency with regard to the legal instruments in force.

To further enhance mutual cooperation and recognition, it was suggested to base new legislation on a rigorous examination of where the practical problems of cooperation in criminal matter lie, and from there approach the matter by means of legislation in order to maximise the use of resources devoted to this aim.

It was highlighted by the interviewees that certain practical issues are essential for efficient cooperation, such as:

- a solid and trustful contact between practitioners and institutions based in the various Member States (e.g. enhancement of the European Judicial Network);
- well functioning communication channels, including the possibility to communicate in a foreign language that is understood by all the parts involved in the cases;
- reasonable knowledge about each others' legal systems and institutions.

As regards the possibility of compiling a database with legal definitions of offences in the Member States, this is almost univocally seen as a non-necessary step to take in order to enhance further cooperation. The reasons added for this conclusion are several, and resonated in a large majority of the interviews conducted.

- First, it has been noted that the categories of offences in the national legal systems are in many cases identical in all Member States. For instance homicide, drug trafficking and other serious crimes are by and large penalised in all legal systems and therefore would not constitute a difficulty for cooperation. There is therefore little doubt about the substantive definition of criminal offences.
- Second, in the cases where a particular offence causes problems as far as its definition can be in doubt, this is in practice solved by taking direct contact by the prosecution authorities with colleagues in the other Member States. This informal

way of proceeding has the advantage of being both accurate and fast, speeding up the procedure as it may sometimes be needed.

- Third, the preparation of a database is seen as a costly endeavour that may not serve its purpose if the definitions of the offences are not continuously updated.
- Fourth, in the most sensitive cases, as for example if a Member State requests the surrender of an individual for alleged violation of national regulation on abortion, racism or sexual offences, such a delicate matter would surely be controversial and potentially problematic. Nevertheless, instances like that were indicated as clearly exceptional cases that only hypothetically would occur. Therefore, an anticipatory attempt to develop conceptual solutions on these matters is regarded as an exercise with a more hypothetical perspective than as an answer to a real problem. Thus, there is no real problem to be tackled by creating a database.

To sum up, the development of a database containing national definition of offences listed in the instrument is not seen as a necessary or viable option.

5. Conclusions

As mentioned above, the overall assessment of the instruments adopted so far on the matter of mutual recognition is generally positive, especially as far as the EAW is concerned. This assessment is based on the experiences gathered so far on the practical use of the EAW. There is very little doubt among the professionals interviewed that the adopted legal instruments of mutual recognition are indeed facilitating the national authorities in carrying out their tasks in the fight against transnational criminal activities.

In light of these considerations, the present practical challenge is to gather systematic experience on the legal instruments so far implemented. It has therefore been suggested to defer a broadening of application of the principle of mutual recognition to other areas of cooperation in criminal matters in order to get sufficient feedback on the practical use of already existing instruments. In regard to national authorities, and especially when arguing to national MPs on the introduction of new legal instruments on mutual recognition, it would certainly sustain arguments for introduction of new instruments if the evaluation of existing arrangements could be presented as supporting evidence for the relevance of further initiatives. Thus the way forward indicated during the interviews was to "build on" existing instruments at some point when it is found necessary in light of new demanding counter-criminality efforts, and to base future initiatives and proposals on the assessment of the existing legal basis.

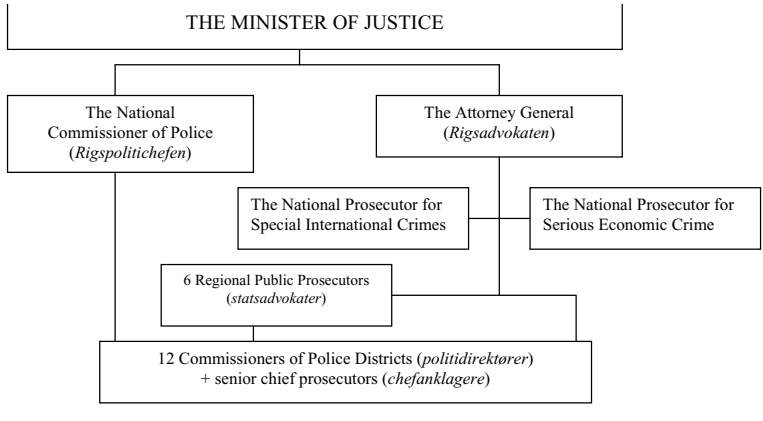
An increased procedural harmonisation may not automatically mean that citizens would gain an improvement of legal certainty as it would not necessary imply that the procedural rules protecting the fundamental rights of the citizens are working in an appropriate way.

On one hand, the harmonisation of the procedural rules can increase the efficiency and the times of processing the requests, e.g. on surrender of suspects and convicted persons. On the other hand, further development of procedural regulations is not desirable, if more detailed rules would mean that the procedures are made more difficult and demanding. This consideration is also valid as far as the consolidation

of the existing instruments of mutual recognition in criminal matters is concerned. However, the fact that several frameworks now coexist, is not seen as troublesome.

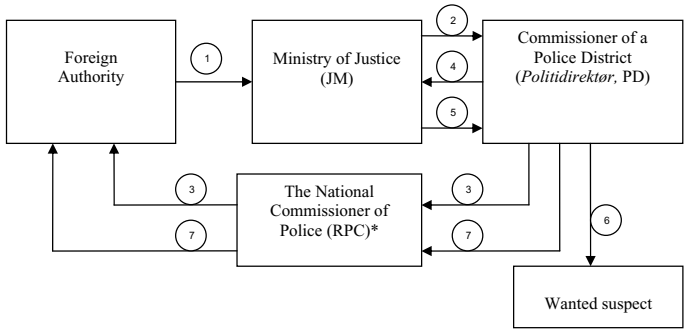
APPENDIX 1

THE BASIC STRUCTURE OF THE POLICE AND THE PROSECUTION AUTHORITY



APPENDIX 2

SURRENDERING ON THE BASIS OF AN EAW
Denmark as executing authority

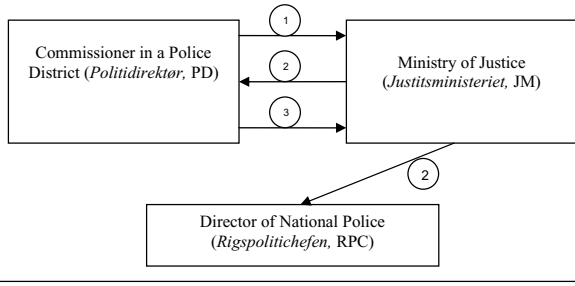


1. JM receives a European Arrest Warrant either directly from the foreign authority or via Schengen and/or Interpol. JM makes a preliminary evaluation of the arrest warrant.
2. The EAW is sent to PD for further inquiry.
3. PD informs through the RPC the foreign authority, if the suspect is arrested and in custody. Copy is sent to the JM.
4. PD sends back a recommendation to the JM, within a deadline of 3 days after, the EAW is available in Danish, Swedish or English.
5. JM decides whether the suspect can be surrendered within a deadline of 10 days after the detention or that the EAW is available in Danish, Swedish or English. The decision is sent to PD.
6. PD notifies the suspect of the JM's decision and of the possibility of trying the decision at the Courts. The deadline for accessing the Courts is 3 days. JM informs of the potential decision of the Courts. A final decision from the Courts has to be reached within 30/60 days.
7. PD decides with the foreign authorities within a deadline of 10 days the practical formalities of the surrender.

* *Rigspolitichefen*, the unit where SIS and Interpol are located.

APPENDIX 3

ISSUING OF AN EAW
Denmark as issuing authority



1. PD informs JM of the intention of requesting a person surrendered to Denmark. Before the PD prepares a draft to a European Arrest Warrant, the case has to be submitted to the Courts. PD sends a draft of EAW to the JM (judicial authority in Denmark).
2. JM controls that the conditions for the issuing of an EAW are met and authorises the arrest warrant. The original arrest warrant is sent to the PD, with copy to the RPC with the request of that the arrest warrant are inserted in the SIS and/or the Interpol. If necessary the EAW is also sent directly to the European country.
3. PD notifies the JM of when the suspect can be surrendered.

The reception of the principle of mutual recognition in the criminal justice systems of EU Member States. The case of Greece

Valsamis Mitsilegas

1. Introduction [1]

The introduction of the principle of mutual recognition in the criminal law sphere entails far reaching changes for domestic criminal justice systems. The main features of this principle, namely speed, automaticity and a minimum of formality, aim to facilitate the movement and enforcement of national judgements and orders across the EU. This system is essentially based on a "no questions asked" approach: the executing judge should in principle not look behind the form sent to him/her by the issuing judge and execute the request as soon as possible. But in practice the "no questions asked" mutual recognition – which presupposes the existence of some level of mutual trust across the EU – effectively consists of a "journey into the unknown"for the executing judge who is in essence being asked to accept almost blindly a decision which stems from the judicial, legal and constitutional tradition of another EU Member State [2].

The application of the mutual recognition principle in criminal matters in these terms – in particular as regards the operation of the most broadly applied mutual recognition instrument in EU law, namely the European Arrest Warrant – has raised a number of constitutional concerns across the European Union. A major concern relates to the principle of legality, which is deemed to be threatened by the abolition

[1] This chapter is partly informed by the Report on Greece prepared for the ECLAN Study "Analysis of the future of mutual recognition in criminal matters in the European Union", by Mr Spyros Karanikolas, postgraduate researcher at Queen Mary, University of London. I would also like to acknowledge the invaluable assistance of Professor Maria Kaiafa-Gbandi and Ms Olga Papadopoulou in the preparation of the draft. The usual disclaimer applies.

[2] See V. Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union", *CMLRev.*, 43, 2006, p. 1277-1311.

of dual criminality for a wide range of offences. This could lead to the authorities of a Member State employing their criminal law enforcement mechanism in order to arrest and surrender an individual for conduct which is not an offence under its domestic law. Legality concerns are inextricably linked in this context with issues of legitimacy and trust, most notably regarding the bond between the State and its citizens. The lack of legitimacy may be an issue in particular in the light of the fact that on the basis of mutual recognition a court in a Member State must accept decisions stemming from standards and laws in the adoption of which the public of the executing State played no part and has limited if not no knowledge of. Further constitutional concerns were raised on the specific issue of the surrender of own nationals which the European Arrest Warrant allows but several national Constitutions expressly prohibited. Last, but not least, a major issue regarding the implementation of the European Arrest Warrant concerned the protection of fundamental rights, in particular the rights of the individual subject to surrender in another Member State before (and crucially) after surrender. It is in this context where the concept of mutual trust has been perhaps most strongly challenged, with a number of concerns voiced regarding the capacity and ability of a number of EU Member States to safeguard effectively the rights of the defendant in their domestic criminal justice systems [3].

This chapter will examine the extent to which these challenges to domestic constitutional and criminal justice systems have emerged in the context of the Greek legal system. The chapter will examine the implementation of the principle of mutual recognition in the Greek legal order. It will begin by an assessment of the stance of the Greek authorities towards mutual recognition in criminal matters, both at the negotiation stage in Brussels and at the broad implementation stage. It will then go on to examine in detail the implementation of the European Arrest Warrant Framework Decision (which is, at the time of writing, the only mutual recognition instrument formally implemented in Greece). The analysis of the implementation will focus on the context and legislative history, and then on the content of the implementing legislation. An assessment of the implementing law will be coupled with an overview of the application of the law by judges, in order to appreciate further how the mutual recognition principle operates in practice in the Greek legal system.

2. Mutual recognition in criminal matters and the Greek authorities

Constitutional concerns with regard to the application of the principle of mutual recognition in criminal matters were raised already at the stage of the negotiations of the Framework Decision on the European Arrest Warrant, when the Greek Government was effectively called to reconcile the need of reaching agreement swiftly in the run up to 9/11, with the need to be seen to protect domestic constitutional principles and civil liberties [4]. Particular concerns in negotiations centered on the application

[3] For an analysis of these issues see V. Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing, 2009 (chapter 3).

[4] See also in this context G. Andreou, "The European Arrest Warrant Negotiations. Negotiations of the Greek Position at Domestic Level", Negotiating European Issues. National Strategies and Priorities, Occasional paper 4.2-11.03, at http://www.oeue.net/papers/greece-negotiationsontheeurope.pdf

of the European Arrest Warrant to acts related to political or labour law rights, in particular rights related to freedom of expression and association and the impact of such developments on the Greek Constitution and civil liberties [5]. At the end of the negotiations the Greek Government proclaimed its satisfaction with the outcome, in particular in the light of the introduction in the text of the Framework Decision of grounds of refusal related to territoriality (which was deemed to address the issue of the compatibility of the Framework Decision with the Greek Constitution with regard to the surrender of own nationals) and of a series of fundamental rights safeguards [6]. The insertion of fundamental rights safeguards in EU mutual recognition measures has since been an aim of the Greek Governments in negotiations in Brussels [7].

Respect for fundamental rights was also a proclaimed goal of the 2003 EU Greek Presidency [8], which aimed *inter alia* to push forward negotiations on a number of mutual recognition measures, namely those concerning financial penalties and confiscation [9]. In this context, the Greek Government used its third pillar power of initiative to table during the Greek Presidency a proposal for a Framework Decision aimed at harmonising the *ne bis in idem* principle [10]. This proposal, which according to the Greek Government would contribute to the protection of the rights of the individual [11], was an ambitious attempt to provide an EU definition of a highly contested concept. It eventually fell at the Council, with the Court of Justice since having to interpret *ne bis in idem* on the basis of the rather elliptical wording of the Schengen Implementing Convention [12].

Although the Greek Government has agreed to a number of mutual recognition instruments, the Framework Decision on the European Arrest Warrant is at the time of writing the only such instrument which Greece has implemented. The implementation of other measures dictating the mutual recognition of orders related to financial matters (such as freezing orders, financial penalties or confiscation) is still pending although implementation is now long overdue.

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[5] I. Mandrou, "Three New Laws on Terrorism" (*Treis Neoi Nomoi Yia Tin Tromokratia*), *To Vima*, 18 November 2001, p. A4.

[6] *Implementation and Evaluation of the Tampere Conclusions*, Press Release, Embassy of Greece, Washington DC, at http://greekembassy.org/embassy/content/en/ArticlePrint.aspx?office=1&folder=39&article=57.

[7] Interview with Greek negotiator, January 2009.

[8] Press Release, Greek Ministry of Justice, at http://www.ministryofjustice.gr/eu2003/press/01.php.

[9] *The Greek Presidency in the field of justice*, Press Release, Greek Ministry of Justice, at http://www.ministryofjustice.gr/eu2003/field.php.

[10] Council doc. 6356/03, Brussels, 13 February 2003; see also the Explanatory Note of the same date, doc. 6356/03 ADD 1.

[11] See note 8 above.

[12] For details, see V. Mitsilegas, *op. cit. (EU Criminal Law)*.

3. The Greek Law on the European Arrest Warrant

A. Negotiations and issues

Unanimous agreement to the European Arrest Warrant Framework Decision was reached in December 2001, with the text itself published in the *Official Journal* in the summer of 2002 and the implementation deadline set for 31 December 2003 [13]. However, Greece was slow to implement the Framework Decision in its domestic legal order, with no implementing legislation being adopted by the prescribed deadline. With the deadline for the implementation of this politically significant instrument having passed, the Greek authorities were placed under considerable pressure to enact implementing legislation, in particular in the light of the approaching date of the 2004 Athens Olympics [14]. Legislation to implement the Framework Decision was tabled by the conservative *Nea Dimokratia* Government which had succeeded in power the socialist Government of *PASOK* (which had negotiated and agreed the European Arrest Warrant and the other mutual recognition instruments) in the summer of 2004. The Greek Government combined the implementation of the European Arrest Warrant Framework Decision with the – also overdue – implementation of the Framework Decision on combating terrorism [15], under a broader counter-terrorism law framework. Given the long-standing opposition of a large body of the Greek public and political opinion to broad counter-terrorism measures, these legislative proposals caused a heated debate in Greece [16]. Opposition to the Greek implementing legislation focused primarily on civil liberties grounds but also on the grounds that legislation is again pushed through due to "foreign" pressure dictating counter-terrorism action in the light of the 2004 Athens Olympics. The Government on the other hand stressed the need to comply with obligations undertaken at EU level and stressed that implementation of the Framework Decisions in question had been long overdue [17].

The provisions aimed at implementing the European Arrest Warrant Framework Decision were met with severe criticism by academics [18] and parliamentarians from

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[13] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1. Article 34(1).

[14] See *The Independent*, "Greece attacked for failing to enforce EU anti-terror laws", 8 June 2004.

[15] *OJ*, no. L 164, 22 June 2002, p. 3. The deadline for implementation of this instrument was 31 December 2002.

[16] On the background and context of the development of counter-terrorism law in Greece, see V. Mitsilegas, "The Impact of the European Union on the Greek Criminal Justice System" *in* L. Cheliotis and S. Xenakis (eds.), *Crime and Punishment in Contemporary Greece: International Comparative Perspectives,* Bern, Berlin, Brussels, Frankfurt, New York, Oxford, Vienna, Peter Lang, forthcoming.

[17] See *Parliamentary Debates* of 22 and 23 June 2004.

[18] See M. Kaiafa-Gbandi, "The Law on the European Arrest Warrant and Terrorism and the Declarations of Faith to the Constitution" (*O Nomos yia to Europaiko Entalma Syllipsis kai oi Dilossies Pistis sto Syntagma*), *Poiniki Dikaiossyni*, 2004, p. 836-839. For a recent overview of reactions, and a highly critical personal view, see G. Bekas, "Political Choices and the Law. The Extradition-Transfer-Surrender of the Defendant and the European Arrest Warrant" (*Politikes Epiloges kai Dikaio. I Ekdossi-Prossagogi-Paradossi Kratoumenou kai to Europaiko Entalma Syllipsis*), *Poinikos Logos*, 2007, p. 549-557.

all opposition parties mainly on three substantive grounds: on the abolition of dual criminality for a list of offences; on allowing the surrender of own nationals; and on extending the State's punitive reach by facilitating surrender [19]. Moreover, criticism focused on the fact that the legislation was passed speedily, with limited consultation or debate [20]. The Government responded by stressing that: the legislator applied the discretion granted to Member States by Framework Decisions to adjust their content to the domestic context, and in this context introduced a series of protective provisions for the individuals; and that the Greek Constitution did not prohibit the surrender of own nationals and that in any case it would prevail. The Government also pointed out again that there was no further leeway from the EU with regard to the implementation of the Framework Decision which was overdue [21].

B. The text

1. Structure and drafting

The Framework Decision on the European Arrest Warrant was eventually implemented by Law 3251/2004 [22]. Its explanatory report stresses the will of Greece to contribute actively to the formulation of a common European policy against international terrorism within the remit of an area of freedom, security and justice [23]. Some 38 sections of the domestic law were devoted to such implementation. The Greek law followed a similar, albeit not identical, structure to that of the Framework Decision. The first part on "general provisions" contains a provision on the definition of the Framework Decision (Article 1 in both EU and domestic law) and a provision on the content and type of the European Arrest Warrant (which comes only in Article 8 of the Framework Decision). The Greek legislator chose to continue by dividing the Framework Decision provisions on the surrender procedure into various more specific parts. Chapter 2 deals with the issuing and transmission of the European Arrest Warrant (Articles 4-8), while Chapter 3 (the bulk of the implementing law) deals with the execution of the Warrant (Articles 9-29). The latter chapter incorporates details with regard to the abolition of dual criminality and the grounds of non-execution which appear at an earlier stage in the Framework Decision. The fourth chapter is devoted to the surrender process itself (Articles 30-32), while the fifth and sixth chapters follow the structure of the Framework Decision by dealing with the effects of the surrender (Articles 33-36) and final provisions (Articles 37-39) respectively. According to the Explanatory Memorandum to the Act, the deviation from the structure of the

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[19] *Parliamentary Debates* of 22 June 2004.

[20] See in this context in particular M. Kaiafa-Gbandi, *op. cit. (Dilosseis Pistis)*, p. 836.

[21] *Ibid.*

[22] For an early analysis, see M. Kaiafa-Gbandi, "European Arrest Warrant: The Provisions of Law 3251/2004 and the Transition from Extradition to 'Surrender'" (*Europaiko Entalma Syllipsis: Oi Rythmisseis tou N 3251/2004 kai I Metavassi apo tin Ekdossi stin 'Paradossi'*), *Poiniki Dikaiossyni*, 2004, p. 1294-1310; and E. Symeonidou-Kastanidou, "The Law on the European Arrest Warrant and the Fight against Terrorism" (*O Nomos yia to Europaiko Entalma Syllipsis kai tin Antimetopissi tis Tromokratias*), *Poiniki Dikaiossyni*, 2004, p. 773-780.

[23] See also N. Livos, *Organised Crime and Special Interrogation Acts* (*Organomeno Egglima kai Eidikes Anakritikes Praxeis*), Athens, P.N. Sakkoulas, 2007, p. 209.

Framework Decision was deemed necessary to facilitate the application of the law in the domestic system[24]. This is in some respects a clearer structure to that of the Framework Decision, highlighting the different stages of the European Arrest Warrant process.

In terms of legislative drafting however, the Greek implementing law has been criticised for adopting *verbatim* the provisions of the Framework Decision[25]. This criticism was also reflected in the recent evaluation report of Greece's implementation of the European Arrest Warrant, which states that the Greek implementing law is, to a large extent, a copy-and-paste of the Framework Decision and that in using this technique, it seems that the legislator did not pay full attention to the relationship with regulations and practices in other fields of criminal law which interact with the handling of European Arrest Warrants[26]. Indeed, the majority of the provisions in the implementing law follow faithfully the wording of the Framework Decision. The main exception, as will be seen below, involves provisions introducing grounds for refusal and safeguards for the individual[27].

2. Competent authorities

The Greek implementing law has introduced a number of provisions on competent authorities linked with various stages of the European Arrest Warrant process. According to Article 3 of the implementing law, the Greek Ministry of Justice is designated as the central authority for assisting the competent judicial authorities and for the administrative transmission and receipt of European Arrest Warrants – it may be entitled to keep statistics[28]. The competent authority for the purposes of issuing European Arrest Warrants and (in cases where Greece acts as an executing State) for the purposes of receiving Warrants, arresting and detaining the requested person, submitting the case to the competent judicial authority and executing the court's decision to surrender is the Public Prosecutor at the Court of Appeal[29]. The issuing

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[24] Para. 8.

[25] M. Kaiafa-Gbandi, *op. cit.* (*Dilosseis Pistis*), p. 836.

[26] 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 Greece*, doc. 13416/2/08 REV 2, Brussels, 3 December 2008, p. 31 (para. 7.1.1).

[27] There are also some discrepancies with regard to the description of conduct for which dual criminality has been abolished, in particular as regards to corruption, swindling and racketeering – see Evaluation Report, p. 18. These provisions – enshrined in Article 10 of the implementing law – have also been criticised in a domestic criminal law context, with the argument being put forward that the terms used are rather general and do not necessarily correspond to specific offences (E. Symeonidou-Kastanidou, *op. cit.,* p. 775). The Greek legislator elected to maintain the dual criminality check for offences falling within the scope of the Framework Decision but which are not included in the list of the 32 offences of Article 2(2).

[28] According to the Evaluation Report on Greece, these tasks are performed by the Department of Special Criminal Cases and International Judicial Co-operation in Criminal Cases, within the Legislative Co-ordination and Special International Legal Relations General Directorate, p. 7.

[29] Articles 4 (on the issuing) and 9 (1) (on the execution).

Prosecutor may use the Schengen Information System or the Interpol system [30]. With regard to the execution of a Warrant, in cases where the requested person consents to surrender, the competence to decide on the execution of the European Arrest Warrant lies with the Presiding Judge of the Court of Appeal of the region where the requested person resides or is arrested [31]. In cases of non-consent the competent authority is a Judicial Council composed of three judges from the same territorially competent Court of Appeal [32]. Their decision may be appealed in the Supreme Court, which decides within eight days from the tabling of the appeal [33]. A rather detailed mechanism for the examination of European Arrest Warrants has thus been established by the law, with a high level of protection in cases of objections to the execution of European Arrest Warrants being aimed at by the involvement in proceedings of the Greek Supreme Court.

However, this multiplicity of competent authorities may lead to complications in practice. The recent evaluation report on the Greek implementation of the European Arrest Warrant (where more on these arrangements can be found) has noted that regular systematic coordination between the different prosecution offices throughout Greece is lacking. The evaluators also raised the issue of lack of specialisation in judges with regard to working with European Arrest Warrants, the lack of training and the *de facto* centralisation of the system of issuing of Warrants in Athens (with more than 2/3 of issuing warrants emanating from the Public Prosecutor's Office at the Athens Court of Appeal – this office is only one out of fifteen authorities competent to issue Warrants in Greece) [34]. The evaluators also noted that with regard to the execution of European Arrest Warrants, more than two-thirds of the Warrants received by Greece in 2007 were assigned to three Public Prosecutor's Offices (Athens, Thessaloniki and Thrace) [35].

3. Safeguards: Grounds for refusal and the protection of fundamental rights

The cases where the Greek implementing law has gone beyond Framework Decision requirements have occurred in particular in order to assuage civil liberties concerns and involve extending the possibility of non-execution of a Warrant by a Greek judge. The possibility to refuse the execution of a Warrant has been expanded by the addition of human rights-related mandatory grounds of refusal (which do not exist as such in the Framework Decision) and by the conversion of optional grounds for refusal into mandatory grounds in the Greek law. Moreover, the Greek law does make use of the territoriality safeguards introduced in the Framework Decision and reiterates the wording of Article 1(3) of the Framework Decision, albeit expanding its wording to take into account domestic constitutional concerns.

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[30] Article 6(2) and (3). In practice, these systems are used in the majority of cases – Evaluation Report, p. 10.

[31] Article 9(2).

[32] Article 9(3).

[33] Article 22.

[34] *Op. cit.*, p. 32-33.

[35] *Ibid.*, p. 33 (para. 7.1.4).

The Greek implementing law has rendered the general fundamental rights safeguard found in the Preamble of the Framework Decision into a mandatory ground for refusal [36]. Article 11(e) prohibits surrender if a Warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of sex, race, religion, ethnic origin, nationality, language, political opinions, sexual orientation *and action to promote freedom*. The latter, italicised element does not appear in the Framework Decision but has been introduced to reflect the Greek constitutional tradition. In a similar reflection of this tradition, the general fundamental rights clause enshrined in Article 1(3) of the Framework Decision has been expanded in the equivalent provision in the Greek implementing law to include a statement to the effect that the requested person is not surrendered, deported or extradited to a State where (s)he incurs a grave danger of the death penalty being imposed or of being subject to torture or other inhuman or degrading penalty or treatment [37].

The Greek implementing law has also converted a number of grounds for refusal which were optional in the Framework Decision into mandatory grounds for refusal. This has occurred with regard to cases where prosecution or punishment is statute barred [38], with regard to the territoriality safeguards of the Framework Decision [39], as well as with regard to cases where Greece undertakes to execute the sentence or detention order (for Warrants issued for the purposes of the execution of a custodial sentence or a detention order) [40] and to cases where the person requested is also being prosecuted in Greece for the same act as the one indicated in the Warrant [41]. It is noteworthy that the mandatory ground for refusal in the two latter cases involves only Greek nationals. These provisions are aimed at addressing constitutional concerns in ensuring that the cases where a Greek national is surrendered following the execution of a European Arrest Warrant are extremely limited [42]. However, it must be noted that the conversion of optional grounds for refusal to mandatory ones has been criticised by those applying the legislation in Greece. It has been noted that depriving the Greek executing authorities of the discretionary powers to apply some of the grounds laid down in the Framework Decision as optional could create difficult situations in practice [43].

4. Mutual recognition in the Greek Courts

A. Methodology and issues

Greek prosecutors and judges have been dealing routinely with European Arrest Warrants [44]. The main legal issues concerning the application of the Framework

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[36] Recital 12.

[37] Article 1(2) of the Greek implementing law.

[38] Article 4(4) of the Framework Decision and 11(δ) of the Greek Implementing Law.

[39] Article 4(7) of the Framework Decision and 11(ζ) of the Greek Implementing Law.

[40] Article 4(6) of the Framework Decision and 11(στ) of the Greek Implementing Law.

[41] Article 4(2) of the Framework Decision and 11(η) of the Greek Implementing Law.

[42] The then Greek Minister of Justice declared that "in practice, no Greek national will be extradited in another country" (*Eleftherotypia* newspaper, 30 June 2004).

[43] Evaluation Report, *op. cit.*, p. 23.

[44] See the statistics in the Evaluation Report above.

Decision have arisen in the context of appeals against the execution of Warrants before the Greek Supreme Court. A general issue has been *the completeness of European Arrest Warrants*, with the Supreme Court's methodology in its examination being as follows: the Court looks at whether the elements of the Warrant required by the Greek law – namely the details of the requested person and the issuing authority, the description of the act and the involvement of the requested person therein are included in the Warrant in question. It then examines whether the acts described in the Warrant fall within the scope of the implementing law in terms of their punishability and whether the grounds for refusal apply in the specific case [45]. Another issue which has arisen involves the execution of a Warrant in cases of trials *in absentia*: in a case involving such a trial in Italy, the Court applied Article 13(1) of the implementing law and allowed the execution of the Warrant after examining the guarantees provided by the law of the issuing Member State (namely that the requested person would have the opportunity to request a retrial where he can appear after his surrender) [46]. *Areios Pagos* (i.e. the Supreme Court) has also defended *the choice* by another Member State (in that case Denmark) *to designate an authority as a judicial authority* for the purposes of the issuing of European Arrest warrants. It confirmed that the designation of the relevant competent authorities is a matter for the legal system of the issuing Member State. However, it also accepted that there is some degree of examination of this legal system by the Greek executing authorities to the extent that the conditions of the issuing of a European Arrest Warrant may breach fundamental constitutional provisions of Greek law linked with the protection of fundamental rights. The Court found that this was not the case with the issuing of the European Arrest Warrant by the Danish authorities [47].

These cases demonstrate in principle a willingness by the Greek Supreme Court not to place undue obstacles to the execution of European Arrest Warrants. However, it is noteworthy that the Court has left open the possibility to examine the legal system of the issuing Member State in order to ascertain whether its provisions are essentially compatible with the Greek criminal justice and constitutional system. In other cases, *Areios Pagos* has indeed extended protection against the execution of European Arrest Warrants on the basis of fundamental principles of the domestic legal order. It refused the execution of a European Arrest Warrant (against a Greek national) for acts which were statute barred under Greek law. In a striking ruling, the Court applied the Greek law on statute of limitations to conduct which had allegedly taken place in the *executing* Member State (in that case Germany). According to the Court, statute barred prosecutions is a public order institution which would be undermined if the provisions of Greek law were not taken into account [48]. The Court has also extended the protective reach of the Greek law to cover (under the territoriality clause) offences

[45] See cases 306/07, 382/08.

[46] Case 382/08.

[47] Case 1735/05, reported in *Poinika Chronika*, 2006, p. 504.

[48] Case 1024/2008, reported in *Poinika Chronika*, 2008, p. 513. Note however the dissenting judges who ruled in favour of the execution of the Warrant, in view of the fact that it was not possible to try in Greece the defendant for alleged tax evasion conduct which is an offence under the law of another Member State.

which have been committed in a continuous manner over time. In a case of alleged fraud, it was deemed that the territoriality safeguard kicks in even if only a small, or very specific, part of the conduct has been committed in the Greek territory. However, the Court allowed the surrender of the defendant by dividing the conduct in question into various separate offences (not all of which were covered by the territoriality safeguard) [49].

B. The surrender of own nationals and the Greek Constitution

As seen above, the surrender of Greek nationals has proven to be one of the matters of controversy in the negotiations of the Greek implementing legislation. Concerns with regard to the compatibility of such surrender with the Greek Constitution have led to the introduction of a series of provisions in the Greek implementing law aiming at limiting in practice the possibility of surrender of a Greek national to another EU Member State [50]. However, the Greek implementing law does not contain an express ground for refusal with regard to the surrender of own nationals. The issue has been inevitably raised before the Greek courts in their handling of European Arrest Warrants. In this context, it is noteworthy that the Greek Supreme Court has consistently ruled that the surrender of Greek nationals is not contrary to the Greek Constitution. In a recent case confirming earlier case law [51] to that effect, the Court produced a somewhat more detailed reasoning. The Court allowed the surrender of a Greek national by accepting that there exists mutual trust between EU Member States, adding essentially that fundamental rights are respected throughout the Union. According to the Court,

> "the prohibition of extradition or surrender of own nationals in another Member State of the European Union does not emanate from the Constitution, nor has it any other ground for existence today between the EU Member States… the provision of the new law is *lex specialis*… within the European Union Member States mutual trust has developed which is based on the respect for fundamental rights and the rule of law… the historical reasons for such prohibition, namely the obligation of the State to protect its citizens and more specifically their protection from the adversity of a trial in a foreign and alien legal environment, but also the existing mistrust towards foreign judicial authorities *is no longer justified especially within the framework of the European Union*" [52].

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[49] Case 1255/05, reported in *Poinika Chronika*, 2005, p. 844. Note however the dissenting judges who argued against the execution of the Warrant on the grounds that the conduct was indivisible and, since even a small part of it has occurred in Greece, surrender should be refused.

[50] See note 42 above. For a view upholding the constitutionality of the surrender of own nationals, see P.I. Pararas, "The Constitution and the European Arrest Warrant", *To Vima* newspaper, 13 January 2002, p. A12. For a more critical comment, see D. Symeonidis and St. Pavlou, "European Arrest Warrant (Law 3251/2004) and Surrender of Own Nationals" (*Europaiko Entalma Syllipsis (n. 3251/2004) kai Ekdossi Ellinon Politon*), *Poinika Chronika*, 2006, p. 193-201.

[51] See in particular the earlier judgement in Case 591/2005.

[52] AP 558/2007, *Poinika Chronika*, 2007, p. 597. My translation, emphasis added.

The reasoning of *Areios Pagos* is noteworthy. Although (unlike Supreme Courts of other EU Member States on the issue of the surrender of own nationals)[53] it does not refer expressly to important Luxembourg case-law, in particular *Pupino*[54], the judgment reflects a willingness to accommodate the requirements of Union law. *Areios Pagos* accepts – in a manner reminiscent of the ECJ *ne bis in idem* case-law[55] – that there is mutual trust in the European Union. Moreover, it accepts that fundamental rights are respected in the EU. Thus, while the Court is prepared to examine the surrender of own nationals (and consequently the bond between the citizen and the State) in the light of the extent to which the Union respects fundamental rights, it draws a markedly different conclusion to the one of the *Bundesverfassungsgericht* in its own ruling on the German implementing law[56]: here the premise is that the Union *does* respect fundamental rights and the rule of law. As with its earlier case-law, *Areios Pagos* is also in this case prepared to accept the constitutionality of the surrender of own nationals on a different ground: namely that the text of the Framework Decision has been unanimously agreed in Brussels[57]. In this context, the Greek Court echoes ECJ case law on the importance of Member States adhering to their EU obligations, as well as the case law by the Polish Supreme Court which based its ruling on the compatibility between the prohibition of the surrender of Polish nationals with the Polish law implementing the European Arrest Warrant Framework Decision partly on the need to respect the principle of *pacta sunt servanda*[58]. As *Areios Pagos* implies, the Greek authorities must implement what they have agreed in Brussels.

5. Conclusion

The implementation of mutual recognition law measures into the Greek criminal justice system has proven to be far from a straightforward task. A number of EU measures in the field have not been implemented at all. The instrument which has been implemented – the Framework Decision on the European Arrest Warrant – saw implementation taking place very slowly, with the relevant legislation being adopted after the expiry of the transposition deadline and following sustained political pressure by EU institutions. Domestic law was adopted speedily, without extensive debate in parliament or civil society. The implementing law itself follows largely the wording of the Framework Decision, departing from this wording mainly in order to address

[53] See in particular the Supreme Court of Cyprus (*Attorney General of the Republic v. Konstantinou*, Decision of 7 November 2005, [2007] 3 CMLR, 42) and the Czech Constitutional Court (*Re Constitutionality of Framework Decision on the European Arrest Warrant,* [2007] 3 CMLR, 24).

[54] ECJ, 16 June 2005, Judgement C-105/03, *Maria Pupino*, *ECR*, p. I-5285.

[55] See in particular the ECJ Judgement, 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügge*, *ECR*, p. I-1345.

[56] Judgement of 18 July 2005, 2 BvR 2236/04, reproduced in English in [2006] 1 CMLR, 16.

[57] See note 52 above.

[58] *Re Enforcement of a European Arrest Warrant*, Judgement of 27 April 2005, P1/05, reported in [2006] 1 CMLR, 36. For details on the case-law of the ECJ and national constitutional courts see V. Mitsilegas, *op. cit.* (*EU Criminal Law*).

domestic civil liberties and constitutional concerns. Although European Arrest Warrants are now routinely issued and executed by Greek authorities, it appears that the integration of the Greek implementing law into the Greek criminal justice system has not been entirely smooth. The recent evaluation report on Greece pointed out that copying the text of the Framework Decision has meant that the Greek legislator has not taken into account how its provisions will function in the context of the domestic criminal justice systems [59]. Moreover, the evaluation report stated that the implementation situation may complicate the work of practitioners in the field, since it is difficult to obtain a clear picture of the law and practices that apply in respect of the handling of the European Arrest Warrant [60].

This criticism may reflect a gap between law in paper and law in practice and demonstrate the need for a period of time for the implementation of the European Arrest Warrant system to mature in Greece. However, it should not detract from noting the far-reaching changes introduced in the Greek criminal justice system in this context [61]. There are three major changes in this context. At the pre-legislative stage, a major change concerns the attitude of the Greek legislator towards the implementation of Union law, and in particular third pillar obligations. While the implementation record of Greece in the field of mutual recognition in criminal matters leaves much to be desired, the debate on the implementation of the European Arrest Warrant Framework Decision reflected a shift in both the tone and content of the political discourse: resistance focusing on the fear of the establishment of an "authoritarian State" has been replaced by a discourse centering on proportionality and the need to reconcile security with freedom; moreover, while anti-terrorism law has been constantly opposed in Greece on the grounds that it constitutes foreign intervention in the country, increasingly (and culminating in the 2004 legislation) there is growing awareness (admittedly the outcome of sustained political pressure) that the commitments undertaken by the Greek Government in Brussels must be honoured.

The second change involves of course the content of the implementing measure, which facilitates surrender, abolishes dual criminality and does not even discuss explicitly the constitutional implications of issues such as the surrender of own nationals. On the other hand, to balance constitutional concerns, the Greek implementing law contains a series of provisions proclaiming respect for fundamental rights and domestic constitutional principles and introduces safeguards which may limit in practice the surrender of Greek nationals or surrender which is deemed as contrary to the Greek Constitution. The third, and perhaps most significant, change involves the post-legislative stage, namely the application of these measures on the ground. In the case of the European Arrest Warrant, it has been the practitioners (and not the politicians or academics) who have boosted the implementation of EU standards in Greece, in particular when having to operate the system on a day to day basis and co-operate with their colleagues in other EU Member States. Although

[59] See note 26 above.

[60] *Ibid.*, p. 32.

[61] See more broadly V. Mitsilegas, *op. cit.* (*The Impact of the EU on the Greek Criminal Justice System*).

in principle demonstrating their willingness to examine Arrest Warrants by judicial authorities from other EU Member States in the light of domestic constitutional, public and criminal law, Greek judges have not hesitated to find ways of accommodating the EU co-operation requirements into the domestic constitutional and criminal justice system. It remains to be seen whether it will be the judges who will ultimately render meaningful the legislative transposition of other mutual recognition measures (in particular the European Evidence Warrant) if and when they are implemented in the Greek legal order.

Mutual recognition in criminal matters in Spain

Ángeles G. Zarza [1]

1. Introduction

The principle of mutual recognition in criminal matters was greeted by Spain with the same anticipation as when a long-awaited friend is welcomed home. For many years, Spain underlined the need to simplify the grounds for refusal and the proceedings for extradition and strongly support the first initiatives in that respect. The Donostia-San Sebastian Agreement of 26 May 1989 on the simplification and modernisation of methods of transmitting extradition requests was adopted during the first Spanish Presidency of the European Union (January – June 1989). The 1995 Convention on simplified extradition proceedings was approved on 10 March 1995, immediately before the second Spanish Presidency of the EU (July – December 1995) and we considered this instrument to be a relevant one in cases when the requested person consents to be extradited. During the cited second EU Presidency, Spanish authorities made relevant progress on the negotiations of the 1996 Convention on Extradition between the Member States of the EU.

When the European Judicial Area started to become a reality, Spain defended the notion that the arrest and surrender of suspects should be as direct as possible and not be subject to special verification mechanisms between the judicial authorities of

[1] The opinions expressed in this chapter are personal to the author and do not necessarily coincide with those of the institution she works for. The author wishes to express her sincere gratitude to the following people for their availability and assistance in the elaboration of this report: Rosana Morán and Jorge Espina (Spanish General Prosecutor Office), Ana Gallego and Elsa García-Maltras (Spanish Ministry of Justice), Luis Francisco de Jorge and Juan Pablo Gonzalez (Spanish General Council of the Judiciary), Luis Aguilar (Permanent Representation of Spain to the European Union) and Eduardo Fungairiño, a brilliant prosecutor at the *Audiencia Nacional* and now at the Spanish General Prosecutor's Office.

the EU Member States. Previous conventions and agreements were considered to be insufficient by the Spanish legislator, the judicial authorities and Spanish citizens.

The Pinochet case triggered a big debate in Spain about the political implications of extradition proceedings. It was difficult to understand, especially for citizens, the different decisions in favour and against the extradition of the Chilean general, which came from different chambers and political authorities of the United Kingdom. It was also difficult for the judiciary to explain to Spanish citizens why extradition requests for members of the ETA criminal organisation were refused by neighbouring countries, which considered their activities as political offences or justified their refusals of extradition by pointing to the obligation to protect the fundamental rights of the requested suspects.

Traditional mechanisms of mutual legal assistance, and even the European Union instruments adopted in that field, have also been viewed in Spain with a certain amount of scepticism. Spanish judicial authorities had the feeling that these instruments were inefficient in the fight against terrorism and organised crime, especially in a common judicial area.

In their annual reports, the Specialised Anti-corruption and Anti-drugs Prosecution Services – set up in the mid-1990s – underlined a lack of cooperation and mutual assistance from some EU Member States, delays in letters rogatory and the subsistence of relevant tax havens in the core of Europe. The 2000 Convention on mutual assistance in criminal matters included more dynamic and efficient measures for the execution of requests for mutual assistance both in general and for certain specific forms of mutual assistance (e.g. restitution, temporary transfer of persons in custody, hearing by videoconference, joint investigation teams), but it was also necessary to work on other relevant issues that are of key importance in the fight against serious crime, such as the freezing of property, confiscation, evidence gathering or the transfer of sentenced persons.

The idea of implementing the principle of mutual recognition in all the phases of the criminal proceeding, and the positive results obtained with the first instrument based on that principle – the European Arrest Warrant – have been welcome in Spain and considered as the starting point of a new period with more effective instruments in the fight against serious transnational crime.

2. Negotiation of mutual recognition instruments

A. General remarks

1. First initiatives: bilateral agreements of mutual recognition in criminal matters

Immediately after the Tampere European Council, Spain started to sign bilateral treaties with some other EU Member States (Belgium, United Kingdom, France, Italy) based on direct contacts between judicial authorities with the purpose of obtaining the arrest and surrender of suspects without the executing Member State first verifying if there are grounds for refusal for extradition requests[2]. These

[2] See *Tratado para la persecución de delitos graves mediante la superación de la extradición en un espacio de justicia común* (Treaty for the prosecution of serious crimes through the overcoming of Extradition in a common Justice Area) signed with Italy on 28

initiatives were mentioned in the JHA Council convened by the French Presidency on 1 December 2000, where the "Programme of measures to implement the principle of mutual recognition in criminal matters" was also adopted [3]. In the same Council, the European Union´s Justice Commissioner Mr Antonio Vitorino announced three draft legislative instruments: "a proposal on the harmonisation of charges and penalties in cases of terrorism, a proposal on the acceleration and simplification of extradition procedures, and a proposal creating a European Arrest Warrant" [4].

Some months later, the State Secretary for Justice Mr Jose Antonio Michavila declared: "It is true that the tragic crimes committed on the 11th of September opened up a different period in the fight against terrorism. But it is also true that, at this time, there was a proposal about the European Arrest Warrant that the Commission had prepared, taking the bilateral agreements signed by Spain with other Member States as a point of reference. The adopted FD [5] is, therefore, a faithful and literal reflection of the Spanish initiative, both in its principles and legal technique" [6].

2. The third Spanish Presidency of the European Union

The development of an Area of Freedom, Security and Justice was one of the priorities of the third Spanish Presidency of the European Union (from January to June 2002), under which some relevant instruments based on mutual recognition were promoted. The final details for the FD on the European Arrest Warrant were agreed and some progress in the proposed FD on orders freezing property or evidence [7] was achieved.

In the informal meeting of justice ministries that took place in Santiago de Compostela on 14 February 2002, six Member States signed a declaration confirming their purpose to apply the FD on the European Arrest Warrant during the first quarter of 2003. Only Spain was able to apply the European Arrest Warrant earlier than that,

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November 2000, Agreement between Spain and Belgium on 30 March 2001, *Acuerdos sobre entrega temporal y cooperacion judicial* (Agreements on temporary surrender and judicial cooperation) agreed with France on 11 October 2001, and *Tratado relativo a la entrega judicial acelerada para delitos graves en un espacio común de Justicia* (Treaty about "accelerated" judicial surrender of suspects of serious crimes in a common Justice Area) agreed with United Kingdom on 23 November 2001.

[3] Doc. 13865/00 – Press release of the JHA Council 30 November – 1 December 2002, Brussels. The cited Programme of measures was published in *OJ*, no. C 12, 15 January 2001, p. 10.

[4] *Ibid.*

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between the Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[6] "España, pionera en la creación de un Área de Libertad, Seguridad y Justicia en la Unión Europea", *Revista del Centro de Estudios Jurídicos de la Administración de Justicia*, 1st semester 2002, no. 0, p. 13.

[7] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in European Union of orders freezing property or evidence, *OJ,* no. L 196, 2 August 2003, p. 45.

thanks to the approval of a domestic law on 14 March 2003 and notification of that approval to the General Secretariat of the Council on 17 December 2003 [8].

3. Spain's contribution to multiannual Justice and Home Affairs programmes

In the preparatory works of The Hague Programme, one of the main objectives included in the Spanish contribution was "the culmination of the programme of measures to implement mutual recognition principle in criminal matters, with the aim of providing the European Union with a coherent and simple legal system in judicial cooperation, capable of replacing traditional mechanisms on judicial assistance between Member States" [9].

The terrorist attacks that took place at Atocha train station on 11th March 2004 (11-M) confirmed the commitment of the Spanish authorities to go forward in the development of mutual recognition instruments as a key element in the fight against terrorism and other forms of serious crime, in particular, drug trafficking, illegal immigration and trafficking of human beings and money laundering.

Three days after the 11-M attacks, the Socialist Party of José Luis Rodríguez Zapatero obtained majority of votes in national parliamentary elections. Spanish support for the development of mutual recognition instruments has been maintained by both Justice Minister Juan Fernando López Aguilar (2004 to 2007) and Justice Minister Mariano Fernández Bermejo (2007 until beginning of 2009).

Appearing at Spain´s national parliament a few days before the approval of The Hague Programme, the Secretary of State for European Union Affairs pointed out: "Spain wanted to go forward in some areas, for example in the mutual recognition of criminal matters, although it is necessary to recognise that some relevant advances have been achieved, in view of a better coordination of criminal investigations, regulation of conflicts of jurisdiction, collection and admissibility of evidence and interconnection of criminal records of all Member States. On this last point, I would like to add that the European Commission has just sent to the Council a new proposal with the purpose of extending what is now an advanced project of interconnection of criminal records between Spain, France and Germany to the 25 Member States. The Hague Programme does not refer to the possible creation of a European Public Prosecutor (which has been recognised in the Constitutional Treaty) but it reinforces the role of Eurojust, which is the embryo of the European Prosecutor" [10].

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[8] Doc. 16232/03. *See* F. Irurzun, "La transposición de la Decisión marco en los 15 Estados miembros de la Unión Europea", p. 2, lecture prepared for the Seminar about the European Arrest Warrant that was held in Toledo from 8th to 11th of November 2004. Minutes can be read at Portal Iberoamericano de Ciencias Penales.

[9] "Contribución de España al debate sobre la consolidación del espacio de Libertad, Seguridad y Justicia", p. 15.

[10] *Diario de Sesiones de las Cortes Generales 2004 – 8 Legislatura*, no. 18, Wednesday 10 November 2004. Hearing of the Secretary of State for the European Union Mr. Navarro González, to provide information on the European Council of 4 and 5 November 2004.

4. Representatives of Spain in European meetings and negotiations

In internal meetings of the Council when the specific content of the proposals of the framework decisions is being debated, Justice Counsellors of the Permanent Representation of Spain to the European Union and some civil servants from the Ministry of Justice participate in the negotiations. From the perspective of the Spanish Ministry of Justice, these counsellors belong to the General Directorate of International Judicial Cooperation located in Brussels but they are in permanent contact with the International Judicial Cooperation General Directorate of the Ministry of Justice in Madrid.

Sometimes, other Spanish experts on criminal cooperation take part in the meetings that take place in Brussels or in the public hearings organised by the Commission in order to discuss specific green papers or proposals on judicial cooperation in criminal matters.

B. Concept and scope of mutual recognition

1. Should mutual recognition be absolute?

Spain is in favour of the mutual recognition principle being interpreted in the purest sense, which implies that grounds for refusal must be nearly non-existent and execution of judicial decisions as immediate and speedy as possible. From this perspective, some grounds for refusal of the European Arrest Warrant could have been deleted (such as the statute-barred of the offence assessed according to the rules of the executing Member State), are repetitive (such as the present regulation of the *non bis in idem* principle), or entail elements that are reminiscent of the traditional mechanisms of judicial cooperation (territoriality principle, current regulation of speciality rule).

Should the principle of mutual recognition be of a different nature depending on the stage of criminal proceedings? During the early stages of work on the European Arrest Warrant, Spain's idea was that custodial sentences should be directly and immediately executed in other EU Member States, while requests for arrest and surrender for the purpose of conducting a criminal prosecution should be sent through a common form to all EU Member States. The FD on European Arrest Warrant finally adopted did not follow that approach, since in both cases it is necessary to issue the aforementioned form, which is submitted, in any case, to verification as to whether there are any grounds for refusal.

Another relevant point, closely connected with the understanding of the mutual recognition principle, is the relation between the European order sent to the executing judicial authority and the national decision, adopted in the course of a national criminal proceeding, and serving as a basis for this European order. The relationship between both of them differs from one framework decision to another and is not always clear.

In the case of the European Arrest Warrant, the judicial instrument directly executed in other Member States is the form contained in the Annex of the FD and, in principle, it is not necessary to facilitate the original of the domestic judicial decision to the executing judicial authority.

The situation is different regarding the European freezing order. Art. 6.1 of the Spanish Law implementing the correspondent FD (LeOFP) [11] states that the national order deciding on the freezing must be sent to the executing judicial authority jointly with the certificate provided for in the annex of the law. That means that the order to be executed in another Member State is the national decision and not the certificate. As the original of this judicial decision should be included in one specific folder of the Spanish criminal proceeding (*pieza separada de medidas cautelares*), an authorised copy has to be prepared, signed by the judicial authority or the secretariat of the court, and sent to the executing judicial authority. This has also been the approach followed by the Spanish law (LeFP) [12] implementing the FD on financial penalties [13]. Art. 8 of the cited LeFP states that the Spanish judicial decision has to be sent accompanied by the certificate included in the annex of the law and that the judicial decision should be the original or an authorised copy (*copia testimoniada*).

2. Interpretation of the limits of the mutual recognition principle

a) Double criminality

Spain totally agrees with the abolition of the double criminality principle as a ground for refusal of the European orders. It is considered that all EU Member States have a similar idea about criminal justice and that specific differences in criminal law cannot justify an automatic check of this ground for refusal by the executing authority.

Nevertheless, the existing regulation of the double criminality principle is more compatible with the mutual recognition principle than the setting up, *as an alternative*, of a database containing the exact correspondence of criminal offences in all Member States. That database could be very useful as a consultative element in order to facilitate the interpretation of criminal offences excluded from double criminality verification, but not a mandatory one.

A negative list of the criminal offences not covered by the mutual recognition principle seems closer to the first stages of extradition and not very compatible with the mutual recognition principle. But this is without prejudice to the possibility for Member States to make declarations about some criminal offences (e.g. euthanasia, abortion, drug trafficking), in cases where the double criminality requirement has been abolished.

b) Territoriality clause

The *territoriality principle*, which is maintained in some framework decisions as a ground for refusal of the European orders, should be considered as a criterion for

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[11] *Ley 18/2006, de 5 de Junio, para la eficacia en la Unión Europea de las resoluciones de embargo de bienes y de aseguramiento de pruebas en procedimientos penales, BOE*, 134, 6 June 2006, p. 21218.

[12] *Ley 1/2008, de 4 de Diciembre, para la ejecución en la Unión Europea de resoluciones que impongan sanciones pecuniarias, BOE*, 293, 5 December 2008, p. 48679.

[13] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ,* no. L 76, 22 March 2005, p. 16.

determining the judicial authority competent for investigating or deciding in a specific case. Therefore, the territoriality principle should be deleted from the framework decisions inspired by the mutual recognition principle and be incorporated in the European instrument governing conflicts of jurisdiction, as one of its criteria, together with nationality of the perpetrator, residence of the victims and facility for collecting evidence. As we will see in paragraph 4.A.1.b), this is the interpretation supported by the *Audiencia Nacional*.

c) Protection of fundamental rights

The reference to the necessary protection of fundamental rights, which is mentioned in some framework decisions, is evidence of the compromise achieved by EU Member States in order to guarantee their full respect in the field of judicial cooperation in criminal matters.

Such reference should not be interpreted as an obligation to check the possible violation of fundamental rights in all cases of European orders received. The point of view must be just the opposite: to consider that all Member States of the European Union share a common culture and the same principles and that all of them observe fundamental rights of defendants in criminal proceedings. Only where a possible violation is specifically alleged by the requested or affected person, should the judicial authority have to resolve the matter. But this is because the judicial authority is the guardian of the fundamental rights of the suspects in the criminal proceeding, not because fundamental rights is one of the grounds for refusal of the European orders based on mutual recognition.

3. Application of mutual recognition in all the phases of criminal proceedings. Codification of European instruments as final result

Spain is in favour of developing the necessary measures to apply the mutual recognition principle in all the phases of the criminal proceedings. The application of conventions and treaties in the fields of judicial cooperation not covered by the mutual recognition instruments (return of nationals to the executing Member State, for example) is considered as a provisional solution.

Codification of mutual recognition instruments would facilitate the inclusion in one request of all the necessary measures to be executed in another Member State (i.e. hearing of witnesses, house searches) and the successive execution of complementary measures and instruments (i.e. freezing orders and confiscation of properties).

The fragmentation of mutual recognition instruments and the fact that the instruments approved up until now only cover partial aspects of criminal judicial cooperation requires a special effort for judges and prosecutors in order to clarify the specific treaty or internal legislation to be applied in a particular case. Perhaps this is a common question to all Member States, but in Spain it presents additional difficulties because we do not have an internal law on judicial cooperation in criminal matters. The matter is governed by European conventions, bilateral treaties and some provisions in the Criminal Code, Criminal Procedural Code, specific laws and domestic regulations. The possible codification of the European instruments of judicial cooperation is an interesting option for Spain, as it would represent the end

of our dispersed and incomplete legislation of judicial cooperation in criminal matters in the EU.

C. Concrete examples of the Spanish approach

Spain supported the proposal for a FD on the supervision of probation measures and alternative sanctions [14] because "it completes the instruments on mutual recognition in criminal matters created in the European Union covering all the phases of criminal proceedings (…). Although the final result is not as ambitious as the original proposal, it will provide some advances compared with treaties and conventions that are currently regulating transfers of sentenced persons between Member States" [15].

The proposal for an FD on prohibitions related to sexual offences [16] was received with more reticence. It is recognised that this proposal was in the framework of measures related to the exchange of information from criminal records, and at the same time it is a sectoral application of the measures announced by the "Programme of measures to implement the principle of mutual recognition in criminal matters". The proposal "was seen as original, but in this field the extension of mutual recognition to prohibitions declared by judicial decision will suppose a partial answer to the traditional national effects of these decisions, despite the free movement of teachers to all Member States according to Communitarian Law" [17].

During the course of the Portuguese Presidency, Spain clearly supported the proposal for an FD on European supervision order [18]: "covering an existing gap, it will guarantee for non residents access to provisional liberty in the same conditions as residents, without the risk of their suffering discrimination when judicial authorities have no guarantees to locate a person in case he or she decides to go back to his/her country of residence" [19]. As for the proposal for an FD on the supervision of probation measures and alternative sanctions [20], Spain supported the general objective of the proposal but insisted on "clarifying the scope of this proposal, and its coherence with

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[14] Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ*, no. L 327, 5 December 2008, p. 27.

[15] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia alemana* (Summary files about the Spanish position at JHA Councils during German Presidency).

[16] Initiative of the Kingdom of Belgium with a view to adopting Council Framework Decision 2008/…/JHA on the recognition and enforcement of prohibitions arising from convictions for sexual offences committed against children, *OJ,* no. C 295, 7 December 2007, p. 18.

[17] *Ibid*.

[18] Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, COM (2006) 468, 29 August 2006.

[19] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia portuguesa.*

[20] Initiative of the Federal Republic of Germany and of the French republic with a view to adopting a Council Framework Decision (2007/…/JHA) of … on the recognition and

other pending proposals, in order to guarantee an instrument of easy application and a final result where all the instruments fitted together" [21].

Lastly, under the Slovenian Presidency, Spain reiterated its support for the proposal for an FD on a European supervision order but added that "it will be absolutely necessary that, in order to guarantee a wide application, the final solution provides an efficient instrument capable of creating enough trust in all Member States of the European Union" [22].

D. Complementary measures to mutual recognition

1. Harmonisation of procedural guarantees

The differences in the criminal proceedings of the EU Member States are not so pronounced as to justify the non-execution of judicial decisions in the European Judicial Area. However, the proposal for an FD on fundamental rights in criminal proceedings [23] was received in our country "in a very positive way, because it covers an area, the protection of fundamental rights and guarantees of defendants, with no significant progress in European Union", and it could serve, at the same time, "to reduce some reluctances still existing about facilitation of mutual recognition in criminal matters" [24].

Concerning the proposal for a Framework Decision enhancing procedural rights in trials "*in absentia*" [25], "Spain shares the objective of reducing the grounds for refusal in the legal instruments of criminal judicial cooperation, because it always has a more dynamic application of mutual recognition principle. So, in principle, the targeted objective is a good one" [26].

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supervision of suspended sentences, alternative sanctions and conditional sentences, *OJ,* no. C 147, 30 June 2007, p. 1.

[21] *Ibid.*

[22] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia Eslovena.*

[23] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328, 28 April 2004.

[24] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia alemana.*

[25] Initiative of the Republic of Slovenia, the French Republic, the Kingdom of Sweden, the Slovak republic, the United Kingdom and the Federal Republic of Germany with a view to adopting a Council Framework Decision 2008/…/JHA on the enforcement of decisions rendered *in absentia* and amending Framework Decision 20027584/JHA on the European Arrest Warrant and the surrender procedures between Member States, Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, Framework Decision 2006/783/JHA on the application of mutual recognition ot confiscation orders, and Framework Decision 2008/…/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ,* no. C 52, 26 February 2008, p. 1.

[26] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia eslovena.*

2. Harmonisation of criminal substantive law

The *harmonisation of criminal substantive law* is considered as a useful mechanism for facilitating the practical application of the mutual recognition principle. In the Spanish contribution to The Hague Programme, it was said that "approximation of national criminal legislations is not an objective, but an instrument to provide security to European citizens" [27].

Spain is very interested in the approximation of criminal offences that cause insecurity in the country: terrorism, illegal immigration, racism and xenophobia. This was the reason why it welcomed both the proposal for an FD amending Framework Decision 2002/475/JHA on combating terrorism [28] and the proposal for an FD on combating racism and xenophobia [29].

Spain also paid attention to the provisional report presented during the German Presidency related to the establishment of a horizontal mechanism of definition of criminal offences, "especially from the point of view of its consequences for the result obtained up until now in the development of the mutual recognition principle, and about the double criminality principle in particular" [30].

3. Other measures

In order to facilitate the full respect of the mutual recognition principle, together with the approval of legal instruments with the purpose of harmonisation, the interconnection of information between judicial and police authorities of Member States is a key element of the smooth running of the mutual recognition principle. It is also necessary to clarify and overcome the technical obstacles to the exchange of information obtained from criminal records.

3. Transposition of European instruments into the Spanish legal system

A. The transposition process

1. State of play

Spain approved Law 3/2003 of 14 March 2003, on the European Arrest Warrant and surrender procedures (LeEAW) [31] and Organic Law 2/2003 of 14 March 2003,

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[27] Spanish Contribution to The Hague Programme, *op. cit.*, p. 16.

[28] Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, COM (2007) 650, 6 November 2007. This initiative has been adopted and published in *OJ*, see Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ,* no. L 330, 9 December 2008, p. 21.

[29] Proposal for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664, 28 November 2001. This initiative has been adopted and published in *OJ*, 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*, no. L 328, 6 December 2008. *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia alemana.*

[30] *Fichas resumen de las posiciones de España en los Consejos de Ministros JAI de la UE durante la Presidencia alemana*

[31] *BOE*, 65, 17 March 2003, p. 10244.

supplementing LeEAW [32], within the deadline established in Art. 34.1 of the relevant FD ("before 31 December 2003", according to the aforementioned European law) [33].

Law 18/2006 of 5 June on the efficacy within the European Union of orders freezing property or evidence in criminal proceedings (LeOFP) and Organic Law 5/2006 of 5 June 2006, supplementing the LeOFP [34], were passed almost one year after the time limit established in Art. 14.1 of the FD on the matter ("2 August 2005 at the latest").

Law 1/2008 of 4 December 2008 for the execution in the European Union of the judicial decisions on financial penalties (LeFP), and Organic Law 2/2008 of 4 December, supplementing the cited law [35], were adopted more than one year and a half after the maximum period of implementation established in the correspondent FD ("before the 22 March 2007", according to Art. 20.1 of this FD).

No other framework decisions on mutual recognition in criminal matters have been transposed into the Spanish legal system at the moment.

2. Difficulties

The delays in the Spanish Parliament´s transposition of the framework decisions are caused by different reasons. The preparation by the Ministry of Justice of the Draft LeOFP and its discussion in the Spanish Parliament coincided with other relevant reforms that Spanish society needed and it was necessary to adjust the legislative timetable to all of them.

The first draft LeFP elaborated by the Ministry of Justice could not be sent to the Congress during the 8th Legislature (2004-2008), because, after the approval of the Ministries Council, it was distributed to the Spanish General Council of the Judiciary, the Prosecutor Council and the State Council, and this last institution sent its opinion in December 2007. A second draft was approved by the Government and sent to the Spanish Parliament in May 2008, which finally resulted in the cited law 1/2008 of 4 December.

In other framework decisions the causes for delay are of a technical or legal nature.

Spain has missed the deadline for the transposition of the FD on confiscation orders [36], but the preparation of a draft requires a detailed assessment and analysis to avoid overlapping with other rules governing confiscation, which were recently modified taking into account some European rules.

Firstly, the provisions regulating confiscation are mainly in our Criminal Code (CC). Art. 127 and 128 CC contain general rules on confiscation and Art. 301.5,

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[32] *Ibid.*

[33] See Report from the Commission based on Art. 34 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, Brussels 23 February 2005, COM (2005) 63 final, p. 2.

[34] *BOE*, 134, 6 June 2006, p. 21207 and *BOE*, 141, 14 June 2006, p. 22682.

[35] *BOE*, 293, 5 December 2008, p. 48678.

[36] Council Framework Decision 2006/783/JHA of 26 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

302.2 and 374 contain certain special rules for money laundering and drug trafficking. These precepts were amended in 2003[37] taking as reference the 1990 Convention on laundering of the proceeds from crime[38], the Framework Decision on money laundering[39] and the recommendations included in the 1997 Action Plan to fight against organised crime.

Secondly, in 2003 Law 17/2003 of 29 May, regulating a State fund for all confiscated goods and assets from illegal drug trafficking and other related offences[40] was also approved.

Thirdly, the Council of Ministries approved on 15 December a bill amending the Criminal Code, which contained relevant changes with a view to reinforcing the fight against organised crime. A new regulation on confiscation was proposed, in accordance with the FD 2005/21/JHA of 24 February 2005 on confiscation on crime-related proceeds. The project was registered at the Congress on 20 December 2006, and the period open to political parties for the presentation of modifications was extended several times, until December 2007, when the project was declared expired due to the end of the 8th Legislature[41].

Lastly, the LeOFP went further than the corresponding FD on orders freezing property or evidence, and did not only regulate the destination of properties and evidence at the pre-trial or cautionary stage, but also some aspects covered by the FD on confiscation orders. The 1st final provision of the law introduced a new Chapter in the Code of Criminal Procedure (CCP) about "the destruction and realisation of judicial effects". Art. 367*sixties*, included in the aforesaid chapter, explains that this regulation "is understood notwithstanding the provisions contained in special rules, in particular the provisions of Art. 374 CCP and Law 17/2003 of 29 May, which regulates the State fund of confiscated instruments and assets from drug trafficking and related offences, and its implementation rules".

In short, the current regulation on confiscation in our system presents considerable complexity and its peculiarities make it highly improbable that the corresponding Framework Decision on mutual recognition of confiscation orders would be transposed as a whole. This block transposition was the methodology used by our policymaker in both the case of the European Arrest Warrant and that of the orders freezing property or evidence, but the particular case of confiscation, as we have already pointed out, requires a particular and detailed analysis of which provisions in the Criminal Code and the complementary legislation should be amended and in what sense.

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[37] *BOE*, 283, 26 November 2003, p. 41842.

[38] Council of Europe Convention on laundering, search, seizures and confiscation of the proceeds from crime, no. 141, 8 November 1990.

[39] Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, *OJ*, no. L 182, 5 July 2001, p. 1.

[40] *Ley 17/2003, de 29 de Mayo, por la que se regula el Fondo de bienes decomisados por tráfico ilícito de drogas y otros delitos relacionados, BOE*, 129, 30 May 2003, p. 20820.

[41] See BOCG – Congreso de los Diputados N. 119-1 of 15 January 2007, p. 1, where the *Proyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal,* ref. 121/000119 was published.

B. The instruments implemented

1. Approach of the Spanish legislator to the mutual recognition principle

The Spanish legislator, in all the Spanish laws implementing the framework decisions of mutual recognition, includes a general introduction (*preámbulo)* which carefully describes the legal bases and makes reference of the mutual recognition principle.

The Tampere European Council and the programme of measures for the implementation of the principle or mutual recognition in criminal matters are always mentioned, but it could be desirable to include also some references to the Hague Programme and its Action Plan (as the multi-annual programme which followed the measures adopted in Tampere).

These general introductions also refer to the quasi-automatic execution of the judicial decisions transmitted thanks to the direct communication between the judicial authorities of the Member States, the absence of verification of the double criminality principle in cases of serious crime and the restrictive application and interpretation of the grounds for refusal.

2. Literal transposition of the European Arrest Warrant

Regarding the content of the Spanish laws based on the principle of mutual recognition, the Spanish policymaker carried out an almost literal transposition of the FD on the European Arrest Warrant. It maintains the same scope of application as the FD and the double criminality principle is regulated in the same manner.

LeEAW literally reproduces the list of offences exempt from the *double criminality check* contained in the FD and it respects the punitive limits established in this European law. As in the FD, it specifies that double criminality must be examined based on "abstract" criteria i.e. "whatever the constituent elements or however it is described" (final subsection of Art. 9.2 LeEAW).

The double criminality check is an option the judicial authority (in this case, the *Audiencia Nacional*) may or may not apply. There are some formal differences in the Spanish regulation [42], but without practical consequences.

The Spanish lawmaker did not include *additional grounds for refusal*. The law literally transposed each and every one of the mandatory and non-mandatory grounds for refusal of the FD. The only difference worth mentioning is in relation to the guarantees that may be requested by the issuing State in specific cases, in particular, where a final judgement has been issued *in absentia.* Art. 11 LeEAW, which regulates the said guarantees, does not refer to cases *in absentia,* but in practice, when the

[42] Art. 9.1 of Law 3/2003 on the European Arrest Warrant has not been included in Chapter I "General Provisions", but in Chapter III related to "Execution of a European Warrant". The Spanish legislator also wanted to improve the internal systematic of the law and, instead of following the European wording (which firstly regulates the scope of application of the law, secondly the derogation of double criminality and, finally, the cases in which the former may be required) decided to firstly describe the list of offences that would be exempt from double criminality checks and afterwards stipulates that in relation to the other criminal offences the judicial authority may verify if the requirement has been fulfilled.

legal counsel of the arrested person claims that a sentence has been adopted in such circumstances, the *Audiencia Nacional* analyses the matter and expressly decides thereon.

The *principle of territoriality* has been regulated in the LeEAW in the same manner as in the FD. The Spanish law allows the competent judicial authority to reject the execution of a European Arrest Warrant "where the European warrant relates to offences which are regarded by Spanish law as having been committed in whole or in part in Spanish territory"[43] and "where the European warrant relates to offences which have been committed outside the territory of the issuing State and Spanish law does not allow prosecution for the same acts when committed outside its territory".

The *arrest and surrender of nationals* is considered in the Spanish system in the same way as in the FD. In accordance with Art. 5.3) FD, Art. 11.2 of LeEAW declared that surrender "may be subject to the return of the person to Spain in order to serve the custodial sentence passed against him in the issuing Member State".

The value that should be given to the *reciprocity principle* was discussed during the parliamentary process of the LeEAW. Art. 13.3 of the Spanish Constitution states that "extradition shall be granted only in compliance with a treaty or with the law, on reciprocal basis" and the issue whether the reciprocity should also inspire relations between Spanish judicial authorities and authorities from other Member States was thus raised within the context of the European Arrest Warrant.

The aforesaid principle is not expressly mentioned in the law regulating the European Arrest Warrant nor has this principle inspired its practical application. It has only been applied by the Spanish judicial authorities after the German Constitutional Court dismissed certain provisions of their national Law in the *Darkanzali* case[44] Spain considered that, until a new German Law was passed, a request for arrest and surrender received from this country should follow the extradition formalities, and requests for surrendering Spanish citizens from German authorities should be rejected based on the application of the reciprocity principle[45].

LeEAW does not contain any reference to the necessary safeguard of fundamental rights recognised in Art. 6 EU. The cited Spanish laws have not introduced a specific reason for refusing European orders because of the risk of violation of fundamental rights.

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[43] Spain has not maintained the last subsection of Art. 4.7.a) which concerns the commission of an offence in whole "or in part in the territory of the executing Member State or *in a place treated as such*". The Third Additional Provision of LeEAW, on "Transmission and execution of European warrants issued from or addressed to Gibraltar" provides that "Application of the Art. regarding European warrants issued from or addressed to the British colony of Gibraltar shall be governed by the provisions of the "Arrangements agreed relative to Gibraltar authorities in the context of EU and EC instruments and related treaties", contained in Council document 7998/00 JHA 45 MI 73 of 19 April 2000".

[44] See Report from the European Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States, Brussels 11 July 2007, doc. COM (2007) 407 final, p. 6.

[45] Agreement of the Criminal Division of the *Audiencia Nacional* on 21 July 2005.

The fact that the legislator has not introduced a specific ground for refusal based on the infringement of fundamental rights does not imply that the competent authority must not analyse this issue when *it is claimed by the lawyer of the requested person or by the Public Prosecutor*. Thus, it is a further reason that the judicial authority has to analyse and appropriately decide in its judicial decision.

The legislator has taken great care of the need to safeguard the rights of the requested person during the arrest (Art. 13 LeEAW) and in the subsequent stages that must be carried out in order to decide whether the surrender is appropriate or not (Art. 17 and 18 LeEAW).

Regarding the proceeding for the execution in Spain of the EAW, the most relevant aspect is the lack of an ordinary remedy against the decision of the Spanish judicial authority.

3. Particularities introduced in the LeOFP and in the LeFP

Further comments should be made on the LeOFP. This law literally reproduces the list of offences exempt from double criminality checks and the punitive limits contained in the relevant FD. But for offences not included in the said list it introduces two main differences.

On the one hand, verification of double criminality is an obligation of the judicial authority and not a mere possibility (as happens with the European Arrest Warrant). With this legislative option, the policymaker intends to avoid different criteria seconded by executing competent authorities (due to the de-centralised system of executing judicial authorities in the case of the European orders freezing assets and evidence).

The Spanish legislator did not maintain the distinction contained in Art. 3, para 4.2d sentence of the FD, which allows the executing judicial authority to submit the recognition and enforcement "to the condition that *the acts* for which the order was issued constitute *an offence which, under the laws of that State, allows for such freezing*". Our policymaker has only pointed out that the Spanish judicial authority shall "subject its verification and execution to the condition that *the acts for which the order was issued constitute an offence* under the Spanish law". At least in relation to the preliminary precautionary stage or preventive freezing this difference does not seem to have relevant consequences [46] as the CCP authorises freezing of property in all cases (irrespective of the kind of offence justifying the measure).

There are some differences in structure in the Spanish regulation and, among them, the most relevant is the introduction of a third section in Art. 10 which states that "in terms of taxes and customs or exchange duties the execution of the measure may not be rejected on the grounds that Spanish law does not impose the same kind of taxes or duties or that it does not contain the same regulation as the issuing State". This

[46] The situation would be quite different if the Spanish legislator maintains this distinction upon transposition of the FD on confiscation, as the CC does regulate several types of confiscation according to the nature of the offence committed. Then, what could happen is that (in a first moment) a Spanish judicial authority executes a freezing order of an asset but (after that) it may not execute a request for confiscation sent to it by the same foreign judicial authority.

clarification appears in the FD in Art. 7 (d) containing grounds for non-recognition or non-execution.

LeOFP does not contain any reference to the necessary safeguard of fundamental rights.

The terminology used in the LeOFP presents some difficulties, because it is quite different than that used in the Spanish CCP. Orders freezing assets or evidence executed in Spain in cases of attempt or imprudence are also controversial when the issuing authority of the other Member State asks for the confiscation, because the present rules in our Criminal Code only allow confiscation based on fraudulent activities.

In the case of the LeFP, it has been stressed that the grounds for refusal are not mandatory and the law refers to amnesty and indult as a reasons to suspend or postpone the execution. The most relevant difference regarding the transposed FD is the introduction in the Spanish law of a ground for refusal based on the possible violation of fundamental rights by the issuing Member State (Art. 14.1.k)).

4. Competent judicial authorities

In relation to the issuing or executing competent judicial authorities, the criteria followed by domestic laws differ considerably.

A European Arrest Warrant may be issued by any Spanish judicial authority competent for detention, judgment or supervision of criminal decisions when it requires bringing the suspect or the convicted before the court: non-centralised competence then, in cases of issuing judicial authorities [47].

On the contrary, the execution of orders received from other Member States must in any case be decided at the *Audiencia Nacional* and therein by the *Juzgados Centrales de Instrucción.* If the requested person does not consent to his/her surrender, or his/her legal counsel or the Public Prosecutor claims that there are grounds for refusal, "the judge of the *Juzgado Central de Instrucción* shall refer the proceedings to the Criminal Division of the *Audiencia Nacional*" (Art. 18.2 LeEAW): centralised competence criteria in the case of the executing judicial authority [48].

A European freezing order may be issued by the competent judge of the criminal investigation in which the measure has been adopted. Public prosecutors may also issue orders freezing property (not evidence) in cases then the required measure does not affect any fundamental right (Art. 3.1. LeOFP). Again, "non centralised" criteria with the relevant point that the public prosecutor is one of the issuing authorities.

The execution of freezing orders is not centralised in the *Audiencia Nacional*. For practical reasons, they must be executed by the investigating court of the place where the property or evidence to be frozen is located. Public prosecutors are competent for executing orders for freezing property or evidence under their competences.

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[47] See Evaluation Report on the fourth round on mutual evaluations "The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States – report of Spain". Brussels 30 March 2007. Doc. 5085/2/07, REV2, p. 5.

[48] See *ibid.,* p. 6 and 11.

Decisions adopted by judicial authorities both as issuing and executing authorities may be revised. On the contrary, it is not possible to appeal the decisions of the public prosecutors. Therefore, people affected by the freezing order would be in a worse position if the decision is taken or executed by a prosecutor.

In the case of financial penalties, the competent authority for issuing a European order is the judge or the court before whom the Spanish criminal proceeding has taken place. The executing judicial authority is the judge of the place where the natural or legal person affected by the decision has some property or income, is normally resident or, in the case of a legal person, has is registered seat.

Both centralised and non-centralised models for issuing or executing European orders have advantages and disadvantages.

In principle, the most efficient option is that European orders are issued by the judicial authority who is investigating or conducting the Spanish criminal proceeding where it is necessary to request legal cooperation from another MS. This is the best way to avoid delays in the transmission of the European orders or when additional information is requested by the executing authority. With this option, drawbacks could arise because all Spanish judicial authorities competent in criminal matters should, in principle, have a good knowledge of the mutual recognition instruments, both its legal regulation and practical application. Training must be well organised, in a permanent way and covering as many judicial authorities as possible. That is why the Spanish Judicial Network of International Cooperation (REJUE-Red Judicial Española de Cooperación Judicial Internacional) and Spanish Network of Prosecutors are key instruments in order to facilitate the practical application of mutual recognition.

Another possible risk is the lack of uniform criteria about the interpretation of domestic legislation. Practical guidelines and handbooks are edited by the General Council of the Judiciary, General Prosecutor Office and Ministry of Justice in order to facilitate and provide elements for the interpretation of European orders.

A centralised system, applied for executing European Arrest Warrants, does not present those disadvantages, but causes other problems. For example, in the particular case of the European Arrest Warrant, wherever the arrest has taken place, all suspects have to be driven to the *Audiencia Nacional* in Madrid, where the hearing of Art. 14 LeEAW takes place. In this context, sometimes it is very difficult to respect the time limits for detention. It has also happened that a defendant has been arrested near the frontier with France and taken to Madrid, where he has given his consent to the surrender, and therefore has been taken back to a place near the same frontier to be surrendered to the French authorities.

C. Instruments not yet implemented. Some issues

In Spain, it has not been discussed in detail whether the FD on the European Evidence Warrant (EEW)[49] will be transposed according to a dual system of coercive

[49] 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*, no. L 350, 30 December 2008, p. 72.

measures or adapting our legislation to the minimum standards provided for by the EEW.

In principle, the content of the FD (Art. 7, 11.3, 14.3) is compatible with the legal regulation of searches and seizures in the Spanish CCP (Art. 545 and f.) and with the practical application of both measures by Spanish judicial authorities, when they are required for obtaining some objects, documents or data in the context of the existing instruments of European legal assistance.

Searches and seizures are governed in our national system by Art. 545 CP, which do not contain a specific list of offences authorising the adoption of these measures. According to the proportionality principle – which must be carefully observed in all measures limiting fundamental rights – coercive measures could be adopted in most cases of serious crime. In other cases, the adoption of the measure could be adopted or not according to a case-by-case analysis. So, our interpretation of the proportionality principle is in line with the *double criminality principle* of Art. 14 FD and the grounds for refusal of Art. 13.

As for the formalities to be adopted during the execution of searches and seizures, Spanish judicial authorities apply domestic regulation (Art. 545 and f. of the Spanish Criminal Law), but maintain a flexible criterion and admit other guarantees requested by the issuing Member State, which is also in line with Art. 12 of the FD.

In relation to the extended powers of confiscation specified in the FD on the confiscation of crime-related proceeds [50], the Spanish legislator tried in 2007 to adapt internal regulation on this issue (contained in Art. 127 and 128 CC) to such extended powers. The introduction (*Exposición de Motivos*) of the draft expressly referred the cited FD and justified the necessity to adapt our internal regulation saying that confiscation is now a major instrument in the fight against criminal organisations. This draft was never approved [51], but it is expected that the Spanish legislator maintains this point of view in the transposition of both the FD on confiscation of crime-related proceeds and on the mutual recognition of confiscation orders.

4. Interpretation and application of mutual recognition instruments by Spanish judicial authorities

A. Judicial interpretation of the mutual recognition principle

1. In line with the spirit and content of the mutual recognition principle

The principle of mutual recognition of judicial decisions in criminal matters is interpreted and applied by Spanish judicial authorities in line with the spirit and the content of the mutual recognition principle. Most of the judicial decisions of the *Audiencia Nacional* on European Arrest Warrants issued by other Member States expressly refer to the *context* in which the arrest and surrender is taking place (the Area of Freedom, Security and Justice), the *basic principles* (mutual recognition, mutual trust) and the *essential characteristics* of the European Arrest Warrants (direct contact

[50] Council Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, *OJ*, no. L 68, 15 March 2005, p. 49.

[51] See para. 3.A.2. of this chapter.

between judicial authorities, immediate execution of orders, restrictive interpretation of grounds for refusal).

As an example, *Auto* 1/2005, of 10 January, rendered by the Criminal Division of the *Audiencia Nacional* stated: "The procedure for surrender under a European Arrest Warrant is regulated by Law 3/2003 of 14 March. The context for this law, as stated in the preamble to it, is the creation of an Area of Freedom, Security and Justice in the European Union, which requires a body of law within which effective legal protection of citizens' rights is ensured and infringements of those rights meet with the response of a legal system without borders in the Union. The traditional mechanisms of judicial cooperation have been replaced by a new form of understanding the relations between the legal systems of Member States based on mutual trust. In this trust lies the principle of mutual recognition, which enables decisions rendered by the judicial authorities of the other States to be executed almost automatically. The application of the principle of mutual recognition means that the grounds for refusal of execution are defined in the text of the law and can be objectively assessed by the judicial authority. It also means the disappearance of intervention by the executive since mutual trust dispenses with the need for verification of the political situation in the issuing State. The procedure is expedited by the fact that the European Arrest Warrant is sent directly by the issuing judicial authority to the authority responsible for its execution without any need for intervention by the central authority, i.e. the Ministry of Justice" [52].

The controversial decisions on the scope and terms of the principle of mutual recognition have been issued by the Spanish Constitutional Court, in proceedings for the protection of fundamental rights (*recursos de amparo*) initiated by suspects to be surrendered to other Member States according to the decision of the Criminal Chamber of the *Audiencia Nacional* [53]. The Constitutional Court, immediately after the admission of the request for protection of fundamental rights and contrary to the general criteria set out in Art. 56.1 of the Organic Law of the Constitutional Court, suspends the surrender until the final decision of the *recurso de amparo* [54].

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[52] Since January 2005 this paragraph has been literally transcribed in the first legal grounds of most of the decisions of the *Audiencia Nacional – Sala Penal – Seccion primera.* As examples, 10 January 2005, AAN 2/2005; 11 January 2005, AAN 3/2005, 24 January 2005, AAN 12/2005,.

[53] Evaluation report on the fourth round on mutual evaluations… Spanish report, *op. cit.*, p. 9 and 32.

[54] According to Art. 56.1 of the Organic Law of the Constitutional Court, the general rule is the non-suspension of the judicial act or decision in the *recurso de amparo*, although, as an exception, the same article provides for suspension in order to prevent the loss of efficacy of the *recurso de amparo,* and with the condition that the said suspension does not cause "a serious infringement of general interests or the fundamental rights or the public liberties of a third party". In agreement with this rule, for extradition cases, the Spanish Constitutional Court usually suspends the authorisation to extradite the requested person until the decision of the *recurso de amparo* have been adopted. Otherwise, when the Constitutional Court renders a decision after the appeal for legal protection, it could happen that its decision may only be declaratory, with no practical effectiveness, as it would be very difficult for a national already under the jurisdiction of another State to be returned to Spain. See, in relation with extradition proceedings, Spanish Constitutional Court, 27 September 1999, ATC 228/1999; 11 November

The postponement of the execution could be criticised from the point of view of the mutual recognition principle, but it must be admitted that, if the surrender is authorised during the course of the *recurso de amparo,* a final decision in favour of the fundamental rights of the surrendered suspect would be very difficult to execute. In order to speed the proceeding up, the Constitutional Court declares that, "due to the general interests of the constitutional decision, the proceeding must be solved in the shortest period of time. And in addition, the executing authority must adopt the necessary measures to avoid the disappearance of the requested person" [55].

In any case, for the moment it is not clear whether the Constitutional Court will continue revising the possible violation of fundamental rights in judicial cooperation proceedings. The law governing the Constitutional Court has been recently modified and a new regulation establishes an additional requirement for the admission of the *recusos de amparo*, focused on the need to justify an appeal to the Constitutional Court on its especial constitutional relevance. From this perspective, it is dubious that the cited High Court attributes such relevance to the judicial cooperation proceedings. The first decision adopted in this context by the Constitutional Court did not admit the *recurso de amparo*, but in this case the lawyer did not justify its special constitutional relevance [56].

2. In favour of the surrender of the requested person

The *Audiencia Nacional* maintains an interpretation of the grounds for refusal of the European Arrest Warrant in a sense clearly favourable to the surrender of suspects and convicted persons. This position is especially noticeable regarding the *res iudicata*, territoriality and double criminality principles.

1999, ATC 266/1999; 17 march 2000, ATC 88/2000; 16 May 2000, ATC 123/2000; 2 April 2001, ATC 78/2001; 14 January 2002, ATC 2/2002, 18 October 2004, ATC 388/2004. The Constitutional Court is of the opinion that: "This argument applies in cases such as this where the surrender of a citizen is requested under a European Arrest Warrant, not only because the new European Arrest Warrant and surrender procedure is legally designed to replace the extradition system between countries which have signed the European Convention on Extradition but also because the European Arrest Warrant and extradition are analogous institutions as regards the objective of the constitutional proceeding for the protection of fundamental rights. As in the case of execution of an extradition order, the execution of a European Arrest Warrant entails the immediate surrender of the appellant to the authorities of the issuing State for trial, with the resulting difficulty in giving effect in the State concerned to a decision upholding an appeal for judicial protection and thus the risk of thereby consolidating de facto the effects of the potential infringement of a fundamental right". Spanish Constitutional Court, 26 February 2007, ATC 68/2007.

[55] *Audiencia Nacional,* 25 September 2006, AAN 330/2006.

[56] *Constitucional Court*, 21 July 2008, ATC 188/2008.

a) Non res iudicata

The refusal of a previous extradition does not have the effect of *res judicata* on a European Arrest Warrant [57]. Extradition and European Arrest Warrant are two mechanisms for judicial cooperation which differ greatly, because of the context in which they are applied and their principles. That means that, after the refusal of an extradition, a European Arrest Warrant about the same person and offence may be authorised, when the reason for rejecting the extradition has disappeared or when it may be interpreted from another perspective. The Constitutional Court has also confirmed this interpretation [58].

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[57] Thus in case ANN 8/2005 of 24 January 2005: "The Portuguese authorities had requested the extradition of the requested person and the Second Chamber of the Criminal Division of the *Audiencia Nacional* had ruled on 17 March 2003 that extradition was inappropriate in view of the fact that the requested person was a Spanish national and that Portuguese domestic law only permitted the extradition of Portuguese nationals in cases of international organised crime (Art. 33.3 of the Portuguese Constitution)", (…) "The defence alleged fraud, arguing that following the rejection of their extradition request the Portuguese authorities had issued a European Arrest Warrant for the same acts against the same person. The matter was discussed by the plenary of the Criminal Division of the *Audiencia Nacional*, which, after examining at length the compatibility of the extradition procedure with the European Arrest Warrant procedure, concluded that the two procedures were fully compatible because they were governed by different legislation and that what transcended was the modernisation of the fight against international crime within the European Union. The issue is making the Third Pillar of the Union a reality, i.e. creating a common Area of Security, Freedom and Justice". In a similar sense, see 10 November 2004, AAN 90/2004, 10 November: "As noted during the hearing, the defence is opposed to surrender because extradition for identical acts was refused on a previous occasion and the case cannot be reopened now, in addition to the fact that an appeal for legal protection has been lodged with the Constitutional Court on which a decision is pending. This argument cannot be accepted. As the party itself recognises, the effect of *res judicata* in the proper sense is not produced in the extradition procedure and, in particular, does not operate when the reason for refusal of extradition was not based on the absence or lack of grounds in respect of the substance of the case but on the existence of obstacles under a convention which disappear at a later date as a result of accession to a new Treaty governing judicial cooperation between States. This is the situation in the case we are concerned with here: France, under the European Convention on Extradition as an international instrument governing judicial cooperation with Spain, did not allow for the possibility of surrender of its own nationals. And Spain, applying the principle of reciprocity, in turn refused requests for the surrender of Spanish nationals to France. However, following the entry into force of the European Arrest Warrant, this obstacle has disappeared, meaning that there is nothing to prevent a fresh request for the surrender of a person whose surrender was refused in an extradition proceeding on grounds of form. Finally, the second transitional provision of Law 3/2003 in no way contradicts this conclusion since it provides in general that the Law applies to acts which occurred prior to its entry into force, unless such acts were the subject of extradition proceedings at that time". Please also refer to 18 August 2005, AAN 98/2005; 26 October 2005, AAN 105/2005; 12 November 2004, AAN 93/2004.

[58] Spanish Constitucional Court, 13 March 2006, ATC 93/2006; 10 October 2006, STC 293/2006; 19 February 2007, ATC 54/2007.

b) Flexible interpretation of territoriality principle, double criminality and prescription

The *territoriality principle* is not the determining factor for granting surrender, but it is examined together with other circumstances and elements in the case. It is thus possible to authorise the surrender of the perpetrators of a crime committed in the Spanish territory where, for instance, they or the victims are nationals of the issuing Member State [59].

Likewise, as drug trafficking offences are universally prosecuted, the *Audiencia Nacional* usually grants the surrender of the requested persons even if their criminal activities extended to Spain (more easily when the Spanish authorities have not started with criminal proceedings against them) [60].

The principle of *double criminality* and the punitive limits are interpreted in a flexible manner. The *Audiencia Nacional* considers that a strict concordance between categories of offences in both countries is not necessary and even more between circumstances modifying criminal liability [61]. The fact that the sentence is considerably higher in the issuing State does not prevent surrender either [62].

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[59] "The *Audiencia Nacional* considers that jurisdiction to prosecute this offence lies with the judicial authorities of Helsinki because most of the victims were from France" (1 April 2004, AAN 11/2004).

"The acts of which the requested person is accused appear to have been committed from Spain, but since no proceedings in connection with the acts in question are being conducted in Spain against the person concerned, since the requested person is a national of the requesting country and since the victim is also in France and France is the country from which the stolen money was transferred, there is no reason to apply this optional ground for refusal considering that the law of Spain would also allow prosecution for the acts in question had they been committed outside Spanish territory and had the accused been a Spanish national (Art. 23.2 of the Organic Law on the Judiciary)" (1 April 2005, AAN 42/2005).

[60] "As drugs trafficking is an offence subject to universal prosecution the partial commitment of the offences in Spain is not an obstacle to surrender. There is no criminal investigation in Spain against the suspect, so there is consequently no objection to his surrender to the Belgian authorities" (10 January 2005, AAN 2/2005). See also 31 May 2005, 65/2005.

[61] "The infringement of the double criminality principle shines by its absence insofar as the acts which have given rise to the request are clearly an offence under both Romanian and Spanish law, and this irrespective of whether certain aggravating circumstances are defined differently, since what cannot be demanded is a full correlation between inspiring principles and legislative techniques of different systems of law" (Decision No. 18/2005 of 8 March. Court roll: 180/2004. Judge Martinez de Salinas Alonso. A Romanian national wanted by the Romanian authorities for an assault in a bar. This was an extradition case).

[62] "In this case, the European Arrest Warrant contains the information required by Art. 3 of the Law and has been issued for an offence of swindling, which is included in the list in Art. 9 of the Law, and since the maximum applicable sentence is 10 years, no verification of double criminality is necessary. Art. 12.1 of the Law lists cases in which execution of a European Arrest Warrant must be refused, based on *non bis in idem*, minority of age and extinguishment of criminal liability following a pardon, and Art. 12.2 lists cases in which execution may be refused. None of these grounds is applicable in this case and this court sees no obstacle to declaring the surrender admissible. The fact that the offence carries a heavier sentence than under Spanish law is no bar to surrender: the acts were carried out in Lithuania and the laws of

In certain cases, the *Audiencia Nacional* refuses the surrender because the act in Spain does not constitute a crime, but simply an administrative offence or non-punishable conduct. The most frequent cases have occurred in Portugal when the surrender of people accused of reckless driving was requested, as they were driving uninsured or without driving licenses [63]. Until the amendment of our Criminal Code through Organic Law 15/2007 of 30 November 2007 [64], this behaviour did not constitute a crime. Similar cases have been raised in Lithuania, whose legislation contemplates heavy sentences for certain kinds of behaviour that do not constitute an offence in Spain.

The statute-barred of the criminal offence or the penalty as a ground for refusal is also applied in a flexible way by the *Audiencia Nacional*, which authorises the surrender of the suspects even when such offences have expired according to Spanish criminal law, except in some exceptional circumstances [65].

c) Conditional surrender of nationals

Regarding the guarantees to be given by the issuing Member State in cases of surrender of nationals, we do not have any information of cases of nationals not returned in order to serve their custodial sentence in Spain. Problems and doubts are more related to the lack of criteria about which the competent authority is to give the guarantees when Spain is the issuing Member State (Ministry of Justice, requesting judicial authority?) and what would be the proceedings to return the sentenced person to the Member State of their nationality. In order to clarify these questions, we consider the initiatives to establish some European common rules on temporary or conditional surrender to be very appropriate.

Lithuania should be applied. The argument that there are insufficient grounds to bring charges should be put to the authorities of the requesting country but cannot be examined by this court since that matter is outside the scope of its competence" (29 October 2004, AAN 87/04).

[63] "In this case, the European Arrest Warrant has been issued for an offence of driving a motor vehicle without legal permission. The offence in question is not included in the list of criminal offences set out in Art. 9.1 and does not meet the double criminality and minimum sentence requirements demanded by Art. 9.2 because driving a motor vehicle without a driving licence is not a crime under Spanish law but rather an administrative misdemeanour, for which reason, although the requested person consents to surrender, the prosecution has formulated a reasoned objection and surrender should be refused" (13 January 2005, AAN 8/2005).

[64] Organic Law 15/2007, of 30 November, which amends Organic Law 10/1995 of 23 November, of the Criminal Code in matters of road safety, *BOE*, 288, 1 December 2007, p. 49505 and f.

[65] 14 August 2006, AAN 66/2006 and 29 August 2006 AAN 69/2006, both in relation to Spanish citizens convicted in other EU Member States for offences statute-barred acording to the Spanish Criminal Code of 1973 (considered applicable in Spain when such offences were committed).

B. Fundamental rights and mutual recognition principle

1. Protection of fundamental rights as a ground for refusal

Since its first sentences on this issue, the Spanish Constitutional Court immediately adopted the *Soering v. United Kingdom* doctrine [66] and considered, therefore, that Spanish judicial authorities must be the guardians of the rights and guarantees of the arrested persons to be extradited when there is a risk that they will suffer torture or any other violation of fundamental rights in the requesting country.

In the European judicial area, these potential violations are only analysed when they are claimed during the hearing provided for by Art. 14 LeEAW, and the judge must then solve the question submitted. Up until now, the *Audiencia Nacional* has never refused detention or surrender in order to avoid the risk of violations of fundamental rights in other Member States, although the question is frequently argued by the lawyer of the suspect.

2. The right to a lawyer. Time limits for the arrested person

The fundamental rights of the criminal proceedings have been adapted by the Spanish Constitutional Court to the particularities of the extradition proceedings. Since the entry into force of the LeEAW, Spain´s Constitutional Court has reinterpreted such case law again, especially in cases where Spain is the executing Member State: the right to a lawyer in the hearing of Art. 14 LeEAW and the time limits for the surrender according to Art. 19 and 20 LeEAW are the main relevant aspects of its new doctrine.

In the hearing of Art. 14 LeEAW, the executing judicial authority (*Juzgado Central de Instruccion de la Audiencia Nacional*) cannot provide a lawyer, under the *rota* legal aid system, to the arrested person in cases when he has appointed a lawyer of his choice [67].

According to the restrictive interpretation of the time limits of Art. 19 and 20 LeEAW, unforeseen circumstances or the lack of coordination between the Spanish police authorities and those of the issuing Member State do not justify any delay in the surrender of the suspect, who must be released when such surrender is not possible under the limitations of the cited articles [68].

Also in relation to Art. 20 LeEAW, when the surrender has been suspended due to the initiation of a criminal investigation in Spain, the judicial decision for deprivation of liberty adopted in the EAW proceeding does not cover or justify the stay in prison of the requested person in such a national criminal investigation. It is necessary that the Spanish judge who initiates this new investigation in Spain issues a new decision of deprivation of liberty [69].

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[66] Eur. Court HR, 7 July 1989, *Soering v. United Kingdom*, Series A, no. 161.

[67] Constitutional Court, 20 December 2005, STC 339/2005.

[68] Constitutional Court, 27 March 2006, STC 99/2006.

[69] Constitutional Court, 7 May 2007, STC 95/2007.

3. Harmonisation of guarantees in criminal proceedings

In Spain it has not been sufficiently discussed to what degree the absence of harmonisation of procedural guarantees may make mutual recognition difficult. In the specific scope of the European Arrest Warrant, it was first a big concern when the guarantees and the rights of the detainee were different in the issuing State and in the executing State but, later on, in daily work, this lack of correspondence has not been an obstacle to the practical operation of this instrument, at least from the Spanish perspective.

It is also worth mentioning that, from the end of the 1990s, Spanish judicial authorities have appreciated the evidence obtained as a result of requests for mutual legal assistance sent to other Member States in a flexible way. Sometimes the defence counsel of the accused refused the validity of this evidence as it did not fulfil the guarantees in criminal matters in Spain. In judgments of 6 June 1994 and 9 December 1996, the Supreme Court stated that "in the scope of the European judicial area no distinction should be made on the impartiality guarantees of judges from one or the other State or on the value of the acts carried out before them according to the law", a reason for which the validity of declarations taken before the judicial authorities of other countries may not be rejected [70].

4. Harmonisation of criminal offences

In recent years several *fora* have discussed whether it would be necessary to draft the exact correspondence in the list of offences exempt from double criminality checks in the framework decisions and the specific offences in the Criminal Code. During this discussion the difficulty in identifying the offences that could be included in the criminological concept of corruption was pointed out [71]. Most of the opinions were against this drafting, as it could confine and establish excessively strict limits to offences that are exempt from double criminality checks, instead of promoting mutual trust between the criminal systems of the Member States.

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[70] The second of the aforementioned sentences was rendered because of a letter rogatory carried out in Germany, whose value as evidence was challenged by the accused because it had not been carried out with the required court intervention but in the presence of the police. The Supreme Court, on the contrary, decided that the "process of the letter rogatory was appropriate and that if the declaration of the witness in Germany was made before the police and not before a judicial authority, this does not diminish the value of the taking of evidence carried out abroad, a reason which justifies the non-fulfilment of the requirements of the principles that establish that evidence must be given in the presence of the judge, publicly and orally, although the requirements related to the contradiction for the possibility that the parties had to make the relevant questions have been fulfilled". For further details please refer to A. Gutiérrez Zarza, *Investigación y enjuiciamento de los delitos económicos*, Madrid, Colex editors, 2000, p. 309 and 310.

[71] In relation to this please refer to C. Jiménez Villarejo, "Reflexiones sobre el concepto de corrupción a propósito de la orden de detención europea", *Actualidad Jurídica Aranzadi*, Pamplona, 560, 2000, p. 1-4.

C. Useful tools and training on mutual recognition instruments for practitioners

At the initiative of the Ministry of Justice and in order to facilitate the practical application of the European Arrest Warrant, a seminar was held in Toledo in 2003, where a preliminary version of the Protocol on the practical application of the European Arrest Warrant was drafted. This Protocol is frequently updated and it is available on the website of the Ministry of Justice [72]. Nothing similar has been drafted in relation to orders freezing property and evidence or financial penalties.

The General Council of the Judiciary has published a collection of studies on LeEAW [73], and another one related to the LeOFP [74].

The most relevant initiative developed in Spain in order to facilitate the practical application of judicial cooperation instruments is the so-called "prontuario", which is accessible on www.prontuario.es (only in Spanish). It is an online platform containing information and facilitating the practical application of legal instruments adopted by the European Union and the Council of Europe, as well as bilateral agreements signed between Spain and other countries around the world both in civil and criminal matters.

On the other hand, the Ministry of Justice, the General Council of the Judiciary and the General Prosecutor's Office have developed certain initiatives in order to evaluate the practical application of mutual recognition instruments.

Shortly after the LeEAW came into force, a working group was created in the Ministry of Justice to follow the law. The working group was made up of senior judges, public prosecutors and civil servants from the Ministry of Justice and the Ministry of Interior.

There are also several discussion *fora* to exchange experience, study practical problems and make proposals for improvements. In 1995, the General Council of the Judiciary created the Spanish Judicial Network of International Cooperation (REJUE), which is regulated in Art. 76*bis* of Regulation 5/1995 on Incidental Aspects of the Judiciary. The network is made up of 62 senior judges, half of whom are specialised in judicial cooperation in civil matters and the other half in judicial cooperation in criminal matters. The International Relations Service of the General Council of the Judiciary is the expert authority in charge of its coordination and proper operation. All members of REJUE meet at least once a year to analyse the latest news in terms of judicial cooperation in civil and criminal matters, to exchange experience, to analyse problems detected in daily practice and propose possible solutions thereto.

Instruction 2/2003 of the General Prosecutor Office created the Network of Public Prosecutors for International Judicial Cooperation, whose main task is to facilitate direct contacts between the Spanish public prosecutors and the competent

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[72] http://www.mjusticia.es and subject areas can be found therein.

[73] VVAA, "La orden europea de detención y entrega", Madrid, *Estudios de Derecho Judicial – Consejo General del Poder Judicial*, 42, 2007.

[74] Barrientos Pacho (coord.) "La nueva Ley para la eficacia en la Unión Europea de las resoluciones de embargo y aseguramiento de pruebas en procedimientos penales", Madrid, *Estudios de Derecho Judicial – Consejo General del Poder Judicial,* 117, 2007.

international judicial authorities in terms of judicial cooperation. They also meet at least once a year [75].

In 2007 the Researching Group "Eva Forum – Evaluation and training in European Union" was created in order to meet at least once a year and analyse the problems and possible solutions in judicial cooperation in criminal matters of the European Union. It is made up of university professors, judges, public prosecutors, members of the SIRENE and Interpol offices, court clerks and civil servants working for the judiciary and it relies on institutional support and co-funding of the Ministry of Education and Science, the University of Castilla-La Mancha and its regional government, in addition to the General Prosecutor Office and the General Council of the Judiciary.

D. Databases and statistical information

So far there are no exhaustive databases containing full judicial decisions rendered by the Spanish authorities competent for issuing or executing European Arrest Warrants and other European orders. Judicial decisions rendered in arrest and surrender proceedings usually take the form of *autos* and the Spanish Documentation Center (CENDOJ) only gathers the final judicial decisions (*sentencias)* of Spanish courts and some categories of *autos* which do not include those announced in the context of the European Arrest Warrant.

Judicial decisions rendered by the Constitutional Court when solving *recursos de amparo* are the easiest to be consulted. Final decisions and *autos* announced by Spain's High Court are available on the website http://www.tribunalconstitucional.es and are published in the Official Journal of Spain [76].

The elaboration of statistics on mutual recognition instruments is a task of the Ministry of Justice. Art. 7.IV of the Spanish Law on the European Arrest Warrant sets forth the obligation of the issuing judicial authorities to send "a copy of European warrants issued" to the Ministry of Justice, and Art. 10.3 provides for the same obligation for the *Juzgados Centrales de Instrucción* when they execute European Arrest Warrants. Despite these legal provisions, the Ministry of Justice does not receive a copy of most of the European warrants issued and received, which makes it very difficult to produce reliable statistics. The absence thereof was criticised in the Spanish report of the 4th round of mutual evaluations [77].

In order to find a solution, the ministry has looked for support and cooperation from the General Council of the Judiciary and the General Prosecutor Office. The Second Additional Provision LeFP provides:

> "Pursuant to the guidelines that, if appropriate, the National Commission for Judicial Statistics shall establish, courts that give or receive European arrest and surrender warrants, orders freezing property and evidence, as well as orders imposing financial penalties, shall notify them to the General Council of the Judiciary.

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[75] See *ibid.*

[76] *Boletin Oficial del Estado*, http://www.boe.es

[77] Pages 41 and 42 of the cited document, and 49 containing the respective recommendation of the group of evaluators.

> The General Council of the Judiciary shall send the information mentioned in the paragraph above to the Ministry of Justice every three months".

The National Commission for Judicial Statistics mentioned in the transcribed provision is governed by *Real Decreto* 1184/2006 of 13 October, and it was formally created on 17 May 2007 by the State Secretary for Justice, who is the Chairman thereof, while the Vice-Chairman is the member of the General Council of the Judiciary in charge of judicial statistics. The Plenary of this Commission is composed of seven members (a representative of the Ministry of Justice, one from the General Council of the Judiciary, the Public Prosecutor of the division providing support to the General Prosecutor Office, four representatives from the Regional communities which have already received judicial powers, which on this first occasion were Madrid, Canary Islands, Catalonia and the Basque Country) and a clerk. This Commission is one of the instruments of the Judicial Transparency Plan approved by Resolution of 28 October 2005 of the State Secretary for Justice and has, among its attributions, the following: "to approve uniform and mandatory criteria for everyone on procurement, computer processing, transfer and use of statistical data of the Spanish judicial system, fully complying with the provisions in the rules in force applicable to public statistics and personal data protection" (paragraph C) and "to approve required technical standard rules on concepts, definitions, classifications, nomenclatures and codes to allow homogeneous procurement and classification of data" (paragraph E).

So far no criteria have been set for the arrangement of reliable statistics in terms of judicial cooperation in criminal matters.

5. Conclusion

Judicial cooperation in criminal matters between Spain and other EU Member States has certainly made progress thanks to the principle of mutual recognition. Major advances have been observed via the practical application of the European Arrest Warrant. Its entry into force allowed the revision of many of the requests for extradition which had been rejected in the past, based on the traditional grounds for refusal which have since disappeared, such as the surrender of nationals or the double criminality principle. Prescription of offences was a ground for refusal that was especially harmful to Spain. ETA committed the most serious attacks in the 1980s and 1990s of the previous century, and therefore, sometimes, the *Audiencia Nacional* requests the surrender of offenders who committed an offence more than twenty years ago. Spanish citizens may feel the same criminal disapproval in relation to these attacks as for the attacks committed one or two years ago, but we cannot demand the same feeling from other European partners, whose criminal laws often do not have such long limitation periods for terrorist activities. However, the other Member States could take into account that the prescription constitutes an optional ground for refusal and that even if the acts have become statute barred in the executing country, the FD authorises the surrender. In the particular case of the collaboration with France, the judgment of European Court of Justice in the *Ignacio Pedro Santesteban Goicoechea* case has solved one of the key questions for the surrender of members of ETA who

committed their crimes a long time ago, but who can be arrested in France and extradited to Spain in application of the 1996 Convention [78].

Concerning mutual legal assistance, the traditional reluctance to executing requests received from other Member States is slowly disappearing in Spain. National judicial authorities are now aware of the importance of the cooperation of foreign authorities to speed up criminal enquiries on drug trafficking offences, terrorism, fraud and corruption and other offences in which, most probably, the instruments of crime, effects of benefits are located abroad. The reluctance to sent rogatory letters by Spanish authorities is also decreasing in number. From the beginning of 2000, Spain has maintained close cooperation with Switzerland and, in recent months, it started active cooperation in some investigations carried out by the *Audiencia Nacional* and the Taxation Agency (*Agencia Tributaria*) with Liechtenstein (after its entry into the Schengen area).

In this atmosphere of general optimism, some difficulties must be admitted. The Spanish legislator shares the feeling of weariness of their European colleagues about implementing European framework decisions, as has been recognised by the High Level Group on the future of European Justice and the contributions to its report presented by some EU Member States [79]. In addition, the first results of practical application of orders freezing property and assets and the confiscation order (after its implementation in Spain) will take some time. Judicial authorities still have to realise the need to execute, in the most effective way, freezing and confiscation orders as the best mechanism in the fight against serious forms of transnational crimes: without economic benefits both the motivation and the resources for the commission of such offences disappear.

In any case, the most difficult obstacles in the progressive construction of the Freedom, Security and Justice Area have been overcome. The long-awaited friend brought along a big puzzle, with different judicial instruments that must fit in properly. We have managed to put together the most difficult part of the puzzle, but we now need to finish it.

[78] ECJ, 12 August 2008, Judgment C-296/08 PPU, *Santesteban Goicoechea*.

[79] The cited report was circulated on 9 July 2008. Doc. 11657/08 LIMITE.

The Finnish approach to mutual recognition in criminal matters and its implementation[1]

Annika Suominen

1. Introduction

The principle of mutual recognition has become the cornerstone of co-operation within the EU. The many changes that it has made to the third pillar co-operation in criminal matters have been questioned by both academics but also by practitioners. Whilst its first steps in this area can be described as tentative, co-operation between the Nordic States has been based on similar ideals for some time. The idea of mutual recognition was therefore familiar to Finnish criminal justice before its manifestation in the Union's Area of Freedom, Security and Justice. However, the application of mutual recognition for judicial decisions from the wider EU has been more difficult than its application between the Nordic States[2].

This article will present the Finnish application of the principle of mutual recognition in the field of criminal law. It will examine the legislation applicable in relation to mutual recognition (point 2), and then highlight those key provisions in Finnish implementing legislation that differ from models adopted in the European instruments (point 3).This is followed by an analysis of the Finnish understanding of the principle of mutual recognition (point 4). Issues that emerge from this consideration

[1] This article is based on the Finnish national report in the *Study on the future of mutual recognition in criminal matters in the EU*, which was supervised by prof. D. Frände and the interviews carried out by LL.M. J. Tallqvist. The author is grateful for the assistance in writing the report and would also like to thank everyone who was interviewed in course of the study. LL.M. S. Miettinen commented on both language and substantive issues. The author remains responsible for any remaining errors.

[2] As the concept of mutual recognition between the Nordic States is based mainly on similar legislation, the difference with mutual recognition in the EU is apparent.

will be examined in detail (point 5), which will be followed by a brief conclusion (point 6).

2. Legislation and national implementation of the mutual recognition instruments

A. The mutual recognition legislation in Finland

In Finland the following legislation is applicable:

- The Act on Extradition on the basis of an offence between Finland and other Member States of the European Union of 30 December 2003. This act has been in force since January 1, 2004 [3].
- The Act on the execution in the European Union of orders freezing property or evidence of 15 July 2005. This act has been in force since August 2, 2005 [4].
- The Act on the national implementation of the provisions related to legislation with regard to the Framework Decision on the application of the principle of mutual recognition to financial penalties and the application of the Framework Decision of 2 March 2007, as amended [5]. The Act and Decree have been in force since March 22, 2007.
- The Act on the national implementation of the provisions related to legislation with regard to the Framework Decision on confiscation orders and the application of the Framework Decision of 11 April 2008, as amended [6]. This act has been in force since November 22, 2008.

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[3] *Laki rikoksen johdosta tapahtuvasta luovuttamisesta Suomen ja muiden Euroopan unionin jäsenvaltioiden välillä 30.12.2003/1286, Suomen säädöskokoelma* (official journal), 31 December 2003. Hereafter the Extradition Act. An unofficial translation provided by the Ministry of Justice is available at http://www.finlex.fi/en/laki/kaannokset/2003/en20031286. See J. Sihto, "Den europeiska arresteringsordern", *JFT (Juridiska föreningens tidsskrift)*, 4-5/2003, p. 502-531 and R. Eerola "Eurooppalaisen pidätysmääräyksen (EAW) täytäntöönpano Suomessa − vastavuoroisen tunnustamisen periaate käytännössä", *in* H. Kaila, E. Pirjatanniemi ja M. Suksi (toim.), *Yksilön oikeusasema Euroopan Unionissa,* Juhlakirja Allan Rosas, Turku, Institute for Human Rights Åbo Akademi University, 2008, p. 701-716.

[4] *Laki omaisuuden tai todistusaineiston jäädyttämistä koskevien päätösten täytäntöönpanosta Euroopan unionissa 15.7.2005/540, Suomen säädöskokoelma*, 20 July 2005. Hereafter the Freezing Orders Act. See D. Frände "Om att frysa i EU – några iakttagelser", in *Rikosoikeudellisia kirjoituksia VIII*, Raimo Lahdelle omistettu, Helsinki, Suomalaisen Lakimiesyhdistyksen julkaisuja, 2006, p. 19-29.

[5] *Laki vastavuoroisen tunnustamisen periaatteen soveltamisesta taloudellisiin seuraamuksiin tehdynpuitepäätöksen lainsäädännön alaan kuuluvien säännösten kansallisesta täytäntöönpanosta japuitepäätöksen soveltamisesta 2.3.2007/231, Suomen säädöskokoelma*, 8 March 2007. This Act has been amended by the Decree on the national implementation and the application of the Framework Decision on the application of the principle of mutual recognition to financial penalties of 8 March 2007 (*Valtioneuvoston asetus vastavuoroisen tunnustamisen periaatteen soveltamisesta taloudellisiin seuraamuksiin tehdyn puitepäätöksen säännösten kansallisesta täytäntöönpanosta ja puitepäätöksen soveltamisesta 8.3.2007/257, Suomen säädöskokoelma 15.3.2007*). Hereafter (as amended) the Financial Penalties Act.

[6] *Laki vastavuoroisen tunnustamisen periaatteen soveltamisesta menetetyksi tuomitsemista koskeviin päätöksiin tehdyn puitepäätöksen lainsäädännön alaan kuuluvien säännösten*

The Extradition Act and the Freezing Orders Act have both sought to transpose the text of the FDs. Neither act therefore incorporates provisions of the FDs by a bare reference. However, in transposing the text of the FDs certain adjustments have been made to preserve the coherence of the preceding national system. Neither of the two implementing acts refers explicitly to mutual recognition and the Extradition Act incorporates the terminology used in previous legislation.

The Financial Penalties Act and Confiscation Orders Act differ from the first two acts on these points. The Financial Penalties Act and the Confiscation Orders Act implement the relevant FDs by reference, and do not themselves contain comparable substantive provisions [7]. The only substantive provisions in these two later acts either alter substantive rules found in the FD, or refer to relevant Finnish procedures as required by relevant FD provisions. The Financial Penalties Act is the first domestic instrument to explicitly accept the principle of mutual recognition [8]. This approach is continued in the Act on Confiscation orders, as demonstrated in the government bill [9]. The Financial Penalties Act and Confiscation Orders Act therefore both clearly indicate that they implement the principle of mutual recognition.

B. Terminology, especially relating to the Extradition Act

The EAW FD introduced a new term, surrender, to denote the mutual recognition of a foreign-issued warrant as opposed to the centrally controlled, essentially discretionary request for extradition. However, the Finnish Extradition Act, which implements the EAW, still uses the old term extradition [10]. This was justified in the government bill by a perceived need to ensure that similar terminology applied to both

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kansallisesta täytäntöönpanosta ja puitepäätöksen soveltamisesta 11.4.2008/222, Suomen säädöskokoelma, 23 April 2008. This act has been amended by the Decree on the national implementation of the provisions related to legislation with regard to the Framework Decision on confiscation orders and the application of the Framework Decision (*Valtioneuvoston asetus vastavuoroisen tunnustamisen periaatteen soveltamisesta menetetyksi tuomitsemista koskeviin päätöksiin tehdyn puitepäätöksen säännösten kansallisesta täytäntöönpanosta ja puitepäätöksen soveltamisesta 13.12.2008/692, Suomen säädöskokoelma 19.12.2008*). Hereafter (as amended) the Confiscation Orders Act.

[7] On the choice of implementation, see S. Melander, *Kriminalisointiteoria – Rangaistavaksi säätämisen oikeudelliset rajoitukset*, Helsinki, Suomalaisen lakimiesyhdistyksen julkaisuja, 2008, p. 34 and K. Nuotio, "Eurooppalaistuva rikosoikeus", *in* T. Ojanen ja A. Haapea (toim.), *EU-oikeuden perusteita II – aineellisen EU-oikeuden aloja ja ulottuvuuksia,* Helsinki, Edita 2007, p. 378.

[8] Government bill HE 142/2006.

[9] Government bill HE 47/2007.

[10] The term extradition (*luovuttaminen*) is in fact used also in the Finnish language version of the FD. It was nevertheless a clear choice in the Government Bill to preserve the old terminology also when implementing the FD. Whether surrender indeed is a new system or a new term to the old system will not be subject of analysis here, see on this matter e.g. A. Weyembergh, "Les jurisdictions belges et le mandat d'arrêt européen", *Eucrim*, 1-2/2006, p. 26-28.

extradition and surrender in domestic legislation [11]. Whilst different as regards the process involved in the transfer, extradition and surrender sought similar outcomes, namely the transfer of an individual to the criminal justice system of another State. The Extradition Act still operates with requests and the terminological appearance of the act seems to imply that there has been no shift at all to mutual recognition [12]. The Extradition Act does not incorporate the EAW form from the FD. This further underlines the preservation of the old system of extradition [13]. It has been stated in the preparatory works, that this preservation of the old terminology is not precluded by the principle of mutual recognition [14]. However a clear terminological difference between the politically influenced system of extradition and the apolitical process of surrender in the Finnish language would have been welcome, especially considering the lack of express recognition of the principle of mutual recognition in either the Extradition Act or the Freezing Orders Act [15].

In fact the Finnish translation of "mutual recognition" is itself rather unsatisfying. The term mutual has been widely translated into "*vastavuoroinen*" in EU documents, including those related to the third pillar. However, whilst it denotes a relationship between parties, it has connotations of reciprocity rather than of automatic recognition. A more appropriate translation might be "*keskinäinen*", which does not have such connotations. Mutual recognition has marked a radical shift from reciprocal and discretionary procedures to systems based on duties, rather than powers of legal assistance. The failure to use appropriate terminology in the implementation of the first two mutual recognition instruments obscures this radical shift from those consulting only the national implementing legislation.

C. The system of recognition

The system of recognition of foreign decisions in Finland is partly centralised and partly decentralised.The district courts (*käräjäoikeus*) or the district prosecutors (*kihlakunnansyyttäjä*) are competent to issue and execute an arrest warrant according to the jurisdiction of appeal courts (*hovioikeus*). Other prosecutors (*syyttäjä*) may also in exceptional circumstances be deemed competent giving special reason. An appeal on an extradition decision can be made to the Supreme Court [16]. As regards freezing decisions, the district prosecutors within the appeal court districts are competent to

[11] See the government bill on this issue, HE 88/2003 p. 8 and also the unofficial English translation of the Finnish act provided by the Ministry of Justice, especially the explanation on the terminology chosen p. 1, available at http://www.finlex.fi/en/laki/kaannokset/2003/en20031286 (last visited 23 January 2009).

[12] The approach chosen has also been criticized in literature, see J. Sihto, *Pyynnöistä määräyksiin, Uusin eurooppalainen luovuttamis- ja oikeusapuoikeus Suomen lainsäädännössä*, Lisansiaatintutkimus (Licensiate thesis), Helsinki, 11/2006, p. 35 and f.

[13] In practice the EAW-form is however used.

[14] The Law Committees preparatory works, LaVM 7/2003 p. 2-3.

[15] For reasons of clarity both terms extradition and surrender are used in this article, however extradition is only used when reference is made to the Finnish Extradition Act and its sections.

[16] Extradition Act, section 37.

issue and execute freezing orders. Decisions on freezing can be appealed to the district court in the area where the respective property or evidence is found [17]. The system for enforcing financial penalties and for confiscation orders is slightly different. The competent authority in these cases is the legal register centre (*oikeusrekisterikeskus*). The decisions of the legal register centre can be appealed to a district court [18].

This regionalised system was preferred as it offers enhanced uniformity of practices and expertise, as centralised systems, but maintains some advantages of localised implementation such as geographic proximity and the speed of the enforcement system. As more than one prosecutor or court is involved, a pool of competent professionals is maintained, which was regarded important to avoid overreliance on a few individuals. One recommendation to further develop this partially decentralised system would be to establish an electronic database with information of all the cases. As regards the legal register centre, its role as an executing authority clearly emphasises the move towards a system of mutual recognition since its role in the enforcement of national judgments does not involve adjudicating on their merits.

3. Specific implementation of certain provisions

A. The requirement of double criminality

The abolition of the double criminality requirement for the list of 32 offences in FDs has been criticized [19]. The practical application of the provisions has however not been problematic and in the *Advocaten voor de Wereld* case the ECJ declared the list compatible with the principle of legality (among others) [20].

Both the Extradition Act and the Freezing Orders Act implemented the provisions limiting the requirement of double criminality precisely as the relevant provisions are found in the FDs. In the subsequent Financial Penalties Act and the Confiscation Orders Act the provisions on double criminality are also identical since national legislation incorporates the relevant provisions of the FDs by reference, and the content of the FDs is therefore made applicable by that reference.

The Nordic Arrest Warrant (NAW) goes further as it applies a principle of mutual recognition that is deeper than that found in the (Finnish) EAW legislation. Article 2(3) of the NAW states that a Nordic Arrest Warrant shall be recognised in accordance with the provisions in the convention and without any control of the requirement

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[17] Freezing Orders Act, section 16.

[18] Financial Penalties Act, section 8 and Confiscation Orders Act, section 8.

[19] See e.g. R. Lahti "Harmonisering av den straffrättsliga lagstiftningen och konsekvenser för den nationella lagstiftningen. Materiella och rättskipningsrelaterade stötestenar", *JFT*, 3-4/2004, p. 382, S. Peers, "Mutual Recognition and criminal law in the European Union: Has the Council got it wrong?", *CMLRev.*, 2004: 41, p. 14-15, N. Keijzer, "The double criminality requirement", *in* R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, The Hague, T.M.C Asser Press, 2005, p. 152-160 and S. Peers, *EU Justice and Home Affairs Law*, Oxford, Oxford University Press, 2006, p. 468.

[20] ECJ, 3 May 2007, Judgment C-303/05, *Advocaten voor de Wereld*, *ECR*, p. I-03633, para. 48-53. On this judgment, see e.g. A. Suominen, "Om giltigheten av ett rambeslut i europeisk straffrätt och Lissabonfördragets inverkan på området för den europeiska straffrätten", *Nordisk Tidsskrift for Kriminalvedenskap*, 2/2008, p. 130-137.

of double criminality. The NAW also includes a provision on accessory surrender. Pursuant to article 2(2) the surrender for prosecution or execution of sentence can take place for several offences even if the conditions for surrender are met for only one of those offences. The total absence of the requirement of double criminality in the NAW goes beyond its partial abolition in the EAW. The NAW explanatory memorandum does not explain why double criminality was considered unnecessary, and it has not in practice proven to be problematic [21]. It could be argued that as the criminal laws of the Nordic States are fairly similar and there is a higher degree of trust between the Nordic States than between other EU Member States, there was possibly no need to uphold the requirement [22].

B. Provisions on human rights

As the whole TEU is implemented into Finnish law, Art. 6 EU is generally applicable. Art. 6 EU and the provisions in FDs which refer to it are considered by domestic experts to imply that the executing authority can exercise some control with regard to the procedural safeguards. The default position is that decisions made in another MS are trusted [23]. However, unlike the corresponding FDs, the domestic Extradition Act, the Financial Penalties Act and the Confiscation Orders Act provide fundamental rights grounds as mandatory grounds to refuse mutual recognition. Each of these provisions differ in their technical execution. Some are detailed and clearly provide for a standard that is not expressly specified in relevant EU instruments.

1. The Extradition Act

Section 5 (1) 6 of the Extradition Act states that extradition shall be refused if "there is justifiable ground to suspect that the requested person is threatened by capital punishment, torture or other degrading treatment or that he or she would be subjected, on the basis of origin, membership in a certain social group, religion, belief or political opinion, to persecution that threatens his or her life or liberty or to other persecution, or there is justifiable cause to assume that he or she would be subjected to a violation of his or her human rights or constitutionally protected due process, freedom of speech or freedom of association" [24].

Furthermore section 5 (2) states that "A request for extradition shall also be refused if the extradition, in view of the age, state of health or other personal circumstances or

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[21] See A. Strandbakken, "The Nordic answer to the European Arrest Warrant: the Nordic Arrest Warrant", *Eucrim*, 3-4/2007, p. 138-140. From a Nordic perspective the complete abolition of the requirement of double criminality in the Swedish Act 500/2005 implementing the Freezing FD is also interesting.

[22] D. Frände, "Finland och den nordiska arresteringsordern", *in* A. Møller-Sørensen og A. Stoorgaard (red.), *Jurist uden omsvøb FESTSKRIFT til Gorm Toftegaard Nielsen,* København, Christian Ejlers' Forlag, 2007, p. 134-135.

[23] This is the general starting point, although the EAW has raised human rights concerns (and also constitutional, but this is not the case in Finland) across Europe. See e.g. V. Mitsilegas, "The Transformation of Criminal Law in the 'Area of Freedom, Security and Justice'", *YEL*, 2007, p. 8 and 14-20.

[24] Unofficial translation of the Ministry of Justice.

special circumstances of the person in question would be unreasonable on humanitarian grounds and this unreasonableness cannot be avoided by postponing execution on the basis of section 47" [25].

Section 5 (1) 6 clearly requires the executing Member State to evaluate both procedural safeguards and respect for the rights of the accused in the issuing Member State. The government bill recognised that this provision cannot be based on any provision of the FD as such. However, its inclusion was justified with reference to recitals 12 and 13 and Art. 1(3) of the FD [26]. It was also justified by the fact that Finland could not, regardless of any such requirement stated in a FD, extradite a person in such circumstances due to its international human rights obligations [27]. To insert the refusal ground as mandatory gives the executing authority a margin of appreciation only as regards determining whether the conditions of the refusal ground are met. If these are met, the person cannot be extradited. This further highlights the preservation of features of the old system of extradition in the Finnish implementation of the EAW. The other relevant section, section 5(2) was inserted by the Law Committee [28]. Although this section is not strictly seen as a provision on human rights, it can also be interpreted as one, as it prevents the extradition on the basis of humanitarian concerns regarding the consequences of extradition. The insertion of a refusal ground relating to the unreasonableness of the extradition was considered appropriate as the postponement would not always rule out the injustice [29].

2. The Financial Penalties Act

Section 5(2) in the Financial Penalties Act states: "The execution [of a decision on a financial penalty] shall be refused if there is a reasonable cause to suspect that the guarantees of a fair trial have been infringed upon in the decision making" [30].

This provision was not in the original government bill, but was inserted by the Law Committee. It is based on Art. 3 of the FD. This refers to Art. 6 EU and states that the FD shall not amend the obligation to respect fundamental rights and fundamental principles [31]. The section was also influenced by Art. 20(3) of the FD which states that the executing State may oppose the recognition and the execution of a decision if the certificate raises questions as to whether fundamental rights or legal principles (Art. 6 EU) have been infringed [32]. Nevertheless, the shift towards the new mutual recognition regime in the act on financial penalties was generally more favourable to mutual recognition in spite of the insertion of a rather general fair trial provision as a mandatory ground for refusal.

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[25] Unofficial translation of the Ministry of Justice.
[26] Government bill HE 88/2003, p. 22.
[27] *Ibid*., p. 23.
[28] The Law Committees preparatory works, LaVM 7/2003, p. 5.
[29] *Ibid*.
[30] The translation is the author's own.
[31] The Law Committees preparatory works, LaVM 28/2006, p. 3.
[32] *Ibid*., p. 3-4.

3. The Confiscation Orders Act

The section 5 of the act on Confiscation Orders states that "The execution of a foreign confiscation decision taken in another Member State shall be refused if there is a reasonable cause to suspect that the guarantees of a fair trial have been infringed upon in the decision making and the execution as a whole would be unreasonable" [33].

This provision was inserted on the same ground as the section in the Act on Financial Penalties and the insertion was even more justified as the decisions on confiscation can concern considerably larger economic interests than fines [34]. Reference was made to the Art. 1(2) in the FD. This refers to Art. 6 EU and states that the FD shall not amend the obligation to respect fundamental rights and fundamental principles. The section in the implementing Act is meant to be applied only in the case of actual, rather than potential infringements, as the wording "have been infringed upon" indicates [35]. This provision also differs from the one in the Financial Penalties Act, as it imposes a further requirement that the execution as a whole should be unreasonable. In this evaluation, the effect of the infringement on the person's status in the trial and the possible compensation already received by the person must be considered [36].

Hence all implementing acts apart from the Freezing Orders Act have provisions on human rights as mandatory grounds for refusal [37].

C. Provisions on territoriality

The terriroriality clause in the EAW demonstrates that state sovereignty is, even on the European level, sometimes still regarded as more important than the overall efficacy of co-operation in criminal matters [38]. The Extradition Act contains two provisions relating to territoriality. According to section 5(1)5 extradition [39] shall be refused if "the act on which the offence is based is deemed in accordance with chapter 1 of the Criminal Code to have been committed in full or in part in Finland or on a Finnish vessel or in a Finnish aircraft and: a) the act or the corresponding act is not punishable in Finland or b) the right to bring charges, according to the law of Finland, has become time-barred or punishment may no longer be imposed or enforced" [40].

The first part of this section corresponds with the optional ground for refusal in Art. 4(7)(a) of the FD. The second corresponds to the optional ground for refusal

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[33] The translation is the author's own.

[34] Government bill HE 47/2007, p. 46.

[35] *Ibid*. There needs to be some indication of an actual infringement.

[36] *Ibid*.

[37] As regards the rights of the defence within the EU, see D. Frände "Om rättsligt försvar i EU", *in* P. Asp och, C. Lernestedt (red.), *Josefs resa, vänbok till Josef Zila*, Uppsala, Iustus, 2007, p. 71-84.

[38] The FD on financial penalties and the FD on confiscation orders also contain provisions relating to the territoriality (Art. 7 (2) d i) and 8 (2) f respectively). Both articles are incorporated into Finnish law by reference to the FDs and will not be analysed here.

[39] The term extradition, rather than surrender is used because both the Finnish-language FD and domestic implementing legislation refer to extradition (*luovutus*), as discussed above.

[40] Unofficial translation of the Ministry of Justice.

in Art. 4(4) of the FD. In the Finnish implementing legislation, both are considered mandatory rather than optional grounds for refusal.

The other ground for refusal in the Extradition act, section 6(1)8 is an optional ground for refusal which states that extradition may be refused if "the act on which the request is based has been committed outside of the territory of the requesting Member State and in accordance with chapter 1 of the Criminal Code in a corresponding situation in Finland the law of Finland does not apply" [41].

This section corresponds to Art. 4(7)b in the FD [42].

D. Special conditions with regard to citizens and residents

The Extradition Act provides special rights for Finnish citizens. Section 5(1)4 states that it is a mandatory ground for refusal if the request "refers to the enforcement of a custodial sentence and the requested person is a citizen of Finland and requests that he or she may serve the custodial sentence in Finland; the custodial sentence shall be enforced in Finland as separately provided" [43].

This insertion was inspired by section 9(3) of the Finnish Constitution, which provides that "Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will" [44].

Part of the optional ground in the article 4(6) EAW for refusal based on citizenship of the executing State has hence been transformed into a mandatory ground for refusal in the Extradition Act. However, the relevant section of the Constitution has subsequently been revised [45]. In the recent revision, the constitutional bar to extradition was removed because it was considered incompatible with Finnish obligations under European and international law [46]. Since the original rationale for the divergent transposition is no longer valid, it would now be possible to revise the Extradition Act to better correspond to the FD.

The Extradition Act also provides special status for permanent residents of Finland. According to section 6(1)6 there is an optional ground for refusal of extradition if "the request pertains to the enforcement of a custodial sentence, the requested person has his or her permanent residence in Finland and requests that he or she may serve the custodial sentence in Finland and on the basis of his or her personal circumstances or another special reason it is justified that he or she serves the custodial sentence in Finland; the custodial sentence is to be enforced in Finland in accordance with what is separately enacted on this" [47].

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[41] Unofficial translation of the Ministry of Justice.

[42] For a general motivation on the reasons behind these provisions, see government bill HE 88/2003, p. 21-22.

[43] Unofficial translation of the Ministry of Justice.

[44] The Finnish Constitution of 11.6.1999/731, unofficial translation of the Ministry of Justice.

[45] Amendment 802/2007.

[46] See also Government bill HE 102/2009, p. 4-5.

[47] Unofficial translation of the Ministry of Justice.

Permanent residence constitutes an optional, rather than a mandatory ground for refusal in the Extradition Act because the Constitution does not require special protection for permanent residents [48]. This section is also based on article 4(6) EAW.

If the person whose extradition is sought is a Finnish citizen, extradition shall be subject to their return if this person has requested to serve the sentence in Finland according to section 8(1) of the Extradition Act. According to section 8(2), if the person sought resides permanently in Finland, the condition of return may be set as a condition to the extradition, if this person has requested to serve the sentence in Finland or there are other special reasons for serving the sentence in Finland. Both eventualities are provided for by the Art. 5(3) of the EAW, but in both cases, the FD makes the request of the executing authority optional rather than mandatory.

The case KKO 2005:139 of the Finnish Supreme Court concerned the surrender of a Finnish national to Sweden, where he had committed an assault, for which he was sentenced to forensic psychiatry care. The necessity of this care was to be revised every six months. The issued arrest warrant was considered to concern the extradition for enforcement of a custodial sentence between Finland and another EU Member State and the Extradition act was applicable. As the committed person was a Finnish citizen and he also requested to serve the custodial sentence in Finland, there was according to the Supreme Court a mandatory ground for refusal according to section 5(1)4 in the Finnish act and the person was not extradited. What should be noted in this case is in the first place the fact that the ground for refusal – the fact that the person in question was a Finnish citizen who requested to serve the custodial sentence in Finland – has through the Finnish act been made into a mandatory ground for refusal. Secondly what is of importance in this case, is that the Supreme Court should perhaps have used the Nordic Extradition Act (of 3.6.1960/270, now replaced with the NAW), instead of the Extradition Act, as the Nordic Extradition Act at the moment regulated extradition between the Nordic countries.

E. Additional amendments of the refusal grounds

The Freezing Orders Act has implemented all of its grounds for refusal as mandatory. In addition to the refusal grounds in the FD, the Act adds a provision requiring the compatibility of the proposed coercive measure with relevant Finnish procedural rules. According to section 4(1)4 the freezing order shall be refused if the freezing of a document, post order or telegram is not allowed according to the Finnish Coercive Measures Act, sections 2 or 4 of the fourth chapter [49]. These sections in the Coercive Measures Act protect certain personal information. Documents containing such information receive stronger protection than "general" documents. This provision therefore inserts a national standard into the implementing act as a mandatory ground for refusal [50].

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[48] Government bill HE 88/2003, p. 25.

[49] *Pakkokeinolaki*, Coercive Measures Act 450/1987.

[50] In the Government bill, HE 56/2005 the insertion of this provision is not specifically explained nor attached to an Art. of the FD, see also J. Sihto, *op. cit*., 2006, p. 105-107.

F. Conclusion on the implementation

Finland is perhaps not an example of best practice in the implementation of mutual recognition instruments in the field of judicial co-operation in criminal matters. Finnish implementing legislation adds grounds for refusal beyond those listed in the FDs. It also transposes many optional grounds for refusal as mandatory grounds, and preserves a substantial degree of state sovereignty as regards territoriality and the execution of arrest warrants. The Finnish legislature also refuses to relinquish substantive control over fundamental rights to the issuing authority, since implementing legislation permits this to be examined by the executing authority. It can in some cases be argued that added grounds for refusal are implicitly permitted by some provisions in the FDs which do not expressly list those considerations as grounds for refusal. Examples include statements in the FDs that affirm respect for rights or preclude the FDs from affecting such rights. This could be interpreted as implying that the executing State retains discretion to refuse a cooperation instrument issued in another State where such issues are at stake. However, their application in individual cases can be problematic from a European perspective because they jeopardise the coherence and consistency of the application of mutual recognition [51].

Domestic issues with the implementation of the mutual recognition instruments can be characterised as legal, rather than practical. These legal issues include the preservation of the old terminology in the Extradition Act and human rights grounds for refusal that are not expressed as such in the European FDs. Those practical problems that have arisen are mostly related to the lack of resources that is associated with the burdens of implementing substantial amounts of legislation in a small country. However, political obstacles have been nonexistent because the national parliament is informed of the negotiations already at the EU level and the successful proposals tend to have the approval of the domestic legislature.

4. The concept of mutual recognition

A. How mutual recognition is understood

Mutual recognition is understood as a principle and a political objective which guides co-operation in criminal matters [52]. Mutual recognition guides how this co-operation should work but requires specific instruments to implement the principle in practice. It is understood as the final acceptance of a foreign criminal judicial decision [53]. This acceptance can differ depending on the level [54] and aim of the instrument to be recognised [55]. The principle is not an absolute rule, but instead has

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[51] The increased competence of the ECJ could be a solution to this. See the future Art. 258-260 TFEU.

[52] The views presented in this chapter are in general based on the interviews carried out in the study.

[53] R. Lahti, *op. cit.*, p. 382.

[54] D. Frände, *op. cit.*, p. 20.

[55] P. Asp, "Ömsesidigt erkännande av europeiska domar och beslut i straffprocessen – erfarenheter och tillämpningsfrågor", in *Forhandlingarna ved det 37 nordiske Juristmøde*, Reykjavik, 2005, Bind I, p. 65-68.

limits. Mutual recognition is built upon mutual trust [56], and is limited wherever that trust is limited. Some of these limits explained in the different instruments based on mutual recognition are separately considered for each instrument. However, it has been suggested that developing the mutual trust upon which mutual recognition is founded may require some harmonisation [57] of criminal law [58].

Mutual recognition presupposes that decisions of any MS authority have legal effects in all MS [59]. The level of mutual recognition can be different depending on which stage of the trial it concerns [60]. Mutually recognising pre-trial decisions is somewhat more difficult due to the differences in the systems of the MS and the differing procedures that can lead to pre-trial decisions. The recognition of final decisions (meaning the final judgment made by a court) is easier, as the final judgment is easier to recognise as such. These judgments are more definitive decisions and on one hand these are generally more relied on. However, certain grounds for refusal cannot be determined when recognising pre-trial decisions, because these do not appear from the information available to the recognising authority. Then again the recognition of pre-trial decision is less problematic from the point of view that these are not final, and the recognition is not definitive.

Overall, practitioners generally perceive mutual recognition to be effective. European Arrest Warrants are in general recognised. This has significantly streamlined the process of extradition. A certain minimum level of fundamental rights is guaranteed in all MS, which makes mutual recognition possible without regular detailed examination in the executing State. The mutual trust in this level of protection facilitates the use of mutual recognition instruments despite limited harmonisation of either substantive or procedural criminal law. Although it is clear that mutual recognition requires some harmonisation, co-operation based on mutual recognition is preferred whenever harmonisation can be avoided [61]. Limits to mutual recognition based on the need to ensure the adequate protection of fundamental rights are possible, as preserving some form of discretion is considered acceptable [62].

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[56] D. Frände, *op. cit.*, p. 20.

[57] In this article harmonisation and approximation are considered to constitute the same measure, see e.g. S. Melander, "Harmonisation of Criminal Law in the EU: A Theoretical Approach to Harmonisation Models", presented at the XXII World Congress of Philosophy of Law and Social Philosophy, "Law and Justice in a Global Society", Granada, IVR-University of Granada, 2005, p. 37-53. The text is available on http://www.nordstraff.net/granada/documents/tecl.pdf (last visited 23 January 2009).

[58] A. Suominen, "Ömsesidigt erkännande av rättsliga beslut som hörnsten i det europeiska straffrättsliga samarbetet?", *JFT*, 6/2006, p. 609-611. On harmonisation and mutual recognition see P. Asp *op. cit.*, p. 68-69.

[59] J. Sihto, *op. cit.*, p. 509.

[60] K. Jahkola, "Rikosasioita koskeva keskinäinen oikeusapu Euroopan Unionissa", *Lakimies*, 2000/4, p. 523-526.

[61] K. Nuotio, *op. cit.*, p. 390.

[62] The loss of sovereign powers can therefore be limited, see S. Peers, *op. cit.*, p. 10.

B. Practitioners' understanding and use of mutual recognition

The EAW is the instrument that has been in use the longest and is the most frequently used of the mutual recognition instruments. It is generally preferred over other, multilateral solutions. It has proven to be efficient, fast and well functioning in general. This view is not shared with respect to other mutual recognition instruments. If the efficacy of other mutual recognition instruments would be as high as the EAW, it would be a big step forward. However, practitioners consider that the threshold for issuing an EAW is sometimes too low, and that it is therefore used in cases that do not merit cross-border law enforcement.

Freezing orders provided for in the Freezing Orders Act are not frequently issued. Other instruments that are used in place of such freezing orders are the 2000 EU Convention on Mutual Legal Assistance [63], the 1990 Council of Europe Convention on Money Laundering [64], the UN 2000 Palermo Convention against Transnational Crime [65] or the 1998 UN Drug Trafficking Convention [66]. The Freezing Orders Act has only been used in a few cases, none of which have resulted in a successful freezing order.

There is no information available on the use of the Financial Penalties Act or the Confiscation Orders Act. At the time of writing, the Confiscation Orders Act has only been in force for some months, and as a result no information is available on the use of confiscation orders. Whether these will be used in the future is difficult to predict. The recently adopted European Evidence Warrant is limited in scope compared to its predecessors [67]. There is therefore a risk that preceding co-operation instruments such as the MLA Convention of 2000 will be used and a dual system applied.

The infrequent use of mutual recognition instruments other than the EAW is most likely due to their novelty combined with inadequate knowledge of the instruments. The use of either traditional co-operation instruments or mutual recognition instruments depends on the rational choice of the person selecting the instrument. The person uses the instrument he or she prefers based on its utility. If the measure sought cannot be obtained through a mutual recognition instrument, an older instrument is used.

5. Problems encountered

A. Confronted problems

Sometimes problems are encountered in the practical use of mutual recognition instruments. These are often solved by negotiations between the judicial authorities. This is also felt to be the best way to solve problems. In some cases the European institutions such as Eurojust, the European Judicial Network, or Europol might be of

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[63] The Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ*, no. C 197, 12 July 2000, p. 3.

[64] The Council of Europe's Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS no. 141, Strasbourg, 8 November 1990.

[65] The United Nations Convention against Transnational Organized Crime of 2000.

[66] The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

[67] The Council Framework Decision on the European Evidence Warrant, *OJ*, no. L 350, 30 December 2008, p. 72.

assistance. However, examples where these institutions have been involved are very limited, as is the extent to which national authorities are aware of their existence and functions.

Problems that practitioners are faced with can be linked to a number of distinct issues. Firstly the procedural differences, harmonisation and the lack of discretion can be problematic. The double criminality requirement, judgments *in absentia* and the return of nationals also sometimes cause problems. Furthermore the process sometimes takes too long, mutual recognition instruments are used in insignificant cases, the instruments might overlap with previous instruments and the issued documents might be ambiguous added to the sometimes divergent implementation. The Freezing FD has caused some problems due to the system in Finnish criminal proceedings and in addition the secrecy between judicial authorities has been seen problematic from the defence point of view. These will be explained here [68].

1. Procedural differences between legal systems

Differences between the legal systems of the issuing and executing States sometimes lead to problems. In the Finnish case these often concern the head of the pre-trial investigation and his position outside the judiciary. The leader of the pre-trial investigations in Finland is usually a police officer. This is unacceptable to most other Member States, where the involvement of a prosecutor or investigative judge is necessary in the investigatory stage. Compatibility requires the involvement of a prosecutor in an earlier stage of the pre-trial investigation than otherwise would be the case under ordinary domestic procedural law. This leads to more time-consuming procedures than would ordinarily be necessary in a purely internal situation. It may also be difficult for Finnish authorities to determine which judicial authority is competent in the other Member State. The foundation for mutual recognition is direct contact between authorities. This is jeopardised when it is unclear which the correct judicial authority is. This differs significantly between Member States.

Mutual recognition is practical only in cases where an equivalent measure is possible according to the law of the executing State. These differences in procedural criminal law can therefore be problematic. If an issued measure does not exist in the executing national system it becomes hard to determine which measure would be an appropriate equivalent. Whilst this issue does not arise in most cases, it may possibly become more frequent when the number of mutual recognition instruments increase. Harmonised instruments, or a greater degree of consideration for the peculiarities of national systems when drafting mutual recognition instruments, would decrease the frequency of this problem. However the differences in procedural law should not be a reason for non-execution, the only exception being the requirement of a fair trial (which is in Finland implemented in most of the acts implementing mutual recognition instruments) or another fundamental procedural right.

Differences related to coercive and investigative measures between the issuing and executing States hamper co-operation and require the further clarification of issued

[68] The problems referred to in this chapter were exposed in the interviews carried out in course of the study.

instruments prior to their execution. The lack of knowledge of the different systems is in addition a deficiency in some cases. There is sometimes not enough information or comprehension of the different instruments applicable, or the specialities of the different systems of the MS. This can further delay co-operation.

One perceived solution to these problems would be increased mutual trust. This could possibly remedy problems relating to technical differences between systems. Common rules on which judicial authorities are competent to issue and execute decisions could be preferred, as this would facilitate the co-operation. The problems as regards uncertainty of the competent judicial authority could be solved by using the EJN, Europol or Eurojust, but these are as yet (unfortunately) poorly known in Finland.

2. Harmonisation

Many problems related to mutual recognition are due to the differing legal cultures and traditions that exist in the MS. The basic idea behind mutual recognition was that it could function without any harmonisation. Although there is a certain level of trust between MS, this is not enough for mutual recognition to function on its own. Differences between criminal procedural laws can be even more fundamental than those between substantive provisions of criminal law. These can cause problems in the practical application of the instruments. There are differing views as to whether harmonisation is a prerequisite to mutual recognition [69]. Harmonisation facilitates the recognition of decisions, as similar systems help when recognising the offence, the decision as well as the sanction as equivalent to one found in the executing system. This supports the view that both substantive and procedural criminal laws should be harmonised. The policy debate ought to focus not on whether harmonisation is desirable, but whether there are some, albeit limited, areas that should not be harmonised and why this might be the case [70]. Harmonisation of sentencing guidelines is particularly sensitive because it can lead to increased repression, and there are substantial differences between MS' criminal policies [71]. Certain minimum standards, especially for the accused, could also be imposed in order to increase mutual trust [72]. This minimum harmonisation might however lead to a race to the bottom as regards the protection of the individual, particularly if MS model their domestic provisions on the minimum rights rather than pre-existing, higher levels of protection.

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[69] See e.g. A. Suominen, *op. cit.*, p. 609-610.

[70] On the trends in European criminal law, see H. Satzger, "Trend und Perspektiven einer europäischen Strafrechstpolitik", *4th European Jurists' Forum 2008*, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 2008, p. 207-241.

[71] K. Nuotio, *op. cit.*, p. 391. See also how the harmonisation results in repressive criminal law in Finland (and the other Nordic MS), T. Elholm, "Does EU criminal law necessarily mean increased repression?", *in* P. O. Träskman (ed.), *Ratio and emotions*, under publication.

[72] How these minimum standards would differ from harmonisation is unclear, as the harmonisation in the field of EU criminal law is not unification.

3. Discretion

The fact that Finnish executing authorities are not granted discretion [73] when executing decisions is sometimes considered problematic. Interviewed practitioners considered that this might jeopardise fundamental rights. Although a certain minimum standard of human rights common to all MS is ensured by the ECHR and general principles that are referred to in Article 6(2) EU, Finnish instruments rely on these to preserve the discretion of executing authorities beyond the express grounds for refusal in the FDs. It is unlikely that the proposed minimum standards in the FD on procedural rights [74] would lead to the deletion of human rights refusal grounds in implementing legislation.

4. Requirement of double criminality

The requirement of double criminality is not generally problematic, but has arisen as an issue in some cases relating to offences for which that requirement has not been abolished. This is most problematic where a person is sentenced to a joint sentence for several offences, some of which fall within the EAW system and others of which remain outside its scope. This is also an issue where offences are only punishable with a lesser sentence than required by the EAW, or where the acts do not on other grounds fulfil the condition of double criminality. In some cases even an annulment from the Supreme Court has been required in order for the sentences to be distinguished in relation of the offences to which they pertain [75].

5. Judgments in absentia

If the person to be surrendered to another Member State has appealed to the fact that he is not aware of the judgment, the execution of the EAW has not been immediate. Finnish authorities have instead examined the judgment in the issuing State. Judgments made in Finland *in absentia* have also caused problems when executing an EAW and the person to be surrendered has informed the executing State that he has not been aware of the judgment. In such cases, the execution has been delayed until further guarantees have been made. The conditions and circumstances in which persons can be surrendered on the basis of such judgments vary in line with the rules on judgments *in absentia* between the MS. Clarifying whether the trial has taken place *in absentia* is not always simple, and can not always be done on the basis of the issued warrant. The mere objection of the defence suffices to delay execution on the grounds that the trial has been held without the defendant present. This is a matter which is addressed

[73] Although some discretion is indeed possible, the lack exists as compared to the previous systems.

[74] Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final, 28 April 2004, which has been discussed ever since 2004 but not agreed on. The Commission is expected to present a new proposal in July 2009.

[75] Cases KKO 1293 of 1.6.2006 Pesänen and KKO 628 of 9.4.2008 Mäkitalo (not published). The cases concerned the extradition from Sweden to Finland for executing a joint custodial sentence.

at the European level. This could amount to some general guiding principles on which criteria in judgments *in absentia* should be focused on [76].

6. Return of nationals

The return of nationals can be problematic, as it is sometimes not clear from the arrest warrant whether the executing State requires the return of a national. In some cases the condition of return of a national has not been complied with. The condition is therefore important to invoke when the arrest warrant is executed. It is also not clear which State is legally responsible when such a condition is imposed, but not satisfied after the execution of the warrant. An agreement on the clarification of such responsibilities would be welcome.

7. Lengthy process

The length of the process is sometimes too long, especially if the decision is not mutually recognised without further examination of its merits. This is problematic particularly in those cases where more information is needed, or the request for information is sent to the wrong authority. This problem is naturally linked to other problems stated in this section, and it can be solved by focusing on the other problems such as improving the level of information on the arrest warrant form or increasing general awareness of the judicial and investigatory processes in other MS. The length of processes is nevertheless a fundamental issue since the purpose of mutual recognition is to improve the efficiency of co-operation between MS.

8. Proportionality

In some cases arrest warrants are issued in insignificant cases that would not ordinarily attract a similar response in the executing MS. The execution of such warrants can be seen as a misdirection of resources from other, more important law enforcement activities. Determining which cases are essential and which ones are not is complicated, but the present system does not provide a mechanism for the appropriate allocation of resources within law enforcement. Possible general guidelines to determine the importance of cases would be welcome. This is a rather delicate issue that would be hard to harmonise, but a simpler system for minor offences could be preferable.

9. Overlap of instruments

The instruments currently in force overlap to some extent, which can cause difficulties in selecting the appropriate instrument or situations where the same result can be achieved in different ways, depending on the instrument used. However, the overlap of some instruments is less problematic than the limited scope of those

[76] The Framework Decision *in absentia* was adopted on 26 February 2009: Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

instruments, because these limits require the use of other instruments that are not based on mutual recognition. It is sometimes hard to select which instrument to use and this hampers the co-operation. This could become a problem with regard to the EEW, since it is widely thought that the restricted scope of the EEW will limit its use. A more general instrument that would enable a wider scope of measures would be preferred.

10. Ambiguity in issued documents

Some of the forms issued are insufficiently precise to determine whether they fall within the scope of the FD. This is particularly the case with vague definitions of criminal acts, which require further clarification and delay execution. Translations of requests can sometimes be of an unsatisfactory quality. This leads to more time consuming processes than necessary, which delays the co-operation. These problems do not arise from mutual recognition as such, but they may significantly hamper the co-operation significantly.

11. Divergent implementation

Divergent implementation of the FDs is also occasionally seen as a problem. The MS might have implemented certain provisions differently and this in some cases causes difficulties in the practical use of the national acts. Determining what constitutes acceptable implementation is a very delicate issue that does not have an easy solution. The FDs do leave some room for the national parliaments to implement the provisions in accordance with national law. It is also difficult to objectively evaluate whether implementation has been successful. Since there are no definitive guidelines on what constitutes correct implementation, MS views may legitimately differ.

12. The Freezing Framework Decision

Both the Freezing Orders Act and the FD on which it is based apply only to orders "securing evidence" or "subsequent confiscation of property" [77]. Property can therefore not be frozen with the aim of securing the civil claim of the complainant. However, Finnish criminal proceedings usually involve both the determination of guilt and the claims of the complainant. It can therefore be unclear from a freezing order whether it is aimed at securing criminal forfeiture, which is permitted by the instruments, or the civil claim of the complainant, which is not. Therefore it can be difficult for a MS authority executing a Finnish freezing order to determine whether the order is within the scope of the FD. Another problem with regard to the Freezing FD is that it is difficult to find information on which MS apply the FD and which authorities within those MS are competent. Thirdly, the differences between domestic standards of proof can also cause problems. As some Member States require a much higher degree of proof for freezing, co-operation is sometimes difficult in the pre-trial stage. Finally, the investigation to catalogue and determine where relevant property

[77] Art. 3 (1) of the Council FD 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

is held should be conducted at an earlier stage. This investigation and therefore also freezing, becomes more difficult after suspects have been interviewed.

13. Secrecy between judicial authorities

Sometimes the information in cases is dealt with strictly confidentially between the judicial authorities of the MS. Confidentiality is in general a positive aspect of criminal procedure, but poses problems for the defence since information may be delivered to the authorities of a MS on condition that it cannot be disclosed to others. Criminal defence lawyers see this confidentiality as the most significant problem concerning co-operation in criminal matters, since they do not have access to all of the information concerning their clients. It is difficult to see a solution to this problem that both preserves confidentiality between judicial authorities and facilitates the rights of the defence to access the file. An overall increase in the rights of the defendant on the European level could contribute to solving this problem.

B. Conclusion on the problems

The problems stated above are rather general to co-operation in criminal matters. Applying mutual recognition does not resolve all of these difficulties. In some cases the mutual recognition instruments themselves are the root cause of issues which arise in their implementation. Nevertheless these issues can be addressed with specific solutions. When the instruments are more frequently used and become more familiar to their users, some of the problems that are caused by unfamiliarity with the principle of mutual recognition seem likely to decrease.

Some practitioners suggested opening a European-level dialogue between practitioners as a solution for most of the problems stated above. This can be endorsed, as it would also increase the practical knowledge and the overall understanding of different legal cultures, the lack of which has caused some problems in executing judicial decisions of other MS authorities. The increased familiarity with other systems can also constitute a basis for increased trust. A second way of supporting mutual recognition would be providing training, both domestically and on a Union level. New instruments differ from previous co-operation instruments. Common training would increase both national understanding and the skills required in co-operation. Thirdly, completing EAWs and other forms as a rule in common working languages would further speed up co-operation. Fourthly, the possibility to electronically send and receive requests would be preferable, as this would considerably shorten the procedural time frame. Finally, clarification on which judicial authorities are competent in each case, and a way to access this information such as an electronic database, would be welcome.

6. Concluding remarks

The Finnish legal system does not as such pose any problems for the implementation or use of mutual recognition. There are no fundamental objections that make the implementation or application of the mutual recognition principle problematic. In certain matters the preservation of fundamental values or structures found in the national system is currently deemed more important than mutual recognition.

However, the need to preserve the national system as far as possible is a declining policy trend. This is demonstrated by the implementation of later mutual recognition FDs by reference rather than by transposition.

Despite the reluctant start to mutual recognition evidenced in early domestic implementing instruments, the present system could be considered reasonably effective. The EAW is used in those cases where it is available, and past experience suggests that the implementation of forthcoming mutual recognition instruments will be faithful to their goals and that their use will prove practical. The shift from the initially reluctant approach to implementation towards less equivocal acceptance of mutual recognition is likely to be mirrored in the application of the principle in Finland. From a Finnish perspective the foundations for an approach to mutual recognition that is faithful to the paradigm have now evolved, and the future of the principle appears promising for both mutual recognition and the application of EU criminal law.

Bilan et perspectives du principe de reconnaissance mutuelle en matière pénale en France[1]

Maiténa Poelemans

1. Introduction. Définition et perception du principe de reconnaissance mutuelle

Selon la formule consacrée en 1999 par le Conseil européen de Tampere, le principe de reconnaissance mutuelle est érigé en tant que « pierre angulaire de la coopération judiciaire en matière pénale ». Dans l'attente d'une consécration institutionnelle par la ratification du traité de Lisbonne, ce principe constitue, avec le rapprochement des législations nationales, une des méthodes d'élaboration des normes européennes en matière de coopération judiciaire. L'adoption, commencée en 2002 avec le mandat d'arrêt européen, d'une série de textes basés sur l'application de la reconnaissance mutuelle aux stades, sentenciel et pré-sentenciel, de la procédure pénale impose aujourd'hui d'évaluer l'application de ces textes au niveau des Etats membres, dont la France qui est l'objet de cette étude. Il en va d'ailleurs du développement de la coopération judiciaire qui se trouve, à ce jour, à la croisée des chemins entre une adoption malaisée des propositions législatives en matière de rapprochement des infractions et des sanctions et la nécessité intrinsèque d'accroître le sentiment de confiance mutuelle entre autorités judiciaires nationales.

[1] Cette contribution se base sur les entretiens menés auprès d'acteurs judiciaires français dans le cadre de l'étude menée par Gisèle Vernimmen et Laura Surano, financée par la Commission européenne, sur « L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne ». L'auteur tient particulièrement à remercier Eric Ruelle, magistrat chargé de mission et chef du Pôle de négociation et de transposition des normes pénales internationales (DACG) au ministère de la Justice, Samuel Lainé, chef du Bureau de l'entraide pénale internationale (BEPI) de la Chancellerie, ainsi que Philippe Faisandier, substitut général près de la Cour d'appel de Pau.

Le principe de reconnaissance mutuelle est unanimement connu et reconnu par les acteurs judiciaires français. Défini classiquement comme le principe selon lequel une décision prise dans un Etat membre doit pouvoir être exécutée plus ou moins automatiquement dans un autre Etat membre de l'Union européenne, il a été qualifié comme un concept porteur ayant le mérite d'impliquer une logique interne en facilitant l'argumentation ainsi que les négociations. La reconnaissance mutuelle est intimement liée au fait que dans un espace commun, l'Espace de liberté, de sécurité et de justice, une décision prise dans un Etat membre doit être reconnue, dans tous ses aspects, par les autres Etats membres. Le maximum de valeur juridique doit être reconnu dans la mesure où tous les Etats membres sont liés par les mêmes standards en matière de droits fondamentaux, issus de la construction prétorienne de la Cour européenne des droits de l'homme et de la Cour de justice des Communautés européennes. S'il apparaît que beaucoup de chemin reste encore à parcourir dans ce domaine, la reconnaissance de ce principe constitue un pas crucial dans l'amélioration de la coopération afin de ne pas faire des Etats membres des « boucliers » protégeant les criminels. Avant cette reconnaissance, il y a dizaine d'années encore, les magistrats étaient invités à « passer leur chemin » [2] lorsqu'ils étaient amenés à traiter un dossier comportant des questions de coopération pénale. Depuis, une nette progression est constatée dans ce domaine, même si cela passe par des efforts considérables.

Cette unanimité conceptuelle et théorique évolue vers un discours davantage tempéré dés lors qu'il s'agit d'envisager la portée de ce principe d'un point de vue pratique, même s'il ne fait aucun doute que la reconnaissance mutuelle constitue la solution aux lenteurs et difficultés de la coopération judiciaire telle qu'elle a été, pendant longtemps, mise en œuvre. Il semble cependant que le principe de reconnaissance mutuelle n'a pas de visibilité concrète pour les opérateurs et ce, essentiellement en raison d'une formation des juges longtemps inadaptée à cette pratique. Il apparaît en effet compréhensible que pour un magistrat formé sur la base de la procédure nationale, reconnaître « force de loi » à une procédure étrangère ou plus simplement, appliquer la loi d'autres autorités n'est pas chose aisée, et peut constituer une véritable révolution. Il en découle que la notion de reconnaissance mutuelle n'est pas bien acquise par les praticiens, ou en tout cas par la majorité d'entre eux. En effet, en dehors des membres et points de contact du Réseau judiciaire européen (RJE), dont font partie les avocats généraux des 35 Cours d'appel en France, les magistrats de liaison et les magistrats travaillant à la Chancellerie dans des services internationaux, les magistrats « de base » ignorent le plus souvent l'origine communautaire du droit qu'ils appliquent. La coopération judiciaire se caractérise ainsi pour un grand nombre de praticiens, par un très grand retard et de grandes difficultés de mise en œuvre. Il n'existe pas encore de réflexe, d'automatisme de la part des magistrats, par rapport au principe de reconnaissance mutuelle. Et d'en conclure que les magistrats ne se sont pas encore approprié cette partie du droit qu'ils sont censés appliquer.

Le décalage des discours entre les différents acteurs chargés de négocier, de transposer puis de mettre en application le principe de reconnaissance mutuelle invite à esquisser une image de la mise en œuvre du principe de reconnaissance mutuelle

[2] Selon l'expression de Samuel Lainé.

en France. Force est alors de constater au final que, loin d'être une image figée, celle-ci apparaît pour le moins contrastée tant les acteurs chargés de cette mise en œuvre se distinguent et tant les problématiques émergentes sur l'application du principe de reconnaissance mutuelle, et plus globalement sur la coopération judiciaire, sont évolutives. La période actuelle est une période charnière appelant à faire le bilan de l'application du principe de reconnaissance mutuelle dans les Etats membres. Celui-ci, à l'instar de ce qui se constate dans l'ensemble des Etats membres [3], est en demi-teinte entre une transposition parfois imparfaite des décisions-cadres et une application qui tend vers l'objectif de reconnaissance mutuelle (2). Les perspectives à venir, ponctuées par l'adoption des nouveaux textes et les négociations des nouvelles propositions, laissent préfigurer des difficultés s'ils ne s'accompagnent pas de mesures complémentaires (3).

2. Un bilan en demi-teinte de la mise en œuvre du principe de reconnaissance mutuelle

Après cinq années d'application du mandat d'arrêt européen, premier instrument basé sur la reconnaissance mutuelle, un premier bilan doit désormais être fait sur la mise en œuvre de ce principe à un moment où son renforcement se trouve conforté au niveau de l'Union européenne [4]. Cet état des lieux passe nécessairement par une analyse de la transposition de ce principe dans les législations nationales (A), puis de son application concrète par l'ensemble des acteurs de la procédure pénale (B).

A. Une copie « en dégradés » des actes législatifs européens

La mise en parallèle des dispositions des décisions-cadres basées sur la reconnaissance mutuelle avec les textes adoptés en France dans le cadre de leur transposition laisse entrevoir, à côté d'un formalisme avéré et d'une quasi-conformité avec la lettre des décisions-cadres (1), des infidélités plus ou moins importantes, en particulier concernant les causes de refus d'exécution ou de non-reconnaissance (2).

1. Une transposition respectueuse des délais

La procédure de transposition des textes en France fait intervenir à des degrés différents les acteurs de la coopération judiciaire. Le Service des affaires européennes et internationales du ministère de la Justice (SAEI) intervient au niveau de la négociation et de la transposition des textes. Il travaille en collaboration avec la Direction des affaires criminelles et des grâces. Le Bureau d'entraide pénale internationale (BEPI) intervient concrètement au stade de la transposition, mais simplement sur des points

[3] « Sa mise en œuvre [du principe de reconnaissance mutuelle] rencontre toutefois des difficultés importantes (…). Le retard dans l'adoption par les Etats membres des mesures nécessaires de transposition de même que les « infidélités » de ces transpositions aux textes des décisions-cadres sont (…) symptomatiques des difficultés rencontrées », A. Weyembergh, « Reconnaissance mutuelle en matière pénale dans l'Union européenne », *Juris-cl. Europe*, fasc. 2720, 2008.

[4] S. Manacorda, « La mutation à droit constant du Troisième pilier : renforcement et élargissement de la coopération », *RSC*, 2008, p. 995.

de droit. Les points de contact du Réseau judiciaire européen (RJE) sont consultés, mais essentiellement pour évaluer les textes.

La transposition des textes européens fondés sur la reconnaissance mutuelle ne pose *a priori* pas de difficultés majeures. La preuve en est la transposition en droit français, dans les délais (ou presque) de trois décisions-cadres sur les quatre, objets de l'étude, respectivement la décision-cadre 2002/584/JAI du 13 juin 2002 sur le mandat d'arrêt européen [5] ; la décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve [6] et la décision-cadre 2005/214/JAI du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires [7].

Force est dés lors d'affirmer la position très favorable du législateur français à l'égard du principe de reconnaissance mutuelle en particulier, et de la coopération judiciaire en général. En effet, les difficultés qui se posent au moment de la transposition, sont davantage d'ordre juridique que politique. Ainsi, lors de la transposition de la décision-cadre 2002/584/JAI du 13 juin 2002 relative au mandat d'arrêt européen, une révision de la constitution française [8] s'est avérée nécessaire par l'insertion d'un nouvel alinéa 3 au paragraphe 2 de l'article 88 de la Constitution en vertu duquel « la loi fixe les règles relatives au mandat d'arrêt européen en application des actes pris sur le fondement du traité sur l'UE ». Le principe fondamental reconnu par les lois de la République selon lequel « l'Etat doit se réserver le droit de refuser l'extradition pour les infractions qu'il considère comme des infractions à caractère politique », toujours inscrit dans l'article 694-4, 2° du Code de procédure pénale (CPP), mais non retenu dans la décision-cadre comme motif de refus de remise, se trouvait ainsi implicitement écarté par le texte constitutionnel.

D'autres difficultés liées à la transposition résultent de ce que le texte législatif national doit traduire les objectifs de la décision-cadre, ce qui n'est pas chose aisée. La difficulté provient en partie du fait que le contrôle de la coopération repose sur les juridictions de terrain. C'est pour parer à ces difficultés d'application qu'il existe, pour le mandat d'arrêt européen, un mécanisme permettant de faire remonter des données statistiques vers la Direction, afin de permettre d'identifier les problèmes, d'y répondre et de compléter la loi. Il s'agit d'un véritable processus d'accompagnement mis en place pour conserver une certaine dynamique dans la mise en œuvre des normes européennes.

La bonne volonté du législateur français à l'égard du principe de reconnaissance mutuelle s'apprécie dans le fait que les transpositions n'ont été que peu retardées au regard des délais inscrits dans les décisions-cadres. C'est le cas de la loi n° 2007-297 du 5 mars 2007 [9] relative à la prévention de la délinquance et modifiant l'article 707-1-5 CPP transposant la DC 2005/214/JAI sur les sanctions pécuniaires. Le décret

[5] *JO*, n° L 190, 18 juillet 2002, p. 1.

[6] *JO*, n° L 196, 2 août 2003, p. 45.

[7] *JO*, n° L 76, 22 mars 2005, p. 16.

[8] La révision constitutionnelle a été opérée par la loi constitutionnelle n° 2003-267 du 25 mars 2003.

[9] *JORF*, 7 mars 2007.

d'application n° 2007-699 du 3 mai 2007[10] précise les modalités d'application des articles du Code de procédure pénale aux sanctions pécuniaires ainsi que les règles applicables à la transmission pour mise à exécution dans un Etat membre de l'Union européenne des sanctions pécuniaires prononcées par les autorités françaises. La DC gel des biens ou éléments de preuve a quant à elle été transposée par la loi n° 2005-750 du 4 juillet 2005 insérant les nouveaux articles 695-9-1 à 695-9-30 dans le Code de procédure pénale[11], complétée par la circulaire du ministère de la Justice du 10 août 2005[12].

Seule la DC 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle des décisions de confiscation[13] n'a, à ce jour, pas reçu de transposition[14].

2. Une transposition approximative des limites du principe de reconnaissance mutuelle

Pour plus d'efficacité, les textes de l'UE relatifs à la reconnaissance mutuelle limitent les motifs de refus d'exécution des décisions émanant d'autres Etats membres. La preuve en est que seule la décision-cadre instituant le mandat d'arrêt européen comporte des motifs obligatoires de non-exécution de la remise : l'amnistie, l'application du principe *non bis in idem* et l'irresponsabilité pénale du fait de l'âge de la personne faisant l'objet du mandat, toutes trois reprises à l'article 695-22 du Code de procédure pénale français. S'alignant sur les dispositions des décisions-cadres, les textes transposant en France les motifs de refus comprennent également des motifs obligatoires et des motifs facultatifs, en s'éloignant parfois des décisions-cadres quant à la qualification des motifs de refus, qui de facultatifs deviennent obligatoires (a). Une appréciation plus poussée des motifs de refus d'exécution ou de reconnaissance les plus « sensibles », comme ceux portant sur le contrôle de la double incrimination (b), sur les droits fondamentaux (c), sur la territorialité (d) ou sur la nationalité (e) permet de conclure à une transposition, qui est proche des textes, en comparaison avec d'autres Etats membres, mais demeure pourtant encore imparfaite.

a) La requalification des motifs de non-exécution ou de non-reconnaissance ou l'insertion de nouveaux motifs

En dehors des motifs obligatoires communs aux dispositions de l'UE et nationales, les motifs de refus obligatoire d'exécution ou de reconnaissance en droit français reprennent pour l'essentiel les motifs de refus facultatifs mentionnés dans les textes de l'Union européenne.

Au titre des motifs obligatoires dans les deux niveaux de législation, nous pouvons citer l'amnistie qui répond, en France, à une exigence constitutionnelle portant sur

[10] *JORF*, 5 mai 2007.
[11] *JORF*, 6 juillet 2005.
[12] Circulaire n° CRIM-05-20/CAB du 10 août 2005.
[13] *JO*, n° L 328, 24 novembre 2006, p. 59.
[14] Le délai s'avère désormais dépassé.

les conditions essentielles d'exercice de la souveraineté nationale [15], de l'existence d'une décision définitive émanant d'un pays tiers, cette décision étant assimilée à un jugement rendu par une juridiction française ou d'un autre Etat membre [16] ou encore le principe *non bis in idem.* Dans ce dernier cas, la personne recherchée fait l'objet, par les autorités judiciaires françaises ou par celles d'un autre Etat membre que l'Etat d'émission, d'une décision définitive pour les mêmes faits que ceux faisant l'objet du mandat d'arrêt européen à condition, en cas de condamnation, que la peine ait été exécutée ou soit en cours d'exécution ou ne puisse plus être ramenée à exécution selon les lois de l'Etat de condamnation (MAE – gel des biens ou des éléments de preuve – sanctions pécuniaires). La minorité pénale instituée en France à treize ans au moment des faits empêche également l'Etat d'exécution de remettre la personne.

En matière de sanction pécuniaire, le décret n° 2007-699 du 3 mai 2007 ne prévoit que trois causes de refus facultatives – l'absence de certificat ou son caractère incomplet ; le montant inférieur à 70 euros de la sanction pécuniaire et la commission des actes, en tout ou partie, sur le territoire français – toutes les autres raisons, énoncées dans la DC constituant des causes obligatoires de refus d'exécution dans le texte de transposition.

D'autre part, certains motifs facultatifs dans certains textes de droit interne deviennent obligatoires dans d'autres de même nature. C'est dire la disparité et l'incohérence des motifs de refus ou de non-exécution, ne serait-ce déjà que dans un seul Etat membre...

Enfin, certaines causes de refus d'exécution ont été ajoutées. Tel est le cas de l'atteinte « à l'ordre public ou aux intérêts essentiels de la Nation » (renvoi par l'article 695-9-17 CPP pour le gel des biens ou des preuves et article D. 48-23 pour l'exécution des sanctions pécuniaires, à l'article 694-4 CPP). Dans la pratique, il appartient au procureur de la République saisi de la demande émanant de l'autorité judiciaire étrangère, de la transmettre au procureur général qui détermine, s'il y a lieu, d'en saisir le ministre de la Justice et donne, le cas échéant, avis de cette transmission au juge d'instruction. Puis, il appartient au ministre d'informer l'autorité requérante des suites données à sa demande. L'insertion de cette nouvelle clause par le droit français a été notamment justifiée par certains parlementaires [17] qui, tout en reconnaissant son absence dans la décision-cadre, se sont référés au TUE et plus particulièrement à son article 34 qui reconnaît explicitement aux Etats membres la possibilité de préserver leur intérêt national. Cette référence a été jugée « totalement hors de propos » [18] par certains auteurs. Ce que confirme d'ailleurs la position que la Commission européenne a mise en avant dans son rapport sur la mise en œuvre de la décision-cadre 2003/577/JAI en concluant à la nécessité d'apporter des modifications

[15] Cons. Const., déc. n° 98-408 DC, 22 janvier 1999 ; CE, avis, 26 septembre 2002, n° 368.282.

[16] Art. 695-22, 2° CPP.

[17] Sénat, rapport de F. Zocchetto, n° 392-2005.

[18] M. Massé, « L'évolution du droit en matière de gel et de confiscation », *RSC*, 2006, p. 463.

aux législations nationales, notamment aux dispositions concernant les motifs de refus de reconnaître ou d'exécuter la décision de gel [19].

b) La règle de double incrimination

Les progrès réalisés en matière de coopération judiciaire pénale sont essentiellement dus à l'atténuation du principe de double incrimination telle qu'elle a été adoptée dans la décision-cadre sur le mandat d'arrêt européen. La France partisane sinon de la suppression de l'application de ce principe, du moins de son atténuation [20], s'est ainsi battue pour que ce point de vue soit retenu lors de l'adoption de la décision-cadre relative au gel des avoirs. La limitation de l'application de cette logique aux seules mesures de gel des avoirs, en excluant les mesures destinées à exécuter une décision de confiscation avait été critiquée par les négociateurs français [21]. L'extension de la suppression de la double incrimination dans les conditions prévues pour le mandat d'arrêt européen doit s'étendre à la confiscation, et *in fine,* à l'ensemble de l'entraide judiciaire [22].

Le législateur français a néanmoins fait de l'absence de double incrimination, pour les infractions non incluses dans la liste des infractions graves et pour lesquelles ce contrôle est supprimé, un motif obligatoire de refus d'exécution alors que les textes européens n'en font qu'un motif facultatif. L'article 695-23 CPP précise en effet que « l'exécution d'un mandat d'arrêt européen est également refusée si le fait faisant l'objet dudit mandat d'arrêt ne constitue pas une infraction au regard de la loi française ». La circulaire ministérielle du 10 août 2005 sur le gel des biens ou d'éléments de preuve et le décret d'application du 5 mai 2007 sur les sanctions pécuniaires incluent également directement, dans les motifs obligatoires de refus, le fait que la sanction ou la décision de gel soient fondés sur un fait qui ne constitue pas une infraction au regard de la loi française (article D 48-23, 1er al. du décret du 5 mai 2007), sauf si la sanction ou le gel concerne une infraction entrant dans l'une des catégories mentionnées pour l'exécution d'un mandat d'arrêt européen à l'article 695-23 CPP auxquelles ont été ajoutées d'autres infractions, selon les textes.

c) Les droits fondamentaux

Le respect des droits fondamentaux constitue une priorité énoncée dans l'ensemble des instruments de reconnaissance mutuelle adoptés au sein de l'Union européenne. La retranscription des dispositions varie cependant d'un texte à l'autre

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[19] COM (2008) 885, 22 décembre 2008.

[20] La France n'ayant pas fait de déclaration sur ce point dans le cadre de la convention d'entraide pénale internationale du 20 avril 1959, n'opposait déjà pas l'absence de la double incrimination pour refuser d'exécuter une demande d'entraide émanant d'un Etat partie et visant à opérer une saisie ou une perquisition.

[21] Le débat pour l'adoption du texte sur le gel des avoirs étant antérieur à celui sur les décisions de confiscations, les négociateurs français avaient critiqué l'exclusion des mesures relatives à la confiscation.

[22] E. Barbe, « Le mandat d'arrêt européen : en tirera-t-on toutes les conséquences ? », *in* G. de Kerchove et A. Weyembergh (éd.), *L'espace pénal européen : enjeux et perspectives*, Bruxelles, Editions de l'Université de Bruxelles, 2002, p. 113.

laissant présager la transposition disparate dans les Etats membres. En France, contrairement à d'autres Etats comme la Belgique, l'Autriche, les Pays-Bas ou encore la Lituanie, le législateur n'a pas ajouté de motif obligatoire de refus reprenant la disposition énonçant que « rien dans la présente décision-cadre, ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux et les principes juridiques fondamentaux tels qu'ils sont consacrés par l'article 6 du traité sur l'Union européenne ». La disposition sur les droits fondamentaux n'a par conséquent pas été transposée en tant que telle dans la législation française, contrairement à la clause de non-discrimination, incluse comme motif obligatoire de refus d'exécution dans l'ensemble des textes de transposition adoptés jusqu'à présent, alors qu'elle ne figure dans les textes européens que dans les considérants. Selon ses termes qui ne varient que pour s'adapter à l'instrument : l'exécution est refusée s'il est établi que la décision a été prise dans le but de condamner ou de poursuivre « une personne en raison de son sexe, de sa race, de sa religion, de son origine ethnique, de sa nationalité, de sa langue, de ses opinions politiques ou de son orientation sexuelle »[23], ou que l'exécution de ladite décision peut porter atteinte à la situation de cette personne pour l'une de ces raisons. Il s'agit d'une clause traditionnelle dans la procédure d'extradition qui permet et oblige même l'Etat d'exécution à refuser la remise pour l'une de ces raisons. Or ce rapprochement avec la procédure classique d'extradition ne peut être invoqué pour les autres textes qui contiennent également tous cette cause de refus[24]. Reconnaissant l'absence de portée normative des considérants des décisions-cadres sur lesquelles cette disposition s'appuie, certains parlementaires ont ainsi considéré que « l'insertion de ces hypothèses autorisant le refus d'exécution de la décision de gel n'était (…) pas strictement nécessaire en droit, mais correspond à un choix d'opportunité (…) »[25] même si cette hypothèse peut surprendre s'agissant d'Etats membres de l'UE, censés tous respecter la démocratie et l'Etat de droit. Enfin, cette disposition risque d'être difficile à mettre en œuvre dans la mesure où elle implique que l'Etat d'exécution, la France, apprécie les motifs officieux qui ont motivé l'émission du mandat.

d) La clause de territorialité

La clause de territorialité permettant aux autorités de l'Etat d'exécution de refuser leur coopération au motif que l'infraction poursuivie a été commise sur tout ou partie du territoire de celui-ci, fait partie des motifs facultatifs de refus dans les textes européens. La clause de territorialité a été transposée dans un premier temps en droit français en tant que motif de refus facultatif d'exécution de la décision de sanction pécuniaire (article D 48-22, 3° CPP) et de remise de la personne (article 695-24, 3°CPP), tout en étant très vite qualifiée par certains de « maintien d'une sorte de réserve territoriale de souveraineté, très étroitement encadrée »[26] et par là même, en opposition avec l'objectif même de coopération judiciaire.

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[23] Article 695-22, 5° CPP.

[24] Article D 48-24, 8° CPP (sanctions pécuniaires) ; article 695-9-17, 3° CPP (gel des biens).

[25] Assemblée nationale, rapport E. Blessig du 4 mai 2005.

[26] D. N. Commaret, « Le mandat d'arrêt européen », *RSC*, 2005, p. 326.

Cette clause a d'ailleurs été qualifiée de « particulièrement inacceptable », lors des négociations sur la proposition de DC relative au mandat européen d'obtention de preuves, et elle a fait l'objet de critiques de la part de la délégation française dès lors qu'elle permet d'opposer un refus sans pour autant obliger l'Etat d'exécution à engager, sur son propre territoire, une procédure pénale [27]. Le risque mis en avant étant que l'utilisation de cette clause aboutisse à paralyser une procédure judiciaire lancée dans l'Etat d'émission sans garantir pour autant qu'une autre procédure soit ouverte contre les mêmes faits dans l'Etat d'exécution. La délégation française a ainsi affirmé le caractère « profondément contraire tant à l'objectif d'entraide qu'au principe de reconnaissance mutuelle [et constituant] une menace sérieuse pour l'avenir de la coopération judiciaire pénale entre les Etats membres de l'Union européenne ». Un compromis a néanmoins été trouvé limitant l'application de la clause de territorialité, cette dernière ne pouvant être avancée qu'à titre exceptionnel et au cas par cas, en prenant en considération les circonstances particulières à chaque espèce et en tenant notamment compte de la question de savoir si les faits considérés se sont déroulés en majeure partie ou pour l'essentiel dans l'Etat d'émission, si le mandat européen d'obtention de preuves concerne un acte qui n'est pas une infraction pénale au regard du droit de l'Etat d'exécution et s'il est nécessaire d'effectuer une perquisition et une saisie aux fins de l'exécution du mandat [28].

e) Le statut des nationaux ou résidents

Le législateur français a conservé le caractère facultatif du motif de refus basé sur la nationalité de la personne faisant l'objet d'un mandat d'arrêt européen émis pour l'exécution d'une peine à condition que les autorités compétentes s'engagent à l'exécuter. Il l'a également limité aux seuls nationaux, sans inclure les résidents [29], comme dans la décision-cadre du 13 juin 2002 [30]. Hormis cette disposition, aucun statut spécifique n'est accordé par le droit français aux nationaux et/ou aux résidents.

B. Une mise en œuvre « en rangs serrés » des dispositions législatives

L'application des dispositions adoptées en France et mettant en œuvre le principe de reconnaissance mutuelle est déléguée aux juridictions judiciaires de l'ensemble du territoire (1). La décentralisation de la procédure n'entrave en rien une certaine uniformisation de la part de la Chambre criminelle de la Cour de cassation dans l'application des différentes législations comme en témoigne l'application des motifs de refus d'exécution, parfois incompatibles avec les décisions-cadres adoptées par l'UE (2).

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[27] Doc. Cl 8018/06 COPEN 33 du 31 mars 2006, note de la délégation française.

[28] Article 13, par. 3 de la décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

[29] Article 695, par. 24, 2° CPP.

[30] Décret n° 2007-699 du 3 mai 2007.

1. Une préférence pour la procédure décentralisée

La procédure en France est une procédure à tendance décentralisée. Ainsi en matière d'exécution des décisions de sanctions pécuniaires, il appartient au procureur de la République (dans chaque Tribunal de grande instance) de poursuivre l'exécution des sanctions pécuniaires prononcées par les autorités compétentes des Etats membres de l'Union. En matière de gel des biens ou d'éléments de preuve, c'est le juge d'instruction qui est compétent pour exécuter une décision et le juge des libertés et de la détention qui statue sur une demande de gel des biens en vue de leur confiscation ultérieure. Le procureur de la République est pour sa part, compétent pour procéder à l'exécution des mesures ordonnées par le juge des libertés et de la détention.

Les autorités compétentes pour exécuter les mandats d'arrêt européens émis par les autorités judiciaires sont le parquet général et la Chambre de l'instruction (Cour d'appel), ce choix visant à harmoniser la procédure suivie avec celle déjà prévue en matière d'extradition. Au titre de l'article 7 de la décision-cadre sur le mandat d'arrêt européen, le ministre de la Justice, et plus spécifiquement la Direction des affaires criminelles et des grâces, sous-direction de la justice pénale spécialisée (BEPI), constitue l'autorité centrale en France. Cette dernière autorité est notamment avertie lorsque suite à un mandat émis par une autorité judiciaire française ou étrangère, l'intéressé a été arrêté.

Le BEPI du ministère de la Justice assure un rôle de conseil aux juridictions qui sont désormais maîtresses de la procédure. Il exerce un rôle d'intermédiaire quand se pose une question relative à une levée d'immunité ou à l'obtention du consentement d'autorités tierces au renoncement au principe de spécialité. Il doit être consulté en cas de demandes concurrentes d'extradition et de remises sur mandat d'arrêt européen. Il délivre enfin l'autorisation pour les transits de personnes remises sur le fondement d'un mandat d'arrêt européen [31].

2. Un bilan mitigé de l'application pratique des motifs de refus

La transformation des causes de refus facultatives en causes obligatoires diminue la marge de manœuvre des juges français et force est de constater, en dépit de certaines incertitudes dues à la nouveauté des instruments, l'émergence d'une jurisprudence au cas par cas en matière notamment de contrôle de la double incrimination (a), de la prise en compte des droits fondamentaux (b), d'application de la clause de territorialité (c), de la nationalité (d) ou encore de critères retenus pour appliquer un motif de refus optionnel (e).

a) Le contrôle encadré de la double incrimination

En dépit de l'atténuation du contrôle de double incrimination qui caractérise les différentes décisions-cadres basées sur le principe de reconnaissance mutuelle, il n'en demeure pas moins qu'en pratique, lors de l'émission par le juge français d'un mandat d'arrêt européen, des Etats membres continuent à procéder au contrôle de la double

[31] Déclaration faite par la France au Secrétariat général du Conseil dans le cadre de la mise en œuvre du mandat d'arrêt européen relative à la décision-cadre du 13 juin 2002, doc. 7450/04 du 17 mars 2004.

incrimination, quand bien même théoriquement ils n'auraient plus à le faire. Le degré de coopération varie ainsi considérablement selon les Etats d'émission ou d'exécution. A titre d'exemple, sur les mandats pratiqués entre la France, d'une part, et l'Espagne ou la Belgique ou encore l'Allemagne, d'autre part, à savoir 70% des mandats traités, il n'y a pas de contrôle de double incrimination, preuve d'un haut degré de confiance mutuelle entre ces Etats.

Pour les magistrats chargés de son application, la clause visant à supprimer le contrôle de la double incrimination dans les cas prévus par le texte est plutôt facile à mettre en œuvre, l'infraction étant soit prévue, soit inexistante.

La Cour de cassation a notamment cassé partiellement, sur un moyen relevé d'office tiré du défaut de double incrimination pour certains faits concernés, l'arrêt d'une Chambre de l'instruction ayant autorisé la remise aux autorités belges d'un citoyen français pour exécuter une peine d'emprisonnement prononcée en Belgique pour, notamment, des faits qualifiés en droit belge de « défaut de déclaration de faillite » et de « défaut de réponse aux convocations de curateur » qui ne sont susceptibles d'aucune qualification juridique en France ou dont les éléments constitutifs sont différents [32].

Mais, la Cour de cassation, en se reconnaissant compétente pour apprécier si l'infraction visée dans le mandat d'arrêt étranger a un équivalent en droit pénal français, exerce également le contrôle de la double incrimination. Elle a ainsi jugé que les faits poursuivis sous la qualification de dissimulation de la part d'un failli par l'autorité judiciaire britannique entrent dans les prévisions de l'article 695-23, al. 1er CPP dès lors qu'ils constituent l'infraction de banqueroute ou d'organisation frauduleuse d'insolvabilité au regard de la loi française ; en revanche, les faits poursuivis sous la qualification de fausses déclarations sous serment faites hors procédure judiciaire ne sont pas constitutifs de l'une des infractions énumérées à l'article 695-23, al. 2 à 34 du Code précité et ne sont susceptibles d'aucune qualification pénale en droit français [33].

La marge d'appréciation du juge s'avère ainsi limitée au nom même de l'atténuation du contrôle de double incrimination. Est ainsi cassé, l'arrêt qui, pour refuser la remise d'une personne recherchée pour des faits qualifiés de fraude, énonce d'une part que l'article visé de la loi du pays d'émission (Pologne) n'est pas applicable faute de voir réunis ses éléments constitutifs et, d'autre part, que ces faits ne sont pas davantage constitutifs d'escroquerie en droit français, alors qu'il n'appartenait pas à la Chambre de l'instruction, sauf inadéquation manifeste entre les faits et la qualification retenue, d'apprécier le bien-fondé de la qualification donnée par l'autorité judiciaire de l'Etat d'émission [34].

b) La clause des droits fondamentaux

Pour les acteurs judiciaires, le contrôle du respect des droits fondamentaux doit exclusivement avoir lieu dans l'Etat d'émission, alors qu'auparavant, un double

[32] Cass. crim., 5 août 2004, 04-84.511, Bull. crim., 187, 2004.
[33] Cass. crim., 14 septembre 2005, pourvoi n° 05-84999.
[34] Cass. crim., 21 novembre 2007, pourvoi n° 07-6597.

contrôle s'effectuait. Il s'agit d'une conséquence quasi obligée du principe de reconnaissance mutuelle, et du fait que l'ensemble des Etats membres sont liés par les mêmes standards communs relatifs aux droits fondamentaux. Cependant, ce principe est souvent malmené par les avocats, qui contestent souvent l'exécution sur la base d'une violation des droits fondamentaux. Tel est systématiquement le cas dans les affaires de mandat d'arrêt européen adressées par l'Espagne à l'encontre de présumés membres de l'ETA qui allèguent pour empêcher leur remise, entre autres arguments, celui d'une mise en cause de la personne résultant de déclarations obtenues sous la torture et par conséquent d'une violation des textes internationaux prônant les droits fondamentaux. Les arrêts de la Cour d'appel de Pau du 7 mars 2008 [35] illustrent la pratique du juge confronté à ces questions mettant en avant la question du contrôle des garanties procédurales et du respect des droits de la défense par l'Etat d'émission. Il en ressort « (…) que nonobstant le principe de confiance mutuelle qui doit présider aux relations entre les Etats membres de l'Union européenne, il appartient aux juridictions de l'Etat requis pour l'exécution d'un mandat d'arrêt européen de veiller au respect par l'Etat requérant de ces principes juridiques fondamentaux relatifs aux droits de l'homme et aux libertés individuelles ». Mais cela n'implique pas pour autant qu'il appartient à l'autorité de l'Etat d'exécution de rechercher les preuves attestant des allégations de la personne. De la même manière qu'il « n'appartient pas à la Chambre de l'instruction de connaître et d'examiner les charges retenues par l'autorité requérante ni d'en apprécier la valeur » et que dès lors « la Chambre de l'instruction n'a pas le pouvoir non plus d'apprécier les moyens de preuve et les éléments produits par la personne faisant l'objet du mandat d'arrêt européen visant à contester son implication dans la commission des faits reprochés ».

La Chambre criminelle de la Cour de cassation a en revanche exigé, sur le fondement de l'article 3 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et de la convention de Genève du 28 juillet 1951 relative au statut des réfugiés que la Chambre de l'instruction s'assure, avant d'accorder la remise, que la personne recherchée, lorsqu'elle bénéficie du statut de réfugié, ne sera pas renvoyée dans son pays d'origine à l'issue de sa peine [36].

c) La clause de territorialité

La clause de territorialité peut s'avérer plus complexe à mettre en œuvre. Elle pose des questions d'appréciation des intérêts en présence, mais lorsqu'il s'agit d'affaires de terrorisme, la remise est le plus souvent ordonnée par la France. La mise en œuvre du principe de territorialité engendre souvent des difficultés, ce principe rimant souvent pour les Etats avec souveraineté et constitue parfois un frein à la réalisation de la coopération judiciaire. La coopération avec certains Etats membres s'avère alors parfois délicate, comme c'est le cas notamment avec les Pays-Bas et l'Allemagne.

La localisation des faits, retenue comme motif facultatif de refus d'exécution du mandat d'arrêt européen à l'article 695-24, 3° CPP a très vite fait l'objet d'une

[35] CA Pau, 7 mars 2008, n° 93/2008, San Sebastian Gaztelumendi Mikel ; n° 94/2008, Iturbide Otxoteko Joseba.

[36] Cass. crim., 7 février 2007, pourvoi n° 7-80162.

interprétation par la Chambre criminelle dans trois arrêts rendus le 8 juillet 2004 [37]. La clause de refus facultatif avancée, n'étant à l'instar de la décision-cadre qu'elle transpose, assortie d'aucune condition, la Chambre criminelle a jugé qu'avait fait une exacte application de l'article 695-24, 3° CPP, la Chambre de l'instruction qui justifie son refus d'exécution d'un mandat d'arrêt européen pour l'exercice de poursuites pénales du chef d'intégration dans une organisation terroriste visant des faits commis, notamment à San Sebastian (Espagne) et Bayonne (France), en énonçant qu'ils auraient été commis pour partie sur le territoire français. La localisation d'une partie des faits sur le territoire de l'Etat d'exécution suffisait pour refuser la remise, sans qu'il soit nécessaire, comme l'avait retenu la Chambre de l'instruction par des motifs qualifiés par la Chambre criminelle d'erronés et surabondants, de prendre en considération la nature des faits en cause ou la nationalité des personnes concernées. Outre le fait que, comme le commentent très justement certains, « en attribuant une compétence territoriale, en l'espèce, à la France, la loi réintroduit la règle de la double incrimination : en effet l'article 695-24, 3° parle de « faits » qui ont été commis sur le territoire français, donc d'infractions commises, c'est-à-dire de faits incriminés en France » [38], la jurisprudence du 8 juillet 2004 qualifiée par les praticiens de « cas d'espèce » ne s'appliquera sans doute pas lorsque le mandat d'arrêt européen concernera un ressortissant non pas français, comme dans cette affaire, mais d'un autre Etat membre [39].

d) L'exécution de la peine dans l'Etat de nationalité

Au titre des motifs de refus facultatifs, celui permettant à l'autorité judiciaire de ne pas exécuter le mandat d'arrêt européen si la personne condamnée est de nationalité française et que les autorités compétentes s'engagent à faire procéder à cette exécution, a fait l'objet d'une interprétation flexible de la part du juge de cassation [40]. Ainsi, le juge français n'est pas tenu de rechercher si la peine peut être exécutée sur le territoire français [41], sauf si l'exécution à l'étranger de la peine prononcée ou à prononcer avait pour la personne recherchée des conséquences manifestement disproportionnées au regard de sa vie privée et familiale, garantie par l'article 8 CEDH [42]. La Chambre criminelle semble cependant s'en remettre sur ce point à l'appréciation du procureur

[37] Pourvoi n° 04-83662, n° 04-83663 ; n° 04-83664, Bull. crim., 181, 2004, p. 662 et s. Voy. le commentaire de P. Lemoine, « Le mandat d'arrêt européen devant la Chambre criminelle », *AJP*, 2006, chron, p. 14.

[38] J. Pradel, « Le mandat d'arrêt européen, un premier pas vers une révolution copernicienne dans le droit français de l'extradition », *Dalloz*, 2004, chron. p. 1392.

[39] A titre d'exemple, Cass. crim., 10 décembre 2008, pourvoi n° 08-87484 où la Cour a considéré qu'il n'y a pas lieu de refuser la remise au titre des articles 1° et 3° de l'article 695-24 CPP, dès lors que la personne faisant l'objet du mandat d'arrêt européen est de nationalité espagnole, que certains des faits reprochés, notamment la détention de documents administratifs espagnols falsifiés seront plus aisément instruits en Espagne et constituent avant tout une atteinte aux intérêts espagnols.

[40] Article 695-24, 2° CPP.

[41] Cass. crim., 5 août 2004, Bull. crim., 187, 2004 ; 23 novembre 2004, Bull. crim., 293, 2004.

[42] Cass. crim., 26 octobre 2005, Bull. crim., 270, 2005.

général compétent en jugeant que « pour écarter la demande de l'intéressé qui, étant de nationalité française et ayant ses attaches familiales sur le territoire national, sollicitait d'y exécuter sa peine, les juges relèvent que le procureur général n'envisage pas de faire procéder à cette exécution en France dès lors qu'il a requis l'exécution du mandat d'arrêt européen » [43].

3. Les perspectives en clair-obscur de la mise en œuvre du principe de reconnaissance mutuelle

Si l'évaluation de l'application du principe de reconnaissance mutuelle ne porte à l'heure actuelle que sur quatre textes, c'est plus du double de décisions-cadres mettant en œuvre ce principe, qui ont été adoptées depuis ou sont en voie d'adoption. Reste que si le succès de la mise en œuvre du mandat d'arrêt européen ne suscite aucun doute, tel n'est pas le cas de tous les textes qui se trouvent parfois en conflit avec les instruments traditionnels d'entraide (A). Des difficultés restent à surmonter, basées en grande partie sur une confiance mutuelle nécessaire mais encore perfectible (B).

A. Une similarité des textes pour des résultats inégaux

La décision-cadre 2002/584/JAI du 13 juin 2002 instituant le mandat d'arrêt européen a servi de modèle aux autres textes mettant en œuvre le principe de reconnaissance mutuelle, sans pour autant répercuter sur ces derniers la réussite escomptée (1). De nouveaux espoirs sont fondés sur le mandat européen d'obtention des preuves sans pour autant emporter l'enthousiasme des acteurs judiciaires qui seront chargés de l'appliquer en France (2).

1. Les suites à attendre des textes adoptés

L'ensemble des acteurs judiciaires mettent en avant la réussite du mandat d'arrêt européen et les évolutions positives qu'il a engendrées pour la coopération judiciaire pénale. Le mandat d'arrêt européen représente « l'unique instrument qui concrétise de la manière la plus claire et la plus efficace, la mise en œuvre de ces principes de confiance et de reconnaissance mutuelles des décisions de justice, et *a fortiori* la collaboration dans l'espace de liberté, de sécurité et de justice » [44]. Qualifié tour à tour de « point d'inflexion le plus important » ou encore « d'avancée tout à fait remarquable pour l'UE et la mise sur pied d'un espace de liberté, de sécurité et de justice », mais aussi de « grand pas en avant pour la reconnaissance mutuelle et l'entraide pénale en général », le bilan d'application du mandat d'arrêt européen est globalement positif tant au niveau de sa transposition que de son application.

A l'opposé, l'échec de la mise en œuvre de la décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution des décisions de gel des biens ou d'éléments de preuve est marquant, d'autant plus qu'elle est issue d'une initiative pour partie française. La loi n° 2005-750 du 4 juillet 2005 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la justice transpose la DC 2003/577/JAI du 22 juillet 2003 en insérant les nouveaux articles 695-9-1 à 695-9-30 du CPP relatifs à

[43] Cass. crim., 25 janvier 2006, Bull. crim., 28, 2006.

[44] S. Lainé, *ELN Interviews*, 3/2007.

l'émission et à l'exécution des décisions de gel de biens ou d'éléments de preuve [45]. Si la transposition s'est effectuée sans difficultés majeures, l'application concrète de ce texte constitue un échec. De l'avis des acteurs chargés de l'application, le système est imparfait car il est déjà issu d'un consensus. La conséquence en est qu'il renvoie très fréquemment aux textes nationaux. C'est pourquoi, en France, les dispositions classiques continuent à s'appliquer par habitude, même si elles ne conviennent pas à l'objectif recherché. Il s'agit pour l'essentiel des dispositions relatives à la saisie immobilière ou la saisie conservatoire qui relèvent du droit civil, et qui semblent inconciliables avec la lutte contre la criminalité organisée.

De même, la réussite de l'application de la convention d'entraide du 29 mai 2000 [46] complique paradoxalement la mise en œuvre des autres textes basés sur la reconnaissance mutuelle. Dans la mesure, où contrairement au mandat d'arrêt européen, les autres instruments n'excluent pas la possibilité d'émettre ou d'exécuter des commissions rogatoires internationales aux mêmes fins, ce sont le plus souvent ces procédures déjà connues, qui sont utilisées au détriment des nouveaux instruments.

2. *Perspectives sur la mise en pratique du mandat européen d'obtention des preuves (MOP)*

L'application du MOP [47] soulève déjà des critiques de la part des praticiens qui anticipent un échec de l'application de ce nouvel instrument. Un des principaux arguments avancés réside là encore dans le succès de l'application de la convention du 29 mai 2000 relative à l'entraide judiciaire en matière pénale. Celle-ci permet en effet d'aboutir aux mêmes résultats, mais de manière moins compliquée. A titre d'exemple, le certificat annexé à la DC relative au MOP constitue une contrainte supplémentaire aux yeux des autorités judiciaires et même si ce document a déjà été utilisé dans le cadre de la décision-cadre sur le gel des biens ou des éléments de preuve, le recul n'est pas encore suffisant pour en tirer des réels enseignements.

Les restrictions du champ d'application de la décision-cadre portent également à critique. En limitant le champ d'application du mandat européen d'obtention des preuves aux seuls objets, documents ou données obtenus en exécution de certaines mesures comme les injonctions, les perquisitions ou les saisies, le texte exclut les interrogatoires, les dépositions, les prélèvements sur le corps d'une personne ou les interceptions téléphoniques, ce qui risque de créer de nouvelles complications. En effet, la très grande majorité des commissions rogatoires internationales comportent des investigations faisant appel aux différents types de preuves, comme par exemple une demande de perquisition accompagnée d'une demande d'audition. De ce fait, le juge devrait, pour une même affaire, délivrer à la fois une commission rogatoire internationale et un mandat européen d'obtention de preuves. Or, les juges doivent

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[45] Leur application est spécifiée dans une circulaire du 10 août 2005, CRIM-05-20.

[46] Acte du Conseil du 29 mai 2000 établissant, conformément à l'article 34 du traité sur l'Union européenne, la convention relative à l'entraide judiciaire en matière pénale entre les Etats membres de l'Union européenne, *JO*, n° C 197, 12 juillet 2000.

[47] Décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

déjà répondre à une multitude de demandes dans un contexte de pénurie de moyens. Leur travail risque ainsi d'être encore plus compliqué, alors que l'objectif escompté réside dans la simplification et la facilitation de l'entraide judiciaire.

Bien que soulevée à l'origine de la proposition de la Commission sur le mandat européen d'obtention des preuves, la difficulté de fond portant sur l'introduction en droit français de principes issus du système anglo-saxon peut être également retenue pour les autres textes sur la reconnaissance mutuelle. Il en est ainsi de la reconnaissance du principe de proportionnalité (notamment article 6 du texte adopté) qui s'explique certes par la spécificité de la procédure pénale anglaise, mais qui tout en étant présent dans la procédure pénale française, ne se traduit pas dans notre système avec la même rigidité. Pour certains, l'introduction de telles garanties aboutirait en fin de compte à étendre à l'Union européenne les difficultés propres à la coopération judiciaire avec les pays de *common law*[48].

Force est dès lors de constater, après des négociations passionnées et un compromis au forceps, une réticence des autorités judiciaires françaises à l'égard du mandat européen d'obtention des preuves.

B. Un renforcement obligé de la confiance mutuelle

La reconnaissance mutuelle ne se décrète pas uniquement par l'adoption de textes prônant ce principe. Elle doit en effet s'accompagner de la confiance mutuelle, « condition de possibilité de la reconnaissance mutuelle »[49] et qui impliquerait que « chacun (des Etats membres) accepte l'application du droit pénal en vigueur dans les autres Etats membres quand bien même la mise en œuvre de son droit national conduirait à une solution différente »[50]. Dès lors, le rapprochement des législations en matière pénale continue d'apparaître comme une solution complémentaire au principe de reconnaissance mutuelle (1) auquel doivent être ajoutées des mesures d'accompagnement (2).

1. Une complémentarité des méthodes

Forts de l'expérience concluante du mandat d'arrêt européen, les acteurs judiciaires en France minimisent l'importance d'une harmonisation des législations pénales, du moins concernant le droit substantiel. Cette position s'explique notamment puisque l'un des premiers objectifs du rapprochement des législations pénales des Etats membres, est de réduire, voire de supprimer, les risques de non-réalisation de l'exigence de double incrimination dans le cadre de la coopération judiciaire. Il apparaît clairement aujourd'hui pour le mandat d'arrêt européen, peut-être demain pour le reste de la coopération judiciaire, que cette disparité résiduelle des législations, parfois forte, sera nuancée si tant est que l'exigence de la double incrimination s'amoindrit. Le fait qu'une harmonisation soit minimale aura dès lors moins d'importance.

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[48] Communication de Pierre Fauchon, Sénat, 20 juillet 2004.

[49] D. Flore, « La notion de confiance mutuelle : l'alpha ou l'oméga d'une justice pénale européenne ? », *in* G. de Kerchove et A. Weyemberg (éd.), *La confiance mutuelle dans l'espace pénal européen*, Bruxelles, Editions de l'Université de Bruxelles, Bruxelles, 2005, p. 18.

[50] CJ, 11 février 2003, aff. C-385/01, C-187/01, *Procédure pénale c. Klaus Brügge et Hüseyin Gözütok*, *Rec.*, p. I-1345 et s.

Deux priorités s'imposent alors. La première consiste pour les autorités judiciaires à développer leurs connaissances sur les principes qui doivent gouverner leur mode de fonctionnement lorsqu'elles sont confrontées à une demande d'un autre Etat. La seconde porte sur la nécessité d'apprendre à travailler ensemble de telle sorte que ces acteurs puissent avoir confiance les uns dans les autres et donc cesser de se demander si la procédure qui va être suivie par un juge étranger est compatible, conforme aux standards auxquels répondent leur propre procédure. Ce dernier challenge constitue en fait un problème culturel [51]. Il apparaît dès lors plus réaliste d'espérer que la reconnaissance mutuelle se développe plutôt que de partir vers une sorte de code pénal européen. L'explication de ce constat se trouve dans la souveraineté. La justice représente une partie intégrante de la notion de souveraineté et une harmonisation constituerait un véritable casse-tête chinois, compte tenu des différences de culture entre Etats membres et, par conséquent, des règles de procédure que cela poserait. Le fait que l'ensemble des Etats membres se soient accordés dans plusieurs textes sur plus de 32 infractions communes représente déjà une grande avancée, l'harmonisation demeurant pour certains « un vœu pieu » [52].

La méthode du rapprochement des législations ne doit pourtant pas être écartée pour autant et en particulier concernant les droits procéduraux. Cette harmonisation n'est pas facile à mettre en œuvre, mais il serait nécessaire de tendre vers elle dans l'avenir. Aujourd'hui, il n'est pas rare de devoir faire face à des règles procédurales « bloquantes », qui empêchent d'avancer. L'objectif final serait l'harmonisation, même s'il convient d'abord de « fluidifier les choses », avant de voir plus loin.

La perspective d'une codification des textes adoptés ou en voie d'adoption n'emporte pas non plus l'unanimité. Pour certains, seule l'élaboration d'un code européen de l'entraide judiciaire en matière pénale, c'est-à-dire d'un texte unique qui viserait l'ensemble des investigations, serait véritablement de nature à remédier aux lacunes actuelles de l'entraide. Cela passe également par une définition commune des règles et des procédures nécessaires à la mise en œuvre efficace des poursuites et des enquêtes pour lutter contre les formes graves de criminalité transnationale [53]. Pour d'autres, la codification est un outil évolué. De nombreuses difficultés se posent déjà dans le seul cadre de l'adoption des textes communs, c'est pourquoi la codification apparaît comme très prématurée. Elle représente en effet un travail de synthèse, ce qui implique que la synthèse de la substance doit avoir été faite avant, niveau qui à ce jour est loin d'être atteint.

2. Des mesures d'accompagnement pour faciliter la RM

Les difficultés sont disparates et nombreuses : complexité des textes, problèmes de rapports avec les autorités étrangères, demande quasi systématique de supplément

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[51] S. Lainé, « La coopération dans l'espace de liberté, de sécurité et de justice : l'exemple du mandat d'arrêt européen », *ELN Interviews*, 3/2007.

[52] *Ibid*.

[53] Communication de P. Fauchon, Sénat, 20 juillet 2004, suite aux entretiens qu'il a eus avec les magistrats impliqués dans le domaine de l'entraide judiciaire pénale, dont M^me^ Edith Boizette, doyen des juges d'instruction du pôle économique et financier du Tribunal de Grande Instance de Paris.

d'informations, mauvaise information sur les textes, divergences procédurales qui posent actuellement des problèmes en pratique. La langue pose également un obstacle à la coopération car les autorités judiciaires ne sont pas formées à cela. Pour illustrer cette lacune, ce n'est que depuis 2007 qu'un département langues et civilisation a été créé à l'Ecole nationale de la magistrature (ENM). Le principal obstacle à la coopération est l'absence de culture commune « non pas au sens où on s'accorde sur les mêmes standards juridiques, mais de culture de fonctionnement en commun, de culture de travailler ensemble » [54].

Il apparaît dés lors primordial de renforcer la mise en réseau des acteurs mettant en œuvre la coopération judiciaire en matière pénale même si cela passe déjà par les points de contact du RJE et les groupes de travail au BEPI. L'essentiel est de diffuser l'information sur les nouvelles normes juridiques, de développer la fonction pédagogique et de renforcer les procédures d'évaluation. A ce titre, le travail pédagogique effectué par le BEPI qui a notamment pour mission d'informer toutes les juridictions du mode de fonctionnement des instruments nouveaux adoptés par le Conseil de l'Union européenne revêt une grande importance. C'est ainsi, que quotidiennement, les magistrats qui y travaillent répondent aux questions posées par les juridictions confrontées à des problématiques dans la mise en œuvre de ces nouveaux instruments. Mais cela ne suffit toujours pas au vu de ce qui se passe dans d'autres Etats membres où une direction internationale a été créée.

La formation des juges doit également devenir une priorité. Elle passe tout d'abord par la formation pour laquelle de nouvelles initiatives ont été prises. Ainsi, l'ENM a mis récemment en place un module qui propose des enseignements spécifiques sur le droit de l'Union européenne et dans le cadre duquel, les élèves magistrats se réunissent avec des élèves magistrats d'autres Etats de l'UE afin qu'ils fassent connaissance et se confrontent sur des cas pratiques (par exemple des demandes d'entraide). L'idée étant que dans quelques années, ces concepts et ces instruments de coopération pénale seront pratique courante et que les magistrats les utiliseront avec des automatismes bien réglés.

Mais la formation des juges doit être permanente. Les praticiens ne participent qu'en aval de l'adoption du texte, à l'évaluation, mais ils ne sont conviés à donner leur opinion ni lors de la négociation, ni lors de la transposition. En revanche, ils doivent être informés des nouveaux textes. Il apparaît donc qu'un magistrat peut ne pas connaître les instruments actuels de reconnaissance mutuelle, mais il ne peut pas dire qu'il ne peut pas s'informer. Des moyens ont ainsi été mis en œuvre pour permettre aux praticiens d'accéder à l'information en France. A titre d'exemple, ils ont un accès Intranet au site du ministère de la Justice, très clair et très complet, qui regroupe les divers textes et instruments, mais aussi la jurisprudence en la matière (notamment des synthèses de la jurisprudence de la Cour de cassation sur le mandat d'arrêt européen), ainsi que les dispositions et les textes pris par les autres Etats membres de l'Union. Certaines Cours d'appel tiennent des statistiques en matière de mandat d'arrêt européen, à l'instar de la Cour de cassation. Le BEPI tient également un registre sur le mandat d'arrêt européen comportant le nombre de MAE (actif/passif) enregistrés sur

[54] S. Lainé, *op. cit*.

une année entre la France et les autres pays ainsi que le nombre de remises sur MAE sur une année (personnes remises à la France/personnes remises par la France).

4. Conclusion

En conclusion, le principe de reconnaissance mutuelle des décisions émanant des juridictions d'autres Etats membres est unanimement reconnu par les acteurs judiciaires en France. La transposition des décisions-cadres en droit français n'a jusqu'à présent pas posé de grandes difficultés, même si elle ne s'est pas toujours conformée à la lettre des textes législatifs européens. Une étape supplémentaire est en passe d'être franchie avec l'adoption de nouveaux textes mettant en œuvre la reconnaissance mutuelle. Elle devra s'accompagner de mesures complémentaires, tant au niveau de l'UE qu'au niveau national, pour être franchie avec succès.

The principle of mutual recognition in criminal matters in Hungary

Katalin Ligeti

1. Introduction *

The principle of mutual recognition is perceived in Hungary as a way of enhancing international cooperation in criminal matters. Mechanisms of international co-operation based on the principle of mutual recognition have not raised any concerns in Hungary until very recently. The relatively little attention that mutual recognition has received in Hungary is due to the fact that international cooperation in criminal matters is governed by a heterogeneous set of legal provisions, partly belonging to criminal law and partly to administrative law. This mixed nature makes the law on international cooperation in criminal matters a rather complicated area of regulation, not very attractive even for the specialists working in this field.

The initial lack of interest in the mutual recognition principle has, however, radically changed with the envisaged expansion of the application of the European Arrest Warrant to Iceland and Norway. The interpretation of the mutual recognition principle provoked fierce academic debates in Hungary and the principle was put to a constitutional test.

This article focuses on the implementation and functioning of the mutual recognition principle in Hungary. Starting from the constitutional implications of mutual recognition in criminal matters in Hungary, the rules of its implementation and application will be examined. The theoretical and legal aspects of the way in which mutual recognition functions in criminal matters will be set out first, followed by an analysis of the practical and technical obstacles encountered during its application. The relationship between mutual recognition and harmonisation will be addressed separately. This article is largely based on interviews that the author has carried out with practitioners involved in the application of mutual recognition.

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* Legislation could have been taken into account until 1 March 2009.

2. The principle of mutual recognition and the Hungarian Constitution

Whereas in some Member States the first objections to the principle of mutual recognition were raised in the context of surrendering own nationals on the basis of a European Arrest Warrant, in Hungary there are no constitutional provisions forbidding the extradition of own nationals. Therefore, the implementation of the Framework Decision on the European Arrest Warrant did not pose any constitutional issues in Hungary. Constitutional concerns were first raised in the light of the proposed expansion of the application of the European Arrest Warrant to Iceland and Norway, as foreseen by the EUIN-Act [1]. The latter raised the question as to whether the principle of mutual recognition can be reconciled with the *nullum crimen sine lege* principle (legality principle). The main arguments of the debate will now be summarised.

A. The principle of mutual recognition and the legality principle

In Hungary, international cooperation in criminal matters is governed by two acts: Act no. 38 of 1996 on international cooperation in criminal matters (hereinafter referred to as MLA-Act) which is applicable in relation to non-EU Member States and Act no. 130 of 2003 on cooperation in criminal matters with the Member States of the European Union (hereafter referred to as EU Criminal Cooperation Act). In Hungary, all EU instruments based on the principle of mutual recognition are implemented by the EU Criminal Cooperation Act.

The Parliament adopted Act no. 167 of 2007 transposing the EUIN-Agreement (hereinafter referred to as EUIN-Act) on 11 June 2007. The EUIN-Act – in line with the provisions of the EU Criminal Cooperation Act – envisaged expanding the application of the European Arrest Warrant in respect of Iceland and Norway, both being associate countries to the Third Pillar. According to the EUIN-Act, the European Arrest Warrant was to be applied on similar terms in regard to EU Member States, Iceland and Norway.

The debate was triggered by the claim put forward by Mr László Sólyom, President of the Republic of Hungary, who requested that the Hungarian Constitutional Court review the constitutionality of the EUIN-Act. In his proposal, Mr Sólyom argued that abolishing the requirement of double criminality for the list of offences – as foreseen by the principle of mutual recognition – is in violation of the constitutional principle of *nullum crimen sine lege*. Mr Sólyom claimed *in concreto* that Art. 3 of the EUIN-Act violates Art. 57(4) of the Hungarian Constitution (the legality principle) because:

- Art. 3(2) of the EUIN-Act does not require basing the arrest warrant on an act the constituent elements of which are identical in the laws of both the issuing and the executing State,
- Art. 3(3) of the EUIN-Act precludes the proof of double criminality in respect of criminal offences linked to organised crime and terrorism,
- Art. 3(4) of the EUIN-Act sets out that Hungary shall not have recourse to the double criminality requirement in the surrender procedure on certain conditions.

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[1] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ*, no. L 292, 21 October 2006, p. 1.

Mr Sólyom argued that the cited provisions of the EUIN-Act violate the *nullum crimen sine lege* principle as stipulated in Art. 57(4) of the Hungarian Constitution since "any provision that empowers the Hungarian authorities to carry out actions in order to establish criminal liability shall be contrary to Art. 57(4) of the Constitution unless according to such provisions the action qualifies as a criminal offence at the time of commission under Hungarian law".

The Hungarian Constitutional Court sustained the claim of the President and found that Art. 3 of the EUIN-Act runs counter to the Hungarian Constitution. The Constitutional Court gave the following reasoning [2]:

- Art. 57(4) of the Hungarian Constitution is mandatory for all criminal laws having actual or potential impact on establishing criminal liability and imposing criminal punishment and therefore precludes any sovereign action aiming at establishing criminal liability of a person for an act that does not qualify as a criminal offence under Hungarian law [3];
- the fact that the legislator amended Art. 57(4) of the Constitution in order to enable the ratification of the Lisbon Treaty [4] indicates that the legislator himself admitted that the application of the mutual recognition principle in respect of non-EU Member States is not in line with the current provisions of the Constitution.

It is obvious from the above arguments that the key issue of the legal dispute concerned whether the *nullum crimen sine lege* principle contained in Art. 57(4) of the Hungarian Constitution applies to acts carried out in the framework of international cooperation in criminal matters. This largely depends on the conception of international cooperation in criminal matters. If proceedings within the framework of international cooperation in criminal matters are seen as part of the criminal procedure of the executing State, it is obvious that such criminal procedure shall not be instituted unless the underlying behaviour qualifies as a criminal offence under the laws of the executing States, i.e., in this case, under Hungarian law. If, however, proceedings undertaken in the framework of cooperation in criminal matters are not regarded as part of the executing State's own criminal procedure, the legality principle does not apply. The decision of the Constitutional Court clearly adopts the first conception.

The Constitutional Court also raised the argument that no constitutional concerns would have been evoked if the amended Constitution on Art. 57(4) had entered into force. The amendment of the Constitution referred to by the Constitutional Court was adopted on 22 December 2007 as part of the Hungarian ratification of the

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[2] Decision no. 733/A/2007 of 8 March 2008 of the Hungarian Constitutional Court.

[3] Point IV of Decision no. 733/A/2007 of 8 March 2008 of the Hungarian Constitutional Court.

[4] Art. 57(4) of the Hungarian Constitution shall be replaced by the following provision upon entry into force of the Lisbon Treaty: "Nobody shall be declared criminally culpable and punished for an act that did not qualify as a criminal offence in the moment of commission under Hungarian law *or* – within the scope of action as provided for in the legal actions of the European Union in order to assure mutual recognition of resolutions, and not restricting the essence of fundamental rights – under the laws of another State co-operating in establishing the Area of Freedom, Justice and Security".

TFEU. The legislator considered the legality principle stipulated in Art. 57(4) of the Hungarian Constitution not in conformity with Art. 82(1) of the TFEU prescribing the application of mutual recognition. In order to enable Hungary to cooperate on the basis of the mutual recognition principle with the judicial authorities of other States participating in the Area of Freedom, Security and Justice, Art. 57(4) of the Constitution had to be modified.[5] The amendment shall enter into force, however, only once the Lisbon Treaty enters into force, which meant that, at the time of the decision of the Constitutional Court, the original version of Art. 57(4) had to be taken into consideration.

Regardless of the amendment to the Hungarian Constitution, one may certainly question the standpoint taken by the Constitutional Court since actions carried out in the framework of international cooperation in criminal matters can hardly be conceived as part of domestic criminal procedure. Contrary to the decision of the Constitutional Court, it is widely accepted that acts undertaken in the course of international cooperation in criminal matters are of an administrative nature since they aim neither at establishing the criminal liability of the person concerned nor at imposing punishment on him/her[6]. Such procedures solely serve the execution of an international cooperation request. Executing an extradition request for example requires only examination as to whether the requirements of the request have been fulfilled and whether no exception to extradition applies. Therefore, the execution of such a request qualifies as an administrative decision[7] and by no means as one manifesting the criminal jurisdiction of the executing State. Consequently, actions undertaken in the course of international cooperation in criminal matters may not be conceived as part of a criminal procedure in an objective sense, for these are not supposed to either decide on the criminal liability of the person concerned or to impose criminal sanctions[8]. The fact that the Code of Criminal Procedure serves as background legislation for the MLA-Act does not make either the extradition or the surrender procedure a criminal procedure.

The author of this report, therefore, disapproves of the standpoint of the Constitutional Court, according to which international cooperation in criminal matters is part of national criminal proceedings, implying that the establishment of criminal

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[5] The text of the amendment to the Constitution was strongly criticised in Hungary both for linguistic errors (see N. Chronowski, *Nullum crimen sine EU?*, Rendészeti Szemle, 2008, p. 39-60; P. Szilágyi, *Szövegértésből elégtelen*, Népszabadság, 26 January 2008) and from a legal point of view. See K. Ligeti and K. Karsai, *Magyar alkotmányosság a bűnügyi jogsegélyjog útvesztőjében*, Magyar Jog, 2008, p. 399-408.

[6] J. Vogel, Vor § 1, *in* H. Grützner, P.-G. Pötz and C. Kreß, *Internationaler Rechtshilfeverkehr in Strafsachen*, R. v. Decker, Heidelberg, 2007, margin number 74b.

[7] Judge András Bragyova takes the same point in his dissenting opinion to Decision no. 733/A/2007 of 8 March 2008 of the Hungarian Constitutional Court.

[8] This conception is widely accepted in international literature. See for instance Lord Russell: "the broad principle that it is to the interest of civilized communities that crimes... should not go unpunished, and... that one State should afford to another every assistance towards bringing persons guilty of such crimes to justice" (*Arton-case*, 1 Q.B. [1896] 111), or Fauchille: "coopération des Etats pour la bonne administration de la justice pénale" (P. Fauchille, *Traité de droit international public*, Paris, 1922, p. 457).

liability and criminal sanctioning is governed by the legality principle of substantive criminal law[9]. The legality principle cannot be stretched to cover international cooperation in criminal matters.

It should also be noted that, prior to Mr Sólyom's proposal claiming that abolishing the double criminality requirement is contrary to the legality principle, the European Court of Justice had already resolved this issue in a preliminary ruling procedure connected with implementation of the European Arrest Warrant in Belgian law. Though the Hungarian Constitutional Court mentioned the European Court of Justice decision in the *Advocaten voor de Wereld* case[10], it omitted to go into the merits of the case. This is especially surprising because the Hungarian Constitutional Court came to exactly the opposite conclusion to the ECJ. Such ignorance of the ECJ decision is hard to understand since the ECJ also acknowledges the legality principle and defines it as one of the sources of Community law and as a legal principle stemming from the common constitutional traditions of the Member States.

The Constitutional Court delivered its decision on 8 March 2008. It is difficult, therefore, to speculate at this time about all the possible consequences of the decision. The decision clearly indicates, however, that Hungary is starting to realise that mutual recognition of criminal decisions of other EU Member States or of associated countries of the Area of Freedom, Security and Justice challenges national sovereignty. This challenge is not easily accepted.

B. Surrender of Hungarian nationals

As has been mentioned earlier, the Hungarian Constitution does not contain any provision forbidding the extradition of own nationals. It should be mentioned, nevertheless, that the fact that there is no constitutional obstacle to extradite own nationals does not mean that Hungary would extradite Hungarian nationals. Hungary made a declaration to the 1957 European Extradition Convention according to which Hungary grants extradition of its own nationals only if the person sought for extradition is also a citizen of another State and has his/her permanent residence in a foreign State. Consequently, Hungary has already granted extradition of Hungarian nationals under certain conditions prior to the entering into force of the European Arrest Warrant, but in practice own nationals not having another nationality and not living in another country were not extradited.

The surrender procedure set out by the EU Criminal Cooperation Act is considered to be different from extradition, so the above restriction does not apply to surrender. Accordingly, Hungary surrenders its own nationals to other EU countries based on a European Arrest Warrant. The only restriction that Hungary made concerning the surrender of own nationals is stipulated in Section 5(1) and (2) of the implementing legislation[11]. According to Section 5(2) of the EU Criminal Cooperation Act the

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[9] K. Ligeti and K. Karsai, *op. cit.*, p. 399-408.

[10] Point X of Decision no. 733/A/2007 of 8 March 2008 of the Hungarian Constitutional Court.

[11] Section 5 of the EU Criminal Cooperation Act foresees that (1) if the European Arrest Warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is a national and a resident of the Republic of Hungary, the

surrender of Hungarian nationals for prosecution in other EU Member States even for offences which are not punishable under Hungarian law is allowed, if the requirements set out in Art. 2(2) of the Framework Decision are met and if the issuing judicial authority provides the Hungarian authorities with a guarantee as stipulated in Section 5(2). If one of these criteria is not met, Hungary will refuse to execute the European Arrest Warrant. In such cases it is not possible to execute the foreign sentence in Hungary because the Hungarian Criminal Code makes the validity of foreign criminal judgements dependent on double criminality. Accordingly, if the act for which the Hungarian national was prosecuted abroad is not punishable under Hungarian law, the sentence decided on abroad may not be executed in Hungary.

It is important to note that Section 5 of the EU Criminal Cooperation Act – as distinct from the rule prohibiting the extradition of nationals – applies only to Hungarian nationals. Whereas Hungary made a declaration to the 1957 Extradition Convention prohibiting the extradition of non-nationals who definitively settled in Hungary, there is no rule which would prohibit the execution of a European Arrest Warrant concerning a non-national who has settled in Hungary. Also the practice in this field clearly demonstrates that Hungary surrenders non-nationals (mostly Romanians) who have settled in Hungary to other EU Member States both for prosecution and execution of a sentence.

On the other hand, the evaluation of the implementation of the European Arrest Warrant in Hungary showed that, in practice, a Hungarian national resident in Hungary and sentenced *in absentia* abroad cannot be surrendered, even if a guarantee of a retrial is given. The Hungarian authorities noted that, in such a case, the European Arrest Warrant is sent to the Office of the Prosecutor General for consideration to be given to the initiation of criminal proceedings.

3. The implementation of the mutual recognition principle in Hungary

As has been mentioned earlier, all EU instruments based on the principle of mutual recognition are implemented in Hungary by the EU Criminal Cooperation Act.

The EU Criminal Cooperation Act was originally designed to implement the European Arrest Warrant and the 2000 Convention [12] in Hungary, but in the meantime it also transposes the rules on the mutual recognition of orders to freeze property or evidence and of financial penalties, pecuniary sanctions against legal entities

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executing judicial authority shall refuse to execute the European Arrest Warrant, and undertakes to execute the sentence or detention order in accordance with Hungarian law (Section 6 of the Hungarian Criminal Code, Section 579 of the Hungarian Code of Criminal Procedure).

(2) Where a person who is the subject of a European Arrest Warrant for the purposes of prosecution is a national who is a resident of the Republic of Hungary, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate that where a sentence has been passed or a detention order has been made, the person, at his request, after being heard, is returned to the territory of the Republic of Hungary in order to serve there the custodial sentence or detention order passed against him.

[12] Convention established by the Council in accordance with Art. 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ*, no. C 197, 12 July 2000, p. 3.

and procedural costs. Hungary thereby opted to implement the various instruments based on the mutual recognition principle in one single instrument. This does not mean, however, that the EU Criminal Cooperation Act represents a consolidated piece of legislation. Unfortunately, the Hungarian legislator omitted to unify grounds for refusal, catalogues of crimes, and mainframe procedural rules. Therefore, there are a lot of repetitions in the EU Criminal Cooperation Act which could have been avoided if the Hungarian legislator had fully used the advantages of a formally unified codification style.

Hungary has so far implemented only three framework decisions relating to the application of the principle of mutual recognition:

- Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedure between Member States,
- Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence [13],
- Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties.

It should be mentioned that the implementation of Framework Decision 2005/214/JHA on application of the principle of mutual recognition to financial penalties gave rise to a set of interpretation dilemmas. The principle of mutual recognition equally applies to financial penalties imposed by criminal courts and to pecuniary sanctions imposed by administrative authorities for regulatory offences. It was questioned whether repressive sanctioning within the framework of the administrative laws of the Member States may be put under this Framework Decision, and thus be submitted to the mutual recognition regime. Finally, the Hungarian legislator decided to follow a restrictive approach when implementing Framework Decision 2005/214/JHA [14].

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[13] The implementing provisions of the Framework Decision on freezing of assets are contained in Chapter 4 of the EU Criminal Cooperation Act of 2003. The concept of a freezing order does not restrict itself to the definitional scope and application of freezing measures provided for in para. 160 of Act no. 19 of 1998 on Criminal Procedure. Therefore, in case of incoming foreign requests/orders, the competent authority must primarily examine the purpose of the request/order. The label of the freezing measure in the issuing State is irrelevant. It is important that in relation to taxes and duties, customs or exchange, execution of a freezing order may not be refused on the ground that Hungarian law does not provide for the same kind of category of financial crimes as the law of the issuing State.

[14] Hungary implemented the FD on mutual recognition of financial penalties by adopting Act no. 13 of 2007. Latter act amended both the EU Criminal Cooperation Act and Act no. 36 of 2007 on international cooperation concerning regulatory offences. Thereby the FD on mutual recognition of financial penalties was implemented in Hungary by two separate laws: (i) the EU Criminal Cooperation Act implemented provisions on mutual recognition for pecuniary sanctions imposed for criminal offences or imposed on legal entities in criminal procedure, whereas (ii) Act no. 36 of 2007 on international cooperation concerning regulatory offences implemented provisions concerning mutual recognition for pecuniary sanctions imposed for regulatory offences. Since the law of regulatory offences is a separate body of law in Hungary, independent from penal law with a separate procedural regime, it could not have been included in the EU Criminal Cooperation Act. N. Kis, "Szupranacionális közigazgatási szankciók az

The Framework Decision 2006/783/JHA on application of the principle of mutual recognition on confiscation orders of 6 October 2006 has not yet been implemented into Hungarian law [15]. Neither has Hungary implemented the most recent Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, the Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty and the Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant. The officials of the Hungarian Ministry of Justice and Law Enforcement have indicated already in the negotiation phase of these instruments that their implementation will require considerable time in Hungary. This is particularly true in respect of the Framework Decision relating to the mutual recognition of alternative sanctions and suspended sentences. The lack of corresponding domestic provisions may cause significant problems in Hungary.

A. The limits of the principle of mutual recognition

The principle of mutual recognition is proclaimed by the EU instruments as a concept with certain limits. The limits of the mutual recognition principle are specified in the facultative and mandatory grounds for refusal contained in the respective framework decisions.

As far as Hungarian legislation is concerned, one may contest that Hungary does not fulfil its obligations under the mutual recognition principle. The EU Criminal Cooperation Act contains certain additional grounds for refusal not foreseen in the underlying framework decision. Furthermore, as a general tendency, Hungary narrows down the application of mutual recognition as far as possible under the given EU instruments.

With a view to the implementation of the European Arrest Warrant, Sections 4-6 of the EU Criminal Cooperation Act transformed all but one of the facultative grounds for refusal provided for in the Framework Decision in mandatory grounds for refusal [16].

Európai Unióban", *in* K. Ligeti and F. Kondorosi (eds.), *Európai büntetőjog kézikönyve*, Budapest, MHK, 2008, p. 373-395.

[15] The implementation of the Framework Decision on the mutual recognition of confiscation orders was delayed due to solely administrative circumstances and not for policy considerations. It is the Ministry of Finance which is in charge of collecting the results of confiscation. The Ministry of Finance failed to elaborate the instruments necessary for the implementation of the Framework Decision on the mutual recognition of confiscation orders. It is, however, scheduled for the near future.

[16] Section 4 of the EU Criminal Cooperation Act stipulates: "The execution of the European Arrest Warrant shall be refused in the following cases: (a) if the person requested may not be held criminally responsible owing to his or her age (Section 23 of the Criminal Code of Hungary); (b) if in one of the cases referred to in Section 3(3) the act on which the European Arrest Warrant is based does not constitute an offence under the law of the Republic of Hungary; (c) if the criminal prosecution or punishment of the requested person is statute-barred according to Hungarian law; (d) where a final judgement has been passed against the requested person in a Member State for the act on which the European Arrest Warrant is based,

Similarly, the FD on freezing orders was implemented in Hungary to the effect that all optional grounds for refusal became mandatory ones [17]. The Hungarian legislator not only restricted the application of the mutual recognition principle in respect of freezing orders to the minimum possible, but also included two additional grounds for refusal not foreseen in the FD. Namely, Art. 67/C of the EU Criminal Cooperation Act does not allow the execution of a freezing order issued in another Member State if criminal prosecution or punishment of the offence is statute-barred according to Hungarian law, or if the laws of Hungary otherwise preclude execution.

One may observe the same approach also in respect of the grounds for refusal contained in the Framework Decision on financial penalties. Again, the Hungarian legislator opted for restricting the scope of application of the mutual recognition principle not only by implementing all optional grounds for refusal as mandatory ones, but also by including one additional ground for refusal. According to Art. 67/M of the EU Criminal Cooperation Act, the Hungarian authorities shall refuse the execution

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which prevents the institution of criminal prosecution, or 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 Member State; (e) if the requested person has been finally judged by a third 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; (f) where the requested person is being prosecuted in the territory of the Republic of Hungary for the act on which the European Arrest Warrant is based; (g) where the Hungarian judicial authority (court or public prosecution) or investigating authority have decided either not to prosecute for the offence on which the European Arrest Warrant is based or to halt proceedings or the investigation; (h) if the offence on which the arrest warrant is based is covered by amnesty under the Hungarian law, and the Hungarian Criminal Code shall be applied for the offence (Sections 3 and 4 of the Criminal Code)".

[17] Section 67/C of the EU Criminal Cooperation Act stipulates: "The execution of an order issued by the judicial authority of a Member State shall be refused if a) the act on which the order is based does not constitute an offence under the law of the Republic of Hungary; (b) the criminal prosecution or punishment of the offence is statute-barred according to Hungarian law; (c) where a final decision has been passed in Hungary or in a Member State for the act on which the order is based, which prevents the institution of criminal prosecution, or by which the confiscation, the forfeiture or the equivalent punishment or measure has been served or is currently being served or may no longer be executed; d) the suspected person has been finally judged by a third State in respect of the same acts provided that, where confiscation, forfeiture or the equivalent punishment or measure has already been enforced, has been served or is currently being served or may no longer be executed under the law of the sentencing country; e) the certificate attached by foreign judicial authority obviously does not refer to order enclosed; f) the deadline set out for corrections and submitting missing documents elapsed or the order corrected may not be executed anyway; g) the order refers to evidence or property held by a person benefiting from immunity either upon his/her constitutional position or upon international provisions, and such immunity has not been suspended; h) the laws of Hungary otherwise preclude execution. Execution of an order issued by the judicial authority of a Member State shall not be refused if such order refers to criminal offences in connection with taxes, charges, customs and foreign currency with the reason that there are no such taxes or charges in Hungary as in the issuing State, or the Hungarian law does not provide similarly for taxes, charges, customs or foreign currencies as does the law of the issuing State".

of a decision on financial penalties also if the offence on which the order is based is covered by amnesty under the Hungarian law, and the Hungarian Criminal Code shall be applied for the offence (Sections 3 and 4 of the Criminal Code) [18].

By transforming all facultative grounds for refusal into mandatory ones, and by including additional grounds for refusal into the implementing legislation, Hungary clearly prompts a narrow understanding of mutual recognition. At the same time, it endeavours to maintain as much national sovereignty as possible under the mutual recognition regime.

According to the EU Criminal Cooperation Act the only remaining facultative ground for refusal is the territoriality clause, which is applied in respect of both the European Arrest Warrant [19] and in respect of the enforcement of financial penalties [20]. Since, however, there is no provision in the Hungarian Criminal Code specifying the circumstances upon which a criminal offence shall be considered as committed in the territory of Hungary, the application of the territoriality clause is uncertain [21]. In case

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[18] Section 67/M of the EU Criminal Cooperation Act stipulates: "The execution of an order of the Member State shall be refused if (a) the person concerned may not be held criminally responsible owing to his or her age, (Section 23 of the Criminal Code of Hungary); (b) the act on which the order is based does not constitute an offence under the law of the Republic of Hungary; (c) the criminal prosecution or punishment of the person concerned is statute-barred according to Hungarian law; (d) where a final judgement has been passed against the person in a Member State for the act on which the order is based, which prevents the institution of criminal prosecution, or where there has been a sentence, the penalty has been paid or is currently being enforced or may no longer be executed under the law of the sentencing Member State; (e) the person has been finally judged by a third State in respect of the same acts provided that the penalty or measure has been enforced or is currently being enforced or may no longer be executed under the law of the sentencing country; f) the certificate attached by the judicial authority of the Member State does not refer to the order enclosed; g) the offence on which the order is based is covered by amnesty under the Hungarian law, and the Hungarian Criminal Code shall be applied for the offence (Sections 3 and 4 of the Criminal Code); h) the suspected person benefits from immunity either upon his/her constitutional position or upon international provisions, and such immunity has not been lifted; i) the amount of money described in the order of the Member State or the Euro equivalent thereof calculated upon exchange rates issued by the National Bank of Hungary on the day of entry into force of the order does not amount to EUR 70. The execution of an order issued by a Member State may be refused if the certificate enclosed by the Member State is missing or incomplete. The execution of an order issued by a Member State shall be refused if the deadline set out for corrections and submitting missing documents elapsed or the order corrected may not be executed anyway".

[19] According to Section 6 of the EU Criminal Cooperation Act, "The executing judicial authority may refuse to execute the European Arrest Warrant where it relates to offences which have been committed in whole or in part in the territory of the Republic of Hungary".

[20] According to Section 67/M para. (3) of the EU Criminal Cooperation Act, "(3) The execution of an order issued by a Member State may be refused if the criminal offence for which it was issued had in full or in part been committed in the territory of the Republic of Hungary".

[21] The Hungarian Criminal Code simply states that all criminal offences perpetrated in the territory of Hungary are subject to Hungarian jurisdiction. In case of criminal offences committed in the territory of more than one State, Hungarian courts follow the so called unity

of conflicting interests Hungarian practice follows the solution according to which Hungary refuses cooperation and exercises its own jurisdiction if the crime was partly committed in the territory of the Republic of Hungary (i.e. the criminal conduct was committed in Hungary but the result of the crime occurred outside Hungary). When deciding on refusing cooperation based on the territoriality exception, the court also takes into account the gravity of the crime underlying the request as well as the issue of evidence.

The narrow understanding of mutual recognition described above is combined with an additional problem stemming from the structure of the EU Criminal Cooperation Act. Although the Hungarian legislator largely abstained from inventing additional grounds for refusal not foreseen in the underlying framework decisions, it did not clarify whether the refusal grounds laid down in the EU Criminal Cooperation Act are exhaustive or not. One may argue, on the one hand, that the instruments based on the principle of mutual recognition represent a new form of cooperation and traditional grounds for refusal do not apply to them. This approach may be challenged, however, by the fact that the MLA-Act – which contains all traditional grounds for refusal such as humanitarian considerations, fundamental rights and freedoms or insufficient mental capacity – is explicitly mentioned as the background legislation of the EU Criminal Cooperation Act[22]. As a result, Hungarian practice currently largely varies as to the admissibility of traditional refusal grounds in respect of the execution of a warrant or order falling under the mutual recognition regime. While some magistrates allow grounds for refusal existing only in the MLA-Act also for example in the course of a surrender procedure, others strictly deny such a possibility[23].

B. Mutual recognition of final judgments and of pre-trial decisions

Hungarian legislation does not attach any formal difference to the mutual recognition of final judgments as opposed to the mutual recognition of pre-trial decisions and there has been no practical case where this distinction was claimed.

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of crime doctrine, according to which a criminal offence shall be considered as committed in the territory of Hungary if one of its constituent elements (either the act of perpetration or the outcome) occurred in the territory of Hungary. It is obvious that the unity of crime doctrine allows to consider any offence as being committed on Hungarian territory which has some remote relation to Hungary. It would be desirable that general criteria are set for defining when should be a crime considered as being committed in the territory of a Member State in order to avoid conflicting claims of Member States. F. Nagy, *A magyar büntetőjog általános része*, Budapest, Korona, 2004; Gy. Berkes, Zs. Kiss, I. Kónya and E. Rabóczki, *Magyar Büntetőjog. Kommentár a gyakorlat számára*, Budapest, HVG Orac, 2004.

[22] Section 2 of the EU Criminal Cooperation Act allows the application of the MLA-Act as background legislation provided that such application is not explicitly forbidden. So e.g. the EU Criminal Cooperation Act does not explicitly abolish the political offence exception. Therefore it is technically possible to raise the political offence exception based on the MLA-Act when executing a European Arrest Warrant.

[23] 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 Hungary, Brussels, 27 February 2008.

Despite the neutral attitude of the Hungarian legislator, in the author's view, the surrender procedure should be distinguished from other forms of cooperation based on the mutual recognition principle [24]. The application of the mutual recognition principle does not usually involve deprivation or restriction of personal liberty except for the surrender procedure. As a result, the actual phase of the criminal procedure (final or pre-trial decision) is of no importance for the person affected by the requested measure. The situation is somewhat different, however, in case of a surrender procedure which by definition also involves the deprivation of liberty of the requested person.

From the viewpoint of the European Arrest Warrant's scope of action, it is of vital importance that the Framework Decision provides both for surrender procedures aiming at instituting a criminal procedure and at enforcing a criminal punishment. This means that the scope of application of the European Arrest Warrant is identical to that of extradition.

The reasoning of the Framework Decision recalls that international agreements on extradition do not distinguish between these two forms of extradition. In the extradition procedure the same provisions apply to both forms of extradition. Therefore, it seemed logical to introduce a similar regime in respect of the different forms of the surrender procedure. Although at first glance this seems to be a convincing reason, it may raise concerns with regard to the special goal of the European Arrest Warrant.

The aim of the European Arrest Warrant is to arrest the requested person and to surrender him/her to the authorities of the issuing Member State in order to allow it to prosecute the person or to enforce a criminal punishment against him/her. There is, however, a difference in respect of procedural guarantees between a final judgement of another Member State and a (pre-trial) arrest warrant of another Member State. A final judgement is rendered after completion of a criminal procedure that assured full respect of human rights and constitutional safeguards of the given Member States. No such safeguards surround, however, the issuing of an arrest warrant. Although such a difference also exists is respect of extradition procedures, it does not raise any concern there since international agreements on extradition enumerate a vast number of grounds for refusal of extradition requests. With a view to the possibility that extradition may in the end be refused by the political decision-maker, differences between the two forms of extradition did not necessitate different provisions. But the mandatory nature of the European Arrest Warrant (except for the grounds of refusal) may in itself constitute sufficient grounds to enact different provisions on mutual recognition of foreign final judgements and foreign arrest warrants [25].

C. The principle of mutual recognition and double criminality

Double criminality is a general condition of cooperation in the MLA-Act. Hungary follows the concept of abstract double criminality which requires that the act concerned is punishable in both the issuing and the executing States, irrespective of the offender's criminal liability or procedural hindrances. The application of abstract

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[24] K. Ligeti, *Strafrecht und strafrechtliche Zusammenarbeit in der Europäischen Union*, Berlin, Duncker & Humblot, 2005, p. 123-125.

[25] *Ibid*., p. 125.

double criminality requires comparison of the constituent elements of the criminal offences and does not pay attention to excuses and justifications that in the concrete case may have an impact on the concrete culpability of the person concerned. With a view to the decision of the Constitutional Court referred to earlier in this article, it can be argued that Art. 57(4) of the Hungarian Constitution requires in fact concrete double criminality and that the present provision of the MLA-Act does not live up to the constitutional requirements. Since the decision of the Constitutional Court is very recent, it is too early to speculate on its consequences.

The EU Criminal Cooperation Act partially abolishes the requirement of double criminality [26], in line with the underlying framework decisions. Consequently, the double criminality rule is not envisaged for the surrender of the requested person, for enforcing a freezing order or a financial penalty, if the offence for which the order was issued is covered by the Annex of the EU Criminal Cooperation Act. In case of surrender and the enforcement of freezing orders there is an additional criterion prescribing that double criminality shall not be examined only if the offence underlying the order is punishable in the issuing Member State by a custodial sentence or a detention order of at least three years. Such minimum level of punishability in relation to the offences contained in the Annex of the EU Criminal Cooperation Act is not foreseen in case of enforcing a financial penalty.

It follows from the above that, except the enforcement of a financial penalty, double criminality must be met as a condition of mutual recognition even in respect of the offences listed in the Annex of the EU Criminal Cooperation Act, if they are punishable in the issuing Member State by a custodial sentence or a detention order for less than three years. Furthermore, in respect of offences not covered by the Annex, double criminality must always be met in order to enable mutual recognition.

An interesting feature of the Hungarian implementing legislation is the implementation of the offence catalogues contained in the framework decisions. Art. 2(2) of the FD on the European Arrest Warrant contains a list of 32 offences without offence definitions. Similar offence catalogues are listed in Art. 3(2) of the FD on freezing orders and in Art. 5(1) of the FD on financial penalties. The Hungarian legislator has already realised during the implementation procedure of the European Arrest Warrant that the application of such a list would require additional interpretation from the Hungarian judicial authorities. In order to make the work of the Hungarian authorities easier and to guide Hungarian practice concerning the application of the European Arrest Warrant, the Hungarian implementing legislation interprets Art. 2(2) of the FD on the European Arrest Warrant by the Annex of the EU Criminal Cooperation Act. Consequently, the implementing legislation defines exactly which provisions of the Hungarian Criminal Code correspond to the offences listed in Art. 2(2) of the FD on the European Arrest Warrant, in Art. 3(2) of the FD on freezing orders and in Art. 5(1) of the FD on financial penalties.. Therefore, the court which decides on the execution of the arrest warrant, the financial penalty or the freezing order does not need to enter into lengthy elaborations as to whether a certain offence

[26] P. M. Nyitrai, *Kommentár a 2003. évi CXXX. törvényhez az Európai Unió tagállamaival folytatott bűnügyi együttműködésről*, Budapest, MHK, 2008.

on which the foreign decision is based falls within the scope of Art. 2(2) of the FD on the European Arrest Warrant, of Art. 3(2) of the FD on freezing orders or of Art. 5(1) of the FD on financial penalties. It is sufficient for the Hungarian court to look into the list provided in the Annex of the EU Criminal Cooperation Act.

Although in theory mutual recognition is not made conditional upon legal harmonisation, the way the catalogue of offences were implemented in Hungary clearly demonstrates that the criminological concepts contained in the framework decisions did not satisfy the Hungarian legislator. This approach was further confirmed by the decision of the Constitutional Court referred to earlier in this article which found the EUIN-Act unconstitutional because, *inter alia*, one of the catalogue crimes provided for in the Act, namely illicit trafficking in hormonal substances and other growth promoters, does not correspond to any offence contained in the Hungarian Criminal Code. "Therefore abolishing the requirement of double criminality in respect of this very crime violates Art. 54 of the Constitution, as it supposes a *crimen* without an underlying *lex*".

D. The application of mutual recognition and procedural safeguards

There had already been reflection at the European level, before the principle of mutual recognition was introduced to the criminal law field, that mutual recognition in many cases would only be possible if common procedural standards were developed [27]. The resistance against the adoption of the draft Framework Decision on procedural guarantees clearly demonstrates, however, that the stipulation of minimum guarantees is rather illusionist at this stage of integration. Members States vigorously safeguard their exclusive competence in respect of criminal procedural law. As a result, the present mutual recognition instruments imply that the executing Member States "blindly" trust that there are adequate procedural guarantees in place in the issuing Member State.

The principle of mutual recognition is based on the idea that decisions taken in the Member States of the EU are in full conformity with fundamental human rights as required by the European Convention of Human Rights. One should consider, however, that the ECHR allows for a relatively wide margin of appreciation for national legislations. Therefore it is inevitable that common procedural safeguards will be adopted in the Member States.

It has not been discussed so far in Hungary that the application of mutual recognition should involve control by the Hungarian executing authorities on the procedural safeguards and respect for the rights of defence in the issuing Member State. Such an approach would, indeed, question the very idea of mutual recognition. It would not only undermine mutual trust as the fundament of mutual recognition, but it would make mutual recognition conditional upon the substantial examination of the background of the foreign decision. This would render cooperation more burdensome

[27] See F. Zeder, "Europastrafrecht zwischen Angleichung im materiellen Recht, gegenseitiger Anerkennung und Angleichung im Strafverfahren", *in* R. Moos, U. Jesionek and O. F. Müller (eds.), *Festschrift für Roland Miklau*, Wien, Studienverlag, 2006, p. 641.

and lengthy, thereby levelling down the cooperation more or less to the level of traditional cooperation instruments.

With a view to Hungarian practice, there have so far been only two cases that raised concerns in respect of the application of the mutual recognition principle and criminal procedural guarantees: (a) statutes of limitation, and (b) *in absentia* procedures.

1. Statutes of limitation

According to Section 4 para. (c) of the EU Criminal Cooperation Act surrender must not be granted if criminal prosecution or punishment of the requested person is statute-barred according to Hungarian law.

The interpretation of the above provision gave rise to manifold practical problems when executing the European Arrest Warrant. The Hungarian Supreme Court therefore delivered a resolution aimed at the uniform application of the provision on lapse of time [28]. The resolution deals with the circumstances that may suspend the lapse of time. According to the resolution, lapse of time is suspended by the issuing of the European Arrest Warrant. As opposed to that, the issuing of an international arrest warrant does not suspend the lapse of time. Similarly, if the requested person was subject to an international arrest warrant and found in the territory of one of the EU Member States, so that the international arrest warrant had to be replaced by a European Arrest Warrant, such a subsequent European Arrest Warrant would not suspend the lapse of time.

Further problems arose in relation to offences contained in Art.2 (2) of the Framework Decision on the European Arrest Warrant. According to Art. 33 of the Hungarian Criminal Code, lapse of time is – except for offences punishable by life imprisonment – equal to the maximum period of imprisonment foreseen for the given offence, but at least three years. With a view to offences contained in Art. 2(2) of the Framework Decision, where double criminality is not examined, it is unclear whether the maximum period of imprisonment foreseen by the Hungarian Criminal Code or by the criminal law of the issuing State should be taken into account. According to the statement of the Ministry of Justice, the Hungarian court has to take into account Hungarian criminal law when examining the lapse of time of so called listed offences [29].

Since, in case of offences contained in Art. 2(2) of the Framework Decision, the Hungarian court must grant surrender without the examination of double criminality – unless there is a ground for refusal – in such cases surrender may take place even if the offence on which the European Arrest Warrant is based does not constitute an offence according to Hungarian law. It is rather paradoxical to say, on the one hand, that the incrimination of the act on which the European Arrest Warrant is based may not be examined according to Hungarian law, but the lapse of time must be examined according to Hungarian law. Even more controversial is the fact that the Hungarian rules on lapse of time are applied also even if Hungary does not have competence in a given case. So even if Hungary does not have jurisdiction, the Hungarian court shall

[28] Resolution no. 1 of 2005 of the Hungarian Supreme Court.

[29] Statement no. IM/NEMZB/2005/NKBÜNT1/9.

examine whether the offence underlying the arrest warrant is time barred in Hungary. If the offence is time-barred according to Hungarian law, the EAW will be refused. It should be mentioned, however, that the latter practice is much debated in Hungary, and some of the judges entrusted with the execution of the EAW clearly follow the opposite practice. One may only conclude that it would be more consistent if lapse of time concerning offences contained in Art. 2(2) of the Framework Decision were to be examined according to the law of the issuing Member State.

2. In absentia *procedure*

Section 7 of the EU Criminal Cooperation Act stipulates in case the European Arrest Warrant was issued for the purposes of executing a decision rendered *in absentia* that if the person concerned was not informed in advance of the date and place of the hearing which led to the decision rendered *in absentia*, surrender shall be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee that the requested person will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment.

This provision is very much in line with Art. 392 of the Hungarian Code of Criminal Procedure, which stipulates that the accused shall be granted the possibility to file for retrial if the court decided on the merits of the case and rendered a final judgement (an executable judgement) *in absentia*. In such a case, retrial of the merits of the case is automatic and is not subject to any kind of preliminary decision on the susceptibility of retrial. Therefore, a judgement rendered *in absentia* is a mandatory ground for extraordinary appeal in the Hungarian legal system. This explains why Hungary makes the surrender of the requested person subject to the guarantee to be able to apply for retrial, if the arrest warrant was issued for the purposes of executing a decision rendered *in absentia*.

E. The principle of mutual recognition and human rights standards

Despite the fact that all EU Member States adhered to the ECHR and that the standards of the ECHR also apply to international cooperation procedures, the ECHR does not always afford effective human rights protection in international judicial cooperation proceedings. Since the initiation of proceedings before the European Court of Human Rights does not suspend the execution of an international cooperation request in the Member States, possible human rights violations can be remedied only at a very late stage.

In Hungary, this general situation is further aggravated by the fact that judges and prosecutors do not generally have appropriate expertise in the law of international protection of human rights. ECHR case law is rarely applied in Hungarian court proceedings although it would be essential and in some cases inevitable in order to ensure the proper interpretation and application of human rights clauses [30].

Although the EU Criminal Cooperation Act does not contain any human rights clause, it refers to the MLA-Act as its background legislation [31]. Therefore, indirectly,

[30] M. Weller, "Strasbourg és a magyar joggyakorlat", *Fundamentum*, 2005/1, p. 59-60.

[31] Section 7 of the MLA-Act.

Hungarian law addresses the issue of the need for protection of human rights. Due to this indirect reference, it is unclear, however, which human rights provisions may be invoked in the context of mutual recognition instruments and what standards should apply. This dilemma is tangible in Hungarian practice regardless of the fact that Section 7 of the MLA-Act – containing the so-called human rights clause – provides for the protection of all human rights contained in international conventional and customary law.

One should note that the Hungarian authorities examine potential infringements of human rights in the requesting/issuing States only rarely, often not even on demand of the defence lawyers. The most problematic aspect of Hungarian practice in this regard is the possibility to invoke the right to private and family life. When enforcing a European Arrest Warrant issued for the execution of punishments handed down abroad, if the requested person has only foreign citizenship, he/she will be surrendered to the issuing Member State regardless of the fact that he/she may not have social ties in his/her national State, whereas he/she may have had permanent residence, family and an officially registered workplace in Hungary for many years. The Hungarian authorities are generally unwilling to interpret the problem in a wider context, namely to take human rights considerations into account as provided for in the MLA-Act as well.

F. The principle of mutual recognition and reciprocity

Reciprocity as a condition to international cooperation in criminal matters is an expression of national sovereignty. According to Section 6 of the MLA-Act, reciprocity is a general condition of international cooperation in criminal matters in Hungary. Accordingly, Hungary will exercise its criminal jurisdiction in order to assist another State only if the requesting State is also ready to accommodate a Hungarian cooperation request.

In contrast to the MLA-Act, the EU Criminal Cooperation Act does not foresee reciprocity as a general condition of cooperation. This follows from the principle of mutual recognition, the underlying idea of which is mutual trust. Nevertheless, the issue of reciprocity came up in connection with the mutual recognition principle when deciding on the execution of a concrete European Arrest Warrant issued by Germany.

As it is well known, the German Constitutional Court declared the German law implementing the European Arrest Warrant in Germany unconstitutional. Consequently, until the new legislation entered into force, the German authorities considered incoming European Arrest Warrants as extradition requests and treated them accordingly [32]. As a result, Germany refused to execute European Arrest Warrants issued between 18 July 2005 and 2 August 2006 and put a ban on extraditing German nationals to other EU Member States.

The case concerned an arrest warrant issued by the Criminal Tribunal (first instance) of Munich on 19 November 2004 seeking the surrender of a Hungarian citizen. The Metropolitan Court, which has exclusive competence to decide on the

[32] 2 BvR 2236/04 of 18 July 2005.

European Arrest Warrant, declared that, since there is no German implementation law in force, Germany shall be considered as a Member State that did not implement the European Arrest Warrant[33]. Consequently, the Metropolitan Court went on to argue that, in such cases, traditional extradition rules shall apply. As was pointed out under 1.B., Hungary made a declaration to the 1957 European Extradition Convention according to which Hungary grants extradition of its own nationals only if the person sought for extradition is also a citizen of another State and has his/her permanent residence in a foreign State. Since the person sought by the German arrest warrant was a Hungarian national with domicile in Hungary, the Metropolitan Court refused his extradition. The Metropolitan Court expressly invoked in its decisions the reciprocity principle and stated that Germany may not require other Member States to execute German arrest warrants for surrendering the executing country's own national if it derogates from the principle of mutual trust.

4. Practical aspects of the application of the mutual recognition principle

Besides the more conceptual problems related to the application of the mutual recognition principle as described in the above paragraph, there are also a lot of technical hindrances which render the work of national authorities more difficult. The most important technical aspects of the application of mutual recognition in Hungary will now be examined.

A. The Hungarian Ministry of Justice and Law Enforcement as central authority

Hungary has implemented the possibility provided by Art. 7 of the Framework Decision on the European Arrest Warrant according to which Member States may designate a central authority which is responsible for the administrative transmission and reception of the European Arrest Warrant as well as for all other official correspondence relating thereto.

According to Section 13 para. (2) of the EU Criminal Cooperation Act, the Minister of Justice and Law Enforcement shall receive delivery of the European Arrest Warrant and it shall immediately forward the request to the Metropolitan Court. Thus, the Hungarian Ministry of Justice and Law Enforcement acts as a central authority for the transmission and the administrative reception of the warrants. The Ministry of Justice and Law Enforcement plays only an administrative role in executing the European Arrest Warrant, with the surrender procedure itself being decided by the judicial authorities.

The author of this article interviewed the officials of the Ministry of Justice and Law Enforcement about the ministry's role as a central authority. The officials of the ministry explained that the execution of a European Arrest Warrant is in fact quicker with countries which designated a central authority compared to countries where the competent judicial authority has to be contacted directly. The ministry explained this phenomenon with language barriers and communication difficulties. The fast and effective execution of a European Arrest Warrant largely depends on the communication with the receiving judicial authority. The Hungarian Ministry of

[33] Court order no. 9.B.435/2005/9.

Justice and Law Enforcement encountered difficulties in case of Belgium and Poland where the contacted judicial authority simply refused to talk any foreign language. In such cases, the ministry transmits the European Arrest Warrant in writing, but the translation takes a couples of days. The same applies when Hungary receives a European Arrest Warrant in a language other than English, German or French.

B. The training of practitioners

The institutional framework of cooperation has been set deliberately in order to enhance the efficiency of cooperation on the basis of the mutual recognition principle. Notwithstanding the fact that training of lawyers in respect of the mechanisms of international criminal cooperation is ongoing, there is not much of a tradition of studying the relevant laws in the Hungarian educational system. Even in the course of undergraduate training, the requirement to master the basics of the relevant material is quite recent.

Bearing this in mind, it is clear that transferring the relevant and necessary knowledge to practitioners is not without difficulties. In order to improve the level of expertise among practitioners and to facilitate the handling of issues in international criminal cooperation effectively, an expert group has been set up in the central administration. This expert group meets on a regular basis to discuss the latest developments in respect of the EU Criminal Cooperation Act. However, a specialised, institutionalised consultative forum or panel has not yet been established in Hungary.

With a view to the knowledge of practitioners, a difference should be made depending on whether the Hungarian authority is an executing or an issuing authority. The Metropolitan Court of Budapest has exclusive competence to execute warrants and orders emanating from other Member States. By contrast, issuing requests/orders for cooperation involves a much wider scope of practitioners. There is therefore a much higher risk of formulating erroneous requests than false execution. In order to avoid errors when formulating a cooperation request, the experts of the central administration exercise professional control over the content of the documents. Practice shows in many cases that, even in the mutual recognition based cooperation scheme, there is a need for up-to-date information on possible political implications. This is especially true in respect of members of certain criminal groups. Here, the control and advice given by the central administration is of great importance.

C. Information for the general public

Although statistics are partly available on court decisions, it is almost impossible for the citizens to gather information about the development of the relevant jurisdiction due to the underdeveloped nature of electronic infrastructure in Hungary. Act no. 150 of 2005 on the freedom of electronic information provides for the possibility to gain free online access to the texts of decisions of certain courts in the so-called Report of Court Decisions without any restrictions and personal identification obligation. According to the Act in question, it is primarily the decisions of the Supreme Court and Regional Courts that should be published. Since the Metropolitan Court has

exclusive competence to decide on international criminal cooperation issues, decisions concerning the mutual recognition principle fall outside the scope of this law.

5. The relationship between mutual recognition and harmonisation

The principle of mutual recognition was originally designed as an alternative to harmonisation of criminal law: by building on mutual recognition, the Member States may avoid far reaching harmonisation of their national criminal laws. Since the mutual recognition principle was also proclaimed for criminal law, several scholars have questioned whether this view was realistic. In order to answer this question, one has to examine the meaning of criminal law harmonisation within the EU context.

Firstly, it must be stressed that the TEU does not speak of harmonisation but of the approximation of criminal laws. It refers to the adjustment of internal laws in order to meet specific objectives. It does not replace pre-existing domestic law as such but only aims at establishing minimum standards. Approximation is defined by Art. 31(e) TEU according to which common action on judicial cooperation in criminal matters is to include "progressively adopting 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".

Though Art. 31(e) TEU is very limited with regard to the fields of criminal law mentioned, it did not prevent the Council from developing approximation in fields other than those expressly mentioned. Most approximation has concerned so far substantive criminal law, in particular the definition of offences. In the field of criminal sanctions, approximation has been very limited and it has been even more restricted in procedural law.

The approximation of criminal laws fulfils basically two functions in the maintenance and development of an Area of Freedom, Security and Justice: on the one hand, approximation of criminal law is aimed at helping to improve judicial cooperation mechanisms. A good example of this is the abolition of double criminality as a condition to surrender. Provided that a certain degree of harmonisation has been achieved, double criminality is no longer an issue, at least for offences which are already harmonised. On the other hand, approximation of criminal law is necessary for an effective fight against crime. It is most obvious in areas falling within the scope of so called European public goods, i.e. interests which are genuinely linked to the functioning of the EU. Here, approximation serves the establishment of criminal law protection since the national criminal law of the Member States did not afford criminal law protection to European public goods, such as the financial interests of the EU. Approximation of criminal law, however, covers a lot of crimes which are not European public goods, but which concern legal interests also known to the national legal systems. Examples include protection of the environment, sexual abuse of children, illegal trade in weapons, etc. In those fields, there are national criminal provisions already in place and so approximation helps to establish certain minimum rules. This second area of approximation measures has been strongly criticised for being inconsistent and rather ad hoc.

Looking at mutual recognition as an alternative to harmonisation implies that Member States are ready to recognise decisions of other Member States even without

harmonisation, i.e. if there are substantial differences between the legal systems. Recognition without harmonisation of substantive criminal law means recognition despite differences in areas closely related to moral standards. In reality, however, there is a relation between the degree of harmonisation and the degree of acceptance of mutual recognition.

Mutual recognition presupposes mutual trust/confidence in the functioning of the judiciary in other Member States. In that sense, the ECJ has repeatedly emphasised that Member States have mutual trust in each other's criminal justice systems [34]. Mutual trust means that each Member State "recognises the criminal law in force in other Member States even when the outcome would be different if its own national law were applied" [35].

The implementation of mutual recognition instruments demonstrate, however, that mutual trust is at hand only to a limited extent. The only way to solve this problem would be to increase such mutual trust. This can be achieved by harmonisation of both substantive and procedural criminal law.

A practical example of problems resulting from lack of harmonisation concerns the enforcement of criminal sanctions not enshrined in the Hungarian Criminal Code, such as release on parole suspending the remaining sentence. To enable enforcement of this type of criminal sanction not known in Hungary, Act no. 13 of 2007 amended both the MLA-Act and EU Criminal Cooperation Act. Accordingly "The final judgement of a foreign court shall have the same effect as the final judgement of a Hungarian court, on condition that neither the procedure instituted against the offender nor the punishment or measure imposed on him in the foreign country are contrary to Hungarian law" [36]. "If the foreign court imposed a prison punishment to be served in part, and the court of judgement probated the remaining part of the punishment, the court shall consider such prison sentence as if the offender had been paroled on early release from a prison sentence to serve. In these concrete cases the period of time to be served on early release shall correspond to the part of the sentence probated by the foreign court of judgement" [37].

It follows from the above that the final judgement of a foreign court shall have the same effect as the final judgement of a Hungarian court on the exclusive condition that neither the procedure instituted against the offender nor the punishment or measure imposed on him in the foreign country are contrary to Hungarian law. Prior to the

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[34] ECJ, 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügge*, *ECR*, p. I-1345, para. 32. Recalled in C-436/04, 9 March 2006, *Van Esbroek*, *ECR*, p. I-2333, para. 29; *Gasparini and Others*, C-467/04, 28 September 2006, *ECR*, p. I-9199, para. 29.

[35] ECJ, 11 February 2003, joint cases C-187/01 and C-385/01, *Gözütok and Brügge*, *ECR*, p. I-1345, para. 33. Recalled in C-436/04, 9 March 2006, *Van Esbroek*, *ECR*, p. I-2333, para. 30; C-150/05, 28 September 2006, *Van Straaten*, *ECR*, p. I-9327, para. 43; C-467/04, 28 September 2006, *Gasparini and Others*, *ECR*, p. I-9199, para. 30. The concept of mutual trust was thus employed by the ECJ to underpin that "the application of Art. 54 of the CISA [is not] made conditional upon harmonisation, or at least approximation, of the criminal laws of the Member States".

[36] Section 47(1) of the MLA-Act.

[37] Section 47(1) of the MLA-Act.

above cited amendment, Hungarian law required for the enforcement of foreign judicial decisions that they are "in conformity with Hungarian law", i.e. that they are in conformity with the Hungarian understanding of the rule of law. The changing of the wording from "in conformity with" to "not contrary to" may not seem to be a revolutionary one as both phrasings ought to mean that the foreign judgment shall not be in contradiction to the principle of rule of law in Hungary and shall not go contrary to the principle of a fair trial and to human rights guarantees. There is, nevertheless, a major practical difference between the two wordings, the standard of "not contrary to" allows foreign criminal punishments to be enforced in Hungary which are not explicitly provided for in the Hungarian Criminal Code, but which are not contrary to Hungarian criminal law either. This may help in the future to overcome problems that can already be perceived with regard to the mutual recognition of alternative sanctions.

The above example demonstrates that the national legislator also has other means to overcome the difference between the national and the foreign legal system than harmonisation. Nevertheless, a certain level of harmonisation renders cooperation easier. With a view to the future and especially with regard to mutual recognition instruments concerning the enforcement of criminal sanctions, a minimum level of harmonisation will be indispensable. Since the sanctioning system of a country is strongly linked to its criminal policy, further application of mutual recognition will necessitate reflection on a common European criminal justice policy. Such a European criminal justice policy may indicate which fields of the national criminal law systems have to be harmonised, including both substantive and procedural law aspects. Such considerations cannot be solely based on the practical needs of practitioners working in the field of criminal cooperation (bottom-up approach), but should rather be shaped by the idea of developing a coherent criminal policy (policy approach).

6. Conclusions

As long as there is no common European criminal justice policy in place, there is always a risk of inconsistency between the instruments adopted. Inconsistency may be overcome systematically only by creating a common point of reference. It is the task of the EU to develop such a common policy. Until now, the EU programmes in the field of criminal justice (Tampere Conclusions and Hague Programme) concerned only the objectives (to develop an Area of Freedom, Security and Justice) and the methods (e.g. mutual recognition or principle of availability), but have remained silent on the substantive issues of the Area of Freedom, Security and Justice. Before developing further mutual recognition instruments, the policy content of this "criminal justice area" should be defined, since the concrete measures are derivatives of certain policy considerations.

Besides policy considerations, it would be also desirable to codify the existing mutual recognition instruments in one piece of legislation. It would allow reflection on the structure of those instruments and consolidation of the general positive and negative requirements of their application. Simultaneously, it would render the task of the national legislator easier and would make it possible to avoid the current patchwork type of legislation.

Finally, for mutual recognition to work, it is essential to establish training mechanisms for practitioners. The latter could not only convey up-to-date knowledge on international cooperation in criminal matters in the EU but also encourage practitioners to recognise that international judicial cooperation mechanisms are not of a purely criminal law nature but they also involve aspects of constitutional law, international human rights law and international customs.

Irish practice on mutual recognition of European Union criminal law

Gerard Conway

1. Introduction

As one of the few common law jurisdictions in the EU, Ireland has been cautious in its participation in EU criminal justice cooperation, while at the same time showing a clear willingness to cooperate where fundamental national principles of the criminal process are not threatened. The "communitarisation" or supranationalisation of the Third Pillar under the Lisbon Treaty, for example, is qualified by the opt-outs from the criminal justice part of the Area of Freedom, Security and Justice (AFSJ) permitted to Ireland, the UK, and Denmark [1]. The mechanism of mutual recognition, as an alternative to harmonisation, has been significant in facilitating this generally cooperative approach. Whereas harmonisation involves the establishment of a common or uniform set of laws on a given topic throughout the EU, mutual recognition [2] involves reciprocal acceptance of the legal classifications of the other Member States, even though the means of reaching a particular decision or classification may vary greatly [3]. The object of the principle is to enhance integration and freedom of movement between the Member States, without having to achieve a uniform system of regulation. Applied to criminal law, the principle involves Member States, for example, recognising the

[1] The Area of Freedom, Security and Justice will encompass police and judicial cooperation in criminal matters, which is now in the Third Pillar, along with border checks, asylum, immigration, and judicial cooperation in civil matters.

[2] On mutual recognition in EU criminal law, see generally, V. Mitsilegas, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU", *CMLRev.*, 2006, p. 1277 and f.

[3] "Approximation" occupies a middle position between mutual recognition and harmonisation, bringing the laws of Member States more in line with each other, but without full-scale harmonisation.

effects of a conviction or of a confiscation order. It is a way of reducing formality [4] and the burden of administrative procedures involved in Member States'cooperation. Mutual recognition involves then a degree of automaticity [5]. Member States accept to a degree at face value the administrative and judicial decisions made by other Member States. Thus, evaluating the operation of the principle in practice involves assessing to what extent automaticity of recognition is in fact practiced by the Member States or, conversely, to what extent do the Member States still subject each others' decisions and judgments to scrutiny?

Criminal law has traditionally been seen as a particularly sensitive aspect of national sovereignty, and it also raises questions concerning individual rights and the coercive and punitive power of the State. It is thus unsurprising that Member States have been more cautious in cooperation in the area of criminal law, reflected in the fact that criminal law cooperation was placed in the looser, more intergovernmental framework of the Third Pillar, rather than the Community method of the First Pillar. Of the criminal law measures adopted by the EU to date based on the mutual recognition principle, the European Arrest Warrant (EAW) is by far the most significant [6]. The purpose of the EAW was to make easier and more rapid the process of extraditing or surrendering a suspect from one Member State to another. In that context, mutual recognition is linked with the establishment of time limits and speedier cooperation.

The term "mutual" implies a two-way process, which suggests mutual recognition is not just about Member States recognising each others' decisions and judgments for the purpose of speedier cooperation, but also recognition of each others' national sensitivities and concerns, given its origin and context as an alternative to harmonisation. Evaluating the operation of the principle in practice then involves both examining (1) the extent to which it has resulted in speedier cooperation and (2) the extent to which Member States have successfully addressed each others' national sensitivities and concerns. It may be that the issue of timing and speed impacts on the second issue and *vice versa*, but evaluating its success overall indicates that both issues need to be addressed in practice and that neither issue should be allowed to entirely negate the other.

2. Method and data

The focus of this chapter is the implementation by Ireland of the FD on the EAW, since that is the most important measure to date in the area of mutual recognition in criminal laws given that it applies across all criminal matters and that it has been in operation since January 2004. As well as examining Ireland's implementing legislation, the study also looks in some detail at the caselaw from the Irish courts on the EAW. As other studies, including evaluation of national practices carried out by the Council of the EU, have looked in detail at administrative practice and have

[4] V. Mitsilegas, *op. cit.*, p. 1282.

[5] *Ibid*.

[6] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, *OJ*, no. L 190, 18 July 2002, p. 1.

gathered statistics[7], this study will not duplicate those aspects of assessing the EAW. The second main focus of the study is an analysis of the FD on the EEW[8] from an Irish perspective. As the EEW is another measure that will apply across all areas of criminal law, it is comparable to the EAW in its breadth or scope, although arguably not as far-reaching in its content. It has not yet been implemented in Ireland, so the discussion below tries to identify the likely issues of principle that may arise when it is implemented. Finally, a number of other Third Pillar instruments that are based on the mutual recognition principle are also examined.

The information in this study was mainly gathered from official sources that are publicly available: the text of the legal instruments themselves, official reports (e.g. annual reports from relevant Irish government agencies) and statistics, caselaw[9], and publications in journals authored by government officials[10].

3. Context of Irish criminal law and procedure

It is useful to set an evaluation of the principle of mutual recognition in Irish law in the context of some of the essential features of Irish criminal process and procedure. Ireland is a common law system, having inherited this legal system from the UK on attaining independence in 1922. This has a number of consequences relevant to mutual recognition:

(1) The requirement that evidence be given orally is a central feature of the Irish law of evidence: this rule "against hearsay" requires that evidence in general be given orally in court by witnesses, rather than through prior written witness statements, in order to allow for the examination and cross-examination of witnesses in court. One of the principal rationales for the rule against hearsay is that live testimony allows juries to evaluate the demeanour of a witness, making it easier to judge the credibility of his/her evidence. Although juries are not always used in Irish law, the rule against hearsay is also generally applicable to cases without juries. A number of statutory exceptions to the rule against hearsay have been adopted over the past 20 years, including in relation to business records and prior inconsistent witness statements (see below for discussion on EEW).

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[7] 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"*, 11843/1/06 RESTREINTE UE, 5 October 2006, p. 14, 18, 22, 28 ("*Evaluation Report*"), available online at: http://www.ulb.ac.be/iee/penal/mutualrecognition/national.htm#ie

[8] Council Framework Decision 2008/978/JHA of 18 December on the European Evidence Warrant, *OJ*, no. L 350, 30 December 2008, p. 72.

[9] All caselaw relied on (with the exception of information on a single *ex tempore* judgment of the Supreme Court, information on which was obtained elsewhere, see below) is publicly available through the judgments database of the Irish Courts Service, available on this Web link: www.courts.ie.

[10] A number of informal interviews were carried out with officials from the Irish Central Authority responsible for the operation of the EAW and based in the Department of Justice, Equality & Law Reform.

(2) Judges have a neutral and non-inquisitorial role in criminal procedure that generally only commences once the "trial proper" has started (although judges may be involved in certain pre-trial interlocutory matters, such as the approval of search warrants): unlike in many civil law systems, a judge in Ireland has no function as regards the investigative phase of a trial. Generally speaking, a criminal trial and thus the judge's role commences only after all the evidence has been gathered by the police, the matter has then been transmitted to the public prosecutor (the Director of Public Prosecutions − DPP), and has been subject to a decision to prosecute by the DPP.

(3) Only very limited pre-trial periods of detention are generally permitted: following on from the non-inquisitorial role of a judge, investigative detention is not permitted in Irish law. The general requirement is that a suspect must be brought before a judge and charged as soon as is practicable (section 15, Criminal Justice Act 1951)[11]. It is now possible to detain a person for certain (again relatively short) periods without charging (see, e.g. s. 4(2), Criminal Justice Act 1984[12], as amended, which applies in relation offences punishable by a period of five years' imprisonment or more; s. 30, Offences Against the State Act 1939)[13].

A further central feature of Irish criminal process is the backdrop of constitutional principles contained in Ireland's Constitution of 1937[14]; unlike the UK, where the constitution is "unwritten" or uncodified, Ireland has a codified constitution with a Bill of Rights. In their interpretation of the Constitution, the Irish courts have developed a number of principles relevant to Irish criminal procedure, chief among them being a strict exclusionary rule where the evidence has been obtained in violation of a constitutional right. Generally, such evidence is inadmissible in a trial save in extraordinary circumstances[15]. For example, a search warrant of a person's home executed out of time will constitute an unjustified interference with the constitutional right to the protection of a person's dwelling, save for extraordinary excusing circumstances, and thus any evidence obtained on foot of the warrant may not be used in court.

4. Background to extradition and mutual legal assistance in criminal matters in Irish law

The following paragraphs set out briefly the background to the existing framework of extradition and mutual legal assistance (MLA) in criminal matters in Irish law[16]: the Foreign Tribunals Evidence Act 1856[17], the Criminal Law (Jurisdiction) Act

[11] No. 02 of 1951.

[12] No. 22 of 1984.

[13] No. 13 of 1939.

[14] Generally referred to its Gaelic translation of Bunracht na Éireann.

[15] See *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 IR 110.

[16] They are mostly based on J. Hamilton, "Mutual Assistance in Criminal Matters in IE and the Proposed European Evidence Warrant", *ERA Forum − Special Issue on European Evidence in Criminal Proceedings,* 2005, p. 53 and f., for which the author was a research assistant.

[17] 19 and 20 Vic. c. 113.

1976 [18], the Council of Europe Convention on Mutual Legal Assistance in Criminal Matters 1959 [19] and its implementation in Irish law by the Criminal Justice Act 1994, and more recent developments reflected in the consolidation of MLA mechanisms by the Criminal Justice (Mutual Assistance) Act 2008 [20].

The first major legislation on MLA in criminal matters applicable in Ireland was the Foreign Tribunals Evidence Act 1856, adopted when all of Ireland was still a part of the UK. This Act provided for a procedure whereby courts within the UK and British colonies and any possessions could require the attendance of witness, examine them on oath and require the production of documents for the purpose of providing evidence on any civil or commercial matter pending before a foreign tribunal. The Extradition Act 1870 clarified that this could also apply to criminal matters [21]. The 1856 Act was quite brief, but did provide that no one may be obliged to incriminate himself and no one was compellable on foot of it who would not have been compellable otherwise, which is consistent with the principle of adherence to the law of the requested State, as both these principles were (and are) features of UK law.

In 1976, Ireland and the UK entered into an arrangement to make it possible to try certain offences committed anywhere on the island of Ireland in the other part of the island (i.e. offences committed in the North of Ireland could be tried in the Republic, and *vice versa*) and also agreed an expedited form of extradition between each other. The context of these agreements was of course the Troubles and paramilitary violence in Northern Ireland between Unionists who wished to remain part of the UK and Nationalists who wished for unification of the South and North as a single independent republic. The arrangement whereby offences committed anywhere in Ireland were to be triable either North or South required parallel legislation in both jurisdictions whereby each jurisdiction assumed the power to try certain offences committed in the other and to allow evidence to be taken in one jurisdiction for use in the other. A degree of *harmonisation* of the substantive criminal law of both jurisdictions was needed and carried out to enable this arrangement to work. The Irish Criminal Law (Jurisdiction) Act 1976 [22] was thus able to provide for a procedure by which the prosecution, the accused or the court of its own motion might issue a letter of request to the Lord Chief Justice of Northern Ireland for the taking of evidence by a judge of the High Court of Justice in Northern Ireland, while UK legislation [23] provided similarly for the taking of evidence from the South by a Northern Ireland court. In practice, these provisions were "rarely used, if at all. The reason would appear to be that official witnesses are generally prepared to travel to the other jurisdiction to give evidence, while civilian witnesses tend not to feature in terrorist trials to any great extent" [24].

In 1965, an expedited extradition procedure between the two countries known as the "backing of warrants" had also been introduced. This provided a very simple

[18] No. 14 of 1976.
[19] ETS no. 30.
[20] No. 7 of 2008.
[21] 33 and 34 Vic. c. 52.
[22] No. 14 of 1976.
[23] Criminal Jurisdiction Act 1976, s. 5, sch. 4.
[24] J. Hamilton, *op. cit.*, p. 57.

procedure whereby a warrant issued in the Republic or the UK could be transmitted to the police force in the other jurisdiction for endorsement by a senior police official, whereupon the warrant could then be executed by any police officer. Section 43 of the Irish Extradition Act 1965 provided, for example:

> "(1) Where
> (*a*) a warrant has been issued by a judicial authority in a place in relation to which this Part applies for the arrest of a person accused or convicted of an offence under the law of that place, being an indictable offence or an offence punishable on summary conviction by imprisonment for a maximum period of at least six months, and
> (*b*) on production of the warrant to the Commissioner of the Garda Síochána it appears to the Commissioner that the person named or described therein may be found in the State,
> the Commissioner shall, subject to the provisions of this Part, endorse the warrant for execution".

Section 43(2) provided a *pro forma* format for such warrants, while section 45 provided that "A warrant endorsed under section 43 may be executed by any member of the Garda Síochána in any part of the State". The suspect could be arrested on foot of the warrant, and brought before a District Court (s. 46) (the lowest court in the Irish hierarchy of courts) for an order that the suspect be handed over to the UK police "at some convenient point of departure from the State" (s. 47). This procedure was available for any offence except those specified in s. 44, which related to political offences[25], offences that existed only under military law, and revenue offences. Compared to conventional extradition under the European Convention on Extradition 1957[26], these provisions abolish double criminality, render speciality moot, and allow direct police-to-police contact.

Both these special extradition and MLA procedures between Ireland and the UK were of course facilitated by the common concern in dealing with the paramilitary and terrorist problems in Northern Ireland, by the close proximity of the two countries, and above all by the similarity between the criminal law systems of both jurisdictions. The special arrangement under Part III of the Extradition Act 1965 is relevant in particular to evaluating the success of the EAW procedure from an Irish perspective, as most EAWs issued and received by Ireland will involve the UK as the other Member State and thus will be replacing this backing of warrants procedure.

As a signatory of the European Convention on Extradition 1957[27], Ireland has applied the principles of that Convention in its relations with States other than the UK; and now, with the passing of the EAW, the 1957 Convention no longer regulates extradition or surrender to any other EU Member State. Part II of the Extradition Act 1965 gave effect to the 1957 Convention in Irish law. A significant feature of Irish practice is the effective operation of an administrative presumption in favour of cooperation. Even where no specific statutory or legal basis exists, the Irish Central

[25] The political offence exception was largely abolished by the Extradition (European Convention on the Suppression on Terrorism) Act 1987, no. 1 of 1987.

[26] ETS no. 124.

[27] ETS no. 24.

Authority generally seeks to provide as much assistance as is possible without infringing any provision of Irish law. A recent example was the facilitation of video evidence requested by Spain, although a statutory basis for this was pending the enactment of the Criminal Justice (Mutual Assistance) Bill 2005 (now the Criminal Justice (Mutual Assistance) Act 2008) [28].

5. Irish statutory implementation of the European Arrest Warrant [29]

A. General

The chief purpose of the FD on a European Arrest Warrant [30] was to speed up and facilitate the extradition or surrender of suspects between Member States of the EU. One of the most significant changes is the relaxation of the double criminality rule, which requires that the offence for which a suspect is sought to be extradited be a criminal offence in both the requesting and the requested States, in relation to a range of offences [31]. Other novel aspects are provisions concerning the optional abolition of the rule of speciality [32]; the assignment of most functions of national authorities to judicial personages, rather than the executive [33]; and the non-application of the political offence exception to extradition [34]. For civil law jurisdictions, a further very significant aspect of the new measure is that it requires the surrender of nationals [35].

Ireland gave effect to the FD on the EAW through the passing of the European Arrest Warrant Act 2003 [36]. This legislation includes abolition of the speciality requirement to a certain extent; this was done through a general provision retaining speciality, which was then subject to a series of exceptions (s. 22 of the Act). Speciality is disapplied where conviction for an offence for which surrender was not sought does not entail imprisonment or deprivation of liberty (s. 22(2)), where the person has already been convicted and the punishment entails only a financial penalty (including if non-payment may lead to imprisonment) (s. 22(3)), where the person has already been convicted and consents to the dis-application of speciality (s. 22(4)), where the Central Authority consents (s. 22(5)), or where an undertaking in writing is given by

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[28] Information provided by officials of Department of Justice, Equality & Law Reform, morning of Tuesday 8th April 2008.

[29] The analysis in the following paragraphs has previously been published in G. Conway, "Judicial Interpretation and the Third Pillar: Ireland's Implementation of the European Arrest Warrant and the *Gözütok and Brügge* Case", *European Journal of Crime, Criminal Law & Criminal Justice*, 2005, p. 255 and f.

[30] The immediate context of its adoption was the attacks on the US in September 9/11 2001 – a factor that appears to have considerably speeded up the progress of the EAW through the EU legislative process.

[31] See the 32 offences listed in Art. 2 of the FD on the EAW.

[32] Art. 27 of the FD on the EAW.

[33] Art. 6 of the FD on the EAW, although Art. 6 further provides that what is a "judicial authority" for this purpose is a matter for the law of each Member State.

[34] See Art. 3 and 4 of the FD on the EAW.

[35] The main innovation of the Council of Europe Treaty on Extradition of 1957, ETS no. 24, the previous multilateral attempt to regulate extradition in Europe, was probably the relaxation of a requirement for the requesting state to show *prima facie* evidence.

[36] No. 45 of 2003.

or on behalf of the issuing judicial authority to the High Court that the person whose surrender is sought will not be proceeded against and no penalty involving deprivation of liberty will be imposed before the expiration of a period of 45 days from the date of the person's final discharge in respect of the offence for which he or she is surrendered during which he or she shall be free to leave the issuing State or unless having been so discharged he or she leaves the issuing State and later returns thereto (s. 22(6)). Part III of the 2003 Act sets out a series of grounds for refusing surrender, including contravention of the ECHR or its Protocols to which Ireland is a party, breach of rights under the Irish Constitution, reasonable grounds for believing the person would be discriminated against on specified grounds, the imposition of the death sentence, or the subjection of the person surrendered to torture or degrading treatment (s. 37); punishment being below the minimum gravity specified in the Act (s. 38); the granting of a pardon under Irish law for the offence(s) for which surrender is sought or of immunity from prosecution for the offence under either Irish law or the law of the issuing State (s. 39); a time bar on prosecution under Irish law (s. 40)[37]; double jeopardy or *non bis in idem* applying because of a prior prosecution either in Ireland or another Member State (s. 41); pending or ongoing legal proceedings in Ireland relating to the person whose surrender is sought (s. 42); age as a ground for foregoing prosecution (s. 43); extra-territorial exercise of jurisdiction by the requesting State (s. 44); *in absentia* conviction for which surrender is sought where the accused had not been given notice of or permitted to attend the trial, unless the issuing State gives an undertaking to hold a retrial (s. 45); immunity in Irish law in virtue of holding a particular office (s. 46).

Ireland sought to further limit the potential scope of the EAW by prohibiting investigative detention – a feature of some civil law traditions, but contrary to Irish criminal procedure. It did so by making a declaration at the time of the agreement and adoption of the EAW. This declaration was later formally read into the parliamentary debate by the Minister for Justice, Equality & Law Reform, in an apparent attempt to influence, or to provide a ready basis for, judicial interpretation. This was done in order to put a gloss on the implementing legislation such that surrender pursuant to an EAW for the purpose of investigative detention would be prohibited. The text of Ireland's declaration is as follows:

> "Ireland shall in the implementation in domestic legislation of this Framework Decision provide that the European Arrest Warrant shall only be executed for the purposes of bringing that person to trial or for the purpose of executing a custodial sentence or detention order"[38].

Objection to investigative detention has some support in existing extradition practice, although there does not appear to be that much authority from Ireland[39] or

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[37] The wording of this provision (s. 40) suggests it does not apply where speciality is not applicable.

[38] As stated by the Irish Minister for Justice, Equality and Law Reform in the Dáil: *Dáil Debates*, 5 December 2003, col. 893.

[39] See *Brien v. King* [1997] 1 ILRM 338, at 343 (High Court); M. Forde, *Extradition Law*, Dublin, Round Hall, 2nd ed., 1995, p. 81-82.

the UK [40] specifically on the point. It might also be argued that extended detention pending the completion of the investigative phase of a trial was a form of preventive detention, unless a fairly high threshold of evidence was to apply to arrest in the first place pending the completion of investigation. It seems likely that preventive detention would be unconstitutional in Ireland [41]. In that context, Recital 12 of the FD provides, *inter alia*, that the FD does not prevent a Member State from applying its domestic constitutional due process or protections for an accused person.

B. Interpreting the declaration in Irish law

Section 11(3) of the European Arrest Warrant Act 2003, was the original provision designed to give effect to Ireland's declaration (this was subsequently repealed and replaced by the Criminal Justice (Terrorist Offences) Act 2005 with a presumption, see below). Section 11(3) as originally enacted provided that the requesting State must make a statement accompanying an EAW to the effect that (a) the person has been charged with the offence concerned, and a decision to try him or her for, the said offence has been made, or (b) the person has not been charged with the offence concerned and a decision to charge him or her with and try him or her for the offence has been made, by a person who in the issuing State, or part thereof, performs functions the same as, or similar to those performed in the State by the Director of Public Prosecutions (DPP). The critical stage in proceedings identified is the charging of the person or a decision about that charge – by a law officer equivalent to the Irish DPP. At first glance, this may seem to have struck a good balance between different criminal procedural systems (i.e. as between common and civil law traditions), since the charging of a suspect in most systems might be thought to represent a point at which an investigation has substantially advanced, even if it is not fully completed, and when a trial proper is more or less ready to commence.

However, a number of difficulties present themselves here. In many civil law jurisdictions, charging does not always occur relatively close to the trial proper [42]. Further, there is also the perhaps evident problem that a person could be charged or be subject to a *pro forma* decision on charging purely for the purpose of satisfying s. 11(3). The person could then be surrendered pursuant to an EAW, and end up undergoing imprisonment for a lengthy period awaiting the outcome of a trial, while an investigation proper takes place. A person of whom surrender is requested could challenge the proceedings in the Irish courts on the basis that the requesting State was unlikely to or might not adhere to the underlying purpose of s. 11(3), or that the request represented an abuse of process by the requesting State. This would be

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[40] Extradition Act 2003, s. 2(3). In the House of Lord, Lord Filkin, Parliamentary Under-Secretary of State for the Home Office, noted regarding s. 2(3) of the UK Bill that: "(…) The Bill, *for the first time*, makes it clear that extradition to another country EU country will be possible only for the purpose of putting a person on trial"(italics added) (*Lords Hansard*, 1st May 2003, col. 854).

[41] See, e.g. *John Gallagher (No. 2) v. The Director of the Central Mental Hospital (No. 2)* [1996] 3IR 10, at 18-19, 34.

[42] See, e.g. Eur. Court HR, 26 January 1993, *W v. Switzerland*, Series A, no. 254.

a challenge on the basis of (purposive)[43] statutory construction (for which Ireland's declaration may be admitted as an aid to construction). Apart from the statute itself, a person contesting an EAW request in Ireland could rely on the constitutional guarantee of a right to trial with reasonable expedition and on the apparent unconstitutionality of preventative detention[44], to argue that the State was prohibited from acquiescing and assisting in a criminal justice process that could or would entail a violation of these interests[45]. In the context, in particular, of this potential constitutional basis for objecting to surrender pursuant to an EAW, an Irish court might be required to look behind the issuing of a statement prepared by the requesting State and to adopt a closer standard of review, to satisfy the requirement of s. 11(3), i.e. to determine whether or not the statement represented substantive, as opposed to merely formal, compliance with s. 11(3).

Further, Ireland's declaration could be invoked in court to confirm a restrictive interpretation limiting surrender where investigation has still to take place[46]. It has not been part of the common law tradition for courts to look to parliamentary statements or the *travaux préparatoires* in interpreting a statute; rather, the notion of legislative intent and purpose has traditionally been regarded as being determinable solely through the text of the statute[47]. However, an exception has always applied in Irish law with respect to legislation implementing international agreements[48]. Given the wording of Ireland's declaration, it would likely assist a defendant arguing for a restrictive approach to surrender in order to avoid investigative detention. Further interpretative considerations that arise, for example, are the principle of strict construction in favour of an accused and the possible influence of EU-style teleological interpretation in favour of the effectiveness of a provision[49].

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[43] A further potential problem related to the particular wording of s. 11(3) (i.e. a literal interpretation of the sub-section), apart from the constitutional context and the general import of s. 11(3): see G. Conway, *op. cit.*, p. 263-265.

[44] Irish caselaw establishes that the State has an overriding duty to prevent the infringement of personal rights, its duty is not confined to vindicating those rights after the fact of their infringement: see, e.g. *ESB v. Gormley* [1985] IR 129, at 151.

[45] Irish constitutional guarantees have precedence over the ECHR in Irish law. The ECHR has been incorporated in IE simply at the level of a statute European Convention on Human Rights Act 2003, no. 20 of 2003.

[46] This would be to apply a historical reading of the s. 11(3).

[47] There has been some dilution of this approach in more recent times, at least in the UK and to greater extent and over a longer period in the US. For UK authority, see *Pepper v. Hart* [1993] 1 ALL ER 42 and subsequent caselaw. The issue is not yet settled in IE: see *Derek Crilly v. T. & J. Ferguson and John O'Connor Ltd* [2001] 3 IR 251.

[48] *Ibid*. Ireland's declaration can be invoked as an element of the *travaux préparatoires* of the FD on the EAW, if not *qua* parliamentary material, although the reference to the declaration by the Minister during Oireachtas debates appears to be the only publicly available text of it.

[49] The principle of strict construction of penal provisions could favour a broad interpretation of IE's declaration in favour of the suspect, which would restrict the EAW procedure (see generally M. Cherif Bassionui, *International Extradition: United States Law and Practice*, New York, Dobbs Ferry, 4th ed., 2002, p. 712-713; Eur. Court HR, 7 July 1989, *Soering v. UK*, Series A, no. 161, at para. 113; *CW Shipping Co Ltd v. Limerick Harbour Commissioners*

The practical effect of all the interpretative principles makes attributing a definite meaning and scope to s. 11(3) less than straightforward. Taken cumulatively, they would seem to point to a balancing approach. While both the wording of s. 11(3) and the import of Ireland's declaration (understood in its context) would suggest that the suspect should not be surrendered pursuant to an EAW unless the "trial proper" (in the common law sense of the trial in open court) of the charges is more or less ready to take place and where the detention of the accused would not result in a violation of the requirement of a trial within reasonable expedition, as understood in Irish law, a more purposive or broadly teleological approach − which would be more consistent with the tradition of First Pillar interpretation by the ECJ – would facilitate the process of integration of EU criminal justice systems of the EAW and would, correspondingly, downplay the significance of Ireland's declaration. Arguably, balancing[50] these potentially conflicting interpretative tendencies would suggest a conclusion that the substance of s. 11(3) required (as originally worded), in effect, that an assurance would be given to Ireland by requesting States that a trial will take place with due expedition following charging. This would ensure that *pro forma* charging of a suspect would not be used to circumvent the stated aim and import of Ireland's declaration and s. 11(3) of Ireland's implementing legislation, i.e. to prevent investigative detention. For civil law States, this would involve in practice a relatively shorter pre-trial phase than may be typical or at least permitted in their system; pre-trial detention should not be of investigative character. It seems that a clause to this effect could relatively easily have been inserted into the FD – which would have been a much simpler and more effective solution than the tortuous approach actually adopted by Ireland[51]. Ireland has in fact adopted this approach. Section 79 of the Criminal Justice (Terrorist Offences) Act 2005, inserting s. 21A into the 2003 Act, seeks to clarify Ireland's opposition to surrender for investigative purposes by stating that surrender will be refused if a decision has not been made to prosecute the person whose surrender is sought, but that it shall be presumed that such a decision has been made.

[1989] ILRM 416, at 426. EC law has influenced the common law toward more purposive interpretation of statutes: see, e.g. K. Zweigert and H. Kötz, *A Introduction to Comparative Law* (trans. by T. Weir), Oxford, Clarendon Press, 3rd ed., 1998, p. 265-268.

[50] The concept of balancing is not without difficulty in interpretation; it is not a precise concept and as such can be subjectively applied because of the incommensurability of the relative weight to be attached to competing considerations – essentially use of the term can be question-begging. See generally, e.g. T.A. Aleinikoff, "Constitutional Law in the Age of Balancing", *YLJ*, 1987, p. 943 and f.; R. Alexy, "Balancing, constitutional review, and representation", *IJCL*, 2005, p. 572 and f. However, this broader conceptual problem with balancing does not arise here to the same extent, since in this situation, all of the conflicting considerations can be reflected to some extent in the solution suggested for interpreting s. 11(3) and IE's declaration.

[51] Section 79 of the Criminal Justice (Terrorist Offences) Act 2005, No. 2 of 2005, amended the European Arrest Warrant Act 2003 Act, No. 45 of 2003, by inserting, *inter alia*, that it shall be presumed that a decision has been made to charge the person with, and try him or her for, issuing State, until the contrary is proved (see below for a summary of the 2005 Act).

C. Interpreting the declaration in EU law

The interpretative problem of Ireland's declaration and implementing legislation is not subject to ECJ jurisdiction, because Ireland has not accepted ECJ jurisdiction under Article 35 EU. The same issues as discussed above would arise before the ECJ if Ireland had opted to accept jurisdiction and a case was brought on the point – except, the case would be brought against the clear backdrop of ECJ jurisprudence favouring broad teleological reading of legislation [52]. It could be argued that since the Third Pillar is essentially public international law in character and does not have the distinctive "supranational" characteristics of the First Pillar, the interpretative principles that apply generally in international law under the Vienna Convention on the Law of Treaties [53] should be adopted by the ECJ under the Third Pillar [54]. One practical effect of adopting the latter approach would be to make relevant material such as declarations, as indicative of the intent of the signatories of treaties or legal instruments. Under EC law, reflecting the view developed in the case-law of the ECJ that the Community legal order was autonomous of the Member States legal orders [55], the intentions of the authors of the Treaties, even including as set out in declarations, are generally accorded little or no weight by the ECJ [56]. In contrast, under general international law (which is essentially the framework under which the Second and Third Pillars operate), the intentions of the authors or parties to a document can be accorded considerable weight in the interpretation of treaties and agreements; *travaux préparatoires* and equivalent material may be used in judicial interpretation where, for example, the provision to be interpreted is ambiguous [57].

Ireland's declaration is potentially covered in this context, given that it is strong evidence of the "intent" of Ireland as party/signatory in circumstances where there is ambiguity as to the point in time in pre-trial proceedings by which surrender may be effected. A pro-integration teleological approach characteristic of the First Pillar would suggest that the ECJ could require that Ireland surrender a suspect pursuant to

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[52] In general, it seems fair to observe that the ECJ under the First Pillar has often favoured pro-integration outcomes as against any assertion of Member State independence or difference.

[53] See Art. 31 and 32 of the Vienna Convention on the Law of Treaties 1969 (VCLT), 1155 UNTS 331, 8 ILM 679.

[54] The ECJ has not to date acknowledged any such distinction between the First Pillar and the Third Pillar in terms of the implications for interpretation.

[55] Sørensen defined "autonomous" to mean "outside the power of sovereignty of the Member States": M. Sørensen, "Autonomous Legal Orders: Some Considerations Relating to a Systems Analysis of International organisations in the World Legal Order", *ICLQ*, 1983, p. 559 and f. at p. 562.

[56] Similarly regarding secondary legislation. See, e.g. ECJ, 26 May 1992, Judgment 149/79, *Commission* v. *Belgium, ECR*, p. 3881, at 3890; ECJ, 6 December 2001, Judgment Opinion 2/00, *Cartegena Protocol on Biosafety, ECR*, p. I-9713, at para. 22. However, see ECJ, 20 February 2001, Judgment C-192/99, *The Queen v. Home Secretary, ex parte Kaur, ECR*, p. I-1237, where the ECJ relied on a declaration by the UK in interpreting a Treaty provision. See also generally L. Senden, *Soft Law in European Community Law*, The Hague, Kluwer, 2004, p. 374-380.

[57] Art. 31(1) of the VCLT.

an EAW so long as the trial has started, whether or not that encompasses a substantial degree of investigation. There has not been any indication from the ECJ to date [58] that its approach to interpretation under the Third Pillar would be substantially different to that it adopts in First Pillar adjudication. Use of *travaux préparatoires* in this way is in effect a historical interpretation, tying the meaning of a provision to that understanding evident at the time of its adoption from preparatory material. This can be justified as the point at which law is invested with democratic legitimacy and as achieving legal certainty.

To address the issue of investigative detention, a clause could have been inserted in the FD on an EAW specifying that Member States could require an undertaking that surrender was not sought for the purpose of investigative detention. Such a clause could operate to pre-empt the kind of "after-the-fact" limitation in the case of Ireland's implementation of the EAW. It may be argued that the inclusion of a clause on investigative detention to protect the common law sensitivity would have undermined the unity or coherence of the FD, reflecting the general importance placed on "unity" as a value in the jurisprudence of the ECJ [59]. However, there seems little use in protecting unity in this way when the result can be undercut by Member States in their implementing legislation and in practice.

D. Amendments to the European Arrest Warrant 2003 Act made by the Criminal Justice (Terrorist Offences) Act 2005

The Criminal Justice (Terrorist Offences) Act 2005 made a number of amendments to the European Arrest Warrant Act 2003 [60]. Most of these relate to matters of detail, such as the form of the EAW and the way in which it is to be executed. However, some are of more significance in the context of evaluating mutual recognition.

Section 69 of the 2005 Act, inserting s. 4A into the 2003 Act, created a general presumption that an issuing State will comply with the requirements of the FD, unless the contrary is shown. This clarifies that the mere raising of the possibility of non-compliance by a person objecting to surrender is not sufficient for the High Court to inquire into the issue and establish to its satisfaction that non-compliance will not

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[58] In ECJ, 11 February 2003, Judgment C-187/01 and C-385/01, *Gözütok and Brügge*, *ECR*, p. I-1345, its first decision under the Schengen Convention, the ECJ interpreted Art. 54 of the Schengen Convention 1990, 30 ILM 184, on *ne bis in idem* as encompassing out-of-court settlements, notwithstanding that the actual wording of Art. 54 used the expression a "trial finally disposed of". Other decisions of the ECJ under the Third Pillar (most to date have actually related to Art. 54 of the Schengen Convention) have not followed this "activist" approach – but on the facts of these cases, little scope for pro-integration activism arguably arose. See, e.g. ECJ, 16 June 2005, Judgment C-105/03, *Pupino,* ECR, p. I-5285; ECJ, 10 March 2005, Judgment C-469/03, *Miraglia*, *ECR*, p. I-2009; ECJ, 9 March 2006, Judgment C-436/04, *Esbroeck*, *ECR*, p. I-2333.

[59] The context arguably suggests a possible broader significance. The EU represents cooperation among States bound even more closely together than Council of Europe. Post-9/11, there was a remarkable convergence of international opinion on the necessity for urgent action to combat terrorism; the EAW example is illustrative of the civil-common law divide.

[60] Set out in Part 8 of the 2005 Act.

occur – so some specific evidence needs to be identified by the respondent. The courts have interpreted this as requiring "cogent evidence" [61].

Section 79 of the 2005 Act, inserting s. 21A into the 2003 Act, seeks to clarify Ireland's opposition to surrender for investigative purposes by stating that surrender will be refused if a decision has not been made to prosecute the person whose surrender is sought, but that it shall be presumed that such a decision has been made. One High Court judgment goes so far as to say that the evidence must be "conclusive" to rebut the presumption now contained in s. 21A of the 2003 Act (as amended) [62]. This is possibly putting it too strongly, as evidence on the balance of probabilities (the normal standard of proof in civil cases in Ireland, extradition not constituting a criminal trial subject to a burden of proof beyond reasonable doubt), for example, that a person's constitutional rights would be infringed (as would arguably be the case in the context of investigative detention) would arguably require the High Court to refuse surrender, since constitutional protections still apply to the EAW procedure.

Sections 81 and 82 of the 2005 Act, amending ss. 23 and 24 respectively of the 2003 Act, similarly prohibits surrender where the issuing Member State will surrender the suspect to a third Member State or other third State, while creating a presumption that the issuing Member State will not surrender the person to a third Member State or other third State.

6. Irish caselaw on the European Arrest Warrant

The general approach of the Irish courts has been favourable to the operation of the EAW, and this appears to be more marked in some of the more recent judgments. From the caselaw, the following principles can be stated as representing Irish law on the EAW:

- Although it seems that courts in the UK and Ireland more willingly use the term "purposive interpretation" as a result of the indirect influence of EC/EU law on the common law, the purposive interpretation of the EAW could be viewed as a traditional application of the common law golden rule of statutory construction whereby an interpretation leading to an absurdity, i.e. the defeat of the very functioning of a provision, is to be avoided [63]. The Irish courts still rely primarily on the ordinary meaning or literal approach to interpretation [64].

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[61] *The Minister for Justice, Equality & Law Reform v. McArdle*, Supreme Court, 4 November 2005, Murray CJ. for a five-member court; *Minister for Justice, Equality and Law Reform v. Altaravicius*, Supreme Court, 5 April 2006, Murray CJ. for a three member court (individual judgment also given by Denham J.).

[62] *Minister for Justice, Equality & Law Reform v. Ostrovskij*, High Court, 26 June 2006 Peart J.

[63] *In the matter of Kenneth Dundon and in the matter of a European Arrest Warrant*, High Court, 14 May 2004, Ó Caoimh J.

[64] *Minister for Justice, Equality & Law Reform v. Michael Fallon aka Michéal Ó Fallúin*, High Court, 9 September 2005 Finlay Geoghegan J.; *Minister for Justice, Equality & Law Reform v. Gotszlik*, High Court, 2 November 2007 Peart J.; *Minister for Justice, Equality & Law Reform v. Tobin*, Supreme Court, 25 February 2008, Fennelly J. for a five-member court.

- The principle of mutual recognition is accepted as requiring that in effect the Irish authorities should accept in good faith averments of the requesting State, but that if any evidence emerged from either the documentary evidence *or* other evidence, the Irish courts should examine the evidence to ensure, to a degree where there was no genuine or reasonable doubts, that the requirements of the Irish legislation had been met [65]. Later cases clarify that "cogent evidence" is needed to displace the statutory presumptions to the effect that it shall be presumed that the issuing State has acted within the requirements of the FD on the EAW and the Irish implementing legislation [66].
- The issue of prejudice to the person whose surrender is sought, arising from delay from the commission of the alleged offences to the prosecution, is a matter for the courts of the issuing Member State, on the basis that the principles of mutual recognition and confidence on which the EAW procedure was based require the Irish courts to assume the fairness and respect for human rights of the criminal justice systems of other Member States [67].
- The possibility of an action being brought by the surrendered person against the issuing State to the European Court of Human Rights could not be assumed by the requested State to represent compliance with the ECHR by the issuing State [68], but this is still subject to the general approach in the previous point.
- Where evidence is presented that the law of the issuing State has not been complied with, some High Court authority suggests this may have the effect of meaning that the EAW has not been duly issued as required by the Irish implementing legislation [69]. However, more recently the Supreme Court has stated in a case involving a request from the Czech Republic:

  > "The appellants wish this Court to rule that the provisions of Czech law which implement the European Arrest Warrant are contrary to Czech constitutional principles. This Court could not conceivably pass judgment on the validity of existing Czech legal provisions. That is patently exclusively a matter for the domestic legal system" [70].

- A relatively strict approach to procedural requirements is taken, which is consistent with the generally stringent rules of due process in Irish criminal procedure, although it seems that resolvable minor errors of procedure would not vitiate the

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[65] *Minister for Justice, Equality & Law Reform v. McGrath*, High Court, 16 March 2005, Macken J.

[66] See above n. 61.

[67] *Minister for Justice Equality and Law Reform v. Stapleton,* Supreme Court, 26 July 2007, Kearns J. for a five-member court; *Minister for Justice, Equality and Law Reform v. SMR*, Supreme Court, 15 November 2007, Finnegan J. for a five-member court.

[68] ETS no. 05 and see *Minister for Justice, Equality & Law Reform v. McArdle*, High Court, 27 May 2005, Finnegan P.

[69] *Minister for Justice, Equality & Law Reform v. Michael Fallon aka Michéal Ó Fallúin*, High Court, 14 October 2005, Finlay Geoghegan J.

[70] *Minister for Justice Equality and Law Reform v. Puta and Sulej,* Supreme Court, 6 May 2008, Fennelly J. for a five-member court.

overall validity of an EAW application [71]. On the issue of double criminality, for example, the EAW request must include details of the offence under its legal system so that the Irish authorities can evaluate correspondence [72].

- The mere fact that a procedure in another Member State is *different* than the procedure constitutionally mandated in Ireland does not mean that surrender should be refused [73].
- On the issue of investigative detention, pre-trial interlocutory matters are not considered to be part of the investigation in the requesting Member State and even though a decision to prosecute must have already been taken when the EAW is issued, subsequent further fact-finding enquiries are not excluded [74].

A general criticism of the Irish implementation of the EAW in the *Evaluation Report* was that Ireland seemed to have re-introduced in practice a double criminality requirement [75]. However, it seems that this was inevitable, given the way in which double criminality was purportedly abolished in relation to specific offences by the FD on the EAW itself. Arguably, the dis-application of double criminality is not all that significant, since in terms of their substantive content, legal systems in the EU are broadly similar as to criminal law prohibitions. Double criminality can be applied strictly or broadly: *in abstracto* (relating to the legal definition of offences, which is strict, since it requires equivalent legal definition, and not just criminalisation) or *in concreto* (relating to the factual definition, i.e. that the same acts be criminalised, whatever the legal definition in the respective systems, which is thus looser). The fact that double criminality is abolished in relation to *specific* offences actually retains the broad principle of correspondence, since it is still necessary to compare offences to see if they come within the list in Article 32 or not. Moreover, as was recently noted in the Supreme Court, the scope of the offences for which double criminality is abolished is unclear, since Article 2(2) of the FD does not define them [76]. Arguably, thus, the effect of the FD is just to exclude a strict *in abstracto* application of double

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[71] *In the matter of Kenneth Dundon and in the matter of a European Arrest Warrant*, Supreme Court, 16 March 2005, Denham J. for a five-member court; *The Minister for Justice Equality and Law Reform v. Brennan,* High Court, 14 March 2006, Peart J.; *Minister for Justice, Equality & Law Reform v. Rodnov*, Supreme Court, 1 June 2006, *ex tempore* judgment of Murray CJ.; *Minister for Justice Equality & Law Reform v. Tobin*, High Court, 12 January 2007, Peart J.; *Minister for Justice, Equality & Law Reform v. Ficzere*, 30 July 2008, Peart J.

[72] *Minister for Justice, Equality & Law Reform v. Wroblewski*, High Court, 9 July 2008, Peart J.; *Minister for Justice, Equality & Law Reform v. Laks,* High Court, 9 January 2009, Peart J.

[73] *Minister for Justice, Equality & Law Reform v. Brennan*, Supreme Court, 4 May 2007, Murray CJ. for a three-member court.

[74] *Minister for Justice, Equality & Law Reform v. McArdle*, Supreme Court, 4 November 2005, Murray CJ. for a five-member court.

[75] *Evaluation Report*, p. 39. The judgment in *The Minister for Justice Equality and Law Reform v. Brennan*, High Court, 14 March 2006, Peart J., could be taken as an example.

[76] *Minister for Justice, Equality & Law Reform v. Ferenca*, Supreme Court, 31 July 2008, per Murray CJ. for a three-member court (Geoghegan and Macken JJ. also gave individual, largely concurring, judgments).

criminality. Partial abolition of double criminality, as the FD attempts, seems for that reason not practicable.

7. The European Evidence Warrant from an Irish perspective

A. Background

EU developments [77] in mutual legal assistance can be considered in the context of the pre-existing Council of Europe principles in the area. The Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters [78] was the first European-wide measure of mutual assistance. The basic provision of the Convention is broadly framed and states that States parties commit to affording each other "the widest measure of mutual legal assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, fall within the jurisdiction of the judicial authorities of the requesting party" [79]. The primary instrument provided for is a rogatory letter [80], which is simply the term for a formal request for assistance. A central principle of the Convention is that the requested party is permitted to execute letters rogatory in a manner provided for in its domestic law [81] and not the law of the requesting State, reflecting the traditional Westphalian principle of the paramountcy of individual State sovereignty in public international law [82]. Perhaps the most obvious context in which this principle as to the priority of the law of the requested State arises is the admissibility of evidence, because of the sharp differences between common law and civil law traditions in this area (so the effect is that common law countries do not have to relax their more restrictive rules of evidence for the purpose of MLA).

B. Changes involved in EEW

The FD on the EEW [83] sets out a procedure whereby a judicial authority in one Member State may issue a judicial decision "with a view to obtaining objects, documents and data from another Member State" (Article 1 of the FD) for use in criminal (or quasi-criminal administrative) proceedings. The main change arguably that the EEW will bring about is the standardisation of procedures in the area throughout the EU and tighter deadlines – the EEW does not appear to entail any fundamental departure from current mutual legal assistance principles. It provides that search and seizure will be carried out according to normal rules of the requested/executing

[77] The principal measure actually enacted to date in the area of police and judicial cooperation in criminal matters is undoubtedly the EAW. Other measures enacted to date concern, for example, victims' rights, terrorism, and mutual legal assistance.

[78] ETS no. 30.

[79] Art. 1.

[80] Art. 3-6.

[81] Art. 5(1)(c).

[82] However, Art. 3 of the Convention further provides that a request in relation to obtaining witness or expert evidence should be acceded to where the law of the requested state does not prohibit it.

[83] 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*, no. L 350, 30 December 2008, p. 72.

Member State (Article 11), and a number of safeguards are provided for (e.g. that the executing authority shall use the least intrusive means necessary to obtain the object – Recital 12); the EEW covers a relatively limited spectrum of evidence, as it relates to evidence in being (Article 4(2))[84]. One of the principal differences effected by the EEW from existing practice is the relaxation of the double criminality rule (Article 14)[85], applicable under the 1959 Council of Europe Convention in respect of search and seizure powers[86] (however, arguably the way in which this provision in the EEW is phrased will limit its significance in that it possibly only removes a strict requirement for equivalence of legal definitions – see discussion above on double criminality and the EAW). In general, the traditional preeminence of the law of the *requested* State is retained under the EEW procedure[87].

C. Broader significance of the EEW

It is important to note the background and context of the adoption of the EEW, which was the European Commission Green Paper on "the protection through the criminal law of the financial interests of the Communities and the establishment of a European prosecutor"[88]. This Green Paper contained a far-reaching proposal, that evidence admissible in one Member State should automatically be admissible in another Member State, in relation to those matters – crimes relating to the financial interests of the Community – over which the envisaged European Public Prosecutor (EPP) was proposed to have jurisdiction[89]. The EPP would have, as proposed in the Green Paper, competence to initiate and direct prosecutions in national courts[90] (so, under the proposal, there would not be a European court with a special jurisdiction). This would clearly represent a seismic shift in approach for common law jurisdictions, where virtually all the usual rules of admissibility of evidence would be relaxed in

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[84] Recital 12 provides that the executing authority shall use the least intrusive means necessary to obtain the objects, documents or data. The EEW excludes: requests to take further evidence, such as witness statements; obtaining evidence in real time, such as interception of communications and monitoring of bank accounts; as well as the taking of evidence from the body of a person, including DNA evidence (Art. 4(2)). However, *existing* evidence within these categories, for example, existing DNA evidence, does not appear to be excluded (Art. 4(4)). See also J. HAMILTON, *op. cit.*, p. 64.

[85] Art. 51 of the Schengen Convention, 30 ILM 184.

[86] It will not be necessary for a prior freezing order to have been issued, which would quicken up and streamline procedures.

[87] The EEW provides that an EEW should be issued only when the issuing authority is satisfied that it would be possible to obtain objects, documents or data in similar circumstances if they were on the territory of the issuing State, even though different procedural measures may be used (Art. 6(b)); similarly, the obligation on the executing State is likewise to execute the warrant "in the same way as the objects, documents or data would be obtained by an authority of the executing State" (Art. 11).

[88] Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European prosecutor (COM (2001) 715 final, Brussels, 11 December 2001).

[89] *Ibid*. at 6.3.4.

[90] *Ibid.* at 3.2.1.

relation to this category of evidence. This proposal was first made in 2001, and the degree of criticism it attracted [91] appears to be reflected in the more modest scope of the EEW, which does not specifically address the general issue of mutual admissibility at all [92].

The proposal for an EPP as originally made [93] by the Commission thus contained a bald proposal for mutual admissibility of evidence, and almost predictably prompted opposition and concern from the common law tradition about the implications of this for traditional common law exclusionary rules. The common law tradition of heavily restricting the general principle of the admissibility of all relevant evidence has, however, been modified. This has occurred in Ireland, for example in at least three respects. The first example is the area of similar fact evidence, where Irish law reflects that more or less in all the major common law jurisdictions. Similar fact evidence has developed as an exception to the exclusion of character evidence. The latter has been generally considered inadmissible because its prejudicial character outweighs its probative weight; it may prejudice a jury to a finding of guilt even though evidence of guilt in the specific circumstances of the instant case is lacking. Similar fact evidence is a particular type of character evidence that is excepted from this general rule of inadmissibility whereby evidence of an accused's prior conduct may be admitted and used as evidence of a fact in issue in the present case if the prior conduct is of such an overwhelming or striking similarity to the conduct forming the basis of the current charge that its probative character outweighs any prejudicial effect it may have [94]. Two further statutory exceptions to the traditional exclusionary rules are relevant. Part II of the Criminal Evidence Act 1992 creates an exception to the exclusion of hearsay evidence [95] in relation to business records [96]. An additional exception to the rule against hearsay is provided for in s. 15 of the Criminal Justice Act 2006 [97], which proposes to give trial courts discretion to admit prior witness statements where

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[91] See, e.g. J. Fish/President of the Council of Bars and Law Societies of Europe (CCBE), "European Commission Public hearing on the Green paper on the establishment of a European Public Prosecutor for the criminal- law protection of the Community's financial interests", (Brussels, CCBE, 16/17 September 2002), available online on the CCBE Web site at: http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/d_16_170902_enpdf1_1183715250.pdf (visited 30 April 2008).

[92] See C. Williams, "The European Evidence Warrant: The Proposal of the European Commission", *ERA Forum – Special Issue on European Evidence*, 2004, p. 17 and f. at p. 25.

[93] See also Art. III-274 of the Treaty on a Constitution for Europe and Art. 86 TFEU (as resulting from the Treaty of Lisbon), which provide that the Member States may by unanimity establish an EPP.

[94] This rule has been modified somewhat away from a narrow approach based on striking similarity so that such evidence may be admitted where it may be particularly relevant because it relates to a disposition of the accused. See, e.g. *Director of Public Prosecutions v. Boardman* [1975] AC 421.

[95] I.e. evidence of an out-of-court statement sought to be admitted as evidence of the truth of its own content (and not for some collateral reasons, e.g. indicating motive or state of mind, in which case it may be admissible).

[96] No. 12 of 1992, s. 5 (1).

[97] No. 26 of 2006.

the same witness(es) fails to follow through with equivalent oral testimony in open court.

These three categories of admissible evidence – similar fact evidence, business records, and prior inconsistent statements – make significant inroads on traditional common law exclusionary rules[98]. Instead of proposing a blanket rule of mutual admissibility, the Commission could have sought, in its proposal for an EPP, to carve out a more detailed framework that would have better respect the common law tradition. It could have worked to first of all reflect the existing inroads on exclusionary rules in its proposal and perhaps developed them in a more incremental and less indiscriminate way. Similarly, as mentioned above, a clause could have been inserted into the FD on the EAW to reflect the common law resistance to investigative detention.

The EEW is limited to existing evidence, and it thus does not involve obtaining further evidence. It is useful here to distinguish between the obtaining of evidence for investigative purposes and the obtaining of evidence for *admitting to a trial*. It is as regards the admissibility of evidence in court that the common law tradition of relatively restrictive rules of evidence becomes relevant, especially the rule against hearsay. These common law evidential rules are not, however, insurmountable in the context of mutual legal assistance. It would be quite possible for a requested State to recognise in its gathering of evidence the common law approach on, for example, hearsay. Evidence could be gathered in a way consistent with the rule against hearsay by the questioning of witnesses being videoed[99] or by a judge travelling from the requesting State to the requested State to obtain the evidence in person, thereby allowing for the assessment of a witness's demeanour. Both these possibilities are provided for already at EU level in the EU Convention on Mutual Assistance in Criminal Matters 2000 (see next section).

8. Ireland and more recent Third Pillar measures – Criminal Justice (Mutual Assistance) Act 2008

This section briefly examines the other Third Pillar measures that Ireland has implemented through the Criminal Justice (Mutual Assistance) Act 2008[100] primarily the Convention on Mutual Assistance in Criminal Matters between the Member States of the EU 2000[101]. The 2008 Act consolidates (though not exclusively)[102] Irish law in the area of MLA. As well as the 2000 EU Convention, the Act seeks to give effect to a range of MLA conventions and legal instruments, including: the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1959

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[98] In particular, the first two of the above seem particularly relevant to the types of crimes over which the EEP would have had prosecutorial competence – i.e. financial crimes. Patterns of conduct and business records are very likely to be relevant in these types of cases.

[99] A possibility recognised by J. Barrington in *Eastern Health Board v. MK* [1999] 2 IR 99, at 119.

[100] No. 7 of 2008.

[101] 29 May 2000; *OJ*, no. C 197, 12 July 2000, p. 1.

[102] The provisions of the Criminal Justice Act 1994, the main statutory basis for MLA in IE, are retained, but amended: see s. 105 of the 2008 Act.

of 1978[103], which concerns MLA for fiscal offences, MLA for the enforcement of sentences and similar measures, and the communication of information from judicial records; the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters 1959 of 2001[104], which deals with a range of MLA issues and overlaps with some EU measures[105]; the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005[106]; and the Council Decision 2005 on the exchange of information and co-operation concerning terrorist offences[107].

Section 3 of the 2008 Act sets out a general basis for the refusal of MLA. The section encompasses refusal by the Minister for Justice, Equality & Law Reform: to protect the sovereignty, security, or other essential interests of the State; if there are reasonable grounds for believing that the request concerned was made for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, language, political opinion or sexual orientation or may result in the person being subjected to torture or to any other contravention of the European Convention on Human Rights; to prevent prejudice to a criminal investigation in the State; or to avoid violation of a relevant international instrument. This is a broadly worded basis for restriction that would give the Minister considerable discretion in refusing assistance, especially in that the protection of sovereignty is a ground of refusal. Any MLA request could potentially be interpreted as a limitation on sovereignty in a general sense. It is also notable that Ireland has not distinguished for this purpose between Council of Europe instruments and EU instruments, suggesting that Ireland sees MLA in the context of the EU in clearly intergovernmental terms and not in the context of the Community method of integration.

The EU Convention on MLA of 2000 provides that MLA may be requested to hand over to the competent authorities of a requesting State objects that have been stolen or obtained by other criminal means and that are found in another Member State; to temporarily transfer to the territory of a Member State where an investigation is being carried out a person held on the territory of another Member State; to permit

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[103] ETS no. 99.

[104] ETS no. 182.

[105] Including the presence of officials of the requesting party at the execution of an MLA request, temporary transfer of detained persons to the territory of the requesting party, channels of communication between parties, the hearing of evidence by video and telephone conference, the accommodation by the requested party of procedural aspects of the law of the requesting party, cross-border observation of suspects by the police from a requesting party in the territory of the requested party, covert investigations, and joint investigation teams. The 2008 Act will give effect to the provisions in Art. 4 and 8 of the Second Additional Protocol, concerning respectively channels of communication and the accommodation by the requested party of procedural aspects of the law of the requesting party (s. 5 of the Act). The use of video evidence and joint investigation terms and the presumption in Art. 8 in favour of accommodating the procedural law of the requesting party, in particular, overlap with the EU Convention on Mutual Legal Assistance of 2000.

[106] ETS no. 198.

[107] Council Decision 2005/671/JHA of 20 September 2005; *OJ*, no. L 253, 29 September 2005, p. 22.

a hearing by videoconference and hearing by telephone conference of evidence; to permit controlled deliveries on the territory of a Member State in the framework of criminal investigations into offences that may give rise to extradition (to be directed and monitored by the authorities of the requested Member State); to establish a joint investigation team for a specific purpose and for a limited period of time; to enable covert investigations to be carried out by officers of another Member State in the territory of the requested Member State; and for the competent authority of a Member State to request another Member State to intercept telecommunications. Although the 2008 Act, in s. 5, directly incorporates only Articles 4 (formalities and procedures in the execution of requests) and 6 (transmission of requests) of the 2000 Convention, virtually all of the other provisions of the 2000 Convention are in effect provided for also in the 2008 Act. Perhaps the most important provision in the 2008 Act is the entrenchment, in s. 6, of the principle that Ireland will comply with the procedural requirements of the requesting Member State in so far as this does not conflict with fundamental principles of Irish law. This in effect will create a general statutory presumption of cooperation in MLA.

The Act will also give effect to the substance of the provisions of the following instruments on mutual recognition as regards the freezing of assets, forfeiture, and financial penalties: FD on the execution in the EU of orders freezing property or evidence 2003 [108] and the FD on confiscation of crime-related proceeds, instrumentalities and property 2005 [109] (Part 4 of the 2008 Act). The FD on the application of the principle of mutual recognition to financial penalties 2006 [110] is not incorporated into Irish law by the 2008 Act.

Ireland has implemented the FD on joint investigation teams 2002 [111] through the Criminal Justice (Joint Investigation Teams) Act 2004, although at an EU level this FD has been superseded by the coming into effect of the EU Convention on MLA of 2000, in August 2005 [112].

9. Ireland, the Treaty on a Constitution for Europe and the Lisbon Treaty

Ireland agreed to the provisions of the Treaty on a Constitution for Europe concerning enhanced cooperation in criminal matters, but has, along with the UK, negotiated an opt-out from the equivalent provisions contained in the Treaty of Lisbon. This was essentially a political decision, and the reasons for it may thus be difficult to

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[108] Council Framework Decision 2003/577/JHA of 22 July 2003; *OJ*, no. L 196, 2 August 2003, p. 45. For a comprehensive overview of Irish law and practice in the area of financial crime, see Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report Anti-Money Laundering and Combating the Financing of Terrorism: IE* (February 2006), available online at: http://www.fatf-gafi.org/dataoecd/63/29/36336845.pdf.

[109] Council Framework Decision 2005/212/JHA of 24 February 2005; *OJ*, no. L 68, 15 March 2005, p. 49.

[110] Council Framework Decision 2005/214/JHA of 24 February 2005; *OJ*, no. L 76, 22 March 2005, p. 16.

[111] Council Framework Decision 2002/465/JHA of 13 June 2002; *OJ*, no. L 162 , 20 June 2002, p. 1.

[112] See: http://europa.eu/scadplus/leg/en/lvb/l33172.htm.

gauge precisely. However, it seems that the main reason for Ireland's opt-out was the UK position opting out [113]. As a relatively small Member State, Ireland's position in the context of opting in to these provisions would have been difficult when it came to defending or advocating a particular stance or policy position from the perspective of a common law tradition. With the exception of Malta and Cyprus, no other Member State shares this tradition and the concerns and perspective it entails [114].

The Irish and UK opt-outs [115] of these provisions of the Lisbon Treaty, which provide for qualified majority voting (instead of unanimity as at present in criminal justice cooperation) as well as the compulsory jurisdiction of the ECJ [116] and the normal Community legislative procedure [117], illustrate that the common law-civil law divide is a central fault line in the practice of mutual recognition. In order to be successful at an EU-wide level, mutual recognition must entail a reconciliation of the differences between the common law and civil law traditions. Ireland's willingness to cooperate in principle is indicated by the provision for a review of Ireland's opt-out [118] and the provisions for Ireland to opt in to measures in this area on a case-by-case basis [119].

10. Conclusions – A summary of challenges and successes of the principle of mutual recognition from an Irish perspective

Ireland has successfully implemented the EAW. No major doctrinal problems have emerged in the caselaw. The most likely area of difficulty had been in relation to the issue of investigative detention and Ireland's prohibition on surrender for this purpose, given that investigative detention is probably unconstitutional in Ireland, but is a feature of many civil law systems. However, the statutory scheme and the courts' interpretation of it have minimised the impact of this by ensuring Ireland's concern on this matter can be satisfied once a decision to prosecute is made. A criticism has been made that Ireland has gone beyond the requirements of the FD on the EAW in the degree of scrutiny exercised by the Central Authority, and that this imposes an additional administrative layer on the endorsement process [120]. However, this approach

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[113] This was indicated by officials of the Department of Justice, Equality & Law Reform in interviews, 8th April 2008.

[114] *Ibid*.

[115] Treaty of Lisbon, Protocol no. 21 on the position of the UK and IE in respect of the Area of Freedom, Security and Justice.

[116] Unlike in the area of the Common Foreign and Security Policy, the Treaty of Lisbon does not exclude the jurisdiction of the ECJ in what are now Third Pillar matters (at present, under Art. 35 EU, Member States have the option of accepting or not accepting the Court's jurisdiction over the Third Pillar – IE has not accepted it).

[117] See Art. 82 TFEU (i.e. post-Lisbon). This implies that the doctrines of direct effect and supremacy will apply, unlike at resent under the Third Pillar.

[118] Protocol no. 21, Art. 8.

[119] Protocol no. 21, Art. 3 and 4.

[120] European Commission, *Second Report from the Commission on the implementation of the European Arrest Warrant and the surrender procedures between Member States 2005, 2006, 2007*, 11 July 2007, SEC (2007) 979 (Commission Staff Working Document), p. 8 of abbreviated document. This criticism was also made in the *Evaluation Report*, p. 43.

arguably does have the effect of increasing the likelihood of success at the judicial stage of the endorsement process, given a relatively strict Irish judicial approach to matters of form and procedure in the area of extradition and surrender. A drawback of the EAW procedure, from an Irish point of view, is that the EAW has, compared to the previous backing of warrants procedure operated with the UK, actually made more cumbersome the process of extradition/surrender [121] (in the context that most Irish EAWs concern the UK).

A general presumption in favour of cooperation appears to exist amongst Irish officials, which has a statutory basis in relation to the EAW and is reflected in the high threshold of evidence set by the jurisprudence to put the High Court on enquiry as to compliance with the FD on the EAW and with fundamental rights by the issuing Member State. The Irish Central Authority will seek to assist in MLA matters on an administrative basis where no specific legal rules currently exist, so long as there are no contrary legal rules on the point. In terms of the degree of the automaticity of Irish recognition of the validity of the procedures of other Member States, Ireland seems to have achieved a successful balance through the use of presumptions and thresholds of evidence whereby the operation of the EAW cannot be frustrated merely by raising hypothetical problems with the different procedures in other Member States, while at the same time leaving open the possibility of refusal of surrender where real evidence exists of a likely breach of rights in another Member State. The largely positive experience to date seems to indicate a growing trust by Irish legal officials in the fairness of the criminal justice systems of other Member States.

The major difficulty in EU cooperation in criminal matters from an Irish point of view is the common law-civil law divide, and this is reflected in Ireland's opt-out of the intensified cooperation and integration entailed in the Lisbon Treaty in this area. A particular issue of difficulty is the much more restrictive common law approach to the admissibility of evidence in criminal trials, reflecting the rule of juries in the common law. However, cooperation has been improved in this context already in the EU. The EU Convention on Mutual Legal Assistance of 2000 contains a good example of how the common law emphasis on oral evidence can be successfully respected as part of the mutual recognition process. Following on from the previous point, strict Irish constitutional law doctrines in relation to criminal process make cooperation in the area of evidence difficult. For example, Ireland has a strict exclusionary rule for evidence obtained in breach of constitutional rights – any increased cooperation in this area will need to reflect this principle. As reflected in Ireland's clarification of its implementation of the FD on a EAW in the matter of investigative detention and in Ireland's non-acceptance of jurisdiction of the ECJ, the possibility that the ECJ may interpret EU criminal laws in a way contrary to Irish interpretative methods in this area makes acceptance of general EU competence more difficult to sanction for Ireland, as opposed to acceptance on a case-by-case basis. The ECJ is well noted for its creative methods of interpretation, which renders EC law uncertain and undermines the formal democratic process of ratification because Member States cannot be certain that the ECJ will follow the text of the Treaties. The complexity of EU cooperation can be

[121] Discussed in the *Evaluation Report*, p. 18.

a further difficulty. For example, the distinction between the First and Third Pillars requires a detailed knowledge of EU institutional law, which is more complex than at national level (e.g. the number and range of different types of legislative instruments and procedures at EU level is much greater than in national systems) [122]. Similarly, the potential for overlap between EU and Council of Europe instruments and mechanisms renders European cooperation more complex than it need be.

[122] An example is the reference to the FD on the EAW as a Directive in the judgment of J. Denham in *Clarke v. Governor of Portlaoise Prison & Minister for Justice Equality & Law Reform v. Clarke*, Supreme Court, 23rd May 2006 (three-member court).

La reconnaissance mutuelle et la mise en œuvre du mandat d'arrêt européen dans l'ordre juridique italien

Gaetano De Amicis *

1. Le principe de reconnaissance mutuelle dans la perspective de la coopération judiciaire pénale

L'efficacité croissante du principe de reconnaissance mutuelle dans le cadre de la coopération judiciaire en matière pénale constitue un élément moteur fondamental pour la construction d'un véritable espace juridique commun [1].

Malgré la connaissance insuffisante de l'importance et des potentialités d'application des instruments de la reconnaissance mutuelle, ce sont surtout les difficultés objectives rencontrées par les différents Etats membres dans les négociations engagées durant ces dernières années sur les projets de décisions-cadres visant le rapprochement des dispositions normatives pénales, dans le domaine tant matériel que

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* Ce rapport a été rédigé en collaboration avec M^lle^ Floriana Bianco, doctorante, doctorat international en « Politiques pénales européennes ».

[1] Sur les raisons de l'affirmation progressive du principe de reconnaissance mutuelle des décisions judiciaires et sur ses liens avec le processus d'harmonisation des législations pénales dans le domaine de la coopération, voy. les réflexions de H. Nilsson, « From classical judicial cooperation to mutual recognition », *International Review of Penal Law*, 2006, p. 53 et s., et de G. Lattanzi, « Prospettive di un sistema di giustizia penale europeo », *La Magistratura*, 1, 2008, p. 138 et s. Sur la problématique du développement des politiques criminelles des pays de l'UE et sur les mécanismes de l'harmonisation pénale, voy., récemment, A. Bernardi, « Politiche di armonizzazione e sistema sanzionatorio penale », *in* T. Rafaraci (éd.), *L'area di libertà, sicurezza e giustizia : alla ricerca di un equilibrio fra priorità repressive ed esigenze di garanzia*, Milan, Giuffrè, 2007, p. 193 et s. Pour une analyse générale sur les possibilités et les limites d'un procès pénal européen et sur les implications liées au changement décisif de perspective dans l'influence des principes européens au niveau du procès pénal, voy. M. Pisani, « Il « processo penale europeo »: problemi e prospettive », *Riv. dir. proc.*, 2004, p. 653 et s.

procédural, qui montrent que la voie parcourue jusqu'à présent par les institutions de l'UE pour promouvoir la reconnaissance mutuelle des mesures judiciaires constitue la seule perspective apte à produire des résultats notables dans le renforcement de la dimension opérationnelle des instruments de coopération judiciaire pénale.

L'importance croissante du principe signifie qu'il représente, à la fois, le « fondement » et l'« objectif » du processus actuel de transformation des mécanismes de fonctionnement de la coopération judiciaire : « fondement », parce que c'est seulement en acceptant la pleine capacité opérationnelle du principe, qu'il sera possible de réaliser un véritable espace juridique européen, un des objectifs principaux de l'UE ; « objectif », parce que bâtir un tel « espace » demande la pleine réalisation de ce principe.

Sur la base des indications du Conseil de Tampere des 15-16 octobre 1999, le principe de reconnaissance mutuelle des décisions judiciaires tant civiles que pénales a, tout d'abord, été « codifié » dans le traité établissant une Constitution pour l'Europe du 29 octobre 2004 et, ensuite, dans le traité de Lisbonne du 13 décembre 2007 (articles 67 et 82 TFUE).

Comme on le verra par la suite, l'énoncé normatif introduit clairement un élément de forte discontinuité au regard du passé, puisqu'il présente la reconnaissance mutuelle comme un nouvel « ordre catégoriel », susceptible d'être appliqué à tous les secteurs de la coopération judiciaire et à chaque type de mesure, *in personam* ou *in rem*, conservatoire ou finale, définitive ou provisoire, rendue par les autorités compétentes des Etats membres [2].

2. La mise en œuvre des instruments de reconnaissance mutuelle dans l'ordre juridique italien : la loi du 22 avril 2005, n° 69, relative au mandat d'arrêt européen

Depuis le 1er janvier 2004, la décision-cadre relative au mandat d'arrêt européen et aux procédures de remise entre les Etats membres de l'Union européenne (DC MAE) a remplacé la procédure d'extradition conventionnelle par un mécanisme simplifié d'arrêt et de remise des personnes recherchées (qui ont fait l'objet d'une condamnation définitive, ou à l'égard desquelles des poursuites pénales ont été exercées ou doivent être engagées).

La mise en œuvre du mandat d'arrêt européen dans l'ordre juridique italien s'est faite tardivement, après un débat parlementaire plutôt tourmenté – marqué, comme on le verra plus loin, par de nombreux doutes et une grande perplexité, y compris sur la constitutionnalité – avec l'entrée en vigueur de la loi du 22 avril 2005, n° 69, « Disposizioni per conformare il diritto interno alla decisione quadro 2002/584/GAI del Consiglio, del 13 giugno 2002, relativa al mandato d'arresto europeo e alle procedure di consegna tra Stati membri » [3].

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[2] Voy. G. De Amicis, G. Iuzzolino, *Guida al mandato d'arresto europeo*, Milan, Giuffrè, 2008, p. 3 et s. ; voy. aussi, G. Iuzzolino, voce « Mandato d'arresto europeo », *in Enc. Giur. Treccani,* Aggiornamento, 2007, p. 1 et s., ainsi que G. De Amicis, « Mandato d'arresto europeo », *in* G. Grasso et R. Sicurella (éd.), *Lezioni di diritto penale europeo*, Milan, Giuffrè, 2007, p. 537 et s.

[3] *Gazzetta Ufficiale*, 98, 29 avril 2005.

La trame normative complexe tissée par la loi de transposition est complétée par la déclaration unilatérale liée à l'article 32 de la décision-cadre, sur la base de laquelle l'Italie continuera à appliquer les conventions en matière d'extradition dans l'exécution des mandats d'arrêt européen émis dans les autres Etats membres pour les faits commis avant l'entrée en vigueur de la décision-cadre, c'est-à-dire le 7 août 2002.

A l'heure actuelle, le mandat d'arrêt européen constitue le seul instrument de reconnaissance mutuelle mis en œuvre dans l'ordre juridique italien.

Par conséquent, les considérations jusqu'ici esquissées et celles qui suivent se fondent essentiellement sur l'analyse des problématiques et de l'expérience liées à la réalisation et au fonctionnement de la nouvelle procédure de remise.

Il faut, cependant, mettre en évidence que le cadre normatif actuel, très limité, semble devoir être soumis à une prochaine évolution significative, liée à l'entrée en vigueur de la loi du 25 février 2008, n° 34, soit la « Legge comunitaria 2007. Disposizioni per l'adempimento di obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee ». L'article 28, al. 1 contient, en effet, une délégation au Gouvernement qui doit adopter, selon les principes et les critères fondamentaux fixés par les articles 30 et 32 de la loi et dans un délai de douze mois après son entrée en vigueur, des décrets législatifs donnant exécution à d'importantes décisions-cadres, notamment, en ce qui concerne le sujet de cette étude : a) la décision-cadre 2003/577/JAI du Conseil du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve ; b) la décision-cadre 2005/214/JAI du Conseil du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires.

3. La « compatibilité » constitutionnelle du MAE

L'ample débat ouvert, au Parlement, ainsi que dans la doctrine, à l'occasion des travaux qui ont précédé la mise au point et l'entrée en vigueur de la loi n° 69/2005 est le résultat de la perplexité liée aux incompatibilités potentielles du mandat d'arrêt européen avec certains principes constitutionnels, en particulier :

- la nature éventuellement politique de l'infraction pour laquelle la remise est demandée, par rapport aux articles 10 et 26 de la Constitution ;
- le risque que l'abandon de la règle de la « double incrimination » puisse violer des principes constitutionnels et, en particulier, les principes d'égalité, de légalité et les droits de la défense (articles 3, 24 et 25 Const.) ;
- le risque que l'extension éventuelle du champ d'application du MAE ne s'oppose à la « *riserva di legge* » en matière pénale prévue par la Constitution (article 25 Const.[4])[5].

[4] « Nul ne peut être distrait de ses juges naturels prévus par la loi. Nul ne peut être puni, si ce n'est en vertu d'une loi entrée en vigueur avant la commission du fait. Nul ne peut être soumis à des mesures de sûreté, hormis dans les cas prévus par la loi ».

[5] En général, voy. surtout V. Caianiello, G. Vassalli, « Parere sulla proposta di decisione quadro sul mandato d'arresto europeo », *Cass. pen.*, 2002, p. 462. Pour une réduction à de plus justes proportions de telles critiques voy., cependant, les observations de A. Cassese, « Il recepimento da parte italiana della Decisione quadro sul mandato d'arresto europeo », *Dir. pen.*

Cette perplexité et ces doutes ont toutefois été considérés comme surmontables en tenant compte du fait que la règle traditionnelle de la double incrimination, dans le cadre de la nouvelle procédure de remise, n'est en réalité pas abandonnée car, sur la base d'une évaluation *ex ante*, les différentes infractions contenues dans la liste visée à l'article 2, par. 2, de la DC MAE constituent des délits dans tous les ordres juridiques des Etats membres [6].

Par ailleurs, aucune des infractions prévues dans la DC MAE, en tout cas aucune des trente-deux infractions pour lesquelles l'article 2 de la DC supprime le test de la double incrimination, ne peut être considérée comme étant de nature politique.

D'autre part, le contenu de la clause de non-discrimination prévue au considérant n° 12 de la DC MAE a été considéré comme amplement suffisant pour contrecarrer les risques éventuels de manipulation ou de manœuvre à des fins politiques du mandat d'arrêt européen, cette clause permettant en effet de refuser la remise si des éléments objectifs montraient qu'il a été émis afin de poursuivre pénalement ou de punir une personne, entre autres à cause de ses opinions politiques.

De toute façon, tous les Etats membres de l'UE sont liés en général par le respect du principe de légalité dans l'adoption de mesures coercitives, prévu à l'article 5, al. 1, c), de la CEDH.

Par ailleurs, lors de l'exécution d'un MAE en Italie, une personne est soumise à une mesure restrictive de sa liberté personnelle non pas directement en vertu de la mesure étrangère, mais à la suite d'une mesure interne, contre laquelle le recours en cassation est admis conformément au principe visé à l'article 111 Const.

4. Les points « critiques » de la législation italienne relative au MAE : l'extension de la liste des motifs de refus

A. Considérations générales

Les doutes sur la « compatibilité » générale de la nouvelle procédure de remise avec les principes suprêmes de l'ordre constitutionnel ont marqué fortement le cours et le résultat des travaux parlementaires. En émerge l'impression générale que le législateur italien a choisi une perspective « nationale » de « superposition » ou de « juxtaposition », plutôt que « d'exécution conforme » du contenu et des buts de la décision-cadre [7] .

C'est ainsi que l'article 2, al. 1, b), de la loi n° 69/2005 rappelle expressément les principes et les normes contenus dans la Constitution, en matière de procès équitable, y compris le principe d'égalité, de liberté personnelle et les droit de la défense, ainsi que les principes relatifs à la responsabilité pénale et à la « qualité » des sanctions pénales : le contrôle judiciaire concret de tels aspects pourrait rendre nécessaire, selon

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e proc., 2003, p. 1565 et s. ; V. Grevi, *Il mandato d'arresto europeo tra ambiguità politiche e attuazione legislativa,* Bologne, Il Mulino, 2002, p. 119 et s. ; M. Bargis, « Il mandato d'arresto : quali prospettive ? », *Giur. it.,* 2003, p. 2423 ; E. Selvaggi, O. Villoni, « Questioni reali e non sul mandato europeo d'arresto », *Cass. pen.*, 2002, p. 457.

[6] Voy., en particulier, E. Selvaggi, O. Villoni, *op. cit.*, p. 445 et s.

[7] Voy. D. Manzione, « Decisione quadro e legge di attuazione : quali compatibilità ? Quali divergenze ? », *in* M. Chiavario, G. De Francesco, D. Manzione, E. Marzaduri, *Il mandato di arresto europeo. Commento alla legge 22 aprile 2005, n. 69*, Turin, Utet, 2006, p. 24.

l'article 2, al. 2, de ladite loi, une requête de « garanties adéquates » auprès de l'EM d'émission. Malgré l'importance indiscutable de telles affirmations de principe et la *ratio* fondamentale de garantie qu'elles sous-tendent, ces dispositions normatives, telles que formulées, ne tiennent pas compte du fait que les ordres juridiques des EM font désormais partie d'un espace judiciaire commun, fondé sur le respect des droits fondamentaux consacrés par la CEDH, comme le confirme l'article 6, par. 2, UE.

D'une manière analogue, l'article 2, al. 3 affirme péremptoirement que « l'Italie refusera la remise de la personne soupçonnée ou condamnée si le Conseil de l'Union européenne constate la *violation grave et persistante* par l'Etat d'émission » des principes énoncés par les normes européennes de protection des droits fondamentaux. Même si elle est en substance conforme au considérant n° 10 de la DC MAE, cette disposition énonce une « règle-avertissement » [8], car on doit présumer que si cette éventualité se vérifie, ce sont les organes compétents de l'UE eux-mêmes qui adopteront des mesures suspensives des procédures de la coopération judiciaire avec l'Etat responsable.

En outre, aux termes de l'article 1, al. 3, de la loi n° 69/2005, l'Italie exécutera un MAE « à condition que la mesure provisoire sur la base de laquelle le mandat a été émis, soit prononcée par un juge et motivée, ou que la décision à exécuter soit définitive ». Le choix opéré par le législateur, non seulement ne trouve aucun fondement direct dans la décision-cadre (laquelle exige uniquement que le MAE soit émis par une autorité judiciaire), mais semble excéder aussi les garanties prévues à l'article 13, al. 2, Const., qui confère à l'autorité judiciaire, et pas seulement à l'autorité juridictionnelle, le pouvoir de limiter la liberté personnelle. D'ailleurs, comme la doctrine l'a constaté, la mesure restrictive de la liberté personnelle n'est pas la mesure émise par l'autorité étrangère – qui constitue le fondement pour entamer la procédure d'émission du MAE – mais la mesure interne prise par la Cour d'appel, par voie d'ordonnance motivée lorsqu'elle prend des mesures préventives avant de décider de l'exécution du MAE, ou bien par voie d'arrêt lorsqu'elle reconnaît et exécute la demande de remise étrangère [9].

En outre, dans le *corpus* créé par la loi de transposition ont été introduites de nombreuses dispositions normatives qui ont affaibli la mise en œuvre correcte du MAE en tant que première « expression » historique du principe de reconnaissance mutuelle des décisions judiciaires.

C'est ainsi que la Cour d'appel est obligée de refuser l'exécution du MAE émis par l'autorité judiciaire d'un autre Etat membre de l'UE lorsque :

− le citoyen italien « ne connaissait pas, sans faute de sa part, la norme pénale de l'Etat membre d'émission sur la base de laquelle le mandat d'arrêt européen a été émis » (article 8, al. 3, de la loi n° 69/2005) ;

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[8] M. Chiavario, *Diritto processuale penale,* Turin, Utet, 2007, p. 667.

[9] Voy. E. Marzaduri, « Sub artt. 1 e 2 l. n. 69/2005 », *in* M. Chiavario, G. De Francesco, D. Manzione, E. Marzaduri (éd.), *Il mandato di arresto europeo..., op. cit.*, p. 81, lequel, sous un autre aspect, souligne que pour être conforme aux principes fondamentaux de l'ordre italien la décision devrait être devenue définitive.

- le destinataire du mandat avait moins de quatorze ans au moment où il a commis le fait, est une femme enceinte ou une mère vivant avec des enfants d'âge inférieur à trois ans (article 18, al. 1, i) et s)) ;
- le fait a été commis avec le consentement du sujet passif de l'infraction selon la loi italienne, ou constitue, pour la loi italienne, l'exercice d'un droit, l'accomplissement d'un devoir, ou a été provoqué par cas fortuit ou force majeure » (article 18, al. 1, b) et c)) ;
- « la législation de l'Etat membre d'émission ne prévoit pas la durée maximale de détention provisoire » (article 18, al. 1, e)) ;
- « la mesure provisoire sur la base de laquelle le mandat d'arrêt européen a été émis manque de motivation » (article 18, al. 1, t)) [10].

En outre, le législateur italien, a choisi de prévoir un système de « barrage » à la remise objectivement plus rigoureux que celui prévu par l'instrument européen puisqu'il a rendu tous les motifs de refus obligatoires. Un tel système est en désaccord avec l'esprit qui anime la DC MAE, d'une part, parce qu'il exclut de fait tout pouvoir discrétionnaire de l'autorité judiciaire et, d'autre part, parce que les motifs de refus formellement prévus dans la décision-cadre doivent être considérés comme tout à fait exceptionnels et susceptibles, à terme, d'être réduits, comme l'article 31, par. 2, de la DC MAE le prévoit [11].

B. L'évaluation des circonstances aggravantes

On doit également considérer comme étrangères au système d'extradition préexistant les dispositions (articles 7, al. 3 et 8, al. 1, de la loi n° 69/2005) selon lesquelles, aux fins du calcul de la peine en vue de l'exécution du MAE, on ne tient pas compte des circonstances aggravantes (sans spécifier, d'autre part, si on a fait référence aux circonstances aggravantes prévues par l'ordre italien, ou à celles prévues par l'ordre étranger).

C. La documentation « complémentaire »

Des problèmes considérables peuvent se poser dans la pratique suite à l'application des dispositions contenues dans l'article 6, al. 3 et 4, de la loi, relatives aux supports documentaires demandés – tels que le rapport sur les faits retenus à charge avec l'indication des éléments de preuve, le texte des dispositions législatives

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[10] Pour un cadre qui reconstruit les caractéristiques et les limites des différents motifs de refus introduits par la loi n° 69/2005, voy. P. Spagnolo, « Il mandato d'arresto europeo e le condizioni ostative alla consegna : prime pronunce giurisprudenziali e primi contrasti interpretativi », *Leg. pen.,* 2007, p. 603 et s. ; sur les lacunes et les contradictions des différents éléments qui entravent la remise prévus par la loi italienne de transposition, voy., aussi, P. Moscarini, « Le condizioni processuali per eseguire il mandato d'arresto europeo », *Dir. pen. proc*., 2007, p. 961 et s.

[11] Voy. M.R. Marchetti, « Il diniego obbligatorio e facoltativo del mandato », *in* E. Rozo Acuna (éd.), *Il mandato d'arresto europeo e l'estradizione*, Padoue, Cedam, 2004, p. 144 ; voy. aussi, P. Spagnolo, *op. cit.*, et G. De Amicis, « L'attuazione del mandato d'arresto europeo negli altri Stati membri dell'Unione Europea », *in* M. Bargis et E. Selvaggi (éd.), *Mandato d'arresto europeo*. *Dall'estradizione alle procedure di consegna*, Turin, Giappichelli, 2005, p. 480.

applicables, la copie de la mesure restrictive de la liberté personnelle ou de la sentence de condamnation qui sont à la base de la demande de remise, etc. Ces documents « complémentaires », non prévus par la décision-cadre, sont cependant nécessaires afin que la Cour d'appel puisse traiter une demande de remise. L'absence de transmission, éventuellement sollicitée par le ministre de la Justice sur demande de l'autorité judiciaire compétente, est sanctionnée par le rejet de la demande de remise (article 6, al. 6, de la loi n° 69/2005) [12].

On observe donc la tendance du législateur italien de transférer dans la nouvelle procédure de remise des notions juridiques qui sont propres à l'ordre interne – mais qui sont inconnues même du fonctionnement traditionnel de la procédure conventionnelle d'extradition – dont l'application suppose, au moins, un contrôle particulièrement pénétrant par le juge italien sur l'infraction commise et donc un élargissement notable et injustifié des pouvoirs juridictionnels de « filtre » sur la mesure « à la base ».

D. L'évaluation des « graves indices de culpabilité »

De la même manière, subordonner la remise à l'existence de graves indices de culpabilité (article 17, al. 4, de la loi n° 69/2005) – condition non prévue par la DC MAE – constitue en soi une « déviation » considérable des principes du droit conventionnel en matière d'extradition tel que fixé dans sa forme classique par la convention européenne de 1957, et par rapport auquel la DC MAE devrait s'imposer comme facteur de simplification et d'assouplissement procédural.

Ce choix normatif représente donc une régression objective par rapport au système de l'extradition, car il conduit à opérer des contrôles qui entraînent de fait une évaluation du fond de l'affaire pénale, pourtant réservée au juge compétent pour connaître de l'infraction, c'est-à-dire à l'autorité judiciaire qui a émis le MAE, et cela en violation du principe général de confiance mutuelle entre les Etats membres.

L'interprétation « corrective » de la jurisprudence concernant cette disposition a toutefois affaibli ces effets négatifs potentiels (voy. *infra)*.

E. La « résurgence » de la double incrimination

De sérieuses interrogations ont été soulevées par le choix du législateur de réintroduire en pratique, dans l'article 8, al. 1 et 2, de la loi n° 69/2005, le principe de double incrimination au moyen d'une opération unilatérale de « description-réélaboration » des trente-deux catégories d'infractions incluses dans la liste de l'article 2 de la DC MAE, laquelle, au contraire, avait entendu les soustraire au mécanisme d'*exequatur* basé sur le contrôle de la double incrimination [13].

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[12] Voy., pour une analyse des différents points « critiques » de la réglementation prévue par la loi n° 69/2005, E. Selvaggi, G. De Amicis, « La legge sul mandato d'arresto europeo tra inadegutezze attuative e incertezze applicative », *Cass. pen*., 2005, p. 1814 et s.

[13] Sur ce sujet en général, voy. les observations de E. Calvanese, G. De Amicis, « Riaffermata la doppia incriminabilità », *Guida dir.*, 2005, n. 19, p. 79 ; voy., aussi, en particulier, les observations de L. Picotti, « Il mandato di arresto europeo tra principio di legalità e doppia incriminazione », *in* M. Bargis et E. Selvaggi (éd.), *Mandato d'arresto europeo, op. cit.*, p. 33 et s., ainsi que E. Selvaggi, G. De Amicis, *op. cit.*, p. 1817.

En effet, selon l'article 8, al. 2, « l'autorité judiciaire italienne contrôle en particulier quelle peut être la définition des délits pour lesquels est demandée la remise, selon la loi de l'Etat membre d'émission, et si elle correspond aux infractions énumérées à l'alinéa 1 ».

Il est évident que l'ampleur du contrôle par les autorités judiciaires italiennes sur la correspondance substantielle entre les infractions ainsi prévues et les délits pour lesquels est demandée la remise selon la loi de l'EM d'émission, risque de produire des incohérences dangereuses dans l'application du texte. En effet, la « reconstruction » des infractions contenues dans la liste de l'article 8, al. 1, greffe de fait dans l'ordre italien un double circuit d'évaluations qui se situe dans la droite ligne de la coopération judiciaire : l'un est centré sur les paradigmes de référence prévus par le code pénal et applicables aux rapports en matière d'extradition qui ne sont pas réglés par le MAE ; l'autre est dicté par la loi interne de transposition et s'applique au domaine territorial plus restreint des EM de l'UE.

A titre d'exemple, la définition du blanchiment prévue par la lettre i) de l'article 8, al. 1, de la loi n° 69/2005 s'inspire de l'article 648*bis* CP, ainsi que de l'article 6 de la convention du Conseil de l'Europe du 8 novembre 1990 relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime, mais s'en éloigne parce qu'elle ne comprend pas la clause d'exclusion de la responsabilité pour celui qui est impliqué dans la commission de l'infraction principale et parce qu'elle ne contient aucune référence au dol dans l'infraction principale [14].

De même, l'infraction de corruption, prévue par la lettre g), al. 1, de l'article 8 ci-dessus, prend uniquement en considération la commission ou la non-commission d'un acte relatif à une fonction publique, malgré l'élaboration récente d'instruments normatifs du Conseil de l'Europe et du Conseil de l'Union européenne sur la corruption dans le secteur privé ; corruption dans le secteur privé que le texte de la DC MAE n'a d'ailleurs pas du tout entendu exclure, vu la référence générique à l'hypothèse de la « corruption » dans son article 2, par. 2.

On pourrait citer beaucoup d'autres exemples, en matière de terrorisme (lettre b), de traite des êtres humains (lettre c), de racisme et xénophobie (lettre s), etc., dont se dégagent des « infractions-monades » qui ne sont pas totalement conformes aux normes européennes et/ou internationales actuellement en vigueur.

Il suffit ici de relever qu'une technique de transposition de ce type non seulement n'est pas prévue par la décision-cadre et apparaît à tout le moins inadéquate quant à sa conformité aux instruments internationaux auxquels l'Italie est partie, mais implique en outre le risque de « bétonner » définitivement dans l'ordre interne des aspects du droit pénal matériel étroitement reliés à la décision-cadre, tout « en détachant » en même temps les contenus et les objectifs du difficile processus d'harmonisation des normes pénales en évolution constante et en voie d'achèvement dans l'UE.

[14] Sur ce point, voy. M. Angelini, « Legalità e parametri di selezione nei casi di consegna obbligatoria », *in* G. Pansini et A. Scalfati (éd.), *Il Mandato d'arresto europeo*, Napoli, Jovene Editore, 2005, p. 135 et s.

F. Les dispositions transitoires

L'article 40, al. 3, de la loi n° 69/2005 également est non conforme à la disposition contenue dans l'article 32 de la DC MAE et à la déclaration unilatérale de l'Italie annexée à la DC – qui exclut l'application de la nouvelle procédure de remise seulement pour les faits commis avant la date du 7 août 2002. Selon cet article 40, le nouveau régime de la double incrimination ne peut être appliqué qu'aux faits commis après l'entrée en vigueur de la loi de transposition. Il en résulte que la Cour d'appel doit renoncer au contrôle de la double incrimination – pourvu que, dans le cas concret, soient réunies les conditions prévues par l'article 8 de la loi – seulement si le délit, pour lequel le mandat d'arrêt a été émis, a été commis après l'entrée en vigueur de la loi (soit le 14 mai 2005).

G. Le rôle de l'autorité centrale

L'article 4 de la loi n° 69/2005 attribue au ministre de la Justice un rôle significatif[15], aussi bien dans la réception que dans la transmission du MAE, en lui réservant la tâche d'exécuter la remise décidée par la Cour d'appel et en prévoyant, aussi, qu'il soit informé sur les relations directes que l'autorité judiciaire interne établit avec les autorités étrangères en application d'accords internationaux spécifiques qui organisent ces rapports directs à des conditions de réciprocité.

Même s'il semble compatible avec le rôle de simple assistance et de support que la décision-cadre assigne aux autorités centrales des EM, l'article 4, al. 4, de la loi n° 69/2005 subordonne, cependant, la possibilité d'une correspondance directe entre les autorités judiciaires, conformément à l'article 9, par. 1, de la DC MAE, au respect de deux conditions que celle-ci ne prévoit pas explicitement et qui s'ajoutent à une obligation d'information immédiate du ministre de la Justice quant à la réception ou à l'émission d'un MAE :

- la ratification, par l'Italie, d'accords internationaux qui règlent les formes et les modalités de la transmission directe du MAE ;
- la condition de réciprocité avec l'autre Etat.

A cet égard, aux yeux de ceux qui sont amenés à l'interpréter, la *ratio* de cet article 4 ne semble pas suffisamment claire, si on considère le champ d'application de la DC MAE (limité au territoire des EM de l'UE) et le fait que la majorité des EM permettent le contact direct entre les autorités judiciaires dans les différentes phases de la procédure de remise.

A cet égard, la doctrine a observé que même si on doit juger opportune, en général, une « centralisation » des données sur le MAE, le choix normatif aurait dû favoriser cette possibilité de transmission directe que la décision-cadre même considère comme

[15] Par ex., la Cour de Cassation a récemment affirmé que dans le cas où la Cour d'appel demande des informations complémentaires, elle doit les demander à l'Etat membre d'émission, directement ou par l'intermédiaire du ministre de la Justice, et ne peut pas utiliser des voies alternatives, par ex. Interpol (Cass., sez. VI, 12 juin 2008 – 7 juillet 2008, n° 27717, *in* www.cortedicassazione.it).

« ordinaire » dans le nouveau système de remise (articles 9, 15 et 23 de la décision-cadre) [16].

5. Le fonctionnement de la procédure « passive » de remise : fondements et conditions

A. Considérations générales

La procédure passive de remise (chapitre I, titre II de la loi n° 69/2005) a pour objet une décision de la Cour d'appel compétente pour exécuter le MAE : le mandat, traduit dans la langue italienne, doit contenir – aux sens de l'article 6, al. 1, 3 et 7 de la loi susmentionnée – une série de renseignements spécifiques, doit être signé par un « juge » (ce qui exclut qu'on puisse donner exécution en Italie à un mandat signé par un magistrat du parquet) et se baser sur une mesure provisoire motivée, ou sur une décision irrévocable de condamnation [17].

Comme on l'a déjà indiqué, il faut joindre au mandat : 1) la copie de la mesure provisoire ou de l'arrêt de condamnation ; 2) un rapport sur les infractions à charge de la personne recherchée, avec l'indication des éléments de preuve, du lieu et du moment de la commission des faits, de la qualification légale et du texte des lois applicables, avec mention du type et de la durée de la peine ; 3) tout autre document nécessaire pour permettre à la Cour d'appel d'accomplir les contrôles prescrits (article 6, al. 4). A cette fin, la Cour peut demander la documentation manquante ou les renseignements nécessaires, directement ou par le biais du ministère de la Justice, à l'autorité judiciaire étrangère, en fixant un délai de transmission qui ne dépasse pas trente jours, sous peine de rejet de la demande (articles 6, al. 2 et 6 ; 9, al. 2 ; 16, al. 1, de la loi n° 69/2005).

La procédure passive de remise commence soit par la transmission directe d'un MAE de la part de l'autorité étrangère d'émission, soit par l'arrestation sur le territoire italien de la personne recherchée.

Dans le premier cas (article 9, loi n° 69/2005), l'autorité étrangère, après avoir émis le MAE, le transmet directement au ministère de la Justice – en tant qu'autorité

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[16] Voy. D. Manzione, *op. cit.*, p. 25 ; G. De Amicis, G. Iuzzolino, « Al via in Italia il mandato d'arresto UE », *Dir. e Giust*., 19, 2005, p. 65 et s.

[17] En général, sur ce point, voy. G. Iuzzolino, « Sub artt. 9-15 » et M. R. Marchetti, « Sub artt. 16 – 22 l. n. 69/2005 », *in* A. Giarda et G. Spangher (éd.), *Codice di procedura penale commentato*, Milan, Ipsoa, 2007, p. 7322 et s. et p. 7335 et s. ; A. Barbieri, G. Vitari et E. De Pasquale, « Sub artt. 9 – 17 », *in* M. Chiavario, G. De Francesco, D. Manzione, E. Marzaduri, *Il Mandato di arresto europeo. Commento alla legge 22 aprile 2005, n.* 69, *op. cit*., p. 239 et s. ; parmi les manuels, voy. M. Chiavario, *Diritto processuale penale, op. cit.*, p. 669 et s. ; P. Tonini, *Manuale di procedura penale,* Milan, Giuffrè, 2007, p. 864 et s. ; A. Gaito, « Rapporti giurisdizionali con autorità straniere », *in* G. Conso et V. Grevi (éd.), *Compendio di procedura penale,* Padoue, Cedam, 2006, p. 1008 et s. ; voy., aussi, A. Scalfati, « La disciplina del mandato d'arresto europeo. La procedura passiva di consegna », *Dir. pen. proc.,* 2005, p. 949 et s. ; M. Tiberi, voce « Mandato di arresto europeo », *Dig. disc. pen.*, III agg., I, Utet, 2005, p. 872 ; A. Barazzetta, R. Bricchetti, « Procedura passiva con termini di ricavare », *Guida dir.*, 2005, n. 19, 92 ; A. Famiglietti, « Il procedimento passivo di consegna », *in* G. Pansini et A. Scalfati (éd.), *Il Mandato d'arresto europeo, op. cit.*, p. 53 et s.

centrale assumant des tâches administratives – qui, à son tour, l'envoie à la Cour d'appel territorialement compétente.

Dans le second cas, (article 11 de la loi susmentionné), la procédure ne commence pas par la transmission directe du MAE, mais par l'activité de la police judiciaire qui procède à la localisation et à l'arrestation en Italie d'une personne recherchée dans l'« espace Schengen ». Dans le cadre de la nouvelle procédure de remise, en effet, le signalement dans le SIS vaut mandat d'arrêt européen *ex lege*, pourvu qu'il en contienne les éléments constitutifs (articles 13, al. 3 et 29, al. 2, de la loi interne, en relation avec l'article 9, par. 3, de la DC MAE).

A cette fin, on a prévu un formulaire intégré, commun aux pays du système Schengen, qui garantit la correspondance entre les données introduites dans le SIS et les données contenues dans le MAE.

La Cour de Cassation a confirmé que la police judiciaire procède de façon légitime à l'arrestation sur la base du seul signalement dans le SIS, auquel est reconnue la même valeur qu'un MAE. La transmission du mandat, en original ou en copie conforme, est nécessaire seulement en vue de la décision ultérieure sur la remise de la personne recherchée : le MAE peut donc parvenir à la Cour d'appel après l'arrestation et l'application de la mesure coercitive [18]. De plus, selon la jurisprudence, l'arrestation sur initiative de la police judiciaire est un *acte obligatoire*, sans aucune marge de pouvoir discrétionnaire, et suppose seulement de contrôler que le signalement dans le SIS a été effectué par l'autorité compétente et selon les formes prescrites par la loi [19]. Cela implique que, en procédant à l'arrestation d'une personne dont le nom a été inséré dans le SIS, la police judiciaire ne doit évaluer ni l'existence du risque de fuite, ni celle d'une situation d'urgence, alors que dans la procédure d'extradition l'arrestation est conçue comme un acte discrétionnaire, la police judiciaire disposant d'une marge d'appréciation sur l'existence des fondements prévus aux articles 715 et 716 CPP.

B. Les délais de la procédure d'exécution

Un des aspects les plus novateurs introduits par la transposition de la DC MAE réside dans la prévision des *délais péremptoires* qui caractérisent les différentes étapes de la procédure aboutissant à la décision sur l'exécution du MAE (articles 14, al. 4 et 17, al. 2, de la loi susmentionnée).

Il s'agit de nouveautés positives et grandement appréciées par les praticiens, non seulement parce qu'elles visent à garantir une plus grande efficacité et rapidité dans un secteur fondamental de la coopération judiciaire pénale, mais aussi parce que, par rapport aux délais plus longs de la procédure d'extradition, elles ont des conséquences objectivement *in bonam partem* en ce qui concerne la restriction de la liberté de la personne concernée.

A cet égard, en transposant les dispositions de la DC MAE, la loi n° 69/2005 a prévu que le *dies a quo* du délai de soixante jours pour la décision sur le fond

[18] Cass., sez. VI, 13 décembre 2005, n° 45254, *Calabrese*.

[19] Cass., sez. VI, 5 juin 2006, n° 20550, *Volanti* ; Cass., sez. VI, 21 novembre 2006, n° 40614, *Arturi*.

de la Cour d'appel est celui de l'exécution de la mesure provisoire, à la suite de la validation de l'arrestation par la police judiciaire. Il s'ensuit que le délai ne commence pas à courir à la date de l'arrestation, mais ultérieurement, au moment de l'exécution de l'ordonnance qui applique la mesure coercitive [20].

De plus, le délai ordinaire peut être prorogé de trente jours, dans les cas de force majeure (article 17, al. 2, loi n° 69/2005). Il s'agit des circonstances, non objectivement déterminées, qui comprennent toute situation – indépendante de la volonté de l'autorité judiciaire – ayant pour effet de retarder la décision. Le ministre de la Justice doit en être informé immédiatement, de façon à pouvoir le communiquer à l'Etat d'émission [21].

Le dépassement du délai de soixante jours prévu à l'article 17, al. 2, entraîne l'obligation de libérer la personne arrêtée (article 21), mais n'a pas pour effet d'annuler la procédure de remise, qui devra continuer jusqu'à l'adoption de la décision sur l'exécution du MAE [22].

C. La validation de l'arrestation et l'application des mesures coercitives

La véritable phase juridictionnelle de la procédure de remise commence par la mise à disposition de la personne arrêtée et par la validation de l'arrestation, que l'article 13 de la loi de transposition réserve au président de la Cour d'appel [23].

En effet, la police judiciaire doit informer immédiatement le ministre de la Justice de l'arrestation et transmettre le procès-verbal au président de la Cour d'appel, dans le délai de vingt-quatre heures (article 11, al. 1).

Si la personne arrêtée n'a pas été mise à disposition dans le délai fixé par la loi, cela entraîne les mêmes conséquences que celles prévues dans l'ordre juridique interne dans une situation analogue, c'est-à-dire l'inefficacité de l'arrestation. C'est ce qui résulte de l'article 39, al. 1 de la loi n° 69/2005 − selon lequel, lorsque rien n'est prévu par cette loi, ce sont les dispositions du code de procédure pénale – soit les articles 386, al. 3 et 7, 389 CPP – qui trouvent à s'appliquer, du moins si elles sont compatibles avec son contenu.

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[20] Cass., sez. VI, 13 décembre 2005, *Calabrese*.

[21] Selon la jurisprudence, la notion de force majeure couvre aussi le poids du travail excessif des tribunaux par rapport au personnel dont ils peuvent disposer concrètement (surtout en période de congé) ou l'impossibilité objective de trouver un interprète (Cass., sez. VI, 13 décembre 2005, *Calabrese*, précit. ; Cass., sez. VI, 1 février 2007, n° 4357, *Kielian*).

[22] Cass., sez. VI, 11 septembre 2008, n° 35290, *Tudor* ; Cass., sez. VI, 15 avril 2008, n° 15627, *Usturoi* ; Cass., sez. VI, 15 janvier 2008, n° 2450, Verduci.

[23] Voy., à cet égard A. Scalfati, « Misure coercitive in attesa della pronuncia », *in* G. Pansini et A. Scalfati (éd.), *Il Mandato d'arresto europeo, op. cit.*, p. 79 et s. ; M. Romano, « L'arresto di polizia e la convalida », *ibid*., p. 65 et s. ; P. Troisi, « L'arresto operato dalla p.g. a seguito della segnalazione nel Sistema di informazione Shengen », *in* L. Kalb, *Mandato di arresto europeo e procedure di consegna*, Milan, Giuffrè, 2005, p. 173 et s. ; A. Aito, « La competenza della Corte d'appello sulla richiesta di consegna della persona e sulle misure cautelari », *ibid*., p. 139 et s. ; F. Lo Voi, « Il procedimento davanti alla Corte d'appello e i provvedimenti de libertate. Il consenso », *in* M. Bargis et E. Selvaggi (éd.), *Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna, op. cit.,* p. 243 et s.

La communication au ministre permet d'informer de l'arrestation l'EM d'émission, afin que celui-ci transmette l'original (ou la copie conforme) du mandat, traduit dans la langue italienne, et la documentation exigée par la loi (article 6, al. 3 et 4).

A partir de la réception du procès-verbal de l'arrestation commence le délai des quarante-huit heures, dans lequel le président de la Cour d'appel doit procéder à la validation de l'arrestation. Il s'agit d'un délai péremptoire [24].

En cas d'arrestation provisoire, le président de la Cour d'appel peut, par ordonnance motivée, procéder aussi à l'application d'une mesure coercitive, si nécessaire pour éviter le risque de fuite. La mesure coercitive perd son efficacité si, dans les dix jours qui suivent, le mandat d'arrêt ou le signalement de la personne dans le SIS n'est pas transmis (article 13, al. 3, loi n° 69/2005). Toutefois, selon la Cour de Cassation, la mesure coercitive prévue par l'article 13, al. 3, ne devient pas caduque, en dépit de l'absence d'envoi de la documentation, si le signalement dans le SIS contient toutes les indications requises par l'article 6, al. 1, de la loi [25].

Si, au contraire, l'arrestation provisoire n'a pas été effectuée, mais qu'il y a eu réception ordinaire du mandat d'arrêt, l'ordonnance d'application de la mesure coercitive est émise par la Cour d'appel en composition collégiale.

De toute façon, les mesures coercitives ne peuvent être prises s'il y a des raisons d'estimer qu'existent des circonstances empêchant la remise (article 9, al. 6) qui correspondent aux motifs de refus prévus par les nombreuses dispositions de la loi n° 69/2005. Dans cette phase, selon la jurisprudence, l'évaluation que la Cour d'appel doit accomplir se limite de toute manière à un jugement formulé en l'état sans considérer l'existence de graves indices de culpabilité, contrairement à tout ce qui est prévu pour la décision sur le fond de la remise : toute autre interprétation constituerait, à cet égard, un pas en arrière par rapport à la procédure traditionnelle d'extradition, et serait de ce fait incompatible avec l'objectif d'en éliminer les complexités et les retards [26].

A cet égard, la Cour de Cassation a précisé le domaine d'application de certaines règles normatives :

- le mandat soi-disant « passif » – ou le signalement équivalent dans le SIS – ne sont pas aptes à différer le *status detentionis*, puisque le titre légitime est représenté seulement par la mesure provisoire appliquée par la Cour d'appel à la suite de la validation de l'arrestation ;
- dans cette phase procédurale, la réception du procès-verbal d'arrestation est suffisante car le contrôle juridictionnel est limité à l'examen des actes de la police judiciaire, tandis que la réception du MAE, complétée par la documentation qui y est relative, est seulement nécessaire en vue de la décision de la Cour en composition collégiale sur la remise de la personne arrêtée ;
- c'est le président de la Cour d'appel qui est fonctionnellement compétent pour juger de la validité de l'arrestation de la personne qui fait l'objet du MAE et

[24] Cass., sez. VI, 5 juin 2006, n° 20550, *Volanti*.
[25] Cass., sez. VI, 12 décembre 2005, n° 46357, *Cusini*.
[26] Cass., sez. F., 13 septembre 2005, n° 33642, *Hussain*.

non pas la Cour en composition collégiale (contrairement aux interprétations jurisprudentielles initiales au sein de différentes Cours d'appel) ;

- la validation de l'arrestation par le président de la Cour d'appel se base sur des fondements exclusivement formels : il s'agit seulement de vérifier si l'arrestation a été effectuée dans un des cas prévus par la loi et s'il n'y a pas eu erreur sur la personne. Ce contrôle n'influence pas du tout le résultat de la procédure de remise ni la possibilité que soit adoptée une mesure provisoire plus appropriée aux exigences du cas particulier et apte à assurer la remise à l'Etat d'émission [27] ;
- la mesure provisoire doit être motivée par le risque de fuite, expressément prévu à l'article 9, al. 4, loi n° 69/2005 (elle est subordonnée « à l'exigence de garantir que la personne dont la remise est demandée ne s'y soustraie pas ») [28] ; ledit risque doit être fondé non sur des conjectures, mais sur une probabilité raisonnable de fuite, dont l'ordonnance provisoire doit spécifiquement rendre compte dans sa motivation [29].

La voie de recours contre les décisions qui imposent des mesures provisoires personnelles est soumise aux normes sur l'extradition contenues dans l'article 719 CPP, auquel fait référence l'article 9, al. 7, loi n° 69/2005, avec la conséquence que l'éventuelle mesure provisoire peut seulement faire l'objet d'un recours en cassation, et exclusivement pour violation de la loi.

D. Les délais des mesures provisoires personnelles

L'application de la mesure coercitive s'étend non seulement au domaine de la véritable phase juridictionnelle, mais aussi à celle proprement exécutive, qui commence après la décision définitive sur la remise et a pour objet l'opération matérielle de déplacement de la personne vers l'Etat d'émission du MAE : l'article 23, al. 1, de la loi n° 69/2005, relatif à cette phase, prévoit que la personne requise soit remise dans le délai de dix jours à compter de la décision irrévocable sur l'exécution du MAE, « selon les procédés et les accords entre-temps obtenus par l'intermédiaire du ministre de la Justice ».

Une fois ce délai expiré, la détention provisoire perd son efficacité et le président de la Cour d'appel décide la libération de la personne arrêtée (article 23, al. 5).

Il est donc évident sous cet angle aussi que les délais de la détention provisoire appliqués dans le cadre de la procédure passive de remise sont nettement inférieurs aux délais applicables dans la procédure d'extradition, avec les conséquences *in bonam partem* déjà exposées (voy. *supra*).

En outre, la simplification que réalise la nouvelle procédure de remise est évidente sous un autre aspect de la matière préventive : d'une part, en effet, le pouvoir

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[27] Cass., sez. VI, 19 février 2007, n° 7709, *Sanfilippo*.

[28] Cass., sez. VI, 10 novembre 2005, n° 42803, *Fuso*.

[29] Cass., sez. VI, 26 janvier 2006, n° 3640, *Spinazzola* où, par exemple, a été considérée comme correcte la motivation fondée sur la condition de clandestinité de la personne requise (Cass., sez. VI, 27 avril 2007, n° 22716, *Novakov*), ou sur l'absence de référents stables et d'un domicile fixe (Cass., sez. F., 13 septembre 2007, n° 35001, *Rocas*), ou, enfin, sur la gravité de la condamnation prononcée dans l'Etat d'émission (Cass., sez. VI, 5 avril 2007, n° 42767, *Franconetti*).

traditionnel d'impulsion de l'autorité politique disparaît, d'autre part, l'autorité judiciaire compétente (c'est-à-dire la Cour d'appel) peut intervenir directement sur le *status libertatis* de la personne recherchée sur la base de la demande d'arrêt et de remise par l'autorité judiciaire étrangère, indépendamment de la nécessité d'un *exequatur* interne de nature politico-administrative.

Il faut signaler enfin l'importance d'un cas spécifique (article 24, al. 1, loi n° 69/2005) qui concerne l'hypothèse de la suspension de la remise pour cause de « satisfaction de la justice interne » : comme dans la procédure d'extradition (article 709 CPP), en même temps qu'elle décide de l'exécution du MAE, la Cour d'appel peut différer la remise de la personne recherchée pour qu'elle puisse être poursuivie en Italie ou, si elle a déjà été condamnée, pour qu'elle puisse y purger la peine encourue en raison d'un fait autre que celui visé par le MAE.

Il s'agit d'une évaluation d'opportunité par la Cour d'appel, qui doit nécessairement tenir compte de l'état de la procédure et de la gravité des faits contestés [30].

Sur la nature et l'incidence des effets de la suspension de la remise sur la mesure provisoire appliquée, la jurisprudence a donné des interprétations différentes.

Selon une première orientation, en effet, les mesures coercitives en cours doivent être suspendues pour la période où la remise est différée, et être rétablies une fois la cause de suspension disparue, afin que dans les délais de l'article 23, al. 1 – à compter du jour où se réalise la possibilité juridique d'exécution du mandat d'arrêt – on puisse procéder à la remise de la personne requise à l'Etat d'émission [31].

Selon une autre jurisprudence, dans le cas prévu à l'article 24, loi n° 69/2005, la mesure provisoire éventuellement appliquée à la personne requise doit être révoquée [32].

E. La décision sur l'exécution du MAE

A l'issue d'une audience à huis-clos, après avoir entendu le procureur général, le défenseur, la personne recherchée – si elle comparaît – ainsi que le représentant de l'Etat d'émission s'il est présent, la Cour d'appel prend une décision sur la demande d'exécution du MAE par ordonnance émise dans les dix jours qui suivent (si l'intéressé consent à sa remise), ou par arrêt adopté dans un délai plus long de soixante jours (si le consentement n'est pas exprimé).

La demande d'exécution du MAE peut être admise, comme on l'a déjà dit, lorsque la Cour d'appel n'identifie pas de causes d'empêchement [33], « si de graves indices de culpabilité existent ou s'il y a une sentence irrévocable de condamnation »

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[30] Cass., sez. VI, 24 octobre 2007, n° 45508, *Bulibasa*.

[31] Cass., sez. VI, 19 février 2007, n° 7709, *Sanfilippo*.

[32] Cass., sez. VI, 5 décembre 2007, n° 331, *Charaf*.

[33] Sur ce point, en général, voy. M. Del Tufo, « Il rifiuto della consegna motivato da esigenze di diritto sostanziale », *in* G. Pansini et A. Scalfati (éd.), *Il Mandato d'arresto europeo, op. cit.*, p. 137 et s. ; C. Pansini, « Il rifiuto della consegna motivato da esigenze « processuali » », *ibid*., p. 157 et s. ; A. Sammarco, « La decisione sulla richiesta di esecuzione del mandato di arresto europeo », *in* L. Kalb, *Mandato di arresto europeo e procedure di consegna*, *op.cit.,* p. 381 et s.

(article 17, al. 4). En cas de rejet de la demande de remise, la Cour d'appel révoque immédiatement les mesures préventives éventuellement appliquées (article 17, al. 5).

F. Les voies de recours

Les mesures prononcées par la Cour d'appel, soit d'acceptation soit de rejet, peuvent faire l'objet d'un recours en cassation par la personne intéressée, par son avocat et par le procureur général près la Cour d'appel, dans un délai de dix jours à partir de la lecture de la décision ou de la communication de l'avis de dépôt de la mesure émise à l'issue de la procédure à huis-clos, lorsque celle-ci a été adoptée en l'absence des parties, qui n'en auraient pas eu connaissance autrement (article 22, al. 1, qui renvoie aux articles 17, al. 6, et 14, al. 5) [34].

Le recours suspend l'exécution de l'arrêt (article 22, al. 2) et si le délai maximum de quatre-vingt-dix jours est écoulé sans que la mesure définitive intervienne, la personne est libérée.

La Cour de Cassation se prononce rapidement sur le recours, dans les quinze jours qui suivent la réception des pourvois, selon la procédure à huis-clos prévue à l'article 127 CPP.

Sur les motifs du recours, enfin, la jurisprudence a clarifié le fait qu'à la décision sur la remise ne peuvent pas être opposés des motifs relatifs à l'application de la mesure préventive ou à quelque autre acte étranger au jugement de remise (comme l'absence de consentement de la personne dont la remise est demandée dans la phase initiale de la procédure) [35].

6. Le fonctionnement de la procédure « active » de remise

Un des aspects les plus novateurs dans la transposition de la DC MAE concerne le régime normatif de la procédure active de remise [36].

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[34] Cass., sez. VI, 16 avril 2007, n° 16566, *Jolly*. Sur ce sujet, en général, M. Pisani, « Il mandato d'arresto europeo e la Cassazione penale come giudice del merito », *Riv. it. dir. proc. pen*., 2005, p. 1291 et s. ; M. R. Marchetti, « Sub art. 22 », *in* A. Giarda et G. Spangher, *Codice di procedura penale commentato, op. cit*., p. 7360 et s. ; M. Bargis, « Analisi della decisione quadro sul mandato di arresto europeo ecc. », *op. cit.*, p. 213, selon lequel le contrôle sur le fond est contraire au principe de reconnaissance mutuelle des décisions judiciaires, lequel s'oppose à toutes les évaluations substantielles des faits à la base de la mesure qui conduit au MAE ; M. Ceresa, Gastaldo, « I mezzi di impugnazione », *in* M. Bargis et E. Selvaggi (éd.), *Mandato d'arresto europeo ecc., op. cit.*, p. 315 et s. ; R. Dedola, G. Frigo, « La cassazione « diventa » giudice di merito », *Guida dir.*, 19, 2005, p. 99 ; E. Calvanese, G. De Amicis, « I nuovi compiti dei giudici di legittimità », *ibid*., p. 97 ; A. Scalfati, « La procedura passiva di consegna », *Dir. pen. proc.,* 2005, p. 947 ; M. Murone, « La decisione sulla consegna : contenuti, dinamica e vicende », *in* G. Pansini et A. Scalfati (éd.), *Il Mandato d'arresto europeo, op. cit.*, p. 93.

[35] Cass., sez. VI, 22 septembre 2006, n° 32516, *Jagela*.

[36] Voy., en général, G. De Amicis, « Sub art. 28-40 l. n° 69/2005 », *in* A. Giarda et G. Spangher, *Codice di procedura penale commentato, op. cit.,* p. 7375 et s. ; G. Iuzzolino, « L'emissione del mandato d'arresto europeo tra ermeneutica e prassi », *Cass. pen.,* 2008, p. 2114.

A cet égard, en effet, le législateur italien a attribué les compétences directement aux autorités judiciaires chargées de la procédure principale, tandis que dans le système d'extradition elles étaient concentrées auprès des Parquets et des Cours d'appel.

L'article 28 de la loi n° 69/2005 attribue la compétence pour l'émission du MAE au juge qui a rendu l'ordonnance de détention préventive au cours de la procédure pénale, ou au ministère public qui a émis l'ordre d'exécution de la peine de détention définitive ou d'une mesure de sûreté personnelle privative de liberté.

Le mandat d'arrêt est donc transmis au ministre de la Justice qui le traduit et le transmet à l'autorité compétente de l'EM dans lequel se trouve la personne concernée.

Cependant, le mandat perd son efficacité lorsque la mesure restrictive de la liberté personnelle, sur la base de laquelle il a été émis, est révoquée ou, de toute façon, devient inefficace dans le cadre de la procédure « interne »: le procureur général près la Cour d'appel communique immédiatement l'inefficacité survenue au ministre de la Justice qui, à son tour, la communique à l'Etat d'exécution (article 31). La *ratio* de l'intervention du procureur général n'est pas bien claire, car il s'agit d'une autorité qui, en considération du changement des compétences intervenu dans la phase d'émission, pourrait ne rien connaître de la procédure : une application correcte de la norme suppose, de toute façon, une communication entre l'autorité judiciaire compétente pour l'émission du MAE et le procureur général.

L'analyse de la pratique jurisprudentielle fait apparaître des doutes quant à l'interprétation et certaines difficultés opérationnelles dans le fonctionnement de la procédure active de remise.

A. La compétence pour l'émission du MAE

Dans le cas de mandat « procédural », c'est-à-dire fondé sur l'adoption d'une mesure préventive, l'autorité compétente est généralement la même que celle qui a pris la mesure (dans la majorité des cas, le *G.i.p.* (*giudice per le indagini preliminari*) ou le Tribunal qui a émis la mesure préventive à la suite de l'appel introduit par le ministère public, article 310 CPP).

Des problèmes interprétatifs se posent, toutefois, lorsque la nécessité d'émettre le MAE se présente à un stade de la procédure postérieur à celui auquel la mesure coercitive a été émise.

Le cas concret pourrait se présenter, par exemple, si l'autorité judiciaire recevait communication de la présence du prévenu caché dans un autre EM alors que la procédure est déjà dans la phase des débats ou en appel.

Selon une interprétation littérale de la norme, c'est le juge qui avait émis la mesure préventive qui devrait être compétent pour émettre le MAE et non le juge de la phase procédurale en cours.

Cependant, dans la pratique certains juges du fond ont considéré que, pour l'émission du MAE, il faut tenir compte de la phase où est parvenue la procédure et, en particulier, du passage éventuel de la phase des enquêtes préliminaires à celle des débats : dans ces cas, le principe selon lequel c'est le juge qui procède qui est compétent pour émettre le MAE pourrait trouver application.

A cet égard, la Cour de Cassation est récemment intervenue pour résoudre un conflit de compétence affirmant que, sur la base d'une interprétation logico-systématique des article 28, 30 et 39 de la loi n° 69/2005, la compétence doit être attribuée à « l'autorité qui procède » considérant, en particulier, le fait que l'autorité d'émission connaît pleinement l'*iter* suivi par la procédure, de sorte que les nombreuses tâches que la loi impose soient accomplies (par exemple, les informations, le rapport d'appui, les renseignements complémentaires, etc.) [37].

B. Le MAE fondé sur la mesure coercitive de la détention domiciliaire

Une autre question problématique pourrait concerner l'éventualité que le MAE soit fondé sur une ordonnance d'application de la mesure de détention domiciliaire, par rapport à la formulation littérale de la prévision normative contenue à l'article 28, al. 1, a), de la loi n° 69/2005.

Il s'agit d'un type de mesures qui n'est pas expressément prévu par la DC MAE, ni par les accords internationaux en matière d'extradition, et qui n'est pas davantage prévu dans les législations de tous les Etats membres de l'UE. L'émission d'un MAE en raison d'une mesure coercitive de détention domiciliaire pourrait donc entraîner des problèmes d'application considérables.

En l'état actuel, l'évaluation de ces situations problématiques semble être soumise, de toute façon, à l'appréciation prudente du juge sur le fond, compétent pour l'émission de la mesure préventive (article 28, al. 1, a), loi n° 69/2005).

C. L'émission du MAE par rapport aux procédures d'exécution de la peine

D'autres problèmes d'application peuvent se présenter en cas d'émission du mandat « exécutif », c'est-à-dire fondé sur l'ordre d'exécution de la peine de détention émis sur la base d'un arrêt de condamnation irrévocable (article 28, al. 1, b), de la loi n° 69/2005).

Dans ces cas, le ministère public doit vérifier : a) que la peine de détention ait une *durée non inférieure à un an* ; b) que la suspension de l'exécution n'opère pas.

La *ratio* de cette disposition doit être recherchée dans l'exigence que la demande d'arrestation et la remise de la personne condamnée visent seulement les infractions caractérisées par un niveau élevé de gravité et qui comportent l'application effective de la peine de détention. Il serait, par exemple, déraisonnable de procéder à l'émission du MAE dans le cas où il est possible de formuler *ex ante* un pronostic favorable d'applicabilité d'une remise de peine à la personne condamnée.

On devrait donc exclure la possibilité d'émettre un MAE si, par exemple, les conditions prévues par la loi pour l'application d'une mesure alternative à la détention existent, ou lorsque la suspension *ex officio* de l'exécution peut opérer.

Même pour les procédures d'extradition « active », les circulaires ministérielles en vigueur excluent en général la demande d'extradition ou la demande d'arrestation visant l'extradition en présence de peines de réclusion qui ne dépassent pas quatre ans.

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[37] Cass., sez. I, 2 juillet 2008, n° 26635, confl. comp. in proc. Trib. Ragusa, *in* www.cortedicassazione.it.

Du reste, les circulaires envoyées par quelques Parquets généraux près les Cours d'appel semblent s'orienter dans le même sens : elles attirent l'attention sur l'opportunité de suivre, dans l'émission du MAE, les mêmes critères que ceux prévus en matière d'extradition active, avec la conséquence que le ministère public devrait, en règle générale, n'émettre de mandat d'arrêt qu'en ce qui concerne l'exécution de peines de détention qui ne sont pas inférieures à quatre ans de réclusion.

Par rapport à ces situations l'émission du MAE est objectivement possible, mais le ministère public devrait limiter le recours à la nouvelle procédure de remise selon une évaluation faite cas par cas tenant compte, par exemple, de la nature de l'infraction, de la personnalité de l'auteur, du fait qu'il s'agit du reste d'une peine importante (qui traduit la gravité du délit), etc.

De toute façon, la décision de ne pas diffuser les recherches ne déboucherait pas sur une forme d'impunité puisque la mesure exécutive resterait, en tout cas, valide et exécutable sur le territoire national.

7. Les principales orientations jurisprudentielles : l'interprétation « corrective » de la Grande Chambre (Sezioni Unite) de la Cour de Cassation

On a déjà souligné de nombreuses différences entre la DC MAE et la législation nationale de transposition.

En plusieurs occasions, ces points « critiques » de la loi de transposition ont été soumis au contrôle de légitimité par la Cour de Cassation, laquelle a proposé une interprétation « corrective » des distorsions manifestes par rapport au contenu et aux buts de l'instrument communautaire [38].

Une telle interprétation a été possible non seulement en donnant une interprétation « conforme » au cadre des principes généraux à la base du nouvel instrument, mais aussi en mettant en valeur les implications liées à la capacité opérationnelle du principe de reconnaissance mutuelle et à l'ampleur des objectifs fixés par les considérants de la décision-cadre [39].

En d'autres occasions, la Cour de Cassation a fourni une interprétation logico-systématique visant à comparer les conséquences négatives, ou vraiment « régressives », de la norme interne, par rapport au *modus operandi* propre à la procédure d'extradition traditionnelle, en recherchant une solution raisonnable et « adéquate » au vu des caractéristiques du nouvel instrument et du principe de reconnaissance mutuelle qui constitue sa justification.

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[38] A cet égard, voy. E. Aprile, « L'interpretazione conforme al diritto comunitario in materia di mandato d'arresto europeo », *in* F. Sgubbi e V. Manes (éd.), *L'interpretazione conforme al diritto comunitario in materia penale*, Bologne, BUP (Bononia University Press), 2007, p. 135 et s.

[39] Par exemple, le considérant n° 5 de la DC MAE qui rattache de façon significative l'objectif de l'Union européenne de créer un espace de liberté, de sécurité et de justice à la suppression de la procédure d'extradition traditionnelle entre les Etats membres, en la remplaçant par un nouveau système de remise entre les autorités judiciaires, aux fins de supprimer les complexités et les risques de retard inhérents aux procédures d'extradition actuelles.

A cet égard, une analyse rapide des principales interventions jurisprudentielles peut se révéler éclairante.

A. Les indices graves de culpabilité

Sur la présence d'indices graves de culpabilité, par exemple, la Cour de Cassation a exclu que la nouvelle loi, justement parce qu'elle a pour objet la transposition de la décision-cadre, exige un contrôle de l'autorité d'exécution plus approfondi que celui prévu par la convention européenne d'extradition, en subordonnant la remise de la personne recherchée à la vérification et à la démonstration de l'existence de « graves indices de culpabilité » et en imposant même un régime d'évaluation et de motivation semblable à celui imposé par l'article 705 CPP pour les cas où une demande d'extradition est présentée par un Etat avec lequel l'Italie n'est pas liée par des accords bilatéraux spécifiques.

Est donc considéré comme suffisant un contrôle limité à la vérification que le mandat d'arrêt est fondé sur un « compendium d'indices » considéré par l'autorité judiciaire d'émission comme sérieusement « évocatoire » d'une infraction commise par la personne dont la remise est demandée.

En d'autres termes, le MAE doit nécessairement se fonder sur de « graves indices de culpabilité » qui doivent, toutefois, être simplement « identifiables » par l'autorité judiciaire italienne, alors que l'appréciation de leur consistance et de leur force probatoire revient à l'autorité d'émission [40].

Il est, par ailleurs, significatif que la même interprétation a été donnée par la jurisprudence de la *House of Lords* qui, dans un arrêt récent, a abordé la question des limites du contrôle des éléments de preuve sur lesquels se fonde le MAE, en établissant que le principe de reconnaissance mutuelle a rendu inappropriée et superflue « *any inquiry* » par l'Etat requis sur le fond de la procédure pénale en cours dans l'Etat requérant. Par conséquent, l'appréciation des éléments de preuve ne relève pas de la compétence des autorités judiciaires de l'Etat requis [41].

B. La question des limites maximales de la détention provisoire

La Cour de Cassation a aussi suivi un modèle d'interprétation qui vise à « rationaliser » le champ d'application d'une autre condition « excentrique » entravant la mise en œuvre correcte de la décision-cadre, à savoir le motif de refus fondé sur le fait que « la législation de l'Etat membre d'émission ne prévoit pas les limites maximales de la détention préventive » (article 18, e) de la loi n° 69/2005).

Dans ce cas, la Grande Chambre a dépassé l'exégèse la plus restrictive, selon laquelle cette disposition normative constitue une « transposition directe » du contenu de l'article 13, al. 5, Const., en valorisant les indications du rapport d'évaluation de

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[40] Cass., Sez. Un., 30 janvier 2007, n° 4614, *Ramoci* ; récemment, dans le cadre d'une jurisprudence confirmée, voy. Cass., sez. VI, 16 avril 2008, n° 16362, *Mandaglio*, qui établit que le juge national n'a pas le pouvoir d'évaluer l'adéquation des indices sur lesquels se fonde la mesure préventive et des éléments de preuve allégués à décharge par le sujet, lesquels sont normalement présentés devant, et évalués par, l'autorité judiciaire d'émission.

[41] Voy., à cet égard, *House of Lords*, 30 janvier 2008, *Hilali*, *in* www.publications.parliament.uk/pa/ld200708/djudgmt/jd080130/hilali-l.htm.

la Commission européenne de 2006, selon lequel plusieurs Etats membres, parmi lesquels l'Italie, ont enfreint la décision-cadre en introduisant des motifs de refus non prévus par cette dernière.

A la lumière des principes fondamentaux consacrés par l'article 6 UE, et cités plusieurs fois par la DC MAE, la Grande Chambre de la Cour de Cassation, par l'arrêt *Ramoci* cité ci-dessus [42], a placé parmi les valeurs unanimement reconnues par les ordres juridiques des EM de l'UE le fait de limiter la détention provisoire à une durée raisonnable, telle que définie non seulement par la jurisprudence consolidée de la Cour européenne des droits de l'homme, mais aussi par la recommandation récente n° 13/2006 adoptée le 27 septembre 2006 par le Comité des ministres du Conseil de l'Europe concernant la détention provisoire, les conditions dans lesquelles elle est exécutée et la mise en place de garanties contre les abus. Par cette recommandation, en effet, le Conseil de l'Europe a notamment demandé aux Etats parties de se doter de systèmes de réexamen périodique de la nécessité réelle du maintien en détention provisoire.

Sur la base de ces prémisses la Cour de Cassation a estimé qu'étaient compatibles avec les dispositions de la loi n° 69/2005 non seulement les systèmes juridiques où la durée maximale de la détention provisoire jusqu'au prononcé de la décision de condamnation en première instance est expressément fixée, mais aussi les systèmes qui ont introduit des mécanismes procéduraux spécifiques qui comportent, à intervalles prédéterminés, un contrôle quant à la nécessité de la détention provisoire, de son prolongement ou de sa cessation immédiate.

Sous cet aspect spécifique, l'interprétation « corrective » fournie par la Cour établit que l'autorité judiciaire italienne doit vérifier que la législation de l'EM d'émission fixe expressément une limite quant à la durée de la détention provisoire jusqu'au prononcé de la décision de condamnation en première instance ou, à défaut, qu'une limite temporelle implicite puisse être déduite des autres mécanismes procéduraux instaurant, obligatoirement et à des intervalles prédéterminés, un contrôle juridictionnel du maintien en détention [43].

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[42] Voy. le commentaire de E. Calvanese, « Problematiche attuative del mandato di arresto europeo », *Cass. pen.,* 2007, p. 1926 et s., ainsi que celui de E. Aprile, « Note a margine della prima pronuncia delle Sezioni Unite sulla disciplina del mandato di arresto europeo », *ibid*., 2007, p. 1941 et s.

[43] A cet égard, la doctrine a proposé des interprétations opposées : voy., pour une série d'observations critiques, G. Frigo, « Annullare la garanzia del limite massimo sconfina nelle prerogative del legislatore », *Guida dir*., 10, 2007, p. 45 et s. ; en sens contraire, voy., E. Selvaggi, « Recuperata una soglia di ragionevolezza », *ibid*., p. 45 et s. ; sur ce sujet, voy., aussi, B. Piattoli, « Mandato di arresto UE : istanze di armonizzazione processuale, distonie applicative e tutela multilivello dei diritti fondamentali », *Dir. pen. proc.*, 2007, p. 1105 et s., selon lequel le choix des limites maximales, même s'il représente un aspect d'originalité du système national, ne peut pas entraver l'harmonisation imposée par les règles européennes ; enfin sur les problèmes de constitutionnalité posés par la règle fixée à l'article 18, e), de la loi n° 69/2005, voy. G. De Amicis, « Mandato d'arresto europeo e limiti massimi di custodia cautelare: incostituzionalità o « interpretazione costituzionalmente orientata » del motivo di rifiuto della consegna », *Giur. merito*, 2007, p. 1435 et s.

La jurisprudence subséquente de la Cour de Cassation s'est pleinement alignée sur les principes de droit énoncés par la Grande Chambre [44] ; elle a précisé, par ailleurs, que la question n'a pas d'importance concrète lorsque la mesure préventive est « *a termine* », c'est-à-dire qu'elle est destinée à cesser après expiration d'un certain délai après la remise de la personne accusée [45].

En outre, par son ordonnance des 14-18 avril 2008, n° 109 [46], la Cour constitutionnelle a déclaré « *manifestamente inammissibile* » la question, soulevée par la Cour d'appel de Venise, de la conformité de l'article 18, al. 1, e), de la loi n° 69/2005 avec les articles 3, 11 et 117, al. 1, Const. Pour ce faire, elle a rappelé dans sa motivation l'interprétation « corrective » de la norme contestée que la Grande Chambre de la Cour de Cassation a proposé dans l'arrêt du 30 janvier 2007, n° 4614, *Ramoci*.

En revanche, la solution adoptée par la Cour Constitutionnelle est tout à fait différente en ce qui concerne l'hypothèse procédurale prévue à l'article 33 de la loi n° 69/2005, lequel a été déclaré inconstitutionnel dans la mesure où il ne prévoit pas que la détention provisoire subie à l'étranger, en exécution d'un MAE, soit aussi prise en compte dans le calcul des délais prévus à l'article 303, al. 1, 2 et 3, CPP [47]. En se référant au cas analogue de la disparité de traitement à laquelle donnait lieu l'article 722 CPP comme conséquence d'une demande d'extradition avant la déclaration d'inconstitutionnalité contenue dans l'arrêt n° 253/2004, la Cour constitutionnelle a observé que la même *ratio decidendi* doit être valable *a fortiori* dans l'hypothèse prévue à l'article 33 susmentionné. A la différence de l'extradition, le nouvel instrument n'exige en effet aucune relation intergouvernementale, mais est fondé sur le principe de reconnaissance immédiate et mutuelle de la décision juridictionnelle, ce qui rend encore moins tolérable au plan constitutionnel une « disparité des garanties en ce qui concerne la durée de la détention provisoire en fonction du lieu – interne ou externe, par rapport aux frontières nationales – où la détention a été subie ».

C. Les délais pour l'acquisition de la documentation complémentaire

La nature même des délais prévus par l'article 16 de la loi n° 69/2005 pour l'obtention des renseignements et vérifications complémentaires et leur conséquence pour la décision de remise de la personne recherchée, a été soumise au contrôle de la Cour de cassation. Selon celle-ci, le délai de trente jours dans lequel l'Etat d'émission doit produire la documentation complémentaire prévue à l'article 16, al. 1, commence à courir à partir du moment où la demande parvient à l'autorité étrangère et il n'emporte

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[44] Cass., sez. VI, 7 janvier 2008, n° 331, *Charaf* ; Cass., sez. VI, 23 mars 2007, n° 12405 ; *Marchesi* ; Cass., sez. VI, 19 mars 2008, n° 12665, *Vaicekauskaite* ; Cass., sez. VI, 28 mars 2008, n° 13463, *Arnoldas* ; Cass., sez. VI, 23 avril 2008, n° 16942, *Ruocco* ; voy., aussi, Cass., sez. VI, 28 août 2008, n° 34574, *D'Orsi*.

[45] Voy. Cass., sez. VI, 27 avril 2007, n° 17810, *Imbra*.

[46] L'arrêt est publié *in Cass. pen.,* 2008, p. 3671 s., avec le commentaire de M. Cerase, « L'interpretazione conforme all'incrocio tra l'ordinamento comunitario e gli obblighi internazionali ».

[47] Corte cost., 7 mai 2008 – 16 mai 2008, n° 143.

aucune conséquence automatique, autrement dit il n'influence pas la remise de la personne qui fait l'objet de la demande [48].

C'est seulement dans l'hypothèse où un délai de trente jours ou un délai inférieur est précisé et que l'autorité étrangère en est expressément informée, qu'une fois ce délai expiré, l'autorité judiciaire italienne peut légitimement prendre une décision sur la base des documents en sa possession. Lorsqu'elle est en possession des renseignements qu'elle juge nécessaires pour prendre sa décision, elle ne sera pas obligée de rejeter la demande de remise même si les éléments documentaires exigés sous peine d'inadmissibilité restent manquants [49].

D'autre part, selon l'interprétation de la Cour de cassation, l'absence d'explications sur les faits retenus à charge de la personne, exigées par l'article 6, al. 4, a) de la loi de transposition, ne constitue pas une cause entravant la remise si les indications fournies dans le MAE [50] ou dans d'autres actes équivalents [51] suffisent pour se prononcer sur l'existence de graves indices de culpabilité (condition prévue par l'article 17, al. 4).

En ce sens, la moindre lacune du MAE n'implique donc pas nécessairement le refus de la remise : c'est à l'autorité judiciaire d'exécution qu'il revient d'apprécier si, en considérant l'infraction concrète et toutes les informations transmises, la lacune peut être considérée comme entravant réellement la remise [52].

Ainsi, par exemple, si le contrôle sur la motivation (article 17, al. 4) et sur les indices graves de culpabilité (article 18, t) peut de toute façon être effectué sur la base du MAE, la Cour d'appel n'est pas obligée d'opposer un rejet, même si l'autorité judiciaire étrangère n'a pas donné suite à la demande d'obtention de l'acte restrictif de liberté qui est à la base du mandat [53].

De la même façon, l'absence de mention des dispositions textuelles applicables (article 6, al. 4, b)), ne constitue pas une cause de refus de la remise, puisqu'il s'agit d'une documentation qui n'est nécessaire que si se posent des problèmes particuliers d'interprétation dont la solution est liée à la connaissance exacte de la norme étrangère (par exemple pour vérifier la double incrimination) [54].

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[48] Cass., sez. VI, 31 mars 2008, n° 13463, *Lubas Arnoldas* ; Cass., sez. VI, 23 avril 2008, n° 16942, *Ruocco* ; Cass., sez. F. 28 août 2007, n° 33633, *Bilan*.

[49] Cass., sez. un., 30 janvier 2007, n° 4614, *Ramoci* ; Cass., sez. VI, 26 octobre 2007, n° 40412, *Aquilano*, concernant un cas où la copie de la mesure restrictive de la liberté personnelle et la relation des faits retenus à charge de la personne, n'avaient pas été envoyés dans le délai fixé, Cass., sez. VI, 21 juin 2007, n° 25420, *Szekely*.

[50] Cass., sez. VI, 28 avril 2006, n° 14993, *Arioua* ; Cass., sez. VI, 28 juin 2007, n° 25421, *Iannuzzi* ; voy., aussi, Cass., sez. VI, 4 juillet 2008, n° 28139, *Luongo*, selon laquelle l'article 6, al. 4, a), ne doit pas être interprété dans un sens formel, mais dans le sens que la documentation transmise par l'autorité de l'Etat d'émission doit contenir les éléments exigés par la norme aux fins de l'acceptation de la demande de remise, éléments qui peuvent être contenus dans n'importe quel acte provenant de cette autorité.

[51] Cass., sez. VI, 18 juin 2007, n° 24771, *Porta*.

[52] Cass., sez. VI, 21 novembre 2006, n° 40614, *Arturi*, selon laquelle, dans l'hypothèse seulement d'une absence de confirmation, l'autorité judiciaire d'exécution peut décider de rejeter la demande.

[53] Cass., sez. VI, 23 janvier 2008, n° 4054, *Vasiliu*.

[54] Cass., sez. VI, 10 avril 2008, n° 17650, *Avram*.

Enfin, la défectuosité éventuelle du MAE ne détermine pas en soi la nullité, si l'invalidité est insignifiante ou inapte à se répercuter sur la validité des actes successifs [55].

D. La question des garanties du « procès équitable »

En ce qui concerne la question des garanties constitutionnelles sur le « procès équitable » (article 2, al. 1, b) de la loi n° 69/2005), la Grande Chambre de la Cour suprême [56] a limité en général l'incidence des clauses de sauvegarde des principes constitutionnels nationaux contenues dans la loi de transposition aux principes « communs » consacrés par l'article 6 UE.

Dans cette perspective, elle a précisé que ce qui compte c'est, surtout, le respect des principes du « procès équitable » tels que définis par les chartes supranationales, et en particulier les principes repris à l'article 6 de la CEDH, auxquels, du reste, la formulation actuelle de l'article 111 de la Constitution italienne se réfère expressément.

Il s'ensuit que l'article 2, al. 1, b), de la loi n° 69/2005 impose au juge national de vérifier que les droits fondamentaux et les principes du procès équitable aient été respectés par l'Etat d'émission ; la portée de cette vérification est toutefois limitée vu que les ordres juridiques des EM font indissolublement partie d'un espace judiciaire commun, construit par référence aux droits fondamentaux consacrés par la CEDH et insérés dans le droit de l'Union européenne par l'article 6, par. 2, UE.

Ce n'est donc pas un élément relevant pour décider de la remise, que l'ordre juridique de l'Etat d'émission présente des garanties qui peuvent apparaître moins satisfaisantes que celles de l'ordre italien en ce qui concerne les dispositions spécifiques qui s'inspirent des principes de l'oralité des débats et du contradictoire [57]. On ne peut pas non plus en déduire des vices de procédure devant l'autorité judiciaire de l'EM d'émission, exception faite des violations des droits minimaux de l'accusé, prévus à l'article 6 de la CEDH [58]. A cet égard, par exemple, le droit de recours, même devant la Cour de cassation, satisfait au droit à un double degré de juridiction en matière pénale, prévu à l'article 2 du protocole n° 7 de la CEDH [59]. Et on ne considère pas comme contraire aux droits fondamentaux le MAE émis sur la base d'un arrêt de condamnation ayant utilisé comme preuve des prélèvements sanguins acquis sans le consentement de la personne accusée [60]. Enfin, dans le cas où la demande de remise repose sur une décision de condamnation rendue par défaut, sans aucune garantie de contradictoire ou de défense, le motif de refus prévu à l'article 18, g) n'est pas pris en considération si l'Etat d'émission garantit à la personne condamnée le droit

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[55] Cass., sez. VI, 11 septembre 2008, n° 35288, *Filippa*.

[56] Cass., Sez. Un., 30 janvier 2007, n° 4614, *Ramoci*.

[57] Cass., sez. VI, 3 mai 2007, n° 17632, *Melina*, in *Cass. pen.,* 2008, p. 2929, avec le commentaire de E. Aprile, « Sull'esecuzione dei mandati di arresto europei, emessi da autorità giudiziarie di altri Paesi dell'UE », p. 2932 et s.

[58] Cass., sez. VI, 10 décembre 2007, n° 46845, *Pano*.

[59] Cass., sez. VI, 12 février 2008, n° 7812, *Tavano* ; Cass., sez. VI, 12 février 2008, n° 7813, *Finotto*.

[60] Cass., sez. VI, 26 septembre 2008, n° 36995, *Dicu*.

de demander, par opposition, une nouvelle procédure de jugement en respectant le contradictoire et les droits de la défense [61].

E. La remise du citoyen italien

Sur la remise aux fins de poursuite d'un citoyen italien (ou d'un résident), la disposition contenue à l'article 19, al. 1, c), de la loi n° 69/2005, correspond à l'article 5, par. 3, de la DC MAE qui prévoit que la remise peut être subordonnée à la condition que le citoyen ou le résident de l'Etat d'exécution « (…), après avoir été entendu, soit renvoyé dans l'Etat membre d'exécution afin d'y subir la peine ou la mesure de sûreté privatives de liberté qui serait prononcée à son encontre dans l'Etat membre d'émission ».

Du reste, la traduction italienne du terme anglais « *heard* » (en français « entendue ») par le terme « *ascoltata* » – aussi bien dans la version italienne du texte de la décision-cadre que dans la loi de transposition – a fait l'objet d'une « lecture » divergente par la jurisprudence, selon laquelle la loi a entendu se référer par cette expression à l'« épuisement du jugement » à la charge de la personne requise, et non pas simplement à son audition (« *audizione* ») [62].

De plus, contrairement à ce qui est prévu à l'article 18, al. 1, r) – qui concerne le refus de la remise aux fins « de punir » un citoyen italien, pourvu que la Cour d'appel décide de l'exécution de la peine en Italie, « conformément à son droit interne » [63]–, l'article 19, al. 1, c), ne concerne pas seulement le citoyen italien, mais tout résident en Italie.

La doctrine a souligné le manque de coordination entre les deux dispositions précitées (l'article 18, al. 1, r) et l'article 19, al. 1, c)), et la différence partielle de la loi de transposition par rapport à la décision-cadre, en mettant en évidence la référence problématique à la « conformité au droit interne » qui semble envisager, à son tour, l'applicabilité du cadre normatif déterminé par les articles 731 et s. CPP, relatifs aux conditions prévues par l'ordre procédural interne relatives à la reconnaissance de sentences pénales étrangères selon les accords internationaux [64].

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[61] Cass., sez. VI, 30 janvier 2008, n° 5400, *Salkanovic* ; Cass., sez. VI, 30 janvier 2008, n° 5403, *Brian*.

[62] Cass., sez. VI, 28 février 2007, n° 9202, *Pascetta* ; Cass., sez. VI, 21 mars 2007, n° 12338, *Compagnin*. Dans le même sens, voy. E. Selvaggi, « Le prime applicazioni del mandato d'arresto europeo e le prime pronunzie giurisprudenziali », Relazione tenuta al Convegno del C.S.M. (Formazione decentrata) su *Il mandato d'arresto europeo: prime applicazioni. Il ruolo di Eurojust*, Milan, 6 février 2006, p. 16 et s., in www.csm.it.

[63] Sur l'inapplicabilité de la disposition de l'article 18, al. 1, r), au résident étranger, voy. Cass., sez. VI, 16 avril 2008, n° 16213, *Badilas*, qui considère que, même si la norme de transposition n'est pas conforme à la décision-cadre 2002/584/JAI, celle-ci ne peut pas justifier une interprétation *contra legem* par le juge national.

[64] Voy. E. Selvaggi, G. De Amicis, *La legge sul mandato d'arresto europeo tra inadeguatezze attuative ed incertezze applicative, op. cit.*, p. 1817 ; G. Iuzzolino, « La decisione sull'esecuzione del mandato d'arresto europeo », *in* M. Bargis et E. Selvaggi (éd.), *Mandato d'arresto europeo,* Turin, Giappichelli, 2005, p. 300 et s.

Les conditions et les critères qui devraient guider la décision de la Cour d'appel sur l'exécution de la condamnation en Italie, ne semblent donc pas fixés [65].

Il y a également un doute quant à la nécessité de se référer au système parallèle prévu par la convention de Strasbourg sur le transfèrement des personnes condamnées, ou sur la question de savoir si la DC MAE est la base juridique adéquate pour la « prise en charge », selon les hypothèses différentes, déjà esquissées, de l'exécution de la peine infligée à l'étranger ou du « re-transfèrement » de la personne condamnée (dans le cas de remise pour l'exercice de poursuites).

En effet, les problèmes découlent, d'une part, de l'applicabilité douteuse du mécanisme interne prévu par l'article 731 CPP aux fins d'assurer cette exécution, car cette disposition se greffe nécessairement sur un accord international en la matière et, d'autre part, de la difficulté de recourir à la convention de Strasbourg du 21 mars 1983 sur le transfèrement des personnes condamnées [66], car dans le cas du MAE il ne s'agit pas de transférer une exécution de l'étranger, et l'expression du consentement de la personne condamnée n'est pas prévue.

Les lacunes de la législation italienne au sujet des modalités d'exécution de la peine en Italie ont donné lieu à des interprétations divergentes dans la jurisprudence. Dans un cas [67], la Cour de cassation a observé que le pouvoir d'évaluation de la Cour d'appel est lié au respect des normes et des conventions internationales en vigueur, qui ne sont ni modifiées ni abrogées par la législation sur le MAE – il s'ensuit que les dispositions de transposition de la convention sur le transfèrement des personnes condamnées, qui imposent des conditions au transfèrement d'un Etat membre vers un autre, s'appliquent. Mais, d'autres cas, tout en confirmant la nécessité que l'exécution soit subordonnée au consentement de l'intéressé, la Cour a souligné la particularité de la réglementation de l'exécution de la sentence étrangère propre au MAE, qui se fonde sur le principe de reconnaissance mutuelle des décisions pénales [68]. En effet, suivant ladite orientation jurisprudentielle, l'initiative n'appartient pas au ministre de la Justice, mais à la Cour d'appel chargée de la procédure relative au MAE qui n'est conditionnée que par l'« accord international » constitué par la décision-cadre elle-même : la décision étrangère ne doit pas être « reconnue » formellement, car son caractère exécutif découle de façon directe de la loi interne de transposition de la décision-cadre, avec application « par analogie » des critères généraux de détermination

[65] Voy. à cet égard, M. Pisani, « « Reinserimento » del condannato e cooperazione giudiziaria internazionale », *Riv. it. dir. proc. pen.,* 2008, p. 529 et s., qui soutient que dans l'exposé des motifs de la proposition de décision-cadre présentée par la Commission européenne le 19 septembre 2001 il était déjà spécifié, en premier lieu, que l'intérêt de la personne est le seul critère dont on doit tenir compte et que le « consentement de l'intéressé » est nécessaire pour une meilleure réinsertion sociale de la personne en cause, d'après la convention de Strasbourg sur le transfèrement des personnes condamnées et l'accord de 1987, textes qui étaient expressément repris par l'exposé des motifs pour que les Etats membres puissent s'en inspirer dans la mise en œuvre du principe de réinsertion de la personne condamnée.

[66] L'Italie l'a ratifiée par la loi 25 juillet 1988, n° 334.

[67] Cass., sez. VI, 6 mars 2007, n° 10544, *Foresta*.

[68] Cass., sez. VI, 10 décembre 2007, n° 46845, *Pano* ; Cass., sez. VI, 12 février 2008, n° 7812, *Tavano*.

de la peine fixés par l'article 735 CPP sur la reconnaissance d'une sentence étrangère, aux fins de la formation d'un titre exécutif valide dans l'Etat italien.

A cet égard, toutefois, on remarquera une hésitation ultérieure de la jurisprudence de la Cour de Cassation qui, en se prononçant de nouveau à propos des modalités d'exécution de la peine, n'a pas fait référence aux dispositions prévues à l'article 735 CPP, mais aux principes généraux prévus par la convention européenne sur le transfèrement des personnes condamnées du 21 mars 1983, dans la partie qui règle les effets de l'exécution dans l'Etat d'origine de la personne condamnée. Il s'ensuit que, par rapport à la détermination de la sanction, on doit appliquer le régime de la « continuation » de l'exécution de la peine prévu à l'article 10, par. 1, de la convention, concernant laquelle l'Italie a choisi conformément à l'article 3, par. 3, l'option prévue à l'article 9, par. 1, a), de la convention [69].

Concernant l'appréciation par la Cour d'Appel de la demande de remise d'un citoyen italien comme prévu à l'article 18, al. 1, r), la Cour de Cassation a affirmé que la première règle applicable est celle qui exclut que le citoyen italien, faisant l'objet d'un MAE émis aux fins d'exécution d'une condamnation, puisse subir la peine de détention à l'étranger, à moins qu'il ne fasse une demande explicite et précise d'exécution de la peine dans l'Etat étranger qui a demandé la remise. En ce sens, l'évaluation par la Cour d'Appel quant à l'exécution en Italie de la peine étrangère – à la différence de ce que la Cour de Cassation avait précédemment établi [70] – se matérialise par une décision de nature « obligatoire » et non « discrétionnaire », qui doit nécessairement tenir compte de la demande, éventuellement formulée par le citoyen, d'exécution de la peine en Italie, car la détermination du lieu d'exécution de la peine (pour le MAE émis soit aux fins de poursuite, soit aux fins d'exécution) est « influencée » par les indications fournies par l'intéressé (qui pourrait, pour différentes raisons, préférer exécuter la peine dans l'Etat d'émission plutôt qu'en Italie) [71].

Enfin, on doit observer que dans un but d'efficacité de la disposition de l'article 19, al. 1, lettre c), de la loi n° 69/2005, la jurisprudence a clarifié le contenu de la notion de résidence, en affirmant qu'il ne suffit pas de démontrer que l'intéressé a sa demeure habituelle en Italie, mais aussi qu'il a l'intention de s'y établir pour une

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[69] Cass., sez. VI, 26 mai 2008, n° 22105, *Tropea*, qui réaffirme, d'ailleurs, les principes de la « force exécutoire directe » de la décision étrangère de la loi interne de transposition de la décision-cadre et de la nécessité de tenir compte du choix que la personne intéressée peut exprimer quant au lieu d'exécution de la peine. Sur ce sujet, voy. M. Pisani, « « Reinserimento » del condannato e cooperazione giudiziaria internazionale », *op. cit.*, p. 530 et s., qui soutient que, malgré le silence du législateur italien, l'engagement à exécuter la peine en Italie, « conformément au droit interne », peut être réalisé par analogie, en même temps que la décision de refus de la remise, avec le titre I (« Dispositions d'application de la convention sur le transfèrement des personnes condamnées ») de la loi 3 juillet 1989, n° 257, et notamment des articles 1, al. 2, 2, 3 et 4, al. 1.

[70] Cass., sez. VI, 6 mars 2007, n° 10544, *Foresta*.

[71] Cass., sez. VI, 16 juillet 2008, n° 30018, *Zurlo*, en vertu duquel la volonté de la personne concernant le lieu d'exécution de la peine peut être manifestée même devant la Cour de Cassation, dans la phase du recours, car il n'y a pas d'obstacles procéduraux ; voy., aussi, Cass., sez. VI, 10 décembre 2007, n° 46845, *Pano*.

certaine période [72]. Il faut donc un enracinement réel et non improvisé de l'étranger sur le territoire italien, où il a établi de manière suffisamment continue le siège principal, éventuellement non exclusif, de ses intérêts affectifs, professionnels ou économiques.

La notion de résidence telle qu'entendue par la Cour de Cassation est donc, d'une part, liée à l'assimilation, opérée par la norme interne, de la catégorie du résident étranger au statut du citoyen et, d'autre part, elle ne s'éloigne pas de l'interprétation que la Cour de justice a récemment proposée relativement au domaine d'application du motif de non-exécution facultative prévu à l'article 4, par. 6, de la décision-cadre. Le juge communautaire retient, en effet, que les termes « réside » et « demeure », auxquels la disposition susmentionnée fait référence, visent respectivement la situation dans laquelle la personne qui fait l'objet d'un MAE a établi sa résidence réelle dans l'Etat membre d'exécution et celle dans laquelle la personne, à la suite d'un séjour stable d'une certaine durée dans cet Etat, a acquis des liens de rattachement avec cet Etat d'un degré similaire à ceux résultant d'une résidence [73].

F. Vers un principe de proportionnalité dans l'exécution des demandes de remise ?

Un autre aspect problématique souligné par la jurisprudence est celui du recours fréquent aux formes de la procédure passive de remise pour l'exécution de mandats d'arrêt relatifs à des infractions mineures, ou présentant un degré de danger social très réduit, ou de mandats émis pour des infractions qui, même si elles tombent formellement dans le champ d'application du MAE, sont sanctionnées dans l'Etat d'émission par des peines trop lourdes par comparaison aux peines prévues pour des infractions semblables dans l'EM d'exécution. Au-delà d'une éventuelle inégalité de traitement de situations comparables à l'intérieur du territoire dans une perspective *de iure condendo* se pose le problème de l'introduction éventuelle, à l'instar des critères généraux et objectivement préétablis au niveau européen, d'une exigence de respect du principe de nécessité et du principe de proportionnalité dans le recours aux mesures

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[72] Cass., sez. VI, 28 avril 2008, n° 17643, *Chaloppe*, qui considère, en outre, inefficace, en soi, le seul certificat de résidence, en cas d'éléments contraires significatifs. ; dans le même sens voy., aussi, Cass., sez. VI, 19 mars 2008, n° 12665, *Vaicekauskaite*.

[73] CJ (Grande Chambre), 17 juillet 2008, aff. C-66/08, *Kozlowski*, qui aux fins de l'application de la disposition normative caractérisée par le terme « demeure » requiert l'appréciation globale de plusieurs éléments objectifs, au nombre desquels figurent, notamment, la durée, la nature et les conditions du séjour, ainsi que les liens familiaux et économiques que la personne entretient avec l'Etat membre d'exécution. A cet égard, voy. les observations que nous partageons de E. Selvaggi, « Aporie nel m.a.e. : quale la base giuridica per il trasferimento dell'esecuzione della pena nel caso del cittadino ? », *Cass. pen.*, 2008, p. 4407 et s., selon lesquelles le raisonnement suivi par le juge communautaire (dont la plus grand partie est centrée sur l'importance particulière accordée à la possibilité d'accroître les chances de réinsertion sociale de la personne recherchée, à l'expiration de la peine à laquelle cette dernière a été condamnée), semble confirmer l'idée que la remise des personnes recherchées résulte de la combinaison entre le système de remise aux fins d'exécution et celui du transfèrement des personnes condamnées, réglé par la convention de Strasbourg de 1983.

procédurales restrictives de la liberté personnelle, dont l'adoption et l'exécution supposent des ressources matérielles, personnelles et de gestion considérables.

Du reste, une clause de proportionnalité, même si elle ne figure pas parmi les motifs de non-reconnaissance ou de non-exécution, a été expressément prévue dans la décision-cadre relative au mandat européen d'obtention de preuves tendant a recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales (considérant n° 11 et article 7 a) [74].

8. Perspectives *de iure condendo*

Enfin, dans le cadre d'une perspective *de iure condendo*, il est opportun de souligner les nouveautés importantes en matière de rapports juridictionnels avec les autorités étrangères qui sont contenues dans le projet de loi de délégation (*legge-delega*) au Gouvernement de la République aux fins de l'adoption du nouveau Code de procédure pénale [75].

En effet, dans le projet de loi de délégation, des lignes directrices précises sont énoncées afin de consacrer dans le corps du Code de procédure pénale les principes directeurs du processus d'adaptation normatif nécessaire pour la mise en œuvre du principe de reconnaissance mutuelle des décisions judiciaires dans les rapports avec les autres Etats membres de l'UE.

De cette façon, commence à cheminer l'idée d'une véritable « réserve de code », c'est-à-dire d'un noyau fondamental de règles [76] – destiné à prévaloir sur les sources normatives du même degré qui n'introduisent pas de dérogations expresses – visant

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[74] Voy. *JO*, n° L 359, 30 décembre 2008, p. 72. A cet égard, pour d'autres références bibliographiques, voy. G. De Amicis, « Il mandato europeo di ricerca delle prove: un'introduzione », *Cass. pen.*, 2008, p. 3033 et s., et également les commentaires de S. Allegrezza, « L'armonizzazione della prova penale alla luce del Trattato di Lisbona », *ibid.*, 2008, p. 3882 et s. et de R. Belfiore, « Il mandato europeo di ricerca delle prove e l'assistenza giudiziaria nell'Unione Europea », *ibid*., 2008, p. 3894 et s.

[75] Ce projet a été récemment rédigé par la Commission pour la réforme du code de procédure pénale présidée par le prof. G. Riccio, instituée près le ministère de la Justice et désignée par décret ministériel du 27 juillet 2006.

[76] Les principales lignes directrices du cadre normatif en voie de définition peuvent être résumées comme suit : a) la transmission directe des décisions dont la reconnaissance est demandée entre les autorités judiciaires intéressées ; b) la correspondance directe entre les autorités compétentes des Etats membres de l'UE, même aux fins de transmission de la documentation, des vérifications complémentaires et des autres renseignements nécessaires pour l'exécution des décisions qui font l'objet de la reconnaissance mutuelle ; c) l'extension de la reconnaissance des décisions judiciaires même aux fins de l'exécution qui s'ensuit − à l'étranger, ou dans le territoire de l'Etat – à l'égard des personnes morales ; d) la plus haute priorité donnée à l'adoption des décisions sur la reconnaissance des mesures à exécuter dans le territoire de l'Etat, de façon à assurer rapidité et efficacité aux procédures concernées ; e) la possibilité d'exécuter les décisions judiciaires des autres Etats de l'UE même si le fait ne constitue pas une infraction au regard de la loi nationale ; f) l'impossibilité d'effectuer un contrôle sur le fond de la décision judiciaire qui fait l'objet d'une demande de reconnaissance, sous réserve du respect des principes fondamentaux de l'ordre juridique ; g) la prévision de voies de recours, qui n'ont pas généralement d'effet suspensif, contre la décision d'exécution de la décision judiciaire faisant l'objet d'une demande de reconnaissance.

à garantir unité et cohérence d'orientation dans la production normative d'adaptation du système procédural aux obligations relatives à la reconnaissance mutuelle déjà assumées et à assumer à l'avenir.

Future of mutual recognition in criminal matters in the European Union: Lithuania

Gintaras Švedas and Darius Mickevičius

1. Introduction

According to Lithuanian law, the Ministry of Justice is responsible for negotiating mutual recognition instruments (both EU legal acts and other instruments such as international treaties on mutual assistance in criminal matters), as well as for drafting implementing laws.

At the negotiation stage, the Ministry of Justice has an obligation to consult with and take into consideration the opinion of the public authorities concerned (Ministry of the Interior, Prosecutor General's Office, European Law Department under the Ministry of Justice, etc.) regarding the drafts of mutual recognition instruments. Final decisions on the drafts on mutual recognition instruments are made by the Government after the approval of the Committee on European Affairs of the Seimas (the Parliament).

The national legal acts implementing mutual recognition instruments are drafted by the Ministry of Justice or a special working group. The Ministry of Justice must consult with and take into consideration the opinion regarding the draft of the public authorities concerned (Ministry of the Interior, Prosecutor General's Office, European Law Department under the Ministry of Justice, etc.). Such consultations are possible (but not compulsory) also with the courts (for example, Supreme Court of Lithuania or Court of Appeal of Lithuania) and judges and scholars of law. Consultations with the abovementioned institutions are not always effective for various reasons (for example, no knowledge of foreign languages, lack of time, lack of experience in work of this type, etc.). Thus the Ministry of Justice often prefers carrying out consultations with scholars of criminal law and criminal procedure. Decisions concerning such draft laws are made by the Government and submitted to the Seimas. Traditionally,

such draft laws are discussed by the Committee on Legal Affairs, the Committee on European Affairs, as well as the Committee on Foreign Affairs of the Seimas.

Lithuania has so far implemented three MR instruments:

1) Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [1] (further on – the FD on the EAW) by Law amending Criminal Code no. IX-2169 of 27 April 2004 and Law amending Code of Criminal Procedure no. IX-2170 of 27 April 2004 [2];
2) Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence [3] (further on – the FD on freezing orders) by Law amending Code of Criminal Procedure no. X-1236 of 28 June 2007 [4];
3) Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [5] (further on – the FD on financial penalties) by Law amending Code of Criminal Procedure no. X-1368 of 13 December 2007 [6].

A draft law has been prepared to implement Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [7]. However it has not yet been adopted by the Seimas.

Legal acts of Lithuania do not define the contents of the principle of mutual recognition in criminal matters. It should be noted that the theory of criminal law and criminal procedure does not attribute any major importance to the common definition of the principle of mutual recognition. Traditionally, the principle of mutual recognition in criminal matters in Lithuania is understood as giving effect to a (pre-trial or final) decision outside the State in which it has been rendered either by attaching to it the legal effects foreseen for it by criminal (procedural) law of the issuing State or by taking it into account in order to make it have the effects foreseen by the criminal law of the executing State. According to the opinion of practitioners, in particular judges, this principle may also be explained as meaning that, for the purposes of strengthening the area of freedom, security and justice and fighting crime on the national and the EU level more effectively in accordance with the principles of mutual trust [8], of assistance, respect and reciprocity, judgments and decisions of the

[1] *OJ*, no. L 190, 18 July 2002, p. 1.
[2] Zin., 2004, no. 72-2492 and Zin., 2004, no. 72-2493, come into force on 1 May 2004.
[3] *OJ*, no. L 196, 2 August 2003, p. 45.
[4] Zin., 2007, no. 81-3312, come into force 21 July 2007.
[5] *OJ*, no. L 76, 22 March 2005, p. 16.
[6] Zin., 2007, no. 140-5748, come into force on 1 March 2008.
[7] *OJ*, no. L 328, 24 November 2006, p. 59.
[8] Mutual trust of the judicial institutions of Member States in their cooperation in criminal matters in practice is understood as: (a) trust of one Member State in the justice system of the other State; (b) consent that citizens of one Member State could be subject to the criminal and criminal procedure laws in force in the other Member State, even if the outcome of their application would be different from that resulting from the application of national laws.

competent authorities of one Member State in criminal matters shall be recognised and enforced in another Member State without questioning the grounds and legitimacy of such judgments or decisions [9].

Nevertheless, in reality there is no absolute principle of the MR either in the instruments of the EU or in the implementing legislation of the Member State. In fact, EU and national legislation allow a Member State to establish certain grounds to refuse the recognition or execution of the foreign judgments and decisions in its own territory, as well as the conditions and procedures to be followed in enforcing such judgements and decisions. Lithuania is not an exception as it has made use of most of the possible restrictions to the aforementioned principle and in some cases has even added some additional limitations. This will be elaborated further in the article.

Practical application of the separate MR instruments differs in Lithuania. Only the surrender of persons under the EAW to and from Lithuania is taking place extensively (see Table 1). By comparison, the Prosecutor General's Office has not yet issued any freezing orders and has so far received only one freezing order (from Sweden) [10]. The provisions on the recognition and execution of financial penalties are also yet to be widely applied.

Scientific research [11] shows that, out of all the EAWs issued in the Republic of Lithuania within the time period from 1 May 2004 to 31 December 2006, twenty-

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[9] Some citation from relevant court practice is noteworthy for the purposes of illustration. For example, ruling no. 1N-36/2007 of the Court of Appeal of Lithuania of 30 August 2007, whereby J. M. was surrendered to Hungary, noted that "paragraph 10 of the Preamble of the FD on the EAW states that the mechanism of the EAW is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 6 EU, determined by the Council pursuant to Article 7(1) EU with the consequences set out in Article 7(2) thereof. Such circumstances have not been identified and the implementation of the mechanism of the EAW has not been suspended". In another ruling no. 1N-1/2008, dated 8 January 2008, whereby A. D. was surrendered to Estonia, the Court of Appeal of Lithuania holds that "differently to requests for extradition, it is not required to provide the information substantiating the accusation in case of requests to surrender under the EAW. Competent judicial authorities of the executing State have to trust the information received from the issuing judicial authorities and believe that it has been substantiated by specific data of the criminal case file. Therefore, the claims contained in the request expressed during the court hearing by A. D. to check the case information on the amount of narcotic substances and the facts of the Russian visa validity, as well as the requests of the defence counsel to produce thorough evidence of guilt shall be refused".

[10] Later, a legal assistance request on the basis of the 1959 European Convention on Mutual Assistance in Criminal Matters was received for the performance of related criminal procedure actions. No problems were encountered during the execution of the freezing order and the subsequent request for legal assistance.

[11] A. Čepas, G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Asmenų, įtariamų padarius nusikalstamą veiką, išdavimas baudžiamajam persekiojimui (ekstradicija, perdavimas Tarptautiniam baudžiamajam teismui arba pagal Europos arešto orderį)* [*International legal assistance in criminal matters. Surrender of persons suspected of having committed offences for the purposes of criminal prosecution (extradition, transfer to the International Criminal Court or European Arrest Warrant*)], Vilnius, Registrų centras, 2008,

eight have resulted in final court judgments (10 in 2004; 10 in 2005; 8 in 2006). These EAWs have been sent by the Republic of Lithuania to eight States: Spain (11), United Kingdom (6), Germany (5), Belgium (2), Czech Republic (1), Sweden (1), Latvia (1) and The Netherlands (1). The persons surrendered to the Republic of Lithuania under these EAWs have been sentenced for 17 different criminal offences, of which 10 persons for robbery (para. 1 of Art. 180 of the Criminal Code (further on CC); 4 persons for theft (para. 2 of Art. 178 of the CC); 4 persons for swindling (para. 1 of Art. 182 of the CC); and 4 persons for document forgery or use of a forged document (para. 1 of Art. 300 of the CC); 3 persons for infringements of public order (para. 1 of Art. 284 of the CC), 1 person for murder (para. 1 of Art. 129 of the CC); 1 person for property destruction or damage (para. 1 of Art. 187 of the CC), etc.

Table 1. Statistical information on the application of the EAW in Lithuania

	2004 [12]	2005 [13]	2006 [14]	2007 [15]
Number of EAWs issued	264	500	538	316
Number of persons transferred to Lithuania under an issued EAW	33	69	57	60
Number of EAWs received	21	36	28	42
Number of persons surrendered to other EU MSs under an issued EAW	5	27	25	18

Out of 159 persons surrendered to Lithuania, 28 cases have resulted in *final* court judgment (it means no appeal or cassation was possible in these cases): they have been sentenced to imprisonment (10 persons), fines (8), detention (2), imprisonment with deferred execution thereof (1, Art. 75 of the CC). Four persons were released from criminal liability as a result of conciliation between the offender and the victim (Art. 38 of the CC); the pre-trial investigation in respect of 3 persons has been discontinued due to the statute of limitations (Art. 95 of the CC). The others surrendered persons

p. 86-87. G. Švedas, *Kai kurios asmens perdavimo pagal Europos arešto orderį baudžiamajam persekiojimui teorinės ir praktinės problemos* [*Certain theoretical and practical issues of surrending persons for criminal prosecution under the European Arrest Warrant*], Teisė, Vilniaus universiteto leidykla, 2008, no. 66(1), p. 68-69.

[12] Numbers based on the document "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant" (doc. 7155/4/05 REV 4 COPEN 49 EJN 15 EUROJUST 15).

[13] Numbers based on the document "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2005" (doc. 9005/5/06 REV 5 COPEN 52 EJN 12 EUROJUST 21).

[14] Numbers based on the document "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2006" (doc. 11371/5/07 REV 5 COPEN 106 EJN 20 EUROJUST 39).

[15] Numbers based on the document "Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2007" (doc. 10330/3/08 REV 3 COPEN 116 EJN 44 EUROJUST 58).

at that time were still awaiting final judgment in the first instance, appeal or cassation instances, or they were surrendered for the enforcement of the sentence.

Scientific research [16] also shows that, during 2005 and the first six months of 2006, the Republic of Lithuania has taken over the execution of custodial sentences imposed by courts of other States on 57 citizens of the Republic of Lithuania. Lithuanian courts have examined compatibility of the sentences imposed by foreign States with the requirements of criminal and punishment enforcement laws of the Republic of Lithuania. Most of the motions have been examined regarding the compatibility of the sentences imposed by courts of the Kingdom of Sweden (9), Czech Republic (9), Republic of Latvia (9), Republic of Austria (5), Federal Republic of Germany (3) and Kingdom of Denmark (2). Adapting the sentences imposed by foreign courts to the criminal and punishment enforcement laws of the Republic of Lithuania, Lithuanian courts have left the same length of sentence, as ordered by the foreign court, to 49 convicted persons while 6 convicted persons have had their sentence time reduced and 2 have had their legal status mitigated in some other manner.

2. Grounds for refusal, conditions and other limitations restricting the scope of MR

Current MR instruments foresee a number of grounds for refusal that are related to principles of double criminality, *non bis in idem*, territoriality, etc. and on provisions on the age of criminal responsibility, statute of limitations, etc. Although some instruments group them into mandatory and optional grounds for refusal, this distinction is not strictly followed by the Lithuanian legislator, who has rearranged these groups. Furthermore, national implementing legislation has added some extra grounds for refusal that are not directly prescribed by the EU instruments but which were arguably extracted from the provisions of the preamble (e.g. human rights clause) or "the spirit" of the instrument (e.g. lack of information).

In addition, some instruments also add certain conditions which may be attached by the executing authority to a recognised decision of the issuing State. Particular attention should be paid to some of these grounds and other limitations.

A. Double criminality

Lithuanian implementing legislation has made use of a limited double criminality principle in the case of all implemented MR instruments. The provisions of these instruments have been introduced as amendments to the CC and the Code of Criminal Procedure (further on CCP). All provisions on dual criminality have been transposed in a similar way: under Lithuanian law, foreign requests must be refused where the

[16] G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Nuteistųjų laisvės atėmimu perdavimas tolesniam bausmės atlikimui* [*International legal assistance in criminal matters. Surrender of persons for the purposes of executing the remaining custodial sentence*], Vilnius, TIC, 2007, p. 86. G. Švedas, *Lietuvos Respublikos tarptautinės sutartys dėl nuteistųjų asmenų perdavimo toliau atlikti bausmę ir jų taikymo Lietuvos teismų praktikoje problemos* [*The main requirements of the treaties of the Republic of Lithuania concerning transfer of sentenced persons and problems of their implementation in the judicial practice in Lithuania*], Teisė, Vilniaus universiteto leidykla, 2007, no. 65, p. 121.

acts committed are not regarded as crimes or misdemeanours under the CC except for the cases when a request is based on "32 listed crimes". National laws do not translate or otherwise explain the "listed crimes". They merely provide for a direct reference to a specific provision of the Framework Decisions and leave its interpretation to judges or other competent institutions. For example, rules on dual criminality of the FD on the EAW have been implemented in Article 9(1) of the CC in this way: "(...) Any citizen of the Republic of Lithuania or a foreigner shall not be surrendered to the country issuing the European Arrest Warrant if: (…) 5) the committed acts are not regarded as crimes or misdemeanours under this Code except for the cases when the European Arrest Warrant is issued for the criminal act provided in paragraph 2 of Article 2 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States whereas criminal laws of the State issuing the European Arrest Warrant foresee a custodial penalty of no less than three years for this criminal act".

When applying these provisions, the prosecutor or court does not normally check dual criminality if the offence is on the list of the 32 criminal offences. They perform only a formal verification that no mistakes have been made (for example, when the offence is on the list of 32 criminal offences although it should not have been included in the aforementioned list given the description of the offence). In cases when a question as to whether a crime was rightly "ticked" as a "listed offence" by the issuing authority arises, the executing authority may ask for additional information from the issuing authority. The omission of the issuing authority may result in the non-execution of the foreign decision on the grounds of "not enough information". Accordingly, the issuing authority should always provide enough information so that the executing authority is convinced that the offence for which the EAW or other MR instrument was issued corresponds to one of the "32 listed offences" as defined by the law of the issuing country.

The question as to whether the crime was reasonably placed in a certain category is not elucidated in national legal provisions. However, it may be presumed that, if the executing authority finds out that the legal description of a committed offence is manifestly incorrect and it cannot be described as one of the categories of "32 listed crimes"; it would be forced to take a negative decision on recognition of the issued EAW or other MR instrument. Thus, in practice Lithuanian authorities usually require a full description of the offence even if it is a "listed offence". A practical example of such a situation is the case of an EAW issued by a Belgian authority. There was a box called "armed robbery" ticked in the issued EAW, although the actual legal description was organised theft under Belgian criminal legislation. A full description of the offence allowed Lithuanian authorities to consider whether the "armed robbery" box was ticked correctly. For that reason, a database containing national definitions of offences and a list of offences excluded from mutual recognition because they are not criminalised in certain Member States would be especially useful and would facilitate the verification of the dual criminality requirement, thereby expediting the process of mutual recognition.

Anyway, the refusal of the recognition and execution of a decision should only be based on such differences in substantive criminal law which lead to incompatibility with

the dual criminality requirement.It should be noted that, in the opinion of Lithuanian scholars of criminal law and criminal procedure, a dual criminality requirement is a principal precondition for mutual recognition (in terms of both pre-trial decisions and final judgments).

It is worthy of note that, on the exception of the 32 "listed offences", there is a question raised in the legal doctrine as to whether exclusion from the rule of dual criminality would be in conformity with the constitutional principles of equality of individuals before the law and their legitimate expectations. Such a question arises in two situations: if Lithuania executes an EAW, a freezing order or a financial penalty issued by another State (1) on the ground of offences which are not fully (or partly) prohibited under the Lithuanian CC, which is the case of racism and xenophobia, counterfeiting and piracy of products, illicit trafficking in hormonal substances and other growth promoters, or (2) on the ground of any other of the 32 listed criminal offences, which are defined more broadly according to the laws of the requesting State than by the Lithuanian CC. This theoretical conflict lies in the fact that Lithuania, executing any EAW, financial penalty or freezing order, would be forced to apply coercive measures (e.g. detention, property seizure or other remand measures, etc.) provided for in criminal procedure or would be obliged to enforce the financial penalty specified in the criminal law for the act, which is not prohibited in Lithuania. In other words, in cases where such an act was committed in Lithuania, the person in question would not be subject to the coercive measures laid down in the criminal law or the financial penalty specified in the criminal law.[17] This theoretical conflict with the constitutional provisions can be disproved only by the Constitutional Court. However, it has not yet heard any cases of this nature.

Accordingly, in order to properly implement the requirements of the EU legal acts and at the same time not to violate the provisions of the Constitution, it is advised to envisage criminal liability at least for the acts which are not currently prohibited in Lithuania but which are covered by the 32 crimes list, such as xenophobia, illicit trafficking in hormonal substances and other growth promoters, etc. Another option would be to negotiate an EU instrument on constituent elements of these criminal acts and then later to implement it in national law. On the other hand, even if follow-up is given to such suggestions, it is impossible to cover all possible situations. Consequently, the constitutional issue raised is still very likely to come up one day in court practice[18].

It should be noted that in the negotiations on other EU instruments, based on mutual recognition (for example, draft Framework Decision on the application of the principle of mutual recognition to custodial sentences), Lithuanian representatives

[17] G. Švedas, *Kai kurios..., op. cit.*, p. 67-68.

[18] It could be mentioned that the mass media of Lithuania some years ago provided information that France had issued an EAW for the prosecution of a citizen of the Republic of Lithuania who was suspected of having committed the offence of illicit trafficking in hormonal substances and other growth promoters, which is not considered to be a crime in Lithuania. However, the EAW was not transmitted to the Lithuanian authorities. At the moment, it is hard to predict what the judiciary's decision would be if the EAW were to be submitted to Lithuania.

were usually consistent in pursuing the position that the dual criminality requirement (at least for crimes that do not fall into the category of the 32 "listed offences") is a prerequisite for mutual recognition. Such position has reasonable grounds as the questions of a constitutional nature have not yet been solved.

B. Nationality of the culprit

One of the major achievements of the FD on the EAW was a waiver of the rule refusing the surrender of nationals. These new provisions were implemented into national law without major objection. A national or a permanent resident who is requested for prosecution purposes may be surrendered on condition that "after the court delivers a judgement in the country issuing the European arrest warrant, the person will be transferred to the Republic of Lithuania to serve the custodial sentence, if the person or the Prosecutor General's Office of the Republic of Lithuania requests so" (para. 7 of Art. 9(1) of the CC). Similarly, a national or a permanent resident who is requested for the purposes of serving a sentence may be refused to be surrendered due to the fact that Lithuania takes over the enforcement of the sentence (para. 4 of Art. 9(1) of the CC). Consequently, in most cases a national or a resident has guarantees that he/she will serve the sentence in Lithuania, at least where he/she wishes so.

However, there is a doubt expressed in the doctrine of criminal law in consideration of the manner in which the aforementioned provisions were drafted, in particular, whether they are in conformity with the requirements of Article 13 of the Constitution, according to which a citizen of the Republic of Lithuania may be surrendered only in the cases specified in the international treaties concluded by the Republic of Lithuania. Some authors claim that the FD on the EAW "specifies that it has been adopted under para. 2(b) of Article 34 EU, whereby the EU Member States have delegated to the Council of the EU the function to adopt Framework Decisions binding to the EU Member States, therefore, it is to be held that the grounds for surrendering citizens of the Republic of Lithuania under the European Arrest Warrant is an international treaty – the Treaty Establishing the European Union"[19]. Similar arguments were also upheld by the Court of Appeal of Lithuania, which has concluded in one of its rulings[20] regarding the surrender of a citizen of the Republic of Lithuania, M. M., to France under the EAW that "the surrender of persons under the European Arrest Warrant is provided for in an international treaty of the Republic of Lithuania, which has supremacy in respect of the rules of Article 226 of the Code of Criminal Procedure of the Republic of Lithuania"[21].

On the other hand, according to other scholars[22], such arguments raise certain doubts, because in cases of extradition the court directly applies the provisions of the

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[19] G. Svedas (ed. in chief), *Lietuvos Respublikos baudžiamojo kodekso komentaras. Bendroji dalis (1-98 straipsniai)* [*Commentary on the Criminal Code of the Republic of Lithuania. General Part (Articles 1-98*)], Vilnius, TIC, 2004, p. 75.

[20] Criminal case no. 1N-11/2006.

[21] A. Čepas, G. Švedas, *op. cit.*, p. 84-85.

[22] G. Švedas, *Kai kurios..., op. cit.*, p. 66.

international treaty on extradition of the Republic of Lithuania, the CC and the CCP[23], whereas, when deciding the issue of surrendering any person (including citizens of the Republic of Lithuania) under the EAW, the court in fact applies only the provisions of the CC and the CCP.

Nevertheless, the actual provisions of the CC and CCP continue to be applied as they stand and the aforementioned question of a constitutional nature can only be solved by the Constitutional Court if such a case is delivered to it.

C. Territoriality clause

As regards the FD on the EAW, the territoriality clause has been implemented as an optional ground for non-execution. It is set out in Article 9(1) of the CC as follows: "where a criminal act is committed on the territory of the Republic of Lithuania or in the sea and river vessels or aircraft flying Lithuanian flag or distinctive symbols". The territory of the Republic of Lithuania is determined by the Law on the Protection of the State Border. The Article also sets forth that a "single criminal act committed both within the territory of the State of Lithuania and abroad shall be considered as having been committed within the territory of the Republic of Lithuania, if it was commenced or completed, or forestalled in the territory of the Republic of Lithuania". The doctrine of criminal law deems that "this rule deliberately pre-programmes a clash between the criminal statutes of several States, intended to prevent the person who commits a criminal offence from avoiding criminal liability. (…) In which State criminal liability will take place depends on various circumstances as defined in the international treaties of Lithuania, for example, the citizenship of the offender or victim, the place where the evidence is, etc."[24]. As Lithuanian law of criminal procedure is based on the legality principle, according to which every offence must be prosecuted, the court must ensure that there will be criminal prosecution for the committed offence in Lithuania or in another State, as well as solve the possible conflict of jurisdiction. Accordingly, before taking a decision on the recognition or refusal of the issued EAW, issues of jurisdiction must also be taken into account.

As a rule, attention is always paid to the location of the offence. If there is no indication of the place where the offence has been committed in the EAW, such information is requested. However, this does not mean that, if the offence has been committed in the territory of Lithuania (also), the surrender of the person will be always refused. Since such ground for refusal is optional, account is taken of other circumstances of the criminal case when deciding the execution of the EAW – the

[23] It should be noted that such a practice of the courts has been held to be well-founded by the Supreme Court of Lithuania in para. 2 of the Senate's Ruling no. 42, "On the practice of courts in applying international treaties of the Republic of Lithuania and the provisions of the Criminal Code and the Code of Criminal Procedure, regulating the surrender of persons to foreign States or to the International Criminal Court" of 29 December 2003, where it emphasised that "deciding whether there are grounds and conditions to surrender the person to a foreign State (…), the Vilnius County Court shall follow international treaties, Article 9 of the Criminal Code and Article 71 of the Code of Criminal Procedure".

[24] G. Svedas (ed. in chief), *Lietuvos Respublikos...*, *op. cit*., p. 48-49.

location of accomplices, evidence, witnesses, etc.[25] Scientific research[26] shows that the territoriality clause as an optional ground for the non-execution of an EAW or other forms of mutual assistance in criminal matters is applied in very rare cases in the jurisprudence of the courts of Lithuania. It is, however, worth noting that the conflicting interests of the issuing and executing Member States (when the offence is wholly or partly committed on their territories) would undoubtedly be more easily reconciled by a new EU instrument on the conflicts of jurisdiction and the transfer of proceedings, which would *inter alia* define the jurisdictions' criteria or rules on coordination of the exercise of jurisdiction of the Member States.

As regards the FD on financial penalties, the Lithuanian legislator has chosen not to incorporate this ground for refusal into the national law. Therefore, the competent Lithuanian authorities are not in a position to refuse or recognise and execute a financial penalty due to the mere fact that the crime has been committed in whole or in part in the territory of Lithuania or in a place treated as such.

D. Grounds related to procedural differences

Differences in procedural law are not a reason not to recognise and execute a decision as long as these procedural differences do not encroach on human rights and are not against constitutional fundamental principles. Even the major structural differences of continental law and common law systems do not presuppose an automatic refusal to recognise and execute a foreign decision. It is worth noting that there is an important difference in recognition of final decisions (e.g. judgements) and non-final decisions (e.g. arrest warrants). It seems that the question of recognition of final decisions is less dependent on procedural differences between Member States.

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[25] A case law example can be given. The Court of Appeal of Lithuania, deciding the issue of refusal to surrender on optional grounds under the EAW in accordance with article 9(1) of the CC (in this case it was a criminal offence committed in the territory of Lithuania), has specified in its ruling of 3 January 2008 (1N-1/2008) the following argumentation explaining why the aforementioned optional grounds for refusal were not made use of: the material submitted under the EAW shows that swindling, of which V. J. whose surrender from Lithuania is sought is suspected, has been committed by a group of accomplices acting in two Member States. Some accomplices were active in the territory of Lithuania, others – in the territory of Latvia. The offence in question has been completed in the territory of Latvia, because it was there that the consequences of the offence have occurred. Criminal proceedings have been instituted due to this offence in Latvia; it is there that all victims reside, the majority of whom are of elderly age. Surrender of the citizen of the Republic of Lithuania or any foreigner can, taking into consideration the facts of the case and the interests of justice, be refused to the issuing State if the criminal offence has been committed in the territory of Lithuania. The place where the offence was committed shall be considered to be in Latvia. The facts contained in the EAW show that the main aspect of the swindling for which prosecution is sought is its dangerous consequences – the money of the victims appropriated deceitfully. The mechanism by which this criminal offence was committed shows that the persons suspected of swindling, including the person sought, have had control over the consequences and have intended the consequences to occur in Latvia.

[26] A. Čepas, G. Švedas, *op. cit.* G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Baudžiamojo..., op. cit*.

It should be stressed that the CCP provides that the procedural actions not covered by the CCP can also be performed in Lithuania at the request of a foreign State if they are specified in an international treaty concluded by Lithuania and used as a legal basis to provide legal assistance. The procedural actions in this case would be performed under the procedure prescribed by the international treaty. For example, the procedural actions, which are not provided for in the CCP and which are stipulated in some MLA conventions (e.g., questioning of witnesses or experts by means of a video conference, questioning of witnesses or experts by phone, etc.), have to be performed in Lithuania according to the procedure stipulated in these conventions. Pre-trial investigation officers, prosecutors and courts (judges) must follow a specific procedure set forth in the request when performing the procedural actions or conducting the proceedings not covered by the CCP, if such procedure or proceedings do not violate the Constitution and laws and do not conflict with the fundamental principles of the Lithuanian criminal procedure.

In the legal doctrine, attention is drawn to the fact that the amendments to the CCP implementing the FD on financial penalties have introduced the provision that "a financial penalty imposed by the competent authority of the EU member state means an obligation imposed upon a natural or legal person by the court or other competent authority of the EU Member State to pay for the criminal offence committed (…)". In the opinion of some scholars [27], this provision of the CCP not only legitimises more than one potential major procedural difference, because the aforementioned financial penalties may be imposed only by the court in Lithuania, but also raises theoretical doubts as to its conformity with the Constitution, which says that "justice shall be administered only by courts in Lithuania".

E. Human rights clause

The Human rights clause is a mandatory ground for non-execution of requests under all three implemented Framework Decisions. All of them have been transposed in a similar way. For example, the human rights clause of the FD on the EAW has been implemented in Article 9(1) of the CC as follows: "Any citizen of the Republic of Lithuania or a foreigner shall not be surrendered to the country issuing the European Arrest Warrant if: 1) the surrender of the person would be in breach of fundamental human rights and/or freedoms; (…)". However, the human rights clause is not explained in detail. In doctrine, this rule is explained as: "it includes cases where the surrender would result in violation of the human rights and liberties, guaranteed by the Constitution or international treaties, e.g., the European Convention on Human Rights with its protocols" [28].

The CC and CCP do not provide any answer to the question of whether a Lithuanian court should or could exercise control on the procedural safeguards and the respect of the rights of defence in the issuing Member State. In the opinion of the judges, a reference to the respect of fundamental human rights in mutual recognition instruments of legal co-operation is understood as a possibility to refuse executing a

[27] The opinions of the authors of this article also part on this question.

[28] G. Svedas (ed. in chief), *Lietuvos Respublikos...*, *op. cit*., p. 76.

request if there are grounds to believe that the execution of such a request manifestly violates the safeguarding of human rights enshrined in the Constitution and in the ECHR. For instance, it would not be possible to surrender someone under the EAW, if it would endanger the life or health of the person sought, if there were apparent data that the person would be prosecuted not as a result of his/her offence, but due to his/her gender, race, religion, ethnic origin, nationality, etc. When surrendering persons under the EAW, the executing State should also make sure and have information proving that the issuing State has sufficient safeguards, provided for in procedural and substantive law to the effect that, in case the person sought is acquitted in the course of the criminal proceedings, this person would be able to exercise his/her rights to compensation for the damage inflicted by the prosecution.

It should be noted that scientific research on the EAW and extradition, transfer of criminal proceedings and transfer on sentenced persons [29] has shown that refusal to execute a request on the grounds of respect for human rights is very rare in the jurisprudence of the courts of Lithuania. Therefore, case law cannot give any answer to the aforementioned question (at least for the time being).

In the opinion of the scholars of criminal law and criminal procedure, the executing Member State should not control the procedural safeguards and respect for the rights of defence in the issuing Member State because all Member States are parties to the ECHR. Moreover, such control would in some sense defy the spirit of the EU, as only such States, which *inter alia* ensure and safeguard human rights and freedoms, can become members of the EU. On the other hand, certain cases of individuals surrendered under an EAW by the courts of Lithuania make it possible to conclude that the executing Member State's control of the procedural safeguards and respect for the rights of defence in the issuing Member State is expedient.

Scientific research [30] shows a limited number of cases where judicial cooperation was expressly and clearly subordinated to the respect for human rights, for instance, in the case of extradition that is linked with the death penalty threatening the person whose extradition is sought or in case of the transfer of sentenced persons whose health condition is not adequate to serve the remaining custodial sentence and to have treatment possibilities in the receiving State. Some of these cases concern cooperation with third countries (Russia, Belarus, etc.) but others concern EU Member States [31].

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[29] G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Nuteistųjų laisvės..., op. cit.*, p. 71-72. A. Čepas, G. Švedas, *op. cit*. G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Baudžiamojo..., op. cit*.

[30] A. Čepas, G. Švedas, *op. cit.,* p. 58-59. G. Švedas, *Tarptautinė teisinė pagalba baudžiamosiose bylose. Nuteistųjų laisvės..., op. cit.*, p. 71-72.

[31] For example, L. P. was extradited by the Republic of Lithuania to the Russian Federation only after the Prosecutor General's Office of that State had assumed obligations that the extradited person would not be subjected to capital punishment (the court of the Russian Federation has found L. P. guilty and sentenced L.P. to 17 years and 11 months of imprisonment). In another example, a citizen of the Republic of Lithuania, V. N., who had a serious disease, was taken over to serve his sentence from the Kingdom of Sweden only after the possibilities of treatment or release of the person from serving the sentence due to a serious illness in Lithuania had been clarified.

It must be noted that the mutual evaluation report on the application of the EAW in Lithuania [32] expresses doubts as to whether there is a need and a possibility for the human rights clause as a ground for refusal and recommends that Lithuanian authorities reconsider it.

F. Other "new" grounds for refusal

As mentioned above, Lithuanian implementing legislation (as well as the legislation of many other EU Member States) provides for some extra grounds for refusal that are not directly prescribed by the EU instruments but which were arguably extracted from the provisions of the preamble or "the spirit" of the instrument..

Besides the mandatory human rights clause that was discussed earlier, Article 9(1) of the CC has provided for some additional grounds for non-execution, which have not been explicitly included in the FD on the EAW. This is the case for the optional ground "where the information contained in the European Arrest Warrant is insufficient to decide the surrender and the issuing judicial authority fails to provide it within the prescribed time limit". There are also some listed grounds for refusal which have been implemented more broadly than they are formulated in the Framework Decision, e.g., not only amnesty, but also pardon, etc.

Concerning the insufficiency of information, Lithuanian courts often encounter the lack of information required to surrender under the EAW. They are baffled by the fact that significantly less information is provided (and is necessary to be provided to the court pursuant to the legislation regulating the execution of EAW) for the purposes of surrendering individuals under the EAW to other Member States than for the purposes of arresting the person prosecuted under criminal procedure in Lithuania under the CCP.

As regards the other instruments, Articles 77(2) and 365(1) of the CCP provide for two additional grounds, which have not been explicitly included in the FD on freezing orders and the FD on financial penalties: 1) mandatory human rights clause; 2) optional ground "where the documents received have not been translated into Lithuanian or English". The executing national prosecutor may decide to apply to the issuing authority for additional information and necessary translation or may decide to proceed without the translation. In fact, it is supposed that only after the issuing authority fails to respond within the set time limits, would the executing prosecutor be authorised to refuse the request.

3. Procedure

In fact, a mixed system for the implementation of mutual recognition instruments is currently applied in Lithuania. All bilateral and the absolute majority of multilateral international treaties of the Republic of Lithuania are based on a centralised procedure, since mutual legal assistance in criminal matters can be provided only through the Ministry of Justice or the Prosecutor General's Office. In case of other multilateral international treaties concluded by the Republic of Lithuania, these two institutions are

[32] Fourth round of mutual evaluations "Evaluation of the practical application of the European Arrest Warrant and corresponding surrender procedures between Member States", Report on Lithuania by Multidisciplinary Group on Organised Crime (doc. 12399/2/07 REV 2 CRIMORG 134 COPEN 121 EJN 25 EUROJUST 45 RESTREINT UE), p. 34-35.

identified as central authorities in the Lithuanian ratification laws or Seimas' resolutions through declarations of the Republic of Lithuania. For example, in the Resolution of the Seimas on the Ratification of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the Seimas has made the following reservation "(...) court documents shall be submitted to the Ministry of Justice of the Republic of Lithuania or to the Prosecutor General's Office of the Republic of Lithuania". Such a centralised approach was chosen for several reasons: (1) Lithuania is a small country and it is possible to work quite effectively in a centralised manner without losing time; (2) the Prosecutor General's Office and the Ministry of Justice have specialised units with teams of very competent prosecutors and experts that are working solely in the sphere of co-operation in criminal matters; (3) territorial prosecution agencies do not have enough skills and facilities to cope with the various EU instruments; etc.

But most recent international treaties, designed for mutual legal assistance in criminal matters, not only establish new forms of mutual legal assistance, but also lay down a decentralised system of state institutions competent to provide legal assistance in order to make international co-operation effective. Currently, there are two international treaties to which Lithuania is a party, i.e. Second Protocol to the European Convention on Mutual Assistance in Criminal Matters and the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, requiring Member States to appoint both central authorities and judicial authorities competent to request and grant mutual legal assistance directly (i.e. not through the central national authorities). Thus, the Seimas, ratifying the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, has made a declaration that:

> "1) The Ministry of Justice and the Prosecutor General's Office shall be the central authorities to perform the functions set forth in the Convention;
>
> 2) Territorial county prosecution agencies, the Court of Appeal of Lithuania, county and local courts shall be the judicial authorities to perform the functions set forth in the Convention. The Ministry of Justice and the Prosecutor General's Office shall in each single case assist in determining which judicial authority shall be competent to provide mutual assistance from a territorial perspective".

The procedure of application of the MR instruments that were introduced by Framework Decision is much more inconsistent. The implementing provisions of the FD on the EAW and the FD on freezing orders foresee a very centralised procedure both for execution and issuance of the requests, as all incoming and outgoing requests are dealt exclusively in one or two central institutions (e. g. execution of the EAW – by the Vilnius County Court and the Prosecutor General's Office; execution of freezing orders – only by the Prosecutor General's Office). On the contrary, the proceedings for the recognition and execution of the financial penalties (in future, also for confiscation orders as it is foreseen in the draft law) are decentralised. Local courts would be the ones to recognise and order the execution of financial penalties originating from abroad. The Ministry of Justice has been appointed as a central authority to help find the right local court. Since this system has just started to function, it is hard to forecast how it will work in practice.

It is difficult to determine why such incoherent procedures were established. It seems that the implementation of instruments is taken on a case by case basis, thus each time the procedure and acting authorities had to be selected depending on the practical considerations. It is worth mentioning that, as Framework Decisions are more the result of negotiations rather than conceptual development, they do not create a coherent system of transnational cooperation within the EU. Each instrument is a separate instrument and they share little in common. In the absence of a consistent structure in the EU legislation, it is difficult to build-up a coherent system in national law. For that reason it is recommendable that in future the procedures for application of all (or some) of the MR instruments could be rearranged.

It must be also noted that the implementation report of the European Commission [33], as well as mutual evaluation report [34], expressed doubts as to whether the Ministry of Justice is an appropriate body to issue an EAW and whether this is in conformity with the provisions of the Framework Decision. Accordingly, the Ministry of Justice is already planning to introduce certain amendments to the system of competent authorities and withdraw itself from it.

The Prosecutor General's Office gathers information about practical aspects relating to the application of EAWs, regularly makes annual reviews and analyses this information, makes summaries and findings, on which all prosecutors are briefed. The Prosecutor General's Office gathers and makes annual summaries of statistical information on the application of EAWs – issuance, receipt, surrender of individuals both from and to Lithuania, criminal prosecution results of the persons surrendered (judgments of conviction, discontinued pre-trial investigation, criminal offences for which such persons are sentenced, sentences imposed, ordering of surrender costs in respect of the persons surrendered).

There is no special data compiled on EU legal co-operation instruments used in individual criminal proceedings by courts. They are not recorded separately in the judicial system, at least, not in all cases. For example, the Vilnius County Court stores applications of prosecutors to surrender individuals under the EAW and court rulings to this effect separately from others. The computerised information system LITEKO is successfully used in the courts of the Republic of Lithuania, enabling the courts to compile information on cases and their course as well as on decisions and judgments, in electronic format.

4. Future prospects

It is too difficult and too early to draw weighty conclusions and provide for guidelines for the future development of the MR principle and instruments that enforce it. So far only the EAW is a "success story" as it is widely and effectively applied throughout the EU. Concerning other MR instruments, either their application in practice is very limited or they are not yet implemented or used in practice. For

[33] Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States COM (2007) 407 of 11 July 2007, p. 8; SEC (2007) 979).

[34] Fourth round of mutual evaluations "Evaluation of the practical application of the European Arrest Warrant...", *op. cit*., p. 30.

that reason it is of the utmost importance to implement all adopted EU instruments related to MR instruments, to start using them and to create effective mechanisms to evaluate how they are functioning. Good practice from the existing EAW assessment procedures should be employed; e.g. peer-to-peer evaluation, regular meetings of the EAW experts [35], a range of scientific projects, studies, etc. The following concerns should be treated only as preliminary observations lacking an analysis of the entirety of the MR instruments.

A. Issue of proportionality

Practical application of the EAW has revealed a serious problem with regard to issuing EAWs in Lithuania – neither prosecution nor the courts apply a proportionality test. The current situation is legal due to the fact that CCP establishes the principle of legality, under which the prosecutor is obliged to prosecute all criminal acts and to take all steps under the law to prosecute an offender (domestically or otherwise). In the EAW matters this principle means that prosecution or the court must issue the EAW without taking into consideration the gravity and seriousness of the crime. The court jurisprudence in Lithuania shows some "odd" examples; i.e. when an EAW was issued for the prosecution of a person who was suspected of committing the theft of a property of a value of 210 Lt (approx. 60 euro) while the costs of his transfer (transportation) from Spain amounted to 8,200 Lt (approx. 2375 euro) [36].

Furthermore, the execution of the EAW often leads to significant organisational and financial expense, which could be avoided in some cases, for example, when a person without any criminal record and no history of earlier prosecutions wishes to appear before the issuing authority or investigators of his/her own free will as soon as he/she finds out about the EAW. Such individuals offer guarantees to the executing authority that they would not avoid the criminal proceedings and prosecution (e.g., pecuniary bail) and produce reliable proof that they had not been aware of the proceedings taking place in another State. However, there are no legal procedural measures defining how to deal with such situations. There is no possibility for the EAW to be revoked by the issuing authority or for the execution of the EAW to be dropped by the executing State in cases where reliable guarantees have been provided to the effect that the person sought will appear before representatives of the issuing authority by the set date of his/her own free will. Consequently, excessive use of coercive and costly measures occasionally occurs. As Lithuanian jurisprudence shows, detention is the usual remand measure imposed in the EAW proceedings in spite of the CCP, which states that "detention may be imposed only in cases where the objectives provided (…) by this Code may not be achieved by a milder remand measure".

[35] They take place in the format of Working Party on the Cooperation in Criminal Matters, which is one of the bodies of the Council of the EU.

[36] G. Švedas, *Kai kurios..., op. cit.*, p. 70.

This issue of proportionality was on several occasions raised by Lithuanian authorities [37] and currently this question is under debate in the relevant EU bodies [38]. Anyway it seems that it should be the issuing authority that ought to perform the proportionality test when considering issuing the EAW. As it affects not only the expenses of the issuing State, but also the rights and liberties of the person in question, this issue should not be left alone to the discretion of individual states and it should be addressed on a higher level, in particular in future EU instruments.

B. Attention to the identity of a suspect

Practitioners in Lithuania and in many other EU Member States have encountered serious problems where a person being sought was not the person who was the actual culprit because of false identity documents, inaccurate work by law enforcement agencies, lack of information allowing for the person to be identified, etc.

Lithuanian prosecutors and judges note that very strict observance of the requirements of Article 8 of the FD on the EAW is very important for the operation of the principle of mutual confidence and in ensuring the rights of persons subject to prosecution. The requirements regarding the identity of the person sought and the description of the criminal offence should not only be compulsory but also extensive. For example, the first name, family name, date of birth, place of residence shall be specified with particular precision. It should be noted, in addition, that information about the education, employment of the person sought, duration of his/her stay in the issuing State, the time and reasons of departure, awareness or ignorance of the person about his/her criminal prosecution, must be provided.

Scientific research [39] shows that the photographs of suspected or accused persons are very important (especially in cases of EAW or extradition). For example, a review of the EAW issued by the Republic of Lithuania in 2004-2006 shows that in all cases there were photos attached to the 28 EAWs, in respect of which judgments had already been pronounced, but they were a few years old (3-6 years) in 3 cases or of poor quality in 4 cases. It should also be noted that the photographs attached to some EAWs issued by foreign States and executed by the Republic of Lithuania were not of good quality and that, consequently, several cases occurred in Lithuania (as well as in Latvia and Estonia) where persons arrested under an EAW were released after a certain period of time after their statements that they had not committed any criminal offences had proved to be true. The Prosecutor General of Lithuania (on behalf of the three Baltic States) informed the President of *Eurojust* about these cases and some other problems related to the execution of EAW by a letter of 3 July 2007.

C. Approximation of laws

Approximation of laws (both substantive and procedural) would undoubtedly facilitate cooperation based on mutual recognition between Member States. It was

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[37] For example, in fourth round of mutual evaluations "Evaluation of the practical application of the European Arrest Warrant...", *op. cit.*, p. 38.

[38] For example, in the meetings of the Working Party on Cooperation in Criminal Matters (Experts on European Arrest Warrant).

[39] A. Čepas, G. Švedas, *op. cit.,* p. 116-117.

already noted that approximation of the legal definitions of certain types of 32 "listed offences" would be expedient.

It should also be pointed out that, as the purpose of most of the Framework Decisions is to enhance judicial cooperation in criminal matters and abolish all formal and unnecessary obstacles hindering effective prosecution and punishment of criminals, there is a risk that such rapid development of investigation and penalisation techniques may result in weakening both national and international human rights protection standards. The circumstance that Member States could not reach agreement on the minimum standards of procedural rights in criminal proceedings in the EU sends the wrong message to national judicial authorities and EU citizens. It also undermines the objective of mutual trust.

Attention should also be paid to the status and situation of the victims of crimes.

The adoption of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [40] was a very good symbolic start, but its vague content and poor implementation do not contribute towards better mutual trust. The initiative of the Commission to propose an instrument amending this FD by Spring 2009 is very much welcomed.

It is worth saying a few words on the legal basis for approximation possibilities under the Third Pillar. As the ECJ has emphasised in its decisions in the cases C-176/03 [41] and C-440/05 [42] that "(...) it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (...), the fact remains that when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, the Community legislature may require the Member States to introduce such penalties in order to ensure that the rules which it lays down in that field are fully effective". Whereas in the case C-440/05, the ECJ has noted that "(...) by contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence". These decisions of the ECJ not only confuse the EU legislator on the question of which pillar an instrument introducing criminal law provisions could be adopted under but also make it doubtful whether the approximation of substantive criminal and procedural law would be possible only for the purposes of the further development of cooperation based on mutual recognition between Member States.

A forthcoming Lisbon Treaty could be a way forward to break the current stalemate.

D. Codification

As mentioned earlier, the compatibility and consistency of EU instruments implementing the principle of MR could be better. For example, only the FD on the EAW stipulates the rules on the non-application of other similar instruments on

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[40] *OJ*, no. L 82, 22 March 2001, p. 1.

[41] ECJ, 13 September 2005, Judgment C-176/03, *Commission v. Council*, *ECR*, p. I-7879.

[42] ECJ, 23 October 2007, Judgment C-440/05, *Commission v. Council*, *ECR*, p. I-9097.

extradition in co-operation between Member States. Moreover, these instruments are fragmentary by the forms of co-operation provided for therein. They do not therefore form a consistent and clear system. In our opinion, it is for this reason that, in the jurisprudence on mutual assistance in criminal matters of the courts of Lithuania, the application of traditional instruments such as bilateral treaties on mutual assistance in criminal matters and Council of Europe conventions prevails.

In our opinion, the adoption of new EU instruments on mutual recognition (a rather complicated and lengthy process) in such a situation will not yield the desired results. In order to increase the efficiency of the mutual recognition instruments, first of all an analysis of the existing instruments is necessary (also to clarify the reasons why some of the instruments are not applied in national jurisprudence). Afterwards, the codification of all instruments would be possible. The mere consolidation of the various instruments based on the mutual recognition principle would not facilitate their implementation. Codification could facilitate the implementation if:

(1) it covers all instruments on which mutual assistance in criminal matters is based. The current situation is that cooperation in criminal matters between Member States rests on various legal acts – from Framework Decisions to international treaties, conventions and additional protocols (both of the EU and the Council of Europe), which lay down different grounds, scope (forms) and conditions for co-operation in criminal matters, and grounds for refusal to co-operate. This poses additional technical problems, for example, which instrument should be attributed priority in co-operation, etc. Thus, in the course of codification, not only should all documents be consolidated; the grounds, extent (forms) and conditions of co-operation and the grounds for refusal to co-operate should be made uniform. Such a code should repeal all the different instruments in the relationships between Member States (as was the case with the FD on the EAW);
(2) the codification process should fill in the gaps which hinder efficient cooperation in criminal matters between Member States. The instruments of mutual recognition in force at present do not form a unified and consistent system because it lacks certain essential instruments, for example, on the transfer of criminal proceedings (to take into account the fact that some Member States apply the principle of mandatory criminal proceedings while others apply the principle of discretionary criminal proceedings), etc. Furthermore, it is necessary to determine the priority and application sequence of the form of co-operation in criminal matters, for example, transfer of persons for the purposes of prosecution has priority over transfer of persons for the purposes of execution of punishments, the EAW is given priority over the transfer of criminal proceedings (or *vice versa*), etc.
(3) the codification process should replace or supplement the existing provisions of the EU instruments, the implementation of which raises certain problems. New provisions could be introduced regarding, for example, the legitimisation of the right to compensation for damage inflicted upon third parties, suspects and victims in the course of the application of a mutual recognition instrument and the definition of the instrument of compensation for such damage, etc.

E. Non-legislative initiatives

Abundant legislative actions must be supplemented by non-legislative initiatives.

In particular, the Commission could create a database of definitions used in the Member States of the 32 "listed offences", in cases where the dual criminality requirement does not apply.

In the longer-term perspective, the expediency of creating an EU institution for the training of judges and prosecutors, which would, *inter alia*, encompass special programmes for the implementation of mutual recognition instruments, should be considered. The Council Resolution on training of judges and other court personnel is the right way forward[43] but it must be accompanied by concrete measures and actions. For instance, *fora* for the exchange of experiences, solution of problems, good practice and specific case studies at both the national and EU levels, in the form of professional development courses for judges, prosecutors and other practitioners, should be created.

F. Principle of MR in the area of administrative offences

Consideration should be given to establishing an appropriate legal basis for a possible application of the mutual recognition principle to cooperation in the area of administrative infringements, in particular, road traffic offences. Some existing instruments (e.g. the FD on financial penalties) provides for the possibility to apply its provisions also to "quasi-criminal offences" but this is applicable to the system of administrative offences only of some Member States.

5. Conclusions

Despite some minor inconsistencies, surrender procedures under the EAW between Lithuania and other Member States are intensive, regular, rather smooth and effective. Although other MR instruments are still pending for their implementation and/or wider application, it can be already confirmed that the principle of MR remains a cornerstone in judicial cooperation in criminal matters. Nevertheless it is of the utmost importance to finalise implementation procedures and simply to start using agreed instruments in order to cover all areas of judicial cooperation in criminal matters. Legislative procedures have moved ahead and actual practice is still falling behind. Therefore major efforts must be made to verify the efficiency of the tools that are already available. In the meantime, new legal initiatives must be shelved or slowed down.

The possibilities of making use of approximation and codification should be examined. In particular, special attention should be paid to enhancing the standards of legal protection of rights and liberties of both suspected (accused) persons and victims of crimes during criminal proceedings and afterwards. Use must be made of relevant non-legislative activities.

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[43] Resolution of the Council and of the Representatives of the Governments of the Member States meeting within the Council on the training of judges, prosecutors and judicial staff in the European Union, *OJ*, no. C 299, 22 November 2008, p. 1.

As the issues of double criminality, human rights clause, etc. remain at least for some countries a matter of serious concern regarding their constitutional provisions, these questions should be discussed thoroughly at an expert and high political level. A way forward to expand the scope of judicial cooperation, based on the principle of MR (e.g. cases of administrative offences), should be examined as well.

Les apports de la reconnaissance mutuelle à la coopération judiciaire pénale et ses déficits. Bilan de l'expérience luxembourgeoise[1]

Stefan Braum

1. Introduction

« Pierre angulaire de la coopération judiciaire en matière pénale »[2], telle est la formule solennelle qui consacre en 1999 la reconnaissance mutuelle (RM) des décisions judiciaires comme principe-guide du développement futur de l'espace pénal européen. Qu'en est-il aujourd'hui de ce projet ambitieux ? Dix ans après le Conseil européen de Tampere, il revient à l'UE d'évaluer les résultats atteints par le recours au principe de RM en matière de coopération pénale.

Cet article présente la situation législative actuelle du Grand-duché de Luxembourg, sans pour autant renoncer à une analyse générale de problématiques à dimension européenne. Le premier instrument de RM à avoir été transposé par le Luxembourg est la DC relative au MAE[3]. La loi luxembourgeoise du 17 mars 2004[4] reste à ce jour la seule application en droit national du principe de RM des décisions judiciaires pénales. Le Luxembourg se prépare néanmoins à la transposition de la DC

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[2] Conclusions du conseil européen de Tampere, 15 et 16 octobre 1999, par. 33.

[3] Décision-cadre 2002/584/JAI du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres, *JO*, n° L 190, 18 juillet 2002, p.1.

[4] Loi du 17 mars 2004 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres de l'Union européenne, Mém. A n° 39, 22 mars 2004, p. 588.

relative à l'application du principe de RM aux sanctions pécuniaires [5]. De même, il faut relever la loi du 1er août 2007 sur la confiscation [6], texte promulgué en vue de la future transposition de la DC 2006/783 [7].

La présente contribution se propose d'évaluer la mise en œuvre de la RM des décisions judiciaires pénales au Luxembourg (2). Cette analyse nous conduira plus particulièrement à mesurer l'impact de ce principe sur le système luxembourgeois de justice pénale (3), à décrire la pratique de la coopération pénale (4), offrant ainsi un aperçu de sa mise en œuvre. Une réflexion attentive est consacrée à la protection des droits fondamentaux (5), question épineuse et cruciale en matière de coopération pénale. De même l'application pratique des motifs de refus, en particulier la clause de territorialité (6), soulève la perplexité. Enfin, il convient de s'interroger sur la cohérence des instruments de reconnaissance mutuelle (7). Les conclusions et perspectives qui seront formulées proposent un soutien à la réflexion du législateur européen (8).

2. La mise en œuvre du principe de reconnaissance mutuelle en droit luxembourgeois

Le principe de RM permet de reconnaître et d'exécuter toute décision judiciaire pénale prise par une autorité compétente d'un autre Etat membre de l'UE, garantissant ainsi une coopération souple et rapide. Le Luxembourg a toujours considéré ce principe comme un outil à la fois intéressant et important. En effet, les systèmes judiciaires européens sont aujourd'hui confrontés à la capacité des criminels d'agir, réagir et coopérer plus vite que les autorités judiciaires. Dans cette optique, la RM facilite et accélère l'action de la justice pénale dans la lutte contre la criminalité transfrontalière. L'efficacité de la RM fait ses preuves dans la pratique quotidienne des autorités luxembourgeoises à travers la mise en œuvre des textes européens (A). Un regard critique peut toutefois être porté au système politique national (B).

A. Réalisation et implications des actes législatifs européens

La transposition des instruments de RM en droit luxembourgeois se caractérise tout d'abord par la *consultation des praticiens*, qui présente une valeur ajoutée permettant d'anticiper les conséquences pratiques de la mise en œuvre des textes. Alors que les négociations en séance relèvent de la compétence exclusive du ministère de la Justice, les praticiens sont consultés dès cette phase du processus décisionnel au sein des groupes de travail. Le procédé est répété lors de la phase législative nationale. La demande d'avis adressée par le procureur général aux autorités judiciaires permet

[5] A cette fin, le gouvernement luxembourgeois a récemment présenté le Projet de loi relative à l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, 25 septembre 2008, n° 5923 Chambre des Députés. Ce texte vise la transposition de la décision-cadre 2005/214/JAI du 24 février 2005.

[6] Loi du 1er août 2007 sur la confiscation et portant modification de différentes dispositions du Code pénal, du Code d'instruction criminelle et de différentes lois spéciales, Mém. A n° 136, 13 août 2007, p. 2429.

[7] Décision-cadre 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation, *JO*, n° L 328, 24 novembre 2006, p. 59.

la prise en compte du point du vue pratique des professionnels sur le thème en question.

La DC relative au MAE reste le seul instrument de RM transposé à ce jour en droit luxembourgeois. Le retard dans la transposition des autres textes européens est principalement lié aux priorités politiques. Du point de vue des Etats, la politique pénale nationale dépasse encore – du moins pour l'instant – la politique européenne. Dans le cas spécifique du Luxembourg, certaines personnes consultées ont indiqué les priorités divergentes d'une part de la Chambre des députés, d'autre part du Conseil d'Etat [8]. Cette situation accentue la lenteur du processus législatif : il faut compter près d'un an et demi pour que le Conseil d'Etat rende son avis, délai qui a une incidence sur la transposition des mesures instaurant la RM.

D´autres contraintes sont à souligner, comme *le défaut de personnel* apte à participer aux travaux de transposition. En effet, la mise en œuvre d'une DC requiert l'introduction du texte européen en droit national tout en assurant la cohérence du système de justice pénale de l'EM. Certes, la RM constitue un moyen plus aisé afin de parvenir à une continuation de la logique européenne, compte tenu des difficultés que soulèverait le rapprochement des législations nationales. Mais la transposition de la législation européenne a inévitablement un *impact* sur l'ordonnancement constitutionnel national [9], impliquant une analyse attentive des textes afin de prévenir les contradictions potentielles au sein du même système de justice pénale. A cet égard, il suffit de songer à la réaction de certaines Cours constitutionnelles nationales au MAE, en particulier aux décisions allemande et polonaise qui ont déclaré en tout ou en partie les lois nationales de transposition inconstitutionnelles [10]. L'on peut également penser à l'exemple de la DC relative à la confiscation puisque la transposition en droit luxembourgeois de cet instrument de RM ne devrait pouvoir se faire qu'à des conditions précises, dictées par les exigences propres au système pénal national.

Afin d'évaluer leur application, le Luxembourg a également développé un outil d'évaluation des instruments de RM spécifique à la gestion et à la genèse des affaires [11]. Mais la jurisprudence luxembourgeoise en la matière est restreinte à la mise en œuvre du MAE et limitée à quelques décisions relatives à la remise en liberté de la personne. Les tribunaux n'ont jamais été confrontés à un examen touchant au fond même du principe de RM.

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[8] Dans le système constitutionnel luxembourgeois, le Conseil d'Etat joue un rôle de seconde chambre parlementaire : conformément à l'article 83*bis* de la Constitution de 1868, aucun vote définitif de la Chambre des députés ne peut intervenir avant que le Conseil d'Etat n'ait rendu son avis.

[9] V. Mitsilegas, « The constitutional implications of mutual recognition in criminal matters in the EU », *CMLRev.*, 2006, 43, p. 1277 et s.

[10] BverfG, Urteil vom 18. Juli 2005, 2 BvR 2236/04. L'arrêt allemand n'est pas un exemple isolé : d'autres instances judiciaires se sont prononcées sur l'inconstitutionnalité de la loi nationale de transposition du MAE, notamment la décision du Tribunal constitutionnel de Pologne du 27 avril 2005 ou encore l'arrêt de la Cour suprême de Chypre du 7 novembre 2007.

[11] L'évaluation s'appuie notamment sur des statistiques judiciaires portant sur l'émission et l'exécution des demandes.

B. Inquiétudes de la pratique malgré l'efficacité affichée

Avant de poursuivre dans l'analyse, il est important de rappeler que parmi les instruments de RM adoptés dans le cadre du troisième pilier, les DC concernant l'application du principe de RM aux sanctions pécuniaires [12], aux décisions de confiscation [13], au gel de biens ou d'éléments de preuve [14] ainsi que le MOP ne sont pas encore transposées en droit luxembourgeois. L'absence de cas d'application n'a cependant pas empêché de rapporter les réactions des autorités luxembourgeoises quant à l'adoption future des lois de transposition.

Les praticiens s'accordent sur le succès obtenu dans le cadre de l'entraide majeure. Le MAE en est l'illustration [15] : si l'exécution d'une décision d'extradition pouvait durer près de 10 mois – voire beaucoup plus – l'introduction de ce premier instrument de la reconnaissance mutuelle a réduit le délai à environ 44 jours. Dans ce contexte, le principe de RM s'est avéré un mécanisme juridique efficace aussi bien au niveau des demandes de remise reçues qu'émises par les autorités judiciaires étrangères, tant dans la phase d'instruction que dans la phase post-sententielle en vue de l'exécution de la peine prononcée.

Toutefois, les réactions divergent quant à l'application du même principe en matière d'entraide mineure [16]. Un écart dans la perception de l'efficacité de la RM entre les autorités administratives et judiciaires est à souligner. Pour certains, l'extension du champ d'application du principe aux procédures pénales est souhaitable à l'instar de l'entraide majeure – notamment le MOP en matière d'administration de la preuve [17]. Cette opération risque toutefois d'être perçue comme une *création administrative* focalisée sur l'aspect bureaucratique, loin des exigences et de la compréhension des praticiens chargés de l'application quotidienne des mesures de RM.

L'impact de la RM sur le système national de justice pénale doit être par conséquent étudié sous ses différentes implications. L'analyse qui suit s'articule autour de quelques aspects essentiels et particulièrement problématiques.

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[12] Décision-cadre 2005/214/JAI du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, *JO*, n° L 76, 22 mars 2005, p. 16.

[13] Décision-cadre 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation, *JO*, n° L 328, 24 novembre 2006, p. 59.

[14] Décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve, *JO*, n° L 196, 2 août 2003, p. 45.

[15] Voy. *Evaluation Report on the Fourth Round of Mutual Evaluations « Practical application of the European Arrest Warrant and corresponding surrender procedures between Member States » – Report on Luxembourg* (doc. 10086/1/07 REV 1).

[16] L'entraide mineure est régie par la loi du 8 août 2000 sur l'entraide judiciaire internationale en matière pénale, Mém. A n° 98, 18 septembre 2000, p. 2202. Ce texte applique les principes traditionnels en matière d'entraide, tels que la règle de double incrimination ainsi que le refus d'une demande d'entraide visant les infractions politiques ou de nature à porter atteinte à la souveraineté, à la sécurité, à l'ordre public ou d'autres intérêts essentiels du Grand-duché du Luxembourg.

[17] Voy. *infra.*

3. L'impact du principe de RM sur le système national de justice pénale

Le principe de RM tel que perçu par les autorités nationales est confronté, d'une part, à l'examen de la double incrimination (1), d'autre part à l'harmonisation des législations pénales (2). Ces deux notions, à première vue antinomiques, se révèlent au contraire fortement liées à ce principe.

A. La reconnaissance mutuelle des décisions judiciaires face à l'examen de la double incrimination

La RM des décisions judiciaires pénales renonce à l'examen de la double incrimination pour les infractions les plus graves [18]. Appliquée dans les cas où elle n'est pas expressément abolie, cette exigence ne concerne plus que les infractions mineures. Reste à savoir si cette opération apporte une plus-value sans autres conséquences à la coopération pénale.

Malgré l'efficacité reconnue du principe de RM en matière d'extradition, la condition de la double incrimination ne constituerait pas un obstacle majeur dans la pratique courante de la coopération pénale. Cette perception des praticiens, à première vue paradoxale, s'explique par l'interprétation que les magistrats font de la double incrimination. Il s'agit d'opérer un contrôle de *double punissabilité* : les faits à la base de la demande d'entraide doivent recevoir tant dans la législation de l'Etat requérant que dans la législation luxembourgeoise une qualification pénale [19]. Autrement dit, il suffit que le même fait soit punissable au sens du droit national sous une qualification quelconque [20]. Dans la pratique judiciaire, la clarté et le caractère suffisant de l'exposé des faits s'avèrent donc particulièrement importants.

Il en découle que la double incrimination est perçue comme une condition essentielle au *formalisme* de la coopération judiciaire. Du point de vue des autorités nationales, une solution qui permette de trouver un équilibre entre la coopération rapide et efficace et le maintien du critère formel de double incrimination n'est pas à exclure. La renonciation à cette règle ne peut s'opérer qu'à condition d'accorder une plus grande attention aux autres aspects de la procédure pénale. Il ne s'agit pas par là de remplacer la double incrimination par un formalisme de nature bureaucratique qui risquerait de faire obstacle à la coopération directe entre les organes judiciaires. Le danger serait alors d'être confronté aux mêmes difficultés propres à la coopération judiciaire classique : une attention focalisée sur les formulaires (hier entre autorités centrales, aujourd'hui entre autorités judiciaires) irait à l'encontre de l'efficacité de la coopération pénale, au risque de marginaliser la question des droits et libertés individuels.

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[18] Renoncer au contrôle de la double incrimination pour les infractions les plus graves ne constitue pas en tant que tel une difficulté majeure dans la mesure où cela concerne des faits réprimés dans la législation de tous les EM.

[19] Voy. G. Vogel, *Lexique de procédure pénale de droit luxembourgeois*, Bruxelles, Larcier, 2001, p. 228.

[20] Ainsi par exemple, lorsque la France envoyait des demandes d'entraide relatives au financement illégal de partis politiques, l'absence de cette même qualification pénale en droit luxembourgeois n'était pas un obstacle dès lors que les faits étaient par exemple constitutifs de corruption au sens du Code pénal luxembourgeois.

Cependant, la standardisation de la coopération judiciaire n'est pas souhaitable. D'une part, son caractère abstrait s'éloigne de l'approche casuistique des praticiens. D'autre part, elle risque d'ignorer le besoin d'un niveau de formalisme procédural à même d'assurer le traitement équitable des affaires. Il s'en suit que la création d'une *banque de données* contenant les définitions des infractions selon le droit national n'apporterait *aucune plus-value* en termes d'application efficace du principe de RM. Une base ainsi construite signifierait une définition en termes de qualification juridique des faits. Or les praticiens ne pourraient utilement avoir recours à un tel système, dès lors que l'examen de double incrimination est interprété en termes de double punissabilité des faits.

De plus, l'examen de double incrimination attaché aux qualifications pénales confronte les praticiens à des définitions *trop génériques* d'infractions. Plus particulièrement, les difficultés majeures sont liées aux catalogues d'infractions tels qu'inscrits dans les textes européens[21]. Des définitions trop larges placent les praticiens dans une position hésitante, lorsqu'il s'agit d'appliquer des règles insuffisamment précises au cas d'espèce. Ainsi, il apparaît d'autant plus essentiel d'œuvrer pour une meilleure prise en compte de l'importance de l'exposé des faits. Cela permettra aux praticiens de juger plus aisément des qualifications juridiques des infractions auxquelles ils sont confrontés.

Quant au contenu de la liste des infractions, il faut toujours garder à l'esprit que le principe de RM s'éloigne considérablement de la perception traditionnelle du droit pénal : reconnaître et exécuter de façon automatique une décision judiciaire étrangère dans son ordre souverain national. De ce fait, il est nécessaire de s'assurer que la liste des infractions pour lesquelles la double incrimination n'a pas lieu d'opérer se concentre sur l'essentiel : une *liste négative* de crimes et délits couvrant la criminalité grave et transfrontalière est la meilleure approche, à condition que ce travail soit complété par l'*harmonisation des infractions* pour lesquelles il n'existe ni définition commune, ni compréhension commune aux Etats membres de l'Union.

En conclusion, l'abolition de la double incrimination appelle à intervenir d'une part sur le plan normatif, d'autre part sur le plan pratique. Tout d'abord, il est clairement nécessaire de formaliser la liste des infractions qui ne sont plus soumises à la double incrimination. Une description plus précise des phénomènes criminels par la formulation des éléments constitutifs des infractions aiderait les praticiens dans le traitement du cas d'espèce, permettant une certaine comparabilité et donc une meilleure compréhension de la législation. Parallèlement, il est important de *renforcer* les bonnes pratiques de la coopération judiciaire pénale, en portant une attention particulière à la transmission d'un exposé clair et précis des faits.

[21] A titre d'exemple, les notions très larges de racket ou de fraude ne sont pas punies en tant que telles en droit national, mais selon les cas de figure rentrent dans des catégories d'infractions plus spécifiques.

B. Un principe confronté à l'harmonisation des législations nationales

1. Harmonisation des principes du droit pénal – droit pénal substantiel et procédures criminelles

La RM ne peut être appréhendée comme une fin en soi, en ce sens qu'elle ne peut se suffire à elle-même. Reconnaître mutuellement les décisions judiciaires pénales présuppose une confiance mutuelle entre les pays européens. L'exemple le plus parlant est la protection des droits de la défense et des garanties procédurales [22]. La vraie limite de la RM réside dans les différences – parfois profondes – entre les droits pénaux nationaux, tant dans la définition des éléments constitutifs des infractions qu'au niveau des sanctions [23]. Sources de difficultés pour les praticiens, les profondes divergences entre systèmes pénaux nationaux le sont également pour les autorités en charge de négocier les textes européens. Si l'application du principe de RM est plus aisément négociée lorsqu'il touche aux jugements définitifs, son application à la phase pré-sententielle pose davantage de difficultés. Lorsqu'elles touchent aux premiers stades des poursuites pénales, les négociations sont confrontées au rôle prédominant des autorités tantôt policières tantôt judiciaires dans la phase d'enquête [24].

Il apparaît donc nécessaire aujourd'hui de mettre en place des règles minimales communes. L'*harmonisation* partielle ou le rapprochement des règles pénales est perçu(e) comme une *condicio sine qua non* non seulement pour le développement de l'espace pénal européen, mais également pour la mise en œuvre de la RM [25]. Cette dernière est en effet intrinsèquement liée à l'harmonisation. La DC elle-même est un instrument destiné au rapprochement des législations pénales [26].

La RM des décisions judiciaires pénales n'est pas perçue comme un principe indérogeable, mais plutôt comme une règle de fonctionnement de l'espace pénal européen. De ce fait, la RM n'est pas un principe absolu ; au contraire elle connaît des limites. Au préalable, elle implique la *confiance mutuelle* dans le bon fonctionnement des systèmes européens de justice pénale. Ainsi par exemple, la Cour constitutionnelle allemande entend cette règle comme un principe qui trouve nécessairement ses limites

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[22] Voy. *infra.*

[23] Analysons l'exemple de la corruption. Alors même qu'elle fait l'objet du premier protocole à la convention sur la protection des intérêts financiers de 1996, la corruption est punie conformément aux articles 246 et s. du Code pénal luxembourgeois d'une peine criminelle (5 à 10 ans de réclusion), sanction trois fois plus sévère par rapport à d'autres EM.

[24] Rien que la qualité des autorités compétentes dans un certain domaine est un obstacle non négligeable : par exemple le rôle central du juge d'instruction dans les systèmes inspirés du droit français est confronté au rôle que joue la police dans les pays nordiques au cours des enquêtes. De même, les décisions relatives au transfert des détenus ou l'exécution des peines impliquent l'intervention soit d'un juge soit d'une autorité administrative, tel le directeur du service pénitencier.

[25] Voy. A. Weyembergh, *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions,* Bruxelles, Editions de l'Université de Bruxelles, 2004, p. 404.

[26] Article 34, 2. c) du traité UE.

dans les garanties procédurales, dans les droits et libertés fondamentales, héritage commun de la pensée européenne des Lumières [27].

Dans cette optique, l'harmonisation des systèmes nationaux en vue du développement de la RM n'est pas simplement un exercice technique limité à l'harmonisation des infractions ou des règles de procédure pénale. Il est avant tout question d'organiser un cadre légal dans lequel la RM des décisions judiciaires pénales est encadrée par un système de protection des principes et droits fondamentaux. Certes ces règles de base font partie d'une tradition partagée par les EM, comme le démontrent différents textes tels la CEDH, la charte des droits fondamentaux ou encore les traditions constitutionnelles nationales. Mais cette impression ne doit en aucun cas masquer la réalité juridique : l'*application effective* de ces principes fondamentaux dépend fortement de leur interprétation et de leur place dans les systèmes pénaux nationaux. Dès lors, un discours structuré doit être lancé pour affirmer ces principes-clef du droit pénal au plan européen. Dans un premier stade, ce débat pourrait être amorcé et stimulé par une étude scientifique à laquelle participeraient académiques et praticiens des différents EM. Une telle démarche permettrait de découvrir les points communs, mais surtout de souligner les différences entre les législations nationales, afin de développer un catalogue regroupant des principes et leur interprétation valables pour l'ensemble de l'espace pénal européen.

La même initiative pourrait s'avérer utile face aux divergences existantes entre procédures pénales, auxquelles le principe de RM est confronté. Analysons à titre d'exemple la future transposition de la DC relative à la confiscation. Alors que certains pays connaissent une procédure de confiscation *in rem*, les autorités luxembourgeoises, en raison de la législation nationale, ne pourraient procéder de cette manière. De même, le Luxembourg admet la confiscation spéciale en tant que peine accessoire [28], contrairement à d'autres EM. Autrement dit les autorités luxembourgeoises sont confrontées, comme leurs homologues étrangers, à des concepts qui ne font pas partie de la culture juridique nationale.

Quant à déterminer si soit l'identité des procédures, soit la simple similarité sont les critères de référence, il n'y a que des réponses relatives qui peuvent être données. Une mesure spécifique au droit de l'Etat d'émission de la décision judiciaire, mais qui n'existe pas en tant que telle dans l'Etat membre d'exécution, peut à première vue constituer un obstacle. Cependant, dans la grande majorité des cas, des mesures similaires prévues par la loi de l'Etat d'exécution pourront être employées. De même, le fait qu'une personne n'a pas bénéficié dans l'Etat qui a rendu la décision des mêmes garanties procédurales que dans l'Etat d'exécution peut être source de blocage. Cela ne signifie cependant pas que le système pénal étranger n'offre pas dans son ensemble des garanties suffisantes. Il s'agit de situations type qui soulèvent un problème de droit comparé : rechercher des correspondances entre le droit de l'Etat d'émission et le droit de l'Etat d'exécution de la décision judiciaire.

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[27] Voy. S. Braum, « Das Prinzip der gegenseitigen Anerkennung. Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung », *GA*, 2005, p. 681.

[28] Voy. D. Spielmann et A. Spielmann, *Droit pénal général luxembourgeois*, Bruxelles, Bruylant, 2002, p. 399 et s.

En conclusion les différences entre systèmes pénaux nationaux sont une *source de blocage* au cours des négociations, sans compter les difficultés qu'elles soulèvent dans la pratique. Ainsi le défaut de connaissances approfondies en droit comparé devient un obstacle significatif, qui exige une formation continue des juges et des praticiens.

2. Un appel à l'amélioration des méthodes normatives et pratiques de coopération

La qualité du cadre légal européen mérite une attention accrue compte tenu du rôle spécifique qu'occupe le droit pénal : ce dernier constitue l'instrument juridique le plus intrusif et lourd de conséquences, qui touche au cœur des droits et libertés individuels. Une application précipitée de la RM risque d'aboutir à ce que soient ignorées les difficultés pratiques auxquelles les praticiens sont confrontés, difficultés accentuées en matière de procédure pénale. Une intervention est dès lors souhaitable tant au niveau de la méthode normative, qu'au niveau de la pratique.

Les autorités luxembourgeoises participant au processus législatif soulignent le besoin d'*approfondir les connaissances en droit pénal comparé*. Les négociations récentes de la DC sur l'exécution des jugements par défaut [29] en sont un exemple : les systèmes particuliers conçus par les législations portugaise et italienne ont fait l'objet d'explications et d'éclaircissements jusqu'au niveau du Coreper (Comité des représentants permanents). Le recours aux universitaires pour la préparation préalable d'études comparées aiderait à la production des textes, aussi bien en réduisant les temps des négociations qu'en augmentant la qualité des actes adoptés.

L'approche normative se doit d'être juridiquement convaincante aux yeux des praticiens pour qu'elle soit appliquée. Afin d´éviter les difficultés, les autorités judiciaires préfèrent parfois avoir recours aux instruments classiques d'entraide. Il faut effectivement relever que les méthodes traditionnelles de coopération sont parfois combinées aux nouveaux mécanismes de RM. Cette tendance s'explique par la prudence dont fait preuve l'appareil judiciaire face à l´introduction d´un nouvel instrument juridique. Dès que la plus-value de l'acte législatif est prouvée, rien ne s´oppose à son application. La prise en compte de la perception des praticiens est donc essentielle pour légitimer une nouvelle approche normative soucieuse des problèmes quotidiennement rencontrés par les autorités judiciaires, approche d'autant plus légitimée par l'attention accordée aux droits fondamentaux. Convaincre les praticiens du bien-fondé des règles qu'ils sont chargés d'appliquer signifie donc la création d'une confiance réelle dans les normes et le *développement de bonnes pratiques*.

L'une des limites le plus significatives que rencontre aujourd'hui la RM est constituée par les divergences de culture juridique, qui ne sauraient être harmonisées. Cet écart entre systèmes juridiques au sein de l'espace pénal européen est particulièrement marqué par l'opposition entre le système de droit continental et celui des pays de *common law*. Mais cette opposition assez simpliste des droits pénaux européens cache une situation bien plus complexe. L'illustration la plus frappante

[29] Cette DC a été adoptée le 26 février 2009 : décision-cadre 2009/299/JAI du Conseil portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès (*JO*, n° L 81, 27 mars 2009, p. 24).

se trouve en droit pénal procédural, dont les divergences se mesurent déjà quant à la désignation des autorités compétentes [30]. Il est vrai que les dernières évolutions législatives indiquent une tendance vers des procédures pénales de moins en moins inquisitoires et de plus en plus accusatoires, dans lesquelles le juge exerce davantage une fonction d'arbitre. Mais il reste souvent difficile de disposer d'une vision claire de cette matière extrêmement mouvante qu'est la procédure pénale dans les différents pays européens. S'ajoute l'attention particulière portée au niveau de la protection des droits fondamentaux dans les pays d'Europe de l'Est, aspect qui joue un rôle essentiel dans la mise en œuvre du principe de RM. Il paraît donc important de soutenir le développement d'une protection juridique efficace dans ces nouveaux EM, tout en renforçant la lutte contre la corruption et en favorisant les contacts entre les praticiens [31].

4. Les difficultés rencontrées dans la pratique de la coopération pénale

A. Pour le développement de bonnes pratiques *en réponse aux défis actuels*

En matière de coopération pénale, les instruments les plus fréquemment utilisés par les praticiens sont la convention européenne d'entraide judiciaire en matière pénale de 1959 [32] ainsi que les accords de Schengen [33]. Compte tenu du nombre important d'affaires transfrontalières, les autorités judiciaires luxembourgeoises font une application quotidienne de ces textes relatifs à l'entraide. Elles estiment que ces conventions offrent aujourd'hui un cadre juridique satisfaisant, qui couvre l'ensemble des cas auxquels les praticiens peuvent être confrontés [34]. De ce fait, toute intervention législative doit être mise en œuvre prudemment. Le principe de proportionnalité doit guider l'application de la RM : autrement dit, toute modification apportée par le législateur européen doit être solidement motivée afin de ne pas perturber le bon fonctionnement des procédures qui se sont révélées efficaces.

Il n'en demeure pas moins que les magistrats sont confrontés à des *difficultés d'ordre pratique* en matière de coopération judiciaire pénale. En premier lieu, les traductions des demandes adressées aux autorités judiciaires sont parfois inintelligibles. En second lieu, des difficultés surgissent lorsque la demande provient d'une autorité

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[30] La figure du juge d'instruction en est un exemple. Tandis que la Suisse envisage de supprimer cette autorité judiciaire, tout comme l'a fait l'Italie, le juge d'instruction continue d'exister dans les pays influencés par le système pénal français, alors que d'autres EM n'ont jamais instauré une telle fonction.

[31] Récemment, la question a été soulevée par la Commission dans ses deux rapports au Parlement européen et au Conseil sur les progrès réalisés par la Roumanie et la Bulgarie au titre du mécanisme de coopération et de vérification, respectivement COM (2008) 494 final et COM (2008) 495 final du 23 juillet 2008.

[32] Convention européenne d'entraide judiciaire en matière pénale du 20 avril 1959, ses protocoles du 17 mars 1978 et du 8 novembre 2001, négociés au sein du Conseil de l'Europe.

[33] En particulier la convention d'application de l'accord de Schengen du 19 juin 1990, *JO*, n° L 239, 22 septembre 2000, p. 19.

[34] Sur l'application en droit luxembourgeois de la convention européenne d'entraide judiciaire en matière pénale de 1959 et la convention d'application de l'accord de Schengen de 1990, voy. notamment D. Spielmann, *Le secret bancaire et l'entraide judiciaire internationale pénal au Grand-duché du Luxembourg*, Bruxelles, Larcier, 2007, p. 95 et s.

judiciaire étrangère qui n'est confrontée que rarement aux instruments d'entraide. En troisième lieu, les demandes présentant une description insuffisante des faits peuvent, dans un premier temps, entraver la coopération [35]. De même, les divergences entre les législations pénales des EM posent des *difficultés d'ordre procédural*. En particulier, la convention de 1959, texte de base en la matière d'entraide, traite les demandes d'entraide mineure comme des mandats. Parfois, il est cependant impossible d'exporter une exigence propre au droit interne. Ainsi, alors que le procureur français peut procéder à une perquisition bancaire, le droit luxembourgeois exige dans ce cas de figure l'intervention du juge d'instruction. Des solutions d'ordre pratique sont mises en œuvre au cas par cas, permettant de surmonter les éventuelles difficultés rencontrées. Dans l'exemple cité, un courrier indiquant que la demande d'entraide doit être envoyée par un juge d'instruction français serait la solution choisie. Le *contrôle de l'ordre public* est encore un exemple de la nécessité d'encadrer le principe de RM. Le choix de poursuivre et juger une personne qui est extradée seulement après le jugement définitif de condamnation peut être fondé sur des raisons d'ordre public. Un autre cas de figure est la demande adressée par une autorité étrangère qui risque de troubler le bon déroulement des poursuites dans l'Etat de réception. Lorsque cette situation se vérifie, les autorités judiciaires ont la possibilité de laisser la demande en suspens jusqu'à la fin du procès. Ainsi, le contact personnel avec les autorités des autres EM permet de résoudre rapidement et d'une manière simple les difficultés qui surgissent dans le cas d'espèce. La voie qui semble privilégiée dans ce cas est la « négociation » directe avec l'autorité étrangère compétente. Cette pratique est aisément utilisée avec les pays voisins du Luxembourg, alors que le dialogue direct avec les autorités des autres EM s'avère plus complexe.

Certes, le dialogue entre autorités judiciaires ne peut être que bénéfique, mais il doit être encadré par des procédures pénales permettant d'assurer une structure transparente de la coopération judiciaire. Le contact direct et personnel entre magistrats doit être normativement encadré afin d'éviter *l'érosion, voire la perte,* du *formalisme procédural,* un formalisme synonyme de garanties pour l'individu dans le cadre de poursuites pénales. Par conséquent, la formulation plus claire des textes juridiques est encore une fois un élément indispensable à une coopération judiciaire pénale efficiente. Affirmer le principe de confiance mutuelle ne suffit pas à en assurer l'application réelle. Il est fondamental d'investir dans la *formation des magistrats*. La réalisation d'une « école européenne de la magistrature », comme suggéré par M. le ministre de la Justice Luc Frieden, permettrait à chaque magistrat de recevoir une formation aux textes européens et au droit comparé dans un environnement multinational [36].

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[35] Par exemple, lorsqu'il est demandé aux autorités luxembourgeoises de procéder à une perquisition dans un établissement bancaire suite à la commission d'un *hold-up*, la demande devra constater un lien minimal entre l'établissement bancaire et l'infraction. Toutefois, cette difficulté est facilement résolue par la demande de la part des autorités nationales d'une description supplémentaire et plus détaillée des faits.

[36] Le projet « CoPen-Training » coordonné par l'IEE-ULB, financé par le programme « Justice pénale » de l'Union européenne, le ministère de la Justice luxembourgeois et l'IUIL et mené en collaboration avec ECLAN et d'autres partenaires, va dans ce sens : dans le cadre du Programme standard de coopération judiciaire en matière pénale au sein de l'UE, un outil

La faisabilité d'un tel projet peut être démontrée par les expériences en matière de contrôle des frontières extérieures, domaine dans lequel les équipes policières de gardes-frontières reçoivent d'ores et déjà des formations dans un contexte européen.

En conclusion, le principe de RM des décisions judiciaires pénales dépend fortement d'une condition préalable : la confiance dans les autres systèmes de la justice pénale. Le bon fonctionnement de la coopération judiciaire pénale présuppose le respect du formalisme procédural, garde-fou du principe du procès équitable tel qu'inscrit à l'article 6 de la CEDH et de tous les droits fondamentaux qui en sont les corollaires. Avant d'élargir le champ d'application de la RM, il apparaît donc utile, mais aussi indispensable, de renforcer les mécanismes mis en œuvre quotidiennement par les praticiens. Renforcer signifie améliorer à tout prix le travail des autorités judiciaires quant aux points suivants :

- accroître la sûreté des traductions ;
- assurer la transparence des demandes, ainsi que le recours à ce que l'on pourrait désigner comme *bonnes pratiques* ;
- œuvrer pour une culture de légalité, axée sur un exposé clair et intelligible des infractions telles que définies dans l'Etat d'émission et – par conséquent – des faits qui doivent pouvoir être prouvés ;
- garantir la formation permanente des praticiens des organes judiciaires, d'autant plus que cela est déjà réalisé pour la police.

De façon générale, le développement de ces mesures pourrait être amorcé par la rédaction d'un *catalogue de bonnes pratiques* consacré à la coopération pénale, mettant en place des règles qui conjuguent l'efficacité de la coopération avec le respect des droits fondamentaux dont chaque citoyen est titulaire. Un tel catalogue pourrait faire l'objet d'une DC accompagnant l'application des instruments de RM.

B. Le mandat d'obtention des preuves, un exemple d'application future de la reconnaissance mutuelle en procédure pénale

L'application du principe de RM en procédure pénale est un processus délicat, encore plus en matière d'administration de la preuve. La DC relative au MOP[37] offre une illustration des aspects qui méritent une réflexion attentive dans le chef du législateur européen. Dans le climat d'enthousiasme qui a marqué l'adoption du MAE et de la DC relative à l'exécution des décisions de gel de biens et d'éléments de preuve, la Commission a proposé d'appliquer le principe de RM à l'administration des preuves en matière pénale. En juillet 2003, elle a présenté la proposition de DC relative au MOP. Le mécanisme est calqué sur le mandat d'arrêt européen : il s'agit d'une décision émise par l'autorité judiciaire d'un EM (où des poursuites pénales sont

visant à faciliter la formation des magistrats européens a été mis à la disposition des autorités nationales. Il s'agit d'un instrument utilisé de façon décentralisé au niveau national, loin de l'institution d'une institution européenne centralisée de formation des magistrats (voy. http://www.copen-training.eu).

[37] Décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves tendant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

engagées) en vue de la transmission d'éléments de preuve se trouvant dans un autre EM, qui reconnaît et exécute le mandat. Adopté en décembre 2008, le MOP devra à présent être mis en œuvre en droit national.

Avant de procéder à l'analyse du texte même, une prémisse est nécessaire. La collecte transfrontalière des preuves pénales est une matière doublement problématique, aussi bien du point de vue des autorités de poursuites que des personnes impliquées. Aux yeux des autorités publiques, elle soulève indéniablement des difficultés d'ordre pratique. Les risques de disparition des preuves ont déjà motivé l'adoption de la DC relative au gel des avoirs. Dans un cadre transnational s'ajoutent également les obstacles quant à l'exécution de perquisitions et saisies sur le territoire d'un autre EM, sans compter les cas d'irrecevabilité des preuves au regard du droit de l'Etat adressant la demande. Mais la collecte de preuves dans le cadre de poursuites pénales touche également aux droits et libertés individuels. Des mesures telles que la saisie ou la perquisition constituent des restrictions aux droits des individus qui en font l'objet. En d'autres termes, il ne s'agit pas seulement d'atteintes potentielles à la liberté de la personne poursuivie, mais également à celle des tiers.

Tout en gardant à l'esprit ces remarques, l'application de la RM en matière de preuve pénale appelle plus particulièrement à l'analyse de trois aspects. En premier lieu, il s'agira d'étudier la substitution de ce principe au régime de l'entraide (1). En second lieu, les conditions d'une mise en œuvre de la RM devront être précisées (2). En troisième lieu, la question centrale de la légalité de la preuve pénale permettra de développer une réflexion sur la protection des droits fondamentaux (3).

1. Quant à la nécessité d'un instrument de reconnaissance mutuelle : bilan du régime d'entraide

La collecte transfrontalière des preuves est actuellement régie au sein de l'espace pénal européen par le droit de l'entraide. Les premiers instruments ont été négociés au sein du Conseil de l'Europe. Encore aujourd'hui, les praticiens ont recours à la convention européenne d'entraide judiciaire de 1959 telle que modifiée par ses protocoles de 1978 et de 2001. Ces textes ont été complétés dans la cadre de l'UE d'abord par la convention d'application Schengen de 1990 (CAAS) et plus récemment par la convention de l'UE relative à l'entraide judiciaire en matière pénale de 2000 et son protocole de 2001. Les récentes modifications du régime de l'entraide n'ont cependant pas découragé la présentation d'un nouvel instrument, cette fois-ci basé sur le principe de RM des décisions judiciaires pénales.

Le MOP permettrait de faire face aux difficultés que présenterait l'actuel régime de l'entraide. Parmi les obstacles invoqués figure d'abord la lenteur des procédures. En effet, alors même que la CAAS établit le principe d'une procédure de juge à juge, elle maintient la possibilité de recours à l'autorité centrale. La coopération serait en revanche totalement judiciarisée avec l'adoption du MOP, tout en imposant des délais pour l'exécution du mandat. Mais la difficulté majeure invoquée réside dans les divergences entre les législations nationales, dans la mesure où le régime de l'entraide

n'exclut pas complètement le contrôle de la double incrimination[38]. De plus, la CAAS soumet l'exécution de la demande d'entraide à la compatibilité avec le droit national du pays requis, autorisant notamment le refus d'effectuer une perquisition ou une saisie en cas d'atteinte aux droits fondamentaux[39]. Au contraire, le MOP abolit l'exigence de la double incrimination pour une liste de 32 infractions[40]. De plus, la proposition réduit essentiellement les motifs de refus aux cas du *bis in idem*.

Certes, le MOP essaye d'améliorer l'efficacité de la coopération pénale en matière de collecte transfrontalière des preuves, telle que mise en place par le régime de l'entraide. Mais une intervention du législateur européen doit toujours être motivée par la nécessité d'un nouvel instrument dans le *respect des principes de subsidiarité et de proportionnalité*. Dès lors, il est important de relever que les praticiens luxembourgeois estiment satisfaisantes les solutions offertes par les normes en vigueur. Quant aux cas de figure dans lesquels la double incrimination trouve encore application, ils ne perçoivent pas cette condition comme un obstacle majeur à la coopération judiciaire pénale, notamment grâce à une lecture axée sur la punissabilité des faits (voy. *supra*). De même, la RM ne suffit pas à elle-seule à résoudre les difficultés soulevées par la grande hétérogénéité des procédures pénales des EM. Ainsi, les instruments actuels d'entraide apportent des solutions efficaces en matière d'administration des preuves pénales, en particulier depuis la loi luxembourgeoise du 8 août 2000 sur l'entraide judiciaire internationale en matière pénale, qui a simplifié la procédure en limitant les possibilités de recours.

La difficulté majeure qui peut se rencontrer en pratique est encore une fois le caractère incomplet de la demande envoyée. De ce fait, les praticiens *n'estimaient pas urgente* l'adoption d'un MOP fondé sur la RM. L'importance cruciale de l'exposé des faits vaut donc également en matière d'administration de la preuve pénale de sorte qu'une définition claire des infractions reste essentielle. Même si le MOP, lorsqu'il implique une perquisition ou saisie, renonce au contrôle de double incrimination pour la même liste d'infractions que celle de l'article 2, par. 2 du MAE, les praticiens se trouvent confrontés à un catalogue de qualifications juridiques imprécises (voir *supra*). Ainsi, la création d'un MOP devrait attirer l'attention des instances européennes sur deux aspects : la *sécurité et clarté juridique des textes* et le *respect des garanties procédurales*.

2. *Conditions du recours au principe de reconnaissance mutuelle*

Une réflexion attentive des conditions de mise en œuvre du MOP s'impose. Deux aspects paraissent particulièrement problématiques : d'une part, le champ d'application du mandat, d'autre part, le choix du mode de collecte des preuves.

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[38] Les articles 5(a) de la convention d'entraide de 1959 et 51(a) de la CAAS admettent la possibilité de subordonner la recevabilité des commissions rogatoires aux fins de perquisition et de saisie à la condition de double incrimination. Le MOP renonce à cette condition (article 14, para. 1), même dans les cas où son exécution rend nécessaire une perquisition ou saisie en vue de la poursuite des 32 infractions listées à l'article 14, para. 2.

[39] Voy. article 51 CAAS.

[40] Article 14 de la décision-cadre relative au MOP.

D'après la proposition de DC, les éléments de preuves visés par le MOP sont les objets, documents, données et extraits de casiers judiciaires[41]. Plus parlante est la liste de ce qui est exclu du *champ d'application* du mandat. Tout d'abord, la collecte de dépositions de témoins ou victimes, ainsi que les interrogatoires de suspects et personnes mises en cause dans une procédure pénale sont des pratiques policières directement confrontées aux droits des individus. Ces mesures exclues du champ d'application du MOP mettent au premier plan le respect des garanties procédurales face aux divergences importantes entre législations nationales, notamment entre système pénal accusatoire anglo-saxon et inquisitoire continental. Si un procureur luxembourgeois devait envoyer l'enregistrement de l'audition d'un témoin à son homologue en Angleterre, sa valeur probante serait probablement nulle au regard du droit anglais, puisqu'il serait qualifié d'*hearsay evidence*. De même, le système accusatoire de *common law* donnant à l'avocat de la défense le droit d'entendre en personne le témoin deviendrait déséquilibré, si la procédure pénale devait, par le biais de la RM, faire disparaître cette possibilité dans la pratique.

L'exclusion, à première vue prudente, de ces éléments de preuve est toutefois contrebalancée par une extension ultérieure du champ d'application du MOP. En effet la DC ne s'appliquera pas à l'obtention de preuves en temps réel, telle l'interception de télécommunications ou la surveillance de comptes bancaires. *A contrario*, les pièces et informations déjà détenues par les autorités de l'Etat d'exécution peuvent faire l'objet du MOP. Autrement dit, il sera impossible d'adresser un MOP pour des écoutes téléphoniques, mais on pourrait obtenir le compte rendu d'interceptions qui ont déjà eu lieu. De même, l'ADN d'une personne analysé dans le cadre d'une autre affaire, ou encore un témoignage déjà recueilli rentre dans le champ d'application du MOP. Cette application du principe de disponibilité, permettant l'obtention d'informations qui ne peuvent être directement récoltées par le biais du MOP, peut paraître en contradiction avec la limitation initiale de son champ d'application. Il devient ainsi d'autant plus important de définir clairement le caractère subsidiaire ou obligatoire du MOP. Cette précision permettrait d'accroître la sécurité juridique et d'assurer l'uniformité de la pratique. De même, un mandat limité à l'obtention de certains types de preuve (par exemple des documents), alors que d'autres éléments probants (par exemple des expertises) restent régis par des textes différents, constitue une source de difficulté en termes de lisibilité du régime juridique applicable.

Outre le champ d'application du MOP, le choix des *pouvoirs coercitifs mis en œuvre* dans la collecte des preuves laisse perplexe. La seule désignation de l'autorité compétente varie selon les Etats : si certains pays s'appuient sur le rôle plus ou moins important de la police dans la phase d'investigation, dans d'autres l'acteur principal est le procureur, voir le juge d'instruction. Cet écart a une incidence sur la réalité de la confiance mutuelle dans la coopération pénale et rend nécessaires des dispositions limitant la porté de la RM : l'article 11, para. 4 de la DC prévoit à cet égard que l'autorité nationale puisse refuser que l'exécution du MOP donne lieu à

[41] Les demandes d'extrait de casier judiciaire ont entretemps fait l'objet de la décision du Conseil 2005/876/JAI du 21 novembre 2005 relative à l'échange d'informations extraites du casier judiciaire, *JO*, n° L 322, 9 décembre 2005, p. 33.

une perquisition ou saisie lorsqu'il n'a pas été validé par un juge, une juridiction, un magistrat instructeur ou un procureur.

De même, les conditions d'exécution d'une « décision aux fins d'obtention de preuves » changent. La différence sensible entre la demande du procureur de divulguer un élément de preuve et l'ordre donné par le juge de procéder à une perquisition peut être facilement perçue. Ainsi les pouvoirs coercitifs mis en œuvre dans la collecte des preuves peuvent être schématisés du moins au plus intrusif. L'échelle va du simple pouvoir de conservation, en passant par la faculté d'exiger la production ou la divulgation d'un élément de preuve, vers le pouvoir de saisie et enfin les ordres de perquisition. Reprenons alors un exemple : un juge d'instruction demande d'effectuer une saisie à son homologue étranger, alors que ce dernier ne dispose pas d'un tel pouvoir d'après sa loi nationale. Il ne peut être obligé d'exécuter la saisie à moins que sa loi nationale n'admette cette possibilité [42]. Le MOP consistera pour l'Etat d'émission à mentionner l'objectif à atteindre (obtenir tel document), tout en laissant à l'Etat d'exécution le choix des moyens conformément à son droit national. La RM ne fait qu'imposer une obligation de résultat.

Comment déterminer alors la mesure le plus adéquate à mettre en œuvre ? La DC se limite à consacrer le principe général du choix de la mesure la plus efficace [43]. La mise en place d'un contrôle efficace de la proportionnalité des moyens employés devient ainsi une mesure urgente, permettant également d'établir une sanction lorsque sont employées des mesures intrusives injustifiées. Cette nécessité mène inévitablement à la question de l'admissibilité des preuves pénales, aspect indissociable de la protection des droits individuels et des garanties procédurales.

3. Légalité de la preuve et respect des garanties procédurales

Les difficultés soulevées par les divergences entre législations pénales nationales se retrouvent toutes dans la question de la légalité de la preuve [44]. C'est sur ce point que le principe de RM pourrait atteindre ses limites : le MOP est automatiquement exécuté, sans pour autant garantir la recevabilité de la preuve dans l'Etat d'émission. L'optique est celle d'assurer l'efficacité de la coopération judiciaire pénale. Dans ce sens, la DC impose à l'Etat d'exécution de veiller à ce que son droit national permette d'obtenir la preuve dans une circonstance analogue à celle du droit de l'Etat d'émission si l'objet en question était disponible sur le territoire de ce dernier. Autrement dit, l'autorité d'exécution doit faire en sorte que l'élément de preuve récolté soit admissible dans les poursuites engagées dans le pays d'émission du mandat.

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[42] L'article 11, para. 3 de la décision-cadre relative au MOP impose aux Etats de veiller à ce qu'il puisse être recouru à des perquisitions ou des saisies aux fins de l'exécution du MOP lorsque celui-ci porte sur l'une des infractions de la liste.

[43] Article 11 (2) de la décision-cadre relative au MOP.

[44] La légalité de la preuve est un principe affirmé dans toutes les législations pénales des EM. En droit luxembourgeois, la définition jurisprudentielle de la règle de loyauté de la preuve s'énonce comme suit : « les juges ne peuvent retenir des éléments de preuves obtenus par des moyens délictueux ou déloyaux » (Trib. Arr. Luxembourg, 11e ch., 6 avril 2000, (M.c.B.)), plus amplement débattu dans J. Vogel, *op. cit.*, p. 326.

Réduire la légalité des preuves à la seule clef de lecture d'une coopération efficiente risque d'en dénaturer la véritable raison d'être. Le contrôle de la légalité n'est pas un simple « obstacle » à l'efficacité de la coopération pénale, mais il est avant tout le *moyen* d'assurer le respect des garanties procédurales, notamment en l'absence d'un texte européen dans le cadre des enquêtes transfrontalières. Le principe de RM doit être accompagné d'une protection suffisante des droits fondamentaux. En particulier les droits de la défense en matière pénale doivent être assurés tout au long de la procédure. Certes la DC pose des garanties minimales. Tout d'abord, l'élément recherché doit être nécessaire et proportionné aux fins des procédures qui sont à l'origine du MOP[45], le but étant d'éviter les ingérences injustifiées dans la vie privée. Quant à l'utilisation des données à caractère personnel, le principe de spécialité et le principe de confidentialité sont posés[46], sachant que les standards de protection de la directive 95/46/CE ne s'appliquent pas au troisième pilier.

Ces garanties sont-elles suffisantes ? Certes la CEDH offre une base commune de protection des droits fondamentaux, mais elle ne permet qu'un contrôle de la conformité de la procédure pénale au sein d'un système national. Le MOP ajoute un caractère transfrontalier susceptible de marquer un *déséquilibre des procédures*[47]. Si un pouvoir coercitif étendu dans la phase de l'enquête préliminaire est contrebalancé par une protection plus grande de la personne poursuivie au cours du procès, on pourra considérer que l'équilibre est respecté au sein du système juridique national. Mais si ce même pouvoir est exercé pour l'obtention d'une preuve qui sera utilisée ensuite dans un autre Etat, où la personne poursuivie ne dispose pas de moyens pour la contester, la procédure pénale porte déjà potentiellement atteinte aux droits de la personne poursuivie. De ce fait, le droit à un recours juridictionnel effectif acquiert une importance cruciale, d'autant plus que l'accès transfrontalier à la justice, consacré dans son principe, se heurte à des difficultés d'ordre pratique.

Ces réflexions valables pour le MOP peuvent être étendues aux autres instruments de RM, tout en soulignant un point essentiel : le respect des droits fondamentaux est un élément constitutif d'un système de justice pénale propre aux Etats de droit, mais également à une *Union de droit.*

5. D'une protection européenne des droits fondamentaux

A première vue, le cadre juridique actuel de protection des droits fondamentaux semblerait adéquat. Soit le système pénal national offre un niveau de protection suffisant, soit la CEDH (notamment son article 6) est considérée comme un instrument supranational à même de protéger les droits des citoyens européens. Cette observation mise en avant par les autorités de poursuite peut *a priori* trouver une confirmation dans le travail des tribunaux luxembourgeois : jusqu'à ce jour, il n'y a pas eu de cas de refus par le Luxembourg de donner suite à une demande de coopération pénale qui aurait été motivé par le non-respect des droits fondamentaux. Ce constat est cependant superficiel et ne rend pas compte d'une problématique plus profonde. S'il est vrai que

[45] Article 7(a) de la décision-cadre relative au MOP.
[46] Article 10 de la décision-cadre relative au MOP.
[47] Voy. *infra.*

les autorités judiciaires luxembourgeoises ne procèdent pas au contrôle du respect des garanties procédurales par l'EM d'émission lorsque la demande s'appuie sur un instrument de RM, elles ne pourraient que refuser de donner suite à la coopération pénale en cas de violation manifeste des droits fondamentaux [48].

Plus généralement, l'élargissement du champ d'application de la RM aux domaines sensibles des procédures pénales fait naître le besoin d'un cadre légal protecteur des garanties procédurales. De la même manière, l'extension géographique du principe vers l'est marque l'importance du renforcement de la confiance mutuelle en vue de la création d'un contrôle judiciaire européen, qui pourrait idéalement s'appuyer sur un régime transfrontalier de garanties procédurales. A défaut de texte européen après l'échec de la proposition de DC relative à certains droits procéduraux accordés dans le cadre des procédures pénales [49], le risque est celui d'une protection des droits fondamentaux en *mosaïque*. Le morcellement des niveaux de protection des libertés individuelles et garanties procédurales en Europe ne semble pas soulever à première vue de difficultés particulières. Tout comme les autres juridictions nationales, le juge luxembourgeois vérifie la légalité d'une demande sur la base des principes fondamentaux de sa législation nationale. Mais l'adoption de critères de référence nationaux n'est pas adaptée à des procédures pénales transfrontalières. Le maintien du *patchwork* actuel conduirait à long terme à une érosion de la protection des droits fondamentaux, réclamant ainsi de réduire les grandes divergences existant dans la pratique de la protection des droits des individus.

La raison d'être des références aux droits fondamentaux dans les instruments de RM n'est en principe pas de servir de fondement à un motif de refus. Cette hypothèse même démontre combien la question des garanties procédurales est centrale. La question est intrinsèquement liée à la *confiance mutuelle*. La déclaration du gouvernement allemand à la DC relative au MOP en témoigne [50]. En effet, la négociation de ce texte a démontré les limites de la RM à défaut d'un texte établissant des règles communes aux Etats de l'Union en matière de garanties procédurales. Le Luxembourg est pleinement en faveur d'un tel instrument juridique, dont l'adoption s'avère aujourd'hui nécessaire. D'une part, le cadre du Conseil de l'Europe et la CEDH sont insuffisants, de même que la jurisprudence de la Cour de Strasbourg, qui a un impact sur l'UE inférieur à la portée des arrêts de la CJ. D'autre part, l'adoption d'un texte sur les garanties procédurales viendrait contrebalancer la prolifération de textes à visée répressive adoptés dans le cadre du troisième pilier. Le droit pénal est une matière sensible puisqu'il concerne directement les libertés des citoyens et de personnes présumées innocentes, de sorte qu'un instrument consacré aux garanties procédurales est essentiel pour le développement de l'espace pénal européen.

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[48] Ainsi par exemple, une demande qui impliquerait un risque d'atteintes graves à la personne faisant l'objet du MAE (torture, traitements inhumain…) ne saurait être exécutée.

[49] Proposition de décision-cadre du Conseil du 28 avril 2004 relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'Union européenne, COM (2004) 328 final. Voy. notamment M. Fletcher et R. Lööf avec B. Gilmore, *EU criminal law and Justice,* Cheltenham, Edward Elgar Publishing, 2008, p. 126.

[50] *JO*, n° L 350, 30 décembre 2008, p. 92.

En pratique, l'autorité compétente pour reconnaître et exécuter une décision judiciaire envoyée par un juge étranger peut difficilement apprécier le respect des garanties du procès équitable, question pourtant fondamentale dans le cadre des poursuites pénales : le juge national est confronté à une décision prise isolément, sans avoir une perception de l'ensemble du système pénal de l'Etat d'émission. Ceci rend également *indispensable* le renforcement du contrôle juridictionnel par l'intervention du juge européen**.** La CJ, appelée à exercer un rôle d'arbitre, pourrait aider à fluidifier le processus, en évitant des situations de crispation au niveau national dans lesquelles les hautes juridictions essaieraient de préserver les spécificités des garanties procédurales offertes par leur droit national. La procédure préjudicielle d'urgence aura certainement un impact fondamental sur la question.

Cette dernière mesure est d'autant plus importante que la conception d'un même droit fondamental, pourtant affirmé dans tous les EM, peut varier d'un ordonnancement juridique à un autre. Une même disposition européenne peut être comprise différemment d'un pays à l'autre selon les exigences internes et la tradition juridique nationale. Cet aspect fait de la protection des droits fondamentaux une question d'autant plus sensible. Il est donc *impératif* de multiplier les efforts pour comprendre les nuances d'interprétation qui se cachent au sein des Etats membres, nécessité à laquelle une *étude comparative* pourrait répondre.

6. L'ambivalence de la clause de territorialité : motif de refus et source de conflit de juridiction

En règle générale, le Luxembourg procède à une transposition textuelle des instruments européens. De ce fait, les risques de réintroduction de motifs de refus non autorisés par le législateur européen sont réduits. Tel a été le cas de la DC relative au MAE, dont la loi de transposition indique clairement le caractère obligatoire des motifs de refus d'exécution. De même, la non-exécution d'une décision judiciaire étrangère reste rare. L'invocation d'un motif de refus est d'autant plus prudente que la coopération pénale est perçue par les autorités judiciaires comme un « donnant-donnant ». Des difficultés se rencontrent néanmoins dans la pratique courante.

Une fois le contrôle de double incrimination éliminé, la pratique des négociations démontre une attention majeure portée par les EM aux autres motifs justifiant la non-exécution d'une demande. Ainsi, certains pays ont invoqué la clause de territorialité pour aboutir au même résultat auquel conduirait l'exigence de double incrimination : préserver les *spécificités* de la législation nationale. Cette dénaturation de la règle de territorialité va s'ajouter à une autre question qui y est directement liée. Lorsqu'une infraction est commise en partie sur le territoire de deux Etats, des *conflits de compétences* sont susceptibles de se produire. Un tel risque est amplifié par l'existence dans la législation pénale nationale de règles de compétence extensives, non seulement fondées sur le critère territorial, mais adoptant également une compétence personnelle et/ou universelle [51]. Quant à la compatibilité du principe de territorialité avec la RM,

[51] La loi luxembourgeoise reconnaît la compétence des juridictions nationales selon le critère de personnalité active et passive, c'est-à-dire lorsqu'un national commet ou est victime, d'un crime ou délit hors du territoire du Grand-duché (article 5 du Code d'instruction criminelle). Une compétence universelle, consacrée à l'article 7 du Code d'instruction criminelle, s'applique

il revient aux Etats de décider lequel va lancer les poursuites, sans qu'il existe de hiérarchie entre Etat d'émission et d'exécution. En l'absence de dispositions légales, les conflits de compétence peuvent être résolus par la négociation, la consultation et l'entretien entre les autorités judiciaires des différents Etats, éléments inévitables dans l'Etat actuel du droit. De façon générale, la pratique cherche à établir quelle juridiction a les liens les plus forts avec l'affaire concernée, ceci dans le respect du principe *non bis in idem.*

Fortes de leur expérience en matière d'affaires transfrontalières, les autorités luxembourgeoises ne rencontrent pas de difficultés majeures sur ce point. La pratique courante démontre que la clause de territorialité ne constitue pas une entrave à la coopération pénale [52], même en dehors des instruments de RM. Les critères développés par la pratique pour déterminer quel Etat est compétent pour exercer les poursuites prennent en compte les différents liens que le cas d'espèce a avec ce pays : lieu de la commission de l'infraction, nationalité respectivement de l'auteur et de la victime, etc. Parmi ces critères figure également le niveau de sanction imposé par les législations nationales. La transposition de la DC relative au MAE offre une illustration du recours à la clause de territorialité par le Luxembourg [53]. Conformément au texte européen, elle constitue un motif de refus facultatif : les autorités luxembourgeoises peuvent refuser la remise d'une personne poursuivie par un autre EM pour un fait commis en tout ou en partie sur le territoire luxembourgeois. Lorsque le principe de territorialité entre en concurrence avec d'autres critères de compétence personnelle ou universelle, la pratique donne généralement priorité à l'Etat du lieu de commission de l'infraction. Les exemples fournis par la pratique démontrent également que cette question est proche du principe *non bis in idem,* ainsi que du contrôle de double incrimination. Une illustration est la décision des autorités luxembourgeoises d'exécuter un MAE émis par la France à l'encontre d'une personne déjà jugée au Luxembourg [54]. Les autorités françaises invoquaient leur compétence territoriale afin de la poursuivre pour criminalité organisée, tout en faisant valoir que le jugement luxembourgeois concernait seulement une infraction aux dispositions de la loi sur les armes. En règle générale, le Luxembourg essaye de suivre le principe de *bonne administration de la justice* en évitant de multiplier les déplacements et les commissions rogatoires lorsqu'un autre Etat membre est territorialement compétent pour exercer les poursuites [55]. Le principe de territorialité, bien qu'exception à la RM, est donc compatible avec celle-ci.

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lorsqu'un non-ressortissant luxembourgeois commet hors du territoire du Grand-duché l'une des infractions limitativement énumérées. Voy. notamment D. Spielmann et A. Spielmann, *op. cit.*, p. 120 et s.

[52] Ainsi, les praticiens ne rencontrent pas de difficultés quant à la remise des nationaux et des résidents sur la base du MAE sous condition du retour de la personne aux fins de l'exécution de la peine.

[53] Article 5 de la loi du 17 mars 2004 relative au mandat d'arrêt européen.

[54] Cet exemple a été donné dans le cadre d'une interview.

[55] La capacité de praticiens à résoudre les conflits de compétence est également illustrée dans une affaire d'escroquerie qui avait débuté au Luxembourg, mais jugée dans un autre pays. Alors que l'infraction avait été commise en France et tant la personne poursuivie que la victime étaient des ressortissants français, la somme d'argent, produit du délit d'escroquerie, avait été

Cette situation laisse toutefois entrevoir un *forum shopping,* d'autant plus que la compétence juridictionnelle est « négociée » entre les autorités de poursuites des EM concernés. A défaut de règles communes de conflit de juridiction, la résolution de la concurrence entre compétences territoriales est laissée à la pratique. Dès lors la clause de territorialité risque à l'avenir de recouvrir une fonction à la fois centrale et ambiguë dans la coopération pénale. Il est donc nécessaire de mettre en place un régime européen qui instaure dans toute leur effectivité les grands principes du droit pénal (notamment le principe de légalité) et garantit la protection adéquate des libertés individuelles. Cela permettrait tout d'abord d'éviter que le principe de territorialité ne remplace la condition abolie de la double incrimination. De plus, la *formalisation* des règles de conflit de juridiction développées par la pratique sert à la création d'un cadre légal clair, prévisible et transparent. Ces caractéristiques, primordiales dans un système de justice pénale, découlent d'une interprétation et d'une application stricte du principe de légalité. La *prévisibilité de la peine* − donc de la loi pénale applicable − présuppose aussi la prévisibilité des compétences des autorités judiciaires pour l'exercice des poursuites pénales, permettant ainsi de réduire les risques de *bis in idem*. Une nouvelle proposition de DC sur ce thème, serait l'occasion d'instaurer un système transparent et d'être critique par rapport aux pratiques de *forum shopping*.

7. Cohérence des instruments de reconnaissance mutuelle

A ce jour, le principe de RM des décisions judiciaires pénales trouve application dans des instruments législatifs disparates, chacun consacré à un aspect particulier du procès pénal. Cette mosaïque normative est source d'incohérences – existantes et potentielles – et rend difficiles la lisibilité et la compréhension du principe même. Certes, ce défaut de cohérence pourrait être résolu par la codification des textes en vigueur. Même si ce processus est théoriquement envisageable, sa réalisation paraît difficile. En effet, entamer le chantier d'un grand instrument de RM codifiant le droit en vigueur heurterait la lourdeur du processus législatif européen, mais risquerait surtout d'être freiné par la négociation politique. Tout d'abord, les délais de promulgation et transposition d'un paquet de mesures s'adaptent mal à la nécessité invoquée par certains d'une réaction rapide aux phénomènes criminels. De plus, le processus de négociation risquerait de compromettre à nouveau la cohérence du résultat final. Enfin, il faut noter un point d'ordre méthodologique : l'existence d'un texte unique européen n'aurait à lui seul aucune retombée pratique, à moins d'assurer une transposition fidèle dans les droits nationaux

Une intervention législative reste toutefois souhaitable, dans la mesure où elle donnerait l'occasion de résoudre les incohérences internes aux textes adoptés. Dans ce sens, l'entrée en vigueur du traité de Lisbonne donnera l'occasion de *consolider* les instruments de RM.

Quant à la méthode de codification, la solution idéale pour les praticiens serait de faire table rase des instruments actuels et de les remplacer par une grande DC recouvrant

placée auprès d'une banque au Luxembourg. L'établissement bancaire luxembourgeois lui-même avait informé le parquet d'un soupçon de blanchiment d'argent. Les autorités judiciaires luxembourgeoises, reconnaissant que l'affaire présentait plus de lien avec la France, ont accepté de renoncer à juger l'affaire.

l'ensemble de l'entraide judiciaire pénale majeure et mineure. Ce projet ambitieux pourrait céder la place à une codification par grands thèmes, plus facilement réalisable et qui aiderait également à la lisibilité du droit. Une « partie générale » consacrée à la RM mènerait ainsi à surmonter les incohérences entre les textes en vigueur. Un tel outil européen devrait reprendre les points communs aux différents instruments de RM, mais ne saurait se limiter à cela. Résoudre les contradictions actuelles signifie mettre en place de règles protégeant les droits fondamentaux, établissant des règles claires de compétence, définissant les bonnes pratiques de la coopération judicaire pénale, tout en imposant une protection juridictionnelle adéquate au niveau européen. Ces apports joueraient non seulement en faveur d'une sécurité juridique accrue, mais entraîneraient de façon plus générale une *amélioration de la qualité normative* des instruments de RM.

8. Conclusions et perspectives

Le principe de RM est avant tout regardé comme un instrument au service du développement d'un espace pénal européen. Cet outil permet de judiciariser les procédures et de s'éloigner des anciennes entraves bureaucratiques propres à la coopération pénale classique. Le chemin entrepris est celui de la démocratisation de la justice, qui ressort libérée des contraintes politiques et diplomatiques caractérisant les procédures qui mettaient auparavant les autorités centrales au cœur de la coopération. Il est indéniable que l'application de la RM aux décisions judiciaires pénales contribue à l'assouplissement des procédures de coopération. Toutefois, le niveau de formalisme à même de garantir la transparence du système de justice pénale doit être *préservé*. Ce nouveau scénario juridique appelle l'attention particulière des instances législatives nationales et supranationales. Certes, un retard dans la mise en œuvre des DC est enregistré. Mais le délai de transposition ne pourrait être réduit en deçà de ce qui est utile à une mise en œuvre consciencieuse des instruments de RM, qui sache préserver la cohérence du système de justice pénale des EM. Cette question est d'autant plus sensible que la transposition des textes européens est susceptible d'avoir un impact sur l'ordre constitutionnel des Etats, aspect que le législateur national est tenu de prendre en compte au même titre que l'exigence de transposition conforme aux instruments européens. De même, les instances décisionnelles supranationales ne peuvent ignorer l'impact constitutionnel que les instruments de RM continuent d'avoir sur les systèmes pénaux nationaux.

La RM ne peut en aucun cas être considérée comme une fin en soi. Légitimer le principe par lui-même serait une erreur. En effet, la RM est un outil au service du bon fonctionnement de l'espace pénal européen, espace qui doit trouver ses fondations dans les principes de base du droit pénal matériel et procédural. Légalité des crimes et délits, droit à un procès équitable, contrôle juridictionnel, indépendance du pouvoir judiciaire − autant de règles dont le principe est partagé par les EM[56], mais qui nécessitent une définition claire sur le plan européen. L'affirmation de leur contenu

[56] Sur le principe de légalité à la fois dans sa valeur constitutionnelle nationale et sa dimension européenne, voy. S. Braum, « Das Prinzip der Strafgesetzlichkeit », *in* J. Gerkrath (éd.), *La jurisprudence de la Cour constitutionnelle du Luxembourg 1997-2007,* Pasicrisie luxembourgeoise, 2008.

ne peut que contribuer au développement de standards de protection des garanties procédurales dans un contexte transnational. Cette voie permettrait d'assurer un espace pénal européen respectueux à la fois des droits individuels et des divergences existantes entre les systèmes nationaux de justice pénale, au lieu de se lancer sur la voie difficilement praticable de l'harmonisation. Couplé au développement de bonnes pratiques, ce processus permettrait d'améliorer les méthodes normatives et les techniques mises en œuvre par les praticiens.

En effet, si la RM a permis un meilleur fonctionnement de la coopération judiciaire, les incertitudes qui demeurent quant à son application doivent être clarifiées. Ce parcours est nécessaire en vue non seulement de l'efficacité des procédures, mais également de la transparence du système de justice pénale. L'insécurité juridique doit être comblée par des règles claires, qui pourraient être développées dans un *catalogue des bonnes pratiques* de la coopération pénale. Accompagné par la formation des magistrats, un tel texte devrait couvrir des points à première vue élémentaires, mais essentiels dans la pratique courante : sûreté des traductions, transparence des demandes, mais surtout développement d'une culture de légalité, dans le sens d'un exposé clair et intelligible des faits et des infractions telles que définies en droit national. Les premiers à bénéficier de ces clarifications seraient les droits individuels et garanties procédurales, dont le respect doit être assuré pour tout citoyen européen.

Entamer ce processus par la mise en place de garanties procédurales « transeuropéennes » doit intervenir avant l'extension ultérieure du principe de RM, qui s'est concentré jusqu'à présent sur la fonction répressive du droit pénal. Comme l'a démontré l'analyse du MOP, ce mouvement nécessite d'être contrebalancé par un discours attentif aux garanties procédurales protégeant l'individu face aux autorités publiques dans le cadre des poursuites pénales. Parallèlement, la mise en place d'un *contrôle juridictionnel indépendant sur le plan européen* est la condition *sine qua non* pour une protection effective des personnes poursuivies. Dans cette optique, l'extension des compétences de la CJ en matière pénale est fondamentale, comme le démontre la procédure préjudicielle d'urgence récemment entrée en vigueur [57].

Une intervention au niveau européen s'avère aujourd'hui nécessaire. La réponse aux nouveaux enjeux de l'espace pénal européen ne peut être retardée qu'au détriment d'une coopération pénale transparente. La réplique législative serait bien un texte européen posant les règles générales d'application de la RM, mais se limitant à résoudre les problématiques les plus urgentes. Les garanties procédurales ainsi que des principes de base du droit pénal trouveraient enfin une affirmation claire au niveau européen. Cela créerait également l'occasion de préciser le contenu du catalogue d'infractions pour lesquelles la double incrimination est abolie et de définir les critères de compétences des autorités de poursuites. Enfin, le bon fonctionnement de l'espace pénal européen et sa transparence appellent aujourd'hui à l'adoption de normes de « bonnes pratiques » de la coopération pénale. Celles-ci devraient porter sur la traduction, les échanges réguliers entre praticiens, la formation permanente des

[57] Notamment sur le plan de la sécurité juridique, deux arrêts récents : CJ, 12 août 2008, aff. C-296/08 PPU, *Santesteban Goicoechea*, non encore publié au *Rec.*, et CJ, 1er décembre 2008, aff. C-388/08 PPU, *Leymann et Pustovarov*, non encore publié au *Rec*.

juges dans une école européenne de la magistrature, les améliorations des méthodes juridiques et des connaissances en droit comparé, une culture de la légalité garantissant l'exposé clair des faits et des preuves à charge, le recours au droit pénal européen pour les infractions les plus graves.

L'appel adressé au législateur européen concerne l'inscription de ces règles dans un *Livre vert* – voire dans un second temps dans une décision-cadre – relatif aux bonnes pratiques de mise en œuvre de la RM des décisions judiciaires en vue de la transparence de la coopération pénale et la sauvegarde des garanties procédurales. Un tel instrument européen constituerait sans doute un pas important vers une coopération judiciaire qui fait des principes de base du droit pénal son point fort. L'efficacité des procédures ne peut être mesurée uniquement sur la base de leur finalité répressive : un système de justice pénale est pleinement efficace lorsqu'il répond également aux droits et libertés individuelles. Ainsi, l'espace pénal européen trouverait dans ce nouveau texte une légitimation solide, fondée sur une Union de droit.

Judicial cooperation and mutual recognition in criminal matters in Malta [1]

Stefano Filletti and Alison Gatt

1. State of play

Malta has so far implemented two out of the Council framework decisions adopted by the Member States, providing for cooperation in criminal matters on the basis of the principle of mutual recognition. The Council Framework Decision of 13th June 2002 on the European arrest warrant and the surrender procedures between Member States [2] was implemented by means of the Extradition (Designated Foreign Countries) Order [3] while the Council Framework Decision on the execution in the European Union of orders freezing property or evidence [4] was implemented by means of the Freezing Orders (Execution in the European Union) Regulations [5]. However, neither of these implementing laws makes specific reference to the principle of mutual recognition. Malta has not yet implemented the Council Framework Decision on the application of the principle of mutual recognition to financial penalties [6] and the

[1] The article contains opinions and comments of jurists, negotiators and drafters involved in the legal process relating to mutual recognition in Criminal Matters. These opinions and comments were taken during specific interviews held for the purposes of this article. The relative positions taken by the said interviewees and the comments made reflect their position and opinion and are not necessarily reflecting any official position.

[2] FD 2002/584/JHA, *OJ*, no. L 190, 18 July 2002, p. 1, hereinafter referred to as the FD EAW.

[3] Subsidiary Legislation 276.05, hereinafter referred to as the EAW Order.

[4] FD 2003/577/JHA, *OJ*, no. L 196, 2 August 2003, p. 45, hereinafter referred to as the FD Freezing Orders.

[5] Subsidiary Legislation 9.13, hereinafter referred to as the Freezing Orders Regulations.

[6] FD 2005/214/JHA, *OJ*, no. L 76, 22 March 2005, p. 16, hereinafter referred to as the FD on Financial Penalties.

Council Framework Decision on the application of the principle of mutual recognition to confiscation orders [7].

While the FD EAW required implementation by the Member States before the 31st December 2003 [8], it was transposed into Maltese legislation by means of Legal Notice 320 of 2004, which was adopted under the Extradition Act [9] and came into force on the 7th June 2004. It has since been amended several times, in order to be brought into line with provisions of the FD [10].

2. Double criminality and territoriality clause

A. Double criminality

The Commission, in its 2005 Report, observed that Malta had implemented the double criminality list in complete conformity with the FD EAW. In fact, the list of offences found in Art. 2(2) of the FD EAW was reproduced in Schedule 2 annexed to the EAW Order, referred to as "scheduled conduct".

The requisite that such offence be punishable in the issuing State with a custodial sentence or detention order for a maximum period of at least 3 years, in order to exclude verification of double criminality, has also been directly transposed into the EAW Order, however it has been limited to those cases where no sentence has as yet been imposed on the person whose surrender is requested [11].

Where a person's surrender is requested for the purpose of executing a sentence which has already been imposed, Maltese legislation goes beyond what was required by the FD EAW with regard to double criminality. Art. 60 provides that when scheduled conduct occurs in the issuing Member State, double criminality is not checked if a sentence of imprisonment or detention for a term of 12 months or more has been imposed. Therefore, like the UK, Malta has reduced the threshold for non-verification of double criminality in conviction cases from 3 years to 12 months, further limiting the application of this principle and hence widening the scope of mutual recognition and facilitating surrender.

Furthermore, by means of LN 224 of 2006, the first amendment to the Order, Malta explicitly extended the abolition of the double criminality rule to attempt, conspiracy and complicity in relation to the scheduled conduct.

In the context of freezing orders, the verification of double criminality is abolished for the same list of offences, when they are punishable by a custodial sentence of a maximum period of at least 3 years. The Freezing Orders Regulations have transposed this provision with wording which is almost identical to that in the FD, although the list of categories of offences is included in a Schedule.

Although the fact that the list of offences for which verification of double criminality is excluded is in fact a list of general categories rather than specific offences, negotiators observe that this constitutes no difficulty. Negotiators consider that it is

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[7] FD 2006/783/JHA, *OJ*, no. L 328, 24 November 2006, p. 59, hereinafter referred to as the FD on Confiscation Orders.

[8] Art. 34.

[9] Chapter 276 of the Laws of Malta.

[10] See Legal Notices 224 of 2006; 367 of 2007, 396 of 2007 and 397 of 2007.

[11] Art. 59.

up to the law and the authorities of the executing Member State to determine whether a particular act falls under one of the offences in the list, and that there is therefore no room for a definition of these offences at a European level. It is considered that the three-year or one-year imprisonment threshold as the case may be, serves as a sufficient "seriousness test" and was already a fragile compromise to agree on.

Mutual recognition is not considered to be incompatible with the retention of dual criminality beyond the list of 32 offences found especially in the EAW and EEW FDs. Going beyond such list however could oblige MS to execute decisions that would be alien in the executing MS' law. For this same reason, negotiators explain that during discussions concerning the FD on the transfer of sentenced persons, the insertion of the standard list of 32 offences was opposed by the Maltese representatives, who joined Ireland and the Netherlands on maintaining that this should be optional, in order to avoid having persons serving sentences in Maltese prisons for acts which do not constitute offences under Maltese law. Therefore, with reference to the FD on custodial sentences, the opt-out clause would be availed of, thus requiring double criminality in all cases.

B. Territoriality clause

The FD EAW includes territoriality as an optional ground for refusal and the domestic EAW Order has implemented this principle through the definition of "extraditable offences", albeit limitedly. With regard to offences for which no verification of double criminality is allowed, it is specifically required that "the conduct occurs in the scheduled country and no part of it occurs in Malta", in order for it to constitute an extraditable offence. On the other hand, where double criminality is satisfied and the offence is punishable with at least 12 months imprisonment, or a sentence has been imposed of at least 4 months, it is merely required that "the conduct occurs in the scheduled country". The Maltese court gave its interpretation of the latter provision in *Police v. Emanuel Borg* [12], where reference was made to a decision handed down by the British House of Lords in similar circumstances. The Maltese court followed the position taken by the House of Lords that "it would impose a wholly artificial restriction on the extradition process if it were taken as meaning that all the conduct which resulted in the offence must have taken place exclusively within the [requesting] territory". As a result, the court held not only that it is not necessary that no part of the conduct occurs in Malta, but that it is sufficient that the *effects* of the conduct occur in the issuing State, even if the conduct itself takes place, wholly or partially in Malta. This was subsequently confirmed by the same court in *Police v. Anthony Muscat* [13].

Therefore, while the territoriality principle has been included in Maltese law concerning the EAW, it has also been ensured that application of this rule does not prevent surrender in cases where the offence in question is of a certain seriousness, as determined by the related punishment. Moreover, it may be argued that a balance is struck between the principle of double criminality and that of territoriality, since the

[12] Court of Magistrates (Court of Committal), Case no.700/2007, 7 September 2007.

[13] Court of Magistrates (Court of Committal), Case no.701/2007, 12 September 2007.

latter's scope is restricted when the former is satisfied. Practitioners are against any further limitation on the territoriality rule.

3. Other grounds for refusal

A. Mandatory grounds under Maltese law

According to the Commission's 2005 Report the three mandatory grounds for non-execution of an EAW established in Art. 3 of the FD EAW, have been correctly transposed into Maltese Law.

The Commission has observed that many Member States have interpreted the optional grounds for refusing an EAW in Art. 4 of the FD, as meaning that the State may choose whether a judge is required to refuse surrender or whether he has discretion in the matter. As a consequence many States have made these grounds for refusal mandatory too. The Maltese legislator has transposed these grounds in varying ways, but many have in fact been made mandatory, namely:

- The non-fulfilment of the double criminality requirement when the conduct in question is not a scheduled offence. In fact, such conduct would not constitute an extraditable offence under Art. 59 and 60 of the Maltese legislation.
- Prescription: once the action is time-barred under Maltese law, and provided the acts fall within the jurisdiction of the Maltese court, the court must in all cases refuse to execute the EAW.
- Where a final decision has been given in a third country: the provision implementing the *ne bis in idem* rule as a mandatory ground of refusal does not distinguish between decisions given in another Member State and those given in a third country. (In fact, the FD on Freezing Orders, confiscation orders, and financial penalties do not distinguish between a sentence given in a Member State or third State).
- Where all or part of the offence was committed in the territory of the executing State (Art. 4(7)(a) FD EAW), and where the offence was committed outside the issuing Member State and the executing State does not allow for prosecution of that offence when committed outside its territory (Art. 4(7)(b) FD EAW). These have been negatively transposed as mandatory grounds in that they would not constitute extraditable offences according to Art. 59 and 60. However, their scope has been limited since the offence will nevertheless be extraditable if the double criminality rule is satisfied and the offence is punishable with at least 12 months imprisonment or detention under Maltese law, or the sentence imposed is of at least 4 months as the case may be. The Commission stated in both reports that these grounds were transposed into Maltese law only in respect of nationals. As observed in Malta's comments on the 2005 report however, neither Art. 59 nor Art. 60 make any distinction between nationals and non-nationals, and so would apply to any requested person.

The FD on Freezing Orders does not establish any grounds of mandatory non-recognition. However, all the optional grounds for refusal of recognition have been transposed into Maltese legislation as mandatory grounds for refusal. As such, the freezing order shall not be recognised if any of those grounds subsist. The result will

probably be similar to that arising with respect to the EAW, with different Member States applying these grounds to a different extent.

In its reports on the EAW, the Commission criticized the fact that the Maltese implementing legislation did not specifically transpose the provision concerning privileges and immunities. Thus no provision required the executing judicial authority to request the waiver of the privilege or immunity when this lay with an authority in Malta and there was no explicit suspension of the time-limits in these cases either. In its comments to the 2005 Report Malta observed that this was considered an academic issue since the possibilities of immunities or privileges are extremely limited under domestic law. However, with the adoption of LN367 of 2007, Art. 20 of the FD dealing with privileges and immunities was transposed into domestic law, with almost identical wording.

With regard to freezing orders, the provision dealing with immunities and privileges was immediately transposed into domestic law as a ground for mandatory non-recognition, so that recognition of a freezing order must be refused if such privilege or immunity exists making execution impossible.

B. Optional grounds

The Maltese courts have been given a degree of discretion with regard to the optional ground referring to a person being prosecuted in Malta for the same act as that on which the arrest warrant is based. Initially, the Maltese court was obliged to adjourn the extradition hearing where the person was being prosecuted for *any* offence in Malta. Once the extradition hearing resumed, the court would then reconsider the question of *ne bis in idem*. Legal Notice 224 of 2006 however amended this position, removing the formerly mandatory nature of the adjournment and distinguishing between those cases in which the local proceedings are in respect of the same offence as that in the EAW and those which are not. At present therefore, when the requested person is the subject of a criminal prosecution in Malta for the same offence, the court has discretion as to whether or not to adjourn the extradition hearing until the domestic proceedings are concluded, whereupon the hearing is resumed and *ne bis in idem* is reconsidered.

On the other hand, an optional ground provided for in the FD which has not been included in the EAW order refers to the case in which the executing State has decided not to prosecute or to halt proceedings for that offence, or in which a final judgment has been passed in a Member State against the same person for the same offence, which prevents further proceedings. While these could be interpreted as elements of the *ne bis in idem* principle, it must be pointed out that Art. 14 of the EAW Order, referring to this rule, makes reference only to an acquittal or conviction, thus seemingly excluding the scenarios covered in this paragraph of the FD EAW. With particular reference to the third part of this paragraph, the situation is rather ambiguous as it seems that "final judgment" refers to a decision other than conviction or acquittal, as these would fall squarely within the *ne bis in idem* rule and constitute a mandatory ground for refusal when referring to another Member State, even under the FD itself. Nevertheless, given that the decision in question is a final judgment handed down by a Member State and preventing further proceedings, this too should

constitute a bar to surrender, particularly in light of the ECJ's decision in *Gözütok* and *Brügge*. On the other hand, all of these scenarios may well be considered by the court as falling under the principle of *ne bis in idem*, in spite of the restrictive wording in the EAW Order itself, since this principle is nevertheless found in the Maltese Constitution and the European Convention Act (implementing the European Convention on Human Rights).

The optional ground for non-execution of an EAW issued for the purpose of executing a custodial sentence or detention order when the requested person is a national or resident of the executing State and such State undertakes to execute the same sentence under its domestic law, has also been left out of the EAW Order. In fact, no special provision is made with regard to Maltese nationals or residents, hence refraining from creating any inroads in this regard to the principle of mutual recognition. The only provision which refers to the nationality or residence of the requested person is that dealing with transit for the purpose of executing a sentence, in which case the law provides that the Maltese court *may* refuse such transit. However, there is no further provision as to the execution of the sentence in Malta. It may be argued that this possibility for refusal of transit on the ground of nationality or residence is rather peculiar since, in view of Malta's location, it seems rather unlikely that its permission for transit will in fact be necessary. Effectively therefore, no distinction is made between persons who are Maltese nationals or residents and those who are not, evidence of which were the various orders for surrender made by the Maltese courts vis-à-vis Maltese nationals, with no guarantee imposed regarding their return to Malta in order to serve their sentence, such as *Police v. Emanuel Borg* [14] and *Police v. Anthony Muscat* [15].

The Freezing Orders Regulations have complied with the FD Freezing Orders insofar as no additional grounds for non-recognition or non-execution have been introduced into domestic law, although the optional grounds under the FD were implemented as mandatory. With regard to the third ground allowing for postponement of execution of such orders however, such postponement is allowed where, in the case of an order freezing property in criminal proceedings with a view to its subsequent confiscation, that property is already subject to an order made in the course of other proceedings in the executing State and until that order is lifted. The FD limits this to cases where according to domestic law, the first order would have priority over subsequent national freezing orders in criminal proceedings. However, this limitation has not been included in the Maltese legislation, so that execution of a freezing order which has been transmitted to Malta can always be postponed if the property is already frozen in the course of local proceedings, whether criminal or not.

C. Additional grounds

Recital 12 of the FD EAW has been partially transposed as a mandatory ground for non-execution since surrender would be considered barred by reason of extraneous considerations if it appears to the Court of Committal that:

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[14] Court of Magistrates (Court of Committal), Case no.700/2007, 7 September 2007.

[15] Court of Magistrates (Court of Committal), Case no.701/2007, 12 September 2007.

- the EAW was in fact issued for the purpose of prosecuting or punishing the requested person by reason of his race, place of origin, nationality, political opinions, colour or creed; or
- if returned, he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of race, place of origin, nationality, political opinions, colour or creed [16].

No reference is made to the grounds of sex, language and sexual orientation.

Another mandatory ground of refusal is the death penalty, deriving from Recital 13. Surrender by Malta is barred if according to the law of the issuing State the offence in respect of which the return is requested is subject to death penalty. Surrender may however be allowed if the requesting country gives assurance accepted as sufficient by the Minister that the death penalty will either not be awarded or if awarded, will not be carried out [17].

It is also apt to mention Malta's views on *in absentia* judgments. Indeed the approach is stringent since the presence of the person charged or accused is required for all stages of the criminal proceedings under Maltese law. Practitioners disagree with the recognition of decisions handed down in the absence of the accused when the proceedings are of a criminal nature, whereas it is important to ascertain that a defendant in civil proceedings was appropriately notified before recognising a decision given *in absentia*. They therefore favour the inclusion of further conditions to ensure that the person's right to a fair hearing is respected and to prevent the recognition of *in absentia* judgments which would violate fundamental procedural rules in domestic law. Establishing minimum procedural rules is also seen as insufficient insofar as *in absentia* judgments are concerned, as it would be necessary to examine whether such minimum threshold was actually observed in each particular case. Establishing further conditions which would enable refusal to execute a mutual recognition instrument issued in relation to a decision given in the absence of the accused or the defendant as the case may be would be a better option. As far as the FD on *in absentia* judgments [18] is concerned, negotiators observe that this does not carry significant difficulty.

Malta did not itself limit the application of the EAW system to acts occurring after a specific time. In fact Malta applies its EAW provisions to all requests received or made by Malta on or after the 7th June 2004 irrespective of the date of the alleged offence.

4. Competent judicial authorities

According to negotiators, Malta is always very careful to safeguard its national systems and procedures. An important matter is the definition of judicial authorities,

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[16] Art. 13(b) and (15) of the EAW Order read in conjunction with Art. 10 of the Extradition Act.

[17] Art. 22 of the EAW Order read in conjunction with Art. 11(2)(b) of the Extradition Act.

[18] This FD was adopted on 26 February 2009: Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

in relation to which negotiators have insisted that competent authorities under mutual recognition instruments should be judicial and not administrative authorities. It is not accepted that decisions of a foreign administrative authority bind the Maltese courts.

Within the Maltese system, the competent judicial authority for issuing an EAW is the Court of Magistrates, whereas that for executing an EAW and deciding upon the request for surrender is the Court of Magistrates sitting as a Court of Criminal Inquiry (referred to as the Court of Committal). Malta's designated central authority is the Office of the Attorney General. In accordance with the FD EAW, the Attorney General is responsible for the transmission and reception of EAWs, requests for waiver of the speciality rule, and requests for consent to subsequent extradition. However, the Attorney General is also charged with certifying that any EAW or other request received was issued by an authority in the issuing Member State which has the function of issuing such EAW or request. This goes beyond the FD, insofar as this certification may be considered an added formality not provided for in the FD and not falling within the definition of 'administrative assistance'. Nevertheless Art. 10(5) of the FD EAW provides that difficulties concerning transmission or authenticity of any document shall be dealt with by direct contacts between the judicial authorities or with the involvement of the central authorities. Hence, the Attorney General's role of certification may well fall within the ambit of this provision.

The Attorney General also plays a role in the issuing of an EAW by the Maltese court. In fact the Attorney General's consent is required in order for the Court of Magistrates to issue an EAW upon a request lodged by a police officer. The Commission in its report considers that the EAW Order has not correctly transposed the FD as far as the role afforded to the Attorney General is concerned.

The Freezing Orders Regulations transposed the obligation in the FD on freezing orders requiring Malta to notify the issuing Member State of decisions regarding the refusal of recognition, impossibility to execute, postponement of execution and the grounds and expected duration thereof, cessation of grounds and execution thereupon, and any other restrictions to which the property is subject. However, no explicit reference was made to the duty of the Maltese authorities to give a report on the execution of the freezing order, to the issuing authority. Nevertheless, it is presumed that notification of such execution will in practice be given.

Similarly, the duty to notify the issuing authority as to the decision taken upon an EAW, has not been specifically transposed into domestic law. Nevertheless, Malta stated that it would in fact notify the issuing State of any such decision, as a matter of course and of good practice.

5. Content and form

The content and form required by the Member State is relevant for the purposes of ensuring that no extra information is demanded, beyond that which is allowed under the FD. Any request for such extra information would reveal a lack of trust in the systems of the other Member States and would make recognition and execution more difficult.

With reference to the details required upon transmission of an EAW, the Commission criticised the Maltese legislation as requiring information beyond that

permitted by the FD EAW. As a result, the EAW Order was amended several times so as to be brought into line with the FD. Art. 5A of the said Order now provides that the form contained in the Annex to the FD shall constitute a relevant EAW. Thus, no extra documentation or information is required under Maltese law as it stands following the latest amendment by means of LN 390 of 2007.

In the context of Freezing Orders, the Freezing Orders Regulations have directly incorporated the certificate annexed to the FD on Freezing Orders as a Schedule to the Regulations. This ensures that the domestic legislation is in conformity with the requirements of the FD. In fact, when reference is made to the provisions concerning freezing orders under the Dangerous Drugs Ordinance, the necessary adjustments are made so to avoid imposing extra requisites.

6. Time limits, postponement of execution or temporary surrender

A. Time limits

According to the FD on Freezing Orders the executing authority shall "forthwith" take the measures necessary for its "immediate" execution and the decision on the freezing order must be taken within 24 hours of its receipt if possible. The property should remain frozen until the executing State has responded definitively to the request for the transfer of evidence or confiscation of property, although the period of freezing could be limited by the executing State after consulting the issuing State and in light of the circumstances of the case.

The Freezing Orders Regulations make no reference whatsoever to the need for immediate execution, nor is any reference made to the time-limit within which a decision on the order is to be made. Rather, reference is made to a number of provisions dealing with freezing orders issued under the Dangerous Drugs Ordinance[19], and which are to be applied to the execution of freezing orders transmitted according to the FD. However, this gives rise to some ambiguity. On one hand, the Freezing Orders Regulations require the Attorney General to certify that the issuing authority has the function of issuing such orders and provide that no further formality is to be required. On the other hand, the Dangerous Drugs Ordinance requires notice of the freezing order to be published without delay in the Government Gazette, and a copy to be registered in the Public Registry in respect of any immovable property. It is therefore unclear whether such publication is necessary when executing a freezing order transmitted according to the FD.

With respect to the duration of the freezing, the Freezing Orders Regulations again refer to the Dangerous Drugs Ordinance. Ambiguity arises in this regard too since on one hand, it is stipulated that the freezing order shall remain in force until the final determination of the proceedings, and in the case of a conviction until the sentence has been executed, whereas on the other hand, it is stated that such order shall remain in force for a period of *six months* from the date on which it is made. This six-month period may be renewed for further periods of six months on application by Attorney General and upon the court being satisfied that the conditions which led to the making of the order still exist, or that the accused has been convicted and the sentence or any

[19] Chapter 101 of the Laws of Malta.

confiscation order consequential or accessory thereto has not been executed. Renewal is also made if, although no confiscation order was made in the sentence imposed upon conviction, the court is satisfied that civil or criminal proceedings for the making of such an order are pending or are imminent. Thus, it may be concluded that the freezing order will in any case remain in force until a final decision has been made or the sentence has been executed as the case may be. However it is uncertain whether the Attorney General's application for renewal every six months is necessary for a freezing order transmitted under the FD.

With regard to the EAW Order, some time-limits have not been transposed, while others were introduced recently. Firstly, when a person has consented to his surrender, the final decision must be given within 10 days from such consent, in full accordance with the FD EAW. The deadline for such decision in cases where no consent is given however, was only introduced into the EAW Order with LN 367 of 2007 which added Art. 27A, requiring the court to take a decision on surrender within one month from the person's arrest. This Legal Notice also tackled the absence of a time-limit for a decision at the appeal stage, imposing another one-month limit for the appeal decision. This brings the total length of the procedure to 2 months, in line with the 60 day time period envisaged in the FD EAW.

When the 10 days from the person's consent lapse, and no order has yet been made, the person must be discharged unless there is reasonable cause for delay. The possibility of retaining the person in custody should such "reasonable cause" exist was introduced with the abovementioned LN 367 of 2007, however no maximum time-limit was established for such cases. The 30-day extension allowed by the FD when the EAW cannot be executed within the time-limits, was not reproduced in the EAW Order, so that the 60 day limit stipulated by the FD may nevertheless be exceeded.

With regard to the lapse of the time-periods established for cases when no consent has been given, the EAW Order does not stipulate how the arrested person must be dealt with. While no provision is made for an extension of the time, the court is not required to order the person's discharge either, so that it seems that he may be kept in custody beyond the said periods.

Finally, no reference is made to the duty to report breaches of the deadlines to Eurojust. However, according to the "Replies to the questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2005" [20] Malta in fact exceeded the time-limit in relation to EAWs received in that year, and Eurojust was informed of such delays in each case.

B. Postponement of execution or temporary surrender

The Freezing Orders Regulations have implemented the grounds for postponement permitted according to the FD on Freezing Orders. However, with regard to an order freezing property in criminal proceedings with a view to its subsequent confiscation, such freezing order transmitted to Malta for the purpose of subsequent confiscation, can always be postponed if the property is already frozen in the course of local

[20] Doc. 9005/5/06 REV5, 18 January 2007.

proceedings, whether criminal or not, giving absolute priority to orders issued by local courts.

With respect to the EAW, the FD envisages various situations in which postponement might be necessary due to the local proceedings against the same person, or as a result of such person having a sentence to serve in Malta. However, the FD also allows for temporary surrender in such cases, so as to avoid prolonging procedures and safeguarding effectiveness and efficacy.

According to the FD EAW, once surrender has been ordered, the executing authority may either postpone return until the person is prosecuted or serves a sentence for an offence, other than that on which the EAW is based, within the executing State or it may temporarily surrender the person under conditions to be determined by mutual agreement between the Member States. Initially the EAW Order required the court to adjourn the hearing when the person was charged with any offence in Malta. On the other hand it had discretion to decide whether or not to adjourn such hearing if the person were serving a sentence in Malta. Thus, postponement was possible even before the final decision on whether or not to execute the EAW, while temporary surrender was not contemplated at all. This was criticised by the Commission in its reports and was subsequently amended.

With LN 224 of 2006, when the court orders surrender and the person is still serving a sentence in Malta, the court has the option of postponing surrender or ordering temporary surrender on the condition that such person is retained in custody and returned to Malta to serve the remainder of his sentence upon completion of the prosecution proceedings or once his sentence has been served in conviction cases. However, in *Police v. Yi Lin*[21], the court interpreted the EAW Order as excluding its discretion in this regard when the surrender order has been made upon the person's consent. It held that in this case it has no option but to order temporary surrender on the abovementioned conditions. The court seems to favour temporary surrender when the person is serving a sentence in Malta, which may be considered a more favourable approach from the perspective of mutual recognition and mutual confidence.

LN 224 of 2006 failed to provide for the possibility of temporary surrender with regard to a person facing charges for an offence in Malta, giving the court no option but to postpone surrender in that case. This was subsequently rectified too with LN 367 of 2007, which introduced this option with regard to charges for an offence other than that on which the EAW is based. In practice however, it seems that temporary surrender in these cases is unlikely. As the court observed in *Police v. Emanuel Borg*, and *Police v. Anthony Muscat*, domestic law requires that criminal proceedings take place in the presence of the person charged or accused. Therefore surrender, even if temporary, when such proceedings are still under way would necessarily hinder such proceedings. Moreover, in cases where the local proceedings are still in the committal stage[22] temporary surrender would interfere with the time limits imposed

[21] Court of Magistrates (Court of Committal), Case no. 699/2007, 31 August 2007.

[22] The committal stage refers to the proceedings before the Court of Magistrates sitting as a Court of Criminal Inquiry, which precede the formal accusation or indictment of such person.

by the Criminal Code for the conclusion of such inquiry, and is therefore not a suitable option (*Police v. Emanuel Borg* and *Police v. Ebeid Osama*[23]). In all of these cases therefore, the court proceeded with the extradition hearing and ordered the person's surrender, while it postponed the actual return until the determination of the domestic proceedings.

When the person is facing charges in Malta for the same offence as that in the EAW, no temporary surrender is provided for, as the EAW Order merely provides that the court may adjourn the extradition hearing until those proceedings are determined, whereupon the said extradition hearing is resumed and the question of *ne bis in idem* must be (re)considered.

7. Protection of human rights

The general provision in the FD EAW and the FD Freezing Orders referring to Art. 6 EU on fundamental rights, has not been explicitly transposed into the Maltese implementing legislation. However, the possibility of redress on the grounds of the provisions of the Constitution and of the European Convention Act (implementing the ECHR) is always possible and the EAW Order specifically requires a court which orders surrender to inform the person of his rights in this respect. In this respect, practitioners agree that the non-transposition of such reference does not in any way diminish the actual respect of such fundamental rights.

Furthermore, although all Member States have ratified the ECHR, and despite the fact that the FD EAW is founded on the principle of mutual recognition and hence mutual trust, the domestic legislation allows examination of whether or not certain fundamental rights have been or might be violated, when deciding upon the request for surrender. As outlined in addressing the grounds for refusal, the violation or possible violation of certain rights such as the possibility of prosecution on grounds of race, place of origin, nationality, political opinions, colour or creed, requires non-recognition of an EAW. With regard to *in absentia* judgments, a guarantee is required from the issuing States in order to safeguard the requested person's rights, whereas in cases where humanitarian reasons exist, surrender may be postponed.

While the adoption of a FD on procedural rights could contribute to a higher level of mutual confidence, this would depend on the level which the FD adopts and the standards it imposes as well as observance in practice of such level. Maltese negotiators are in favour of an instrument requiring practical cooperation between Member States in the context of guaranteeing procedural rights of defendants in criminal proceedings. On the other hand, Malta together with a number of other Member States are against any type of harmonization of substantive and procedural laws. This is also due to the fact that Art. 6 ECHR and the jurisprudence of the European court of Human Rights are considered as affording sufficient protection of the rights to due process.

[23] Court of Magistrates (Court of Committal), Case no.722/2007, 14 September 2007.

8. Some specific issues related to EAW

A. Multiple requests

When competing EAWs are received in Malta, the court must decide which should be executed, taking into consideration all the circumstances and particularly those identified in the FD EAW namely, the relative seriousness and place of the offences, the respective dates of the EAWs and whether the EAW was issued for prosecution or execution of a sentence. However, the EAW Order also specifically refers to consideration of the nationality, citizenship and ordinary residence of the person concerned in making such decision. Once again, it seems that the legislator gave Maltese courts the possibility of deciding to execute one EAW rather than another on the basis of the nationality or residence of the person in question, whereas no special consideration is given to the fact that a subject of an EAW is a Maltese citizen or resident, even where such consideration would be allowed under the FD. This is an indication of the fact that the EAW Order seeks to ensure that surrender takes place with the fewest limitations possible. The possibility of consulting the EJN when multiple requests are received has not been transposed into the domestic law.

With regard to an EAW and a competing extradition request from a third country, the competent authority to make such decision is the Minister, who may order deferral of the proceedings on the EAW (whether the hearing or the surrender) until the competing extradition request is decided. In making such decision he is to consider the same elements that the court would consider in the case of competing EAWs. Once the competing extradition request is disposed of the court can order resumption of the proceedings concerning the EAW. Such order must be made within 21 days from when the extradition request was disposed of, otherwise the court must discharge the person concerned if he makes an application to that effect.

Malta, in its *Fiche Française* notifying implementation of the FD EAW, declared its commitment to accept EAWs issued in respect of multiple offences. Such offences must all be mentioned in the same EAW however, since multiple EAWs in respect of multiple offences will be considered as competing warrants and a request for consent to the person being dealt with in respect of the other offence would be required.

B. Rule of speciality

Malta has not given notification under Art. 28(1), which would exclude application of the speciality rule vis-à-vis other Member States making similar notifications. Malta's consent would not be required in respect of:

- any lesser offence proved by the facts proved before the Court of Committal the offence in respect of which the person is returned;
- an extraditable offence disclosed by the same facts as that offence;
- an extraditable offence in respect of which the Court gives its consent to the person being dealt with;
- an offence which is not punishable with imprisonment or another form of detention;
- an offence in respect of which the person will not be detained in connection with his trial, sentence or appeal;

– an offence in respect of which the person waives the right that he would have (but for this paragraph) not to be dealt with for the offence.

The EAW Order, read in conjunction with the Extradition Act, therefore reproduces the list of scenarios in Art. 27(3)(a)-(f) of the FD, in which the speciality rule cannot be applied. Hence, the Commission's concern that consent would be required and possibly refused by the Maltese authorities in these cases, is misplaced. In fact, the EAW Order goes beyond the cases listed in the FD, and allows a person to be dealt with, without consent being required, for any offence which is disclosed by the same facts as the offence for which he was surrendered and any lesser offence which is proved by the same facts. Application of the speciality rule is therefore limited further than is strictly necessary under the FD, enhancing the efficacy of the EAW on the basis of mutual confidence.

In line with the FD EAW, the speciality rule is also inapplicable and consent is not required, if the person concerned has the opportunity to leave the country and

(a) does not do so within 45 days from when he arrives in the scheduled country; or
(b) if he did so within that period, he returns there.

To begin with, the EAW Order also excluded speciality when a person consented to his return, since such person was "taken to have waived any right he would have not to be dealt with in the scheduled country for an offence committed before his return". While this reduced the application of the speciality rule, it was criticised by the Commission as possibly discouraging consent, thus prolonging the surrender procedure. This provision was amended by LN 224 of 2006, requiring a person who gives his consent to surrender to declare also whether or not he waives the right deriving from the speciality rule. This was in fact the case in *Police v. Yi Lin*[24], wherein the defendant consented to his surrender but specifically stated that he was not renouncing his right to the rule of speciality.

When Malta's consent is required, the request for consent transmitted by another State is received by the Attorney General who certifies that the requesting authority has the function of making such requests. The person is notified unless it is not practicable to do so, and a consent hearing must begin within 21 days from receipt of the request by the Attorney General, which period may be extended by the court if that would be in the interests of justice. Consent *must* be refused if the 21 days lapse and there is no extension. On the other hand, the EAW Order does not establish the 30-day time-period provided for in the FD for a decision on consent to be given. During the consent hearing the court first decides whether such consent is in fact required. In that case, the court will decide to give or refuse its consent in the same way as it would decide upon the surrender of the person for the offence in question.

The rule of speciality according to the EAW Order is therefore in line with the provisions of the FD EAW, with the only difference being that no consent is required for the person to be dealt with for another offence disclosed by the same facts.

[24] Court of Magistrates (Court of Committal), Case no. 699/2007, 31 August 2007.

C. Accessory surrender

The question of accessory surrender i.e. where an EAW is issued for an offence falling within the scope of the FD but also refers to other offences outside that scope, is not dealt with under the FD EAW but is contained in the 1957 Council of Europe Convention on Extradition. This lack of EU legislation in this area has resulted in varied practices occurring with some Member States accepting the possibility of accessory surrender whilst others do not. In terms of Maltese legislation, surrender can only be granted for extraditable offences, thus necessarily excluding accessory surrender, and limiting recognition strictly to those offences which are covered by the EAW Order.

D. Subsequent extradition

Under the EAW Order, execution of an EAW may be refused on the ground that such person was earlier extradited to Malta from another Member State. However this is only possible if there are arrangements between Malta and that Member State requiring the latter's consent for such further surrender, and such consent has not been given. It is presumed that the FD EAW itself constitutes an arrangement dealing with further surrender, so that while as a general rule consent of the initial surrendering State is necessary, that consent would not be required in certain cases, namely:

- when the person could have left the country and did not do so within 45 days from final discharge, or if he has returned after having left it; or
- when the requested person consents to further surrender; or
- when the requested person is not subject to the speciality rule because he waived such right, or because the Member State's consent was given for him to be dealt with for another offence, or because he could have left the Member State but did not do so within 45 days or returned after having left.

Therefore, in these cases, earlier extradition from a Member State will not bar surrender by Malta to another Member State, and Malta will not need to request consent from the Member State from which the person was surrendered to it.

In other cases, consent will be required, and Malta will only surrender the person to another Member State if the first Member State grants such consent.

When Malta is itself asked for consent in order for a Member State to further surrender the person to a third Member State, such request is decided at a consent hearing. According to the EAW Order such hearing must begin within 21 days from receipt of the request, but no provision is made for the decision on consent to be given within 30 days as stipulated in the FD EAW. The court will decide whether such consent is required, presumably according to the FD, since the Order only specifically excludes the need for consent with respect to cases where the person had the opportunity to leave the Member State and did not do so within 45 days, or having done so, subsequently returned to that Member State. In case consent is in fact needed, the court will give or refuse such consent in the same way as it would decide upon whether or not the person should be surrendered.

Thus, as long as the FD is in fact considered an arrangement between the Member States for the purposes of determining whether consent for subsequent surrender is

needed, the EAW Order fully implements the provisions of the FD in this regard, with the exception of the 30-day time-limit, which may constitute an obstacle to the efficacy of the EAW mechanism.

9. Conclusion

It may be noted that despite the limitations on surrender in the implementing legislation, no EAW had been refused by the Maltese courts until 2006[25]. On the other hand, Malta seems to have had difficulty with regard to an EAW issued to Austria in April 2006, as no surrender had taken place, nor had the Austrian authorities proceeded to prosecute the person in question.

Nevertheless, practitioners and negotiators agree that EAW and Freezing Orders have been effectively recognised and no difficulties have been met vis-à-vis efficacy of the system.

The FD on the EAW and that on Freezing Orders have been completely implemented in Maltese law and applied in practice with little difficulty. General principles such as double criminality, territoriality and speciality continue being considered important, and any further limitation of their application seems to be unlikely from the Maltese perspective. Nevertheless, these principles with their scope limited as it is in the mutual recognition instruments, are considered compatible with the principle of mutual recognition itself and have not affected the effectiveness and efficacy of the instruments in practice. On the other hand, protection of the right to due process, afforded to the person charged or accused, is held to be paramount, in itself imposing some limits on the extent to which mutual recognition can be stretched.

[25] *Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2005*, doc. 9005/5/06 REV 5, 18 January 2007 and *Replies to questionnaire on quantitative information on the practical operation of the European Arrest Warrant – Year 2006*, doc. 11371/2/07 REV 3, 3 October 2007.

The Netherlands and mutual recognition: between proportionality and the rule of law

Wouter VAN BALLEGOOIJ [1]

1. Introduction

The European Union is about to adopt its third five year programme on the maintenance and development of the Union as an Area of Freedom, Security and Justice ("Stockholm programme"). In this context, the Netherlands, like all other Member States, is being asked to position itself in the debate on the future of mutual recognition of judicial decisions in criminal matters. In this chapter, an assessment is made as to how the Netherlands' policy-makers, judicial authorities and defence lawyers approach the issue.

In doing so it might be useful to provide some contextual guidance regarding the concept of mutual recognition [2]. Mutual recognition of judicial decisions in criminal matters is best perceived as a norm. Being a norm it contains obligations that need to be met. Those obligations are the result of the balancing of several interests that takes place at three levels. First, norms are developed within an institutional framework

[1] The author would like to thank all the individuals interviewed in preparation of the Netherlands' contribution to the Study on the future of mutual recognition in criminal matters in the European Union. Comments are welcome at wvballegooij@hotmail.com.

[2] See more extensively W. VAN BALLEGOOIJ, "The European arrest warrant: between the free movement of judicial decisions, proportionality and the rule of law", in E. GUILD (ed.), *Constitutional challenges to the European arrest warrant, second edition*, 2009 (forthcoming).

of aims[3] and principles[4]. Second, norms interact with other complementary or conflicting norms and normative figures[5]. In this context the Commission and Council have had previous experience in setting so called "parameters" for mutual recognition of judicial decisions in criminal matters in their December 2000 Programme of measures to implement the principle of mutual recognition of judicial decision in criminal matters[6]. Thirdly, norms are applied in accordance with the facts and circumstances on the ground[7].

The 2000 Programme talked about mutual recognition being "applied differently depending on the nature of the decision or the penalty imposed"[8]. Since 2000, mutual recognition has indeed been "applied differently" regarding decisions related to pre-trial supervision (Eurobail)[9], to freeze property or evidence (European freezing order)[10], to hand over evidence (European Evidence Warrant)[11] and mutual recognition of arrest warrants (European arrest warrant)[12], the decision to take

[3] The institutional framework of mutual recognition of judicial decisions in criminal matters is that of the Area of Freedom, Security and Justice. In accordance with Article 2 of the Treaty on European Union the Union sets itself the objective "to maintain and develop the Union as an Area of Freedom, Security and Justice, in which the free movement of persons is assured in cooperation with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime"; on the interpretation of the concepts of freedom, security and justice see D. Bigo, "Liberty, whose liberty? the Hague programme and the conception of freedom", in T. Balzacq and S. Carrera (eds.), *Security vs. Freedom, a new challenge for Europe's future*, Ashgate, 2006, p. 35.

[4] E.g. fundamental rights (ECJ, 3 May 2007, Judgment C-303/05, *Advocaten voor de Wereld*, *ECR*, p. 3633, para. 45), and freedoms, such as the free movement of persons (ECJ, 9 March 2006, Judgment C-436/04, *Van Esbroeck*, *ECR*, p. 2333, para. 34), loyalty (ECJ, 16 June 2005, Judgment C-105/03, *Maria Pupino*, *ECR*, p. 5285, para. 42) and legality (ECJ, 3 May 2007, Judgment C-303/05, *Advocaten voor de Wereld*, *ECR*, p. 3633, para. 46).

[5] E.g. the (non) imposition of dual criminality or territoriality requirements.

[6] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ,* n° C 12, 15 January 2001, p. 10.

[7] This includes the knowledge and trust between judicial authorities, the improvement of which was a high priority for the Hague programme (Annex 1 to presidency conclusions of the Brussels European Council 4 November 2004, at p. 36).

[8] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *op. cit.*, p. 11.

[9] Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, general approach reached in the Council on 28 November 2008, doc. 16382/08 COPEN 239.

[10] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, no. L 196, 2 August 2003, p. 45.

[11] 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*, no. L 350, 30 December 2008, p. 72.

[12] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

into account previous convictions [13], confiscation (European confiscation order) [14] and the imposition of criminal sanctions (European enforcement order) [15], financial penalties [16] or alternative sanctions [17].

It is important to remark that many of these instruments have only recently been published in the official journal or are still under negotiation or pending publication. The Netherlands has implemented the European freezing order [18], the European arrest warrant [19], taken measures for the mutual recognition of financial penalties [20] and has almost implemented the European confiscation order [21].

In the paragraphs below, the approach of the Netherlands' policy-makers, judicial authorities and defence lawyers to mutual recognition will be assessed by looking at their general approach towards mutual recognition (2); the perceived limits (3); harmonisation and practical measures they perceive are needed to strengthen mutual trust (4). This will be followed by some concluding remarks (5). Where appropriate, reference will be made to the institutional framework and the factual set of circumstances within which mutual recognition operates. Even though the

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[13] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, *OJ*, no. L 220, 15 August 2008, p. 32.

[14] Council Framework Decision 2006/683/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[15] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ*, no. L 327, 5 December 2008, p. 27.

[16] Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16.

[17] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *OJ*, no. L 337, 16 December 2008, p. 102.

[18] *Wet van 16 juni 2005, houdende implementatie van het kaderbesluit nr. 2003/577/JBZ inzake de tenuitvoerlegging in de Europese Unie van beslissingen tot bevriezing van voorwerpen of bewijsstukken, Staatsblad*, 2005, 310.

[19] *Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet), Staatsblad,* 2004, 195.

[20] Implemented by the *Wet van 27 september 2007 tot implementatie van het kaderbesluit nr. 2005/214/JBZ van de Raad van de Europese Unie van 24 februari 2005 inzake de toepassing van het beginsel van wederzijdse erkenning op geldelijke sancties* (*Wet wederzijdse erkenning en tenuitvoerlegging strafrechtelijke sancties, Staatsblad 2007, 354* and the *Besluit van 30 oktober 2007, houdende regels ter uitvoering van de Wet wederzijdse erkenning en tenuitvoerlegging strafrechtelijke sancties (Uitvoeringsbesluit wederzijdse erkenning en tenuitvoerlegging geldelijke sancties, Staatsblad*, 2007, 433.

[21] *Voorstel van 15 augustus 2008 tot wijzing van de wet wederzijdse erkenning en tenuitvoerlegging strafrechtelijke sancties in verband met de toepassing op beslissingen tot confiscatie*, *Tweede Kamer vergaderjaar 2007-2008, 3155, nr. 2.*

Netherlands has implemented several mutual recognition measures, the country has had most experience with the Framework Decision on the European Arrest Warrant. Experience with this instrument will therefore be the main source for this analysis.

2. General approach towards mutual recognition in the Netherlands

One of the main decisions to be taken when applying mutual recognition is whether it should apply directly or whether a "validation" procedure with grounds for refusal/ non-execution is necessary.

As for final decisions in criminal matters, in its 2000 Communication the Commission stated that, ideally, there should be no need at all for a validation procedure [22]. Mutual recognition would work directly and automatically without any additional step. However, the Commission recognised that there was a need for translation of the decision and verification that it originated from a competent authority. If the scope of mutual recognition was to be limited, then the "validation" procedure would have to include a step to ensure that the decision was within that scope. With every additional point to be checked, the validation procedure would become lengthier. An overly heavy validation procedure would have the effect of allowing the creation of a mutual recognition regime that in practice would be very much the same as the traditional "request" regime [23]. The Commission and Council's programme of measures (covering all mutual recognition measures) was more cautious by just mentioning the following parameter: "whether enforcement of the decision is direct or indirect, and the definition and scope of a validation procedure, if any" [24].

Below, the views of the Ministry (A), prosecutors (B), the judge (C) and lawyers (D) – researched for the Study on the future of mutual recognition in criminal matters – on the scope and limits of mutual recognition are presented.

A. Ministry

The ministry's policy documents indicate acceptance of the Commission's approach towards mutual recognition focusing on the need to make free movement of judicial decisions within the Area of Freedom, Security and Justice a reality. A 2004 letter from the Minister of Justice regarding dual criminality in Dutch criminal law for instance states: "More generally it can be said that the establishment of an Area of Freedom, Security and Justice implies that decisions in criminal matters, irrespective of in which country they were taken, have in principle got the same legal force within that European legal area" [25].

At the same time, the ministry insists on clear needs and an impact assessment of new instruments geared at mutual recognition, in which questions are raised

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[22] Commission Communication *Mutual recognition of final decisions in criminal matters*, COM (2000) 495 final, 26 July 2000, p. 17.

[23] *Ibid.*, p.17.

[24] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *op. cit.*, p. 12.

[25] Brief van de Minister van Justitie aan de voorzitter van de Tweede Kamer der Staten-Generaal, Dubbele strafbaarheid in het Nederlandse strafrecht, Tweede Kamer, vergaderjaar 2003-2004, 29451, n° 1, p. 6.

regarding the aims to be achieved, the added benefit of EU legislation for general judicial practice and the impact on the domestic organisation of the Public Prosecutors Office and judiciary. Once that has been done, the negotiations should focus on issues encountered in general judicial practice and time should not be lost on arduous discussions regarding problems encountered in very rare situations, leading to "overcomplicated and useless regulation". Furthermore, a request is made for implementation deadlines to be realistic and for attention to be paid to the practical measures needed to implement a framework decision.

The replies by the ministry indicate that we should distinguish between mutual recognition of final decisions and decisions in the course of an investigation or during a trial. With recognition of final decisions, we are dealing with a "stable situation" since the facts have been determined and a final assessment has been made. With recognition of decisions in the course of an investigation or during a trial we do not have a stable situation. Also, with final decisions, recognition boils down to the execution of the decision in the executing Member State. In other words, "the responsibility shifts from the issuing to the executing Member State". Therefore the ministry believes that we cannot have a standard approach to the various mutual recognition instruments. Grounds for refusal like territoriality and dual criminality play a different role. The Framework Decision on the enforcement of criminal sanctions is cited as an example of a situation in which dual criminality is "essential for achieving the aim of the measure". The ministry finds it hard to imagine a reintegration/resocialisation programme for a society that does not penalise the person's behaviour. In addition, the territoriality clause is seen as important to prevent prosecutions for acts committed on the territory of another Member State. It is easier to give up on the dual criminality requirement if prosecution for acts that are not incriminated in the Netherlands can be preventing by applying the territoriality exception [26]. The Netherlands has been keen to prevent, for instance, having to cooperate with a foreign prosecution of a doctor committing an abortion on a woman from another Member State on Dutch territory or of someone running a "coffee shop" there. It generally feels that the abolition of dual criminality cannot lead to a loss of legal certainty for citizens acting on Dutch territory in accordance with Dutch law [27].

B. Prosecutors

The Public Prosecutors did not engage in defining the concept of mutual recognition although they generally welcome the judicial cooperation instruments developed by

[26] Brief van de Minister van Justitie aan de voorzitter van de Tweede Kamer der Staten-Generaal, Dubbele strafbaarheid in het Nederlandse strafrecht, Tweede Kamer, vergaderjaar 2003-2004, 29451, n° 1, p. 7. (translation): "Furthermore is has been important that in all cases – including those mentioned in the list – a Member State can refuse recognition and execution of a decision taken by a foreign authority, in case the act was committed on the territory of the State that is to recognise the decision and execute it. This means that the Netherlands does not have to cooperate with foreign prosecution of a person who committed an act that is not punishable under Dutch law, but would be under foreign law".

[27] Brief van de Minister van Justitie aan de voorzitter van de Tweede Kamer der Staten-Generaal, Dubbele strafbaarheid in het Nederlandse strafrecht, *op. cit*., p. 9.

the EU. Public Prosecutors expressed doubts regarding the assessment of the practical needs of judicial authorities before proposing mutual recognition instruments. They echoed the ministry in requesting that the impact on the domestic organisation of the Public Prosecutors Office be taken into account when drafting framework decisions.

Regarding instruments in force, no experience was reported with freezing orders[28]. Public Prosecutors feel that the freezing order unnecessarily complicates judicial cooperation. They also expressed some concern regarding European Arrest Warrants issued for minor offences, for example theft of minor items. A concrete case was mentioned of a European Arrest Warrant for the theft of two bottles of deodorant. Prosecutors feel that it is necessary to develop mutual confidence for a better exploitation of the instruments that already exist. They are generally positive about the direct contacts between judicial authorities, the limited grounds for refusal, the deadlines and the standard forms and certificates, but did complain about the language skills of some of their colleagues. As regards future instruments, the European Evidence Warrant is regarded with scepticism, as, according to prosecutors, it remains to be seen what kind of organisational impact it will have and if that impact is going to be proportionate to the type of assistance requested. The limitations of the types of cooperation (only existing evidence) cast doubt on the practical use of the instrument.

C. District Court of Amsterdam

The view obtained from the District Court of Amsterdam (which acts as the executing judicial authority for all European Arrest Warrants that the Netherlands receives) is that criminals should not be able to hide behind borders. At the same time, the Netherlands should protect its citizens and qualifying residents against unnecessary time-consuming pre-trial detention and unnecessary foreign prosecution. In addition, the District Court feels that, particularly since the wanted person cannot appeal against its decision, it has to be severe in cases where the issuing judicial authorities violate the trust given to them by sloppiness, inaccurate and disproportionate action that makes it hard to maintain the principle of mutual recognition. The European Union went too far when it forgot about subsidiarity and proportionality. The arrest warrant should be necessary (no other options available) and there should be a balancing exercise between the interest of the issuing judicial authority to try the person in its Member States and the interest of the wanted person to be tried in the executing Member State. The District Court also stresses that there should be limited humanitarian exceptions to surrender, jurisdiction rules that take the interest of the defendant into account and adequate procedural safeguards. In spite of delays, the executing judicial authority should be able to request additional information when it considers the information provided in the EAW to be insufficient. Verification of European Arrest Warrants is not only necessary to protect national values, but also to protect the individual's

[28] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, no. L 196, 2 August 2003, p. 45, implemented by *Wet van 16 juni 2005, houdende implementatie van het kaderbesluit nr. 2003/577/JBZ inzake de tenuitvoerlegging in de Europese Unie van beslissingen tot bevriezing van voorwerpen of bewijsstukken, Staatsblad*, 2005, 310.

rights under Articles 1, 5 and 13 of the ECHR against unlawful prosecution. The District Court is of the opinion that "the need for legal certainty supersedes the interest of speed". It furthermore indicates that persons surrendered with a guarantee that they may return to the Netherlands to serve their sentence after conviction should be returned swiftly. It also underlines that we should not close our eyes to the issue of lengthy pre-trial detentions in some of the other Member States. The District Court raised the idea of following the fate of surrendered persons better, perhaps in co-operation with their lawyers. What happened to their case? How long did they serve in pre-trial detention? How long did their trial take? And how long did it take for them to be returned to the Netherlands (if applicable)?

D. Lawyers

The defence lawyers interviewed generally agree that criminals should not be able to hide behind borders. Ultimately a person does have his/her own responsibility if he/she travels abroad and commits a crime there. At the same time, Member States have an obligation to protect their citizens against unnecessary foreign prosecution as a general principle since surrender will put the suspect at a significant disadvantage in a trial (language, legal system and assistance), but also to take into account his/her personal circumstances (disruption of family life, employment). Also, there may be circumstances in which the humanitarian situation of the person involved should lead to refusal and not just delay of surrender [29]. Even if surrender is deemed proportionate, relying on the ECHR to proclaim mutual trust in each others' criminal justice systems is not enough, since all Member States still regularly violate its principles [30]. Defence lawyers expressed a keen interest in harmonising procedural safeguards [31] and projects for cross border co-operation of defence lawyers.

3. Limits

We have already touched upon the way in which the ministry sees traditional exceptions to mutual legal assistance and extradition in the new Area of Freedom, Security and Justice context. Above and beyond that, the ministry indicates that the mutual recognition principle has its "inherent limits". The judicial decision for which recognition is sought has to comply with the rule of law. Once the judicial decision is recognised, a number of grounds may prevent execution of the request. According to the ministry the grounds for non-execution applied in the current mutual recognition instruments can to a large degree be related back to this "natural confinement". A second natural confinement of the reach of the mutual recognition principle suggested by the ministry is that of proportionality. Both on the point of compliance with the rule of law, which will be elaborated on in (A) below and proportionality, which will be elaborated on in (B) below, there seem to be differences of appreciation between

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[29] *Ibid.*

[30] See T. Spronken, "Procedural Guarantees and Evidential Safeguards at EU level: Status quo and Future Perspectives", speech presented at *Mutual recognition of judicial decision in criminal matters: the role of the national judge, ERA Second Annual Forum*, Trier, 21-23 November 2007.

[31] COM (2004) 328, 28 April 2004.

the ministry, prosecutors, the courts (also among each other) and defence lawyers, particularly regarding judicial discretion to be allowed.

A. Compliance with the rule of law

The rule of law generally refers to respect for fundamental rights (1). Compliance with the rule of law could, however, also be understood as correctly applying the provisions of national law, for instance those that implement the Framework Decision on the European Arrest Warrant (2).

1. Human rights

As mentioned, the ministry indicates that the mutual recognition principle has its inherent limits. "Member States cannot claim recognition of decisions that fail to comply with the standards of the European Convention on Human Rights nor may such recognition itself violate the ECHR". In order to address the issue of human rights compliance, in a speech of November 2007, the Minister of Justice proposed an examination of developments in the rule of law in the Member States and a discussion of the results on a yearly basis [32].

Irrespective of such peer evaluation exercises, it is noted that human rights conventions, such as the ECHR, have direct effect under Dutch law and, moreover, are superior to domestic law. This was pointed out by the then Minister of Justice in the course of the legislative process leading up to the adoption of the Surrender Act [33], when he mentioned that consideration had been given to include a human rights exception in the proposed bill. It was decided not to do so as such a provision would not have any added value in the Dutch legal system [34]. Nevertheless, in the end, due to pressure from the Parliament, an explicit reference to the ECHR as a ground for refusal of Article 11 of the Surrender Act was made. Surrender shall not be allowed in cases in which, in the opinion of the Court, there is justified suspicion based on facts and circumstances, that granting the (surrender) request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention on Human Rights (Article 11 Surrender Act) [35].

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[32] Speech by Ernst Hirsch Ballin, Minister of Justice of the Kingdom of the Netherlands, "Investigating in confidence-a vision of police and judicial cooperation in the EU", Brussels, 8 November 2007, p. 6-7.

[33] *Wet van 29 april 2004 tot implementatie van het kaderbesluit van de Raad van de Europese Unie betreffende het Europees aanhoudingsbevel en de procedures van overlevering tussen de lidstaten van de Europese Unie (Overleveringswet), Staatsblad*, 2004, 195.

[34] *Parliamentary Papers II*, 2003-2004, 29042, no. 12, p. 22.

[35] The Council's evaluation report on the practical application of the Framework decision on the European arrest warrant in the Netherlands advises the Netherlands to scrap its explicit implementation of article 1(3): "This ground for non-execution goes, strictly speaking, beyond the provisions of the Framework decision since it is not included in Articles 3 and 4 of the Framework Decision. The expert team is familiar with recital 12 of the Framework Decision but considers that this recital should not have been elevated to a ground for non-recognition, in view also of the fact that all Member States are signatories to and hence are bound by the Convention on Human Rights and Fundamental Freedoms. The experts are of the view that this ground for non-recognition is the expression of a lack of confidence in the criminal law systems

According to the Council's evaluation report on the practical application of the Framework decision on the European arrest in the Netherlands, the District Court of Amsterdam has refused surrender on two occasions when it held that surrender would cause a flagrant breach of the right to a fair trial *ex* Art. 6 ECHR, particularly the right to be tried within a "reasonable term", without there being an "effective remedy" *ex* Art. 13 ECHR [36]. One is District Court of Amsterdam, AT8580, 1 July 2005. The case concerned a criminal investigation by the Spanish authorities instigated against the requested person on 27 March 1997. The person was released on bail on 6 October 1997. Considering the facts and circumstances, the Court ruled that there was a flagrant violation as set out in Article 11 Surrender Act, because:

- the requested person was caught in the act and detained immediately;
- the prosecuting authorities had released requested person on bail in October 1997 and had not done anything to get the case to trial until January 2005;
- the information given by the issuing authorities to explain this lapse of time had not been satisfactory to the Court. In addition to all that the Spanish authorities were not able to say when the case would go to trial. The second question was whether there is still an "effective remedy" as mentioned in Art. 13 ECHR. Based on the principle of mutual trust, the Court had to rely on the Spanish authorities to have such a remedy. The question was whether it was effective enough. The Court distinguished between the situation where there was a threat of flagrant violation and the situation where the violation had already taken place. Every (additional) day the investigation lasted longer, the requested person's uncertainty would grow. The Court therefore held there was no longer an effective remedy *ex* Art. 13 ECHR. This lead to refusal surrender based on a violation of Art. 11 Surrender Act. More recent case law of the Netherlands Supreme Court in which it determined that violation of the "reasonable term" cannot lead to inadmissibility of prosecution (*niet ontvankelijkheid*) has however limited its discretion in the matter [37].

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of the other Member States", 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 Netherlands, Council document 15370/2/08 REV 2 of 27 February 2009, p. 47; Article 11 was included based on pressure by the Netherlands parliament, which was very concerned to remind the executing judicial authorities to uphold fundamental rights. The Netherlands Minister of Justice in a letter sent to Parliament accompanying the Council's evaluation indicates he will not follow this recommendation by the expert team; see N. Keijzer, "The European arrest warrant framework decision between past and future", in E. Guild (ed.), *Consitutional challenges to the European arrest warrant*, Nijmegen, Wolf, 2006, p. 57: "An advantage of explicitly including the Human Rights exception in the Implementation Acts is that otherwise it could perhaps be overlooked".

[36] 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 Netherlands, Council document 15370/2/08 REV 2 of 27 February 2009, p. 29.

[37] Supreme Court of the Netherlands, 17 June 2008, case BC6913; District Court of Amsterdam, 17 October 2008, case BG6051, para. 6, on Article 11 Surrender Act (translation): "The District Court rejects the appeal by counsel [based on Article 11 Surrender Act]. Irrespective of the fact that, considering the recent case law of the Supreme Court, violation of

2. Correct application of the law

The District Court of Amsterdam has held that a test as to whether certain acts may be reasonably qualified as one of the categories of crimes mentioned on the list belonging to Art. 2.2 of the Framework Decision on the European Arrest Warrant, for which dual criminality is no longer required, should be performed. It should be a marginal test only: "can it reasonably be assumed that the (requesting) Member State qualifies the acts as one of the categories of crime mentioned on the list" [38]. In one case it could not be established whether (some of) the acts for which surrender was requested could be qualified as a criminal offence in the issuing Member State. Surrender was refused for these acts [39].

To be able to perform a marginal test on correct qualification, the District Court established a practice of requiring the production of the relevant legal provisions in the European Arrest Warrant or for these provisions to be sent separately, basing itself on statements by the Minister of Justice during the treatment of the Surrender Act in Parliament [40]. It ceased this practice after the Supreme Court ruled such a general

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the reasonable can no longer lead to inadmissibility of prosecution, an appeal on violation of the reasonable term as referred to in Article 6 ECHR is to be made in the country where the case will be treated, in this case Germany. No appeal has been made by or on behalf of the wanted person that no effective remedy as referred to in Article13 ECHR would be available against the alleged breach in Germany".

[38] The practice is mentioned in the 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 Netherlands', Council document 15370/2/08 REV 2 of 27 February 2009, p. 18: "A specific issue arose during the evaluation visit in connection with the offences list set out in Article 2(2) of the Framework Decision. According to the information provided the [public prosecutor at the district court of Amsterdam] checks, on the basis of the factual description in box e), if the issuing judicial authority was correct under its national law in classifying the offence for which surrender is requested as an offence from the list as referred to in Article 2(2) of the Framework Decision. The Netherlands authorities explained that this is a marginal check, used only to assess if the punishable acts can reasonably be regarded as an offence in the ticked category, based on the fact that sometimes the EAW is not accurate. If necessary, the issuing judicial authority is asked to provide additional information (…)".

[39] District Court of Amsterdam, LJN BB2690 of 6 July 2007. The case concerned a European Arrest Warrant from Malaga, Spain. The case was based on Art. 225*bis* of the Spanish Criminal Code ("abduction of a child by a parent"). From the facts of the case it appeared that the wanted person was accused of abducting the children he had together with a Spanish woman. The relevant provision 225*bis* had however not yet entered into force at the time of the alleged abduction (the alleged abduction took place in 1998, the relevant provision entered into force in 2002). Nor did the Spanish authorities submit any other provisions incriminating the abduction of a child by one of its parents at the time, even after they had been requested to do so. The District Court of Amsterdam decided to refuse surrender based on the fact that it had not been shown that the alleged acts were punishable under Spanish law at the time they were committed.

[40] District Court of Amsterdam, AU0326 of 4 March 2005; though the Minister since revised his position in a letter of 1 July 2005; Advocate General to the Supreme Court Fokkens opinion of 20 May 2008 in case BD 2447, para. 14-15.

obligation to be incompatible with the Surrender Act [41]. The Supreme Court reasoned that the Surrender Act needed to be interpreted in line with the provisions and aims of the Framework Decision on the European Arrest Warrant (referring to ECJ case C-105/03, *Pupino*). It held that Article 8 of the Framework Decision on the European Arrest Warrant does not prescribe the production of the relevant legal provisions in the European Arrest Warrant or for these provisions to be sent separately, nor can this be implied by the model annexed to the Framework Decision. Regarding the aims of the Framework Decision, the Supreme Court remarked that it is based on a high level of trust between Member States, to prevent complexity and loss of time.

Another explanation would reduce the level of trust and unjustifiably hinder the foreseen simplification. Furthermore, the Court held such an explanation of Article 8 para. 1 of the Framework Decision in line with the implementing law and jurisprudence of other Member States [42].

B. Proportionality

The ministry indicates that recognition of minor offences should be excluded; that the consequences of recognition for the wanted person should be proportionate to the gravity of the fact and that the efforts the executing judicial authorities have to make to execute a foreign judicial decision have to be in proportion to the interest served. Furthermore, a degree of balance must be maintained between issuing and executing Member States (no one-sided efforts by a small Member State on behalf of a large Member State). In the subparagraphs below the exclusion of recognition for minor offences and dual criminality (1), and the territoriality exceptions (2) will be elaborated upon.

1. Excluding minor offences and dual criminality

In its 2000 Communication, the Commission argued that upholding the dual criminality requirement for mutual recognition would lead to an additional step for each and every validation procedure and would considerably lengthen that procedure in certain cases, where what the offender actually did would have to be re-established [43].

The Commission saw a solution in excluding from the scope of mutual recognition some behaviours which are criminalised in certain Member States but not in others. Examples relate to sensitive areas such as abortion, euthanasia, press offences and soft drugs offences [44]. In contrast with the Commission's Communication, which called for the abolition of the dual criminality requirement, the programme of measures seemed to suggest a choice for mutual recognition and the dual criminality requirement to co-

[41] District Court of Amsterdam, BG 6051 of 17 October 2008; Supreme Court of the Netherlands of 8 July 2008, case BD 2447.

[42] Supreme Court of the Netherlands of 8 July 2008, case BD 2447, para. 3.5.2; Advocate General Fokkens opinion of 20 May 2008 (annexed to decision BD 2447), para. 23-25.

[43] Commission Communication *Mutual recognition of final decisions in criminal matters*, COM (2000) 495 final, 26 July 2000, p. 11.

[44] *Ibid.*

exist, the parameter being: "whether fulfilment of the dual criminality requirement as a condition for recognition is maintained or dropped" [45].

As mentioned, instead of opting for a negative list system, the Netherlands seeks to protect its policies in sensitive areas by relying on territoriality exceptions. From the Netherlands' evaluation it becomes clear that dual criminality is mostly an academic issue whereas the ministry states that "the condition of dual criminality is irrelevant to 90% of the cases". Public Prosecutors think that the dual criminality requirement issue is overestimated since dual criminality can almost always be established. In general there is no problem regarding the list of categories of crimes mentioned in the Surrender Act. The judge interviewed also confirms that dual criminality is, in daily practice, hardly ever a point of discussion [46].

The ministry indicates that the real problem lies in "wanting to recognise everything without looking at effectiveness", which "creates uncertainty regarding the requirement of dual criminality". Dual criminality is deemed relevant "as long as recognition of the sum of the incriminations of the 27 Member States is enabled". "Limitation to recognition would be possible if more attention was paid to the proportionality principle". The prosecutors felt a solution needs to be found to prevent or at least persuade judicial authorities in other Member States not to use European Arrest Warrants in case of such minor offences [47]. They took the position, however, that the Public Prosecutors Office cannot refuse execution of these arrest warrants, since all formal requirements for surrender have been met.

Even though the Surrender Division of District Court of Amsterdam has not yet refused any surrender for minor offences, it has carved out its authority to do so in exceptional cases. The District Court of Amsterdam did so in a surrender decision of 30 December 2008 [48], where it referred to the "European handbook on how to fill in the European arrest warrant" [49]. In this case the defence counsel had asked the District Court whether, in cases of minor offences, the court would have the room to refuse surrender if it concerned *de minimis* crimes, in any event crimes that in practice would not be punished or received minor punishment. Counsel referred to a number of fundamental Community freedoms, such as Articles 18 and 49 EC and Directive 2004/38 EC. Given the minor nature of the accusations, the counsel did not deem the infringement of those rights justified. According to the counsel, the proportionality principle was affected [50].

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[45] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *op. cit.*, p. 12.

[46] See e.g. COM (2000) 495, the Council mutual recognition programme (*OJ*, no. C 12, 15 January 2001 p. 10), the evaluation report on the implementation of the EAW in Belgium, COPEN 128 REV2 p. 21.

[47] *Ibid.*

[48] District Court of Amsterdam of 30 December 2008, LJN BG 9037.

[49] Council of the EU, COPEN 70 REV2 of 18 June 2008.

[50] He pointed out that the ECJ has accepted the principle of proportionality as a general principle of Community law in cases *Ferwerda* (ECJ, 5 March 1980, case 256/78) and *Hauer* (ECJ, 13 December 1979, case 44/79).

The District Court held that, regarding the question as to whether there would be disproportionality, one needs to distinguish between the so called "system proportionality" of the Surrender Act and the "proportionality of the issuing of a European Arrest Warrant". The system of the Surrender Act is, in accordance with the Framework Decision that it implements, that it does not go beyond the achievement of the goals of the Framework Decision [51]. In spite of this, the District Court held that the concrete application of the Surrender Act, particularly the issuing of a European Arrest Warrant, could disproportionately affect the interests of the requested person. It then referred to the "European handbook on how to issue a European Arrest Warrant" to reiterate its point [52]. It concluded by stating that, given the general proportionality of the Framework Decision, an appeal regarding the disproportionality of a European Arrest Warrant could only succeed under special circumstances. In this case the court had not been made aware of circumstances that would be special to the extent that surrender would have to be refused.

2. Application of the territoriality exception

Even the territoriality issue might be linked to the issue of proportionality. According to the ministry, the question raised in the questionnaire for the Study on the future of mutual recognition in criminal matters as to whether the territoriality exception could be reconciled with the principle of mutual recognition "does not go to the heart of the matter" [53]. One should have asked "How far should judicial cooperation between Member States go?" and whether the aim of European Union law is "that Member States are to be allowed to prosecute acts committed on the territory of other Member States and in that process oblige these other Member States to cooperate in this prosecution?" The ministry answers the second question in the negative. As mentioned, it sees the territoriality clause as a means to prevent prosecutions for acts committed on the territory of another Member State. Instead of talking about the compatibility of the territoriality clause, it wishes to improve "cooperation between Member States in case of cross border crime, including efforts to concentrate criminal proceedings in one Member State".

The aspect of the application of the territoriality exception preventing assistance to foreign prosecution is particularly relevant in case the surrender of a person is requested. Article 13 of the Surrender Act implements the territoriality exceptions of Art. 4(7) of the Framework Decision on the European Arrest Warrant. It stipulates that execution of a European Arrest Warrant will be refused if the criminal act to which the arrest warrant applies has been committed in whole or in part on Dutch territory

[51] The District Court referred to recital 7 of the Framework Decision on the European Arrest Warrant and the legal framework of the Framework Decision, as it was formulated by the ECJ in its decision of 3 May 2007 (Case C-303/05, *Advocaten voor de Wereld VZW v. Council* and the Opinion in this case by AG Ruiz-Jarabo Colomer of 12 September 2006, para. 18-26).

[52] District Court of Amsterdam of 30 December 2008, LJN BG 9037, para. 6.3.

[53] The question was the following: Is the principle of mutual recognition compatible with the territoriality clause (which enables a MS to refuse to recognize and execute a decision issued for an offence wholly or partly committed on its territory)? How could possibly conflicting interests of the issuing and executing MS be reconciled?

unless the Public Prosecutor files an application for this ground for refusal not to be invoked.

The Public Prosecutors Office has appealed to the Supreme Court seeking clarification of duties imposed by the District Court of Amsterdam on the Public Prosecutors Office under Art. 13 of the Surrender Act. The District Court refused surrender in three cases concerning Dutch nationals since the Public Prosecutors Office had not complied with:

1. A duty to weigh the personal interests of the wanted person before filing an application *ex* Art. 13(2) not to refuse the execution of a European Arrest Warrant under the territoriality exception under Art. 13(1) of the Surrender Act [54];
2. A duty to take humanitarian concerns into account before filing an application *ex* Art. 13(2) not to refuse the execution of a European Arrest Warrant under the territoriality exception under Art. 13(1) of the Surrender Act [55];
3. An aggravated motivation of an application *ex* Art. 13(2) not to refuse the execution of a European Arrest Warrant under the territoriality exception under Art. 13(1) of the Surrender Act in absence of written or unwritten policy guidelines on when to file an application *ex* Art. 13(2) [56].

The Supreme Court [57] did not comment on the first duty [58]. As for the second duty, it considered that, by including Art. 13, the legislature had intended to prevent Dutch judicial authorities from being obligated to execute an arrest warrant which concerned facts that, if committed in Dutch territory, would not constitute a criminal offence under Dutch law (such as abortion and euthanasia) or are, as a general rule, not subjected to criminal prosecution. The possibility for the Public Prosecutor to file an application not to refuse the execution of an arrest warrant was included to further the "proper administration of justice" (*goede rechtsbedeling*) particularly in cases where Member States had cooperated in the investigation and where it seemed to be advisable to concentrate the prosecution in one of the Member States.

It had not been the intent of the Dutch legislature for serious humanitarian reasons to be taken into consideration when deciding on the reasonability of the Public Prosecutor's application. Serious humanitarian reasons could only be a ground to temporarily postpone the surrender, in accordance with Article 35(3) Surrender Act (which implements Article 23(4) FD-EAW) [59].

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[54] District Court of Amsterdam of 2 July 2004, AQ6068.

[55] District Court of Amsterdam of 1 April 2005, AT3380 and District Court of Amsterdam of 2 December 2005, AU8399.

[56] *Ibid.*

[57] Netherlands Supreme Court of 28 November 2006, AY6631.

[58] See N. Roozemond, "Bevat het Overleveringsrecht een humanitaire weigeringsgrond? De eerste cassaties in het belang der wet in overleveringszaken", *Nederlands Juristenblad*, 2007, p. 473, who concludes from this that the personal interests of the wanted person should be taken into account by the Public Prosecutor before filing an application ex Art. 13(2) not to refuse the execution of a European Arrest Warrant under the territoriality exception under Art. 13(1) of the Surrender Act.

[59] Netherlands Supreme Court of 28 November 2006, AY6631, para. 3.4.3, 3.5.

As for the third duty, the Supreme Court judged that the District Court had erred by demanding the Public Prosecutor to motivate his application more extensively as there were no written or unwritten policy guidelines concerning the filing by the Public Prosecutor of such an application. An aggravated motivation is neither supported by the preparatory documents nor a textual interpretation of Art. 13 Surrender Act [60]

The territoriality exception *ex* Article 4(7) Framework Decision on the European Arrest Warrant as implemented by Article 13 of the Surrender Act, is therefore mainly inspired by the idea of allowing the Netherlands to protect national policies regarding abortion, euthanasia and soft drugs [61]. In this context, it is striking that, according to Dutch Public Prosecutors, not a single European Arrest Warrant was received so far for someone committing an abortion, assisting with euthanasia or selling soft drugs in a coffee shop. In spite of this, a more general question remains regarding the factors that should be taken into account when balancing the interest of the wanted person to be prosecuted in the Netherlands against a European Arrest Warrant for foreign prosecution. The judge interviewed remarked that the Public Prosecutors Office is very quick in deciding that foreign prosecutors are best placed to prosecute.

4. Harmonisation and practical measures

In line with its cautious approach to mutual recognition, the ministry indicates that, for the moment, mutual recognition of pre-trial decisions should concentrate on the most frequently occurring forms of mutual legal assistance that can be applied without a substantial change in national legislation. It expects the gains to be made are significant without a huge amount of opposition to be expected. It does not want to strive for harmonisation without a concrete aim in mind. Moreover, it expects that such an approach would probably be met with a lot of resistance.

According to the ministry, the need for procedural harmonisation becomes clear as concrete mutual recognition measures are put in place and start to be applied. An example is the European Evidence Warrant, which needs to be supplemented by minimum rules on evidence gathering [62]. Public Prosecutors also believe that the EU should look into minimum standards for the collection and admissibility of evidence.

The ministry is sceptical with regard to the possibility of devising an EU instrument on the transfer of proceedings. The ministry expects that Member States that prosecute based on the opportunity as opposed to the legality principle will find it hard to accept an obligation to take over prosecution. It also wants to prevent Member

[60] *Ibid*., para. 3.4.2, 3.7.

[61] *Parliamentary Documents II*, 29 451, no. 1, p. 9-10.

[62] Speech by Ernst Hirsch Ballin, Minister of Justice of the Kingdom of the Netherlands, "Investigating in confidence-a vision of police and judicial cooperation in the EU", Brussels, 8 November 2007, p. 10: The Netherlands has been a supporter of a move towards using the same system for European evidence gathering. The agreements made in the Hague Programme of 2004 have set us on the right track. The time is now ripe to take more far-reaching steps. In my view, the Commission should look into the possibilities of setting European minimum rules for evidence gathering. Because if we can obtain evidence more quickly by means of the European Evidence Warrant, we must avoid a situation in which that evidence, gathered with due regard to fundamental rights, cannot be used because of differences in procedural law".

States "light-heartedly" exporting their cases against nationals of other Member States to lighten the burden on the domestic system of criminal justice, with severe financial and personal consequences. Public Prosecutors also think that the European Union should not address the issue of the transfer of proceedings, certainly not via an obligation to take over a prosecution. They believe that this would seriously disrupt the national prosecutorial capacity. The judge interviewed would, however, be very much in favour of the European Union addressing the issue of transfer of proceedings.

The ministry has been generally supportive of an instrument harmonising procedural rights [63]. As mentioned, lawyers and the judge interviewed stress the need for procedural safeguards. Even if surrender is deemed proportionate, relying on the ECHR to proclaim mutual trust in each others' criminal justice systems is not enough. As mentioned, Public Prosecutors do not believe in extensive harmonisation. They most of all want an effective application of rights under the European Convention on Human Rights, effective legal aid, translation of documents and interpretation.

The cautious approach to harmonisation is contrasted by the enthusiasm for practical measures to strengthen mutual trust. The ministry feels that it is essential for Netherlands' practitioners to get acquainted with their colleagues and legal systems of the other Member States. Seminars and exchanges should be organised regularly in collaboration with Eurojust, the European Judicial Network and the European Commission where appropriate. According to the ministry, people talk a lot about transnational crimes but, in the end, the majority of the cases relate to neighbouring Member States. It is therefore particularly necessary to know about their legal systems. The Public Prosecutors would focus on implementing the current instruments properly. This would imply exchange of best practices and training of judges and prosecutors. A suggestion based on the comments made by the judge interviewed might be to set out guidelines for the judicial authorities issuing the form attached to the mutual recognition instrument. Defence lawyers are currently trying to build their own networks [64] to deal with the new environment of EU criminal justice.

5. Conclusion

As the title of this contribution suggests, the Netherlands' approach towards mutual recognition of judicial decisions in criminal matters is based on considerations of compliance with the rule of law and respect for proportionality. In doing so,

[63] Brief van de Minister van Justitie aan de Voorzitter van de vaste commissie voor de JBZ-Raad van de Eerste Kamer der Staten-Generaal der Staten-Generaal, EU-migratiepakket en post-Haags programma, 17 juni 2008: "*Het Verdrag van Lissabon biedt een uitdrukkelijke rechtsgrondslag voor de harmonisatie van rechten van personen in het strafproces. Vóór de totstandkoming van dit verdrag zijn geen nieuwe initiatieven op dit terrein te verwachten. Het ligt voor de hand dat de Commissie na de totstandkoming van het Verdrag van Lissabon met een voorstel voor een richtlijn inzake onderlinge aanpassing van rechten voor verdachten zal komen. Het kabinet acht de totstandkoming van een dergelijke richtlijn van belang*".

[64] For instance the research project "effective criminal defence rights" conducted with Commission funding by a consortium of JUSTICE (UK), the University of the West of England, the Open Society Institute and Maastricht University.

the various actors directly question the aims of the Area of Freedom, Security and Justice.

In answering "no" to what boils down to three basic questions:

1. should we recognise decisions that fail to comply with the standards of the European Convention on Human Rights?;
2. should we recognise the sum of the incriminations of the 27 Member States?; and
3. is it an aim of European Union law that Member States are to be allowed to prosecute acts committed on the territory of other Member States and in that process oblige these other Member States to cooperate in this prosecution?,

the Ministry seems to be building a new normative framework for mutual recognition by "recycling" traditional grounds for refusal such as the territoriality and the dual criminality exceptions.

This is a framework which might not be understood by those who advocate free movement of judicial decisions with harmonisation of substantive and procedural law as supplements and see the territoriality and dual criminality requirements as expressions of sovereignty no longer appropriate in the Area of Freedom, Security and Justice.

After trying to reintroduce some requirements from traditional extradition law (sending along articles, humanitarian considerations as a ground for refusal), the District Court of Amsterdam's call upon the Community's/ Union's proportionality principle to flush out European Arrest Warrants for *de minimis* crimes is a very interesting departure. It will, however, clearly be difficult to reconcile the proportionality principle with the principle of free movement of judicial decisions. The theft of a pig might be seen as *de minimis* crime from a Dutch perspective but who are we to judge? If Member States fail to find an appropriate solution for the issue it is to be expected that sooner or later the European Court of Justice will be asked to prenounce itself on the matter.

More effective judicial cooperation is what mutual recognition is aimed at. Still the "target group" does not seem to be entirely happy with what the European Union has produced so far. The only instrument prosecutors are really using is the European Arrest Warrant. Practical training might overcome some scepticism, but in the end the EU mutual recognition instruments should offer clear benefits as opposed to traditional mutual legal assistance.

The "mutual recognition" system was not devised for suspects, though there could be benefits in swift surrender for prosecution and return after conviction for instance. The establishment of equivalent procedural safeguards on their own will not allow suspects to benefit from the system as well. It is essential that crossborder cooperation between defence lawyers gets off the ground.

From EU with trust: the potential and limits of the mutual recognition in the Third Pillar from the Polish perspective

Adam Łazowski [1]

1. Introduction

The principle of mutual recognition in its third pillar *alter ego* remains one of the most puzzling concepts of contemporary EU law [2]. What took the European Court of Justice over twenty years to develop in the context of free movement of goods [3] was proclaimed by the European Council in Tampere in 1999 [4]. This is clearly one of the

[1] The author is grateful to several persons who showed their kindness and allowed to be interviewed. The list includes Dr Agnieszka Grzelak, The Chancellery of the Sejm; Dr Tomasz Ostropolski, Head of the Unit, Department of Judicial Cooperation and European Law, Ministry of Justice; Mr Tomasz Darkowski, Deputy Director, Department of Judicial Cooperation and European Law, Ministry of Justice; Prosecutor Igor Dzialuk, Ministry of Justice; Judge Dariusz Sielicki, Ministry of Justice; Prosecutor Karol Koch, The Office of the Polish Ombudsman; Mr Marek Łukaszuk, Director of the Criminal Law Department, The Office of the Polish Ombudsman; Dr Barbara Nita, Economic University in Cracow, Constitutional Tribunal; Judge Wojciech Hermeliński, Constitutional Tribunal; Dr Piotr Kładoczny, Helsinki Foundation for Human Rights, University of Warsaw. All opinions expressed by the interviewees were personal and should not be associated with official positions of the institutions they work for.

[2] See, *inter alia*, P. Cramér, "Reflections on the Roles of Mutual Trust in EU Law", *in* M. Dougan, S. Currie (eds.), *50 Years of the European Treaties. Looking Back and Thinking Forward*, Oxford and Portland, Oregon, Hart Publishing, 2009, p. 43; K.A. Armstrong, "Mutual Recognition", in C. Barnard, J. Scott (eds.), *The Law of the Single Market. Unpacking the Premises*, Oxford and Portland, Oregon, Hart Publishing, 2002, p. 225.

[3] ECJ, 20 February 1979, Judgment 120/79, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, *ECR*, p. 649.

[4] For an academic appraisal see, *inter alia*, V. Mitsilegas, *EU Criminal Law*, Oxford and Portland, Oregon, Hart Publishing, 2009, p. 115; S. Peers, "Mutual Recognition and Criminal Law of the European Union: Has the Council Got it Wrong?", *CMLRev.*, 2004, p. 5;

crucial idiosyncrasies of the police and judicial co-operation in criminal matters [5] The initiative coming from the top of political hierarchy, making a rather bold declaration of trust in everyone else is now facing the biggest challenge – the test of effectiveness. Unfortunately, the reality bites. With twenty seven Member States of very diverse legal orders and legal cultures several questions emerge as to the best way forward. In more general terms, by looking at the pace of transposition and level of implementation of all third pillar framework decisions one may even question the sustainability of the entire project. Frequent delays in transposition, limited implementation substantiate this argument [6] The only legal instrument that survives the test is the Framework Decision 2002/584/JHA on the European Arrest Warrant [7]. It may not be perfect and certainly is quite problematic, nevertheless it works. Being the guinea pig of the mutual recognition it has proved its usefulness so many times that its mere existence is not being questioned [8]. The discourse, however, develops at another level and turns to defense rights as well as the relationship between the EAW machinery and human rights, which the European Union declares to respect pursuant to Art. 6 EU. This triggers a great deal of new questions which have already emerged and are emerging almost on daily basis in domestic courts. Some of them have been raised over the past five years in Poland – the biggest new Member State of the European Union [9]. Poland, as all recent newcomers, had no opportunity to contribute to the creation of principle in question, moreover no requests for transitional periods had been made. Quite to the contrary, the new Member States had no option but to accept the *acquis* as a part of the accession package [10]. Both, the Framework Decision on the European

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G. de Kerchove, A. Weyembergh (eds.), *La confiance mutuelle dans l'espace pénal européen/ Mutual Trust in the European Criminal Area*, Bruxelles, Editions de l'Université de Bruxelles, 2005; G. de Kerchove, A. Weyembergh (eds.), *La reconnaissance mutuelle des décisions judiciaires dans l'Union européenne/Mutual recognition of judicial decisions in the penal field within the European Union*, Bruxelles, Editions de l'Université de Bruxelles, 2001.

[5] See further, A. Łazowski, ""Prisoners in Paradise" Idiosyncrasies of Justice and Home Affairs Area", forthcoming.

[6] EU legislation on combatting trafficking in human beings may serve as a very good example. See Framework Decision 2002/629/JHA of 19 July 2002 on combatting trafficking in human beings, *OJ*, no. L 203, 1 August 2002, p. 1; Proposal for a Council Framework Decision on preventing and combatting trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM (2009) 136, 25 March 2009. For an academic appraisal see, *inter alia*, A. Weyembergh, V. Santamaria (eds.), *The evaluation of European criminal law. The example of the Framework Decision on combatting trafficking in human beings*, Bruxelles, Editions de l'Université de Bruxelles, 2009.

[7] Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 15 July 2002, p. 15. For an early appraisal see R. Blekxtoon (ed.), *Handbook on the European Arrest Warrant*, The Hague, Asser Press, 2004.

[8] See, *inter alia*, N. Keijzer, E. van Sliedregt (eds.), *The European Arrest Warrant in Practice*, The Hague, T.M.C. Asser Press, 2009.

[9] See, *inter alia*, Polish Supreme Court, 3 March 2009, judgment I KZP 30/08 *Criminal Proceedings against Jakub T.*, not yet reported (on file with the author).

[10] On the pre-accession approximation effort in this area of EU law see further A. Łazowski, "Implementation of the Third Pillar Acquis. A Challenge for the Applicant Countries?", in

Arrest Warrant and the Framework Decision 2003/577/JHA on Freezing of Property and Evidence Orders [11] had been adopted before the enlargement. On the other hand, Polish representatives [12] participated in the negotiations that led to the adoption of the Framework Decision 2005/214/JHA on financial penalties [13], the Framework Decision 2006/783/JHA on confiscation orders [14], the Framework Decision 2008/978/JHA on the European Evidence Warrant [15] as well as all the remaining mutual recognition instruments [16]. It is fitting to acknowledge that Poland, together with the Czech Republic, Sweden, Slovakia and Slovenia, is one of the authors of the recent proposal for a Framework Decision on jurisdiction in criminal proceedings [17]. Clearly then Polish authorities contribute on regular basis to the shaping of the police and judicial cooperation in criminal matters. The latter example proves that the contribution goes beyond mere approval of measures proposed by the European Commission or other Member States of the European Union. The question is how the activities at EU level translate into domestic implementation of the principle of mutual recognition. The five years of participation in the JHA endeavor give an interesting record. The reception of the principle of mutual recognition by the political, decision making and practitioners circles is mixed, to say the least. Arguably, mutual trust imposed from the above is negotiating its way, yet a degree of resentment is clearly visible. At the same time, as in most other EU Member States, the only legal instrument that really

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G. de Kerchove, A. Weyemberg (eds.), *Sécurité et justice: enjeu de la politique extérieure de l'Union européenne*, Bruxelles, Editions de l'Université de Bruxelles, 2003, p. 157-167.

[11] Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ,* no. L 196, 2 August 2003, p. 45.

[12] A group of practitioners that is public prosecutors and judges is consulted in the negotiation phase. The choice of persons for consultation is not random, on the contrary it involves a group of practitioners who, apart from being practicing lawyers remain on the payroll of the Ministry of Justice. In general, other practitioners – not employed at the Ministry – are usually not involved in the process. Arguably, there is a general lack of interest in this respect. Also, the pace of negotiations precludes broader involvement. One of the reasons for a limited involvement of practitioners is the fast pace of negotiations at EU level. However, practitioners are far more involved in the transposition of framework decisions to the Polish legal order.

[13] Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16.

[14] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[15] 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*, no. L 350, 30 December 2008, p. 72.

[16] Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *OJ*, no. L 327, 5 December 2008, p. 27; Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *OJ,* no. L 337, 16 December 2008, p. 102.

[17] Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Council Doc. no. SN 5768/1/08, 11 December 2008.

works in practice is the European Arrest Warrant. In fact, as explained later in this contribution, it is a victim of its own success as Polish authorities like it far too much. Indeed they like it to the point when, quite rightly, they are accused of the overuse. Not surprisingly, it is the European Arrest Warrant that will serve as the main point of reference in this analysis. By following the Cervantes's law of statistics the author is going to engage in a critical appraisal of the principle of mutual recognition and its reception in Poland. Cervantes argued that "by a small sample we may judge of the whole piece" [18], so by the EAW sample we are going to judge the mutual recognition in police and judicial cooperation in criminal matters. More general conclusions are presented in the final part of the chapter.

2. The European Arrest Warrant and the transposition of the Framework Decision

A. From pre-accession approximation to implementation − the first transposition effort

Before looking at the implementation of the European Arrest Warrant it seems fitting to look at the initial transposition effort. There is a number of reasons justifying the analysis of political and legal factors that contributed to the current state of affairs. First and foremost, the evaluation of the approximation exercise allows to appreciate the perception of mutual recognition and mutual trust by political elites involved in the decision making. Second, it gives information on the constitutional background, leading straight to the next part of this contribution, that is, to the widely discussed judgment of the Polish Constitutional Tribunal quashing the domestic transposition measures [19].

As already noted, Poland did not participate in the negotiations leading up to the adoption of the Framework Decision 2002/584/JHA on the European Arrest Warrant. At that time, the country was at the final stages of accession negotiations thus the adoption of domestic legislation giving effect to the European Arrest Warrant machinery was part of the enormous pre-accession approximation exercise. In purely legal terms, approximation of laws was based on Art. 68-69 Europe Agreement [20]. Literal interpretation of these provisions was quite misleading as it tended to give a wrong impression that the obligation to approximate was a mere best endeavors commitment. Already in 1997 E. Piontek argued that contextual interpretation of the same provision was more appropriate as taking into account the application for the EU membership submitted by Poland in 1994 [21]. Arguably, this factor alone transformed

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[18] H. Rawson, *The Unwritten Laws of Life. Unofficial Rules as Handed Down by Murphy and Other Sages*, Farnham, Carbolic Smoke Ball Co., 2008, p. 55.

[19] Polish Constitutional Tribunal, 27 April 2005, Judgment in case P 1/05 Re Constitutionality of Framework Decision on the European Arrest Warrant, [2006] 1 CMLR, 36.

[20] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, *OJ,* no. L 348, 31 December 1993, p. 2.

[21] E. Piontek, "Central and Eastern European Countries in Preparation for Membership in the European Union – A Polish Perspective", *YPES*, 1997, p. 73.

the obligation to approximate from the best endeavors type of commitment to a straightforward obligation to approximate Polish law with *acquis communautaire*. The list of priority areas provided in Art. 69 Europe Agreement with Poland did not include measures falling under the JHA area [22]. This was not surprising as at the time of negotiations of the Europe Agreement the Treaty of European Union was not yet in force. Nevertheless, as Poland progressed with its *rapprochement* towards the EU it was clear that legal acts adopted within the third pillar had to be transposed into the domestic legal order. As already noted, neither Poland nor the EU itself requested transitional periods in this respect. As it happened, the first third pillar piece of legislation to be transposed was the Framework Decision on the European Arrest Warrant. The relevant Polish legislation was adopted a little over a month before the big bang enlargement and entered into force on the date of accession.

The contents of the transposition measures has been extensively covered by the European Commission in its two subsequent reports on the implementation of the EAW framework decision [23] as well, in relation to Poland, in the Evaluation Report of 7th February 2008 [24]. Thus, it is not necessary to reproduce the basic findings in this chapter. However, bearing in mind the focus of this exercise, it is fitting to take a closer look at the legislative process that had led to the adoption of the domestic legislation. Indeed, this was the first time that a framework decision introducing the principle of mutual recognition was subject to parliamentary work in Poland. It was transposed by the Act amending the Criminal Procedure Code of 28 March 2004 [25]. The relevant provisions were inserted as chapters 65a and 65b of the CPC 1997. Articles 607a-607j CPC 1997 provide rules on the issuing of EAW by Polish courts. This is followed by Art. 607k-ze CPC 1997 which regulate the execution of EAW submitted by authorities of other Member States of the European Union [26]. It is notable that the Polish legislator decided to employ a "cluster" technique of adding oddly numbered sections and provisions to the existing Code of Criminal Procedure. The same *modus operandi* is used for the transposition of other framework decisions dealing with the principle of mutual recognition [27].

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[22] For a comparative overview of all Europe Agreements see, *inter alia*, A. Ott, K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process*, The Hague, T.M.C. Asser Press, 2002.

[23] Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2005) 63; Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2006) 8.

[24] 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 Poland, Council Document 14240/2/07.

[25] Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń, Dziennik Ustaw 2004 no. 69, Item 626.

[26] The specimen of EAW as well as some flanking measures were adopted by the Minister of Justice in an implementing regulation.

[27] See further section 4B of this chapter.

The bill was formally presented by the Polish Government on September 19th, 2003[28]. It was tailored to approximate Polish law with the Council of Europe Convention on Cybercrime[29], Convention on the Protection of the financial interests of the EC[30] as well as the EAW Framework Decision. The reading of an explanatory note attached to the bill proves very instructive. The drafters clarified the aims and purposes of the proposed legislation as well as explained the rationale behind the principle of mutual recognition. A link was established between the free movement of persons (including the benefits and threats stemming therefrom) and the need for enhanced judicial and police co-operation in criminal matters. As argued by the drafters, such enhancement was possible only when high level of mutual trust was established. An emphasis on the respect for fundamental rights was also made. A large part of the Explanatory Note was devoted to the question of compatibility of the bill with Art. 55(1) of the Polish Constitution[31]. At that time the provision in question contained a clear cut prohibition to extradite Polish nationals[32]. It was acknowledged that there were at least two alternative schools of thought. The first was based on the specificity of the EAW machinery and type of differences between the surrender and extradition procedures. Bearing those in mind, the drafters argued that the EAW mechanics fell outside the scope of Art. 55(1) of the Polish Constitution. The second school of thought was based on the premise that extradition and surrender are merely two sides of the same coin, thus equally covered by the prohibition in question. In such case, it was recommended to interpret exceptions to Art. 55(1) of the Polish Constitution from other provisions contained therein. Following the advice of the Legislative Council separate chapters on extradition and surrender were proposed. This was to emphasize the difference between the two types of procedures.

The bill was widely consulted with stakeholders[33]. It is fitting to refer to the submission of the Supreme Court as it raised the important question of compliance with Art. 55(1) of the Polish Constitution. The Supreme Court was of the opinion

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[28] Projekt ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń wraz z projektem podstawowego aktu wykonawczego, Druk no. 2031. Text on file with the author.

[29] Council of Europe Convention on Cybercrime, Council of Europe Treaty Series no. 185.

[30] 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,* no. C 316, 27 November 1995, p. 48.

[31] The Constitution of the Republic of Poland of 2 April 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku] Dziennik Ustaw [1997] no. 78, Item 483 (hereinafter referred to as the Polish Constitution). The English translation of the Constitution is available in A. Pol, W. Odrowąż-Sypniewski (eds.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials,* Warsaw, Chancellery of the Sejm, 2000, p. 25. All quotes from the Polish Constitution inserted throughout this contribution originate from this book (unless stated otherwise).

[32] Art. 55 (1) read as follows: "The extradition of Polish nationals is prohibited".

[33] This included the National Judiciary Council, the Supreme Court, the National Association of Legal Advisors, the National Advocacy Association, the General Inspector for Data Protection, the Joint Commission of the Government and local authorities, the President of

that the proposed bill, to the extent it envisaged surrender of Polish nationals, was in breach of the provision in question and the Act amounted to a clear circumvention.

In both chambers of the Polish Parliament the bill led to several debates. First, on the initiative of a group of right wing parties, a motion for the rejection of the bill *in toto* was submitted. It was subsequently rejected by the majority of the members of the Sejm − the lower house of the Polish Parliament [34]. Several amendments were introduced during the readings of the bill. The meetings of the Sejm committee were attended by selected members of the Sejm, representatives of the government as well as by a group of invited experts. The debates unlocked a number of phenomena. Some experts (professors of law) argued strongly that the surrender procedure and extradition were rather different concepts, thus there was no need for a revision of the Polish Constitution. The compatibility of the proposed provisions with Article 55(1) of the Constitution was addressed in numerous diverging expert opinions [35] as well as in the opinion of the Legislative Council [36]. Yet, the political climate was not very favourable. For example during the committee debate on 20th January 2004 two members of the Parliament argued that adoption of the bill could trigger public debate about the potential breach of the Polish Constitution. Also, it was suggested to postpone transposition of the EAW Framework Decision and proceed with a revision of the Polish Constitution first [37]. Paradoxically both speakers referred to "EC directive" instead of "EU framework decision". Such suggestions were rebuked by the Deputy Minister of Justice who emphasized the importance of the principles of mutual recognition and mutual trust as two cornerstones of the police and judicial cooperation in criminal matters. The debate that followed focused on a number of important issues connected with the transposition. For example, on the suggestion of one of the experts - who submitted a written position on the bill - a measure transposing Art. 5(2) EAW Framework Decision was added. Also, the translation of the term "judicial authority" triggered an interesting discussion. The measures providing for the transposition of Art. 5(3) EAW Framework Decision drew the attention of the Sejm committee

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the National Bank of Poland and several trade unions. Opinions were submitted by the Supreme Court, National Bank of Poland and the General Inspector for Data Protection.

[34] Still, in total 111 MP's supported the motion to reject the bill. Most of them were from the right wing, generally anti-EU parties.

[35] See, *inter alia*, E. Piontek, "Opinia uzupełniająca w przedmiocie wdrożenia ENA do prawa polskiego" [Supplementary Opinion on Implementation of European Arrest Warrant in Polish Law]; P. Sarnecki, "Opinia na temat konstytucyjności projektu ustawy w sprawie nowelizacji kodeksu karnego, kodeksu postępowania karnego i kodeksu wykroczeń" [Opinion on Conformity with the Constitution of the Bill amending the Penal Code, Penal Procedure Code and Minor Offences Code]; M. Płachta, "Opinia w sprawie projektu ustawy o zmianie Kodeksu karnego, Kodeksu postępowania karnego oraz Kodeksu wykroczeń" [Opinion on the Bill amending the Penal Code, Penal Procedure Code and Minor Offences Code]. All of the above opinions are available at the website of the Sejm (the lower chamber of the Polish Parliament) at http://orka.sejm.gov.pl/rexdomk4.nsf/Opwsdr?OpenForm&2031.

[36] See "Opinia o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego [europejski nakaz aresztowania]", *Przegląd Legislacyjny,* 2004, p. 147.

[37] In a rather populist fashion both members suggested that Poland was trying too hard to comply with the requirements of the membership in the European Union.

reading the bill. The original text submitted by the government made the surrender of a Polish national subject to a mandatory condition that the person in question was returned to Poland in order to serve the custodial sentence. Experts giving evidence to the committee successfully challenged the wording of this provision on the grounds of non-conformity with the EAW Framework Decision. The transposition of grounds for refusal was clearly an issue. In an interesting contribution deputy minister of justice questioned the drafting of Art. 4 EAW Framework Decision. It was argued that two interpretations were possible. First taking the optional grounds as addressed to the Member States only, giving ample flexibility regarding the transposition. The second reading suggested that all grounds had to be transposed; yet domestic judicial authorities would be granted discretion when making a decision on surrender requests. The discussion about the transposition of Art. 2(2) EAW Framework Decision merits attention. The original proposal submitted by the Government used the word "xenophobia", which was not used in the Criminal Code 1997 [38]. Arguably, such drafting would have caused a degree of uncertainty not typical for the Polish criminal law. Thus, the drafting was changed into more descriptive to reconcile the transposition requirement with the drafting techniques traditionally employed by the Polish legislator. Alas, this issue did not trigger a discussion on the relationship between mutual recognition and harmonization of laws.

The bill received three readings in the Sejm (the lower chamber of the Polish Parliament) and was subsequently revised by the Senat (the upper chamber of the Polish Parliament). While most of the changes proposed by the latter had technical nature only, one merits particular attention as it facilitated correct transposition of Art. 21 and 27 (1-3) EAW FD [39]. The bill was adopted by both chambers of the Polish parliament and, as already mentioned, entered into force on May 1st 2004.

B. The constitutional drama

1. The judgment of the Constitutional Tribunal

The legislation transposing the EAW framework decision suffered a major blow when the Constitutional Court declared Art. 607t, para. 1 of CPC to be contrary to Art. 55(1) Polish Constitution [40]. As the provision in question touches one of the vital

[38] Kodeks Karny z dnia 6 czerwca 1997 r., Dziennik Ustaw 1997 no. 88, Item 553.

[39] Text of the resolution on file with the author.

[40] *Loc. cit*., note 19. One should notice that Poland is not unique in this respect as similar challenges to the legality of domestic measures transposing the Framework Decision on the European Arrest Warrant were submitted in Germany, Cyprus and Czech Republic. See German Constitutional Tribunal, 18 July 2005, Judgment 2 BvR 2236/04, [2006] 1 *CMLR* 16; Supreme Court of Cyprus, 7 November 2005, Judgment in case *Attorney General of the Republic v Konstantinou*, [2007] 3 *CMLR* 42; Constitutional Court of the Czech Republic, 3 May 2006, *Re Constitutionality of Framework Decision on the European Arrest Warrant*, [2007] 3 *CMLR* 24. For an academic commentary see, *inter alia*, E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant*, Nijmegen, Wolf Legal Publishers, 2006; Z. Kühn, "The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance/Acceptance: The EAW Saga as Narrated by the Constitutional Judiciary in Poland, Germany, and the Czech Republic", *CYELP*, 2007, p. 99; D. Leczykiewicz, "Constitutional Conflicts and the Third Pillar", *ELRev*.,

aspects of the principle of mutual recognition - that is the abolition of traditional ban to extradite own nationals – the judgment merits particular attention [41].

In the discussed case a reference was made by the Criminal Division of the Regional Court in Gdańsk, which had received a European Arrest Warrant requesting the surrender of a Polish citizen to the Netherlands [42]. Before giving suit to the request the Court wanted to have clarified whether the surrendering of Polish citizens pursuant to Art. 607t CPC 1997 was acceptable in the light of Art. 55(1) of the Constitution [43].

2008, p. 230; J. Komárek, "European Constitutionalism and the European Arrest Warrant: in Search of the Limits of Contrapunctual Principles", *CMLRev.*, 2007, p. 9.

[41] For an academic commentary see, *inter alia*, A. Nussberger, "Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant", *JCL*, 2008, p. 162; A. Łazowski, "Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005", *EuConst.*, 2005, p. 569; A. Wyrozumska, "Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant", *PolYBIL,* 2004-2005, p. 5; D. Leczykiewicz, "Trybunal Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05", *CMLRev.*, 2006, p. 1108.

[42] According to Article 3 of the Constitutional Tribunal Act "Any court may refer a question of law to the Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or a statute if the answer to this question of law determines the matter pending before the court". (The Constitutional Tribunal Act (as amended) [Ustawa z dnia 1 sierpnia 1997 o Trybunale Konstytucyjnym] Dziennik Ustaw [1997] no. 102, Item 643 (hereinafter referred to as CTA). The English translation is available in A. Pol, W. Odrowąż-Sypniewski (eds.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials*, 2nd ed. (Warsaw, Chancellery of the Sejm 2000) at p. 385-416).

[43] The referring court raised several questions. The first concerned the introduction of the surrender procedure by the new legislation into the Polish legal system. The definition of extradition is contained in Article 602 CPC 1997, which states that "subject to the exceptions established in Chapters 65b and 66a CPC 1997 extradition is a transfer of the person who is pursued or sentenced on the initiative of the other State". The referring court wondered whether this wording allowed for the conclusion that extradition is different from the "surrender procedure" envisaged by the EAW FD and by the Statute of the International Criminal Court (the latter is regulated in Chapter 66a CPC). In this context, the Gdańsk Regional Court also pointed to the fact that Chapter 65a CPC 1997 is not referred to in Art. 602 CPC 1997. Secondly, the Gdańsk Regional Court doubted – in view of the Constitution – whether the national legislature with the transposing legislation wanted to allow the surrender of Polish citizens. It noted that the *travaux préparatoires* of the Constitution proved that while Art. 55(1) Polish Constitution in its original version contained exceptions allowing extradition of citizens when this was required by an international agreement, the text was reformulated during the drafting process in order to create an absolute ban on the extradition of nationals. Thirdly, the referring court argued that it was very risky to request pro-European interpretation of the Art. 55(1) Polish Constitution leading to exclusion of the European Arrest Warrant surrender from the extradition ban. Fourthly, the Gdańsk Regional Court claimed that the drafters of the EAW FD only intended to simplify the existing extradition procedures. According to the referring court this conclusion came from points 1 and 13 of the preamble to the EAW FD. Finally, it was argued that three old Member States which previously had similar provisions in their legal systems have introduced necessary amendments in order to transpose fully the EAW FD. In

The first part of the judgment of the Constitutional Tribunal is devoted to a rather superfluous and superficial analysis of the legal nature of the third pillar of the European Union in general and of framework decisions in particular. For instance in paragraph 2.1. the Tribunal briefly concluded that the main difference between the first pillar of the European Union on one hand, and the second and third on the other is the intergovernmental character of the latter, without taking into consideration developments of the Treaty of Amsterdam [44] and the Treaty establishing a Constitution for Europe [45]. The Tribunals' position on the legal nature of the third pillar secondary legislation is also not very clear. It rightly concluded that these acts belong to the secondary law of the European Union (and not the European Community). At the same time it stated in the preceding paragraph that the technique of implementation of framework decisions is equal to technique of implementing first pillar directives. It further presented rather contradictory and sometimes extreme opinions based on academic writing (i.e. opinion that framework decisions are part of the public international law). Again, in paragraph 2.4 the Constitutional Tribunal used a shortcut saying that the obligation to transpose framework decisions arises from Art. 9 of the Polish Constitution 1997 (confirming that Poland respects international law), without mentioning that the origins of the obligation lies in Art. 34 (2) of the EU Treaty. It is interesting to note that the Constitutional Tribunal also referred to the principle of mutual trust, yet it did so implicitly without looking at the heart of the matter.

Paragraph 3 of the judgment deals with extradition and surrender procedures. After an *exposé* on the evolution of Polish provisions on extradition and the history of Art. 55(1) Polish Constitution, the questions referred by the Regional Court in Gdańsk are treated. On basis of literal interpretation Polish scholars argued that extradition and surrender are of a different nature, and thus Art. 55(1) Polish Constitution was not infringed. It is fitting to add that both acted in the capacity of external experts in course of the parliamentary works leading to the adoption of the provisions in question. For instance E. Zielińska argued that it is clear from the preamble of the EAW framework decision that the differentiation between the two terms is not accidental [46]. On the basis of the similar argument P. Kruszyński also argued that discussed terms must not be given the same meaning [47]. The Constitutional Tribunal rejected this

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other words the referring court implied that the Constitution should have been changed in order to transpose fully the EAW FD.

[44] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, *OJ,* no. C 340, 10 November 1997, p. 1. See further, *inter alia*, D. O'Keeffe, P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Oxford-Portland, Oregon, Hart Publishing, 1999.

[45] Treaty establishing a Constitution for Europe, *OJ,* no. C 310, 16 December 2004, p. 1. See further, *inter alia*, J.-P. Piris, *The constitution for Europe. A legal analysis*, Cambridge, Cambridge University Press, 2006.

[46] E. Zielińska, « Ekstradycja a europejski nakaz aresztowania. Studium różnic » [Extradition and the European Arrest Warrant. The Study of Differences] as quoted by the Constitutional Tribunal in para. III-3.2. of the judgment.

[47] P. Kruszyński, « Europejski Nakaz Aresztowania jako forma realizacji zasady wzajemnego wykonywania orzeczeń w ramach UE – Jaką rolę należy przypisać E.N.A. w procesie tworzenia Wspólnego Obszaru Wolnościm Bezpieczeństwa i Sprawiedliwości UE

argumentation by simply stating that the Constitution does not mention the surrender procedure. The Tribunal also rejected the argumentation forwarded by the Legislative Council [48]. The latter submitted that the clarification of differences between the two institutions in the CPC 1997 should suffice to exclude surrender from the scope of Art. 55(1) Polish Constitution 1997 [49]. The Constitutional Tribunal however held that the interpretation of statutory terms may not bind and define the interpretation of the constitutional norms [50]. *A contrario*, the interpretation of the Constitution determines the interpretation of Acts of Parliament. Arguably, this argument of the Constitutional Tribunal encapsulates a more general problem relating to the principle of mutual recognition and the co-operation in the third pillar.

The Constitutional Tribunal made a reference to the well established principle of indirect effect, requiring the interpretation of domestic law as far as possible in accordance with EC law [51]. By the time of adjudication the Case C-105/03 *Pupino* was still pending, therefore Tribunals' analysis was purely theoretical [52]. The Constitutional Tribunal did not exclude the possibility of extending the obligation to the third pillar

– opierającego się na zasadzie wzajemnego uznawania i wykonywania orzeczeń? » [European Arrest Warrant as a Form of Realisation of the Principle of Mutual Execution of Judgements in the EU – What is the Role of European Arrest Warrant in Creation of an Area of Freedom, Security and Justice based on the Principle of Mutual Trust and Execution of Judgments?] as quoted by the Constitutional Tribunal in para. III-3.2 of the judgment.

[48] Para. III-3.3 of the judgment. It shall be noted that the opinion of the Legislative Council was not adopted unanimously.

[49] See "Opinia o projekcie ustawy o zmianie ustawy – Kodeks karny oraz ustawy – Kodeks postępowania karnego [europejski nakaz aresztowania]" [Opinion on Bill amending the Penal Code and Penal Procedure Code [European Arrest Warrant], *Przegląd Legislacyjny,* 2004, p. 147.

[50] "Constitutional notions have an autonomous nature in relation to binding acts of lower rank. The meaning of terms contained in ordinary statutes may not determine the interpretation of constitutional provisions; otherwise the guarantees contained in these provisions would lose any sense. On the contrary, it is constitutional norms that dictate the manner and direction of interpreting statutory provisions. The starting point for the interpretation of constitutional notions is the understanding of terms used in the text of the Constitution, shaped historically and defined within legal doctrine".

[51] See further, *inter alia*, ECJ, 14 April 1984, Judgment 14/83, *Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen*, *ECR*, p. 1891; ECJ, 13 November 1990, Judgment C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, *ECR*, p. I-4135; ECJ, 8 October 1987, Judgment 80/86, *Criminal proceedings against Kolpinghuis Nijmegen BV*, *ECR*, p. 3969; ECJ, 26 September 1996, Judgment C-168/95, *Criminal proceedings against Luciano Arcaro*, *ECR*, p. I-4705. For an academic appraisal see, *inter alia*, S. Drake, "Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's Community rights", *ELRev.,* 2005, p. 329.

[52] ECJ, 16 June 2005, Judgement C-105/03, *Criminal proceedings against Maria Pupino*, *ECR,* p. I-5285. See further M. Fletcher, "Extending "indirect effect" to the third pillar: the significance of Pupino?", *ELRev.,* 2005, p. 862; E. Spaventa, "Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in Pupino", *EuConst*., 2007, p. 5.

act albeit subject to limitations already set out in the existing jurisprudence of the European Court of Justice [53].

This led the Constitutional Tribunal to analysis of the differences between extradition and the surrender procedure. On the basis of different elements in the surrender procedure, among others the lack of the double criminality requirement for 32 offences, the exclusive involvement of judicial authorities in it and quasi abolition of two key barriers to extradition (no extradition of own nationals and for political offence), the Tribunal concluded that both institutions differ not only formally but also substantially. However, the differences were defined in the statutory provisions and could not impose a particular interpretation of Art. 55(1) Polish Constitution 1997. The latter did not define the differences, therefore extradition and surrender could only be considered as two separate procedures when they differed by nature. This however was not the case: both involved the transfer of a person to another country for the purposes of criminal procedure or execution of a sentence. This reasoning led the Constitutional Tribunal to the following conclusion:

> "since the essence (core) of extradition lies in the transfer of a prosecuted, or sentenced, person for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them, the surrendering of a person prosecuted on the basis of an EAW for the purpose of conducting a criminal prosecution against them or executing an imposed custodial sentence or another measure consisting in the deprivation of liberty, on the territory of another Member State, must be viewed as a form of extradition within the meaning of Article 55 (1) of the Constitution".

The fact that the Constitution preceded the adoption of the EAW FD did not exclude the application of Art. 55 (1) Polish Constitution *pro futuro* − that is to new types of similar procedures subsequently established. Interestingly enough, the Legislative Council and the General Public Prosecutor had argued that even if the surrender procedure would fall under Art. 55(1) Polish Constitution, the infringement could be justified on account of Article 31(3) Polish Constitution [54]. The Legislative Council argued that in view of the (procedural) rights given in the EAW FD, the essence of constitutionally protected freedoms and rights was not affected. The Constitutional Tribunal however also rejected these submissions reasoning that the extradition ban is unexceptional. With the same reasoning it rejected the arguments based on the Union citizenship and the non-applicability of Art. 55(1) Polish Constitution to extradition and surrender to Union Member States [55]. Art. 607t(1) 1 CPC allowing the surrender of Polish citizens to the Member States of the European Union was therefore declared as contrary to Art. 55 (1) Polish Constitution.

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[53] Which in fact is what the ECJ did in the *Pupino* judgement.

[54] Art. 31(3) reads: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

[55] See also E. Piontek, "Europejski Nakaz Aresztowania", *Państwo i Prawo*, 2004, p. 37.

The legal effect of the Tribunal's judgments declaring provisions of Polish law contrary to the Constitution is their annulment. In principle, unconstitutional provisions lose their force on the date of publication of judgement in the State Gazette (in most of the cases this is Dziennik Ustaw). However, exceptionally the Constitutional Tribunal has the power to set another date for repeal, which in case of acts of parliament may not be longer than 18 months. In this case the Constitutional Tribunal took into account various legal factors, including, *inter alia,* the protection of individuals' rights, obligations to respect international law; complexity and potential duration of Constitution revision procedure[56]. Having analysed them all the Constitutional Tribunal decided to delay the annulment of contested provision by a maximum period available, mainly 18 months (Paragraph III-5.1-5.9). Consequentially, Art. 607t CPC 1997 was fully applicable until the expiry of the transitional period, *i.e.* the 5th of November 2006.

2. The consequences of the judgment

The judgment of the Constitutional Tribunal has naturally caused shockwaves in the system. The 18 months transitional period during which the surrender of Polish nationals was still possible, despite the unconstitutional wording of the CPC 1997, has proved to be quite challenging for the domestic courts. A decision of Court of Appeal in Szczecin in case II AKz 404/06 may serve as an excellent example[57]. In case of Dariusz J., whose surrender was requested by German authorities, the Regional Court in Szczecin in a decision of November 7th, 2006 refused to surrender the person in question on the ground that this was no longer possible upon the expiry of the transitional period. The Regional Court also annulled the decision on the detention of Dariusz J. As proved by the decision of the Court of Appeal the issue at stake was whether pursuant to the applicable law the Regional Court had the jurisdiction to refuse surrender. The Court of Appeal rightly acknowledged that the only provision repealed by the Constitutional Tribunal was Art. 607t, para. 1 CPC 1997, allowing the surrender of Polish nationals subject to a request that they are returned for the purposes of serving the sentence[58]. The Court of Appeal took into account the principle of indirect effect[59] as well as the principle of mutual recognition. It annulled the contested decision and held that Polish courts had no jurisdiction to refuse surrender if the EAW complied with formal requirements and there were no compulsory or optional grounds for refusal (laid down in Art. 607p-r CPC 1997).

[56] The Constitutional Tribunal also took into account the possibility of a safeguard clause based on the Accession Treaty being employed *vis-à-vis* Poland.

[57] Court of Appeal in Szczecin, 13 grudnia 2006, Order II Akz 404/06, not reported (on file with the author).

[58] Arguably, the Court which made a reference to the Constitutional Tribunal in the EAW case mistakenly referred to this provision (*sic!*).

[59] Yet, it failed to refer explicitly to the *Pupino* judgment.

C. The revision of Art. 55 Polish Constitution and Criminal Procedure Code 1997

Following the judgment of the Constitutional Court the President of the Republic submitted a proposal for the Revision of the Polish Constitution [60] as well as a bill amending the Criminal Procedure Code 1997 [61]. The proposed revision of the Constitution was in compliance with the EAW framework decision. The Explanatory Note attached to the bill contained a thorough analysis of the merits behind the proposal. EAW framework decision was presented as a very useful and desired tool. The provision in question was drafted in the following terms:

> "Art. 55 Polish Constitution
> 1. Extradition of Polish nationals is prohibited, subject to exceptions laid down in section 2.
> 2. Polish national may be surrendered to another State or international court if such possibility stems from an international treaty to which Poland is a party to or an act of Parliament giving effect to a legal act adopted by an international organisation which Poland is a member of.
> 3. It is prohibited to extradite a person accused of a political offence committed without the use of force.
> 4. In matters of extradition decisions are adopted by courts" [62].

As expected, the Presidential submission triggered a debate in the Parliament. Since it ended up with an adoption of a provision which is contrary to the EAW framework decision it is fitting to take a closer look at the preparatory works. Indeed, it sheds light on the way the principle of mutual recognition is perceived by the stakeholders and political elites.

A careful study of minutes of meetings of the Parliamentary Committee as well as the plenary sessions of the Polish Parliament proves that the principle of mutual recognition is almost non-existent in the public discourse [63]. The entire debate focused on two issues. First, the wording of Art. 55(1) Polish Constitution 1997 and the need to make a clear distinction between the words "extradition" and "surrender". Second, the possibility of introducing the double criminality to the legal act in question. To surprise of many, the first meeting of the Parliamentary Committee started with a submission of a different bill by the head of the Committee [64]. Seemingly, the rationale behind this proposal was based on the premise that some of the Member States of the European Union already adopted similar provisions or were about to. This proposal was subject to a heated debate, yet only several MPs noticed the lack of conformity

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[60] Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej, Druk no. 580, text on file with the author.

[61] Projekt ustawy o zmianie ustawy − Kodeks postępowania karnego, Druk no. 581 text on file with the author.

[62] Translation by the author.

[63] Minutes are on file with the author.

[64] Representing Law and Justice Party, outside of politics a lecturer of International Criminal Law (*sic!*).

with the EAW framework decision [65]. The author of the bill argued that the proposed arrangement remained in compliance with the EU *acquis* as all offences listed in Art. 2(2) EAW framework decision were penalised in the existing Member States. It is fitting to acknowledge that during the parliamentary debate several speakers praised the usefulness of the EAW machinery [66].

Eventually, both houses of the Parliament followed the controversial proposal submitted to the Parliamentary Committee. The new wording of Art. 55 Polish Constitution [67] reads as follows:

> "Article 55
> 1. The extradition of a Polish citizen shall be prohibited, except in cases specified in para. 2 and 3.
> 2. Extradition of a Polish citizen may be granted upon a request made by a foreign State or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition:
>   1) was committed outside the territory of the Republic of Poland, and
>   2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.
> 3. Compliance with the conditions specified in para. 2 subpara. 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.
> 4. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.
> 5. The courts shall adjudicate on the admissibility of extradition".

As noted, the wording of this provision, especially section 2 is a source of concern and has been criticised in course of the evaluation exercise. It is striking that the requirement for double criminality has been written down into the national constitution. Arguably, there were purely political grounds behind the decision and in the current political environment in Poland to revise this provision in the foreseeable future will be very difficult The new provision entered into force on 7 November

[65] Governmental and parliamentary experts who participated in the meetings of the Parliamentary Committee made it bluntly clear that the proposal was contrary to the EAW Framework Decision.

[66] Text of speeches on file with the author.

[67] Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej, Dziennik Ustaw 2006 no. 200, Item 1471.

2006. It was followed by the re-inserted provision of Art. 607t para. 1 CPC, which entered into force on 26 December 2006 [68].

3. Testing the potential and limits of mutual recognition − the European Arrest Warrant in practice

A. General perception of the European Arrest Warrant

The general perception among the practitioners is very positive [69]. Undoubtedly the EAW framework decision is a welcome development, facilitating the application of criminal policy and the enforcement of law. Practitioners frequently praise the instrument and its functioning. As noted in the Evaluation Report of 2008 "the expert team can only share the enthusiasm of the Polish authorities regarding the efficiency of the EAW and the solution it can bring to criminal proceedings which, in the extradition regime, would have ended too often unsatisfactorily" [70]. This exercise has clearly proved that the practitioners are very well aware of the meaning and potential of the principle of mutual recognition. Arguably, the judiciary considers the EAW machinery as a very important tool at its disposal. At the same time it has a tendency of employing the principle of mutual recognition in a very automatic, not always rational way. Yet, in the political circles the EU developments are being looked at with a degree of concern and suspicion. Seemingly the traditional understanding of the notion of sovereignty is still *en vogue* [71]. This was clearly visible in the debate on the revision of the Polish Constitution aimed at the abolition of the ban on extradition of own nationals. It may constitute a serious obstacle if further measures are proposed at the EU level and if not to block the decision making process then at least slow down the transposition and implementation effort.

B. Do we like it too much? The (over)use of the EAW by Polish Authorities

The positive approach of practitioners is reflected in, sometimes excessive, use of the European Arrest Warrant. As clear from the statistics available, Poland is the most active issuing country out of all twenty-seven Member States of the European Union. The following table represents the tendencies over the past three years.

Table 1. Number of EAW issued by Polish authorities

2005	1,448
2006	2,421
2007	3,473

[68] Ustawa z dnia 27 października 2006 r. o zmianie ustawy - Kodeks postępowania karnego, Dziennik Ustaw 2006, no. 226, Item 1647.

[69] This part of the chapter is based on the empirical research and interviews conducted by the author.

[70] Evaluation report, *loc. cit*., note 24 at p. 38.

[71] For a more general evaluation of the practice of the Polish Parliament in EU matters see, *inter alia*, A. Łazowski, "The Polish parliament and EU affairs. An effective actor or an accidental hero?", in J. O'Brennan, T. Raunio (eds.), *National Parliaments within the Enlarged European Union*, London and New York, Routledge, 2007, p. 203.

It is clear that the increase in the number of issued EAW is considerable. Such number of EAW issued, even bearing in mind mass emigration of Polish nationals to other Member States of the European Union (arguably sometimes with a sole aim of avoiding the prosecution at home), is a cause for praise as much as it is a ground for concern. On the one hand, it proves that the prosecutors and judges are fully aware of the mechanics and functioning of the EAW procedure. As proved by the Evaluation exercise they are fully aware of the principle of mutual recognition and consider it as the cornerstone of police and judicial co-operation in criminal matters. At the same time such frequent use of the EAW triggers questions of proportionality.

Before this issue is looked at it is fitting to provide data encapsulating the tendencies in question. As per Detective Sergeant Gary Flood of Scotland Yard's extradition unit dozens of surrender requests from Poland (amounting to 40% of all requests submitted to the UK authorities per annum) "are being used (…) for large volume of trivial extradition requests" [72]. This includes extreme cases of a carpenter who removed cabinet doors as a sanction for non payment for service rendered or a theft of a desert. Having said that, one has to acknowledge that Polish authorities are fully aware of the proportionality issue. At the same time, as the evaluation exercise has revealed, under the current legal framework the considerations of proportionality are problematic to be taken into account [73]. It is also acknowledged that they could potentially trigger the question of equality before the law. This would have taken place if certain offences were prosecuted in purely domestic environment but not so if a fugitive resided in another Member State of the European Union.

The data presented above proves a clear tendency to overuse the European Arrest Warrant machinery. It leads to a natural question as the source of the problem. Naturally, they are diverse and closely linked to the specificity of the Polish legal order. One argument is that Polish courts tend to use the European Arrest Warrant to achieve aims that are different to the rationale behind this instrument. Also, numerous EAW requests deal with pre-accession offences, thus they constitute old extradition requests which have been changed into EAW [74]. Notorious strict legalism, underpinning the Polish legal order, is also an issue. The case-law of the Constitutional Tribunal proves it is not specific to the area of law in question but quite to the contrary it is visible across the board [75]. Arguably there is no easy way to remedy the existing situation. Two options may be potentially considered. First, the introduction of the principle of proportionality. However tempting such an option may be, it may also backlash with rather unwanted phenomena. The degree of finesse required to apply the proportionality may in practice prove to be too difficult for the judiciary and, in the end, may undermine the effectiveness of the system. Also, the introduction of proportionality may have daunting consequences as some minor offences will remain

[72] A. Hirsch, "*Door thief, piglet rustler, pudding snatcher: British courts despair at extradition requests*", *The Guardian*, Monday October 20th, 2008, p. 3.

[73] Evaluation report, *loc. cit*., note 20 at p. 37-38.

[74] The author is grateful to Prosecutor Igor Dzialuk for his insightful comments in this respect.

[75] The author is grateful to Judge Wojciech Hermeliński for drawing attention to this issue.

non prosecuted, putting the Member States, in which offenders reside, in a difficult position. The second option – clearly more controversial – is reduction of the scope of EAW to exhaustively listed types of crimes and offences only.

It is also fitting to take a closer look at the cases when requests for surrender were not entertained. This is of particular importance upon the revision of the Polish Constitution 1997, which led to the introduction of measures which, as explained earlier, are clearly contrary to the EAW framework decision. First, it has to be noted that the application of double criminality rules to Polish nationals did not hamper the functioning of the EAW machinery, as all 32 offences listed in the Art. 2(2) EAW framework decision have their equivalents in the Polish legislation. This has been emphasised by the practitioners interviewed in course of the mutual evaluation exercise. The numbers of refusals are considerably low. The table below shows the tendencies in this respect.

Table 2 Number of requests for surrender

	2005	2006	2007
Requests received	218	228	214
Surrender refused	16	35	32

As the statistical data proves majority of requests for surrender received by the Polish authorities are entertained. The grounds for refusal vary; they include lack of double criminality, parallel prosecutions in Poland and another Member State of the European Union, the principle of territoriality, the principle of *non bis in idem*, EAW concerned a judgment which was not binding and final and the penalty was conditionally suspended [76].

C. Overview of case-law of the Supreme Court and ordinary courts

The volume of case-law is ever growing. Both, in the judgments of the Supreme Court and ordinary courts the principle of mutual recognition is clearly visible. This overview highlights the most interesting judicial developments.

On July 20th, 2006 the Supreme Court rendered a judgment in highly publicised case I KZP 21/06 [77]. The case dealt with a 17 year old man of Polish nationality, who was accused of committing a murder at the Brussels Central Train Station. Since the perpetrator managed to escape to Poland the Belgian authorities requested surrender pursuant to the EAW provisions. This surrender request triggered a number of important questions regarding the scope of the EAW provisions. Due to the age of the perpetrator and the wording of the EAW it was not clear whether the request was covered by the EAW machinery. As explained in later in this chapter, the Supreme Court expressed regret that it had no jurisdiction to make a reference for preliminary ruling to the European Court of Justice. The Supreme Court came to the following conclusions:

[76] Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2007, Council Document no. 10330/2/08, p. 18.

[77] Polish Supreme Court, 20 July 2006, Judgment I KZP 21/06 *Criminal Proceedings against Adam G.*, Orzecznictwo Sądów Polskich no. 6/2007.

- the judicial authority of the executing State may refuse surrender, if it finds that the request was adopted in breach of conditions of issue,
- the decision whether surrender is requested for the purposes of criminal procedure is verified against these law of the issuing country,
- surrender is possible, irrespective of the fact whether the criminal procedure against the person in question has already been initiated in the issuing Member State, yet surrender is only possible if the grounds for EAW prove that initiation of criminal procedure is possible,
- since the surrender will facilitate criminal procedure in the issuing State, a Polish national should be returned if such procedure is not initiated therein.

This judgment was followed by equally publicised case of Jakub T. [78]. The factual background merits attention and may be summarized as follows. Jakub T. legally resided in the United Kingdom where allegedly he raped a 48 year old woman. As he returned to Poland the UK authorities issued a European Arrest Warrant, requesting surrender for the purposes of prosecution and sentencing. Pursuant to Art. 607t, para. 1 CPC 1997 the executing court requested return of the perpetrator in order to serve the sentence. The English court sentenced Jakub T. to life imprisonment, with a possibility of an earlier conditional release after 9 years. A Polish court confirmed the decision of the English judiciary and held to be bound by the decision of the English court. This decision was challenged by the defendant as the maximum penalty for rape under the Polish law is 12 years. The Court of Appeal decided to submit a reference to the Supreme Court as to the interpretation of the Polish legislation. The Supreme Court, in its judgment of 3 March 2009, confirmed that Polish courts are bound by decisions of courts in other Member States, both in terms of the sanction and potential early release. The basis for the decision is the principle of mutual recognition considered by the Supreme Court as the cornerstone of the police and judicial cooperation in criminal matters. It extensively referred to EU legislation and practice, including the *Pupino* judgment and the very recent Framework Decision 2008/909/JHA. It merits attention that apart from the standard appeal the defendant submitted a constitutional complaint to the Constitutional Tribunal. In the request he asked for the verification of conformity:

- Art. 607k-m, 607p CPC with Art. 45 (1) Polish Constitution [79], Art. 6 ECHR and Art. 14(1) ICCPR as much as the provisions of the Polish law allow for surrender of nationals to another Member States of the European Union when a request is not fully substantiated,
- Art. 607k-m, 607p CPC with Art. 55(4) Polish Constitution to the extent such transfer is contrary to fundamental rights.

The Constitutional Tribunal is expected to deal with this complaint in not too distant future. Interestingly enough, the Polish Ombudsman has decided not to submit written and oral observations in the given case. Arguably, the complaint has no merits

[78] *Loc. cit*., note 9.

[79] It reads: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court".

if one take into account the principle of mutual recognition based on mutual trust between the Member States.

Having looked at the two landmark judgments of the Polish Supreme Court it is fitting to take a few samples from case law of lower courts. The access to judgments of such courts is fairly limited, nevertheless this selection provided may be considered as representative. In case II AK 577/04 the Court of Appeal in Warsaw was seized with a request for review of decision of a Regional Court rejecting the submission for the adoption of European Arrest Warrant [80]. According to the files of the case, the prosecutor submitted that the person covered by the prosecution was in a given time in Slovakia. The Regional Court rejected the request and concluded that the prosecutor did not manage to prove the person in question was in Slovakia. The Court of Appeal held that the appeal had merits and returned the case for repeated adjudication to the Regional Court. In order to issue a European Arrest Warrant it was not necessary for the public prosecutor to prove high probability that a person in question resides in a particular Member State of the European Union. A decision of the Court of Appeal in Katowice in case II AKz 685/06 may serve as an example to prove the argument that Polish prosecutors and judges are fully aware of the principle of mutual recognition and legal consequences arising [81]. This Court held that the issuing of EAW translates into the lack of need to verify the evidence which served as the basis for detention. Yet, decisions on surrender should not be automatic and should take into account circumstances surrounding the case. In the order II Akz 518/06 of August 23rd 2006 adopted by the Court of Appeal in Katowice it was held that any decisions on surrender must be governed by the principle of mutual recognition [82]. As a matter of principle, requests for surrender and detention should be entertained. This decision was delivered against the following factual and legal background. On July 19th, 2006 the Regional Public Prosecutor in Katowice submitted to the Regional Court in Katowice a request for the execution of the European Arrest Warrant issued by the Public Prosecutor in Görlitz (German), supplemented by the request for the arrest of the person in question. Both requests were rejected by the Court. The Public Prosecutor submitted an appeal to the Court of Appeal in Katowice. The Court of Appeal annulled the contested judgment and returned the case for the repeated adjudication. It held that the original decision in part dealing with the request for surrender was under argumented and not really elaborated on. Moreover, several important documents regarding the case, were submitted by the German authorities already after the contested decision had been delivered. The Court of Appeal put a lot of emphasis on the principle of mutual trust, being the cornerstone of the police and judicial cooperation in criminal matters. This led to the conclusion that, as a matter of principle, a decision requesting the arrest and surrender should not be verified, unless there were important factors justifying the verification. This was not the case with the request in question.

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[80] Court of Appeal in Warsaw, 19 November 2004, Order II Akz 577/04, not reported (on file with the author).

[81] Court of Appeal in Katowice, 25 October 2006, Order II Akz 685/06, not reported (on file with the author).

[82] Court of Appeal in Katowice, 23 August 2006, Order II Akz 518/06, not reported (on file with the author).

D. Conclusions

There is a number of conclusions coming from the presented analysis. The European Arrest Warrant is clearly a well known and popular instrument. In terms of the legal framework one has to acknowledge that the Polish transposition measures are largely in compliance with the EAW Framework Decision [83]. The recent revision of the Polish Constitution clearly is an issue as the new wording of Art. 55 is even more contrary to the EU legislation than the original version had been. The parliamentary works that led to the unfortunate revision encapsulate the limited understanding and knowledge of EU matters among the political elites. The same cannot be said about the policy makers working for the governmental departments. Unlike the members of political circles, policy makers are fully aware of the principle of mutual recognition, both in terms of its potential but also its legal and practical limits.

A real test for any piece of legislation, be it domestic or EU, is not really what happens at the very inception phase or during the decision making process, but how it functions in practice. The constitutional drama started with the EAW judgment of the Constitutional Tribunal continues. The recent decision of the Supreme Court in case I KZP 30/08 (*Jakub T*. case) shows the challenges faced by the judiciary when the EAW is in operation. The decision itself demonstrates the strength of the principle of mutual recognition and its position as the cornerstone of the 3rd Pillar. The question that is naturally coming up is the forthcoming judgment of the Constitutional Tribunal in the related case. Will the domestic legislation giving effect to the European Arrest Warrant survive the test as to its compliance with the right to fair trial guaranteed by the Polish Constitution? Leaving the fundamental issues aside it is legitimate to conclude that in everyday practice the European Arrest Warrant serves its purpose reasonably well. Various gaps are coming to the surface yet they are not as much connected with the content of existing measures but rather with more general legal problems of the police and judicial cooperation in criminal matters. The implementation and use of the European Arrest Warrant in Poland raises voices for praise and concern at the same time. On the one hand, practitioners are clearly familiar with the concept of mutual recognition and employ the EAW in their everyday practice. On the other hand, the excessive use of the EAW to trivial cases leads to an overload in the executing States (particularly the United Kingdom) [84]. The degree of automatism in the issuing and executing European Arrest Warrants should be subject to criticism. Questions emerge as to future reform of the EAW mechanics.

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[83] A revision is in the pipeline. See Projekt z dnia 18 sierpnia 2008 r. Ustawa z dnia…o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego, ustawy – Kodeks karny wykonawczy, ustawy – Kodeks karny skarbowy oraz niektórych innych ustaw. Text on file with the author.

[84] In fact, the intensity of relations with the United Kingdom has led to a number of bilateral difficulties, which have been addressed in the past years. The difficulties in question materialised in the form of multiplication of UK requests for supplementary information as well as requests for the re-issuing of EAW. However, steps have been taken (on bilateral basis) to resolve those problems. Similar meetings are expected to take place with counterparts in the Netherlands, France and Ireland.

4. Beyond the European Arrest Warrant: *quo vadis*?

A. Introduction

Was Cervantes correct in saying that by a sample we may judge an entire piece? Or, to put it in the context of this chapter, does the practice and perception of the European Arrest Warrant allow us to draw more general conclusions as to the potential and limits of the mutual recognition? Clearly, the story of the European Arrest Warrant tells a lot, however the analysis would be incomplete without at least a brief look at other legal acts embodying the principle of mutual recognition. This is why this part of the chapter goes beyond the European Arrest Warrant and will focus on general approach of the Polish authorities to mutual recognition and mutual trust. Arguably we are dealing with a patchwork of contradictions. On the one hand, clearly the general perception of the mutual recognition is positive. On the other hand, the delays with the transposition of some framework decisions, combined with the limited utilization of the new mutual recognition instruments, makes one wonder as to the best way forward.

B. The transposition of other Framework Decisions dealing with the mutual recognition

As the law stood on 31 March 2009, Poland has transposed three other pieces of EU legislation dealing with the principle of mutual recognition. First, the Framework Decision 2003/577/JHA on freezing of property and evidence was transposed in 2005 [85]. In this case Poland in fact complied with the transposition deadline, which pursuant to Art. 14 of the FD, was 2 August 2005. The other two instruments, that is the Framework Decision 2005/214/JHA on mutual recognition of financial penalties and the Framework Decision 2006/783/JHA on confiscation orders were transposed with a delay (minor in the latter case) [86]. The relevant domestic provisions entered into force on 18 December 2008 and 5 February 2009 (respectively). The transposition of the remaining framework decisions is not yet in the pipeline.

Bearing in mind the very recent date of entry into force of the domestic provisions transposing the Framework Decisions 2005/214/JHA and 2006/783/JHA it is not surprising that there is no practical experience yet. However, it comes to a surprise that the measures on freezing of property and evidence remain a shop window display only. A mere analysis of new provisions will not give us much information in terms of the principle of mutual recognition. They are largely in compliance with the relevant EU *acquis* and just awaiting the real test of the application in everyday practice. The evaluation of parliamentary works will not be helpful either. No general debate as to the rationale behind and scope of the mutual recognition had preceded the

[85] Ustawa z dnia 7 lipca 2005 r. o zmianie ustawy - Kodeks postępowania karnego oraz ustawy – Kodeks postępowania w sprawach o wykroczenia, Dziennik Ustaw 2005 no. 143, Item 1203.

[86] See, respectively, Ustawa z dnia 24 października 2008 r. o zmianie ustawy - Kodeks karny oraz niektórych innych ustaw, Dziennik Ustaw 2008, no. 214, Item 1344 and Ustawa z dnia 19 grudnia 2008 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw, Dziennik Ustaw 2009 no. 8, Item 39.

adoption of national measures. Some lose comments appeared in the debate yet they were of limited importance. However, interviews conducted with practitioners shed an interesting light on the perception of the cornerstone of the third pillar. They are analysed in the section that follows.

C. The general perception of the principle of mutual recognition in criminal matters

Judging from the excessive use of the European Arrest Warrant machinery one may come to a genuine conclusion that the concept of mutual recognition is very well perceived. However, to stop here would amount to a mere understatement. Seemingly, there is no single approach to the European Arrest Warrant alone, even more so to the principle of mutual recognition. Opinions vary depending on the scientific and professional background. Political circles, at least partly, are dominated by a very traditional, if not old fashioned, perception of state sovereignty. Some debates held at the Polish Parliament substantiate this argument. At the same time the practitioners circles consider the principle of mutual recognition as a useful concept, yet with some limitations [87]. Indeed, the general perception is that the principle of mutual recognition is not absolute and does have limits. This is consequential to the breadth, and at the same time, vagueness of mutual trust. The latter is supposed to be an answer to lack of EU measures on such issues as territoriality (as an example). The mutual trust is based on a presumption that in general terms the Member States of the European Union respect the same basic standards and rights (i.e. the presumption of innocence). Arguably, this approach is illusive. The following arguments can be put forward. There are natural limits to mutual trust, based on non-legal factors. Such concept like mutual trust cannot be imposed by political circles. Mutual trust requires decades of co-operation thus the entire concept of mutual recognition in criminal matters is suffering from a birth defect. As argued in the introduction to this chapter, it is fitting to compare this area of co-operation with the internal market, whereby it took the European Court of Justice many years to establish the principle of mutual recognition in relation to free movement of goods. Another argument is related to the recent and future enlargements of the European Union. The current candidates for the membership [88], as well as potential candidates from the Western Balkans [89], are facing

[87] For example, A. Grzelak (text on file with the author) argues that the principle of mutual recognition is the cornerstone of co-operation in criminal matters, or to put it differently, a vehicle for integration in this area. It is an opportunity to make the Area of Freedom, Security and Justice effective and functioning. The principle of mutual recognition is based on mutual trust, however there is a doubt as to the meaning and potential of the latter. The shadow of the doubt is based on a conundrum – is the mutual trust a concept that cannot be questioned, or is it a general rule that can be subject to exceptions. The principle amounts to far more than recognition of different legal orders, as it amounts to recognition of decisions resulting from the application of law. She also detested the opinion that the principle of mutual recognition equals the loss of national control over the core of its sovereignty – criminal law.

[88] Turkey, Croatia and Former Yugoslav Republic of Macedonia (FYROM).

[89] Albania, Montenegro, Serbia, Kosovo (under UN Security Council Resolution 1244), Bosnia and Herzegovina.

major challenges of the rule of law, independence of the judiciary and compliance with human rights standards. Also, the existing extradition experiences with Turkey prove that the establishment of trust in the Turkish legal order and judiciary is likely to be troublesome. This triggers an interesting question as to the role of human rights argumentation in enforcement of the mutual recognition instruments. It is often argued that potential breach of Art. 3 ECHR should serve as the ground for refusal to surrender [90]. This also triggers a question as to the constitutional limits, as proven by the judgments of German, Polish, Czech Constitutional Courts and the Supreme Court of Cyprus. In this context the linguistic nuisances remain of vital importance as legal concepts have to be interpreted in the light of the constitutional requirements [91].

Another issue of fundamental importance is the relationship between mutual recognition and harmonisation of laws. It leaves no doubts that differences between different domestic laws of the Member States may be an obstacle to mutual recognition. Those differences have their roots in divergent legal traditions and discrepancies between the criminal policies employed. In theory, harmonisation should have preceded or at least supplemented the principle of mutual recognition. This however, has been neither possible nor politically acceptable. At this stage it is very difficult to achieve political consensus. This factor seems to preclude further harmonisation of laws, especially with the Treaty of Lisbon emerging on the horizon [92]. Arguably, some of the differences in domestic criminal laws are so considerable as to preclude harmonisation efforts. By the same token, the use of very broad terms may also have a negative effect on the harmonious development of the Area of Freedom, Security and Justice [93]. The judgment of the ECJ in case C-303/05 *Advocaten voor de Wereld* is much appreciated, as the Court confirmed that the technique employed in Art. 2(2) EAW framework decision does not breach the principle of legality of criminal offences and penalties [94]. However, a degree of harmonisation seems to be inevitable. With complete harmonisation rather out of question even in the long run one has to

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[90] A. Łazowski, S. Nash, "Detention", in N. Keijzer, E. van Sliedregt (eds.), *The European Arrest Warrant in Practice*, The Hague, T.M.C. Asser Press, 2009, p. 33.

[91] The author is grateful to Dr Barbara Nita for her insightful comments in this respect.

[92] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *OJ*, no. C 306, 17 December 2007, p. 1. For an academic appraisal (in the context of JHA matters) see, *inter alia*, C. Ladenburger, "Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method", *EuConst.,* 2008, p. 20; S. Peers, "EU Criminal Law and the Treaty of Lisbon", *ELRev.*, 2008, p. 507.

[93] One may have doubts if prosecution deals with on-line phone bugging and traditional bugging of a landline. The first will qualify as "computer-related crime", which is excluded from the double criminality requirement. Also, as explained in part 3 of this report, the definition of xenophobia raised concerns when the transposing legislation for EAW framework decision was being drafted. The author is grateful to Dr Agnieszka Grzelak for drawing attention to these issues.

[94] ECJ, 3 May 2007, Judgment C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, *ECR*, p. I-3633. See further E. Herlin-Karnell, "In the wake of Pupino: Advocaten voor der Wereld and Dell'Orto", *GLJ,* 2007, p. 1147; P. O'Reilly, "The Exit of the Elephant from the European Arrest Warrant Parlour", *JECL*, 2007, p. 472. See also case notes by Ch. Janssens, *CJEL*, 2007-2008, p. 169; F. Geyer, *EuConst.,* 2008, p. 149.

make a very careful selection of *dossiers*. Arguably, up till now the choice of issues for EU law coverage has been rather accidental, thus a very clear cut and realistic action plan could be useful. This should be preceded by wide consultations involving practitioners. At this stage of integration the initiative should come from the bottom of the ladder, not the top of political hierarchy. The choice of *dossiers* has also be made on grounds of what is possible and acceptable. The notorious delays with the transposition of framework decisions are not accidental. It shows that even when unanimity in the Council is possible, the transposition of legal acts faces daunting internal obstacles.

With the recent adoption of numerous framework decisions a question arises as to the potential codification at EU level. At this stage the focus should be on the completeness of domestic transposition measures, however *pro futuro* such idea calls for praise. Such potential consolidation of the existing EU instruments could possibly lead to unification of similar provisions that currently exist in the different framework decisions [95]. The result of such exercise could be a common system of general rules underpinning the mutual recognition. At the same time a degree of caution would be necessary as re-opening of negotiations in the current political climate could have led to results damaging the existing system. Arguably, such codification exercise when all major legal acts are in force and a transformation to directives is required, providing the Treaty of Lisbon enters into force [96]. Also, such exercise could be combined with the revision of existing instruments to take into account the domestic experiences gained in the process of law application. One has to agree with the argument that a degree of caution should be exercised when opening the negotiations on some of the existing instruments.

The other priority in the Polish case is consolidation of the existing transposition measures. All framework decisions were or are in the process of being implanted into the existing piece of legislation that is Criminal Procedure Code 1997. Such *modus operandi* affects the clarity of the existing legislation (not to mention strange numbering involving numbers of provisions accompanied by letters of alphabet). Thus, it has been suggested by the Legislative Council to either proceed with a grand revision of this part of the CPC or extract provisions on international co-operation to a separate act of Parliament [97].Again, a degree of caution is necessary. Although praiseworthy in theory, such arrangement may have disastrous consequences in everyday practice. Arguably the Polish legal culture is based on dominance of codes, thus a piece of separate legislation dealing with the mutual recognition may be at risk of being simply overlooked [98].

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[95] The author is grateful to Prosecutor Igor Dzialuk for his insightful comments in this respect.

[96] The Treaty for Lisbon provides for the unification of legal instruments, thus the existing tailor made catalogue of sources for the existing third pillar will cease to exist. See Art. 9-10 of Protocol No. 36 annexed to TEU and TFUE.

[97] See also P. Hofmański, A. Sakowicz, "Reguły kolizyjne w obszarze międzynarodowej współpracy w sprawach karnych", *Państwo i Prawo*, 2006, p. 29.

[98] The author is grateful to Dr Piotr Kładoczny for his interesting comments on this issue.

5. Conclusions

The purpose of this chapter was to present a Polish perspective on the principle of mutual recognition and the concept of mutual trust. The emerging picture is mixed. The European Arrest Warrant is arguably up and running, functioning rather smoothly. Despite the constitutional drama and with a few high profile Supreme Court cases the EAW machinery is serving its purpose. Yet, those major challenges encapsulate numerous legal phenomena which will clearly come back in the future case law. They also show the potential limits of mutual recognition. The overuse of the EAW is another issue that will have to be addressed in not too distant future. Following the judgment of the Constitutional Tribunal in case Kp 3/08 Poland is likely to accept the jurisdiction of the European Court of Justice pursuant to Art. 35 EU[99]. Thus one may expect that at some point Polish courts will submit references for preliminary rulings on police and judicial cooperation in criminal matters[100]. The question remains as to the extent the Polish authorities are ready to employ the remaining mutual recognition tools. The lack of practice in relation to the freezing of property and evidence legislation is quite discouraging. It triggers serious questions as to the contents of the measures, or even, the need for such a legal instrument. This also touches the heart of the matter – the role of mutual recognition in this sensitive area of integration. Arguably, "from EU with trust" was not the best option to be followed. Mutual trust is limited when imposed by political circles, it is far more effective when coming naturally from practitioners. Also, mutual recognition is not unlimited. This is not only in the case of police and judicial cooperation in criminal matters but it is a wider phenomenon known and acknowledged in all other areas of legal integration within the European Union/European Communities. Finally, the principle of mutual recognition is not a self sustained concept, it has to go together with a degree of harmonization. This, as proved in this contribution, may be inevitable in the coming years.

[99] Polish Constitutional Tribunal, 18 February 2009, Judgment Kp 3/08 re Recognition of Jurisdiction of the European Court of Justice under Art. 35 EU, not yet reported (on file with the author).

[100] As already noted, the lack of jurisdiction to refer has been already acknowledged by the Supreme Court in case I KZP 21/06.

The Portuguese experience of mutual recognition in criminal matters: five years of European Arrest Warrant

Pedro Caeiro and Sónia Fidalgo

1. Introduction

The purpose of this study is to assess the Portuguese experience of mutual recognition in criminal matters, which consists of the *implementation* and *application* of the rules on the European Arrest Warrant (EAW). The authors do not intend to provide an exhaustive analysis of the EAW in the Portuguese legal system, but rather to select a few critical issues that, in their view, might be of general interest for the comprehension of the EAW as a mechanism of cooperation springing from mutual recognition [1].

The first part of this article deals with the *legislative level*, describing the implementation of the Framework Decision on the European Arrest Warrant (FD

[1] The Portuguese report (S. Fidalgo, "Analysis of the future of mutual recognition in criminal matters in the European Union – Portuguese Report", 2008) for the project that gave origin to this book included an assessment of the observations made by a pool of policymakers and practitioners who kindly answered a "questionnaire" drafted by the coordinators. Some of their thoughts and remarks have been embodied in both parts of this study.

Following explicit instructions from the editors, interviewees are not quoted individually throughout the text; the reader will rather find the mention "some interviewees".

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EAW)[2] and evaluating the compliance of the current national regime with European law from a theoretical point of view.

The second part deals with the *judicial level*, reviewing some decisions of the Portuguese courts concerning the EAW.

2. The legislative level

A. National legal framework: the Portuguese Constitution and Law no. 65/2003 of 23 August 2003

1. Portuguese legislation does not define mutual recognition and its possible limits. The only reference to mutual recognition in criminal matters[3] is found in Art. 1º, no. 2, of Law 65/2003 of 23 August 2003 (hereafter, PTL EAW)[4], which transposed the FD EAW: "the European arrest warrant shall be executed on the basis of the principle of mutual recognition".

In fact, the FD on the execution of orders freezing property or evidence[5], the FD on financial penalties[6] and the FD on confiscation orders[7] have not been transposed into Portuguese law yet.

Therefore, the Portuguese experience concerning the principle of mutual recognition in criminal matters is based only on the EAW.

2. The full transposition of the FD and the introduction of the concept of mutual recognition in criminal matters into Portuguese law has required an amendment of the Constitution of the Portuguese Republic (hereafter, CRP), in order to exempt the cooperation under the EAW from the tight constitutional limits set to the extradition /surrender of Portuguese citizens[8] and persons who can be subject to actual life sentences (or life-time security measures)[9].

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[2] Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ*, no. L 190, 18 July 2002, p. 1.

[3] The concept of mutual recognition is mentioned in other fields as, for instance, in *Lei* 23/2007, 4 July 2007 (*Diário da República*, Série I, 4 July 2007), which transposes Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, *OJ*, no. L 149, 2 June 2001, p. 34.

[4] *Lei* no. 65/2003, 23 August 2003, *Diário da República*, I Série-A, 23 August 2003.

[5] Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *OJ*, no. L 196, 2 August 2003, p. 45. The Portuguese Government has already submitted to the Parliament a draft law transposing this FD, which should be discussed and voted soon (*Proposta de Lei* no. 237/X, in *Diário da Assembleia da República*, II Série A, no. 37/X/4, 4 December 2008, p. 66 and f.).

[6] Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16. The Portuguese Government has already drafted a preparatory draft law (*anteprojecto de lei*) for the transposition of this FD, and is now consulting several entities in the justice area for their opinion on the document.

[7] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[8] Art. 33º, no. 3, CRP.

[9] Art. 33º, no. 4, CRP.

Thus Art. 33º, no. 5, CRP[10] provides that the strict requirements that condition the extradition/surrender in the two mentioned situations, set in the previous numbers of the same article, do not apply to judicial cooperation in criminal matters established in the ambit of the EU[11].

Notably, this "EU exemption clause" affects neither the prohibition of extradition/surrender for political motives or in cases where the crime is punishable with the death penalty (or a penalty that causes irreversible bodily harm) by the law of the requesting State[12], nor the exclusive competence of the judicial authorities for ordering the extradition/surrender of the requested person[13], nor the right to asylum[14].

3. The transposition of the FD EAW followed the procedure that is usually adopted for the implementation of EU law in areas where Parliament enjoys exclusive legislative competence: draft law (*Proposta de Lei*) submitted by the Government[15], subsequent passing of the law by Parliament and its ratification by the President of the Republic.

As noted by an interviewee, judicial authorities are often invited to give their advisory opinion on draft national laws transposing EU legislation, in various ways and moments: through direct involvement (mostly of prosecutors) in the negotiations of the EU act; through direct consultation of judges and prosecutors by the policymakers during the drafting of the implementing law; through requests for written contributions addressed by the Governmental Departments to the High Council of the Bench (*Conselho Superior da Magistratura*) and to the Prosecutor-General's Office, that can lead to modifications of the initial draft; and also through auditions promoted by Parliament when discussing the draft laws proposed by the Government. However, as a structured and systematic contribution at the stage of negotiations and of drafting implementing legislation does not exist, that "written institutional collaboration" has little visibility, and many practitioners do not know whether judges, prosecutors and lawyers are consulted at all. Some interviewees suggested that a deeper involvement of practitioners could help avoiding certain practical problems and find better solutions.

B. Compliance of Portuguese law with the FD EAW

In general, it can be said that Portuguese law complies with the FD EAW. Nevertheless, there are a few aspects where national law seems to deviate from the FD (*infra*, 1, 2, 3 4, and 5) or raises some interpretative issues (*infra*, 6).

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[10] Introduced by *Lei Constitucional* no. 1/2001, of 12 December 2001, *Diário da República*, Série I-A, 12 December 2001.

[11] Art. 33º, no. 5, CRP: "*O disposto nos números anteriores não prejudica a aplicação das normas de cooperação judiciária penal estabelecidas no âmbito da União Europeia*".

[12] Art. 33º, no. 6, CRP; see *infra*, B, 1.

[13] Art. 33º, no. 7, CRP.

[14] Art. 33º, no. 8, CRP.

[15] *Proposta de Lei* no. 42/IX, in *Diário da Assembleia da República*, II Série A, no. 71/IX/1, 20 February 2003, p. 3086 and f. Actually, in this particular case, the draft law submitted by the Government was merged with a draft law that had been previously submitted by some Members of Parliament (*Projecto de Lei* no. 207/IX, in *Diário da Assembleia da República*, II Série A, no. 61/IX/1, 25 January 2003, p. 2460 and f.).

1. In the first place, Art. 11º PTL EAW lays down two grounds for mandatory non-execution that are not *explicitly* enshrined in Art. 3 FD: the execution of the EAW shall be refused when the law of the issuing State punishes the underlying offence with the death penalty, or a penalty that causes irreversible bodily harm [16] [*infra*, a], and when the issuance of the EAW is determined by "political motives" [17] [*infra*, b]. Both obstacles to cooperation enjoy constitutional rank [18] and are unaffected by the "EU exemption clause" [19].

a. The applicability of the death penalty, or a penalty that causes irreversible bodily harm, by a Member State (MS) seems to be highly improbable and would infringe upon EU law itself. The death penalty has been abolished in all MS and is forbidden by Art. 2(2) of the Charter of Fundamental Rights of the European Union (CFREU), and corporal punishment, as a whole, has been considered as a "degrading punishment" by the European Court of Human Rights (Eur. Court HR) [20], and thus forbidden by Art. 3 of the European Convention on Human Rights (ECHR) and Art. 4 CFREU. Finally, the FD itself undertakes to respect fundamental rights as reflected in the CFREU [21]. Therefore, a request for cooperation based on facts that are punishable with those (forbidden) penalties in the issuing State would be beyond the ambit of applicability of the FD.

b. It could be argued that the same reasoning applies to the refusal of execution based on the "political motives" that might underlie an EAW: the aim of the FD is to improve cooperation in criminal matters between the MS, not to enable political persecutions. However, there is an obvious difference between the two grounds for refusal: the applicability, by the issuing MS, of the penalties that contravene EU law is in itself, for the executing MS, a *matter of fact*, not open to interpretation, and the refusal of execution may claim "universal" validity within the EU; whereas the

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[16] Art. 11º, al. d) PTL EAW.

[17] Art. 11º, al. e) PTL EAW.

[18] I. Godinho, "O mandado de detenção europeu e a "Nova Criminalidade": a definição da definição ou o pleonasmo do sentido", *Politeia, Revista do Instituto Superior de Ciências Policiais e Segurança Interna*, 2, 2005, p. 103 and f., 133, criticises Law 65/2003 for not including other similar obstacles to cooperation, such as the persecution for racial, religious or other motives. Arguably, this "omission" is due to the fact that only the persecution for political motives and the applicability of the said penalties enjoy *explicit* constitutional rank as bars to extradition/surrender, although it is true that the constitutional norm may be applied, by analogy, to other similar situations (P. Caeiro, "Proibições constitucionais de extraditar em função da pena aplicável: o estatuto constitucional das proibições de extraditar fundadas na natureza da pena correspondente ao crime segundo o direito do estado requerente, antes e depois da Lei Constitucional n°1/97", *Revista Portuguesa de Ciência Criminal*, 8, 1998, p. 7 and f., 20 and f.).

[19] See *supra*, 2, A, 2.

[20] See the Court's Judgment in the leading case Eur. Court HR, 25 April 1978, *Tyrer v. The United Kingdom*, Series A, no. 26, para. 28 and f., esp. 33 and f.; arguably, a penalty that causes "*irreversible* bodily harm" would also amount to "inhumane punishment".

[21] Preamble of the FD EAW, para. (12) and (13). See also L. Silva Pereira, "Alguns aspectos da implementação do regime relativo ao Mandado de Detenção Europeu: Lei no. 65/2003, de 23 de Agosto", *Revista do Ministério Público*, 96, 2003, p. 39 and f., 60.

assertion that a concrete EAW is based on "political motives" amounts, ultimately, to a *particular qualification* made by the courts of the executing MS, not necessarily shared by the courts of other MS (or, indeed, other courts of the *same* MS). Therefore, the alleged non compliance of Art. 11º, al. e) PTL EAW, with the FD would not lie in the exclusion of political persecutions from the ambit of the EAW (since it does not cover such acts), but in the *attribution of a competence to national courts* for which there is no provision in the FD.

Then again, one should bear in mind that the FD categorically states: "*Nothing* in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European Arrest Warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her (…) political opinions" [22]. Thus, if the FD allows MS to refuse cooperation in those cases, it necessarily allows them to vest their courts with the power to ascertain that a concrete request for cooperation is, in reality, a political persecution.

c. In sum, it is submitted that both "grounds for refusal" comply with the FD.

2. Art. 12º, no. 1, al. f) PTL EAW transposes Art. 4(5) FD (*non bis in idem* originating from a judgment in a third State). The transposition is not correct, since the last part of the European norm refers to "the law of the sentencing country", while the Portuguese norm refers to "Portuguese law" [23]. It is, most obviously, a *lapsus calami*.

3. Art. 23(5) FD provides that "Upon expiry of the time limits referred to in paragraphs 2 to 4, if the person is still being held in custody he shall be released". Art. 29º PTL EAW, while transposing all the other paragraphs of Art. 23 of the FD accurately, contains no similar (absolute) temporal limit for the surrender.
Arguably, Portuguese law does not comply with the FD in this respect.
Moreover, Portuguese courts may not apply Art. 23(5) of the FD, despite its obvious direct effect [24], since Art. 34(2)(b) EU clearly excludes the right for individuals to rely on the direct effect of the norms of a FD [25].

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[22] Preamble, para. (12) (emphasis added).

[23] "(…) *a pena tenha sido integralmente cumprida, esteja a ser executada ou já não possa ser cumprida* segundo a lei portuguesa" (emphasis added).

[24] Actually, Art. 23(5) FD creates a precise and unequivocal obligation for the MS to release the person when the time limits set therein expire.

[25] It is known that Art. 34(2)(b) EU literally excludes the "direct effect" of the norms contained in framework decisions. However, the "direct effect" is a consequence of the *contents* of the *norm itself* (*i. e.,* the capacity of creating rights by its own scope), not of its *applicability* (defined by the type of *act* at stake), and therefore cannot be excluded by the "legislator" (*in casu*, the drafters of the Treaty). Nevertheless, the legislative power can, indeed, model, limit or exclude the right for individuals to invoke norms that entail a "direct effect" but do not bear direct applicability (in detail, P. Caeiro, *Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado: o Caso Português*, Dissertação de Doutoramento em Ciências Jurídico-Criminais pela Faculdade de Direito da Universidade de Coimbra, unpublished, Coimbra, 2007, p. 452 and f.).

It seems that this is not a matter of *interpretation* of the national law, but rather a lack of regulation (*lacuna*), and, as a consequence, the stance taken by the ECJ in the *Pupino* case [26] is of no avail to the Portuguese judiciary.

4. Art. 5 FD provides that the execution of the EAW may be subject to certain conditions [27], while Art. 13º PTL EAW reads "the execution of the EAW will only take place if the issuing State provides *one* of the following *guarantees*" (emphasis added).

The wording of the Portuguese norm raises two issues:

– First, and contrary to the Portuguese provision, the issuing judicial authority is not bound by the FD to provide a *concrete* assurance in situations other than those described in Art. 5(1). In the case of para. (2), where the underlying offence is punishable by custodial life sentence (or life-time detention order), it is for the *executing* judicial authority to verify whether the law of the issuing State meets the requirements set therein. Finally, if the requested person is a national or resident of the Portuguese State (para. 3), the court may *order* that he or she is returned to Portugal to serve the sentence there [28]. This ruling should be respected by the issuing State, but there is no place for a concrete act assuring that it will do so [29].

  Arguably, Portuguese law does not comply with the FD in this respect, since it makes it incumbent upon the national judicial authorities to ask for guarantees that the issuing MS is not obliged to provide.

– Secondly, and despite the wording of most linguistic versions of the FD ("*one* of the following conditions"), replicated in Art. 13º of the PTL EAW, it is clear that the FD allows the MS to make surrender dependent on the verification of *more than one condition* whenever the situations to which they refer are present. For instance: as an executing State, the Portuguese judicial authority should ask for a guarantee for retrial (or appeal) in the cases of Art. 5(1) of the FD and, would that be the case, make sure that the law of the issuing State complies with the requirements set in para. (2) [30]. Therefore, it is submitted that the English version ("be subject to the following conditions") is the one which expresses most accurately the normative meaning of Art. 5 of the FD.

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[26] ECJ, 16 June 2005, Judgment C-105/03, *Maria Pupino*, *ECR*, p. I-5285.

[27] "(…) may be subject to the following conditions: (…)".

[28] This is a case where judicial discretion is fully justified, because it may be more convenient that the requested person serves the sentence in the issuing State (*e. g.*, if he or she is a Portuguese national residing in that country): on the issue of mandatory regulation *versus* judicial discretion, see *infra*, 6, and 3, B, 3.

[29] In the opposite sense, holding that the Portuguese executing judicial authority may ask from the issuing judicial authority concrete "guarantees" concerning the conditions set in Art. 13º, als. b) and c) PTL EAW (= Art. 5(2) and 5(3) FD), see L. Silva Pereira, *op. cit.* [fn. 21], p. 48 and f.

[30] In the same sense, agreeing that the conditions (in the Author's view, the "guarantees") may be cumulative, see also L. Silva Pereira, *op. cit.* [fn. 21], p. 48 and f.

5. In cases where the decision has been rendered *in absentia* and the defendant has not been summoned in person or otherwise informed of the date and place of the hearing that led to the decision, Art. 5(1) of the Portuguese version of the FD provides that the execution of the EAW may be subject to the condition that the requested person "may appeal or apply for a retrial of the case in the issuing Member State", whereas the versions in other languages do not refer to the possibility of *appealing*, but solely to the application for a *retrial*[31].

For its part, Art. 13º, al. a) PTL EAW copies the Portuguese version of the FD and thus refers also to the possibility of appealing against the conviction as an alternative condition for granting surrender.

In order to assess the compliance of this norm with the FD, it is necessary to set apart the cases where Portugal is the executing and the issuing State.

In the first case, and since the implementation of this requirement is optional, Portugal can ask from the issuing State a guarantee that the requested person will benefit from *either one* of the alternatives (appeal or retrial). In any of those cases, that will suffice for surrender. Thus, Portuguese law enlarges the ambit of possible cooperation: even if the law of the issuing State does not provide for a retrial, the possibility of appealing against the conviction suffices for the execution of the EAW.

In the second case, acting as an issuing State, Portugal cannot offer a guarantee for retrial, due to the rules of domestic penal procedure: the person convicted *in absentia* may appeal against the decision, but may not apply directly for a retrial of the case[32].

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[31] It is not the first time that the Portuguese version of a FD differs from the versions in other languages, leading sometimes to very unfortunate results: for instance, Art. 5(3) of the FD on combating terrorism (Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3), in its several linguistic versions, provides for the punishment of the leader of a terrorist organisation with imprisonment for a *maximum* period of not less than 15 years; however, the Portuguese version of the FD omitted the word "maximum" and, as a result, the drafters of the transposing law set the applicable penalty in imprisonment for a *minimum* of 15 (!) and a maximum of 20 years [Article 2, no. 3, of the Portuguese law on combating terrorism (*Lei* 52/2003, of 22 August 2003, *Diário da República* no. 193, Série I-A, 22 August 2003)] – in the context of a penal system where murder is punished with imprisonment of 8 to 16 years. On this issue, see J. DE FIGUEIREDO DIAS and P. CAEIRO, "A Lei de Combate ao Terrorismo (Lei no. 52/2003, de 22 de Agosto)", *Revista de Legislação e de Jurisprudência,* 3935, 2005, p. 70 and f., 89; and S. FIDALGO, "Direito Penal Europeu: entre uma Europa securitária e uma Europa solidária", *Boletim da Faculdade de Direito*, 81, 2005, p. 931 and f., 947 and f.

[32] In this sense, see also A. L. DOS SANTOS ALVES, "Mandado de Detenção Europeu: julgamento na ausência e garantia de novo julgamento", *Revista do Ministério Público*, 103, 2005, p. 65 and f., 72 and f.; and R. SANTIAGO, "O defensor e o arguido no processo penal português: aspectos polémicos", *Revista Portuguesa de Ciência Criminal*, 17, 2007, p. 207 and f., 251.

Prior to 2000, Art. 380º-A of the Code of Penal Procedure granted individuals convicted *in absentia* the right to apply for a retrial of the case (on this, see M. J. ANTUNES, "A falta do arguido à audiência de julgamento e a revisão do Código de Processo Penal", *Revista Portuguesa de Ciência Criminal*, 8, 1998, p. 215 and f.). However, *Decreto-Lei* no. 320-C/2000, of 15 December 2000, has struck that right (on this, see R. SANTIAGO, "Breves reflexões sobre a novíssima revisão do Código de Processo Penal", *Revista Portuguesa de Ciência Criminal*,

Therefore, the execution of the EAW will depend on the law of the executing State: if it strictly requires the possibility of applying for a retrial, there will be no surrender.

None of these solutions violates the FD.

6. As to the transposition of Art. 2(4) and 4(1) FD, the regime provided by Portuguese law is unclear.

In the first place, it is crucial to set out the correct interpretation of the FD in respect of double criminality. It is known that one of the most important and controversial features of the FD EAW is to exempt from the double criminality test the requests for surrender based on the offences listed in Art. 2(2), as long as such offences are punishable by the law of the issuing State with a deprivation of liberty for a maximum period of not less than three years [33]. Regarding EAWs based on offences that do *not* meet those requirements – *i. e.*, offences that do *not belong* to the areas of criminality listed, irrespective of the applicable penalties, *or* that, although being listed, are *not* punishable with a custodial sentence for a maximum period not less than three years [34] –, Art. 2(4) FD allows the MS to *choose* [35] whether or not the surrender is dependent on double criminality. Then, Art. 3 and 4 FD draw a general

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10, 2000, p. 535 and f.), providing only for a grounds for appealing against the decision. It is doubtful that current Portuguese law complies with the ECHR, as interpreted by the Eur. Court HR: see A. L. dos Santos Alves, *ibid*, p. 77.

[33] In the view of Portuguese policymakers, the abolition of the double criminality test for the list of the 32 offences is justified by two main reasons: they are serious offences and are more or less harmonised under EU instruments. This means that there is a basis for a common understanding of the meaning and scope of those categories of offences. Hence, Portuguese policymakers agree that there is no justification for the control of double criminality in respect of such offences.

This view is not fully shared by the practitioners and the literature.

As to the former, some of the interviewees put forward that the description of the "domains of criminality" in Art. 2º, no. 2 PTL EAW (which copies Art. 2(2) FD) is too vague, causing uncertainty for the citizens and for the judicial authorities, although they admit that an exhaustive description of the offences might be inconsistent with the very principle of mutual recognition. Some practitioners also feel that they lack information and knowledge regarding the law of other MS. Two interviewees suggested that it might be useful to set "general criteria, to the attention of the issuing judicial authorities, on the indication of a given offence as pertaining to the categories listed in the EU instrument. These criteria could draw on the experience of the application of the EAW regime and take into account the concrete decisions of the courts resulting in a refusal of surrender".

The literature on the EAW also raises some objections regarding the abolition of double criminality, namely because it might strengthen the repressive profile of European criminal law: see A. Miranda Rodrigues, "O mandado de detenção europeu – na via da construção de um sistema penal europeu: um passo ou um salto", *Revista Portuguesa de Ciência Criminal*, 13, 2003, p. 27 and f., 31, 44; Id., "O Tribunal de Justiça das Comunidades Europeias no espaço de Liberdade, de Segurança e de Justiça – A caminhar se faz o caminho", *ibid.*, 17, 2007, p. 387 and f., 389; R. Bragança de Matos, "O princípio do reconhecimento mútuo e o mandado de detenção europeu", *ibid.*, 14, 2004, p. 325 and f., 352 and f.; and M. Guedes Valente, *Do mandado de detenção europeu,* Coimbra, Almedina, 2006, p. 61.

[34] See A. Miranda Rodrigues, "O mandado…", *op. cit.* [fn. 33], p. 40, footnote 44.

[35] "(…) surrender *may* be subject to the condition that (…)" (emphasis added).

distinction between grounds for "mandatory" and "optional" non-execution, that is to say, grounds upon which the MS are, respectively, *obliged* or *entitled* not to execute the EAW. Consistently with the regime set in Art. 2(4), Art. 4(1) provides that, in the cases mentioned in the former, the "executing judicial authority may refuse to execute the EAW" – "may", because the MS at stake may have chosen *not* to consider the lack of double criminality as an obstacle to surrender.

Thus Art. 4(1) FD is *not* to be construed in the sense that MS that choose to control double criminality for offences other than those set in Art. 2(2) *must* leave the ultimate decision over execution to the discretion of their courts [36]. Rather, it is for the MS to choose: (i) whether or not, and under which circumstances, those grounds should lead to non-execution; (ii) whether such non-execution should be imposed by the law, binding for the courts, or left to judicial discretion [37].

As far as Portuguese law is concerned, Art. 2º, no. 2 PTL EAW transposes Art. 2(2) FD adequately, ruling that the control of double criminality shall not take place when (i) the underlying facts constitute one of the listed offences, and (ii) such offence is punishable by the law of the issuing State by a custodial sentence or a detention order for a maximum period of at least three years.

Then, still in line with Art. 2(4) FD, the Portuguese legislator chose to make the execution of a EAW dependent on the ascertainment of double criminality in respect of the offences that are not included in Art. 2º, no. 2 PTL EAW: in fact, Art. 2º, no. 3, provides that "regarding the offences not included in the previous number, the surrender of the requested person is admissible *only* where the act underlying the EAW constitutes an offence punishable by Portuguese law, irrespective of its constituent elements or legal qualification" (emphasis added) [38]. The wording of the norm suggests that the legislator chose to require the double criminality test for all the offences "not included" in no. 2, *i. e.*, the offences that do not meet *both* conditions: those not listed in the several paragraphs (whatever the penalties applicable by the issuing State may be) *and* the offences listed that are punishable with deprivation of liberty for a maximum period of less than three years. The consequence is also obvious: if an offence pertaining to one of those two groups is not punishable by Portuguese law, the EAW *cannot* be executed. This interpretative result complies with the margin of discretion left to the MS by Art. 2(4) FD.

However, Art. 12º, no. 1, al. a) PTL EAW, transposing Art. 4(1) FD, provides that, for the offences not included in Art. 2º, no. 2, the absence of double criminality

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[36] In the opposite sense, however, see I. Godinho, *op. cit.*, p. 137, asserting that the "transformation" of optional grounds for non-execution into mandatory ones would infringe upon the FD.

[37] Writing before the transposition of the FD EAW, Anabela Miranda Rodrigues has clearly put forward that Art. 2(4) of the FD entitles the national legislator to opt for *either one* of the alternatives: see A. Miranda Rodrigues, "O mandado…", *op. cit.* [fn. 33], p. 40, footnote 45.

[38] "*No que respeita às infracções não previstas no número anterior só é admissível a entrega da pessoa reclamada se os factos que justificam a emissão do mandado de detenção europeu constituírem infracção punível pela lei portuguesa, independentemente dos seus elementos constitutivos ou da sua qualificação*".

is a mere ground for *optional* non-execution of the EAW, to be decided by the court, which seems to contradict Art. 2º, no. 3 (mandatory non-execution).

Most authors acknowledge this normative contradiction, but all do not agree on how it should be overcome. Some claim that Art. 12º, no. 1, al. a), should be ignored, since judiciary discretion to decide over the execution is explicitly excluded by Art. 2º, no. 3 [39], whereas others rely on the principle of mutual recognition for interpretative guidance and tend to disregard the imperative nature of the latter norm, which is of course less "cooperation-friendly" [40].

It is indisputable that the *commands* of the two norms are contradictory, because Art. 2º, no. 3, provides for mandatory non-execution, while Art. 12º, no. 1, al. a), provides for possible non-execution (to be decided by the court) [41]. Hence, the only way to reconcile them (and preserve their normative value) would be to differentiate their scope.

A *restrictive* interpretation of both norms could lead to the following constructions:

– Art. 2º, no. 3, would refer only to the offences that *do not* pertain to the areas of criminality listed (where the absence of double criminality would be a ground for *mandatory* non-execution), while Art. 12º, no. 1, al. a), would refer only to the offences *listed* that are not punishable with a maximum custodial sentence of at least three years (where the absence of double criminality would be a ground for *optional* non-execution). Such construction would be consistent with the purpose of the FD, since it enhances the role of the list of offences for which cooperation should be made easier.
– According to yet a different view, Art. 2º, no. 3, would refer exclusively to offences *not listed* that are *not punishable* with deprivation of liberty of at least three years (where the absence of double criminality would be a ground for *mandatory* non-execution), whereas Art. 12º, no. 1, al. a), would refer to all the remaining offences, *i. e.*, offences listed that are not punishable with deprivation of liberty of at least three years *and* offences that are not listed but are punishable with deprivation of liberty for a period of at least three years (where the absence of double criminality would be a ground for *optional* non-execution) [42].

It is more than doubtful that those constructions can be accepted.

In the first place, one should dismiss the "European conformity" argument. The so called "conform interpretation" should serve to interpret national law in a way that is compatible with European law, and thus supposes a previous determination of the meaning and scope of national norms. In other words, it is not for European law to *clarify* the domestic law, or to solve its contradictions (except in the case where one of the possible constructions would turn out to be incompatible with European law).

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[39] L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

[40] I. Godinho, *op. cit.* , p. 137; and M. Guedes Valente, *op. cit.*, p. 241.

[41] L. Silva Pereira, *op. cit.* [fn. 21], p. 59.

[42] Putting forward this interpretation, see Tribunal da Relação de Evora, *Acórdão*, 3 July 2007, Case no. 1317/07-1, available at www.dgsi.pt (in detail, see *infra*, 3.).

Moreover, even if European law could be used as a guidance for overcoming this contradiction (which, as submitted, is not the case), one should not rely on an *abstract formulation* of the principle of mutual recognition, as if it were equivalent to "maximum execution", in order to justify the most "execution-friendly" interpretation [43]. In fact, the FD gives shape to the *concretisation* of that principle in the field of extradition/surrender (*i. e.*, its actual contents and, indeed, its *limits*), and, in the context of the FD, mutual recognition means *also* that the issuing State must recognise the *ius non puniendi* of the executing State as a valid grounds for non-execution in the cases where it is permitted.

Finally, a national law that considers the lack of double criminality as a cogent ground for non-execution, binding for the courts, is not "less conform" with the FD EAW than the one that leaves the decision to judicial discretion: as said above, the FD does not intend to regulate the way in which the national legislator implements "optional" grounds for non-execution.

If we now turn to the interpretation of Portuguese law itself, it is probable that the contradictory norms do not embody two *genuine* normative purposes. It is submitted that the drafters of the PTL EAW did not fully comprehend the distinction between "mandatory" and "optional" non-execution set in Art. 3 and 4 FD. Apparently, the contradiction is due to the plain fact that the Portuguese legislator has misunderstood Art. 4 of the FD as a whole, erroneously assuming that it would impose upon the MS the duty to leave optional non-execution to judicial discretion, while forgetting, at the same time, that he clearly chose to make non-execution mandatory for the courts in the absence of double criminality (Art. 2º, no. 3) [44]. This mistake is confirmed by the fact that *all* the grounds for "optional non-execution" provided in Art. 4 FD have been transposed into Portuguese law as grounds for judicial discretion on refusal.

The *explanation* of the probable reasons underlying the contradiction between Art. 2º, no. 3, and Art. 12º, no. 1, al. a) PTL EAW provides context for the problem, but does not suffice to set aside the applicability of the latter. It is submitted that, while some of the grounds for "optional non-execution" are perfectly compatible with (and perhaps better assessed by) concrete judicial decisions, that does not apply to the absence of double criminality [45]. In fact, it is understandable that, for instance,

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[43] However, such equivalence seems to be a common perception among the practitioners interviewed, and it certainly reflects on some case law of the Portuguese courts (see *infra*, 3, B, 3).

[44] In this precise sense, L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

[45] This is certainly the reason why most of the national laws transposing the FD EAW provide, *as a rule binding for their courts*, that there is no surrender in the absence of double criminality, except where the EAW is based on offences listed *and* punishable with deprivation of liberty for a period of not less than three years: IT: Art. 7, no. 1, and 8, no. 1, of Law no. 69, of 22 April 2005, *Gazzetta Ufficiale*, 98, 29 April 2005; FR: Art. 695-23, of the *Code de Procédure Pénale*; BE: Art. 5 of Law 19 December 2003; IE: section 38(1) of the *European Arrest Warrant Act* 2003; NL: Art. 7(1) of the Act of 29 April 2004, *Overleveringswet, Staatsblad*, no. 195, 2004. The sole exception seems to be Spanish Law 3/2003, of 14 March 2003, where Art. 9, no. 2, and 12, no. 2, al. a), clearly leave the decision on surrender, in the absence of double criminality, to the judicial authorities.

the decision either to surrender or to continue the domestic criminal procedure for the same acts (Art. 4(2) FD) should be conferred upon the courts, so that all the relevant interests (the grounds on which each State purports to exercise its jurisdiction, the stage of the procedure in each State, etc.), *which differ, in their concrete features, from case to case*, can be given due consideration and be pondered by the judicial authority. However, the interest underlying the requirement for double criminality (no repressive action, including detention and surrender, beyond the boundaries of [national] criminal law) is of a *general* nature and its relevance is not dependent on the *concrete* features of a given case [46]. Therefore, the decision on whether or not such interest shall prevail over the interest in judicial cooperation must lie with the legislator, not with the courts [47].

In sum, it is submitted that the contradiction between Art. 2º, no. 3, and 12º, no. 1, al. a), PTL EAW was caused by an inadequate transposition of the FD. Bearing in mind the scope of the requirement for double criminality, current Portuguese law should be interpreted in the sense that EAWs based on acts that do not meet both the conditions set in Art. 2(2) FD (= Art. 2º, no. 2, PTL EAW) cannot be executed if such acts do not constitute an offence under Portuguese law (Art. 2º, no. 3). Correspondently, Art. 12º, no. 1, al. a), PTL EAW should be simply disregarded [48]. This result complies with Art. 2(4) and 4(1) FD.

3. The judicial level

A. Mutual recognition as a topic and a ground for judicial decisions

The general perception of mutual recognition by Portuguese judges, prosecutors and lawyers is based on the application of the EAW. The EAW is seen as an instrument that replaces the extradition procedure between Member States, the main feature of which being that foreign judicial decisions should be, in principle, executed, and grounds for non-execution should be exceptional.

Despite the absence of a clear concept defined in the law, Portuguese courts often use mutual recognition, based on mutual trust, as a topic to justify some decisions concerning the EAW.

1. At a general level, the Supreme Court has characterised the EAW, in a *dictum*, as embodying three features that, in its view, symbolise mutual recognition: the duty to execute decisions taken by foreign judicial authorities; the limitation of the grounds for non-execution; and the evolution of the rules on double criminality.

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[46] Arguably, the same reasoning applies to the grounds set in Art. 4 (4) and 4(5) FD, which have also been transposed into Portuguese law as grounds for "optional" non-execution (Art. 12º, no. 1, als. e), f)). However, in those cases, there is no norm similar to Art. 2º, no. 3 PTL EAW, and those provisions for judicial discretion, although inadequate, have to be applied.

[47] In the same sense, writing before Law 65/2003 was passed, Anabela Miranda Rodrigues has argued that conferring this competence upon the courts would result in the application of "hardly justifiable" criteria of "convenience": see A. Miranda Rodrigues, "O mandado…", *op. cit.* [fn. 33], p. 40, footnote 45.

[48] In this sense, see also L. Silva Pereira, *op. cit.* [fn. 21], p. 60.

It also has held that domestic norms on the EAW should be interpreted taking into consideration the duties arising from mutual recognition, as well as the persistence of some elements of State sovereignty in criminal matters [49].

2. At a more concrete level, the Supreme Court has relied on the principle of mutual recognition (which "allows for an almost automatic execution of the decisions taken by the judicial authorities of the other States") to justify the inapplicability of the requirement for reciprocity [50]. The Court has also ruled that reciprocity is not required by the Constitution in respect of judicial cooperation in the EU, even when the surrender of Portuguese nationals is at stake [51].

In another judgment, the Supreme Court has held that, in cases where Portugal executes a conviction handed down by another MS, the principle of mutual recognition demands the acceptance and the respect of the foreign decision in its precise terms, which means that the national courts cannot suspend a prison sentence handed down by a court of another MS, even where such suspension would be permissible under Portuguese law [52].

Concerning the rights of the defence, the Supreme Court has ruled that "the full exercise of the right of defence against the accusation must take place in the courts of the issuing State, because the EAW is based on the principles of judicial cooperation between MS, mutual recognition of their respective legal systems and trust between the said States" [53].

Finally, the Appeal Court of Evora has relied partly on the principle of mutual recognition to justify a certain interpretation of the national rules concerning grounds for "mandatory" and "optional" non-execution [54].

B. Case-law on other issues raised by the EAW

1. Pending proceedings and non bis in idem

The existence of pending proceedings in Portugal against the requested person and the possible application of Art. 12º, no. 1, al. b) PTL EAW (= Art. 4(2) FD) seems to be one of the most relevant issues in the case-law of Portuguese superior courts.

a) Case A: an EAW was issued by the judicial authority of another MS in order to obtain the surrender of a person investigated for drug trafficking. Some – *but not all* – of the acts that gave rise to the EAW were also subject to a criminal investigation by the Portuguese authorities under the territoriality principle.

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[49] Supremo Tribunal de Justiça, *Acórdão*, 27 April 2006, Case no. 06P1429, available at www.dgsi.pt; Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt.

[50] Supremo Tribunal de Justiça (3ª Secção), *Acórdão*, 3 March 2005, Case no. 773/05, available at www.pgdlisboa.pt.

[51] Supremo Tribunal de Justiça, *Acórdão*, 13 January 2005, Case no. 04P4738, available at www.dgsi.pt.

[52] Supremo Tribunal de Justiça (3ª Secção), *Acórdão*, 21 February 2007, Case no. 250/07, available at www.pgdlisboa.pt.

[53] Supremo Tribunal de Justiça, *Acórdão*, 29 May 2008, Case no. 08P1891, available at www.dgsi.pt.

[54] In detail, see *infra*, B, 3, b.

The Appeal Court of Lisbon held that the existence of pending proceedings in Portugal for facts constituting part of the conduct that underlies the EAW does not bar the surrender of the defendant. The Court applied Art. 31º, no. 1 PTL EAW (= Art. 24(1) FD) and postponed the surrender, so that domestic proceedings could continue, while stressing that the issuing State is bound by provisions on *non bis in idem* and, therefore, obliged to respect the decision to be eventually handed down by the Portuguese courts regarding the acts committed in Portugal [55].

On appeal, the Supreme Court confirmed the decision and ruled further that, in the face of the documents available, the acts were not the "same acts" in the sense meant by Art. 12, no. 1, al. b) PTL EAW. According to the Court, the ascertainment of whether the acts committed in Portugal could be merged with other acts committed abroad, integrating in only *one crime*, was a question on the merits, not to be decided by the executing judicial authority. Therefore, the Court correctly decided that there was no ground for discussing the optional non execution of the EAW [56].

b) Case B: in another case, where the acts underlying the EAW were probably the same as those that were being investigated by the Portuguese authorities, the Appeal Court of Evora highlighted the distinction between mandatory refusal of surrender based on a final decision and optional refusal of surrender based on the existence of pending proceedings [57]. The Court further held that the transfer of the proceedings may overcome the issue raised by the existence of pending proceedings, enabling the investigation of all the facts in the same procedure by the foreign authority. In this context, when deciding on the application of Art. 12º, no. 1, al. b) PTL EAW (= Art. 4(2) FD EAW), the Court concluded that the continuation of the proceedings initiated in the executing State may be delegated to the issuing State if the latter accepts it, thus avoiding the shortcomings resulting from article 12º PTL EAW.

2. Territoriality

a) Case A: in a case of armed robbery and kidnapping allegedly committed by a Portuguese citizen, where the armed robbery had been perpetrated in another MS and the kidnapping had begun in that MS but had continued (and finished) in Portugal, the Supreme Court of Justice decided to execute the European Arrest Warrant concerning the robbery. The surrender, however, was subject to the condition that the person would be returned to Portugal in order either to continue the pending proceedings for kidnapping or to serve the possible sentence handed down in the issuing MS [58].

b) Case B: an EAW was issued by another MS against one of its citizens, who resided in Portugal, for attempted fraud. The offence allegedly consisted of the said person having given instructions to her lawyer so that he would claim in the courts of

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[55] Tribunal da Relação de Lisboa, *Acórdão*, 16 May 2006, Case no. 9715/2005-5, available at www.dgsi.pt.

[56] Supremo Tribunal de Justiça, *Acórdão*, 22 June 2006, Case no. 06P2326, available at www.dgsi.pt.

[57] Tribunal da Relação de Evora, *Acórdão*, 3 May 2005, Case no. 29/05-1, available at www.dgsi.pt.

[58] Supremo Tribunal de Justiça, *Acórdão*, 18 April 2007, Case no. 07P1432, available at www.dgsi.pt.

that MS, using false documents, a certain amount of money, which he did. The issuing authority explicitly stated that it was not known whether those instructions had been given to the lawyer at distance, from Portuguese territory (as the requested person claimed), or personally, in the territory of the issuing State. Indeed, it was a relevant question for the possible application of Art. 12º, no. 1, al h), (i) (optional grounds for non-execution by virtue of territoriality).

Actually, Art. 4º of the Portuguese Penal Code (CP) provides that Portuguese penal law is applicable to all the acts committed in Portuguese territory, irrespective of the nationality of the offender, and Art. 7º, no. 1 CP states that the crime is deemed to have been committed both in the place where the criminal action has been perpetrated, wholly or *in part*, as well as in the place where consummation has occurred. Art. 7º, no. 2 CP provides further that attempted offences are *also* deemed to have been committed in the place where the criminal "result" (consequence, or effect) should take place, according to the plan of the offender. Thus, if the attempt would have taken place in Portugal, even if only in part, the "territoriality clause" could apply, as a ground for optional non-execution.

However, the Supreme Court dismissed the issue by interpreting Art. 7º, no. 2 CP in the sense that attempted offences are deemed to have been committed (solely) in the place where consummation (the criminal "result") should occur according to the plan of the offender. Consequently, as the fraud was intended to materialise in the territory of the issuing MS, the act should not be seen as having been perpetrated in Portugal, and there was no place for discussing the possible application of the territoriality clause [59].

This interpretation of Art. 7º, no. 2 CP cannot be accepted: the purpose of the provision is to *extend*, for attempted offences, the criteria set in no. 1, not to *narrow* their scope. Such purpose is made clear by the use of the adverb "also" ("*igualmente*"), which means that Art. 7º, no. 2 CP does not affect the ambit of applicability of the former [60].

Thus, due to the mistaken interpretation of the rules on the applicability of Portuguese criminal law, the Supreme Court was unable to rule on an important issue: it would have been an excellent occasion to determine whether or not the executing judicial authority has the power (or indeed the duty) to allow for the presentation of evidence concerning the facts upon which the execution of the EAW can depend, even when such facts are part of the criminal conduct [61]. It is submitted that a positive

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[59] Supremo Tribunal de Justiça, *Acórdão*, 2 January 2008, Case no. 07P4850, available at www.dgsi.pt.

[60] "*No caso de tentativa, o facto considera-se* igualmente *praticado no lugar em que, de acordo com a representação do agente, o resultado se deveria ter produzido*" (emphasis added).

[61] In a case where the EAW had been issued for the purpose of executing a custodial sentence in the issuing State, the Supreme Court ruled that the executing court must ascertain whether the situation of the requested person makes it advisable to refuse the surrender and determine that the execution takes place in Portugal; otherwise, the judgment is null and void, according to Art. 379º, no. 1, al. c) of the Code of Penal Procedure: Supremo Tribunal de Justiça, *Acórdão*, 27 April 2006, Case no. 06P1429, available at www.dgsi.pt.

answer should be given to that question, although it is clear that the executing judicial authority is not bound to allow for the presentation of such evidence when the facts at stake (*e. g.*, some of the criminal acts having allegedly been committed in Portugal), even if proved, would *not* lead to a (optional) non-execution of the warrant (*e. g.*, because the crime has produced much more serious effects in the issuing State).

3. Double criminality

a) Double criminality and the offences listed in Art. 2(2) FD

In its Judgment of 4 January 2007[62], the Supreme Court held that the abolition of the double criminality test presupposes that the executing authority verifies, in accordance with the principles of trust and mutual recognition, whether the acts underlying the European Arrest Warrant, as qualified by the issuing authority, do integrate the "material domains of criminality" defined in Art. 2(2) FD, or are rather "manifestly beyond them". Any disparity has, however, to be "patent", resulting directly and immediately from the formulation of the warrant and from the formal, systematic and material framework of the law of the issuing State.

The case concerned the "abduction" of a child by one of her parents, thus depriving the other from the visits established by a judicial decision, and was qualified under the list of Art. 2(2) FD as "kidnapping". According to the Portuguese law then in force, not only the offence could not be qualified as such, but also the acts did not constitute a criminal offence at all, in that they were committed by one of the parents holding – exclusively or jointly – the parental authority, as well as the custody of the child.

The Supreme Court ruled that, in spite of the qualification made by the issuing authority, the acts did not integrate the domain of criminality defined as "kidnapping", making clear that it was not applying Portuguese law, but rather interpreting the concepts used in the FD, in the light of a "reasonable and common material assessment"[63]. Therefore, the Portuguese judicial authority might refuse to execute the EAW, under Art. 12º, no. 1, al. a) PTL EAW (= Art. 4(1) FD EAW), since Portuguese law did not punish those acts.

b) The absence of double criminality as a ground for "mandatory" versus "optional" non-execution

In spite of the contradiction between Art. 2º, no. 3, and 12º, no. 1, al. a) PTL EAW, already analysed *supra*[64], many of the judicial decisions that deal with the lack of double criminality as a ground for non-execution do not delve deep into the matter.

In most cases, it is simply assumed that it constitutes a ground for "optional" non-execution, in the sense that it is for the executing judicial authority to decide

[62] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt.

[63] Some of the interviewees argued that new measures on the EAW should be focused on increasing mutual trust by ensuring the accuracy control in the issuing State. In this regard, the setting up of general criteria on how to proceed at EU level could also be envisaged.

[64] *Supra*, 2, B, 6.

whether or not the warrant should be executed, no reference being made to the former provision [65].

To the authors' knowledge, there is only one decision where the issue has been explicitly dealt with. In a case where the EAW was based on one offence of conspiracy, the Appeal Court of Evora found, in its Judgment of 3 July 2007 [66], that such crime was not part of the common list; consequently, the execution of the warrant was subject to the mentioned contradictory norms. At this point, the Court, relying on the *Pupino* case, put forward that the "doubts" on the interpretation of national law should be "solved" with recourse to the "spirit" of the FD EAW, which would consist, in its view, of "mutual recognition, trust, abolition of autonomous requirements for extradition (double criminality), freedom, security, justice, celerity and simplicity in the Union area". Then, asserting that "optional grounds for non-execution cannot be changed into mandatory ones", the Court held that Art. 2º, no. 3 PTL EAW provides for mandatory non-execution *only* where the warrants are based on non-listed offences that are not punishable under Portuguese law *and* that are punishable by the law of the issuing State with deprivation of liberty for a maximum period of less than three years. The execution of the warrants based on the remaining (non-listed) offences (namely, those which are not punishable under Portuguese law *but* are punishable by the law of the issuing State with deprivation of liberty for a period of three years or more) would be subject to judicial discretion, under Art. 12º, no. 1, al. a).

As said above [67], it is submitted that European law does not play a role in the clarification of national law, especially where the possible solutions are equally compatible with the European instrument. Moreover, the Court based its Judgment on a misconception of what the terms "optional" and "mandatory" mean in the context of the FD EAW. Therefore, and contrary to what the Court decided, the execution of the warrant should have been refused, on the strength of Art. 2º, no. 3 PTL EAW.

The stance taken by the Portuguese courts regarding "optional" non-execution in the absence of double criminality led them to admit, unsurprisingly, that the legislator did not provide for criteria on which the decision whether or not to execute can be based. Hence, the Supreme Court has held that this "*lacuna*" should be fulfilled with recourse to the general criteria set in Art. 10º of the Portuguese Civil Code, or to "similar cases", or to "the principles embedded in the unity of the legal system" [68].

In a more concrete manner, the Appeal Court of Evora, in the Judgment cited above [69], ruled that the warrant should be executed in view of the "undisputable gravity" of the acts underlying the warrant (an offence of conspiracy), given the "applicable penalties", the "nature of the acts" and the "personality of the offender".

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[65] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt; Supremo Tribunal de Justiça, *Acórdão*, 18 April 2007, Case no. 07P1432, available at www.dgsi.pt.

[66] Tribunal da Relação de Évora, *Acórdão*, 3 July 2007, Case no. 1317/07-1, available at www.dgsi.pt.

[67] *Supra*, 2, B, 6.

[68] Supremo Tribunal de Justiça, *Acórdão*, 4 January 2007, Case no. 06P4707, available at www.dgsi.pt

[69] *Supra*, *op. cit.*[fn. 66].

Indeed, it is hard to imagine what criteria other than the gravity of the acts and/or the dangerousness of the offender can advise the detention and surrender of a person for an act that is neither punishable under national law, nor subject to the consensus embodied in Art. 2(2) FD EAW. However, it is submitted that this kind of reasoning is based on an insoluble contradiction: how can a national court assert the "high gravity" of a given act (or the dangerousness of the person who committed it) when its own law does not consider such act as a crime at all, nor exempt the warrants based on that act from the double criminality test?

It may even be legitimate for a State to abolish double criminality *in general*, especially within the EU, where MS are bonded by particular ties at many levels, thus serving the penal systems of other States. Nevertheless, that option is to be made by the legislator, because the interests at stake are not susceptible of being balanced with the interests underlying a concrete case.

4. Recognition versus confirmation of foreign sentences to the effects of Art. 4(6) FD

Art. 12º, no. 1, al. g) PTL EAW (=Art. 4(6) FD) provides that the execution of an EAW may be refused "if the arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in the national territory, is a Portuguese national or lives in Portugal and the Portuguese State undertakes to execute the sentence or detention order in accordance with Portuguese law". The FD does not provide for specific rules on the recognition of foreign sentences for their execution, and Art. 234º, no. 1 of the Portuguese Code of Criminal Procedure (CCP) requires the review and confirmation of foreign sentences for their enforcement in Portugal, by the means of a special procedure regulated in articles 234º and f.

The Appeal Court of Coimbra, in its Judgement of 7 February 2007[70], ruled that the Portuguese State cannot undertake to execute the foreign sentence before it has been reviewed and confirmed through the said procedure. As a consequence, in the absence of a formal and separate decision of confirmation, the courts cannot apply Art. 12º, no. 1, al. g) PTL EAW and the warrant should be executed. Recently, a decision of the Supreme Court has followed the same reasoning[71].

However, the Supreme Court had already decided in the opposite sense, in its Judgment of 23 November 2006[72]. The decision stressed that the purpose of the EAW is to implement the principle of mutual recognition, which is based on mutual trust between MS, and that the EAW intends to replace the extradition between MS, which was based on the idea of "mistrust" and "doubt". The Court observed that the

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[70] Tribunal da Relação de Coimbra, *Acórdão*, 7 February 2007, in *Colectânea de Jurisprudência*, Ano XXXII, Tomo I, 2007, p. 54.

[71] Supremo Tribunal de Justiça, *Acórdão*, 9 January 2008, Case no. 07P4856, available at www.dgsi.pt. In the same sense, L. Silva Pereira, "Contributo para uma interpretação dos artigos 12º, no. 1 al. g) e 13º. al. c) da Lei no. 65/2003, de 23 de Agosto", *Revista do CEJ*, 7, 2007, p. 265 and f., 277 and f.

[72] Supremo Tribunal de Justiça, *Acórdão*, 23 November 2006, Case no. 06P4352, available at www.dgsi.pt.

PTL EAW does not establish any procedure for review and confirmation of sentences because this would contradict the very purpose of the EAW. According to the Supreme Court, if the Portuguese court finds it more convenient to have the foreign conviction executed in Portugal rather than to surrender the requested person, then it should accept and respect its terms, under the principle of mutual recognition, without review or confirmation. Thus, the decision not to execute the warrant means, at the same time, that the Portuguese State *undertakes* to enforce the foreign sentence and, in that case, the court should order its immediate execution. Therefore, the Supreme Court concluded that the expression "Portuguese law" in accordance with which the sentence must be executed (Art. 12º, no. 1, al. g) PTL EAW) does not refer to the procedure of review and confirmation of foreign sentences established in the CCP, but rather to the law that regulates the execution of imprisonment and other measures involving deprivation of liberty [73].

It is submitted that the reasoning followed by the Supreme Court in the latter decision is sound and more consistent with the purposes of the EAW. The fact that the FD EAW does not provide for specific rules on the recognition of sentences in those cases does not prevent the MS from creating a special set of rules on that matter. Nevertheless, as the law is unclear and the courts' opinions are divergent, a legislative clarification of the regime is strongly recommended.

4. Conclusion

In Portugal, the EAW is viewed as a mechanism springing from mutual recognition, both at a *legislative level* and at a *judicial level*.

Although there are a few aspects where national law seems to deviate from the FD EAW or raises some interpretative issues, it can be said that, in general, Portuguese law complies with the European instrument. For their part, Portuguese courts often use mutual recognition, based on mutual trust, as a topic to justify some decisions concerning the EAW. Indeed, some shortcomings and inconsistencies in the implementation of the EAW are inherent to the fact that the contents and limits of mutual recognition are still not totally clear themselves [74].

As suggested by some interviewees [75], the functioning of the EAW could be improved by taking additional measures, both at the legislative level (*e. g.*, regulating the prevention and settlement of conflicts of jurisdiction) as well as at a practical level (*e. g.*, providing specific training for judges, prosecutors and lawyers). In any case, Portuguese policymakers and practitioners seem to have internalised the main feature of the EAW: foreign judicial decisions shall be, in principle, executed, grounds for non-execution shall be exceptional.

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[73] *Decreto-lei* no. 265/79, of 1 August 1979 (*Diário da República*, no. 176, Suplemento, Série I, 1 August 1979), modified by *Decreto-lei 49/80*, of 22 March 1980 (*Diário da República*, no. 69, Série I, 22 March 1980), and *Decreto-lei 414/85*, 18 October 1985 (*Diário da República*, no. 240, Série I, 18 October 1985). The Portuguese Government has already approved a new draft law (*Proposta de Lei*) on the enforcement of measures involving deprivation of liberty, which will be submitted to Parliament soon.

[74] See A. Klip, *European Criminal Law*, Antwerp, Intersentia, 2009, p. 23 and f.

[75] See S. Fidalgo, *op. cit.* [fn. 1], p. 31 and f.

Le principe de reconnaissance mutuelle des décisions judiciaires dans l'Union européenne devant les juridictions roumaines. Présent et perspectives

Florin Streteanu et Diana Ionescu

1. Le cadre législatif national

La transposition des normes européennes relatives à la coopération judiciaire s'est imposée comme une condition obligatoire dans le processus d'intégration de la Roumanie dans l'espace de liberté, de sécurité et de justice de l'UE. C'est la raison pour laquelle la coopération en matière pénale a constitué un point important dans les négociations sur le traité d'adhésion de la Roumanie à l'UE (chapitre 24). Et, bien sûr, la reconnaissance mutuelle des décisions judiciaires, la *clé de voûte* de la coopération, ne pouvait pas être ignorée.

Sur le plan législatif national, la première mesure législative prise à cet égard a été la mise en œuvre, par les dispositions du titre III de la loi n° 302/2004 sur la coopération judiciaire internationale en matière pénale [1], de la décision-cadre sur le mandat d'arrêt européen et les procédures de remise entre les Etats membres. En raison de certaines imperfections de cette première réglementation et compte tenu de l'expérience déjà acquise par les autres EM de l'UE, la loi n° 302/2004 a subi une première modification importante en 2006 par les dispositions de la loi n° 224/2006 [2].

Deux ans plus tard, la loi n° 302/2004 a fait l'objet d'une nouvelle réforme, par la loi n° 222/2008 [3], qui a modifié de nouveau quelques dispositions sur le MAE et,

[1] La loi n° 302/2004 sur la coopération judiciaire internationale en matière pénale a été adoptée le 24 juin 2004 et a été publiée dans le *Journal officiel*, n° 594, du 1er juillet 2004.

[2] La loi n° 224/2006 a été adoptée le 1er juin 2006 et a été publiée dans le *Journal officiel*, n° 534 du 21 juin 2006.

[3] La loi n° 222/2008 a été adoptée le 28 octobre 2008 et a été publiée dans le *Journal officiel*, n° 758 du 10 novembre 2008.

de plus, a transposé en droit roumain trois autres décisions-cadres liées au principe de RM des décisions judiciaires. Il s'agit de :

- la décision-cadre du Conseil 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve [4] ;
- la décision-cadre du Conseil 2005/214/JAI du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires [5] ;
- la décision-cadre du Conseil 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation [6].

Les dispositions relatives au MAE sont entrées en vigueur le 1er janvier 2007, au moment de l'adhésion de la Roumanie à l'UE. Les normes par lesquelles les trois autres décisions-cadres ont été transposées en droit roumain sont applicables depuis le 13 novembre 2008. Donc, à la fin de novembre 2008, presque deux ans après son adhésion à l'UE, la Roumanie avait transposé les quatre décisions-cadres liées au principe de RM adoptées au niveau européen et censées être transposées.

Bien qu'elle ne vise pas le principe de RM, il convient de mentionner aussi la décision du Conseil 2007/763/CE du 8 novembre 2007 [7] relative à l'adhésion de la Bulgarie et de la Roumanie à la convention établie par le Conseil conformément à l'article 34 du traité sur l'UE relative à l'entraide judiciaire en matière pénale entre les EM de l'UE. Selon l'article 1er de cette décision, la convention du 29 mai 2000 relative à l'entraide judiciaire en matière pénale entre les EM de l'UE et son protocole additionnel du 16 octobre 2001 sont entrés en vigueur pour la Roumanie le 1er décembre 2007. La Roumanie agit donc actuellement en matière de coopération judiciaire dans le cadre de l'UE conformément aux instruments juridiques concernant la RM et aussi sur la base de l'entraide judiciaire réglementée par la convention du 29 mai 2000 et celle du 19 juin 1990 pour l'application de l'accord de Schengen.

Les quatre décisions-cadres liées au principe de RM ont été transposées dans un seul acte normatif, la loi n° 302/2004 sur la coopération judiciaire internationale en matière pénale. Le législateur roumain n'a pas choisi de transposer chacune de ces décisions-cadres dans un acte normatif individuel, en considérant que tous ces instruments réglementent des formes spécifiques de coopération en matière pénale qui peuvent être transposées dans la loi cadre en ce domaine.

En principe, la loi interne de transposition a respecté la lettre et l'esprit des décisions-cadres. Par exemple, en ce qui concerne le MAE, le système roumain l'a distingué nettement de la procédure d'extradition. Ainsi, le titre II de la loi n° 302/2004 traite de l'extradition et le titre III du MAE. L'idée de considérer le MAE comme une forme spécifique d'extradition a ainsi été rejetée. En conséquence, la loi de transposition a repris aussi la terminologie utilisée par la DC sur le MAE : *autorité judiciaire d'émission, autorité d'exécution*, *remise*.

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[4] *JO*, n° L 196, 2 août 2003, p. 45

[5] *JO*, n° L 76, 22 mars 2005, p. 16.

[6] *JO*, n° L 328, 24 novembre 2006, p. 59.

[7] *JO*, n° L 307, 24 novembre 2007, p. 18-19.

Pourtant, la transposition des trois autres décisions-cadres par la loi n° 222/2008 peut être mise en doute quant à la systématisation choisie par le législateur. Ainsi, ces trois décisions-cadres ont été transposées dans le chapitre II (« dispositions concernant l'entraide judiciaire applicable dans les relations avec les EM de l'UE ») du titre VII de la loi n° 302/2004 (« l'entraide judiciaire en matière pénale »). Dans ce chapitre, le législateur a introduit les sections suivantes : section I – dispositions concernant l'application de la convention pour l'application de l'accord de Schengen ; section II – dispositions concernant l'application de la convention relative à l'entraide judiciaire en matière pénale entre les EM de l'UE ; section III – dispositions concernant la transposition de la décision-cadre relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve ; section IV – dispositions concernant la transposition de la décision-cadre concernant l'application du principe de RM aux sanctions pécuniaires *;* section V – dispositions concernant la décision-cadre relative à l'application du principe de RM aux décisions de confiscation.

A la distinction nette entre le MAE et l'extradition, s'oppose la conception du législateur roumain sur les trois autres décisions-cadres, conception en vertu de laquelle la coopération avec les autres EM afin d'exécuter les décisions de gel de biens ou d'éléments de preuve, les décisions concernant les sanctions pécuniaires et les décisions de confiscation représente une forme d'entraide judiciaire.

En général, la formulation des dispositions de la loi roumaine est très proche du texte original des décisions-cadres. La transposition a été accomplie d'une manière formelle et le législateur roumain n'a pas apporté de modifications substantielles aux dispositions des instruments européens. Cette manière de transposer a été soutenue aussi par le fait que l'implémentation du principe de RM dans le système roumain n'a pas provoqué de véritables débats et discussions. Il ressort des travaux parlementaires lors de l'adoption de la loi n° 302/2004 et de la loi n° 222/2008 qu'aucun problème juridique de fond n'a été soulevé, la transposition de l'acquis communautaire étant perçue comme *obligatoire*.

Toutefois, ce mode de transposition des normes européennes peut soulever des problèmes quant à leur corrélation avec les normes applicables aux procédures nationales. Par exemple, la transposition de la décision-cadre relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve n'a pas été mise en accord avec le Code de procédure pénale qui ne connaît pas la notion de *gel d'éléments de preuve*. En conséquence, la procédure applicable est celle de *saisie*, procédure réglementée par le Code roumain de procédure pénale. Pourtant, cette interprétation a pour conséquence une distinction importante entre la procédure nationale et celle qui est amorcée dans un autre EM. Dans la procédure nationale, pendant la poursuite pénale, il n'y a aucune voie de recours devant un juge contre l'ordre de saisie émis par le procureur. En conséquence, lorsque la Roumanie agit en tant qu'Etat d'émission, l'ordre du procureur ne peut pas être contesté devant un juge. En revanche, quand la Roumanie devient Etat d'exécution, le législateur a réglementé le recours contre un tel ordre, recours qui est formé devant le Tribunal départemental. Mais, en ce qui concerne les garanties procédurales, le législateur doit imposer le même niveau de protection pour toutes les procédures qui ont lieu dans l'Etat roumain et, par conséquent, il aurait été préférable de mettre en accord les dispositions adoptées pour la mise en œuvre

des instruments européens et les dispositions du Code pénal ou du Code de procédure pénale.

2. L'interprétation du principe de RM en droit interne

A. La réglementation du principe de RM dans la loi

Le principe de la RM est mentionné de façon explicite par l'article 77 de la loi n° 302/2004 telle que modifiée par la loi n° 222/2008, selon lequel : « (1) Le MAE est une décision judiciaire par laquelle une autorité judiciaire compétente d'un Etat membre de l'UE demande l'arrestation et la remise d'une personne par un autre Etat membre en vue de l'exercice d'une poursuite pénale, d'un jugement ou pour l'exécution d'une peine ou d'une mesure privative de liberté ; (2) Le MAE est exécuté sur la base du principe de reconnaissance et confiance mutuelles, conformément aux dispositions de la décision-cadre du Conseil 2002/584/JAI du 13 juin 2002, publiée dans le *Journal officiel des Communautés européennes*, n° L 190/1 du 18 juillet 2002 ».

Les dispositions qui transposent les trois autres décisions-cadres ne contiennent aucune référence explicite au principe de RM.

Au-delà de cette mention explicite de l'article 77 concernant le MAE, les dispositions de la loi sur la coopération judiciaire ne donnent aucune définition du principe de RM et ne précisent pas son contenu. Dans ces conditions, c'est la tâche de la doctrine et de la jurisprudence d'interpréter ce principe. On peut remarquer toutefois que le législateur roumain a mentionné aussi la *confiance*, à côté de la notion de *reconnaissance mutuelle*.

Comme les trois autres décisions-cadres mentionnées (relatives à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve, à l'application du principe de RM aux sanctions pécuniaires *et* à l'application du principe de RM aux décisions de confiscation) viennent d'être transposées en droit roumain, il n'y a pas pour l'instant de jurisprudence relative à celles-ci. C'est la raison pour laquelle nous ferons référence uniquement à des décisions judiciaires concernant le MAE.

B. L'approche des magistrats sur le principe de RM

La majorité des magistrats roumains estiment que l'analyse du principe de RM est peu développée dans la jurisprudence, tout en admettant qu'il est généralement accepté par les autorités judiciaires roumaines, notamment en relation avec le MAE.

En ce qui concerne la définition du principe, ils considèrent que la RM doit avoir pour conséquence la possibilité qu'une décision en matière pénale rendue par une autorité judiciaire d'un Etat membre produise ses effets dans tous les autres EM sans être soumise à des formalités inutiles ou à l'examen de conformité avec l'ordre juridique de l'Etat qui la reçoit. En d'autres mots, même si un Etat membre ne suit pas une procédure identique, les résultats obtenus doivent être équivalents. En ce sens, en vertu du principe de reconnaissance et de confiance mutuelles, les autorités judiciaires saisies de l'exécution d'un MAE ne peuvent pas apprécier la culpabilité de la personne qui fait l'objet du mandat, la gravité des faits imputés à cette personne, ou le bien-fondé des accusations portées contre elle, car ces appréciations relèvent de la compétence exclusive des autorités judiciaires qui ont émis le mandat.

Le principe de la RM implique donc le fait que chaque autorité judiciaire nationale reçoit et exécute, sous réserve de certaines formalités minimales, la demande de remise d'une personne formulée par une autorité judiciaire appartenant à un autre Etat membre. Ainsi, le MAE fait l'objet d'un simple contrôle de légalité sans être soumis à des conditions de conformité avec le système judiciaire de l'Etat d'exécution [8].

C. L'interprétation du principe par la jurisprudence

Dès l'entrée en vigueur des dispositions relatives au MAE, le principe de RM a été constamment contesté devant la Haute Cour de Cassation et de Justice (ci-après HCCJ), qui s'est vue ainsi obligée à procéder à son interprétation. En même temps, le principe a fait aussi l'objet d'une interprétation donnée par la Cour constitutionnelle.

Par l'arrêt n° 4045/2007, la HCCJ a jugé que « En vertu du principe de reconnaissance et de confiance mutuelle, tel que posé par l'article 77, al. 2 de la loi n° 302/2004, constater l'existence des faits reprochés et le bien-fondé des accusations portées contre la personne en cause ne relève pas de la compétence de la Cour d'Appel saisie de l'exécution d'un mandat d'arrêt européen » [9].

Dans le même sens, par l'arrêt n° 2862/2007, la Haute Cour a décidé que les juridictions roumaines en tant qu'autorités d'exécution n'ont la compétence de statuer ni sur le bien-fondé des poursuites par les autorités judiciaires de l'Etat membre d'émission ni sur l'opportunité de la mise en détention provisoire de la personne qui fait l'objet du MAE, car un tel examen enfreindrait le principe de reconnaissance et de confiance mutuelles [10].

Par conséquent, aux yeux de la Haute Cour roumaine, en vertu du principe de RM, l'Etat d'exécution est obligé de se borner à vérifier si les conditions légales pour l'émission du mandat sont réunies. Donc, les autorités judiciaires roumaines en tant qu'autorités d'exécution ne peuvent refuser la remise de la personne qui fait l'objet du mandat que dans les hypothèses réglementées par l'article 88 de la loi n° 302/2004, dispositions qui transposent les motifs de non-exécution réglementés par la DC [11].

Quant à la Cour constitutionnelle [12], la première référence au MAE est celle faite dans l'arrêt n° 134/2007. La Cour a considéré que « pour la Roumanie, après l'adhésion à l'UE, le MAE est la clé de voûte de la coopération judiciaire fondée sur le principe de RM des décisions pénales. D'ailleurs, l'objectif poursuivi par la décision-cadre du Conseil de l'Union européenne du 13 juin 2002, c'était d'une part la création d'une procédure simplifiée, destinée à remplacer la procédure formaliste

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[8] C. S. Muntean, «Mandatul european de arestare. Un instrument juridic apt să înlocuiască extrădarea », *Caiete de drept penal*, 1/2007, p. 99.

[9] HCCJ, chambre criminelle, arrêt n° 4045 du 30 août 2007, www.scj.ro.

[10] HCCJ, chambre criminelle, arrêt n° 2862 du 28 mai 2007, www.scj.ro. En même sens, HCCJ, chambre criminelle, arrêt n° 2885 du 30 mai 2007, www.scj.ro.

[11] HCCJ, chambre criminelle, arrêt n° 581 du 18 février 2008, www.scj.ro ; HCCJ, chambre criminelle, arrêt n° 5844 du 4 décembre 2007, www.scj.ro.

[12] Pour une synthèse de la jurisprudence de la Cour constitutionnelle en la matière, voir K. Benke, « Mandatul european de arestare in jurisprudenta instantelor constitutionale », *Studia Universitatis Babes-Bolyai*, 1/2007, p. 66 et s.

et rigide de l'extradition prévue par les documents internationaux, et d'autre part la transformation de l'UE en une zone libre de sécurité et de justice » [13].

L'enthousiasme de la Cour constitutionnelle devant le principe de RM et le MAE mérite d'être remarqué d'autant plus que l'arrêt a été rendu suite à une saisine antérieure au 1er janvier 2007, date à laquelle les dispositions relatives au MAE sont entrées en vigueur pour la Roumanie (en effet, l'exception d'inconstitutionnalité avait été soulevée le 5 octobre 2006). Par conséquent, l'arrêt de la Cour constitutionnelle concernait une procédure d'extradition passive et les dispositions législatives applicables dans l'espèce n'avaient rien à voir avec le MAE (selon les dispositions de la loi n° 302/2004, les procédures d'extradition déclenchées avant le 1er janvier 2007 seront traitées selon les dispositions en matière d'extradition).

Quelques mois plus tard, la Cour constitutionnelle a souligné que « le juge roumain décide de l'arrestation de la personne qui fait l'objet du MAE après avoir vérifié les conditions nécessaires pour l'émission du mandat, mais il ne se prononce en aucun cas sur le bien-fondé des poursuites ou de la condamnation prononcée par l'autorité judiciaire étrangère, ou sur l'opportunité de la mise en détention. Par un tel examen le juge porterait atteinte au principe de RM des décisions pénales » [14].

Dans un autre arrêt, la Cour a constaté que « les auteurs de l'exception (d'inconstitutionnalité) partent d'une prémisse erronée, selon laquelle l'autorité judiciaire d'exécution doit se prononcer sur le bien-fondé de la mesure prise par l'autorité judiciaire étrangère. Le MAE est une mesure qui met en œuvre le principe de RM en matière pénale. Dans la logique de la décision-cadre du Conseil 2002/584/JAI du 13 juin 2002 sur le mandat d'arrêt européen et les procédures de remise entre les Etats membres, mise en œuvre en droit interne par la loi n° 302/2004, l'autorité judiciaire de l'Etat membre sur le territoire duquel se trouve la personne qui fait l'objet du mandat peut décider la remise de cette personne sans se prononcer sur le bien-fondé de la mesure préventive ou de la décision judiciaire prononcée dans l'Etat d'émission. (…). La contestation du bien-fondé de cette mesure, c'est-à-dire de la décision judiciaire prononcée dans un autre Etat membre de l'UE aura lieu devant les autorités judiciaires de l'Etat qui a pris la décision en cause, où la personne qui fait l'objet du mandat jouira de toutes les garanties procédurales existantes » [15].

A titre de conclusion, on peut donc souligner que pour la HCCJ ainsi que pour la Cour constitutionnelle roumaine, le principe de RM exclut tout examen de la part des autorités judiciaires de l'Etat d'exécution du bien-fondé ou de l'opportunité des décisions prises par l'Etat membre d'émission. En vertu de ce principe, tel qu'il a été développé par les dispositions législatives internes et par la jurisprudence sur le MAE, l'Etat roumain en tant qu'Etat d'exécution assume la décision judiciaire émise dans un autre Etat membre et met en œuvre cette décision dans les mêmes conditions que ses propres décisions, sur la base du constat que les conditions prévues par la loi sont réunies.

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[13] Sans doute, la Cour a voulu faire référence à l'espace de liberté, de sécurité et de justice, même si la traduction en roumain n'est pas la meilleure.

[14] Cour constitutionnelle, arrêt n° 400 du 24 avril 2007, www.ccr.ro.

[15] Cour constitutionnelle, arrêt n° 419 du 3 mai 2007. En même sens, arrêt n° 1127 du 27 novembre 2007, www.ccr.ro.

3. L'application des dispositions sur le MAE en Roumanie

A. La compatibilité du MAE avec les dispositions constitutionnelles relatives à l'extradition des citoyens roumains

Les dispositions de l'article 19 de la Constitution, telle que modifiée suite à la révision de 2003, permettent l'extradition des citoyens roumains si les trois conditions suivantes sont réunies : a) l'extradition est prévue par une convention internationale ratifiée par la Roumanie ; b) la réciprocité est assurée ; c) les conditions spéciales prévues par la loi sont satisfaites.

Comme la révision de la Constitution a été réalisée quelques années avant l'adhésion de la Roumanie à l'UE la doctrine considère que cette modification constitutionnelle a été réalisée justement dans cette perspective [16]. A son tour, la Cour constitutionnelle a jugé que « dans le but de répondre à certaines exigences de l'acquis communautaire liées à la lutte contre le terrorisme, la criminalité transnationale, la criminalité organisée, le trafic de drogues et la traite d'êtres humains, il est nécessaire de nuancer l'interdiction constitutionnelle relative à l'extradition des citoyens roumains » [17].

Le seul aspect qui aurait mérité une analyse est lié à la première condition posée par l'article 19 de la Constitution – la remise en vertu d'une convention internationale. En effet, la DC n'est pas une convention, ce qui peut créer une apparence d'inconstitutionnalité. En réalité, il ne faut pas oublier que le caractère obligatoire de la DC découle des dispositions de l'article 34 UE, auquel la Roumanie est devenue partie. On peut donc constater que l'obligation de la remise des citoyens roumains dispose d'un fondement conventionnel, ce qui fait que la condition posée par l'article 19 de la Constitution est remplie [18].

Une exception d'inconstitutionnalité fondée sur l'incompatibilité de la remise d'un citoyen roumain qui fait l'objet d'un MAE avec les dispositions de l'article 19 de la Constitution a quand même été soulevée peu de temps après l'entrée en vigueur des dispositions sur le MAE. Comme l'exception n'a pas été accompagnée d'une motivation suffisante, elle a été rejetée par la Cour constitutionnelle sans donner lieu à une analyse approfondie de ce problème [19].

Quelques mois plus tard, la Cour constitutionnelle a été une nouvelle fois appelée à se prononcer sur cet aspect. La Cour a rejeté l'exception d'inconstitutionnalité tout en considérant que les normes qui transposent le MAE dans le droit interne sont conformes à l'article 19 de la Constitution [20]. Dans sa motivation, la Cour a utilisé un argument de droit comparé. La Cour a fait mention de l'évolution du système juridique polonais, en soulignant le fait que la révision de la constitution polonaise a été faite dans le même sens que la révision de la constitution roumaine, et que, à

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[16] E. Boc, *Drepturile omului si libertatile publice*, Accent, Cluj Napoca, 2004, vol. I, p. 79.

[17] Cour constitutionnelle, arrêt n° 148 du 16 avril 2003, www.ccr.ro.

[18] Voy. F. Streteanu, « Cateva consideratii privind mandatul european de arestare », *Caiete de drept penal*, 1/2008, p. 13.

[19] Cour constitutionnelle, arrêt n° 445 du 10 mai 2007, www.ccr.ro.

[20] Cour constitutionnelle, arrêt n° 1127 du 27 novembre 2007, www.ccr.ro.

l'heure actuelle, dans le système juridique polonais la décision-cadre sur le MAE est considérée comme une obligation internationale, la condition constitutionnelle étant ainsi respectée.

Les citoyens roumains bénéficient toutefois d'un statut particulier en ce qui concerne l'application d'un MAE en Roumanie. Dans ce contexte, on peut évoquer deux hypothèses :

a) l'article 87, al. 2 de la loi n° 302 /2004 introduit l'hypothèse de l'article 5, par. 3 de la DC sur le MAE. En vertu de cette disposition de la loi, lorsque la personne qui fait l'objet d'un MAE aux fins de poursuite ou de jugement est un citoyen roumain, la remise est effectuée à condition que la personne, après avoir été condamnée à une peine privative de liberté, soit renvoyée en Roumanie afin d'y purger la peine prononcée à son encontre dans l'Etat membre d'émission.
Contrairement aux dispositions de l'article 5 de la DC, la disposition nationale est impérative. L'exécution du MAE est donc toujours soumise à cette condition lorsque la personne recherchée est un citoyen roumain. Une autre différence par rapport à la DC est que ledit régime spécial n'est pas applicable aux personnes qui résident en Roumanie ; il est en effet réservé aux citoyens roumains.
b) l'article 88 de la loi n° 302 /2004 reprend l'hypothèse inscrite dans l'article 4, par. 6 de la DC sur le MAE en tant que motif facultatif de refus d'exécution. Ainsi, en vertu de cette disposition, la juridiction roumaine peut refuser d'exécuter le MAE aux fin d'exécution d'une peine privative de liberté ou d'une mesure de sûreté privative de liberté si la personne recherchée est un citoyen roumain et si elle refuse explicitement d'exécuter cette peine ou mesure de sûreté dans l'Etat d'émission. Dans ce cas, la peine ou la mesure de sûreté sera exécutée en Roumanie. Comme dans la première hypothèse, ce motif de refus facultatif n'est pas applicable aux simples résidents.

B. L'application dans le temps des normes relatives au MAE

Selon la loi n° 302/2004, les mandats d'arrêt européens émis par les autorités judiciaires compétentes des autres EM seront exécutés par les autorités roumaines quelle que soit la date de l'accomplissement des faits. En ce qui concerne l'exécution d'un MAE, la Roumanie n'a fait aucune déclaration concernant une limitation en raison d'une quelconque date de commission des faits. L'élément essentiel est la date de réception d'un MAE.

En effet, selon la règle transitoire inscrite dans l'article 108, al. 1er de la loi n° 302/2004, les dispositions du titre III de cette loi sont applicables aux mandats d'arrêt européens émis après l'entrée en vigueur de ces dispositions (1er janvier 2007), même si les mandats concernent des faits commis antérieurement.

Le texte mentionné laisse quand même la place à des incertitudes à l'égard des mandats émis par une autorité étrangère avant le 1er janvier 2007. La jurisprudence a interprété le texte d'une façon permettant l'exécution de ces mandats. Selon un arrêt de la HCCJ, les dispositions transitoires inscrites dans l'article 108 de la loi n° 302/2004, ne concernent pas les mandats émis par les autorités judiciaires compétentes des autres EM, mais les mandats d'arrêt européens émis par les autorités judiciaires

roumaines [21]. De date récente, cette interprétation a été imposée par la HCCJ à toutes les instances judiciaires roumaines, par le biais d'un arrêt rendu sur un recours dans l'intérêt de la loi. Selon la Haute Cour, « la formule *qui sont émis ultérieurement à son entrée en vigueur* employée par ce texte (article 108) concerne les mandats d'arrêt européens émis par les autorités roumaines après le 1er janvier 2007 et non ceux qui sont émis par les autorités étrangères et transmis aux autorités roumaines en vue de leur exécution » [22].

En conséquence, même les mandats émis avant la date de l'adhésion de la Roumanie à l'UE seront exécutés, à la condition qu'ils aient été transmis aux autorités roumaines après le 1er janvier 2007.

La réglementation nationale prévoit donc l'application immédiate des dispositions relatives au MAE, y compris à l'égard des faits commis avant l'entrée en vigueur des dispositions législatives nationales en la matière. Un problème d'inconstitutionnalité potentiel a été ainsi soulevé, car selon l'article 15, al. 2 de la Constitution, « la loi dispose seulement pour l'avenir, à l'exception de la loi pénale et contraventionnelle la plus douce ». La Cour constitutionnelle a pourtant décidé que l'interdiction de l'application rétroactive posée par la Constitution n'a pas été violée. Aux yeux de la Cour, « le fait que les infractions pour lesquelles les mandats ont été émis peuvent être antérieures à l'entrée en vigueur des nouvelles réglementations ne confère pas un caractère rétroactif à ces normes, car il s'agit de normes procédurales, domaine dans lequel la loi nouvelle est d'application immédiate » [23].

C. L'autorité judiciaire compétente

Selon l'article 6 de la DC, les autorités impliquées dans la procédure d'émission et d'exécution d'un MAE doivent être des autorités judiciaires, plus précisément des autorités habilitées à émettre ou à mettre en exécution un mandat d'arrêt selon les dispositions du droit national.

Conformément à l'article 12 de la DC, lorsqu'une personne est arrêtée sur la base d'un MAE, l'autorité judiciaire d'exécution décide s'il convient de la maintenir en détention conformément au droit de l'Etat membre d'exécution. A partir de ce texte, on est arrivé à la conclusion que l'autorité d'exécution désignée par un Etat membre doit être une autorité compétente pour décider du maintien en détention de la personne qui fait l'objet du mandat [24].

En application de cette règle, l'article 78 de la loi n° 302/2004 dispose : « (1) En Roumanie sont désignées en tant qu'autorités judiciaires d'émission les juridictions ; (2) Les autorités judiciaires roumaines d'exécution sont les Cours d'Appel ; (…) ; (3) L'autorité centrale est le ministère de la Justice (…) ». Le texte distingue ainsi clairement entre les autorités d'émission et d'exécution qui sont toujours des juridictions, et l'autorité centrale, qui est une autorité administrative (le ministère de la Justice).

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[21] HCCJ, chambre criminelle, arrêt n° 1517 du 19 mars 2007, www.scj.ro.

[22] HCCJ, assemblée plénière, arrêt n° 3 du 21 janvier 2007, www.scj.ro.

[23] Cour constitutionnelle, arrêt n° 445 du 10 mai 2007, www.ccr.ro.

[24] C. S. Muntean, *op. cit.,* p. 103.

En droit roumain, le placement en détention provisoire ne peut être décidé que par un juge, le procureur n'ayant aucune compétence de décision en ce sens. Cette solution s'est imposée suite à l'arrêt de la Cour européenne des droits de l'homme rendu dans l'affaire *Pantea c. Roumanie*[25]. Dans cet arrêt, la Cour a constaté que le procureur roumain n'est pas un magistrat indépendant et impartial et, par conséquent, il ne peut pas être considéré comme une autorité judiciaire compétente pour décider du placement en détention provisoire. Lors de la révision constitutionnelle de 2003, on a inscrit dans le texte de la loi fondamentale que « le placement en détention provisoire est décidé par le juge et uniquement durant le procès pénal » (article 23, al. 4). Le procureur reste compétent pour ordonner le placement en garde à vue pour une durée de 24 heures au plus.

En conséquence, seules les juridictions sont habilitées à émettre un mandat d'arrêt national et aussi, selon l'article 78 de la loi n° 302/2004, un MAE. Conformément aux dispositions du Code de procédure pénale, durant la phase des poursuites la mise en détention provisoire peut être décidée, soit par un juge du tribunal qui aurait la compétence de jugement en premier ressort, soit par un juge du tribunal dont la compétence s'exerce sur le lieu où la personne en cause est placée en garde à vue, sur le lieu de l'accomplissement de l'infraction ou sur le lieu où se trouve le siège du parquet auquel appartient le procureur chargé de l'affaire. Dans ces dernières hypothèses, la compétence revient au tribunal de même niveau que celui qui a la compétence de jugement en premier ressort. En raison des règles sur la compétence matérielle, le tribunal compétent pour émettre le mandat d'arrêt européen peut être le tribunal de première instance (*judecătoria*), le tribunal départemental, la Cour d'appel ou la Haute Cour de Cassation et de Justice.

Durant le jugement, le placement en détention provisoire est décidé par le tribunal saisi de l'affaire, de sorte que la compétence peut appartenir au tribunal de première instance (*judecătoria*), au tribunal départemental, à la Cour d'appel ou à la HCCJ.

En ce qui concerne les mandats d'exécution d'une peine, la compétence appartient toujours aux juridictions. Selon l'article 418 du Code de procédure pénale, la décision définitive de condamnation sera mise en exécution par l'instance ayant statué en premier ressort. Les décisions prononcées en premier ressort par la HCCJ seront mises en exécution par le Tribunal de Bucarest ou, selon le cas, par le Tribunal militaire territorial ayant son siège à Bucarest.

Enfin, selon l'article 78 de la loi n° 302/2004 les Cours d'appel sont désignées en tant qu'autorités d'exécution des mandats d'arrêt européens émis par les autorités des autres EM. La compétence territoriale de la Cour d'appel est déterminée par le lieu du domicile de la personne qui fait l'objet du mandat ou par le lieu où cette personne a été identifiée. Contre les décisions d'une Cour d'appel, on peut interjeter un recours devant la HCCJ. De ce point de vue, l'option du législateur roumain de conférer la compétence d'exécuter un MAE aux Cours d'appel est opportune parce qu'elle permet l'intervention de la Haute Cour en cas de recours, ce qui permet d'assurer une interprétation uniforme des dispositions concernant la mise en exécution d'un MAE.

[25] Cour eur. DH, 3 juin 2003, *Pantea c. Roumanie*.

D. La double incrimination du fait

En suivant les règles posées par la DC, le législateur roumain a prévu que la condition de la double incrimination n'est pas requise et que la remise sera accordée par la Cour d'Appel roumaine compétente lorsque le mandat a été émis pour l'une des infractions mentionnées à l'article 85 de la loi n° 302/2004. Il est pourtant nécessaire que l'infraction en cause, quelle que soit sa qualification selon la loi de l'Etat membre d'émission, soit punie conformément à la législation de cet Etat d'une peine ou d'une mesure de sûreté privative de liberté d'un maximum d'au moins trois ans. Le texte de l'article 85 reprend de manière fidèle la liste de l'article 2 de la DC, en disposant que :

> « (1) Lorsqu'un mandat d'arrêt européen a été émis pour l'un des faits ci-dessous énumérés, quelle que soit la qualification de l'infraction dans l'Etat membre d'émission, et lorsque l'infraction est punie selon la législation de cet Etat d'une peine ou d'une mesure de sûreté privative de liberté d'un maximum d'au moins trois ans, la remise sera accordée même si la condition de la double incrimination n'est pas satisfaite : 1) participation à une organisation criminelle ; 2) terrorisme ; 3) traite des êtres humains ; 4) exploitation sexuelle des enfants et pédopornographie ; 5) trafic illicite de stupéfiants et de substances psychotropes ; 6) trafic illicite d'armes, de munitions et d'explosifs ; 7) corruption ; 8) fraude, y compris la fraude portant atteinte aux intérêts financiers des Communautés européennes au sens de la convention du 26 juillet 1995 relative à la protection des intérêts financiers des Communautés européennes ; 9) blanchiment du produit du crime ; 10) faux-monnayage, y compris la contrefaçon de l'euro ; 11) cybercriminalité ; 12) infractions contre l'environnement, y compris le trafic illicite d'espèces animales et végétales menacées ; 13) aide à l'entrée et au séjour irréguliers ; 14) homicide volontaire, coups et blessures graves ; 15) trafic illicite d'organes et de tissus humains ; 16) enlèvement, séquestration et prise d'otage ; 17) racisme et xénophobie ; 18) vols organisés ou avec arme ; 19) trafic illicite de biens culturels, y compris antiquités et œuvres d'art ; 20) escroquerie ; 21) racket et extorsion de fonds ; 22) contrefaçon et piratage de produits ; 23) falsification de documents officiels et usage de faux [26] ; 24) falsification de moyens de paiement ; 25) trafic illicite de substances hormonales et autres facteurs de croissance ; 26) trafic illicite de matières nucléaires et radioactives ; 27) trafic de véhicules volés ; 28) viol ; 29) incendie volontaire ; 30) crimes relevant de la juridiction de la Cour pénale internationale ; 31) détournement d'avions ou de navires ; 32) sabotage ».

Malgré le fait que le législateur roumain n'a pas inclus dans la liste des références à des infractions déterminées, mais à des catégories d'infractions comme dans la décision-cadre, jusqu'à présent aucun problème de constitutionnalité lié au respect du principe de légalité n'a été constaté par la Cour constitutionnelle. En 2008, ce problème d'inconstitutionnalité a été soulevé devant la Cour par un requérant qui faisait valoir que l'article 85 de la loi n° 302/2004 ne règlemente pas le contenu précis des

[26] La formule utilisée par la décision-cadre « falsification de documents administratifs et trafic de faux » ne couvre pas les mêmes catégories de comportements que celle employée par le législateur roumain.

infractions prévues. Sans avancer une motivation détaillée, la Cour constitutionnelle a rejeté cet argument et a débouté ledit requérant [27].

En ce qui concerne les autres catégories d'infractions que celles mentionnées par le 1er alinéa de l'article 85, le législateur roumain a prévu en 2004 que « la remise peut être subordonnée à la condition que les faits pour lesquels le mandat d'arrêt européen a été émis constituent une infraction au regard de la loi pénale roumaine, quels que soient les éléments constitutifs ou la qualification de celle-ci ». Le fait que la loi roumaine a repris la formule employée par la DC « la remise *peut être* subordonnée » confère un caractère facultatif à la condition de la double incrimination, la Cour d'appel saisie de l'exécution du mandat pouvant apprécier si la remise doit être subordonnée ou non à la vérification de la double incrimination du fait [28]. Dans une autre opinion, le caractère facultatif de la vérification de la double incrimination pour les autres catégories d'infractions que celles mentionnées par le 1er al. de l'article 85 peut être mis en doute. Selon l'auteur, comme le MAE est une espèce d'extradition, il doit être soumis aux règles générales de cette institution, *inter alia*, la double incrimination du fait [29].

Même si le législateur n'a fourni aucune justification, la modification apportée en 2008 à la loi n° 302/2004 a changé la règle. Selon le nouveau libellé de l'article 85 al. 2, « la remise *est subordonnée* » à la condition de la double incrimination du fait. En effet, en vertu de cette modification législative, la double incrimination des faits qui ne figurent pas dans la liste constitue une condition impérative pour l'exécution d'un MAE émis par un autre EM. En conséquence, pour la Roumanie, en matière de MAE, le principe reste le maintien du contrôle de la double incrimination, sauf pour les 32 catégories d'infractions mentionnées dans la liste. Une solution pareille a été choisie lors de la transposition des trois autres décisions-cadres (relatives à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve, à l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires *et* à l'application du principe de reconnaissance mutuelle aux décisions de confiscation).

Concernant cette modification de la règle, on peut remarquer toutefois un manque de cohérence. Le législateur a modifié l'article 85, al. 2 en introduisant le caractère impératif de la double incrimination du fait, mais il a maintenu inchangé l'article 88, al. 2 lettre a) qui fait de la non-réalisation de la condition de la double incrimination un motif de refus optionnel. Face à la modification apportée par la loi n° 222/2008, ce motif de refus facultatif doit être interprété comme un motif de non-exécution obligatoire.

Quant à la condition de la double incrimination, les magistrats roumains considèrent qu'un contrôle obligatoire à cet égard ne fait que mettre des obstacles à la coopération en matière pénale. En même temps, ils estiment qu'une base de données contenant les définitions matérielles nationales des infractions pour lesquelles la condition de la

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[27] Cour constitutionnelle, arrêt n° 424 du 10 avril 2008, www.ccr.ro.

[28] F. Streteanu, *op. cit.,* p. 8 ; I. C. Morar, « Mandatul european de arestare. Context European şi intern », *Curierul Judiciar*, 4, 2005, p. 110.

[29] T. Ştefan, « Recunoaşterea mutuala », *in Cooperarea judiciară în materie penală*, Bucureşti, Editura Didactică şi Pedagogică, 2003, p. 32.

double incrimination a déjà été abolie s'avère bien utile pour faciliter et accélérer la procédure de reconnaissance mutuelle.

E. La clause de territorialité

Conformément aux dispositions de l'article 88, al. 2, lettre e) de la loi n° 302/2004, on est en présence d'un motif de refus de remise lorsque le MAE concerne des infractions qui, selon la loi roumaine, ont été commises sur le territoire de la Roumanie. On doit souligner qu'il s'agit d'un motif de non-exécution facultatif du mandat, dans chaque cas la Cour d'appel pouvant décider si la remise peut être accordée.

Selon l'article 143, al. 2 du Code pénal roumain, l'infraction est considérée comme commise sur le territoire roumain lorsqu'un commencement d'exécution a eu lieu sur ce territoire ou à bord d'un avion ou d'un navire roumain ou lorsque le résultat s'y est produit. Par conséquent, la remise peut être refusée dans l'hypothèse où tous les éléments de l'infraction ont été réalisés sur le territoire roumain mais aussi lorsque l'infraction n'a été commise qu'en partie sur ce territoire.

En général les magistrats considèrent que la clause de territorialité n'implique pas le risque de la restauration d'un motif de refus de remise qui a été expressément supprimé par la DC.

F. Les motifs de non-exécution du MAE

La législation roumaine, en transposant la DC sur le MAE, n'a pas apporté des modifications aux dispositions de celle-ci. La loi n° 302/2004 n'a réintroduit aucune des causes de refus abolies par cet instrument européen et ne prévoit pas de motifs de non-exécution complémentaires. Les motifs de non-exécution qui sont prévus en tant que motifs facultatifs dans la DC ne sont pas rendus obligatoires. La seule exception est celle mentionnée ci-dessus, à savoir l'exigence de la double incrimination des faits non inscrits dans la liste de 32 catégories d'infractions.

Conformément aux dispositions de l'article 88, al. 1er de la loi n° 302/2004, on est en présence d'un motif de non-exécution obligatoire du MAE lorsque :

a) il résulte des informations à la disposition de l'instance judiciaire d'exécution que la personne recherchée a fait l'objet d'un jugement définitif pour les mêmes faits dans un Etat membre de l'UE, à condition que, en cas de condamnation, la sanction ait été exécutée ou soit actuellement en cours d'exécution ou ne puisse plus être exécutée selon la loi de l'Etat de condamnation ;
b) si l'infraction qui est à la base du MAE est couverte par l'amnistie en Roumanie lorsque les autorités roumaines avaient, selon la loi roumaine, compétence pour poursuivre cette infraction ;
c) si la personne qui fait l'objet du MAE ne peut, en raison de son âge, être tenue pénalement responsable des faits à l'origine de ce mandat selon le droit roumain. En conséquence, si la personne recherchée est un mineur qui n'a pas atteint l'âge de 14 ans, sa remise sera refusée car selon la loi roumaine, cette personne ne peut pas être pénalement responsable.

En ce qui concerne les motifs de non-exécution facultatifs, l'article 88 réglemente les hypothèses suivantes :

a) s'il s'agit d'un cas visé à l'article 85, al. 2, lorsque le fait qui est à la base du MAE ne constitue pas une infraction au regard du droit roumain. Toutefois, en matière de taxes et impôts, de douane et de change, l'exécution du mandat d'arrêt européen ne pourra être refusée pour le motif que la législation roumaine n'impose pas le même type de taxes ou d'impôts ou ne contient pas le même type de réglementation en matière de taxes, d'impôts, de douane et de change que la législation de l'Etat membre d'émission. Comme nous l'avons précédemment mis en exergue, suite aux modifications apportées en 2008, ce motif de non-exécution doit désormais être interprété comme un motif impératif.
   De plus, tombent dans le champ d'application de ce motif de refus de remise les infractions inscrites dans la liste prévue par l'article 85, al. 1er lorsque la peine encourue selon la loi de l'Etat d'émission est inférieure à 3 ans ;
b) lorsque la personne qui fait l'objet du MAE est poursuivie en Roumanie pour le même fait que celui qui est à la base du mandat d'arrêt européen ;
c) la personne recherchée a fait l'objet d'un jugement définitif pour les mêmes faits dans un Etat membre de l'UE.
   Dans cette hypothèse, la sanction infligée n'a pas été exécutée et n'est pas en cours d'exécution dans un autre Etat ;
d) si le MAE a été délivré aux fins d'exécution d'une peine ou d'une mesure de sûreté privative de liberté, lorsque la personne recherchée est un citoyen roumain et qu'elle refuse l'exécution de la peine ou de la mesure de sûreté dans l'Etat d'émission ;
e) la personne qui fait l'objet du MAE a été définitivement jugée pour les mêmes faits par un pays tiers qui n'est pas membre de l'UE, à condition que, en cas de condamnation, la sanction infligée ait été subie ou soit actuellement en cours d'exécution, qu'il y ait eu prescription de l'exécution, que l'infraction soit couverte par l'amnistie, ou que la peine ait fait l'objet d'une grâce selon la loi de l'Etat de condamnation ;
f) le MAE porte sur des infractions qui selon la loi roumaine ont été commises sur le territoire roumain ;
g) le MAE porte sur des infractions qui ont été commises hors du territoire de l'Etat membre d'émission et la loi roumaine n'autorise pas la poursuite pour les mêmes infractions commises en dehors du territoire roumain ;
h) conformément à la législation roumaine, il y a eu prescription de l'action pénale ou de la peine et les faits relèvent de la compétence des autorités roumaines ;
i) l'autorité judiciaire roumaine compétente a décidé, soit de ne pas engager des poursuites pour l'infraction faisant l'objet du mandat d'arrêt européen, soit d'y mettre fin, ou la personne recherchée a fait l'objet d'une décision définitive pour les mêmes faits qui fait obstacle à l'exercice ultérieur de poursuites.

Il faut souligner que le législateur n'a offert aucun critère pour l'appréciation de l'opportunité d'un refus d'exécution lorsqu'on est en présence d'un motif de non-exécution facultative du mandat. Par conséquent, les magistrats disposent d'une large marge d'appréciation à cet égard. Compte tenu de la période relativement courte d'application de ces dispositions, il n'est pas possible pour l'instant d'identifier des critères d'application générale développés par la jurisprudence.

On peut quand même dire que les motifs de non-exécution sont interprétés de façon stricte par les instances judiciaires roumaines.

Par exemple, la HCCJ a décidé que

> « la définition donnée à cet acte de procédure ainsi que les normes qui régissent le MAE imposent comme principe fondamental de la coopération judiciaire entre les EM (…) l'obligation de mettre en exécution des mandats d'arrêt européens. C'est seulement dans les cas expressément prévus par la loi que l'autorité judiciaire d'exécution refuse ou peut refuser l'exécution d'un MAE. (…) Par rapport à l'extradition, la procédure mise en œuvre par le MAE simplifie beaucoup les modalités de poursuite internationale des personnes qui ont commis des infractions et oblige au respect du principe de célérité. En conséquence, afin de rendre efficace la coopération judiciaire entre les EM de l'UE et d'assurer une riposte rapide face à la criminalité transfrontalière, les instances judiciaires doivent être prudentes lorsqu'il s'agit de refuser l'exécution d'un MAE » [30].

Les mêmes interprétation et application stricte ont été données aux motifs de remise différée. Selon l'article 97, al. 1er de la loi n° 302/2004, lorsque la personne recherchée est poursuivie ou condamnée par les autorités judiciaires roumaines en raison d'une infraction autre que celle visée par le MAE, l'autorité judiciaire roumaine d'exécution peut, même si l'exécution a été autorisée, différer la remise jusqu'à la fin des poursuites ou de l'exécution de la peine infligée.

Dans l'application de ce texte, la HCCJ a décidé que la remise différée constitue *une possibilité*, *pas une obligation* pour la juridiction d'exécution. L'autorité d'exécution peut rejeter la demande de différer la remise, même si la personne qui fait l'objet du mandat d'arrêt européen est poursuivie par les autorités roumaines. Pour décider de différer la remise on doit prendre en considération, selon la Haute Cour, la gravité des faits sur lesquels porte le MAE par rapport à la gravité des faits qui ont déterminé les poursuites exercées par les autorités roumaines, mais aussi les effets qu'une remise différée peut avoir dans les affaires qui ont déterminé l'émission du mandat. Sur la base de ces critères, la Haute Cour a rejeté la demande de différer la remise d'une personne qui était jugée en Roumanie pour une infraction de faux sur l'identité et de passage illégal de la frontière, infractions considérées d'une gravité bien moindre que les infractions qui ont donné lieu aux poursuites déclenchées par les autorités italiennes et qui ont servi de base pour le MAE (trafic illégal de stupéfiants et participation à une organisation criminelle) [31].

L'analyse de cette jurisprudence développée en application des dispositions législatives sur les motifs de non-exécution du mandat et sur la remise différée nous permet de conclure que la jurisprudence roumaine reconnaît une certaine priorité d'application en faveur du MAE.

G. Le respect des droits fondamentaux

Conformément à l'article 1er, al. 3 de la DC, « La présente décision-cadre ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux

[30] HCCJ, chambre criminelle, arrêt n° 3141 du 12 juin 2007, www.scj.ro.

[31] HCCJ, chambre criminelle, arrêt n° 3611 du 5 juillet 2007, www.scj.ro.

et les principes juridiques fondamentaux tels qu'ils sont consacrés par l'article 6 du traité sur l'UE ». Cette disposition n'a pas été reprise dans la loi interne. De plus, la législation roumaine n'a pas inclus non plus la clause de non-discrimination prévue dans le préambule de la DC sur le MAE.

Mais l'article 77, al. 2 de la loi n° 302/2004 dispose que « le mandat d'arrêt européen est exécuté sur la base du principe de reconnaissance et confiance mutuelles, conformément aux dispositions de la décision-cadre du Conseil 2002/584/JAI du 13 juin 2002, publiée dans le *Journal officiel des Communautés européennes*, n° L 190/1 du 18 juillet 2002 ».

Ainsi, le législateur roumain n'a pas inséré un motif de non-exécution du MAE lié au respect des droits fondamentaux dans le système pénal matériel ou procédural de l'Etat d'émission. On s'accorde pourtant à considérer que la référence à la DC que nous avons citée ci-dessus impose l'obligation de veiller au respect des droits fondamentaux dans toute procédure d'émission et d'exécution d'un MAE. De plus, selon l'article 11 de la Constitution roumaine, les traités ratifiés par le Parlement font partie du droit interne et, selon l'article 20, en matière de droits fondamentaux, ils jouissent d'une priorité d'application par rapport aux normes internes. En conséquence, les droits garantis par la CEDH ainsi que le principe réglementé par l'article 6 UE s'appliquent directement dans les procédures internes.

En revanche, il n'y a pas parmi les magistrats roumains un point de vue unanime sur la question de savoir si la référence aux droits fondamentaux inscrite dans les documents relatifs à la RM impose un contrôle exercé par l'autorité d'exécution sur les garanties procédurales et sur le respect des droits de la défense dans l'Etat d'émission.

Selon une opinion, l'autorité d'exécution doit exercer un contrôle sur les garanties procédurales et sur le respect des droits de la défense dans l'Etat d'émission. Les arguments en faveur de cette solution sont tirés des dispositions de l'article1er, al. 3 de la DC et de celles de l'article 77, al. 2 de la loi n° 302/2004, selon lesquelles les dispositions sur l'exécution d'un MAE ne peuvent pas porter atteinte à l'obligation de respecter les droits fondamentaux tels que prévus par l'article 6 UE. Dans ces conditions, l'autorité d'exécution doit pouvoir vérifier dans chaque cas si la mise en exécution du mandat n'entraîne pas une atteinte aux exigences découlant des articles 5 et 6 de la CEDH, relatifs à la privation de liberté et au droit à un procès équitable. Les magistrats qui partagent ce point de vue reconnaissent toutefois que la réglementation roumaine en vigueur n'autorise qu'un examen sur les conditions de validité du mandat et sur les exceptions ou les motifs de non-exécution soulevés par la personne qui fait l'objet du mandat ou par le ministère public.

D'autres magistrats estiment quand même que la mise en exécution du MAE ne peut pas être autorisée sans procéder à une vérification du respect des garanties procédurales et que l'absence de ces garanties peut être considérée comme un motif de refus de remise.

En ce sens, on peut citer une décision de la Cour d'Appel de Targu Mures, décision aux termes de laquelle l'exécution d'un MAE émis par l'autorité compétente

hongroise a été refusée en considération d'une violation des droits de la défense dans l'Etat d'émission [32].

Dans son arrêt, la Cour d'appel a jugé que l'exécution du MAE n'est pas possible parce que « la personne recherchée qui est en train d'être jugée par le tribunal de première instance de Szentendre a été placée en détention provisoire sans être assistée par un avocat nommé d'office. (…). On doit souligner que la procédure d'exécution d'un MAE est soumise aux dispositions procédurales roumaines et que, suite à la vérification de la légalité et du bien-fondé de l'acte émis par les autorités judiciaires hongroises, on peut constater qu'il y a un cas de nullité absolue qui fait obstacle à l'application des dispositions qui réglementent le MAE en droit interne. Cet aspect doit être abordé non seulement du point de vue des dispositions du titre III de la loi n° 302/2004 et des dispositions de la DC sur le MAE, mais on doit également prendre en compte les dispositions de l'article 6, par. 3, lettres b) et c) de la CEDH. De l'analyse de cette dernière disposition, qui jouit d'une priorité d'application face au droit interne, il ressort que dans la situation où l'accusé n'est pas présent devant la juridiction et il n'a pas un défenseur de son choix, les autorités judiciaires ont l'obligation de nommer un avocat d'office afin de préserver un niveau minimal des droits de la défense. Vu la jurisprudence de la Cour européenne des droits de l'homme et les dispositions nationales qui imposent la condition d'assistance obligatoire pendant la procédure d'émission d'un mandat d'arrêt, la Cour constate que l'acte dont la mise en exécution a été requise est entaché d'une nullité absolue et donc il ne peut pas être exécuté ».

Bien que la Cour d'appel se soit référée non seulement aux dispositions de la CEDH, mais aussi aux dispositions de droit interne, cette décision a fait l'objet de certains commentaires critiques, commentaires dont les arguments principaux font référence au principe de RM [33]. En effet, on peut douter du bien-fondé de cette solution prononcée par la Cour d'Appel de Targu Mures, car les dispositions du droit interne ne peuvent fonder une vérification du respect des droits fondamentaux dans un autre EM. De plus, la raison d'être du principe de RM c'est justement l'exclusion de tout examen de la conformité du mandat aux dispositions du droit interne de l'EM d'exécution.

De l'autre côté se situent les magistrats qui apprécient que le contrôle des garanties procédurales ne relève pas de la compétence de l'autorité d'exécution, car un tel contrôle introduit une limitation dans l'application du principe de confiance mutuelle entre les EM de l'UE. Toute contestation liée au niveau et au contenu des garanties procédurales dans l'Etat d'émission doit être formulée devant les autorités judiciaires de cet Etat.

Cette approche est soutenue par la HCCJ. Dans un arrêt prononcé le 24 janvier 2008, la Cour d'appel de Brasov a déclaré que, vu les dispositions de l'article 1, al. 3 de la DC sur le MAE et de l'article 6 UE, « la cour est obligée de vérifier dans

[32] Cour d'Appel de Targu Mures, 23 juillet 2007, décision citée par I. C. Morar, M. Zainea, *Cooperarea judiciara in materie penala. Culegere de practica judiciara*, Bucuresti, C. H. Beck, 2008, p. 356-358.

[33] I. C. Morar, M. Zainea, *op. cit.*, p. 358-359.

tous les cas si l'exécution d'un MAE est conforme aux garanties prévues par les articles 5 et 6 de la CEDH, concernant la détention provisoire mais aussi le droit à un procès équitable pour le citoyen roumain »[34]. Le procureur a interjeté recours contre cette décision. En admettant le recours, la HCCJ a déclaré que « dans la procédure d'exécution d'un MAE le rôle des juridictions roumaines est limité à la vérification des conditions formelles du mandat – de sorte que les aspects liés à l'existence des faits reprochés et au bien-fondé de la détention provisoire restent en dehors de ces limites –, à la résolution des éventuels problèmes d'identité et à l'application des motifs de non-exécution »[35].

Concernant le respect du droit d'être entendu et des droits de la défense, le législateur roumain a prévu des conditions supplémentaires pour la remise, applicables lorsque le MAE vise à mettre en exécution une condamnation prononcée par contumace.

Conformément aux dispositions de l'article 87, al. 1er, lettre a) de la loi n° 302/2004, « lorsque le MAE a été délivré aux fins d'exécution d'une peine ou une mesure de sûreté privative de liberté prononcée par une décision rendue par défaut ou lorsque la personne concernée n'a pas été légalement citée et informée de la date et du lieu de l'audience qui a mené à la décision rendue par défaut, la remise ne sera exécutée que si l'autorité judiciaire d'émission donne des assurances jugées suffisantes pour garantir à la personne qui fait l'objet du mandat d'arrêt européen qu'elle aura la possibilité d'être jugée à nouveau, en sa présence, dans l'Etat membre d'émission ». De la même façon que la DC, la législation nationale prévoit que cette condition est réalisée si l'Etat d'émission garantit la *possibilité* d'un nouveau jugement. En effet, il ne s'agit pas d'un droit à être jugé de nouveau.

Compte tenu du fait que les dispositions législatives nationales en la matière sont très variées, l'établissement des règles minimales concernant le jugement par défaut et la réglementation des conditions d'exercice du droit à une nouvelle procédure de jugement constitue un moyen important d'assurer l'efficacité du MAE. A cet égard, le système judiciaire roumain offre un bon exemple d'absence de réglementation en matière de jugement par défaut et des conditions dans lesquelles une nouvelle procédure de jugement, en présence de l'inculpé, peut être déclenchée.

H. Le respect des droits de la défense

Conformément à l'article 91 de la loi n° 302/2004, dans la procédure d'exécution d'un MAE dans le système roumain, les droits suivants sont garantis à la personne recherchée : a) le droit d'être informé du contenu du MAE ; b) le droit d'avoir l'assistance d'un défenseur de son choix ou d'un avocat nommé d'office ; c) le droit de se faire assister gratuitement d'un interprète si la personne ne comprend pas ou ne parle pas la langue roumaine.

En ce qui concerne la compatibilité de ces dispositions avec les exigences du droit à un procès équitable, la Cour constitutionnelle a constaté que la réglementation sur le MAE ne porte pas atteinte à ce droit constitutionnel. Selon la Cour, « la mise en

[34] Cour d'Appel de Brasov, arrêt du 24 janvier 2008, arrêt cité dans l'arrêt n° 581 du 18 février 2008 de HCCJ.

[35] HCCJ, chambre criminelle, arrêt n° 581 du 18 février 2008, www.scj.ro.

détention provisoire ordonnée en vue de la remise de la personne recherchée vers un autre Etat membre de l'UE constitue une privation de liberté de caractère temporaire prise en accord avec l'article 23, al. 2 de la Constitution et satisfait pleinement les exigences constitutionnelles posées par l'article 21 de la Constitution [droit à un procès équitable]. La personne concernée jouit de toutes les garanties d'un procès équitable dont on peut mentionner à titre d'exemple la possibilité de faire valoir des motifs de non-exécution obligatoire du mandat, l'audition de la personne mise en détention provisoire, la possibilité de formuler un recours contre la décision de mise en détention etc. »[36].

Devant les autorités judiciaires roumaines a été soulevée aussi une question préjudicielle concernant l'incompatibilité de la réglementation nationale sur le MAE avec les dispositions de l'article1er, al. 3 de la DC, les personnes intéressées sollicitant la saisine de la CJ. L'incompatibilité a été motivée par l'absence de toute référence dans la loi nationale à l'obligation de garantir les droits et les libertés fondamentales telles que prévues par l'article6 UE.

La Cour d'Appel a débouté les requérants de ces demandes, et la HCCJ a rejeté les recours formulés contre les décisions de la Cour d'Appel. Selon la HCCJ, « par rapport aux dispositions de l'article 35, al. 1er UE, la CJ est compétente pour se prononcer par voie préjudicielle sur l'interprétation des décisions-cadres. Par conséquent, les autorités judiciaires nationales ne peuvent pas demander à la CJ de statuer, par voie d'interprétation du droit communautaire, sur la compatibilité des dispositions contenues dans la législation nationale avec le droit communautaire. La tâche de la CJ est d'interpréter le droit communautaire et non pas de l'appliquer dans l'ordre juridique national des EM.

Le titre III de la loi n° 302/2004 ne contrevient pas aux dispositions de la loi n° 157/2005 sur la ratification du traité d'adhésion de la Bulgarie et de la Roumanie à l'UE, car les droits de la défense reconnus à la personne recherchée sont consacrés par la loi n° 302 dans tous leurs aspects. Ainsi, la loi consacre le droit de la personne recherchée d'obtenir des informations sur la procédure à son encontre, la juridiction d'exécution ayant l'obligation de l'informer sur le contenu du MAE dont elle fait l'objet, le droit de formuler des déclarations à l'égard de la demande de l'Etat d'émission, le droit d'être assistée par un avocat de son choix, pour bénéficier d'une assistance juridique qualifiée »[37].

4. L'application des dispositions concernant les décisions de gel de biens ou d'éléments de preuve

Quant aux décisions de gel de biens ou d'éléments de preuve, la loi n° 302/2004 – telle que modifiée en 2008 – dispose dans l'article 187(23) que la décision est émise par le procureur durant la phase des poursuites et par la juridiction saisie de l'affaire pendant le jugement. L'exécution d'une telle décision est confiée au procureur du parquet auprès du Tribunal départemental pendant la phase des poursuites et au

[36] Cour constitutionnelle, arrêt n° 400 du 24 avril 2007, www.ccr.ro.

[37] HCCJ, chambre criminelle, arrêt n° 535 du 14 février 2008 et arrêt n° 583 du 19 février 2008, www.scj.ro.

Tribunal départemental pendant la phase de jugement. La compétence territoriale est déterminée par le lieu où se trouve le bien visé par la décision.

Une réglementation pareille est actuellement prévue par le Code de procédure pénale en matière de gel des biens meubles ou immeubles destiné à réparer le dommage causé par la commission de l'infraction, à faire l'objet d'une confiscation ou à assurer le payement de l'amende. Cette mesure est limitée au niveau national.

La liste des infractions à l'égard desquelles la double incrimination du fait n'est pas exigée est identique à la liste prévue dans le cas du MAE. Pour les autres infractions, l'exécution d'une décision de gel de biens est soumise à deux conditions *sine qua non* : a) la double incrimination ; b) selon la loi roumaine, l'infraction est susceptible de donner lieu à une décision de gel de biens.

De plus, le législateur roumain a prévu trois autres motifs de refus d'exécution :

- le certificat n'est pas produit, n'est pas établi de manière complète ou ne correspond manifestement pas à la décision de gel ;
- le droit roumain prévoit une immunité ou un privilège qui rend l'exécution de la décision impossible ;
- il ressort des renseignements fournis dans le certificat que l'exécution de la décision enfreindrait le principe *non bis in idem*.

Apparemment les trois hypothèses représentent des motifs facultatifs de non-exécution, car la loi dispose que « les autorités roumaines compétentes *ne peuvent refuser* la reconnaissance ou l'exécution de la décision de gel *que dans le cas où* … ». En réalité, compte tenu de la nature des situations prises en compte par le législateur, le refus doit être obligatoire.

5. L'application des dispositions sur la reconnaissance mutuelle des sanctions pécuniaires

Quant à la mise en œuvre de la DC concernant l'application du principe de RM aux sanctions pécuniaires, la loi n° 302/2004 prévoit dans son article 187(34) que

> « le mot *décision*, désigne toute décision définitive infligeant une sanction pécuniaire qui doit être exécutée sur une personne physique ou morale, lorsque la décision a été rendue par : a) une juridiction de l'Etat d'émission en raison d'une infraction pénale au regard du droit de l'Etat d'émission ; b) une autorité de l'Etat d'émission autre qu'une juridiction en raison d'une infraction pénale au regard du droit de l'Etat d'émission, à la condition que l'intéressé ait eu la possibilité de faire porter l'affaire devant une juridiction ayant compétence en matière pénale ; c) une autorité de l'Etat d'émission autre qu'une juridiction en raison d'actes punissables au regard du droit national de l'Etat d'émission en ce qu'ils constituent des infractions aux règles de droit, pour autant que l'intéressé ait eu la possibilité de faire porter l'affaire devant une juridiction ayant compétence en matière pénale ; d) une juridiction ayant compétence en matière pénale, lorsque la décision a été rendue en ce qui concerne une décision au sens du point c) ».

Selon l'article 187(35),

> « (1) Les autorités roumaines compétentes pour émettre une décision sont les juridictions ; (2) Les autorités roumaines compétentes pour mettre en exécution une décision sont les juridictions ; (3) L'autorité centrale pour l'application de l'article 2

al. 2 de la DC est le ministère de la Justice qui a pour rôle d'assister les juridictions et de recevoir et transmettre les décisions dans les cas où le contact direct n'est pas possible ».

En ce qui concerne la double incrimination, l'article 187(40), de la loi reprend de façon fidèle la liste des 39 catégories d'infractions à l'égard desquelles la DC a imposé la suppression de cette exigence. Comme d'habitude, le législateur n'a fait aucun effort pour mettre ces dispositions en accord avec les catégories d'infractions existantes en droit roumain. De plus, certaines erreurs de traduction vont rendre très difficile la tâche des magistrats appelés à appliquer ces dispositions. Par exemple, le « vandalisme criminel », employé par la DC a été traduit par « dommages soumis à la loi pénale ». Pour les infractions non comprises dans la liste, l'absence de la double incrimination empêche la reconnaissance de la décision.

6. L'application des dispositions sur la reconnaissance mutuelle des décisions de confiscation

La nouvelle section de la loi n° 302/2004 visant à mettre en œuvre la DC relative à l'application du principe de RM aux décisions de confiscation dispose dans l'article 187(49) que « le terme *décision de confiscation*, désigne la sanction ou la mesure définitive ordonnée par une juridiction à la suite d'une procédure pénale, aboutissant à la sortie forcée et définitive des biens du patrimoine de celui qui les détient ».

Quant aux autorités compétentes, l'article 187(51) dispose que « (1) Les autorités roumaines compétentes pour émettre une décision de confiscation sont les juridictions ; (2) A l'égard d'une décision de confiscation émise par une autorité judiciaire d'un Etat membre la compétence de mise en exécution appartient au tribunal départemental du lieu où se trouve le bien qui fait l'objet de la confiscation ».

La liste des infractions à l'égard desquelles la double incrimination du fait n'est pas exigée est identique à la liste prévue pour le MAE.

Pour les autres infractions, la reconnaissance et l'exécution de la décision de confiscation sont soumises à la condition que les faits donnant lieu à la décision de confiscation permettraient la confiscation, au regard de la législation roumaine, quels que soient les éléments constitutifs ou la qualification de ceux-ci au regard de la législation de l'Etat d'émission. De nouveau, le législateur s'est contenté d'une simple traduction des dispositions de l'article 6, par. 3 de la décision-cadre 2006/783/JAI sans aucune préoccupation pour le sens et la raison d'être de ce texte. En droit roumain, la confiscation est réglementée en matière pénale et en matière administrative-pénale, mais le texte de la loi n° 302/2004 ne fait aucune distinction à cet égard. Le principal problème qui va donc se poser dans l'application de cette disposition concerne la reconnaissance d'une décision de confiscation prononcée à l'étranger en raison d'une infraction pénale qui ne figure pas dans la liste et qui, selon la loi roumaine, constitue une infraction administrative-pénale. A notre avis, dans ce cas la décision de confiscation ne sera pas exécutée.

Lorsque les faits qui ont donné lieu à la décision de confiscation constituent une infraction pénale au regard du droit roumain, cette condition ne pose pas de problèmes car le code pénal roumain prévoit une sphère assez large de biens qui peuvent faire

objet d'une confiscation. Conformément aux dispositions de l'article 118 du Code pénal en vigueur, seront confisqués :

a) les biens produits par l'accomplissement des faits incriminés par la loi pénale ;
b) les biens utilisés, de quelque manière que ce soit, pour la commission d'une infraction, s'ils appartiennent au délinquant ou à une autre personne si celle-ci avait connaissance du but de leur usage. Cette mesure ne peut pas être ordonnée en cas d'infraction commise par l'intermédiaire de la presse ;
c) les biens produits, modifiés ou adaptés dans le but de commettre une infraction, s'ils ont été utilisés pour l'accomplissement de celle-ci et s'ils appartiennent au délinquant. Lorsque les biens appartiennent à une autre personne, la confiscation est ordonnée si la production, la modification ou l'adaptation a été effectuée par le propriétaire ou par l'auteur de l'infraction avec la permission du propriétaire ;
d) les biens offerts afin d'encourager l'accomplissement d'une infraction ou de récompenser le délinquant ;
e) les biens acquis via l'accomplissement des faits incriminés par la loi pénale, s'ils ne sont pas restitués à la personne lésée et dans la mesure où ils ne servent pas au dédommagement de celle-ci ;
f) les biens dont la possession est interdite par la loi.

7. Conclusions

La transposition des quatre décisions-cadres mentionnées constitue un pas important dans la consécration du principe de reconnaissance mutuelle des décisions judiciaires en droit roumain. C'est maintenant la tâche de la doctrine et de la jurisprudence de signaler les modifications à apporter en vue de l'amélioration de cette réglementation.

Le contexte est favorable au perfectionnement du cadre légal en la matière, car le projet du nouveau Code de procédure pénale vient d'être déposé au Parlement. Même si les dispositions concernant la coopération judiciaire en matière pénale ne seront pas intégrées dans le nouveau code, l'élaboration de celui-ci offre l'opportunité d'harmoniser les normes applicables aux procédures strictement internes et celles concernant les procédures d'exécution des décisions judiciaires émises dans d'autres Etats membres de l'Union européenne.

De plus, dans un futur proche le législateur roumain doit transposer en droit interne les autres décisions-cadres fondées sur le principe de reconnaissance mutuelle récemment adoptées par le Conseil de l'Union européenne, et qui n'ont pas fait l'objet de la loi n° 222 de 2008.

The approach of Swedish practitioners to the principle of mutual recognition in criminal matters

Laura SURANO

1. Introduction

Although a general definition of mutual recognition in criminal matters is regarded as essentially a theoretical exercise, the main characteristics of the principle may be summarised by two essential concepts: equivalence and trust. In other words, the decision adopted by the issuing authority of a Member State should not be questioned and should be executed in the best and fastest way by the executing authority of another Member State.

According to the *explanatory memorandum* which accompanies the Swedish European Arrest Warrant bill (see *infra*), mutual recognition mainly means "acceptance" of a decision taken in another Member State. Also the Swedish Supreme Court points out that mutual recognition is based on a high level of trust and that room for refusal is so limited that there is an obligation to surrender apart from in cases where fundamental rights have been seriously and continuously violated [1].

This chapter seeks to give a brief overview as to how the principle of mutual recognition in criminal matters is perceived in practice by Swedish legal practitioners involved in the application of EU instruments. It is mainly based on interviews carried out with policymakers, judicial authorities and defence lawyers as part of the *study on the future of mutual recognition in criminal matters in the European Union* [2].

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[1] Judgment no. 430-07 of 21 March 2007, *Miroslaw Jan Biszczak* case.

[2] The author would like to warmly thank for their time, openness and essential help all the experts interviewed, in particular: Lars Werkström, Ulf Wallentheim, Per Hedvall, Marie Skåninger, Cecilia Riddselius, Ola Löfgren, Annette von Sydow, Katarina Johansson Welin, Joakim Zetterstedt, Ida Kärnström, Johan Sangborn, Thomas Olsson. Special thanks go to Gisèle Vernimmen-Van Tiggelen for her indispensable support and contribution to this paper. The author apologises for the inherent limits of the exercise due to a lack of knowledge of the

After having outlined the state of play of the principle of mutual recognition in Sweden (2), the chapter deals with the transposition procedure of mutual recognition instruments, dwelling on specific issues related to the European Arrest Warrant (3). Some of the main issues encountered in the practical application of the instruments are then analysed (4).

2. State of play regarding mutual recognition in criminal matters in Sweden

A. Legislation implementing EU instruments

Sweden has so far transposed into domestic legislation two European Union instruments applying the principle of mutual recognition in criminal matters:

– the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States (hereby EAW FD) [3], which was implemented by means of the Act on surrender from Sweden according to the European Arrest Warrant [4] and the Ordinance on surrender to Sweden according to the European Arrest Warrant [5] (both came into force on the 1st January 2004) [6];
– and the Framework Decision on the execution in the European Union of orders freezing property or evidence [7], which was implemented by means of the Act on recognition and execution of European Union freezing decisions [8] (which came into force on the 1st July 2005).

Concerning the implementation of the Framework Decision on the application of the principle of mutual recognition to financial penalties [9], consultation has taken place on the *second bill* [10] and the implementing law is due to be adopted by mid 2009.

Swedish language and inexperience with regard to this particular country, and she assumes sole responsibility for any gaps or inaccuracies in the text.

[3] Council Framework Decision 2002/584/JHA of 13 June 2002 (*OJ*, no. L 190, 18 July 2002, p. 1). The deadline for transposition expired on 31 December 2003.

[4] *Lag om överlämnande från Sverige enligt en europeisk arresteringsorder* (2003:1156) of 30 December 2003.

[5] *Förordning om överlämnande till Sverige enligt en europeisk arresteringsorder* (2003:1178) of 30 December 2003.

[6] The transitional provision concerning the non-applicability of the Swedish EAW Act in relation to a Member State which has not yet implemented the EAW FD (Chapter 8, point 1. of Act 2003:1156) was applied provisionally vis-à-vis Germany following the *Bundesverfassungsgericht* (Federal Constitutional Court of Germany) decision to suspend German law implementing the EAW FD. Nevertheless, that was not intended as an application of the reciprocity principle, but rather the law was constructed in such a way that an extradition request could not be handled as an EAW under those conditions. The result was the same even though the procedure longer.

[7] Council Framework Decision 2003/577/JHA of 22 July 2003 (*OJ*, no. L 196, 2 August 2003, p. 45). The deadline for transposition expired on 2 August 2005.

[8] *Lag om erkännande och verkställighet inom Europeiska unionen av frysningsbeslut* (2005:500) of 17 June 2005.

[9] Council Framework Decision 2005/214/JHA of 24 February 2005 (*OJ*, no. L 76, 22 March 2005, p. 16). The deadline for transposition expired on 22 March 2007.

[10] See *infra* 3.A.1.

Finally, as to the Framework Decision on the application of the principle of mutual recognition to confiscation orders [11], a draft of the *second bill* has recently been launched for consultation.

While the Framework Decision on freezing orders has been implemented, it seems that this instrument does not apply in practice: up until now, the Ministry of Justice has not received any feedback on its application and it is perceived by practitioners as a rather complicated instrument. Therefore, the only mutual recognition instrument currently in application in Sweden is the EAW [12].

B. Mutual recognition and mutual trust: the Nordic cooperation model

Before proceeding with the analysis, it might be useful to briefly refer to the Nordic cooperation mechanisms Sweden is part of. The "Nordic agreements", discussed in an *ad hoc* body called the Nordic Council, are the fruit of many decades of legal and judicial cooperation among the Nordic Countries (Sweden, Denmark, Finland, Norway and Iceland). Particularly active as from the 1960s – and within the framework of a no-borders area with free movement of people since the 1970s – this close and successful cooperation is based on a common approach and shared mentality which fosters a high level of mutual trust among those States on a daily basis. Similar languages, legislation and legal traditions, regular and direct contacts between relevant authorities are the main ingredients of this Nordic cooperation. In particular, communication is an essential element. There is seldom a need for translation or interpretation (as Scandinavian languages, in written and oral form, can be broadly understood by fellow Scandinavians) and a high level of informal contact is ensured, while there is not much red tape.

With regard to the functioning of the Nordic Council, the different ministers usually meet once a year on the basis of a rotating presidency. Several working parties and some *ad hoc* committees (e.g. for the Nordic Arrest Warrant) [13] have been set up over the years, while decisions are prepared by the Steering Committee. Instead of drawing up common formal binding agreements, the Nordic countries are used to adopting similar legislation – following an exchange of drafts – on the basis of informal agreements. As an example, the agreement on enforcement of most final decisions which, as from 1963, does not provide any ground for refusal: despite the lack of obligation to enforce decisions, none of them has ever been refused. Moreover, the possible extension of the agreement to other sentences (e.g. community services) is currently under discussion, as well as new arrangements on pre-trial detention.

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[11] Council Framework Decision 2006/783/JHA of 6 October 2006 (*OJ*, no. L 328, 24 November 2006, p. 59). The deadline for transposition expired on 24 November 2008.

[12] On 15 December 2005, the government submitted a Communication (skr 2005/06:62) to the *Riksdag* (Swedish Parliament) on how the Swedish government agencies concerned have applied and been affected by the new legislation on the EAW. In addition, the EU has decided to evaluate the practical application of the EAW by each Member State (so-called *peer evaluation*). This evaluation took place for Sweden in December 2007 and the report was issued on 28 May 2008 (doc. 9927/08 CRIMORG 79).

[13] Sweden has not yet implemented the Nordic Arrest Warrant.

Following the Nordic cooperation example, the same kind of reciprocal confidence and mutual understanding should be the basis on which EU cooperation in criminal matters can be gradually improved. For this purpose, Sweden would in principle agree to going further at EU level and policymakers are generally in favour of pursuing the path of "enhanced cooperation" among some Member States [14].

3. Transposition of mutual recognition instruments

A. Transposition procedure and competent authorities

1. Role of the Parliament and involvement of practitioners

The procedure by which EU Third Pillar instruments are transposed into national legislation is quite long and elaborate in Sweden. There are two main reasons for this: on the one hand, the broad and ongoing participation of the national Parliament right from the negotiation phase of the instrument at EU level; on the other, the involvement of practitioners at a certain stage.

The Swedish Parliament (the *Riksdag*) is closely associated with the transposition procedure.

Before Sweden lifts its reservation on an EU text at the Council, a *first bill* is sent to the Parliament. The bill is drafted by the government (i.e. the Ministry of Justice) and contains statements about the way they intend to implement the future EU legislation in Sweden. More specifically, it describes the context and impact of the EU instrument on Swedish legislation, the budgetary implications and a constitutionality assessment. The Parliament is asked to answer only one question, that is whether or not it approves the government's adoption of the EU instrument and therefore lifts the parliamentary reservation. It takes Parliament from ten to twelve weeks to reply. The *first bill* is also sent to practitioners for comments and opinions.

In a further stage, following the adoption of the instrument at EU level, the government submits a *second bill* to Parliament. This more extensive and comprehensive document contains the implementing law along with explanations and comments, and it is sent to the relevant stakeholders. All remarks are either taken on board or the reasons why they are not are explained in the *final bill* submitted thereafter to the Parliament. Furthermore, those *explanatory memoranda* can be then used by courts in individual decisions for interpretation purposes.

If the Lisbon Treaty enters into force, this procedure will be replaced by the faster one already in force at present under EU First Pillar matters. Parliament would then only be informed about the government's starting position on each new EU proposal and afterwards regularly updated about the ongoing decision-making process in Brussels.

As mentioned, all relevant stakeholders (i.e. courts, Prosecutor-General Office, Bar Association, etc.) are involved in the transposition procedure, being consulted on both bills.

[14] Some of those interviewed even argued that enhanced cooperation is rather a necessity, even though some obstacles could occur in practice.

As for judges, the International Division of Stockholm District Court is in charge of the examination of mutual recognition instruments and drafts written comments, which are taken into account by the Ministry of Justice later on.

When it is consulted, the Bar Association forwards the documents to one of its specialised members. Afterwards, a committee of three lawyers, chaired by a member of the board, is set up in order to deal with the specific matter and give an opinion [15].

Nevertheless, a defence lawyer interviewed complains about the legislative procedure in Sweden not being very transparent. In his opinion, the projects presented by the ministry are rarely accompanied by an exhaustive explanation about the context and aim of the proposal. As a result, this lack of information might have a negative impact on individual rights.

2. Central Authority and judiciary structure

Concerning the application of mutual recognition instruments, since decisions and communication take place directly between judicial authorities, the role of the Central Authority has declined [16].

In Sweden, the Central Authority is part of the Division for Criminal Cases and International Judicial Cooperation (BIRS) at the Ministry of Justice, which deals with matters related to international judicial cooperation.

The Central Authority assists Swedish and foreign authorities in such matters as international legal assistance in criminal matters, extradition for criminal offences, transfer of enforcement of sentences and transfer of criminal proceedings.

The Division for Criminal Cases and International Judicial Cooperation is also in charge of the legislation on international judicial cooperation in criminal matters and negotiations within the EU (and the Nordic Region, the Council of Europe and the UN) related to this field [17].

With respect to the Swedish judiciary structure, there are three specialised units for international matters in prosecution offices (in Stockholm, Göteborg and Malmö). Two thirds of the cases they deal with are international affairs. On the contrary, the Prosecutor-General Office is not involved daily on individual cases but is only informed about the most difficult ones. Instead, it provides guidance and administers the prosecution service all over the country. The International Unit in the Prosecutor-General Office is made up of five prosecutors and deals with extradition and EAW cases and, occasionally, with mutual legal assistance cases.

Finally, the Stockholm District Court is the only one to have a special division, made up of eight judges, which deals with international cases. Nevertheless, these cases represent no more than 20% of their total case law. For instance, in the past year they have only dealt with about ten cases of EAW.

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[15] The Bar Association is consulted on about 120 draft legislations a year.

[16] *International judicial cooperation – the role of the Central Authority*, fact sheet of the Ministry of Justice, November 2007.

[17] The Division is made up of about 18 people, half of which deal with legislation issues and the other half of which act as a Central Authority.

B. Specific issues related to the EAW

1. Grounds for refusal

According to the Swedish EAW Act implementing the EAW FD, all grounds for refusal are mandatory. The national legislator opted for this solution because of concern about compliance with the principle of predictability. Moreover, it can be argued – and that was also done in the preparatory works leading to the EAW legislation – that the matter is quite new to Swedish practitioners and decisions are supposed to be taken within a limited period of time. It was then considered to be reasonable to simplify the courts' decision-making process by making all grounds for refusal in the EAW Act mandatory.

However, in practice it is up to the courts – on the basis of information provided by the prosecutor – to assess whether or not a given condition exists. A prosecutor has only a wide margin as to open or close a national case with regard to Art. 4(2) of the EAW FD [18]. For instance, in case of ongoing proceeding in Sweden, there is not automatic refusal, but rather a decision taken by the local prosecutor on whether or not to refuse executing the EAW and proceeding instead with the case. Furthermore, although in principle proceedings could be started after reception of an EAW, the prosecutor would not normally do it. Also, the enforcement of the sentence instead of surrender of the person requested is in practice usually subject to a request by the person concerned.

The impression is that, in general, Swedish practitioners are, on the one hand, troubled by the absence of "soft" grounds for refusal in EAW cases (*ordre public*, humanitarian reasons, etc.); but, on the other hand, they feel reassured by the fact that the Swedish EAW Act contains a full and comprehensive regulation of the grounds for refusal.

When asked about the reason why there are more grounds for refusal in mutual recognition instruments than in traditional mutual legal assistance conventions, a judge interviewed argued that the grounds for refusal expressed in mutual recognition instruments, directly or indirectly, are exhaustive. This enables the parties involved to foresee what elements will be relevant in the procedure and to take the steps necessary to act or argue in the case. The traditional mutual legal assistance instruments, on the contrary, leave a greater margin of discretion for the requested State. As a result, the process under that regime is less foreseeable.

As for the Framework Decision on the European Evidence Warrant [19], Sweden shall not make use of all the grounds for refusal in the future implementing law, or at least that was the intention indicated by the Ministry of Justice in the *first bill* submitted to the Parliament.

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[18] "The executing judicial authority may refuse to execute the European Arrest Warrant: (…) where the person who is the subject of the European Arrest Warrant is being prosecuted in the executing Member State for the same act as that on which the European Arrest Warrant is based".

[19] 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*, no. L 350, 30 December 2008, p. 72).

2. Status of nationals

According to the Swedish EAW Act, only Swedish citizens may benefit, on request, from the enforcement of the sanction in Sweden instead of the surrender (Art. 4(6) of the EAW FD), and the implementation of the return clause (Art. 5(3) of the EAW FD). Section 6, Chapter 2 of the Act 2003:1156 states that: "When the person whose surrender is requested for execution of a custodial sentence or detention order is a Swedish national, surrender may not be granted if the person concerned demands that the sanction be enforced in Sweden". And Section 2, Chapter 3 says that: "Surrender of a Swedish national for the purpose of conducting a criminal prosecution may, if the requested person demands execution in Sweden of any custodial sentence or detention order imposed after surrender, be approved only if the issuing judicial authority provides guarantees that the requested person will be returned to Sweden for such execution". Furthermore, the return clause is not conditioned by the way the sentence will be served and, up to now, has been accepted even if the sentence would have been lower in Sweden as the executing Member State.

Therefore, residents in Sweden are generally excluded from the different treatment allowed to Swedish nationals. Despite the general openness of Sweden on the matter, this issue seems to be sensitive more from a political point of view than from a legal one. Nevertheless, the competent Swedish authorities are aware of possible future developments in European Court of Justice case law on this matter and keep a close eye on it.

Nordic citizens are also not formally assimilated as Swedish nationals. In fact, Sweden has never implemented the declaration annexed to the 1957 Council of Europe Convention on Extradition which provided for an equal treatment of all Nordic citizens. This question was raised again in the context of the 1996 European Union Convention on Extradition (ratified by Sweden in 2000), but Swedish authorities opted not to incorporate this provision in an EU context.

3. Proportionality check and mutual recognition of pre-trial decisions

Although in Sweden the legality principle applies, a proportionality check shall be carried out by the Swedish judicial authorities before issuing a warrant. In accordance with Section 5 of the 2003:1178 Ordinance implementing the EAW FD in the matter of surrender to Sweden, "A Swedish arrest warrant may only be issued if it appears justified to do so in view of the nature and seriousness of the crime and the circumstances in general, and when the harm to the individual and the delay and costs that can be expected in the case are taken into account".

In practice, there is a double proportionality test. The first one is made by the court when the person is summoned before getting a detention order, and the second one is made by the prosecutor before issuing an EAW. Though summonses are regarded as related to a fundamental right, they are effectively conceivable only when a known address abroad exists. Otherwise the detention order is issued *in absentia* and a defence lawyer, designated by the judge, attends the hearing before the court decision. However, Sweden is also in a position to execute an EAW where no summons was made in the issuing State.

As far as the execution of EAW for *de minimis* cases is concerned, Sweden is used to executing all the warrants without any distinction since no ground for refusal refers to this question. Nevertheless, several experts interviewed consider that some Member States should reduce the issuing of EAW for old and/or petty crimes [20].

Moreover, Sweden does not seem to encounter any particular problem on mutual recognition of pre-trial decisions. Although final decisions are more easily recognised, an EAW issued – even by a non-judicial authority (i.e. police) – at an early stage of investigation when no formal charge or summons have been issued yet is usually recognised and executed by Swedish authorities.

Sweden has indeed understood the principle of mutual recognition as leaving it to the issuing State to determine whether or not there is a reason to issue an EAW. The decision to issue may be taken at a very early or a very late stage of the issuing State's proceedings and, in that opinion, also in proceedings after appeal and where the requested person is subjected to a new trial. The important issue here is whether the issuing State might produce a decision in accordance with Art. 8 (1)(c) of the EAW FD [21].

4. Practical application of the EAW and other judicial cooperation instruments

Formally considered as an adversarial system, the Swedish criminal proceeding is rather a "mixed system": on the one hand, the trial phase is mostly adversarial while, on the other hand, the inquisitorial aspects are still prominent in the investigation phase where the defence has limited powers. Investigations are generally held by the police, unless for serious crimes or as soon as a suspect is identified where the police acts under the prosecutor's control.

Prosecutors have quite wide powers. They may take all the decisions related to the investigation phase except for issuing detention orders, where the court must decide. Nevertheless, measures ordered by prosecutors (e.g. search, seizure, freezing, etc.) might be challenged before the court, which is responsible for remedies.

In the following paragraphs, some particular issues regarding the practical application of the EAW and other judicial cooperation instruments will be briefly presented.

A. EAW: grounds for refusal, dual criminality and supervision instead of detention

Despite the fact that the grounds for refusal are mandatory, under some circumstances a margin of discretion is still applied. For instance, following a request from a Member State, in the event that the same facts are already being investigated in Sweden, the local leading prosecutor would decide whether to pursue the matter in Sweden or drop the proceeding in favour of the issuing State.

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[20] In order to discuss in particular the proportionality problem in issuing EAW, a delegation of Swedish prosecutors met their Polish colleagues in Warsaw at the beginning of 2008.

[21] (Content and form of the EAW): "The EAW shall contain the following information (…): evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2".

The territorial clause does not seem to be applied in practice very often as a ground for refusal. None of those interviewed gave any example of a case where it had been applied.

On the contrary, an example of refusal was provided regarding the expiry of the time limit for prosecution. That is the case of a Swedish citizen requested by Germany for facts committed more than 25 years before. As Sweden had competence, the prosecutor informed German authorities that surrender would not be granted. He also recommended the withdrawal of the EAW, since the person would otherwise be informed, if the case was pursued up to the District Court. If he did not know, and travelled outside Sweden, Germany could have a chance of having him surrendered from another Member State.

As for dual criminality, in case of "listed" offences, in principle Swedish authorities do not check the consistency between the facts and the ticked box: often it is not yet possible to have a definitive view about the offence at this stage of the procedure. Nevertheless, when the offence is not a criminal offence in Sweden (e.g. participation in a criminal organisation), the description of facts in the EAW will be looked at in order to consider whether the person sought could be guilty of another offence (e.g. direct participation in criminal activities).

According to the EAW legislation, only in specific cases may detention be avoided, i.e. when it should be almost obvious that the requested person will not escape or that his or her release would not jeopardise the investigation in the issuing State. Since judges are quite uneasy when facing the commitment of that provision to detain the requested person, the impression is that courts use supervision to a much greater extent than the legislator had in mind. And this is in particular true when it comes to nationals, even though no distinction in respect of nationality should be made according to non discrimination rules.

B. Fundamental rights and procedural guarantees

With regard to the protection of fundamental rights, the experts interviewed share concerns regarding the lack of procedural safeguards. Sweden would be definitely in favour of the approximation of procedural guarantees and individual rights at EU level[22]. In fact, in order to improve cooperation in criminal matters and enhance mutual trust, the EU should start having a common system with common basic rules, a balance between mutual recognition and approximation being essential.

A good example in this direction is the recently adopted Framework Decision *in absentia*[23], which is likely to lead to changes in domestic law in order to avoid a risk of non-recognition of decisions rendered in the absence of the person concerned at the

[22] To this purpose, during the Swedish EU Presidency in the second semester 2009, there is a plan to endorse a new text following the latest version of the Framework Decision discussed in June 2007 which did not succeed (Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU, last version doc. 10287/07 DROIPEN 56 of 5 June 2007).

[23] Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle

trial (so-called "harmonisation by the back door"). However, the difficulties related to the said approximation – due to the considerable differences among Member States' legal systems – are not negligible according to several experts interviewed.

As far as the EAW application in Sweden is concerned, only in two cases have fundamental rights been challenged before the court up to now. In general, practitioners complain about the narrow space provided for human rights control in mutual recognition instruments.

Defence lawyers highlighted in particular the question of compliance with fundamental rights and the rule of law by the executing State, and support the idea of creating a European ombudsman in charge of monitoring the respect of fundamental rights by Member States and delivering opinions on both EU instruments and national laws implementing those instruments.

As far as cross-border cases are concerned, there are no mechanisms in place to ensure continuity of defence, but direct contacts on a case by case basis are facilitated by the respective Bar Associations [24].

Another issue that concerns some Swedish practitioners is the (assumed) lower level of protection of fundamental rights in the new Member States of the EU. However, no concrete sources or examples which could justify this mistrust towards new Member States' judicial systems were produced.

C. Transfer of proceedings and conflicts of jurisdiction

In Sweden, provisions on the transfer of proceedings are given in the Act on international cooperation in criminal proceedings (1976:19). The application of the Act is restricted to the States that have acceded to the 1972 European Convention on the Transfer of Proceedings in Criminal Matters and, as only a few States have ratified it, relatively infrequent use of this Convention is made in practice.

However, domestic legislation of the other country concerned permitting, a transfer of proceedings can occur even in the absence of a convention and without any particular condition. In such cases only the customary rules for criminal proceedings apply.

The Central Authority at the Ministry of Justice has been appointed to send and receive requests for the transfer of proceedings. In cases involving transfers between Nordic countries, which are based on the Nordic cooperation agreement, the public prosecution offices in the countries concerned communicate directly with one another.

In this respect, it must be pointed out that Sweden applies very broad jurisdiction criteria and it even has universal jurisdiction for very serious crimes (where the lowest level of sentence is at least 4 years). But the Prosecutor-General has to agree on the interest in exercising the jurisdiction in the specific case.

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of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

[24] Although, for instance, a Swedish lawyer would be able to defend Swedish citizens in some parts of Finland where Swedish is spoken, in most of the cases a Finnish lawyer shall be preferred.

Asked about the conflicts of jurisdiction issue, the experts interviewed found that a possible solution at EU level on this matter could complement other mutual recognition instruments (including EAW), but should not be in the form of binding arbitration (e.g. from a supranational body such as Eurojust). Improvement of existing mechanisms could be considered since at the present time they are not aimed at solving all cases [25].

D. Transfer of enforcement of sentence

The transfer of enforcement of sentence is regulated in Sweden in the Act on international cooperation in the enforcement of criminal judgments (1972:260) [26]. A special Act contains provisions on the transfer of enforcement of sentence to and from the Nordic States: the procedure provided between those countries is particularly informal and fast.

In principle, a transfer of enforcement of a sentence to Sweden may take place even though the imposed term of imprisonment is more severe than would have been imposed for a similar offence in Sweden. When foreign sentences of this kind are transferred, the Swedish rules for the enforcement of sentences apply, which, among other things, means that a person serving a prison sentence for a set term cannot be conditionally released before two-thirds of the term have been served. The sentence is neither converted (unless it is unknown in Sweden, such as for some measures for mentally ills) nor reduced to the maximum applicable in Sweden. Nevertheless, dual criminality is required.

In the context of an EAW, the EAW Act provides an autonomous legal basis for the transfer back of the sentenced person (Chapter 7).

E. Admissibility of evidence and approximation of rules regarding evidence gathering. The Swedish experience on Joint Investigation Teams

In domestic proceedings, according to the Swedish legal system, the principle of free admissibility and assessment of evidence by the courts applies. Although some forms of gathering evidence are regulated, the principle is interpreted in a very broad sense (insomuch as even illegally obtained evidence could be used in theory). For this reason, the majority of the experts interviewed agree that an approximation of rules regarding evidence gathering at EU level – which would restrict domestic rules – would be very "unfamiliar" to Sweden. In that respect, they rather support the application of the assimilation principle: in fact, in this area, there is not much chance of getting true mutual recognition meant as an obligation or agreement to transfer evidence.

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[25] The Council of the EU recently reached agreement on a general approach for a Member States' initiative on the matter (Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, general approach on 6 April 2009 (8478/09, Press 83), last version doc. 5208/09 COPEN 7 of 20 January 2009).

[26] The Act on international cooperation in the enforcement of criminal judgments (1972:260) is based on Sweden's accession to the 1970 European Convention on the International Validity of Criminal Judgments and the 1983 Convention on the Transfer of Sentenced Persons.

General concerns emerged with regard to the practical implementation of the European Evidence Warrant: even if prosecutors shall be obliged to apply it in certain cases, the problem of the excessive fragmentation of the instruments will still remain [27].

The Framework Decision on Joint Investigation Teams (JIT) [28] was implemented in Sweden by means of the Act on joint investigation teams for criminal investigations (in force since 1st January 2004) [29]. This Act regulates certain forms of cooperation used within the framework of international legal assistance and also in international police work [30].

Notwithstanding Sweden was in favour of the adoption of this instrument, in practice very few JIT (with Finland) have been set up so far directly on the basis of the 2000 EU Convention on mutual legal assistance [31]. The constitution of a team with Germany and Slovenia failed because those countries could not accept that the Swedish part would have been composed of policemen (but the JIT worked anyhow between Germany and Slovenia). However, there is beneficial informal cooperation among Nordic countries. In particular, some permanent teams of police, customs and prosecutors were set up at the border with Norway and meet on a monthly basis. According to a prosecutor interviewed, even though they are not exactly specialised JIT – but rather regional crossborder mechanisms of cooperation where methods, operations and the exercise of jurisdiction are discussed – those teams were also envisaged by Eurojust and Europol in the framework of cooperation among EU Member States.

F. Training for practitioners and feedback on application of the EAW

Notwithstanding the intensive initial training required to practise legal professions (such as judge, prosecutor and defence lawyer), Swedish practitioners ask in general for a more specific initial and continuous training in EU judicial cooperation matters.

In particular, as cases rarely have international connections, defence lawyers are generally not specialised in these matters. The lack of information can be also caused by the lack of a perceived need for information.

On the other side, a special effort is being made to assess the functioning of the EAW.

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[27] In Sweden, the provisions on international legal assistance in criminal matters are mainly contained in the International Legal Assistance in Criminal Matters Act (2000:562). For further details, see the Ministry of Justice website: http://www.regeringen.se/sb/d/2710/a/15268. Supplementary provisions on legal assistance in certain cases are contained in the Act on Joint Investigation Teams for Criminal Investigations (2003:1174), see *infra*.

[28] Council Framework Decision 2002/465/JHA of 13 June 2002 (*OJ*, no. L 162, 20 June 2002, p. 1).

[29] *Lag om gemensamma utredningsgrupper för brottsutredningar* (2003:1174) of 30 December 2003.

[30] The forms of cooperation regulated in the Act are joint investigation teams, controlled deliveries and crime investigations and use of protected identities. For further details, see the Ministry of Justice website: http://www.regeringen.se/sb/d/2710/a/15268.

[31] In 2005, Sweden ratified the EU Convention of 29 May 2000 on mutual assistance in criminal matters and its supplementary Protocol of 2001 (government bill 2004/05:144).

The Ministry of Justice meets three times a year with a group of practitioners, made up of judges, defence lawyers, prosecutors and also police and probation officers, in order to discuss outcomes and problematic issues on the matter.

The Prosecutor-General Office issued a handbook on the practical application of the EAW, which is addressed to legal professionals. This useful tool is regularly updated, pulling together information and experience from the local level. Moreover, some courts have also been working on the drafting of a practical handbook focused on the EAW.

5. Conclusions

The general perception of Swedish practitioners towards the principle of mutual recognition is rather positive.

Judges and prosecutors consider that the main elements of smoothly functioning judicial cooperation in criminal matters are speediness and efficiency. In other words, the measure requested should be effectively and quickly executed by the relevant authority. That is exactly what mutual recognition stands for.

Even though experience is limited to the application of the only instrument fully used in practice, i.e. the European Arrest Warrant, the good results are encouraging and may lead to judicial cooperation being pursued on the same path.

On the other hand, the attitude of defence lawyers seems to be more critical, especially with regard to EU intervention in criminal matters in general. This intervention is often seen as a loss of democratic control in a sensitive and traditionally national issue such as criminal law.

Finally, the majority of practitioners agree that the right balance between mutual recognition and approximation of basic rules should be found in order to improve cooperation in criminal matters and enhance mutual trust within the European Union.

Mutual recognition in the context of Slovenian criminal law

Katja Šugman Stubbs and Mojca Mihelj Plesničar [1]

1. Introduction

Slovenian lawyers working in criminal justice tend to see the principle of mutual recognition as a new approach, based on mutual trust in the legal systems of other Member States (MS), which makes fundamental changes to the prior convention or treaty-based principles [2]. From a practical point of view, it is perceived as recognizing foreign judicial decision (especially final judgements) as one's own, with only a very limited number of possibilities for verifying the foreign judicial decision beyond the scope of a basic formal check. Naturally, the principle was initially greeted with scepticism. In the case of the European Arrest Warrant (EAW), there was a doubt as to whether other MS would really surrender their own nationals. But, now that practitioners have seen the principle of mutual recognition in use, the general impression is that they are getting used to it and are coming to accept it.

[1] The authors would like to thank the following experts for their time and all the information provided: judges Lea Dukič-Japelj, Matevž Gros, Igor Majnik, Iztok Naglav, Marjutka Paškulin, defence lawyers Dr. Blaž Kovačič Mlinar, District State Prosecutors, Harij Furlan, LL.M., Roman Sevšek, Maja Weber Šajn, LL.M., Sandi Čurin, State Undersecretary, Ministry of Interior, Dušan Kerin, Head of the Police Unit for International Cooperation, Ana Bučar Brglez, Head of the Sector for International legal aid, Ministry of Justice, Andreja Lang, State Undersecretary, Ministry of Justice, Peter Pavlin, State Undersecretary, Ministry of Justice, Petra Sešek, and Katarina Vreg from the Ministry of Justice.

[2] See H. G. Nilsson, "Mutual Trust or Mutual Mistrust?", *in* G. de Kerchove and A. Weyembergh (eds.), *La confiance mutuelle dans l'espace pénal européen*, Bruxelles, Editions de l'Université de Bruxelles, 2005, p. 29-40 and I. Bantekas, "The Principle of Mutual Recognition in EU Criminal Law", *ELRev.*, 32/3, 2007, p. 365-385.

2. Transposition of mutual recognition instruments

A. State of implementation

An extensive debate was held on the question of whether Slovenia should implement the Framework Decision on the European Arrest Warrant (FD EAW)[3] in the form of a special statute or as an amendment to the Code of Criminal Procedure (CCP), since Slovenian national law already contained provisions on extradition in the CCP[4]. The legislator decided on the first option and passed a special act. Thus Slovenia implemented the FD EAW by adopting the Act on the European Arrest Warrant and Surrender Procedures (AEAW) which came into force on the day of Slovenia's accession to the EU (1 May 2004)[5]. The rules on the form of the European arrest and surrender warrant were published in May 2007[6].

However, this legislation did not last long. On 26 October 2007, the National Assembly adopted the Act on International Co-operation in Criminal Matters between Member States of the European Union (AICCM)[7], regulating cooperation under international law in criminal matters with EU Member States, replacing the provisions of the AEAW from 2004. The AICCM was adopted with the purpose of regulating the substance of cooperation in criminal matters between Member States wholly, transparently, and efficiently in one single act[8]. It also changed some solutions adopted by the AEAW. Besides the FD EAW, the AICCM also implemented some additional EU legislation in the criminal law field: (1) the FD on joint investigation teams[9]; (2) the Council Decision on setting up Eurojust with a view to reinforcing the fight

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[3] Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant, *OJ* no. L 190, 18 July 2002, p. 1.

[4] But firstly, Art. 47 of the Constitution was amended since it previously explicitly forbade the extradition of Slovenian nationals to foreign countries. The newly adopted Art. 47 CRS now provides for surrender as follows: "No citizen of Slovenia may be extradited or surrendered unless such obligation to extradite or surrender arises from a treaty by which, in accordance with the provisions of the first paragraph of Art. 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organisation". The Constitutional Act Amending the First Chapter and Articles 47 and 68 of the Constitution of the Republic of Slovenia, *OJRS*, no. 24-899, 7 March 2003. See C. Ribičič, "Položaj slovenske ustave po vključitvi v EU", (The Position of the Slovenian Constitution after joining the EU), *Pravna praksa*, 25/29-30, 2006, p. II-VI.

[5] *OJRS*, no. 37/04, 15 April 2004.

[6] *OJRS*, no. 51/04, 7 May 2004.

[7] *OJRS*, no. 102/07, 9 November 2007.

[8] For a more detailed description of Slovenian implementation see K. Šugman Stubbs, "The Implementation of the European Arrest Warrant in the Republic of Slovenia", *Eucrim*, 3-4, 2007, p. 133-137 and K. Šugman Stubbs, "The Execution of the European Arrest Warrant in Slovenia: Problems of Practice and Legislation", *in* A. Gorski (ed.), *The European Arrest Warrant and its implementation in the Member States of the European Union*, Warszawa, C.H. Beck, 2008, p. 112-117.

[9] Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams, *OJ,* no. L 162, 20 June 2002, p. 1.

against serious crime [10]; (3) the Joint Action on the creation of a European Judicial Network [11]; (4) the FD on the application of the principle of mutual recognition to financial penalties [12]; (5) the FD on the execution in the EU of orders freezing property and evidence [13]; (6) the FD on confiscation of crime-related proceeds, instrumentalities and property [14]; (7) the FD on the application of the principle of mutual recognition to confiscation orders [15]; (8) the Council Decision on the exchange of information extracted from criminal records [16]. Up to this point, there had been no discussion on the question as to how the European Evidence Warrant (EEW) will be implemented [17]. But the general opinion is that national legislation should not be changed to adopt the EU standards.

As we can see, both the FD on the application of the principle of mutual recognition to confiscation orders and the FD on the application of the principle of mutual recognition to financial penalties were transposed without great difficulty. Reciprocity was never an issue when negotiating or implementing an instrument. Slovenia chose as a solution to execute confiscation orders only to the extent provided for in similar domestic cases under national law. Article 99(11) AICCM namely provides that the domestic court must not execute a confiscation order (on obligatory grounds) if the confiscation cannot be issued in accordance with the legal system of the Republic of Slovenia. Domestic criminal legislation does not contain provisions on the extended powers of confiscation and we have not yet implemented the FD on the confiscation of crime-related proceeds, instrumentalities and property in this respect.

It was in this context that the debate on the possible dual system of coercive measures first took place. The question was therefore: shall we change our legal system according to the needs of the principle of mutual recognition and recognise the extended powers of confiscation despite the fact that our legal system does not provide for such a measure or shall we change our legal system by introducing the extended powers of confiscation in order to be able to execute MS' judicial decisions? As can clearly be seen, we chose a third way: that of not implementing anything, not

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[10] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, *OJ*, no. L 63, 6 March 2002, p. 1.

[11] Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Art. K.3 of the Treaty on European Union on the creation of a European Judicial Network, *OJ*, no. L 191, 7 July 1998, p. 4.

[12] Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *OJ*, no. L 76, 22 March 2005, p. 16.

[13] Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property and evidence, *OJ*, no. L 196, 2 August 2003, p. 45.

[14] Framework Decision 2005/212/JHA of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property, *OJ*, no. L 68, 15 March 2005, p. 49.

[15] Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *OJ*, no. L 328, 24 November 2006, p. 59.

[16] Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal records, *OJ*, no. L 322, 9 December 2005, p. 33.

[17] 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*, no. L 350, 30 December 2008, p. 72.

changing the national legal system and not recognising decisions on the extended powers of confiscation.

1. Double criminality

In the case of any of the 32 categories of criminal offences for which the double criminality check has been abolished by the FD EAW, the Slovenian legislator strictly followed the provisions of Article 2(2) FD EAW, (Art. 8(2) AICCM). The same is true regarding the FD on the application of the principle of mutual recognition to financial penalties. The Slovenian legislator transposed the whole list provided in Art. 5(1) FD in the national legislation (Art. 76(1) AICCM). Regarding the FD on the application of the principle of mutual recognition to confiscation orders, the Slovenian legislator transposed the whole list of criminal offences for which double criminality must not be checked from Art. 6(1) FD to Art. 89(2) AICCM.

Mutual recognition is considered to be very much compatible with the double criminality requirement. The experts interviewed think that the double criminality check was abolished too rashly and for too many categories of offences [18]. Since there are still big differences in definitions of criminal offences, it is therefore generally considered that the lack of double criminality check causes a lot of problems and it is likely that the principle of legality is infringed. Some experts also pointed out that they find it problematic that criminal offences which do not have a cross-border dimension were also included in this list (e. g. rape) [19]. They find it difficult to accept that the EC and sometimes also EU act in an area for which they have no jurisdiction [20].

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[18] This is confirmed by academics criticising the way that EU criminal law is being drafted: hurriedly and impulsively without reflection on necessity, frequently under the political pressure of certain States or interest groups, disregarding warnings from human rights agencies etc. See as well a detailed analysis of the gradual abolition of traditional extradition principles of double criminality, political offence exception and the non-discrimination rule in G. Vermeulen, "Criminal Policy aspects of the EU's (Internal) Asylum Policy", *Revue des affaires européennes – Law & European Affairs*, 5, 2001, p. 602-612. The EU began gradually abolishing those two traditional principles under political pressure applied by MS fighting problems with internal terrorism.

[19] Bantekas calls attention to the fact that not all the listed offences have been approximated in EU and EC legal instruments, nor are they subject to such approximation (e. g. murder, grievous bodily harm, swindling, trafficking in stolen vehicles and rape). He also points out that: "despite double criminality requirements having been dispensed with, this does not resolve the lack of approximation, which will certainly be the cause of some initial mistrust", (I. Bantekas, *op. cit.*, p. 374).

[20] The debate on EC criminal law competences has been going on for some time already. The main reason why the debate on this question was, until the aforementioned decisions were reached, largely still open, is the fact that the EC Treaty does not mention the topic of criminal law as one of the objectives of the EC. When it does mention criminal law, it does so in passing, specifically referring only to the powers that the EC *does not* have in this field. See S. Peers, "Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?", *CMLRev.,* 41/5, 2004, p. 5-36 ; M. Wasmeier, N. Thwaites, "The "battle of pillars": does the European Community have the power to approximate national criminal laws?", *ELRev.*, 29/5, 2004, p. 613-635 ; V. Mitsilegas, "Constitutional Principles of the European Community and European Criminal Law", *European Journal of Law Reform*, 8/2-3, 2007, p. 301-323.

The experts strongly feel that huge discrepancies in legal concepts should be a reason to reject the execution of a measure (e. g. completely different concept of intent). This does not mean, however, that they would support the unification of the legal definition of criminal offences. They are more in favour of the idea of the double criminality check being allowed. However, they are also well aware that this opportunity has long since passed.

There is wide support for the idea of each MS having a list of its own offences which fall into a certain category from Art. 2(2) FD EAW. Expert practitioners find it more difficult to create a negative list since it is difficult to know which acts are considered criminal offences in other MS and not in one's own MS. Such a list, however, could be drafted on the basis of experience. Typical acts that do not constitute a criminal offence in Slovenia and would fall on the negative list are, for example, drunk driving, driving without a valid licence etc.

2. Territoriality clause

The territoriality clause was transposed as one of the grounds for optional non-execution of the EAW almost literally following the provision of Article 4(7) FD EAW. Article 10 AICCM provides that the surrender of a requested person *may* be refused *inter alia*:

(1) if the EAW has been issued for criminal offences regarded by domestic law as having been committed in whole or in part in the territory of the Republic of Slovenia and the Slovenian State Prosecutor affirms that he will prosecute the offence in Slovenia (Art. 10(4) AICCM);
(2) if the EAW has been issued for criminal offences having been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory (Art. 10(5) AICCM).

The same is true in the case of the FD on the application of the principle of mutual recognition to financial penalties. National legislation implemented the two grounds for non-execution provided for by Article 7(2)(d) FD on the application of the principle of mutual recognition to financial penalties. The competent authority in the executing State may also refuse to recognise and execute the decision if it is established that the decision relates to:

(1) acts which are regarded by domestic law as having been committed in whole or in part in the territory of Slovenia (Art. 75(2) AICCM);
(2) acts committed outside the territory of the Republic of Slovenia and Slovenian law does not allow prosecution for the same offences when committed outside its territory (Art. 75(3) AICCM).

In the case of the FD on the application of the principle of mutual recognition to confiscation orders, national legislation implemented as mandatory the two grounds for the non-execution relating to the territoriality clause from Article 8(2)(f) FD on the application of the principle of mutual recognition to confiscation orders. Article 99(1) AICCM provides that, among other reasons, the domestic judicial authority shall not execute the decision if it is established that the criminal offence for which

the confiscation order was issued or any of the previous criminal offences which were tried together with the criminal offence of money laundering was committed on the territory of the Republic of Slovenia or was committed outside the territory of the issuing State and the law of the executing State does not permit legal proceedings to be taken in respect of such offences where they are committed outside that State's territory.

Experts generally consider the territoriality clause as being compatible with the principle of mutual recognition. They see it as a positive mechanism, giving a stronger position to the executing MS. By contrast, in cases of EAW, the conflicts should be resolved by negotiation. Priority should be given according to two principles: the nationality (or residence) of the requested person and the State in which it will be easier to try a case (more evidence, more witnesses etc.).

3. Other grounds for refusal

As far as the EAW is concerned a closer analysis reveals that the Slovenian legislator decided to organise the grounds for mandatory and optional non-execution in a manner different to that of the FD EAW. The Slovenian legislation first introduces some mandatory grounds for non-execution other than those provided by the FD EAW: e.g. ground for a mandatory non-execution of the EAW on the basis of discrimination which is not provided for by the FD EAW (Art. 9(8) AICCM). Secondly, it stipulates that optional grounds provided for in the FD EAW are mandatory: e.g. Art. 4(4) FD EAW (where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law) became a mandatory ground for non-execution (Art. 9(5) AICCM). And thirdly, Slovenian law sometimes splits the grounds for optional non-execution into two parts; one part is covered by a mandatory ground and the other by an optional ground for the non-execution. E.g. the optional ground from Article 4(2) FD EAW (where the person who is the subject of the European Arrest Warrant is being prosecuted in the executing Member State for the same act as that on which the European Arrest Warrant is based) has been split into two parts: (a) a mandatory ground is covered by Article 9(7) AICCM (if criminal proceedings are taking place against a requested person in Slovenia for the same criminal offence for which the warrant was issued, and that criminal offence was committed against the Republic of Slovenia or against a citizen of the Republic of Slovenia but no insurance has been given for enforcement of the pecuniary claim of the victim;) and an optional ground covered by Article 10(1) AICCM (if criminal proceedings are taking place against the requested person in the Republic of Slovenia for the same criminal offence for which the warrant was issued even if the grounds from point Art. 9(6) AICCM have not been adduced and if it would clearly be easier for criminal proceedings to be held in the Republic of Slovenia).

Also in the case of other instruments implementing the principle of mutual recognition other grounds for non-execution were added, but none of the interviewed persons saw this as something that should be avoided in the future. It is generally considered that it is not the duty of the court to check whether there exist any grounds for non-execution, but that the responsibility lies with the requested person to establish

the existence of possible grounds for non-execution in order for the court to begin investigating them.

4. Nationals and residents

In general nationals and residents have the same status as foreigners. They have a special position in only a very limited respect provided for by the FD EAW. Slovenian law implemented an optional ground for non-execution from Article 4(6) FD EAW by which the executing judicial authority may refuse to execute the European Arrest Warrant if it has been issued for the purposes of executing a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State (or a foreigner with a permission for permanent residence in Republic of Slovenia) and that State undertakes to execute the sentence or detention order in accordance with its domestic law (Art. 10(3) AICCM).

The second instance where nationals and residents have a special position is also the implementation of Article 5(3) FD EAW which provides for the possibility of the executing MS to subject the execution of the EAW to certain guarantees given by the issuing State. Slovenian law provides that the domestic court may request guarantees from the issuing court in case a person who is the subject of a European Arrest Warrant for the purposes of prosecution is a national or resident of the executing Member State, that he is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State (Art. 11(3) AICCM).

B. Principal problems in transposing the EU instruments

We detected two major difficulties in transposing the EU instruments based on the principle of mutual recognition of judicial judgements. Both of them are in certain ways characteristic of Slovenia, but could be used to understand other Member States' problems as well since they can be applied to all MS which entered the EU after 1 May 2004 and to (at least) all the smaller MS or MS which organise their working processes in similar fashion.

The first problem is the lack of involvement in the negotiating process. Such a lack of involvement is due

(1) either to the fact that certain documents were negotiated before a certain Member State was actively involved in the process of negotiation;
In the case of Slovenia the basic documents following the principle of mutual recognition were already adopted before our accession (1 May 2004). Slovenia was therefore put in a position where it needed to implement the legislation without having been involved in the mental exercise of developing certain principles and understanding the reasons (*ratio legis*) guiding the adoption of a certain norm[21]. If this was a common impression among those who were (or

[21] As Blekxtoon puts it after summarising the general impression on one of the ESW conferences: "FWD is far from clear as to its meaning and intentions", R. Blekxtoon, "Introduction ", *in* R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, The Hague, T.M.C. Asser Press, 2005, p. 6.

could have been) party to the process of drafting the FD, then it must have been even much more puzzling for people who could not even consult anyone involved in the negotiation process ;

(2) or to the fact that people involved in the process of negotiation are not the same as those in charge of implementation into national legislation.

In Slovenia it was usually officials from the Permanent Representation of the Republic of Slovenia to the EU who would be involved in the negotiation (or before the accession were observers). The legislation meanwhile is usually drafted by the employees of the Ministry of Justice in Slovenia. The transfer of knowledge is therefore relatively low. To make matters worse, people negotiating the documents are not necessarily specialised in the Justice and Home Affairs (JHA) area and are frequently involved in many other projects as well. They also frequently change positions or jobs and so there can be more persons involved at different times in the negotiation of a certain document. In this way, knowledge and continuity get lost and it is sometimes difficult to know whom to ask for advice, even if such a person exists. All this is also a result of Slovenia being a small country that cannot allot a team of specialised experts for every particular field of legislation, but requires instead its officials to be involved in a wide range of different projects. There are also not enough officials to cover everything.

As a result, the working knowledge the experts involved in drafting the national implementation legislation miss most is that which they would have obtained had they been actively involved in the original process of negotiation, and which would clarify how and why, for example, a certain legal norm was adopted. They expressed frustration with the fact that while knowing they must change their approach from following convention-oriented principles to the new mutual recognition criteria, they are unclear as to how and why this should be done. They realise that some solutions are more the result of a compromise to accommodate one country's position, while others were adopted through a general and more genuine consensus [22]. Some solutions are thus peripheral while others are truly crucial to the spirit of the agreement. But it is difficult to distinguish between them if one does not know the context of the negotiations which determined them. The lack of explanatory notes and memoranda and sometimes very general and vague phrasing of the articles do not help. The experts emphasised a need for the explanatory memoranda to be included in the material for MS to be able to implement the instruments appropriately. This lack of knowledge leaves them in an empty space where they need to speculate what was the purpose of a certain principle or a certain concrete article and what would be the best way to

[22] De Leeuw repeats the academic argument that the real reason why discussing legislative decisions in secrecy was defended in the Council was to "cover the many side-deals and particular interpretations that surround Council decision-making". Quoting Verhoeven (A. Verhoeven, *The European Union in search of a Democratic and Constitutional Theory*, The Hague, Kluwer Law International, 2002, p. 272) she continues that "decisions taken by the Council are only provisional bargaining results that may be further fleshed out through tactics of secretive compromise", M. E. De Leeuw, "Openness in the Legislative Process in the European Union", *ELRev.*, 32/3, 2007, p. 295-318.

implement it. In this way, the solutions implemented are sometimes more a result of a guess at what a FD article was intended to achieve.

Ideally, there would be more than one person involved in negotiations (preferably a team) in which at least one would be an expert in negotiating and at the same time an expert in the field of practice, at least one would subsequently be actively involved (or in charge) of the implementation of the discussed document, and (at least) one would be a practitioner, knowing what obstacles a certain mechanism would meet with in practice. Ideally, such teams would need to be constituted on a relatively permanent basis.

Things improved substantially during the Slovenian presidency: more people were involved in the process and more knowledge was accumulated. Recently practitioners have also become more involved in the overall process: some are involved in the course of negotiations, during which Constitutional judges or Supreme Court judges are also on occasion consulted.

3. Limits to the principle of mutual recognition, harmonisation and human rights issues

A. Final decisions v. *pre-trial decisions*

Most experts interviewed did not see any crucial difference between the mutual recognition of final decisions as compared with the recognition of pre-trial decisions. Both are based on the principle of mutual trust and, with all of the MS being signatories to the main human rights conventions, practitioners see no reason why Slovenians would have more or less confidence in final decisions than pre-trial decisions. Some pointed out that this step had already been taken by recognising some pre-trial decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Court (ICC), with the effect that the EU introducing mutual recognition of pre-trial decisions would not be considered something new.

One of the experts interviewed saw more problems recognising decisions on pre-trial detention in pre-trial procedures. The expert thought that a MS would find it more difficult to accept the pre-trial detention orders from another MS since they are not final decisions, which would allow the MS executing them to go further on completely different procedural premises than those of the issuing MS. Therefore, there is a crucial difference: recognising final decisions is followed only by executing them, while recognising pre-trial detention orders allows the executing MS to continue the procedure in a different way to that followed by the issuing MS. But even the sceptical expert mentioned that mutual recognition of pre-trial orders works to the benefit of the defendant, since the non-residents of a given MS would benefit from being subjected to less coercive measures than pre-trial detention.

B. Harmonisation of laws

Many of those interviewed pointed out that the principle of mutual recognition would work better if there were greater approximation of laws [23]. Psychologically, it

[23] See Bantekas's discussion on the question whether approximation has any role in the mutual recognition process, in I. Bantekas, *op. cit*. (p. 367-372). See as well A. Weyembergh,

is easier to trust other MS' legal systems the more similar those systems are to one's own. Some interviewees mentioned that sanctions should be harmonised or at least more approximated. They feel that there are big differences in penalties provided for a given criminal offence. Since MS do not understand one another's law in this area (passing sentence, form of sanctions, early release rules etc.), this can be a cause of mistrust between systems. The Slovenian system is especially prone to this, since it has comparatively lenient sentences and a very low imprisonment rate. We are therefore inclined to see other systems as more (and possibly too) repressive[24]. But the argument about approximating (or even harmonising) sentences cuts two ways, as Slovenian experts are well aware[25]. If the EU begins approximating sentences even more, it depends what kind of sentences it will propose. In any case, either the MS with more lenient systems and lower crime rates will feel unsatisfied at being pushed to make their sentencing system harsher or the MS with stricter penalties will feel frustrated. The last thing Slovenia would approve of is to be forced to increase penalties.

All of the experts consulted expressed the view that mutual recognition should be based on similar procedural mechanisms; especially those protecting the human rights of the defendant. Some expressed a concern that those standards have not yet been agreed and fear that the EU finds it easier to agree on measures promoting efficiency than measures advancing the rights of defendants or measures enhancing other guarantees.

They particularly emphasised the importance of approximating procedural rules. But they warned against approximation at the lowest possible denominator because such approximation can have a strong negative effect[26]. Despite the fact that there is a clause providing for a national law's right to enforce higher standards, they see a danger that the minimum rules will be perceived as a standard rather than as a minimum. The experts we talked to were afraid that politicians might take this as an opportunity to interpret the minimum standards as the EU-promoted "ideal"

"Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme", *CMLRev.*, 42/6, 2005, p. 1567-1597.

[24] See E. Baker, "Taking European Criminal Law Seriously", *Criminal Law Review*, June 2008, p. 361-380, pointing out the opposite effect by providing some examples of ECJ reducing draconian criminal and sentencing laws and being generally optimistic about: "(…) Community law [having] untapped potential not only to play a role in securing respectable criminal justice standards throughout the Member States but standards that go beyond the minimum guarantees contained in the Convention" (p. 380).

[25] M. Wasmeier, N. Thwaites, "The "battle of pillars": does the European Community have the power to approximate national criminal laws?", *op. cit*.

[26] Similarly De Mas points out that even ECHR standards are inadequate and contain shortcomings "that leave the defendant or suspect unprotected" (p. 871), concluding that "(…) the principle of mutual recognition, on which the European Arrest Warrant and all mutual legal assistance is based, rests somewhat uneasily on a system of common minimal standards that is open-ended and over-burdened, a variety of different legal systems struggling to find definition under huge political pressure towards law enforcement (…)", S. De Mas, "Protecting the Legal Rights of the Travelling Citizen: Easier Said than Done", *Criminal Law Review*, December 2003, p. 873).

standards[27]. In the political debate it was not uncommon to hear the following argument: "Why should we be wiser and more protecting than the EU? Let us adapt to the EU-promoted standards". Concerns at the lowering of national standards are not completely unfounded since we have already experienced such pressures in Slovenia. There was a case where a domestic standard of proof for a certain investigating act was lowered in order to comply with what was supposedly in an EU instrument[28]. It did not help that the EU instrument only recommended such a standard; this was seen as a sufficient excuse to lower the existing national standard. Many of the experts therefore feel that it would be better not to have any procedural instruments at all on, e. g. the rights of the defendant, than to have them accept the lowest possible common denominator as standard.

C. Criminal law principles and human rights issues

There was general agreement among all the experts interviewed that there are limits to the principle of mutual recognition. They mostly claimed that the existing reasons for non-execution prove that there are legally recognised limits to it. The most frequently mentioned limitations were the *non bis in idem* principle, the territoriality clause and the double criminality principle.

Some experts also mentioned other principles which, in their opinion, should limit the principle of mutual recognition despite the fact that it is unclear whether they do so in reality. Among these factors they mentioned some basic criminal law principles and basic human rights from the ECHR, such as: the right to a fair trial,

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[27] See *e. g.* Walsh's detailed description of the implementation debate of the FD EAW in Ireland, where the government used every way it could to render critical discussion a mere formality, D. Walsh, "Parliamentary Scrutiny of EU Criminal Law in Ireland", *ELRev.*, 31/1, 2006, p. 48-68.

[28] Introducing one of our Criminal Procedure Code Amendments (CCP-E Amendment, *Official Journal* of the RS 56/03) the Governmental Report explained the removal of the evidential standard for one of the very intrusive investigating measures – the monitoring of bank accounts (Art. 156 Code of Criminal Procedure) by referring to the requirements of the Council Act of 16 October 2001 establishing Protocol to the Convention on Mutual Assistance on Criminal Matters between the Member States of the EU (2001/C 326/01). Before that Amendment, our legislation provided for the state prosecutor having to prove that there exists "a well-founded suspicion" that a certain person has committed a certain crime in order for a judge to issue the monitoring order. What the government explanation of the Code's Amendment did not mention is the fact that the Protocol specifically emphasizes the right of each country to specify the evidential standard for these investigative acts and even recommends the evidential standard for house searches (usually a very high standard – 'probable cause or 'more likely than not'). We therefore lowered standards that were completely EU-adequate already with the argument that we are conforming to the EU standards. Whether it was done on purpose, using the "EU argument", knowing that that would achieve anything, or from ignorance, is hardly even important – both possibilities are equally sad and tell us a lot about the mentality in which candidate States approach harmonisation. K. Šugman, "Critical Analysis of Evaluation Process in Assessing Candidate Countries", *in* A. Weyembergh and S. De Biolley (eds.), *Comment évaluer le droit pénal européen?*, Bruxelles, Editions de l'Université de Bruxelles, 2006, p. 197-207.

the right to an impartial judge, principle of legality etc.[29]. It is not completely clear whether the preamble or Article 1(3) FD EAW can be directly applied and whether the MS can also reject the execution of the EAW on the basis of the preamble, or whether they should incorporate the contents of the preamble into their implementation law in order to be able to regard the conditions mentioned in the preamble as grounds for non-execution. Some of them also think that the judicial check of the EAW should be wider and more thorough. It should include a check of whether the legal qualification of the facts described is reasonable – even in cases where it is not permissible to check for double criminality. If the classification (legal qualification of the facts) is obviously wrong and/or the wrong listed offence is indicated then the assessment of the issuing MS is unreliable.

Some of the limits that should especially apply are those stemming from human rights issues and from the rights of the defendant[30]. The experts interviewed were also well aware that some MS implemented the likelihood of a breach of human rights as a reason for non-execution and felt sorry Slovenia had not done so accordingly. Slovenia only implemented the non-discrimination clause as an obligatory ground for the non-execution and even so we were criticized (in the process of the evaluation) for doing so. The critics said that such an implementation is not necessary since we are already signatories to the ECHR and TEU and this is enough. The experts interviewed who mentioned this saw such a criticism as unreasonable for at least two reasons. Firstly, other MS implemented even wider grounds for non-execution which gives them much more room for a judicial check and rejection of the EAW. And more importantly, it is not sufficient that human rights issues are dealt with by ratifying a convention or a treaty. When judges decide on EAW cases they mostly consult the national implementation law only (not the FD) and if there is no direct reference to human rights exception in the national law then it is more likely that they will not think of it themselves. If it is possible to reject an EAW on the basis of a breach of human rights then this should be provided for by the implementation law. In general it was felt that the EU should put more emphasis on human rights by not leaving it up to the individual MS to decide how far and how freely they should abide by them.

Some also mentioned a problem they saw in importing the principle of mutual recognition from the First Pillar which is organised in a different way to the Third

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[29] Review under Article 34(4) of the Framework Decision on the European Arrest Warrant, 13061/2/03 COPEN 92, p. 8. See as well N. Keijzer, "The European Arrest Warrant and Human Rights", *in* Z. Đurđević (ed.), *Current Issues in European Criminal Law and the Protection of EU Financial Interest, Austrian Association of European Criminal Law*, Zagreb, Croatian Association of European Criminal Law, 2006, p. 139-146.

[30] The idea that human rights can be breached while exercising the principle of mutual recognition (e. g. in the case of the EAW) is not completely unthought-of since the MS are not immune to such breaches. As ECHR case law shows the MS have already very frequently been convicted in extradition cases. *E. g.* Secretary of State for Home Department Ex. P. Ramda (2002) EWHC 1278; 2002 WL 1655064, *Cour d'Apel de Pao*, Irastorza Dorronsoro, No. 238/2003, from 16 May 2003. See S. Alegre and M. Leaf, *European Arrest Warrant: A solution ahead of its time?*, London, Justice, 2003, p. 25-31.

Pillar[31]. Firstly, in the First Pillar there are more instruments providing for the harmonization of MS' legislations and the principle of mutual recognition can function much better. It is thus more difficult to achieve trust in criminal law issues since legislations and legal traditions differ much more. Secondly, the values at stake in the First Pillar are not so delicate as those at stake in the Third. The subjects covered by the First Pillar do not involve such subtle balances between the rights of the State on one side and the rights of individuals on the other[32]. Member States also feel more threatened by interventions in the criminal law field. These are serious obstacles to the principle of mutual recognition coming to full effect.

4. Codification or consolidation of the various instruments based on the mutual recognition principle

The experts were split on the question as to whether it is better to codify different instruments based on the principle of mutual recognition or not. Ideally, they think it would be better if all the mutual recognition instruments would be codified and consistent. But they also see some obstacles to this.

As stated above Slovenia decided to implement eight EU instruments (few of them implementing the principle of mutual recognition in the national legal system) in the same code. Practitioners mostly regard this as an improvement since the topic became a semi-independent part of the criminal procedure which simplifies their work in practice; they would therefore opt for codification. Many also mentioned that the original EU instruments are seldom consulted and work is carried out on the basis of the implementing law.

On the other hand, experts drafting the legislation found it odd that many elements of those Framework Decisions differ greatly from one another[33]. As an example they gave the lists of criminal offences for which double criminality must not be checked and grounds for non-execution. Their opinion is that the practitioners certainly find this puzzling and that greater consistency would also show that the EU has at least some unified vision in this field instead of allowing every instrument to be agreed upon on different terms. They take such differences as signs of the compromise taken each time the instrument was negotiated. As a result they show a much less enthusiastic attitude towards codification at the European level, sensibly stating that due to the compromises likely to emerge from negotiations the odds are against the task of codification being successful. They are also concerned that the result of codification on a European level may be a significant decline in standards since all the documents

[31] "any inroads to such rights caused by criminal law must be extensively debated and justified. Using mutual recognition to achieve regulatory competition (as has been the case in the internal market) cannot be repeated in the criminal law sphere" (V. Mitsilegas, *op. cit*., p. 315).

[32] As Mitsilegas points out criminal law and justice is an area of law which is qualitatively different from the regulation of trade and markets; the substantial differences being a substantial impact on human rights and the fact that criminal law regulates the relationship between the individual and a State and "guarantees not only State interests but also individual freedoms and rights in limiting State intervention" (*ibid.*).

[33] See more in I. Bantekas, *op. cit.*

would be unified according to the lowest existing denominator regarding the rights of the defence.

But on the other hand, they also see that this "gradual approach" has certain advantages. Firstly, it is easier to negotiate a single instrument than to reach agreement on the entire block of Framework Decisions. They are sure that MS would be much more reluctant to agree on the body of instruments. Secondly, MS can learn from the experience gathered from previous instruments based on the principle of mutual recognition, allowing new instruments therefore to be improved. They find that the newer instruments based on the principle of mutual recognition are more harmonious with one another and that people negotiating them frequently refer to solutions from the previous Framework Decisions.

All the experts interviewed find the idea of a complete codification unrealistic. They would also find it problematic if all the negotiated topics were to be reopened again. Once again there is a fear that the lowest common denominator would prevail and all the instruments would be united according to the lowest level of protection of rights (e. g. the most extensive list for abolishing the double criminality check).

5. Practical experience with mutual recognition instruments

One of the problems in assessing the practical implementation of the European Union instruments and principles common to smaller Member States is the shortage of data: a rather small amount of cases and a subsequent lack of established practice in the field. The same is true for the principle of mutual recognition, where one can survey and analyse practitioners' personal opinions and attitudes, but these are formed only on the basis of the few cases each practitioner is likely to have dealt with. It is to be noted that only about a hundred or so cases have been tried in Slovenia involving mutual recognition, the overwhelming majority of which involved the European Arrest Warrant [34].

There was an idea to designate a single Slovenian court (Ljubljana court) as the only court with jurisdiction over the execution of incoming EAWs. Since Slovenia is a small country the transfer of requested persons would not be a problem. The advantages would also be that there could be judges who would specialise on the topic and would have an expert knowledge of the issues. They could easily handle all the incoming cases since the number of cases is not that big. But the legislator decided that it is more convenient for the requested persons to be dealt with near to where they live or reside, which resulted in a decentralised system of dealing with EAWs [35].

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[34] According to data collected by the end of 2007. The Institute of Criminology at the Faculty of Law Ljubljana conducted an extensive comparative and empirical research on the EAW, for now only accessible in Slovene: K. Šugman (ed.), *Evropski nalog za prijetje in predajo: primerjalnopravni in nacionalni vidiki (European Arrest Warrant: comparative and national aspects)*, Ljubljana, Inštitut za kriminologijo, 2008.

[35] When adopting a new legislation the legislator unfortunately did not seize the opportunity to improve some solutions, the most notorious being the problem with the central authority (according to Art. 7(2) FD EAW). Slovenian law still does not provide for it. However, the notification to the Council designates (Slovenian notification concerning the EAW (http://www.eurowarrant.net/documents/cms_eaw_2_1_EJN537.pdf) the Ministry of Justice as being

This has resulted in a relatively small number of practitioners having dealt with such cases. Moreover those practitioners have experience of only a fairly small number of cases. As explained below, this is true of all practitioners involved in dealing with mutual recognition cases, with the exception of Interpol officers whose specialised unit (SIRENE) has been allocated all police related tasks regarding mutual recognition.

A. The EAW as a model procedure

The practical use of the EAW is the model for all proceedings and basically the only instrument encountered in practice. As such it requires more detailed consideration.

Most commonly the residence of the requested person is unknown and investigating their whereabouts requires the involvement of Interpol. Once the search for a person is put in the system (SIS) and the requested person is found in Slovenia (either by random detection or by a designated search), he/she is immediately arrested and Slovenia Interpol Unit informed to take action and provide the arresting officers with the EAW form. Once the warrant is obtained from the issuing authority, the arrested person is taken to the investigating judge. The other possibility is for the issuing authority to contact the investigating judge directly and provide him with an EAW. This option, applied only exceptionally, should be used when the residence of the requested person is known.

The investigating judges across the country act as executing authorities [36]. When the arrested person for whom the European Arrest Warrant has been issued is brought to the judge, he/she will commence the surrender procedure. The requested person is *ex officio* assigned a defence lawyer and normally granted an interpreter. He/she is presented with the EAW and its content and given time to prepare for the surrender hearing (48 hours), during which he/she may be held in police custody. A hearing

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competent to act as the central authority to assist the competent judicial authorities if difficulties arise in transmitting the arrest warrant. At present SIRENE (managed by the Slovenian Interpol Unit) performs, at least in part, the role of a central authority. It maintains the register of EAWs, but only when the whereabouts of the requested persons are unknown; otherwise they are sent directly to a competent judicial authority. When a request is executed (the person is surrendered), the EAW is also entered into the SIRENE system. Therefore, if a certain judicial authority wants to know whether there was a warrant issued for a certain person, there is no Slovenian authority which can provide the relevant information in cases in which the whereabouts of the person are known and the EAW proceedings are in progress. There is also no central registration of outgoing EAWs. Judicial authorities as well as the police are also lacking an authority to provide advice or expertise in this matter.

[36] There are 11 District Courts with assigned investigating judges in Slovenia. District Courts are one of the two types of first instance courts that try cases punishable by more than three years' imprisonment. The investigating judge is the *dominus litis* of the investigation phase and carries out two main functions, investigative and protective. The latter has expanded in recent years, assigning the investigating judges with more and more duties meant to safeguard the rights and liberties of the defendant. For further explanations on the Slovenian penal system, see K. Šugman *et al*., *Slovenia, Criminal Justice Systems in Europe and North America*, Helsinki, Heuni, 2004. For Slovenian courts in general see M. Mihelj Plesničar, P. Tepina, U. Vrtačnik, "The Slovenian Judiciary: A guide through Slovenian Courts", *Slovenian Law Review*, 3/1-2, 2006, p. 209-239.

may then be held immediately or after the appropriate amount of time, at which the requested person is presented with the option of agreeing to the surrender and giving up the protection of the principle of speciality. The investigating judge must take his/her final decision on the surrender within 48 hours after the defendant is first brought before him/her. When the surrender is granted, the defendant has the opportunity to appeal, in which instance a final decision is passed by the pre-trial chamber (a special judicial body of three professional judges).

After the hearing the investigating judge may decide to issue an order of detention, when the request to issue the EAW expressly demands that this be carried out, or at the request of the public prosecutor, whose presence at the hearing is also mandatory. Detention is usually ordered for defendants who are thought likely to abscond, but their presence may, however, be ensured by milder measures than detention if the judge deems them sufficient. Once the surrender is decided upon, the investigating judge notifies the issuing authority and instructs Slovenia Interpol Unit to commence preparatory proceedings for this to be implemented. The surrender must take place within 10 days of the decision.

It is also interesting to know that one interesting case regarding the EAW has been brought to the CC (U-I-14/06, from 22 June 2006). The applicant (the requested person) claimed that the law implementing the FD EAW at a time (namely the AEAW) was not in line with the Slovenian Constitution (CRS) because it breached Articles 23, 25 and 29 of the Constitution. Art. 23 CRS guarantees the right to judicial protection. The applicant claimed that, according to the well-established constitutional doctrine, the right to judicial protection has to be effective and not merely formal. In the case of the EAW, this would mean that the judicial protection can only be effective if the court can perform an in-depth reflection on the merits and not only a formal check. The right to judicial protection was therefore breached by the fact that the procedure of deciding on the EAW allows only for a formal check and the court is not allowed to check the legal basis or the evidence of the case. The same logic applies to the right deriving from Art. 25 CRS – the right to legal remedies. The right to legal remedy has to be effective, which means that the appellate court must be able to decide on the merits of the case and not only make a formal check. Art. 29 CRS contains legal guarantees in criminal proceedings. Since there can be no doubt that, in the case of an EAW, the concept of a "criminal charge" can be applied, the rights guaranteed in Art. 29 CRS should also apply to the EAW procedures. According to the applicant, the right of Art. 29(4) CRS had been breached – namely the right to produce evidence to his benefit – since the court deciding on the EAW did not assess the evidence or the probability that the criminal offence in question was committed. It would have been very interesting to see how the CC would have answered all these assertions but, unfortunately, the application was rejected since the requested person had already been surrendered to the issuing MS. Art. 24 of the Constitutional Court Act namely provides that only a person holding a so-called "legal interest" may file a request. Since the applicant had already been surrendered, the CC held that he no longer had a legal interest in the case

and therefore rejected the request as inadmissible. The decision was criticised in the academic journals [37].

B. Practitioners' point of view

As one can deduce from the typical procedure as it has been described, there are four main groups of practitioners involved in the process of mutual recognition and their roles in the process vary significantly from one another as do their perceptions of the principle itself.

Investigating judges are mostly fairly comfortable with the new proceedings, especially when comparing them to treaty-based solutions. The main advantages of mutual recognition instruments from their position are certainly the considerable reduction in bureaucratic obstacles and the notable reduction in the length of proceedings. Most Slovenian judges have shown a rather unbiased attitude towards recognising their European colleagues' decisions, pragmatically keeping in mind that they would prefer that those same colleagues trust their decisions too.

There is, however, evidence of some scepticism. Reservations mostly come from a lack of detailed knowledge of foreign systems and of exactly what those systems allow for. The promptness of the procedure itself, which is mainly seen as a great benefit, may sometimes also be the cause of uncertainty and doubts as to whether sufficient safeguards are being applied.

On the whole, though, such reservations are not prevalent and it is safe to say that judges mostly welcome mutual recognition instruments as saving time and increasing efficiency.

The *public prosecutors* hold this opinion even more firmly. As was mentioned above, their involvement in the procedure is mandatory, yet their role is not completely unambiguous. The very purpose of their involvement is not clear, nor is the question of whose interests they are supposed to protect in the procedure. They see their role as guarding the "procedure's own interests" or even guaranteeing the "fairness of the procedure" itself. Putting these questions aside, however, public prosecutors seem to look approvingly upon the mutual recognition instruments and simplification of proceedings.

In contrast to public prosecutors, *defence lawyers* seem rather unconvinced by the principle of mutual recognition. As one might expect, they have greater reservations, especially about the perceived oversimplification of the procedure. There is some fear of lowering defence safeguards, but defence lawyers are in general most sceptical about the process of surrendering nationals. While agreeing that the principle of mutual recognition needs to be implemented in a united Europe, they would rather opt for a less simplified implementation, with greater safeguards.

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[37] B. Kovačič Mlinar, "Je ZENPP v neskladju z Ustavo?" (Is the AEAW in accordance with the Constitution?), *Pravna praksa*, 25/14, 2006, p. 13-14, B. Kovačič Mlinar, "Pomanjkanje poguma pri odločitvi o pobudi za oceno ustavnosti ZENPP" (Lack of courage while deciding on the request for assessment of the constitutionality of the AEAW), *ibid.*, 25/37, 2006, p. 15, A. Erbežnik, "Ustavno sodišče RS ter ENPP" (Constitutional Court of the Republic of Slovenia and EAW), *ibid.*, 27/1, 2008, p. 22-24.

The last group of professionals involved in the mutual recognition procedures is the police, with most of the work carried out by the Slovenian *Interpol Unit*. Of all police agencies, Interpol has probably experienced the most substantial changes in its daily routines since Slovenia's accession to the EU, especially in cases where the principle of mutual recognition applies. Cooperation with European colleagues has on the whole become simpler, though not always more efficient. Slovenian Interpol Unit's attitude towards mutual recognition is generally very positive, especially when mutual recognition instruments (mainly the EAW) are compared to treaty-based solutions. Slovenian Interpol Unit welcomes most of all the speediness of procedures, their efficiency and the extended possibilities to fight transnational crime.

As explained above[38], the negotiating process has been far from perfect from Slovenia's point of view and practitioners' attitudes reflect all of its disadvantages. The overwhelmingly prevalent grievance lies with the practitioners' exclusion from all the negotiations and even from the implementation phase.

Practitioners are most often presented with the implemented text and are required to apply it in practice without any guidelines or directions[39]. The questions they ask themselves when trying to find the solutions are usually solved through consulting other colleagues and at occasional professional conferences. Nearly all of them complain that insufficient time is allotted to study all the original European instruments such as the Framework Decisions in order to understand the purpose of the norms that have been implemented. This is even truer for instruments that have not yet been implemented (such as the EEW). JHA subject matter has been developing into a new subset of criminal procedural rules, especially since the entry into force of the AICCM in February 2008. Practitioners, though in principle satisfied with the national codification itself and the subsequent clarification of the subject area brought about by it, find it rather challenging to deal with new concepts and tasks while still maintaining all their previous responsibilities.

So far Slovenian practitioners have mainly dealt with the EAW and have no or very little experience with other instruments. The EAW is rather well accepted, for the most part due to the substantive shortening of proceedings. Some of the practitioners, mainly defence lawyers, still have certain reservations as to its application. However, the predominant attitude is fairly positive.

Practitioners are mostly rather unfamiliar with the details of other instruments, even more so in the case of instruments yet to be finalised (or even negotiated). This was the case of the European Evidence Warrant at the time of the interviews[40]. They do, however, share a generally sceptical attitude towards the EEW and find it hard to

[38] See section 2.B.

[39] What is stated here is not true for the Slovenian Interpol Unit, which has set up national internal guidelines for police officers assigned an EAW case. They give officers relatively detailed information on the proceedings and the rules to be followed at any given stage when exercising their duties.

[40] The EEW has been adopted in the meanwhile: 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*, no. L 350, 30 December 2008, p.72).

believe it will ever be even remotely as successful as the EAW. Their main reservation is the wide variety of investigating measures and the difference between the penal systems across the EU. They find it hard to believe that it will be possible to reconcile their differences in the matter of standards of proof and other conditions required. Furthermore, some of them have also expressed some unease regarding a potentially successful unification in this field, which would probably lead to a substantial lowering of standards in some Member States. Others have, on the other hand, stressed that some sort of approximation is absolutely necessary: since crime does not limit itself to one MS only, but more and more frequently stretches across borders, so should the possibilities of fighting it [41].

C. Practical difficulties

Different groups of practitioners have different concerns about the mutual recognition instruments, sometimes overlapping and sometimes arising from the nature of the different roles they play in the procedure. Interpol, for example, has complained that the time allowed for bringing the requested person before the judge or executing the surrender is too short [42], while the defence lawyer would also argue that too little time is allowed to prepare and present an adequate defence. These differences and objections are, however, very reasonable and derive from the nature of the proceedings.

There are however other open issues particularly felt by the investigating judges, which are not inherent to their role in the proceedings. Firstly, there is the previously mentioned problem of a lack of detailed knowledge about the legal system of the issuing Member State and the main concern in this respect lies with the matter of mutual trust. Since Member States have chosen different types of implementation and empowered different authorities to act as issuing authorities, the judge can never be sure about the correctness of the procedure. However, though occasionally frustrating, differences in procedural rules do not seem to be a very serious problem. Practitioners tend to trust their European colleagues and mostly see no difference between trusting a Slovenian colleague's decision and trusting that of a practitioner from another MS.

Some of the interviewed judges share the opinion that, besides enhancing the understanding of foreign proceedings, some additional information on the course the

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[41] An EU instrument introducing common grounds in criminal procedure, such as the proposed Framework Decision on certain procedural rights in criminal proceedings, would be able to achieve those desired goals but, even among practitioners, objections to such an instrument are numerous. For a strong opposition to the originally proposed text see R Lööf, "Shooting from the Hip: Proposed Minimum Rights in Criminal Proceedings throughout the EU", *European Law Journal*, 12/3, 2006, p. 421-430. See also T. van der Vijver and R.R. Babajev, "The Framework Decision on procedural rights in criminal matters: One small step for human rights; a giant leap for mutual trust", *Cambridge Student Law Review*, 74, 2008, p. 74-91.

[42] The AEAW instructed the police to bring the apprehended person before the investigating judge within six hours of her apprehension. The police have long complained about the shortness of the time limit, mainly in cases of smaller courts with fewer judges on duty during weekends or night shifts. The AICCM has granted their complaints and set the time limit at 48 hours from the wanted person's apprehension.

procedure will take after the surrender has been granted could alleviate such concerns. The fact is that the executing authorities are usually not informed of the final decision of the issuing MS and while such notifications can have no effect on the decision in the given case, some of the interviewed judges believe it could deepen mutual trust in future cases. On the other hand, it has been pointed out by others that such information would only mean additional work for judges and that such extra duties are not really necessary.

One of the unresolved questions that practitioners find rather bewildering is the necessity of detention in EAW proceedings. Some of them find it unclear as to whether pre-trial detention is mandatory. In most cases they believe it is not, and order milder measures, mostly in cases of surrendering Slovene nationals. Non-Slovenian nationals, however, are usually detained until their surrender takes place. This practise is warmly supported by Interpol officers, who have experienced trouble in the past with requested persons absconding and evading surrender.

Another major problem that investigating judges face in the practical application of the EAW is the occasional vagueness with which both criminal offences and prescribed sanctions are described. Despite the fact that the investigating judges for the most part regard the abolition of the double criminality check with relief, they sometimes feel rather powerless in exercising their judicial function on the basis of inadequate information in the paperwork they receive. Many believe that different approaches in filling-in the unified form derive from the differences between legal systems, with some preferring accurate and lengthy descriptions, with others opting for succinctness and brevity. The problem may be and usually is resolved by demanding additional clarification. However when asking issuing authorities for further explanations they sometimes encounter rather cool and uncooperative responses and receive clarifications only after an extended period of time. Such cases are nevertheless rare and judges regard their cooperation with foreign colleagues as being successful on the whole.

A further issue, one probably not only confined to Slovenia, is the language of the EAW or any other instrument. The original EAW usually needs translating, often even twice, once for the court and once for the defendant. Even though originally it was meant for the issuing country to provide for the translation, frequently the court employs interpreters who translate the EAW directly at the hearing before the judge. The new implementing law now demands that the EAW be translated into either Slovene or English (Art. 78, para. 1 AICCM). Some practitioners do not approve of this since they believe that the official language of the Republic of Slovenia should be respected and that respect for the different languages should be promoted in the EU. But even they admit that the solution is rather rational, since there are plenty of English interpreters and much fewer for the more remote or smaller language groups (e. g. Baltic languages). If other MS do provide a translation in the Slovenian language it is frequently of such a poor quality that it is sometimes difficult to understand. In such cases they would rather opt for the English text.

The problems raised earlier, deriving from inadequate knowledge of foreign legal systems, are not confined only to practitioners. An important emphasis was made by a defence lawyer, who stressed that the lack of information is even more serious for the requested persons. Usually, they are completely ignorant of the proceedings on

EAW and expect that the hearing will give them a chance to prove their innocence. When faced with what seems to be merely an identification process they feel lost and bewildered. They are assigned a defence lawyer but usually are unable to communicate with him/her directly because of the language barriers between them. To requested persons, the entire process seems depersonalised and confusing, since they are usually unfamiliar with the system of surrender based on EAW, with the system in the executing State (e.g. Slovenia) and very frequently with the system in the issuing country.

D. Limits to the principle and grounds for refusal in practice

The Slovenian system does allow for certain limitations to the general principle and interviewed practitioners predominantly find those limits reasonable and necessary. Both the double criminality principle and territoriality clause are recognised as compatible with the principle of mutual recognition and present no real problems in practice.

Interestingly enough, with the exception of defence lawyers, practitioners seem rather in favour of the abolition of the double criminality check in the majority of cases tried. One of the judges has pointed out that the criminal offences explicitly listed for exclusion from any check for double criminality appear in practically every legal system and there has never yet been a case of a more exotic criminal offence being "disguised" under one of the 32 exempted categories. The practitioners give the impression that the question of the abolition of the double criminality check, which brings along serious conceptual changes and opens a variety of questions, does not represent an important issue in practice. Practically none of them has expressed problems with the concept and for the most part they consider it a valuable innovation. This, however, was not confirmed by the Institute of Criminology's research in which the EAW files where Slovenia was an executing State were examined [43]. The research showed that instances of dubious legal qualification were quite frequent, with cases being inappropriately placed under the 32 categories of criminal offences for which the double criminality check has been abolished.

Diametrically opposed to the views of non-practising experts, practitioners show a great deal of reluctance towards any kind of database containing national definitions of the listed offences. Most of them find it expendable and see no real advantage in introducing such a database. Many in fact fear it would hamper proceedings and openly admit that it is impossible for them to know all legal systems.

The national law provides for two types of grounds of refusal, mandatory and optional. Practice has not yet developed any given criteria on deciding these grounds; understandably in light of the fact there has as yet been little practice in this field. The judges, who have the final say on refusal, decide on a case-by-case basis and a consistent practice has yet to be established. One of the judges has pointed out that, throughout the proceedings, the decision on optional grounds of refusal is the only "real" judicial decision, while others appear to be merely checking for listed requirements.

[43] *Supra* note 34.

Some concerns and potentially welcome limitations have nevertheless been expressed as regards the surrender of nationals. Many of the interviewed practitioners are rather disinclined towards surrendering nationals and find it still an open question. Nationals in fact are treated differently in practice and seem to be privileged in certain respects. One of the advantages is certainly the common language, the other being detention. Judges are much less inclined to put nationals in detention and try to secure their presence by milder measures, while detention is practically mandatory in cases of non-nationals. Some of the interviewed practitioners have raised the question of the constitutionality of surrendering nationals and find it necessary for the Constitutional Court to make a final decision on the matter.

6. Conclusion

Generally speaking, Slovenian experts and practitioners welcome the principle of mutual recognition. However there are degrees to their approval of individual instruments and the adopted solutions.Whilst admitting the many advantages and improvements which the principle has introduced, experts who were engaged in the process of transposing the EU instruments into national law seem to be rather reserved and even sceptical towards some key ideas brought forward by the concept of mutual recognition. They are unconvinced by the idea of abolishing the double criminality check, have deep concerns about the non-implementation of any human rights exception and are disturbed by the occasional lack of clarity in the instruments. Slovenian experts were put to the task of consolidating all existing EU mutual recognition instruments into a single national law, a job they found extremely useful from a practical point of view, but very challenging in the process of transposition itself. In light of their experience and the knowledge of negotiations at the European level, they feel that a common European codified instrument is not only an unfeasible aim, but also a rather precarious one – a minimum common denominator of standards seems to be a solution to be avoided.

On the other hand, practitioners seem far more enthusiastic, a reaction that is understandable in light of their role in the process. They are especially favourable towards the codification of mutual recognition instruments at the national level (admitting they practically never refer directly to EU instruments) and they particularly value the increased efficiency of proceedings. However, some reservations are still present, for the most part with regard to the surrender of nationals. Some judges feel frustrated with the apparent reduction of full judicial powers to a mere bureaucratic formalistic check of the forms provided on the basis of the mutual recognition instruments.

The differences between experts and practitioners are not that surprising. In fact, those differences may well be what we would have opted for in the first place. The fact that practitioners are willing to accept new approaches (while still keeping in mind the possible shortcomings) is commendable and allows for new practices to be developed in the future. Having cautious experts collaborating in the negotiations and transposition processes on the other hand allows for a mindful and prudent choice of those new approaches, an attitude of crucial importance in a field as delicate as criminal law.

Mutual recognition of decisions in criminal justice and the United Kingdom[1]

John R. Spencer

1. Popular attitudes in Britain towards Europe and European criminal law

To understand attitudes in the United Kingdom towards mutual recognition in criminal justice matters, it is necessary to know something about traditional British attitudes towards criminal justice in continental Europe – and also something about attitudes in Britain towards the EU and "Europe" generally, at any rate as reflected in the popular press.

Reflecting the views of its owners and the editors they appoint, a powerful section of the UK press is systematically eurosceptic. The main papers that regularly take this line are three tabloids, *The Sun*, *The Daily Mail* and *The Daily Express*, whose daily sale is more than twice that of the rest of the tabloid newspapers put together – and *The Daily Telegraph*, which is by a long way the best selling of our "serious" daily papers. Although it is unlikely that most or even many of our leading politicians and our senior civil servants share the extreme views that appear in the eurosceptic press, for obvious reasons they are obliged to take some degree of notice of them. The views

[1] This chapter, like the others in this book, is based on a report prepared in the spring of 2008, and deals with mutual recognition in the context of the four Framework Decisions (FDs) that had been adopted at that stage. It examines the legislation so far enacted in the UK to implement them and the case-law this has generated, and it also examines the prevailing attitudes towards mutual recognition among lawyers, civil servants, and the media. The "attitudes" section is based in part on official documents publicly available, in particular, reports by Parliamentary committees, and responses to "consultation papers" issued by the Government. It is also based on interviews with a range of people with particular knowledge: practitioners, judges, civil servants, police officers, and academics working in this area. The report was prepared with the help of Giulietta Gamberini and José Lopes de Lima.

of the eurosceptic press on continental criminal justice are examined in the paragraphs below.

A. The moral superiority of the "common law"

In crude terms, the traditional British view is that the United Kingdom, as part of its "common law heritage", enjoys a type of criminal procedure called "the accusatorial system" (alias the "adversarial" system), which is righteous, fair and morally sound, whereas the citizens of continental Europe suffer under something called "the inquisitorial system", alias "the Napoleonic system", which is evil, unjust and morally corrupt. Although there are some vocal people, like the famous defence barrister Michael Mansfield[2], QC, and the campaigning journalist Ludovic Kennedy[3], who have publicly challenged this view, even to the point of saying that "the accusatorial system" is fundamentally flawed and needs to be reformed along inquisitorial lines, the traditional view predominates in the popular press: typically when a British citizen is prosecuted for a crime abroad, or when rumours reach the ears of British journalists about discussions on criminal justice matters taking place in Brussels. In the debates in the press that follow either of these events, the elements that are usually claimed to make British "adversarial system" superior to its equivalent on the Continent include the presence of jury trial, *habeas corpus*, the right of silence, and the presumption of innocence: all of which are said, or assumed, to be unknown in the legal systems on the other side of the Channel. A writer who specialises in disseminating material of this sort is one Mr. Torquil Dick-Erikson, who describes himself as "a constitutional lawyer living in Italy", and whose views on continental criminal justice appear to be accepted as authoritative by much of the British press.

All this, of course, makes it harder for the government to agree to new mutual recognition measures, or to implement them when they have been agreed. An example of this was the struggle faced by the government when it set out to implement the European Arrest Warrant by what is now Part I of the Extradition Act 2003. In Parliament, this was fought by the Conservatives, the main opposition party, on the ground that it would make it easier to our citizens to be sent for trial in the continental systems, which are inquisitorial, and do not respect the presumption of innocence[4].

Regrettably, these ignorant views about continental criminal justice, though mainly seen in the tabloid newspapers, are also echoed by a number of supposedly "serious" journalists who ought in principle to know better. On 14 September 2008, for example, an alarmist article appeared in *The Daily Telegraph* about the proposed FD to limit the mutual recognition of sentences imposed on defendants *in absentia*[5]. Entitled

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[2] See his book *Presumed guilty – the British legal system exposed*, London, Mandarin, 1993.

[3] See *inter alia* his book *Thirty-six murders and two immoral earnings*, London, Profile Books, 2002.

[4] See my article "The European Arrest Warrant", *6 Cambridge Yearbook of European Legal Studies*, 2003-4, ch. 9.

[5] This FD was adopted on 26 February 2009: Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the

"EU Extradition on Demand Undermines Justice" the journalist misrepresented the proposal as being designed to make recognition of judgments *in absentia* obligatory: exactly the opposite of what was actually proposed.

B. "Euromyths"

In the eurosceptic press, much of the reporting and editorial comment appears to be based on the theory that there exists in Brussels a secret plot to stamp out our national institutions and crush our national way of life – and no scare-story is too improbable to be disseminated. Thus at one time and another the eurosceptic press has solemnly warned us (*inter alia*) that "Brussels" plans to ban corgis – the little dogs that are famous in the UK as the favourite pets of the HM the Queen, and also double-decker buses – the tall red-painted buses which, together with Tower Bridge and the Houses of Parliament, are among the international symbols of London.

But the eurosceptic press has a particular *penchant* for "euromyths" that relate to continental criminal justice. For example, on 9 September 2007 *The Daily Express* published a story about the European Gendarmerie Force under the headline "Brussels has set up a new EU police force which could eventually patrol the streets of Britain" – together with comments from Mr. Dick-Erikson about continental justice, warning readers that unless we act quickly "our traditions will be erased".

C. "Popular punitivism"

Coincidentally, another consistent feature of the editorial policy of the UK's eurosceptic newspapers is their espousal of the cause that criminologists have labelled "popular punitivism"[6]. That is to say, these newspapers give great prominence to news stories about crime, and as a solution to the problem of crime in general their editors advocate penalties that are ever more severe. One ugly aspect of the matter is a tendency to make personal attacks on judges whom it considers to have imposed sentences that are unduly lenient[7]. Another is to press for changes in the law to make it harsher and more authoritarian[8].

Whether in taking this "punitive" approach the popular press is reacting to public opinion, or actually creating it, is a matter of debate: but whichever it is, there is no doubt that crime is an issue about which public opinion in the UK is at present very much disturbed. According to a MORI[9] poll published on 6 November 2006, the

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application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*OJ*, no. L 81, 27 March 2009, p. 24).

[6] The term seems to have been coined by Professor Tony Bottoms: see T. Bottoms, "The politics of sentencing reform", in C. Clarkson and R. Morgan (eds.), *The politics of sentencing reform,* Oxford, OUP, 1995, p. 17.

[7] In February 2007, *The Sun* began a campaign of "naming and shaming" judges who gave what they regard as unduly lenient sentences.

[8] For example, the popular newspapers ran a campaign against "killer drivers", as a result of which the government introduced legislation which (*inter alia*) makes causing death by simple negligence at the wheel of a motor vehicle punishable with up to five years' immediate imprisonment.

[9] Ipsos Mori is a UK company that carries out market research.

fear of crime is greater in the UK than it is elsewhere in Western Europe, and the UK government is less trusted than any other to deal with the issue. In reaction to this, in recent years the government has put through Parliament a large number of criminal justice measures designed to be "tough on crime". (Needless to say, the newspapers that espouse "popular punitivism" in criminal justice matters invariably take an equally authoritarian line about another issue of great public concern: immigration).

Paradoxically, the "popular punitivism" of much of the British press reinforces its hostility towards Europe in the context of criminal justice. At first sight this seems rather odd. As we saw earlier, the picture painted by the UK press of the "Napoleonic" systems that supposedly exist on the other side of the Channel is that they are heavy-handed and authoritarian, and one would have thought that these qualities would make the UK's "popularly punitive" newspapers welcome the European influence in criminal justice matters, because Europe is (supposedly) so "tough on crime". However, when the popular press is calling for repressive measures all this is instantly forgotten, and the malign influence of a different "Europe" is then held up to blame: the Europe of Strasbourg, the Council of Europe and the European Convention. That the European Union and the Council of Europe are distinct bodies is understood by lawyers in the UK, but not by the eurosceptic press, which sees both as manifestations of the common enemy: "Europe".

D. Euroscepticism, authoritarianism, and the attack on the European Convention

Recently the Labour Party that has been in power since 1997 has been a notable champion of authoritarian measures [10]. But up until the early 1990s the Labour Party used to take a libertarian line on "law and order" matters, and when first elected twelve years ago, these tendencies were still in evidence. One of the first legislative measures of the newly-elected Labour government was the Human Rights Act of 1998, the effect of which was to give the European Convention on Human Rights a greater measure of direct effect in national law.

Even before the Human Rights Act was enacted, the European Convention and the Strasbourg Court were objects of intermittent suspicion among politicians and journalists on the nationalistic and authoritarian right [11]; and since the Human Rights Act they have become an object of almost continuous attack. When the Human Rights Act came into force, one of the most visible results was to widen the powers of the judges to quash Ministers' administrative measures as contrary to the rights guaranteed by the Convention, and also to censure legislation on the same account. And as the measures and legislation that the Courts condemn as falling foul of the Convention are

[10] Including indefinite detention without trial for foreign terrorists by order of the Home Secretary, and when that was condemned by the courts as contrary to the European Convention, indefinite house arrest ("control orders") for terrorist suspects of any nationality; a major sentencing reform in 2003 which increased the use of indeterminate sentences; the creation of a huge number of new criminal offences – possibly as many as 3,000 since it came to power; and a severe restriction on demonstrations outside Parliament.

[11] The decision in *McCann and others v. UK* (1996) 21 EHRR 97, over the shooting of IRA suspects in Gibraltar in 1988 led to calls for the UK to denounce the European Convention.

often "populist" ones the popular newspapers thoroughly approve of, this has led to a rising tide of criticism of the Convention from the popular press, which has painted it as another form of "European interference". One example – alas, out of very many – is this headline that appeared in *The Daily Mail* [12]: "If We REALLY Want to Escape the Grip of Human Rights Law We Must Quit the EU".

In 2006, the Prime Minister, Tony Blair, was sufficiently moved by these continuous attacks on the European Convention to commission the Lord Chancellor to carry out a study as to whether the Human Rights Act ought to be amended or repealed. To the disappointment of those who were campaigning to see the Act repealed and the Convention denounced by the UK, the Review [13] gave the Human Rights Act a clean bill of health – and criticised the media for propagating "damaging and misleading myths" about it.

2. The public reaction in the UK to the *Corpus Juris* project, and the birth of "mutual recognition"

When the *Corpus Juris* project was published in 1997, this initially passed unnoticed. Then in the course of 1998 it was "discovered", with the help of Mr. Dick-Erikson, by the eurosceptic press, which "exposed" it as a secret plot, hatched in Brussels, to create a single European criminal justice system, and so to force upon the British the "Napoleonic system" [14].

This press-coverage quickly led the Government to announce that it did not support the *Corpus Juris* scheme. However, unlike the eurosceptic newspapers, the Government recognised that the *Corpus Juris* proposal was a genuine attempt to find a solution to a real and urgent problem. So too did the House of Lords Select Committee on the European Communities, which published a Report on the *Corpus Juris* project in 1999 [15]. Though critical of the *Corpus Juris* approach, it described the *Corpus Juris* as "a serious attempt to tackle a real problem where national laws alone seem to be failing the citizen". The government, and the House of Lords Select Committee, agreed that a better and more workable approach to the problem was to promote the concept of mutual recognition.

"Mutual recognition" was an idea that came naturally to UK government, because it is a concept that has long operated within the borders of United Kingdom itself. For the administration of justice, including criminal justice, the UK consists internally of three separate jurisdictions, i) England and Wales, ii) Scotland and iii) Northern Ireland, each of which has its own court system, and each of which has its own system of criminal law. And between these systems significant differences

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[12] 16 May 2006.

[13] *Review of the Implementation of the Human Rights Act*, Department for Constitutional Affairs, July 2006.

[14] See in particular *The Daily Telegraph* of 30 November 1998, much of which was devoted to an attack upon it.

[15] House of Lords, Select Committee on the European Communities, Session 1998-1999, 9th Report, "Prosecuting fraud on the Communities' finances – the *Corpus Juris*", HL Paper 62. See further, J.R. Spencer, "The *Corpus Juris* project – has it a future?", *2 Cambridge Yearbook of European Legal Studies*, 1999, ch. 15.

exist, both in substantive criminal law and in criminal procedure. To take just two examples out of many, abortion, is (at least in theory) strictly forbidden under the law of Northern Ireland, although in England, Wales and Scotland it is virtually available on demand; and the powers of the police to detain arrested persons for questioning differ significantly as between England and Scotland. Yet despite these differences, the courts of each part of the UK give automatic recognition to the decisions of the courts of the others. The analogy with the relationship between the legal systems of the different parts of the UK was used by the Government when promoting "mutual recognition" as the way forward [16].

3. The UK's official position in response to EU "mutual recognition" instruments, actual and proposed

Officially, the UK has been a strong supporter of "mutual recognition" in criminal justice for the last 10 years [17]. But in my view, the record of the UK government is not quite as strong as this official statement suggests.

As regards the four Framework Decisions on mutual recognition that had been adopted by the time the report on which this chapter was based, the UK either took the lead, or else was generally supportive. Thus it is widely known that the UK took a leading part in the negotiations that led to the Framework Decision on the European Arrest Warrant. The UK was also one of the promoters of the Framework Decision on the Mutual Recognition of Financial Penalties. And it also accepted the Framework Decision on the Mutual Recognition of Orders Freezing Assets and Evidence, and the Framework Decision on the Mutual Recognition of Confiscation Orders. But as regards other proposed Framework Decisions in the area of mutual recognition the position of the UK has been less consistent.

The UK government took a public stand towards the proposed European Evidence Warrant that is generally supportive; but prompted by criticisms expressed in Parliament, it pressed for amendments to the original draft that would add "human rights" protections for the individual [18]. The UK government officially supported the proposal for a Framework Decision on taking account of Convictions in New Criminal Proceedings. The UK government strongly supported the proposal for a Framework Decision on the Mutual Recognition of Prison Sentences (in reality, on the mandatory transfer of prisoners) – to the point where it offended the House of Commons European Scrutiny Committee by announcing its support before raising the matter in Parliament,

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[16] See the statement from Kate Hoey, a Minister, when giving evidence to the House of Lords Select Committee on the European Communities, previous note; the comment is printed on p. 100 of the Report.

[17] "The UK supports the principle of mutual recognition and welcomes measures which lead to more effective and efficient judicial co-operation": stated in the government's *Consultation Document on the proposed European Evidence Warrant* (2003), and repeated in its *Consultation Document on the proposed Framework Decision on taking account of Criminal Convictions in New Criminal Proceedings* (2005).

[18] See the *Third Report of the House of Commons European Scrutiny Committee*, 2004-5.

as convention requires [19]. It was also supportive towards the proposal for a Framework Decision on the mutual recognition of Suspended Sentences, Alternative Sanctions and Conditional Sentences [20]. However, the UK government's support for the proposed Framework Decision on a European Supervision Order appears to be more muted [21]. And by contrast, the UK government opposed the idea of a Framework Decision on Procedural Rights for Defendants. Having initially announced its "cautious support to this proposal" in a consultation paper [22], in 2006 the UK then changed its position and took the lead among the minority of Member States that were opposed, as a result of which the proposal has come to nothing [23]. The UK was equally unsupportive towards a proposal for a parallel Framework Decision to guarantee the presumption of innocence [24]. Its negative position on these proposals is surprising, because within the UK the proposed Framework Decision on defence rights had received widespread support: from NGOs, the legal profession, and from the legal press [25].

No intelligible explanation has been given for the Government's change of position on the proposed FD on defence rights, and the reason for it remains something of a mystery. Giving evidence to the House of Lords European Affairs Committee, which was disturbed about the volte-face, the Attorney General said that the government was anxious to avoid "unnecessary duplication with the European Convention on Human Rights" [26]; but as the Committee rightly said in response to this, it is not "reasonable to oppose action on fundamental rights within the EU simply on the basis that the Council of Europe is a European organisation for the protection of human rights". Part of the reason, I suspect, is that in 2006 the government, in "popularly punitive" mode,

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[19] In 1998, the government announced that it would not enter into any further European engagements without first consulting the two Parliamentary Committees that scrutinise EU affairs.

[20] In a statement to Parliament on 19 November 2007, a government spokesman reporting on recent discussion of this proposal at Justice and Home Affairs Council said: "The Justice Secretary and the Scottish Solicitor-General intervened to emphasise the need for proportionality and to make it clear that the issuing state had discretion not to transfer sentences to States that were unable to take on full responsibility for both supervision and enforcement, and to argue that the instrument should respect the rights of victims".

[21] See the Minister's statement, reported in the European Union Committee, 31st Session 2006-7, *European Supervision Order*, Evidence, p. 83.

[22] *Consultation Document for Commission Proposal on Certain Procedural Rights during Criminal Proceedings throughout the European Union,* 8 March 2005.

[23] Normally this information would remain confidential, but the German Presidency "took the unprecedented step of allowing the Council deliberations to be held in public, the aim being for those Member States who refused to commit to the text to be named and shamed. They are the UK, Ireland, the Czech Republic, Slovakia, Malta and Cyprus": *ECBA Newsletter*, Issue 12, July 2007.

[24] See the Attorney General's memorandum of 7 June 2006, quoted in §18.10 of the *33d Report of the House of Commons European Scrutiny Committee,* July 2006.

[25] See for example S. Alegre, "EU fair trial rights – added value or no value?", *New Law Journal*, 2004, 758.

[26] House of Lords European Union Committee, 2nd Report of Session 2006-7, *Breaking the deadlock: what future for EU procedural rights?* HL Paper 20.

had announced its intention to seek a change in English law to deprive the Court of Appeal of the power to quash convictions of factually guilty persons on account of "procedural irregularities"[27], and did not wish its stance on this to be undermined by headlines in the eurosceptic press saying that "Brussels" was forcing it to go in the opposite direction.

All this was in 2006; and two years later, with a further change of direction, the UK government was in a *garantiste* mode once again, promoting a Draft Framework Decision designed to amend three existing Framework Decisions so as to reduce the application of these instruments to judgments against defendants who were tried *in absentia*. But paradoxically, whilst taking this high-minded position at the international level, the UK government had been busily promoting internal legislation to extend the powers of the courts in England and Wales to deal with defendants in their absence[28]!

4. The implementation in the United Kingdom of the first four EU "mutual recognition" measures adopted after Tampere

In this section I examine the steps that have taken the UK to implement the different EU "mutual recognition" measures the texts of which have already been agreed. To understand what follows, it is necessary to grasp two basic points about the legislative process in the United Kingdom.

The first arises from the fact that, as explained earlier, for the purpose of the criminal law and its enforcement, the UK consists of three separate jurisdictions: (i) England and Wales, (ii) Scotland and (iii) Northern Ireland. The UK Parliament at Westminster is competent to pass legislation that is effective in all three, and in principle, an Act of the Westminster Parliament applies in all three jurisdictions unless the contrary is indicated in the text. In practice, however, separate legislative provision for each part is often made; and to add to the complication, since 2000 Scotland has also had its separate Parliament, with overlapping competence in the area of criminal justice.

The second concerns the way in which Acts of Parliament come into force (or quite often, fail to do so). In principle, an Act of Parliament comes into force from the date of Royal Assent, unless the text otherwise provides. In practice, the text nearly always does "otherwise provide", and the usual formula is a section which provides that Act shall come into force only when the Secretary of State (which usually means the Home Secretary) issues what is called a "Commencement Order", and going further, usually also allows him to bring different parts of the Act into force at different dates. By this means, the executive effectively controls whether or not an Act of Parliament is ever implemented. Where there is a change of government, or a change of governmental policy, the result can be that an Act of Parliament, or parts of it, are never brought into force at all; and significant parts of the UK statute-book remain for ever purely "virtual law".

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[27] See its Consultation Paper *Quashing Convictions*, Office for Criminal Justice Reform, September 2006. Legislation to carry out this proposal was later introduced, but abandoned after opposition in Parliament.

[28] Now enacted in the Criminal Justice and Immigration Act 2008.

A. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

The UK implemented the Framework Decision on the European Arrest Warrant (EAW) by means of primary legislation: Part I of the Extradition Act 2003 – which applies to all three parts of the UK.

On the "plus side", the UK was one of *les bons élèves*, in that it implemented the FD in time, or very nearly so: the Extradition Act 2003 came into force on 1 January 2004, only seconds after the date specified in the FD. Furthermore, in one respect the UK implementing legislation goes beyond what the FD requires[29]. For offences on the "Framework Decision List" set out in article 2, Member States are required to surrender wanted persons, irrespective of whether the "double criminality" requirement is met, provided the conduct is punishable with at least three years' imprisonment in the issuing State. Under the Extradition Act, the UK draws a distinction in this respect between those who are accused, and those who have already been convicted. Accused persons are handed over, irrespective of double criminality, if the offence in the issuing State carries at least three years. But convicted persons are handed over, irrespective of double criminality, wherever they have been sentenced to one year's imprisonment or more, whatever the maximum penalty applicable in the issuing State.

On the "minus side", however, the UK's implementing legislation can be criticised in at least three respects. First, the drafting is technically deficient. Secondly, in certain minor ways it fails to implement FD. And thirdly, and more contentiously, it could be viewed by some as failing in certain ways to respect the spirit of it.

1. Technical difficulties with the drafting

Part I of the Extradition Act 2003 is drafted in a way that causes needless difficulties. It is very long – far longer than the equivalent legislation in France or Italy, for example. The copious use of cross-references makes the text difficult to read and understand. And the fact that the legislation has been drafted so as to avoid reproducing either the general scheme of the FD, or any of its terminology, makes it difficult for the user to link the two together.

An unfortunate consequence of this opaque drafting style is to make it look as if the UK has failed to implement the FD in various ways, although in fact it has. One example concerns time-limits. These are, of course, a key element in the FD, but the Act does not mention them explicitly, so giving the impression that the UK has decided to ignore them; although this is not the case, in fact, because they are provided for in various pieces of secondary legislation, which fall outside the body of the Act[30]. Another concerns the *non bis in idem* rule, on which the convoluted

[29] Among lawyers in the UK, going beyond what is required when implementing an EU measure is called "gold plating".

[30] For example, for England and Wales, the Civil Procedure Rules, Practice Direction 22.6A.

provision in the Extradition Act appears at first sight to flout the FD, although on a closer reader it is clear that it does not [31].

More seriously, the drafting of Part I of the Extradition Act 2003 contains a number of departures from the wording of the FD which, if read literally, would have frustrated its implementation in the UK in a number of important respects; but the UK courts, mindful of the words of the ECJ in the *Pupino* case [32], have departed from their usual "literal" canons of interpretation to give the wording of the Act a meaning which enables the purpose of FD to be carried out.

One of these concerns the formalities that are necessary for a EAW to be valid and enforceable. Section 64(2)(b) of the Extradition Act 2003 appears to say that a UK court can only order the surrender of a person wanted for a "framework list offence" if, in addition to the EAW itself, the issuing State also provides a separate document certifying that "the conduct falls within the European framework list". No such requirement is to be found in the FD, Article 8 of which makes it clear that a statement to this effect is something which has to be set out in the EAW itself. Relying on the FD, the Spanish courts sent the UK an EAW in respect of a person suspected of involvement in the Madrid train bombing which conformed with Article 8 – but without a separate certificate, which section 64(2)(b) of the Extradition Act apparently required. By a majority, the House of Lords interpreted section 64(2)(b) in the light of Article 8 of FD, and so held that the requirement of a "certificate" was met by a statement contained within the EAW itself [33].

Another potential difficulty is that section 64(2)(a) of the Act provides that a requested person can be surrendered for a "framework list offence" only in a case where "no part of it occurs in the United Kingdom". By including this provision the UK did not contravene the FD, because one of the optional grounds for non-execution listed in Article 4 is that the offences in question "are regarded by the law of the executing Member State as having been committed in whole or in part of the territory of the executing Member State or in a place treated as such". But the inclusion of a proviso in the form of words used by section 64(2)(a) potentially frustrated the purposes of the FD, because if read literally it makes it impossible to use the EAW to secure a person wanted for a "framework list offence" any part of which, however small, had been carried out in the UK. This problem arose in a case where a man was wanted in Belgium for smuggling illegal immigrants into Belgium, via London. The requested person argued that, as the offence in question was a "framework list offence", part of which had been committed in the UK, the Extradition Act prohibited his surrender. The House of Lords circumvented the problem by deciding that, although he could not be surrendered under the provisions of the Extradition Act that deal explicitly with "framework list offences", he could still be surrendered under other provisions of the

[31] See the criticism of the UK contained in the Report from the Commission *based on Article 34 of the Council Framework Decision of 13 June* 2002 on the European arrest warrant and the surrender procedures between Member States, COM (2006) 8, 24 January 2002, and the UK Government's response, attached to the *30th Report of the House of Lords European Union Committee* (Session 2005-06), HL Paper 156, 4 April 2006.

[32] ECJ, 16 June 2005, Case C-105/03.

[33] *Dabas v. High Court of Justice, Madrid* [2007] UKHL 6.

Extradition Act which allow the EAW to be used for other offences in respect of which the requirement of "double criminality" is met – provisions which can be used even where some part of the *actus reus* took place in the UK [34].

A third potential problem arose from section 21 of the Extradition Act, which forbids a judge to order the surrender of a person in pursuance of an EAW unless he has first decided that the extradition of this person would be compatible with his rights under the European Convention on Human Rights. If read broadly, this section could have enabled requested persons to delay their surrender by making vague and generalised complaints about the administration of justice in the issuing State – or even to defeat the request altogether, by requiring the issuing State to disprove them. In a series of decisions, the English courts have made it plain that such an interpretation would frustrate the implementation of the FD, and section 21 must therefore be read restrictively. When dealing with other EU Member States, our courts take the position that they can assume that their legal systems conform to the requirements of the European Convention on Human Rights, and that where breaches of Convention rights occur, the other Member States provide the victim with a remedy. In order to use section 21 to resist his surrender, our courts say that a requested person must be able to identify some fact, of particular relevance to him, suggesting that the legal system of the issuing State will not deal with him and his case fairly [35].

2. Incompatibilities

Thus thanks to the determination of the UK judiciary to make the legislation work, the most damaging potential conflicts between the Part I of the Extradition Act 2003 and the FD have been avoided. Nevertheless, the UK implementing legislation is still incompatible with the FD in a number of respects: none of which, happily, are of huge practical importance.

One of these is section 208 of the Extradition Act, which gives the Secretary of State the power to block a surrender on grounds of "national security", if the requested person was "acting for the purpose of assisting in the exercise of a function conferred of imposed by or under an enactment", or where, "as a result of an authorisation given by the Secretary of State", the person would not be criminally liable if prosecuted in the United Kingdom.

Another is the inclusion of two extra grounds for refusal of surrender by the UK courts, neither of which have any basis in the FD. The first (and highly specific) one is where the person is wanted for an offence under the International Convention against the Taking of Hostages of 1979, the case could be tried in the UK, and if extradited the wanted person might suffer prejudice at trial through the inability to communicate with his consular authorities [36]. The second, and more general one is where the surrender would be "unjust or oppressive" in the light of the requested person's "physical or

[34] *Office of the King's Prosecutor, Brussels v. Cando Armas* [2005] UKHL 67, [2006] 2 AC 1.

[35] *Boudhiba v. Central Examining Court No 5 of Madrid* [2006] EWHC 167 (Admin); [2007] 1 WLR 124; see *R (Hilali) Governor of Whitemoor Prison* [2008] UKHL 3, [2008] 1 AC 805, at [14]; *Prancs v. Rezekne Court of Latvia* [2006] EWHC 2573.

[36] Extradition Act 2003 s. 11(1)(e).

mental condition"[37]: a bar which may or may not add anything to section 21 of the Act which, as already mentioned, forbids the judge to order a surrender if to do so would infringe the requested person's rights under the European Convention.

A third incompatibility, of a relatively minor sort, concerns the surrender of requested persons whom the issuing State wishes to try or punish for an offence committed outside its own national territory. By Article 4(7)(b) of the FD, one of the optional grounds for refusal to execute a EAW is that the offence has "been committed outside the territory of the issuing Member State and the law of the executing Member State does not allow prosecution for the same offences when committed outside its territory." The UK has taken advantage of this possibility to build an exclusion, and in doing so has gone even further than Article 4(7)(b) allows. By section 64(5) of the Extradition Act, the surrender of a requested person whom the issuing State wishes to try or punish for an offence committed outside its own national territory is only possible both where (i) the UK has extra-territorial jurisdiction over this sort of conduct too, and (ii) under UK law, it is punishable with a more than 12 months' imprisonment[38].

A fourth incompatibility, also relatively minor, concerns the surrender of persons who have been tried *in absentia*. By article 5(1) of the FD, it is possible for a requested State to make the surrender of a person who has been tried *in absentia* subject to a condition "that the issuing judicial authority gives an assurance deemed adequate to guarantee that the person... will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment". By section 20 of the Extradition Act the UK has gone further: the surrender of a person tried *in absentia* is banned unless the person would *be entitled to a retrial*, not merely entitled to request one; and unless at that retrial, he would have "the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required; [and] the right to examine or have examined witnesses on his behalf under the same condition as witnesses against him". (This provision reflects the fact that, traditionally, the UK is highly suspicious of trials *in absentia*, which it sees as contrary to the basic notions of the common law tradition. With that in mind, as already mentioned, the UK promoted a new Framework Decision, designed to amend the Framework Decision on the Arrest Warrant, plus three others, to clarify and tighten up the rules about the enforcement of decisions made against defendants in their absence)[39].

3. A failure to respect the spirit?

The Framework Decision on the European Arrest Warrant devised a scheme that was to be applicable among the Member States of the European Union: no more, and

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[37] Extradition Act 2003 s. 25.

[38] By section 64(6), it is also possible where the offences in question involve "genocide, crimes against humanity and war crimes".

[39] Consultation Paper [CP(L)/08408], *Enhancing procedural rights and judicial co-operation in the EU: proposed Framework Decision on new rules for cross-border cases where judgments are made in absentia*, 28 February 2008.

no less. Part I of the Extradition Act 2003, however, makes almost[40] no mention of "European Arrest Warrant", "European Union" or "Member State". Instead, it talks about "Part 1 warrants", which the Act makes applicable to what the Act calls "category one territories": which are ones "designated by order made by the Secretary of State". This means that, as far as the UK is concerned, the European Arrest Warrant applies only to such EU Member States as the executive decides – and if the executive so wished, the European Arrest Warrant scheme could be extended to countries which are not part of the European Union[41].

The second way in which the UK implementing legislation can be criticised on this account is that it stubbornly perpetuates the old terminology. Although the new process created by the FD is called in the English version "surrender", Part I of the Extradition Act persists in calling it "extradition".

The third respect in which the Extradition Act 2003 is (at least arguably) out of tune with the spirit of the Framework Decision concerns the designation of a "central authority". The basic idea of the European Arrest Warrant, of course, is that it should operate automatically between judges and courts, with the executive firmly excluded. By Article 7 of the FD, however, a Member State may, if it wishes, designate a "central authority... to assist the competent judicial authorities", and it may also make this "central authority" responsible "for the administrative transmission and reception of European Arrest Warrants as well as for other official correspondence relating to them." The UK has made the most of this possibility by designating, as the "central authority" for England and Wales, the Serious Organised Crime Agency: which is a police agency, under the control of the Home Secretary; and in Scotland, the Crown Office, which is under the control of the Lord Advocate, who like the Home Secretary is a Minister.

4. Conclusion

From the previous paragraphs, it will be clear that the UK has implemented the Framework Decision on the European Arrest Warrant; and furthermore, that it has done so by a scheme which, despite initial appearances, reflects the FD quite closely, and appears to work. But it will also be clear that this result is due, to a large extent, to the efforts of the judges, who were prepared to "bend" the implementing legislation to make it fit. And the implementing legislation also gives the reader the clear impression that government and Parliament were anxious, when implementing the Framework Decision, to avoid the impression that they were "giving in to Brussels". Part 1 of the Extradition Act 2003 is, in effect, the legal equivalent of Prime Minister Gordon Brown carefully arranging his diary to miss the signing ceremony for the Lisbon Treaty – but turning up in the afternoon, when nobody was about, to sign it with an appearance of calculated reluctance.

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[40] For the benefit of persistent readers who get as far as section 215 of the Act, all three receive a brief mention there.

[41] The Extradition Act 2003 (Designation of Part 1 Territories) Order 2003/3333 (as amended) designates all the EU Member States, plus Gibraltar.

These various departures from the letter and the spirit of the Framework Decision have, of course, been the subject of adverse comment in the "mutual evaluations" that the Council has undertaken into the implementation of the Framework Decision in the Member States.

B. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence

This Framework Decision requires Member States to give automatic recognition and enforcement to "freezing orders" issued by the courts of other Member States for the purposes of (a) securing evidence, or (b) subsequent confiscation of property. The implementation date for this Framework Decision was 2 August 2005.

At the time of writing the UK has, in effect, failed to implement it – although to the untutored eye, examination of the statutes enacted by Parliament over the last five years suggests the opposite. In 2003, Parliament (at the instance of the government) enacted the Crime (International Co-operation) Act, parts of which appear to implement the FD. Sections 10, 11, 12 and 28(5) of this Act were designed to enable UK courts to take advantage of the FD by issuing freezing orders in respect of "listed offences", i.e. offences in the list set out in Article 3 of the FD. And section 90, together with Schedule 4, creates a long and detailed set of rules the purpose of which is (*inter alia*) to implement the FD by requiring courts in the UK to give effect to overseas freezing orders issued in respect of "framework list offences": but only those which "are done as an act of terrorism or for the purpose of terrorism"[42]. By section 94 of the Act, however, none of these provisions come into force until the Secretary of State issues a "Commencement Order"; and at the time of writing, no Commencement Order has been issued, and there is no sign of one of the official horizon.

If ever brought into force, these provisions would only enable the courts in the UK to give effect to freezing orders issued in the context of terrorism; and with that in mind, two years later Parliament enacted section 96 of the Serious Organised Crime and Police Act 2005 which authorises the government to make rules implementing the FD generally by means of secondary legislation. This provision, unlike those of the Crime (International Co-operation) Act, has been brought into force. However, it only confers what is usually called "a rule-making power" – i.e., it gives power to the executive to implement the FD by making secondary legislation. And so it remains ineffective until the necessary secondary legislation is drawn up and promulgated by the Minister – which has not yet been done. (According to our informant in the Home Office, the work on this has been delayed by other priorities, but is now in hand).

In October 2006 the EU Council Evaluation of the implementation of this FD stated that the UK had "implemented those parts of the Decision relating to the freezing of evidence and of terrorist property. Legislation for the remainder, regarding freezing of the proceeds of crime and their instrumentalities, adopted, but necessary administrative procedure to bring that legislation into force, not finalised". But this assessment is over-optimistic, because at the present time, everything that the UK

[42] The new rules so created by Schedule 4 operate by adding no less than 18 new sections to the main UK legislation on Terrorism, the Terrorism Act 2000.

has done in respect of this FD remains in the realm of what might be called "virtual law".

As is explained below, the existing UK legislation on confiscation orders incidentally also provides, within limits, for the enforcement of freezing orders. In practice, freezing orders issued by the courts of other Member States would sometimes be enforceable in the UK by virtue of these provisions. But although this legislation provides a mechanism for the enforcement in the UK of foreign orders designed to freeze the proceeds of crime, they do not apply to orders intended to freeze evidence – as against to freeze the proceeds of a crime.

C. Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders

The implementation date for this Framework Decision is 24 November 2008. So far, no legislation has been enacted in the UK with the specific of implementing it, and at the time of writing, none is planned. The provisional view within the Home Office is that our law already satisfies the requirements of this FD: though the Home Office says that it has not yet carried out a thorough study, and its view may change when this is done.

However, the quick look at the existing UK legislation on the enforcement of foreign confiscation orders that we have made leads me to believe that there are in fact some significant discrepancies between the two, and that if the UK is to fully comply with this FD, further legislation will be necessary.

The main[43] piece of UK legislation in this area is Part 11 of the Proceeds of Crime Act 2002, and a piece of secondary legislation made under it: the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005/3181. In this connected pair of laws, the broad outlines of the scheme are stated in the Act, and the Order made under it contains the detailed rules. As is often the case with UK legislation, the Order is extremely long, consisting of no less than 213 Articles and five Schedules, which together cover 115 pages of legislative text (!). Part of the reason for the size is that the Order creates, for each of the three legal jurisdictions of which the UK is composed, a separate regime for dealing with orders emanating from other countries; though all three schemes are essentially similar, the differences being mainly in the names of the different authorities and courts involved.

In outline, the common scheme created by the Order for each part of the UK is very generous in the provision made to enforce orders from abroad, and in some ways goes far beyond what the FD actually requires. The UK legislation provides for the enforcement of two types of external order: (i) freezing orders, and (ii) confiscation orders; and in principle, both types of order are enforceable in all parts of the UK, irrespective of whether a similar order could be made in the UK in respect of the proceeds of this type of crime.

[43] There is also The Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) Order 2005 (SI 2005 No. 3180).

However, there is, by contrast, a general requirement of "double criminality". In broad terms, the orders to be enforced must relate to "criminal conduct", and by section 447 of the Act this is defined as "conduct which (a) constitutes an offence in any part of the United Kingdom, or (b) would constitute an offence in any part of the United Kingdom if it occurred there". Thus the UK legislation is not compatible with Article 6 of the FD, which requires Member States to enforce confiscation orders in respect of "framework list offences" whether or not "dual criminality" exists.

A second and important respect in which the UK legislation does not comply with the FD is the requirement of "automatic enforcement". The FD requires Member States to enforce one another's confiscation orders except where one of the reasons for non-recognition or non-execution listed in Article 8 is present. Under the UK legislation, however, enforcement is doubly discretionary. All foreign requests and orders are received by the Secretary of State before being forwarded to the Crown Prosecution Service, or one of a number of other official investigating or prosecuting agencies. When the Secretary of State is seized of the request, he "may" [44] refer it to an investigating or prosecuting agency; and if it is so referred, the agency "may" [45] then bring the foreign order before a UK court for enforcement. And as the relevant Home Office Circular explains, "all bodies have full discretion to decide whether or not to accept or reject such a request" [46]. (Though once the matter comes to court, the court "must" enforce the foreign confiscation order once it finds that certain specified conditions are met [47]).

A third discrepancy involves Article 13 (2) of the FD, which provides that "Only the issuing State may determine any application for review of the confiscation order". Under the scheme created by the UK legislation, any person may apply to the UK court for the order to be varied [48].

A fourth discrepancy concerns Article 16 of the FD. This sets out in precise terms the rules as to how any money confiscated under the FD shall be divided as between the issuing State and the executing State. This is different from the scheme set out in the Order [49].

Lastly, the UK legislation is of general application. The rules that it sets out apply in the same way to foreign compensation orders from every corner of the world, from Albania to Zimbabwe. There is no reference to the European Union, or (of course) to the Framework Decision, which came into existence after the UK legislation was made.

In practice, however, confiscation orders made by other Member States are likely to be enforced in the UK in the circumstances that the FD requires them to be, despite the discrepancies between the FD and the national legislation. The "double criminality" requirement is unlikely to pose a problem. Our courts interpret "double criminality"

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[44] Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005/3181, para. 18 (setting out the rules of the scheme for England and Wales).

[45] *Ibid.*, para. 20.

[46] Home Office Circular 4/2006, reference number LSTN-6M7JE3.

[47] *Ibid.*, note 43 above, para. 21.

[48] See, for the scheme in England and Wales, para. 9.

[49] See, for the scheme in England and Wales, para. 33 to 36.

broadly, so that the requirement is met in any case where the behaviour in question is in fact punishable as something in both the issuing and the requested State, irrespective of whether the definitions of the offences in the two countries correspond[50]. And in addition, almost anything that is punishable in another Member State is likely to be punishable in the UK too, given that in recent years the UK executive and Parliament have been extraordinary active in extending the boundaries of the criminal law[51]. And the Home Office (through which incoming requests are initially processed in the name of the "Secretary of State") tells us that, where a request comes from a Member State, they would expect to deal with it "according to the spirit of the Framework Decision".

D. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties

The UK was one of the Member States on whose initiative this Framework Decision was enacted. Surprisingly, that fact was not enough to ensure that the UK implemented it by the prescribed date, which was 22 March 2007. At the time of writing, it has still not been implemented in the UK, which in consequence is almost two years late. Provisions to implement the FD in England and Wales and Northern Ireland were enacted in the Criminal Justice and Immigration Act 2008, which received the Royal Assent on 8 May 2008. As usual, the Act contains a section which prevents these provisions coming into force until the Secretary of State (Home Secretary) issues a Commencement Order, and at the time of writing it is not known when (if ever) this will be.

Unlike a number of the UK's other attempts to implement Framework Decisions, the provisions of the Criminal Justice and Immigration Act 2008 that are designed to implement this FD expressly refer to it, and closely follow the wording and the scheme that it creates.

These provisions of the Criminal Justice and Immigration Act 2008 apply only to England and Wales, and Northern Ireland. Scotland has been left to make its own arrangements – in which respect it is currently both ahead of and behind the rest of the UK. It is ahead, in that in 2007 the Scottish Parliament enacted a statute[52] to enable the FD on the mutual recognition of financial penalties to be implemented in Scotland. But it is behind the rest of the UK in that it operates by authorising the Scottish ministers to make the necessary rules by delegated legislation – and at the time of writing, this has not yet been done.

The later part of 2008 saw the adoption in Brussels of four further Framework Decisions on mutual recognition, all of which had been under discussion for some

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[50] *Norris v. USA* [2008] UKHL 16; 2 WLR 673.

[51] It is widely said that, since Labour came to power in 1997, some 3,000 new criminal offences have been created. This figure, if correct, includes of course a lot of minor regulatory offences created by secondary legislation. But a large number of new serious offences have been created too. In response to a question in Parliament in November 2005, a Minister said that, since 1997, no less than 404 new criminal offences had been created at the instance of the Home Office.

[52] Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6), section 56.

time before: of criminal convictions[53], of prison sentences[54], of probation orders and "alternative sanctions"[55], and finally, the European Evidence Warrant[56]. In January 2009, the Government introduced a Bill in Parliament, provisions of which are designed to implement the first of these[57]. At the time of writing, it is not known what the UK's legislative response to the other measures will be.

5. The UK's policy towards mutual recognition in criminal proceedings: a brief evaluation

In the earlier paragraphs of this chapter we saw that the UK's official on mutual recognition is clear: it is strongly in favour of it. But although my view would not be accepted either by the government or by its civil servants, it seems to me that up to now its policies have been distinctly muddled – both as regards the creation of new instruments, and the implementation of those that are agreed.

As regards the first, the UK took the lead in the creation of the European Arrest Warrant, and also helped to promote the Framework Decision on the mutual recognition of financial penalties. On the other hand, it used its muscle to block other Framework Decisions that would have been helpful to the defence, notably the proposed Framework Decision on Procedural Rights. But although taking an authoritarian stance over these, when negotiating other Framework Decisions it has taken a *garantiste* approach, insisting on the addition of extra safeguards for the defence, even helping to promote a new Framework Decision to limit the mutual recognition of decisions made against defendants tried *in absentia*.

As regards implementation, the UK has followed an equally inconsistent approach. To implement the FD on financial penalties it enacted legislation that closely follows the wording and the spirit of the instrument; but when implementing the FD on the European Arrest Warrant it studiously avoided doing so; and in other two cases it has (in reality) failed to implement the instrument at all.

I suspect that these inconsistencies of approach reflect, in part, the contradictory notions about Europe and continental criminal justice that were explained in the first section of this chapter. They also give the impression of an absence of any overall direction.

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[53] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

[54] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[55] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

[56] 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.

[57] Coroners and Justice Bill 2009, clause 124 and Schedule 15.

6. How well, in practice, is mutual recognition working in the UK?

In reality this question can only be examined in relation to the European Arrest Warrant, because this is the only one of the four FDs on mutual recognition which is actually in force [58].

From the Brussels perspective, the working of the European Arrest Warrant in the UK have already been examined in a series of long and detailed evaluations by the Council. In addition, however, the workings of the European Arrest Warrant have been officially examined from the UK perspective in the reports of several Parliamentary Committees [59]. The paragraphs that follow briefly summarise the main points emerging from these and other sources in the UK, rather than from the reports emanating from Brussels.

On balance, it seems to be agreed on all sides that, so far, the European Arrest Warrant has worked rather well in the UK. But to this generally positive assessment there are some qualifications.

First, the figures suggest that the UK is doing rather better out of the new scheme than the rest of Europe is doing out of the UK, in that a higher proportion of suspects arrested in Europe on the basis of warrants issued in the UK are returned than vice versa [60]. For this there could be various explanations, one of which is that the UK implementing legislation provides more guarantees (or, when viewed from the perspective of law enforcement agencies, presents more obstacles).

Secondly, where the UK is concerned as the executing State, the process often takes rather longer than the periods specified in the Framework Decision. This is so, in particular, when the wanted person enters an appeal – of which in the early years of the scheme there have been many. The reason for the number of appeals is the drafting of Part I of the Extradition Act 2003, the obscurity of which has given rise to many doubtful points which have justified the intervention of the High Court to resolve them – and indeed, in four cases, the further intervention of the House of Lords [61].

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[58] "The EAW FD is the only one of these 4 FDs that is in effective operation": government Consultation Paper CP(L)/0408 on the Proposed Framework Decision on judgments *in absentia*.

[59] House of Lords European Union Committee, *30th Report of Session 2005-06, European Arrest Warrant*, Recent Developments, 4 April 2006, HL Paper 156; House of Commons Home Affairs Committee, *Third Report of Session 2006-07*, Justice and Home Affairs at European Union Level, HC 76-1, 5 June 2007; House of Lords European Union Committee, *31st Report of Session 2006-07, European Supervision Order* (passim).

[60] According to the House of Lords European Union Committee, *30th Report of Session 2005-6*, between January 2004 and February 2006, 175 wanted persons were arrested in the UK, of whom 88 sere surrendered; and of the 90 arrests made at the instance of the UK in Europe, 69 persons were surrendered.

[61] When Judge Workman, whose court deals with all the EAW requests handled in England and Wales, gave evidence to the House of Commons Home Affairs Committee (note 55 above), he was told that "of the 44 reported breaches of the time limit on European Arrest Warrants for which reasons have been provided, 31 are of the United Kingdom and the majority of Member States have none reported". Judge Workman explained "It is largely process. The Extradition Act with its bars [against surrender] goes rather further than the Framework Decision in terms

Thirdly, from a number of different sources we have learnt that certain countries in Europe (for example, Poland) issue warrants for behaviour which scarcely seems to justify the trouble involved in sending the suspect or convicted person back: minor shoplifting, for example, or in one case, the reckless riding of a pedal cycle (!). From the UK perspective, these are seen as a waste of time, money and judicial resources, and potentially oppressive towards the persons sought. This has led to the suggestion that mutual recognition instruments ought to be constructed so that factually trivial cases are excluded – or more constructively, that some other and gentler way is found of enforcing the law in these cases that does not involve sending the wanted person back [62].

Fourthly, a particularly difficult problem has arisen over EAWs issued by countries whose systems of criminal procedure are structurally different from our own. The UK implementing legislation, copying the FD, makes it a condition for surrender that the wanted person has either been convicted, or is wanted "for the purpose of being prosecuted for the offence" [63]. English law draws a clear line between a suspect who is being investigated and an accused person who is being "prosecuted". In a serious case, the chain of events is that the police arrest a "suspect" and question him, and if at the end of this they believe him to be guilty he is "charged", at which point he turns into an "accused". "Charging" marks the dividing line between the "investigation" and the "prosecution" – and, broadly speaking, once a person has been charged the authorities lose the power to question him. This is, of course, very different from the position in France and a number of other European countries, in which there is an intermediate stage, "*la mise en examen*", which (as seen through English legal eyes) is neither one thing nor the other. And this raises the question whether, on a proper interpretation of the UK implementing legislation, a person *mise en examen* is wanted "for the purpose of being prosecuted", in which case the conditions set out in our legislation for executing an EAW are met, or merely wanted for the purpose of an investigation, in which case they are not, and he is not liable to surrender. This, obviously, is a point of great practical significance – and one which so far remains to be decided [64]. A similar issue arose, and has now been decided, as regards the status of fugitive wanted in Italy, where he had been convicted and sentenced, but under Italian law, both conviction and sentence were provisional pending his possible appeal [65].

Finally, a number of people to whom we spoke expressed serious worries about the fact that, at least officially, there is nothing that can be done by the court within the executing State to investigate a plausible allegation that the issue of the warrant

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of the protection it provides to the defendant. Some would describe these as obstacles the prosecution have to get over; others would see them as safeguards" (Evidence, p. 63).

[62] For a discussion, see R. Davidson, "A Sledgehammer to Crack a Nut? Should there be a Bar of Triviality in European Arrest Warrant Cases?", *Criminal Law Review*, 31, 2009.

[63] Extradition Act 2003 s. 2(3)(b).

[64] It was discussed, by not finally decided, by the Administrative Court in *Vey v. The Office of the Public Prosecutor of Montlucon* [2006] EWHC 760.

[65] *Caldarelli v. Judge for Preliminary Investigations of the Court of Naples* [2008] UKHL 51, [2008] 1 WLR 1724. The House of Lords, affirming the decision of the courts below, held that he counted as person "accused", not "convicted".

was all a terrible and obvious mistake: for example, where the person sought had been the victim of identity theft. (In practice, issues of this sort are sometimes resolved by the judge making further enquiries of the authority that issued the warrant – or where this was a prosecutor and not a court, by asking the public prosecutor to do so. But sometimes problems of language and of culture make it difficult to do this).

7. The current state of informed opinion in the UK on the future of mutual recognition

A. Is "mutual recognition" a good thing, or a bad thing?

Almost everyone within the UK seems to accept that "mutual recognition" as between the different Member States of the EU is in principle a good thing, rather than a bad one. Some of those whom we interviewed expressed their warm support for it. Others, whilst supporting it, took the position that mutual recognition was something rather unpleasant that had to be accepted only as the lesser of two evils, the greater evil being "harmonisation".

As already mentioned, the "mutual recognition" concept was originally put forward by the government with the express aim of providing an alternative to any kind of "vertical" approach. And as already explained in Section 3 of this chapter, whilst the UK government is a strong supporter of "mutual recognition" concept in theory, in practice it has not always been so, and in reality has adopted what might be called a "pick and mix" approach.

B. "Mutual trust"

In the UK it has often been said that mutual recognition is generally acceptable, and this is because within the EU there exists "mutual trust" in the sense of

> "(...) confidence and trust that the judgment/decision was made by a legislative/legal process that is fair and meets at least the minimum standards laid down by the ECHR and other international instruments" [66].

Remarks to this effect are widely found in judgments of the courts when dealing with cases arising from the European Arrest Warrant. For example, in a House of Lords case one of the judges said:

> "It seems equally important that every requested State should approach the matter on the basis that this has been done: in other words, in a spirit of mutual trust and respect and not in a spirit of suspicion and disrespect. For better or worse, we have committed ourselves to this system and it is up to us to make it work" [67].

In Section 4 of this chapter, we saw how the higher courts have invoked this "mutual trust" to prevent persons requested under European Arrest Warrants from producing vague and general complaints about the criminal justice systems of other Member States in order to resist surrender on "human rights" grounds.

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[66] Evidence of the Criminal Bar Association to the House of Commons Home Affairs Committee, note 59 above.

[67] *R (Hilali) v. Governor or Whitemoor Prison* [2008] UKHL 3, [2008] 1 AC 805 at [32] per Baroness Hale. And see Cranston J. in *Ektor v. Netherlands* [2007] EWHC 3106 (Admin).

But while the "official position" is that mutual trust exists, many people in the UK have doubts about whether such "mutual trust" is really justified; and this worry is shared not only by those who hold the sort of xenophobic views that were described in the Section 1 of this chapter. A number of serious commentators express concern, in particular, about the real standards of justice that exist in some of the new Member States. As the non-governmental organisation LIBERTY put it in the context of the public debate about the implementation of the European Arrest Warrant:

> "The proposed expansion of the EU to include countries which formed part of the Soviet Bloc little more than a decade ago demonstrates the potential danger. The European Convention on Extradition has been signed by countries with appalling human rights records whose judiciaries in many cases are neither independent nor impartial. Whilst they may also have signed the ECHR, this is no guarantee that in an individual case the accused will receive his Convention rights" [68].

It was defence lawyers, of course, from whom we mainly heard views of this sort, but similar worries were expressed by others. A prosecutor said:

> "(...) the differences in protections for suspects and defendants between countries, particularly the new accession ones and the established ones, is substantial. Surely this has to be addressed to ensure that mutual recognition can take place with confidence? I lectured to judges and prosecutors in one of the new EU States and was mortified to read that one of the judges I lectured to had been removed from the bench for witchcraft!"

Some people in the UK clearly believe that the legal systems of a number of the new Member States were not, in reality, "fit for purpose" when they were allowed to join. And it is for this reason, among others, that many lawyers with experience in this area were disappointed when the UK government did a volte-face in 2006 and blocked the progress of the proposed Framework Decision on Defence Rights. And equally, the same worries make a number of UK lawyers wary of extending the "mutual recognition" concept any further.

C. The "dual criminality" issue

Some commentators in the UK have expressed serious disquiet about the partial abandonment of the "dual criminality" requirement in the European Arrest Warrant and the various FDs that have followed it. In particular, doubts have been expressed by the academic writer Professor Steve Peers. In general terms, his position is that in this area, EU measures to date "have failed to strike the right balance between the objective of securing public security and the protection of civil liberties" [69]. In a powerfully-argued article [70] he suggests that the policy of "mutual recognition" in the area of criminal justice has been developed by way of a mistaken and misleading analogy with "mutual recognition" as an element in the free movement of persons,

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[68] *Liberty's response to the Draft Extradition Bill*, October 2002. And see further the comments of this organisation on the proposed European Evidence Warrant (July 2004).

[69] S. Peers, *EU Justice and Home Affairs Law*, Oxford, OUP, 2nd ed. 2006, p. 562.

[70] "Mutual recognition and criminal law in the EU: has the Council got it wrong?", *Common Market Law Review*, 41, 2004, p. 5-36.

goods, services and capital. In the context of the internal EU market, the "mutual recognition" principle is one that requires *non*-intervention by the State: a Member State must not intervene in transactions between private parties. But when transferred to the context of criminal justice, it requires *active intervention* by the Member States: to arrest, detain, remove or punish individuals. According to Peers, "If a State is required to use coercive powers, it should be obliged to justify the use of those powers to *its* population, even if those powers are exercised at the behest of another State" [71]. And from this he concludes that "a "fast track" approach to cross-border prosecutions can be accepted only for those crimes where there is sufficient substantive harmonisation in an EU measure, taking account of the established approach to dual criminality in extradition law, or where the Member States' law is already sufficiently similar, whether as a result of international treaties or the spontaneous convergence of values". This point of view gains force, of course, when the *actus reus* of the offence, or part of it, was actually committed in the territory of the executing State [72].

By contrast, worries of this sort were not widely expressed by the practitioners who were interviewed. For their absence of concern, there are probably three reasons. One, as already mentioned in Section 2 of this chapter, is that, within the UK, "mutual recognition" works between the three different legal entities, despite considerable differences of substantive criminal law, without a requirement of dual criminality. Another is that "dual criminality", as currently interpreted by our courts, is a very loose and unexacting concept [73] – in consequence of which, "dual criminality" is probably seen by practising lawyers in the UK as rather a "non-issue". And a third reason is that, when implementing the European Arrest Warrant, the UK took care to exclude, as far as possible, offences of which the *actus reus* was committed in whole or in part with the national territory of the UK.

D. The attitude towards possible new "mutual recognition" instruments

Unsurprisingly, there seems to be a wide range of opinion as to whether further mutual recognition instruments are either necessary or desirable.

The eurosceptic press, needless to say, is usually very much opposed to new initiatives in this area. If it notices proposals of this sort, it usually reports them as covert attempts by Brussels to put British law and British institutions under the control of foreigners. Thus *The Daily Telegraph* – predictably – reported the proposed European Evidence Warrant under headlines saying "EU Warrant "undermines British law"" [74] and "Warrant will give EU judges power over British police" [75].

At the other end of the scale, the Bar is generally favourable to the idea of new "mutual recognition" instruments that would, unlike the four that have so far come into force, provide benefits to the defence. Thus the Criminal Bar Association warmly

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[71] At p. 25.

[72] See Professor Peers's comments in oral evidence to the House of Commons Home Affairs Commitee, 23 January 2007. "Why should we hand someone over to Ireland, for instance, to be prosecuted for performing abortion services in the UK which are legal here?"

[73] See *Norris v. USA* [2008] UKHL 16, 2 WLR 673.

[74] 31 January 2005.

[75] 2 February 2006.

welcomed the proposed FD on Defence Rights [76] and later deplored the fact that the project had been abandoned [77]. Similar views were expressed by defence lawyers whom we interviewed in connection with the preparation of our Report – one of whom remarked to us that the current trend in mutual recognition instruments is very "prosecution minded".

As long ago as 2000 Criminal Bar Association also floated the possibility of a mutual recognition instrument in connection with acquittals and the *non bis in idem* rule, and mutual recognition of non-custodial measures (which it supports because the general effect of this would probably be to reduce the likelihood of those who are convicted outside their own country being sent to prison) [78].

Turning to look at mutual recognition from the other end of the telescope, in the same document the Criminal Bar Association also floated the idea, since carried out, of an instrument for the mutual enforcement of fines, and an instrument for the mutual recognition of disqualifications (of all sorts – not merely of motoring offenders).

Surprisingly, perhaps, prosecutors in the UK seem to be distinctly unenthusiastic about some of the new instruments that are proposed with the apparent aim of helping prosecutors: in particular, the proposed new European Evidence Warrant. One prosecutor with experience in trans-national cases said:

> "From a practical point of view, apart from abolishing the double criminality requirement, due to its limited application (to evidence already in existence) I see little added value from this FD, unless it is radically altered to cover everything that I can currently obtain by way of a letter of request using the 1959 Convention as amended. The thought of having the two systems working alongside each other is typical of some of the muddled thinking coming out of the EU with regard to the practical effects!" [79].

Several interviewees also said, forcefully, that they thought that Framework Decisions in the area of criminal justice were often manufactured for political reasons which had little to do with improving the workings of European criminal justice. As one put it, "Each six month presidency wants to push through a FD to show it has achieved something... the political imperative seems to take precedence over practical considerations".

On the subject of practical utility, a police officer who was interviewed pointed out that at present it is difficult and expensive (and sometimes impossible) for the UK police to trace the owners of motor vehicles with foreign registration plates, and as

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[76] *Response of the Criminal Bar Association of England and Wales to the Green Paper from the European Commission on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings Throughout the European Union*, London, 2003.

[77] In written evidence to the House of Commons Home Affairs Committee in December 2006.

[78] *Observations regarding the advancement of mutual recognition of final decisions in criminal matters. A response to the European Commission's initiative*. (Prepared by Rudi Fortson for the Bar Council of England and Wales, and the Criminal Bar Association).

[79] And compare the published comments of another English prosecutor: B. WHEELDON, "Relationship between EU policy and national practice: four practical recommendations from a CPS perspective", *ERA Forum,* Special Issue, 2005.

a result, drivers from other Member States are in practice immune from prosecution in the UK for traffic offences unless they are particularly serious. He said it would be sensible if Europe solved this practical problem before having a Framework Decision on the mutual recognition of financial penalties. Reflecting this view, some civil servants also said they believed that "practical measures" of co-operation were likely to be more beneficial than further legislation.

E. The need for "flanking measures"

By contrast, there was widespread agreement from those we interviewed on the need for counterbalancing the existing (and future) mutual recognition instruments with measures like the proposed Framework Decision on Defence Rights. Like the Criminal Bar Association, those to whom we spoke were both surprised and sorry that this initiative had been abandoned – with the UK taking the leading role in "killing" it. Comments to this effect were made, of course, by defence lawyers, but also by civil servants. One civil servant with extensive experience of mutual legal assistance work told us: "Is there indeed a limit to all this about trust, if we cannot even agree fundamental stuff about rights to redress the balance?" [80]

F. Has mutual recognition reached its limits?

On this important topic, different views are expressed by different people. One opinion that is widely held is that, even though the "mutual recognition" was invented in order to avoid the need for harmonising national systems of criminal justice, the limit of this process has been reached, and no further "mutual recognition" is possible without a degree of harmonisation. According to this view, a lack of harmonisation between the different legal systems already leads to difficulties even with the European Arrest Warrant, which is the one mutual recognition instrument that is actually "up and running": as we saw earlier, in the context of doubts that have arisen in the English courts about whether it is possible to surrender persons to France who have been *mises en examen.* And when it comes to the mutual recognition of other court decisions in areas where national rules and practices are even more divergent – for example, pre-trial measures, or non-custodial penalties – the problems become even more acute.

The Criminal Bar Association took this position when submitting evidence to the House of Commons Home Affairs Committee in December 2006. It said:

> "(...) we are of the opinion that, for mutual recognition to achieve its full potential, some degree of harmonisation of the concepts on which it rests, at least as regards cross-border cases, is inevitable".

A solicitor with experience in trans-national cases, and practical knowledge of the criminal justice systems of some other Member States, gave us the example of bail condition requiring the suspect to surrender his passport to the authorities

[80] Though support was not universal; an experienced Scottish advocate who was interviewed said: "We already have, especially in ECHR, a well developed set of principles, designed to ensure fairness. I cannot myself think of any additional rules which need to be, or which could be, promulgated. The danger is that flanking measures which went beyond that would assume particular legal contexts and sit uncomfortably in some".

pending trial. In the UK, and a number of other Member States, this condition is routinely imposed on those who are remanded on bail, as against being remanded on custody. But in some Member States this measure would be impossible, as it would be unconstitutional. Another practical difficulty of this sort was mentioned to us in connection with the mutual recognition and enforcement of custodial sentences. Between the Member States, the rules differ very widely as regards premature release. If a custodial sentence imposed by country X is then enforced in country Y, which country's rules on the subject then apply [81]?

But although everyone recognises the potential difficulties, it is not everyone who takes the view that mutual recognition is impossible in these areas without some harmonisation of the rules. For example, Senior District Judge Workman, whose court in London deals with all the English business concerning European Arrest Warrants, told the House of Lords European Union Committee, when it was examining the proposal for a European Supervision Order, that the problem could be resolved by listing in the Framework Decision a number of conditions which are in practice available in all the Member States [82].

G. Would it be desirable to put all the different "mutual recognition" instruments together into one single instrument?

Most of those interviewed thought that it would be. They felt that the proliferation of different Framework Decisions was needlessly confusing: and particularly so where (as sometimes happens) basic issues are dealt with in slightly different ways. A defence solicitor with wide experience in this area expressed himself thus:

> "Extradition was the really big problem. Once that had been solved by the Framework Decision on the European Arrest Warrant, the sensible thing would have been to suspend work on further mutual recognition measures for five years until we could all see how the Arrest Warrant was working. Then when that was known, there should have been a period of general reflection, leading to an overall plan of further mutual recognition measures built around what is really needed. And then all the new measures should have been enacted in a single instrument".

[81] Article 17 of the new Framework Decision on the mutual recognition of prison sentences (see note 54 above) attempts to deal with this.

[82] European Union Committee, *31st Report of Session 2006-7*, *European Supervision Order*, HL Paper 145, evidence, p. 72.

Quel futur pour la reconnaissance mutuelle en matière pénale ? Analyse transversale

Gisèle Vernimmen-Van Tiggelen et Laura Surano

1. Introduction

Les pages qui suivent tenteront de faire le point sur la mise en œuvre du principe de reconnaissance mutuelle en matière pénale dans l'Union, les difficultés rencontrées, ainsi que les attentes des acteurs de justice, avant d'avancer quelques pistes de réflexion pour l'avenir dans les différents domaines abordés. Cette contribution se base largement sur l'*étude sur l'avenir de la reconnaissance mutuelle en matière pénale dans l'UE* qui a été mise en contexte dans l'introduction au présent ouvrage [1].

2. Bilan de l'acquis

A. Où en est-on de la réalisation du programme de reconnaissance mutuelle ?

Depuis le Conseil européen de Tampere qui a consacré le principe de reconnaissance mutuelle comme pierre angulaire de la coopération judiciaire dans l'Union européenne, malgré l'apparente logique des programmes et malgré l'adoption de plans d'action

[1] Les auteurs expriment leur reconnaissance aux nombreuses personnes qui ont contribué à cette étude. Outre les rapporteurs nationaux, et les personnes interviewées (plus de 170), les auteurs adressent leurs remerciements aux experts qui ont accepté de participer aux deux réunions de travail (Julia Bateman, Daniel Flore, Světlana Kloučková, Samuli Miettinen, Fernando Piernavieja Niembro, Eric Ruelle, Veronica Santamaria, Eugenio Selvaggi, Joachim Vogel et Anne Weyembergh). Elles assument cependant entièrement les lacunes ou imprécisions que cette contribution pourrait contenir. Pour des raisons de confidentialité, les notes infrapaginales ne renvoient pas à des entretiens particuliers et n'indiquent pas nominativement les opinions personnelles des personnes interviewées.

énonçant des priorités et fixant des calendriers et des échéances [2], la mise en œuvre de la reconnaissance mutuelle est aléatoire, les retards et blocages se sont multipliés [3], et surtout l'ambition concrète des instruments adoptés s'amenuise. La mise en place d'un espace de justice européen fondé sur la reconnaissance mutuelle des décisions, et sur la confiance réciproque qui la sous-tend, se fait attendre et son élaboration se révèle plus chaotique qu'harmonieuse. Les praticiens dénoncent le décalage de plus en plus net entre les intentions déclarées d'une part, leur mise en œuvre dans les textes et la transposition de ceux-ci de l'autre. Autrement dit, on assiste à un essoufflement, à un manque de suivi, et sans doute à un manque de conviction.

Il y a à cela sans doute au moins trois raisons. La première est que la confiance réciproque qui doit sous-tendre ce programme n'est pas toujours au rendez-vous. La consécration du principe de reconnaissance mutuelle comme moteur de la coopération judiciaire en matière pénale n'est pas l'aboutissement d'une évolution ou la conséquence d'un niveau constaté de profonde confiance réciproque. Il est indéniable au contraire qu'au Conseil européen de Cardiff, puis de Tampere, on est parti d'un postulat de confiance mutuelle, mais que celle-ci n'est pas toujours spontanément et concrètement éprouvée dans la pratique, même si on peut constater qu'elle a tendance à s'accroître [4]. Tous nos interlocuteurs s'accordent à reconnaître que la confiance mutuelle est un apprentissage, un processus dynamique et réciproque. Elle demande un effort et une disposition d'esprit des deux parties : la confiance s'accorde, mais elle se mérite également.

En deuxième lieu, comme l'ordre prévu dans le calendrier n'a pas été respecté, ces travaux ont débouché sur un arsenal complexe d'instruments disparates [5]. Leur

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[2] Programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales, *JO*, n° C 12, 15 janvier 2001, p. 10 ; Plan d'action de La Haye mettant en œuvre le programme de La Haye visant à renforcer la liberté, la sécurité et la justice dans l'Union européenne, *JO*, n° C 198, 12 août 2005, p. 1.

[3] On relèvera toutefois une série d'instruments concernant la reconnaissance mutuelle, sur lesquels des réserves parlementaires très longtemps maintenues, ont été levées et les textes adoptés entre novembre 2008 et avril 2009 : décision-cadre 2008/909/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution dans l'UE, *JO*, n° L 327, 5 décembre 2008, p. 27 ; décision-cadre 2008/947/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements et aux décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution, *JO*, n° L 337, 16 décembre 2008, p. 102 ; décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves tendant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72 ; décision-cadre 2009/299/JAI du 26 février 2009 portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès, *JO*, n° L 81, 27 mars 2009, p. 24.

[4] Voy. à cet égard les contributions de G. Conway et de I. Šlosarčík au présent ouvrage.

[5] Voy. par exemple l'analyse de A.Weyembergh et V. Santamaria, ou de A. Suominen sur ce point dans leur contribution au présent ouvrage.

transposition se heurte à la difficulté de mesurer leur impact sur des législations connexes. Le rythme des modifications législatives successives entraîne une certaine lassitude et, faute d'information et de formation accessibles à tous, rend leur application concrète malaisée et aléatoire. Les praticiens ont du mal à suivre la mise en œuvre d'instruments multiples, complexes, mal coordonnés et parfois trop ciblés.

Dans la phase qui suit le jugement, l'exécution de sanctions dans un autre EM que celui de la condamnation fait l'objet d'instruments de reconnaissance mutuelle selon une séquence relativement logique : l'extradition a fait place à la remise sur la base d'un MAE[6], les DC du 24 février 2005[7] et du 6 octobre 2006[8] vont permettre d'exécuter les sanctions pécuniaires et les décisions de confiscation, les DC du 27 novembre 2008[9] sur la reconnaissance mutuelle respectivement des peines privatives de liberté et des peines assorties de sursis ou alternatives vont garantir que leur exécution concilie respect et efficacité de la décision prononcée d'une part, et conditions optimales de la réinsertion de personnes condamnées de l'autre. Bien entendu, il est essentiel que ces instruments se complètent harmonieusement et que l'ensemble ne laisse pas subsister de sanctuaire ou de « poche d'impunité ».

La question de la reconnaissance des déchéances ou interdictions est un problème épineux qui a été laissé en friche après la communication de la Commission[10]. A juste titre, les travaux ont porté préalablement sur l'échange d'informations sur les condamnations[11]. La présente étude n'a guère abordé cette question qui demanderait une analyse séparée beaucoup plus fouillée.

Dans la phase avant jugement, le remplacement de la coopération classique par des instruments de reconnaissance mutuelle propres à l'Union s'opère de manière

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[6] Décision-cadre 2002/584/JAI du 13 juin 2002 relative au mandat d'arrêt européen et aux procédures de remise entre Etats membres, *JO*, n° L 190, 18 juillet 2002, p. 1.

[7] Décision-cadre 2005/214/JAI du 24 février 2005 concernant l'application du principe de reconnaissance mutuelle aux sanctions pécuniaires, *JO*, n° L 76, 22 mars 2005, p. 16.

[8] Décision-cadre 2006/783/JAI du 6 octobre 2006 relative à l'application du principe de reconnaissance mutuelle aux décisions de confiscation, *JO*, n° L 328, 24 novembre 2006, p. 59.

[9] Décision-cadre 2008/909/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements en matière pénale prononçant des peines ou des mesures privatives de liberté aux fins de leur exécution dans l'UE, *JO*, n° L 327, 5 décembre 2008, p. 27 ; décision-cadre 2008/947/JAI du 27 novembre 2008 concernant l'application du principe de reconnaissance mutuelle aux jugements et aux décisions de probation aux fins de la surveillance des mesures de probation et des peines de substitution, *JO*, n° L 337, 16 décembre 2008, p. 102.

[10] Communication de la Commission, *Les déchéances de droits consécutives aux condamnations pénales dans l'UE*, COM (2006) 73, 21 février 2006.

[11] Décision-cadre 2008/675/JAI du 24 juillet 2008 sur la prise en compte des décisions de condamnation, *JO*, n° L 220, 15 août 2008, p. 32 ; décision-cadre 2009/315/JAI du 26 février 2009 concernant l'organisation et le contenu des échanges d'informations extraites du casier judiciaire entre les Etats membres, *JO* n° L 93, 7 avril 2009, p. 23 ; et décision 2009/316/JAI du 6 avril 2009 relative à la création du système européen d'information sur les casiers judiciaires (ECRIS), en application de l'article 11 de la DC 2009/315/JAI, *JO*, n° L 93, 7 avril 2009, p. 33.

progressive, mais plus chaotique. La remise sur la base d'un MAE a ici aussi supplanté l'extradition. La future DC sur la décision européenne de contrôle judiciaire présentenciel [12] s'attachera à faire en sorte que des mesures de surveillance puissent être exercées dans l'Etat membre de résidence en lieu et place d'une détention préventive ou de mesures de contrôle dans celui de la procédure. Mais l'introduction du principe de reconnaissance mutuelle dans la collecte de la preuve est encore embryonnaire. A ce jour, seuls deux instruments ont été adoptés : la DC du 22 juillet 2003 [13] sur le gel, et celle du 18 décembre 2008 [14] sur le mandat d'obtention des preuves (MOP).

La politique des petits pas dans ce domaine est souvent perçue comme une erreur stratégique. L'effort demandé pour se familiariser avec un nouvel instrument est ressenti comme disproportionné par rapport à son efficacité, laquelle est nécessairement limitée dans une procédure qui nécessite plusieurs mesures d'assistance mutuelle [15]. La DC sur le MOP est fréquemment citée comme l'exemple à ne pas suivre [16]. La DC sur le gel n'est pas non plus un franc succès [17].

Pour beaucoup de personnes interrogées, la situation actuelle ne permet pas de procéder à une codification [18], mais invite toutefois à traiter dans un même instrument de plus larges ensembles de mesures [19], quitte à y intégrer celles qui ont déjà fait l'objet d'initiatives de l'UE. Les risques inhérents au reformatage ne sont cependant pas à négliger : vu la relative modestie ou le recul des derniers instruments, rouvrir le débat sur le MAE, par exemple, pourrait conduire à un texte moins ambitieux.

La troisième entrave à la pleine réalisation du programme de reconnaissance mutuelle tient aux divergences importantes entre les législations et traditions des Etats membres. On verra dans les sections qui suivent que la mise en place d'un régime

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[12] Proposition de la Commission de décision-cadre du Conseil relative à l'application du principe de reconnaissance mutuelle des décisions concernant le contrôle judiciaire comme alternative de détention provisoire (COM (2006) 468 du 29 août 2006, dernière version 17506/08 COPEN 261 du 6 mars 2009, accord politique du Conseil du 28 novembre 2008, 16325/1/08REV1).

[13] Décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'Union européenne des décisions de gel de biens ou d'éléments de preuve, *JO*, n° L 196, 2 août 2003, p. 45.

[14] Décision-cadre 2008/978/JAI du 18 décembre 2008 relative au mandat européen d'obtention de preuves visant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales, *JO*, n° L 350, 30 décembre 2008, p. 72.

[15] Voy. par exemple la contribution au présent ouvrage de A. Weyembergh et V. Santamaria.

[16] Voy. ainsi les contributions de W. van Ballegooij, de M. Poelemans, de R. Kert, et de L. Surano au présent ouvrage, ainsi que celle de T. Wahl qui souligne les possibles effets pervers du système.

[17] Voy. par exemple les contributions au présent ouvrage de M. Poelemans et de M. Chinova et M. Assenova.

[18] Dans ce sens, les contributions au présent ouvrage de G. Švedas et D. Mickevičius, de M. Poelemans, de S. Braum, de K. Šugman Stubbs et M. Mihelj Plesničar, et de J. Vestergaard et S. Adamo. On lira en revanche des positions plus ouvertes à la codification dans la contribution de Á. G. Zarza.

[19] Voy. par exemple la contribution de A. Suominen au présent ouvrage.

fondé sur la reconnaissance mutuelle se heurte ainsi à la difficulté de surmonter les différences de droit matériel (B), de droit procédural, en particulier les règles concernant les droits de la défense (C), de systèmes judiciaires (D), de compétence juridictionnelle (E), et de traitement des nationaux (F).

Enfin, des questions de méthode, en ce compris les mesures d'accompagnement (G), doivent être posées.

B. Reconnaissance mutuelle et différences de droit substantiel

1. Le défaut de double incrimination comme motif de refus de reconnaissance

a) Le mandat d'arrêt européen

La compatibilité de l'abolition de l'exigence de double incrimination avec les règles constitutionnelles a été mise en cause dans plusieurs Etats membres, comme en République tchèque [20], en Hongrie [21], en Roumanie [22] et fait encore l'objet de débats de principe [23], malgré la position de la Cour de justice qui a conclu à l'absence de violation du principe de légalité des délits et des peines [24]. La pratique révèle toutefois peu de problèmes flagrants liés à des divergences entre le droit matériel de l'EM d'émission et celui d'exécution. Dans les cas relevant des 32 catégories d'infractions pour lesquelles le contrôle de double incrimination est aboli par la DC sur le mandat d'arrêt européen, la vérification de l'adéquation des faits avec la catégorie sélectionnée subsiste néanmoins [25], ce qui suppose une interprétation de la concordance des catégories avec les qualifications de la loi de l'Etat membre d'émission ou même de celle de l'Etat membre d'exécution [26]. C'est pourquoi, si nombre d'experts indiquent qu'en principe l'absence de contrôle de la double incrimination n'apporte pas de changement substantiel par rapport à la situation antérieure, où la double incrimination était examinée *in abstracto*, il n'en demeure pas moins que la formalisation du MAE, avec une description assez sommaire des faits, crée un certain malaise pour l'autorité d'exécution si elle entend s'assurer qu'elle partage le choix de la catégorie concernée par l'autorité d'émission.

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[20] Cour constitutionnelle CZ, n° Pl. Us. 66/04 du 3 mai 2006.

[21] Cour de Cassation HU, décision 733/A/2007 du 8 mars 2008.

[22] Cour constitutionnelle RO, arrêt n° 424 du 10 avril 2008.

[23] Voy. notamment les contributions de G. Švedas et D. Mickevičius et de K. Šugman Stubbs et M. Mihelj Plesničar dans le présent ouvrage.

[24] CJ, 3 mai 2007, aff. C-303/05, *ASBL Advocaten voor de wereld*.

[25] Voy. entre autres les contributions de G. Conway, de G. Švedas et D. Mickevičius, de R. Kert, de S. Filletti et A. Gatt, de J. Vestergaard et S. Adamo, et de W. van Ballegooij dans le présent ouvrage, ainsi que les circulaires ministérielles belges de 2005 et de 2007, auxquelles renvoie la contribution de A. Weyembergh et V. Santamaria. Voy. aussi l'arrêt de la Cour suprême portugaise du 4 janvier 2007 (n° 06P4707) cité dans la contribution de P. Caeiro et S. Fidalgo.

[26] Voy., par exemple, les contributions de K. Ligeti et de G. De Amicis au présent ouvrage sur la « réécriture » des infractions rentrant dans les catégories de la liste par les législations de transposition HU et IT.

b) L'entraide judiciaire mineure

Traditionnellement, le défaut de double incrimination est un motif de refus classique dans le domaine de l'extradition, alors qu'en ce qui concerne l'entraide judiciaire mineure, il ne s'applique que lorsque la mesure demandée consiste en une perquisition ou une saisie. Les conditions auxquelles l'assistance peut être subordonnée dans ce dernier cas sont, entre Etats membres, encadrées par l'article 51 de la CAAS [27] qui a modifié sur ce point à la fois la portée de l'article 5 de la convention du Conseil de l'Europe de 1959, et celle des réserves que les Etats membres avaient émises sur cette disposition.

Seuls trois Etats membres (Hongrie, Lituanie et Estonie) ont fait, concernant cette fois l'article 2 de la convention de 1959, une déclaration aux termes de laquelle ils peuvent conditionner l'octroi de toute forme d'assistance à l'existence de la double incrimination. Ces réserves restaient d'application entre Etats membres, la convention de 2000 ne les affectant pas. Suite à l'arrêt de sa Cour constitutionnelle, la Hongrie a modifié l'article 57(4) de sa Constitution pour permettre de renoncer au contrôle de double incrimination [28]. L'entrée en vigueur de cette modification est cependant subordonnée à celle du traité de Lisbonne, ce qui fait que la situation est imprécise aujourd'hui. En Lituanie, la question de l'éventuelle violation, par l'abolition de l'exigence de double incrimination, du principe constitutionnel de l'égalité des individus devant la loi, reste, selon les personnes interrogées, théoriquement posée, mais n'a pas été soumise à la Cour constitutionnelle [29]. En Estonie, la réserve à l'article 2 connaît une interprétation stricte, mais l'abolition du contrôle, entre Etats membres et pour les catégories d'infractions figurant sur la liste, ne rencontre pas d'objection d'ordre constitutionnel.

Les instruments de reconnaissance mutuelle qui portent sur l'entraide judiciaire mineure, c'est-à-dire les DC sur le gel et sur le MOP, ont repris de celle sur le MAE la distinction entre catégories d'infractions « listées », à l'égard desquelles le contrôle de la double incrimination n'est pas admis, et autres, pour lesquelles il est autorisé. Pour l'exécution des perquisitions et des saisies, il s'agit évidemment d'un progrès, pour les infractions relevant des 32 catégories, bien sûr, mais même aussi pour les infractions « hors liste », puisque la condition de minimum de six mois de peine encourue ne peut plus être exigée.

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[27] L'article 51 de la convention d'application de l'accord de Schengen prévoit que : « Les Parties contractantes ne subordonnent pas la recevabilité de commissions rogatoires aux fins de perquisition et de saisie à des conditions autres que celles ci-après :
a) le fait qui a donné lieu à la commission rogatoire est punissable selon le droit des deux Parties Contractantes d'une peine privative de liberté ou d'une mesure de sûreté restreignant la liberté d'un maximum d'au moins six mois, ou punissable selon le droit d'une des deux Parties contractantes d'une sanction équivalente et selon le droit de l'autre Partie contractante au titre d'infraction aux règlements poursuivie par des autorités administratives dont la décision peut donner lieu à un recours devant une juridiction compétente notamment en matière pénale ;
b) l'exécution de la commission rogatoire est compatible avec le droit de la Partie contractante requise ».

[28] Voy. l'analyse de K. Ligeti dans le présent ouvrage.

[29] Voy. l'analyse de G. Švedas et D. Mickevičius dans le présent ouvrage.

Cette présentation relativement optimiste doit néanmoins être nuancée.

D'abord, la possibilité d'invoquer l'absence de double incrimination pour refuser l'exécution d'une décision de gel ou d'un MOP nécessitant une perquisition ou une saisie lorsqu'il s'agit d'une infraction « hors liste » est théoriquement ouverte à tous les Etats membres, même s'ils ne faisaient pas usage de cette faculté à l'encontre d'une commission rogatoire traditionnelle, et ce parce que les nouveaux instruments créent en principe un régime nouveau, différent, et qui ne se greffe pas sur les instruments précédents. De nombreux praticiens considèrent d'ailleurs que, même limitée, la possibilité de subordonner à la double incrimination l'exécution du MOP ou de la décision de gel, loin de représenter un progrès, constitue un recul paradoxal dans la coopération judiciaire entre Etats membres [30].

En deuxième lieu, dans le contexte du MOP, l'Allemagne s'est réservé le droit de maintenir l'exigence de double incrimination pour certaines catégories « listées »le terrorisme, la cybercriminalité, le racisme et la xénophobie, le sabotage, le racket, l'extorsion de fonds et l'escroquerie [31], dérogation que le Conseil devra réexaminer dans les cinq ans qui suivent l'entrée en vigueur de la DC, c'est-à-dire d'ici janvier 2014.

Troisièmement, l'articulation entre instruments en vigueur manque de clarté. En effet, l'analyse selon laquelle ces deux instruments ne viennent pas compléter ou faciliter l'application des conventions préexistantes, mais les remplacer par un régime autonome avec ses propres règles de fonctionnement, doit être nuancée. Par exemple, l'article 10 de la DC sur le gel stipule que la décision de gel est accompagnée d'une demande de transfert de la preuve, ou d'une demande de confiscation, ou encore d'une instruction visant à conserver les biens dans l'attente d'une telle demande. Tant qu'il n'y a pas d'instrument de reconnaissance mutuelle en vigueur (et transposé !), ces demandes se font encore par commission rogatoire internationale avec les motifs de refus traditionnels. Il est vrai que l'article 10(3) de la DC sur le gel interdit d'invoquer l'absence de double incrimination pour le transfert de preuves dans le cas de délits relevant des catégories listées, et punissables de trois ans au moins dans l'Etat membre d'émission. Mais lorsque le gel est ou doit être suivi d'une confiscation, rien n'est prévu, et cela reste une source de confusion, tant que la DC sur les décisions de confiscation n'est pas appliquée entre tous les Etats membres [32]. S'agissant du MOP, l'article 21(3) de la DC du 18 décembre 2008 permet expressément d'écarter cet instrument au bénéfice de l'assistance mutuelle traditionnelle si l'obtention de preuves relevant de la DC sur le MOP fait partie d'une demande plus vaste, voire même si dans le cas d'espèce, l'assistance mutuelle serait de nature à faciliter la coopération avec l'Etat membre d'exécution. L'application pratique future de cette disposition est incertaine.

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[30] Voy. par exemple la contribution de M. Poelemans au présent ouvrage.

[31] Voy. l'article 23(4) de la DC 2008/978/JAI et la déclaration publiée au *JO*, n° L 350, 30 décembre 2008, p. 92.

[32] Au 1er mars 2009, seuls AT, CZ, DK, FI, IE, PL, RO et SI l'avaient transposée.

c) L'exécution de la peine

Si l'on prend en considération à présent les dernières DC relatives à l'exécution de la peine [33], l'exigence de la double incrimination est de nature à limiter la portée d'un instrument qui pourrait bénéficier à l'individu. C'est pourquoi certains Etats membres n'envisageraient pas de faire usage du motif de refus fondé sur l'absence de double incrimination, ou du moins s'interrogent sur l'opportunité de le faire, lorsque ce refus serait contraire aux intérêts de la personne concernée [34], alors que pour d'autres l'exécution d'une peine sur leur territoire suppose nécessairement que les faits reprochés y soient pénalement sanctionnés [35]. On se trouvera vraisemblablement dans une situation analogue en ce qui concerne la future DC sur le contrôle pré-sentenciel dans l'Etat membre d'origine ou de résidence [36].

2. La proportionnalité

On constate d'autre part une certaine préoccupation à l'égard de l'émission de mandats d'arrêt européens pour des faits qualifiés de mineurs dans l'EM d'exécution [37]. Si les critères quantitatifs d'application (niveau de la peine encourue ou durée de la peine imposée) ne sont pas contestés, et si des sensibilités diverses quant à la gravité de certains délits (vol, vandalisme, coups et blessures, …) sont considérées comme normales, il est souvent fait appel à plus de modération et de proportionnalité dans l'émission des mandats d'arrêt européens [38]. Le manuel sur l'émission de mandats d'arrêt européens reflète d'ailleurs ce souci [39]. Lors de la réunion au cours de laquelle le projet de rapport final a été présenté [40], plusieurs intervenants ont suggéré que cet usage « abusif » du MAE disparaisse au profit de l'audition, si besoin à distance, de la personne, d'un jugement par défaut conforme à la DC sur les procédures « *in absentia* » [41], et de l'imposition d'une amende à exécuter selon la DC sur les sanctions pécuniaires.

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[33] Voy. *supra*, note 9.

[34] Voy. par exemple la contribution de J. Vestergaard et S. Adamo au présent ouvrage.

[35] Voy. par exemple la contribution de W. van Ballegooij au présent ouvrage.

[36] Proposition de la Commission de décision-cadre du Conseil relative à l'application du principe de reconnaissance mutuelle des décisions concernant le contrôle judiciaire comme alternative de détention provisoire (COM (2006) 468, 29 août 2006, dernière version Doc. 17506/08 COPEN 261 du 6 mars 2009).

[37] Voy. par exemple les contributions de W. van Ballegoij, de A. Łazowski, de T. Wahl, de G. De Amicis, de A. Suominen, et de J. R. Spencer dans le présent ouvrage.

[38] La possibilité de ne pas émettre de MAE est cependant liée à celle de ne pas poursuivre, et les Etats membres qui connaissent le principe de la légalité des poursuites n'ont pas toujours la marge de manœuvre nécessaire pour répondre à ce vœu. Voy. par exemple sur ce point la contribution de K. Šugman Stubbs et M. Mihelj Plesničar dans le présent ouvrage.

[39] Manuel européen concernant l'émission d'un mandat d'arrêt européen (Conseil de l'UE, COPEN 70 REV2 du 18 juin 2008).

[40] Réunion d'experts du 27 octobre 2008 organisée à Bruxelles par la Commission européenne.

[41] Adoptée depuis : décision-cadre 2009/299/JAI du 26 février 2009 portant modification des décisions-cadres 2002/584/JAI, 2005/214/JAI, 2006/783/JAI, 2008/909/JAI et 2008/947/JAI, renforçant les droits procéduraux des personnes et favorisant l'application du principe de

3. L'harmonisation du droit substantiel

La poursuite du rapprochement du droit substantiel au sens de la définition commune de qualifications pénales n'est pas généralement perçue comme un préalable à l'adoption et à l'application d'instruments de reconnaissance mutuelle, même si nombre d'interlocuteurs manifestent un intérêt pour cette démarche.

L'idée a été émise d'une base de données qui reprendrait les qualifications pénales nationales correspondant aux catégories d'infractions à l'égard desquelles le contrôle de la double incrimination est aboli. Cela permettrait d'illustrer la liste de catégories des délits et d'en harmoniser l'interprétation. La majorité des personnes consultées sont cependant sceptiques quant à l'utilité d'une telle liste [42].

En revanche des différences sur d'autres aspects du droit pénal, comme le concept d'intention [43], l'âge de la responsabilité pénale [44], le délai de prescription, la responsabilité des personnes morales [45], sont parfois évoquées comme des entraves au bon fonctionnement des instruments.

Ni la volonté politique, ni la base légale n'existent pour convenir d'une politique criminelle commune au sens d'un accord sur les comportements à sanctionner, les moyens à mettre en œuvre pour les appréhender, le degré de sévérité avec lequel les punir, les méthodes de réinsertion sociale à appliquer, etc.

L'UE est donc confrontée au défi de mettre en place un cadre législatif qui oblige les Etats membres à se prêter assistance et à reconnaître des décisions les uns des autres, tout en n'imposant pas aux plus tolérants l'approche plus restrictive des autres [46], mais au contraire en permettant aux choix éthiques et de société de chaque Etat membre de coexister.

Il n'en demeure pas moins qu'on s'attendrait à ce qu'une enceinte existe au sein de laquelle les politiques criminelles nationales soient discutées [47], en tout cas dans les domaines qui ont fait l'objet d'un rapprochement du droit substantiel.

C. Reconnaissance mutuelle et différences de droit procédural

1. Le respect des droits fondamentaux

La possibilité de contrôler le respect des droits fondamentaux est expressément prévue dans bon nombre de législations de transposition [48]. Si elle ne l'est pas, elle

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reconnaissance mutuelle aux décisions rendues en l'absence de la personne concernée lors du procès, *JO*, n° L 81, 27 mars 2009, p. 24.

[42] Voy. au contraire les contributions de M. Chinova et M. Assenova, de Á. G. Zarza, et de F. Streteanu et D. Ionescu.

[43] Voy. dans le présent ouvrage la contribution de K. Šugman Stubbs et M. Mihelj Plesničar.

[44] Voy. dans le présent ouvrage la contribution de A. Weyembergh et V. Santamaria.

[45] Voy. en particulier la contribution de I. Šlosarčík au présent ouvrage.

[46] Voy. à ce sujet la contribution de R. Kert au présent ouvrage.

[47] Voy. dans ce sens la contribution de K. Ligeti au présent ouvrage.

[48] Telles les lois de transposition AT (Sections 19 para. 4, 52a para.1 fig.10, 53a fig.11 EU-JZG), FI (art. 5(1) 6, Extradition Act), IT (article 2(3) de la loi 69/2005), BE (article 4(5) de la loi du 19 décembre 2003), IE (Partie III du 2003 EAW Act, S. 37), DE (article 73, 2e phrase IRG), EL (article 1(2) de la loi 3251/2004).

peut être sous-entendue [49]. L'usage qu'en font les autorités judiciaires est cependant marginal et les cas de refus sont jusqu'ici limités [50]. Les cours ont tendance à user avec beaucoup de parcimonie du motif de refus tiré de la violation alléguée des droits fondamentaux [51].

Les juridictions supérieures font généralement preuve de confiance dans la justice rendue par leurs homologues des autres Etats membres. Sans toujours citer expressément la décision de la CJ dans l'affaire *Pupino* [52], elles témoignent en effet, dans tous les Etats membres, d'un souci de respecter le plus fidèlement possible la lettre et l'esprit de l'instrument de l'Union [53]. Les entretiens comme les rapports démontrent une adhésion à la construction d'un espace judiciaire européen. Sans doute cette attitude s'explique-t-elle par le fait que ces juridictions s'attachent plus au droit qu'aux circonstances de la cause et sont généralement investies de la responsabilité de définir des jurisprudences contraignantes. Les Cours constitutionnelles, quand elles ont été amenées à se prononcer, ont manifesté elles aussi une attitude généralement positive à l'égard de la reconnaissance mutuelle [54].

Cependant, le fait que ces garanties soient consacrées juridiquement n'empêche pas que dans un cas individuel, elles ne soient pas respectées, et la vaste majorité des magistrats entendent pouvoir exercer ce contrôle dans des cas exceptionnels [55]. On peut d'ailleurs y voir un souci de légitimité : les juges se sentent investis d'une

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[49] Voy. notamment les contributions de W. van Ballegooij, de M. Poelemans, de M. Chinova et M. Assenova, de F. Streteanu et D. Ionescu, de K. Ligeti, et de S. Filletti et A. Gatt dans le présent ouvrage.

[50] Voy. par exemple : District Court of Amsterdam (1 juillet 2005, AT 8580), Cour d'Appel de Pau (n° 94/2008 du 7 mars 2008), Cour d'Appel de Sofia (aff. 205/2007 du 8 mars 2007), Cour de Cassation italienne (n°17632 du 3 mai 2007), Irish Supreme Court (arrêt *Krasnovas* du 24 novembre 2006), Chambre de mise en accusation de Bruxelles (8 décembre 2006), Oberlandsgericht Celle 20 mai 2008, 1 Ars 21/08).

[51] Voy. aussi la contribution de M. Chinova et M. Assenova au présent ouvrage.

[52] CJ, 16 juin 2005, aff. C-105/03, *Pupino*.

[53] Voy. notamment : IE (Supreme Court, *Altaravicius* du 5 avril.2006 et *Brennan* du 4 mai 2007) ; UK (House of Lords, *Hilali* case [2008] UKHL 3 du 30 janvier 2008, et l'opinion de la Baroness Hale of Richmond) ; NL (SC 8 juillet 2008, BD 2447) ; RO (HCCJ, chambre criminelle, arrêts n° 4045 du 30 août 2007, n° 2862 du 28 mai 2007 et n° 2885 du 30 mai 2007) ; PT (Supremo Tribunal de Justiça (3ª Secção), *Acórdão*, 21 février 2007, Case no. 250/07) ; EL (Cour suprême AP 558/2007) ; ES (*Auto* 1/2005, Division Criminelle de l'*Audiencia Nacional*, 10 janvier 2005) ; BG (Cour d'appel de Sofia, 8 mars 2007, *Konrad Reizmund*, aff. n° 205/2007) ; DK (*Højesteret*, U 2004.2229 H). Toutes ces décisions sont citées dans les contributions au présent ouvrage, respectivement de G. Conway, de J. R. Spencer, de W. van Ballegooij, de F. Streteanu et D. Ionescu, de P. Caeiro et S. Fidalgo, de V. Mitsilegas, de Á. G. Zarza, de M. Chinova et M. Assenova, et de J. Vestergaard et S. Adamo.

[54] Voy. en particulier la Cour constitutionnelle tchèque (arrêt n° PI.US 66/04 du 3 mai 2005 cité par I. Šlosarčík dans sa contribution au présent ouvrage).

[55] Voy. en particulier les contributions de T. Wahl, de S. Braum, de A. Suominen, et de F. Streteanu et D. Ionescu dans le présent ouvrage. Voy. aussi l'arrêt *Boudhiba v. Central Examining Court n° 5 of Madrid* [2006] EWHC 167 (Administrative Court) cité par J. R. Spencer dans le présent ouvrage.

responsabilité à cet égard et ne souhaitent pas s'y dérober ou être perçus comme y renonçant.

2. L'exercice du droit de la défense

Le sentiment partagé par tous les avocats est que, à ce stade, le principe de reconnaissance mutuelle ne profite pas à la défense, et que l'approche est globalement déséquilibrée [56]. On a parfois avancé que l'importation du concept de reconnaissance mutuelle du droit communautaire, ou de la coopération judiciaire civile (qui, au départ, ne relevait pas du droit communautaire), ne va pas nécessairement de soi et n'a pas nécessairement en matière pénale les implications qu'en attendaient ceux qui l'ont prônée [57]. Certains n'ont pas manqué de souligner que la reconnaissance mutuelle dans le domaine pénal implique l'intervention active des Etats membres (l'exécution forcée), ce qui n'est pas le cas normalement dans les matières civiles ou commerciales. Alors que dans ces matières, il s'agit de régler les relations entre intérêts privés, dans le domaine pénal, c'est la relation entre l'Etat et l'individu qui est en jeu.

L'accent a été mis jusqu'ici sur l'amélioration de la coopération entre autorités judiciaires, ce qui correspond assez naturellement au postulat de départ de la reconnaissance mutuelle. Pour autant que la situation de la personne ait été prise en considération, les dispositions visant à la protéger se sont quelquefois perdues au cours des négociations [58], de sorte que l'équilibre n'est pas atteint, ou qu'en tout cas il n'est pas évident.

Le malaise s'explique d'abord du fait que le seul instrument en vigueur partout et largement utilisé à ce jour est le mandat d'arrêt européen. Le seul avantage, et il n'est pas toujours perçu comme tel [59], pour la personne qui fait l'objet du MAE, est l'accélération de la procédure. Dans la mesure où les délais sont très courts et les motifs de refus limités, l'avocat joue un rôle mineur dans la procédure d'examen du MAE et de remise.

Deux points méritent en particulier d'être signalés.

Le premier, qui concerne les recours de la personne affectée par la mesure de reconnaissance mutuelle, présente lui-même un double aspect. Quant aux recours possibles contre la décision de reconnaissance d'une décision d'un autre EM, la situation est très variable d'un EM à l'autre et les délais d'examen par l'autorité judiciaire varient énormément [60]. De plus, le recours contre la décision qui fait l'objet de la reconnaissance est réglé de manière, logique sans doute, mais peu accessible

[56] Cette position est également apparue clairement lors de la présentation du rapport intérimaire au Sous-groupe Justice pénale du Forum Justice le 10 juillet 2008.

[57] Voy. par exemple les commentaires recueillis par J. R. Spencer et par R. Kert dans leur contribution au présent ouvrage.

[58] Par exemple, les articles 13 et 34 de la proposition de DC MAE (COM (2001) 522, 25 septembre 2001).

[59] Voy. notamment la contribution de T. Wahl au présent ouvrage.

[60] Voy. pour des délais particulièrement courts le rapport sur la Slovénie dans le cadre de la quatrième série d'évaluations mutuelles, « The practical application of the European arrest warrant and corresponding surrender procedures between Member States » (Doc. 7301/08 COPEN 48 du 6 mars 2008).

pour celui qui souhaite s'en prévaloir [61]. Il serait sans doute concevable d'en faciliter l'exercice. Dans ce contexte, la question de l'indemnisation de la personne pour signalement erroné dans le SIS [62] ou pour détention inopérante [63], par exemple, est également posée.

Le deuxième aspect concerne l'organisation de la profession. Tous les avocats s'accordent à dire que la profession ne bénéficie pas assez d'information et de formation sur les nouveaux instruments, et manque de moyens et de structures pour assurer une continuité et une pleine efficacité de la défense dans des situations transfrontières. L'accent est mis souvent sur l'opportunité, mais aussi la difficulté, d'instaurer un système de « double défense» dans l'Etat membre d'émission et dans celui d'exécution [64]. La demande est formulée de soutenir les efforts des avocats pour s'organiser de façon à mieux répondre aux moyens mis en œuvre par les autorités de poursuite et à mieux connaître ceux que la personne peut activer elle-même. Il est indispensable d'encourager, au besoin financièrement, la formation des avocats spécialisés et leur mise en réseau afin d'assurer le relais de la défense, de la phase d'instruction à celle de l'exécution de la sentence éventuelle, dans les affaires transfrontières [65].

3. L'harmonisation du droit procédural

La relation (proportionnelle) entre le niveau d'harmonisation (dans le sens d' « harmonie ») entre droit procédural et garanties procédurales d'une part, et degré de confiance mutuelle, en tant que condition d'une reconnaissance mutuelle réussie de l'autre, n'est guère contestée. En témoigne le haut degré de coopération entre pays nordiques, reconnu dans les rapports de la première évaluation sur le Danemark, la Finlande et la Suède [66], qualité de coopération dont l'effet est amplifié par une proximité culturelle ou historique et des traditions de longue date.

Seule une minorité d'interlocuteurs, représentant à la fois une minorité d'Etats membres et une minorité de praticiens, restent réticents à un effort de rapprochement dans ce domaine. Confrontés à l'échec de la proposition de décision-cadre sur les garanties procédurales [67], la plupart des experts rencontrés souhaitent la relance des

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[61] Voy. par exemple l'article 11 (2) de la DC 2003/577/JAI du 22 juillet 2003 (DC sur le gel). Voy. aussi la contribution de J. Vestergaard et S. Adamo au présent ouvrage.

[62] Voy. sur ce point la contribution de G. Švedas et D. Mickevičius au présent ouvrage.

[63] Voy. la contribution de A. Weyembergh et V. Santamaria au présent ouvrage.

[64] Voy. notamment sur ce point la contribution de T. Wahl au présent ouvrage.

[65] Voy. en particulier les contributions de T. Wahl et de W. van Ballegooij au présent ouvrage. Cette demande a été particulièrement appuyée lors de la présentation du rapport intérimaire au Sous-groupe Justice pénale du Forum Justice le 10 juillet 2008.

[66] Cités par A. Weyembergh dans *L'harmonisation des législations : condition de l'espace pénal européen et révélateur de ses tensions*, Bruxelles, Editions de l'Université de Bruxelles, 2004, p. 196. Voy. aussi les contributions de J. Vestergaard et S. Adamo, de A. Suominen, et de L. Surano dans le présent ouvrage.

[67] Proposition de décision-cadre du Conseil relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'UE (COM (2004) 328, 28 avril 2004).

travaux [68]. Même dans des Etats membres qui s'étaient prononcés contre l'adoption de la DC sur les garanties procédurales en juin 2007, les entretiens conduits par les rapporteurs nationaux ont fait état du désir de praticiens de reprendre les travaux [69]. Quel que soit le niveau d'ambition, on souligne l'intérêt du contrôle par la Cour de justice, et d'un libellé suffisamment ouvert pour développer une jurisprudence. Mais on insiste souvent pour que ces travaux se fassent sur une base ambitieuse : la crainte existe que les travaux conduisent à un nivellement par le bas au cas où le texte de l'Union ne ferait que s'accorder sur un plus petit dénominateur commun [70].

Le rapprochement doit porter sur les garanties essentielles, tout en acceptant que celles-ci soient éventuellement rencontrées de façon quelque peu différente dans les divers systèmes judiciaires.

De nombreux praticiens expriment le souhait de rapprocher les règles en matière de collecte de preuves [71]. Néanmoins, le respect des traditions et systèmes juridiques des différents Etats membres, et en particulier, la sauvegarde des spécificités de la *common law*, pose des limites à cet exercice [72].

D. Reconnaissance mutuelle et différences entre systèmes judiciaires

Il est intéressant de noter que, pour bon nombre des interlocuteurs rencontrés, la reconnaissance de décisions finales est plus facile à mettre en œuvre dans la mesure où ces décisions s'entourent de plus de garanties et sont prises par des autorités judiciaires largement équivalentes dans tous les Etats membres, alors que les autorités compétentes pour prendre des décisions pré-sentencielles ne présentent pas les mêmes caractéristiques partout [73]. Les paragraphes 4 et 5 de la DC sur le MOP témoignent de cette difficulté en permettant de soumettre l'exécution du MOP à une validation par une autorité judiciaire de l'Etat membre d'émission lorsqu'il n'est pas émis par un juge, un magistrat ou un procureur [74]. Pour d'autres personnes interrogées, en revanche, il devrait être plus facile de reconnaître les décisions pré-sentencielles puisqu'elles n'ont qu'une portée et des conséquences limitées.

En revanche, la possibilité de s'en remettre à l'autorité d'émission et donc de limiter l'examen par l'autorité d'exécution pourrait dépendre du degré d'implication de cette dernière dans la procédure lancée dans l'Etat membre d'émission. On retrouve ici la distinction classique entre entraide judiciaire secondaire et primaire.

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[68] Voy. en particulier les contributions de R. Kert, de T. Wahl, de A. Suominen, et de S. Braum au présent ouvrage.

[69] Voy. par exemple la contribution de J. R. Spencer au présent ouvrage, mais, dans un sens contraire, celle de S. Filletti et A. Gatt.

[70] Voy. par exemple les contributions de K. Šugman Stubbs et M. Mihelj Plesničar et de A. Suominen dans le présent ouvrage.

[71] Voy. par exemple les contributions de W. van Ballegooij et de S. Braum dans le présent ouvrage. En sens contraire, la contribution de T. Wahl.

[72] On renverra par exemple à la contribution de G. Conway au présent ouvrage.

[73] Voy. en particulier les contributions de K. Ligeti, de S. Braum, de W. van Ballegooij, de A. Suominen, de M. Chinova et M. Assenova, et de G. Švedas et D. Mickevičius au présent ouvrage.

[74] AT a déclaré vouloir faire usage de cette faculté (voir Doc. 15414/1/08 REV1 COPEN 220 du 18 novembre 2008).

Dans le premier cas, il suffit de reconnaître une décision, de transmettre un élément de preuve, de veiller à ce qu'une personne respecte les conditions de son maintien en liberté. Dans l'autre, la responsabilité de la poursuite de la procédure entamée ou de l'exécution de la sentence passe de l'autorité d'émission à celle d'exécution.

Si les textes ne reflètent pas vraiment cette analyse (en effet, à part la DC sur le gel des avoirs et des preuves [75], les motifs de refus principaux se retrouvent partout, même si leur libellé diffère), elle peut être éclairante pour comprendre la façon dont les professionnels appréhendent et appliquent les textes.

Par ailleurs, il convient de rappeler la réticence des Etats membres de *common law* à exécuter un mandat d'arrêt européen lorsque la personne recherchée n'est pas encore formellement poursuivie alors que la question ne se pose pas pour les autorités d'exécution des autres Etats membres [76]. C'est ce qui explique la déclaration de l'Irlande lors de l'adoption de la DC sur le MAE [77], de même que des refus ou des demandes d'information complémentaire de la part des autorités d'exécution britanniques.

E. Reconnaissance mutuelle et compétence juridictionnelle

1. La clause territoriale comme motif de refus

Tous les instruments de reconnaissance mutuelle, qu'ils soient formellement adoptés ou qu'ils n'aient fait que l'objet d'un accord politique, sauf la DC du 22 juillet 2003 sur les décisions de gel des avoirs ou des preuves, admettent la clause territoriale à titre de motif de refus optionnel.

Pour s'en tenir au MAE, et plus particulièrement concernant le premier volet de l'article 4(7) de la DC (c'est-à-dire la circonstance que l'acte incriminé a été commis en tout ou en partie sur le territoire de l'Etat membre d'exécution), la manière dont cette disposition a été transposée, et est appliquée concrètement présente une étonnante diversité. Dans de nombreux Etats membres, ce motif de refus est obligatoire [78]. S'il n'est pas obligatoire, il arrive aussi que le ministère public doive présenter une demande

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[75] L'article 7 de la décision-cadre 2003/577/JAI du 22 juillet 2003 relative à l'exécution dans l'UE des décisions de gel de biens ou d'éléments de preuve ne contient pas de motif de refus fondé sur l'âge, ni sur la prescription, ni sur la territorialité, *JO*, n° L 196, 2 août 2003, p. 45.

[76] Par exemple Supreme Court EL (CS 924/2005). Voy. cependant Cour de Cassation IT, Sez. VI, n° 15970 du 19 avril 2007, *Piras*.

[77] Le texte de cette déclaration est reproduit dans le *Dáil Debates* du 5 décembre 2003 Col. 893. Voy. à ce sujet dans le présent ouvrage l'analyse de G. Conway et les arrêts de la High Court qu'il cite : *Minister for Justice, Equality & Law Reform v. McArdle*, Supreme Court, 4 novembre 2005, et *Minister for Justice, Equality & Law Reform v. Ostrovskij*, High Court, 26 juin 2006, Peart J.

[78] Voy. par exemple l'article 5(1) de la loi sur l'extradition FI, l'article 11 (ζ) de la loi EL, l'article 64(2)a) de l'Extradition Act UK. Voy. aussi l'arrêt *Office of the King's Prosecutor, Brussels v. Cando Armas* [2005] UKHL 67, [2006] 2 AC 1, cité par J. R. Spencer dans sa contribution au présent ouvrage. En revanche, en ES, en HU ou en BG, par exemple, ce motif reste facultatif : voy. à cet égard les contributions de Á. G. Zarza, de K. Ligeti et de M. Chinova et M. Assenova au présent ouvrage.

motivée s'il ne souhaite pas qu'il s'applique [79]. En République tchèque, il n'a pas été explicitement repris dans la législation de transposition, mais son application découle de l'interprétation des dispositions du Code de procédure pénale (par. 377 et 393) [80]. Bien souvent, le fait que l'acte a été commis en tout ou en partie sur le territoire de l'Etat membre d'exécution n'est un motif de refus que lorsqu'il se combine avec d'autres circonstances : la nationalité, la résidence, l'absence de double incrimination, ou bien le fait que des poursuites sont engagées ou prescrites dans l'EM d'exécution. Le nombre de cas dans lesquels il est utilisé est évidemment fonction de ce caractère obligatoire ou non, mais dans l'ensemble, il est peu employé. Son maintien est toutefois tenu pour important dans certains Etats membres. En Belgique, il est vu comme un moyen d'échapper à l'abolition du contrôle de double incrimination [81]. De même, aux Pays Bas, il permet de ne pas remettre la personne si le fait reproché n'est pas punissable, ou, dans le cas où il l'est, lorsque des poursuites ne sont normalement pas considérées opportunes [82]. Enfin, la mise en œuvre de la clause territoriale est parfois l'occasion de réserver un traitement différent aux nationaux, à l'égard desquels le motif est obligatoire, alors qu'il reste facultatif, ou conditionnel pour les résidents. C'est le cas en Pologne [83], en Autriche [84] et en Allemagne [85]. Même si la législation ne fait pas de distinction, il arrive qu'en pratique la clause territoriale soit utilisée pour ne pas remettre un citoyen à l'Etat membre d'émission et entamer une procédure à son égard, alors qu'elle ne serait normalement pas engagée s'il s'agissait d'un non-national [86].

Le motif de refus tiré de cette clause territoriale n'est pas systématiquement repris dans les législations de transposition des autres instruments de reconnaissance mutuelle [87]. Il arrive au contraire que le motif de refus ait été modulé dans le cadre du mandat d'arrêt européen, mais que son application soit plus large dans le cas de la DC sur la confiscation ou les amendes [88]. Au demeurant, les experts interrogés sont souvent critiques à l'égard de l'insertion de ce motif de refus dans les instruments de reconnaissance mutuelle de décisions pré-sentencielles alors qu'il n'était pas usuel dans l'assistance mutuelle traditionnelle et qu'une commission rogatoire portant

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[79] Voy. l'article 13 de la législation NL et la contribution de W.van Ballegooij dans le présent ouvrage.

[80] Par. 377 et 393 du code de procédure pénale. Voy. aussi la contribution de I. Šlosarčík au présent ouvrage.

[81] Voy. la circulaire ministérielle du 31 août 2005, p. 14, ainsi que la contribution de A. Weyembergh et V. Santamaria au présent ouvrage.

[82] Voy. la contribution de W. van Ballegooij au présent ouvrage.

[83] Articles 50 de la Constitution et 607t, par. 1 du CPP. Voy. aussi la contribution de A. Łazowski au présent ouvrage.

[84] Section 6, 52 a par. 1, 53 a fig 2 lit a EU-JZG.

[85] Articles 80 et 83b du *Gesetz über die internationale Rechtshilfe in Strafsachen « IRG »*, ainsi que la contribution de T. Wahl au présent ouvrage.

[86] Voy. à ce sujet la contribution de M. Chinova et M. Assenova au présent ouvrage.

[87] Voy. par exemple la contribution de G. Švedas et D. Mickevičius dans le présent ouvrage.

[88] C'est le cas en AT : comparer la section 5 par. 3 EU-JZG (concernant le MAE) et la section 53a fig. 2 lit a et b EU-JZG (concernant les amendes).

sur le même objet aurait été exécutée [89]. Dans le contexte de la coopération avant jugement, la reproduction du schéma de la DC sur le mandat d'arrêt européen apparaît ici contreproductive [90].

2. La coordination des poursuites

Mises à part la création d'Eurojust et, dans une certaine mesure, la DC sur les équipes communes d'enquête, les outils pour la coordination des poursuites n'existent pas au niveau de l'Union, et il n'y a pas encore d'instrument de l'UE en vigueur qui concerne le transfert de procédures.

Eurojust n'a pas vocation à intervenir dans tous les cas de conflits de juridiction, ses décisions ne sont pas contraignantes, mais c'est un forum utilisé de plus en plus et avec succès, comme en témoignent ses rapports annuels.

L'expérience des équipes communes d'enquête est encore limitée, même si les interlocuteurs rencontrés ont fait état de résultats très encourageants là où elles ont été mises en place.

Si certains experts ont souligné que les conflits négatifs de compétence étaient à leurs yeux plus fréquents et plus malaisés à résoudre, les entretiens comme les rapports nationaux ont confirmé une attente et un assez large consensus quant à la priorité de traiter de la question de la coordination des poursuites et de la prévention des conflits de compétence [91].

Cependant, la façon dont le principe de légalité des poursuites (c'est-à-dire l'obligation de poursuivre) est interprété dans les Etats membres où il s'applique [92], et la manière dont la clause territoriale a été transposée (comme motif de refus obligatoire ou discrétionnaire pour le juge) et concrètement mise en œuvre, montrent que les critères de compétence juridictionnelle, et l'abandon de cette compétence au profit d'un autre EM dans un souci supérieur de bonne administration de la justice, révèlent une problématique difficile.

Des solutions contraignantes sont ainsi rejetées par l'ensemble des personnes rencontrées, qui privilégient le dialogue et la flexibilité [93].

L'approche préférée par nos interlocuteurs est d'encourager les consultations précoces et l'usage des mécanismes existants, comme Eurojust et/ou les équipes communes d'enquête. C'est sur la base d'une analyse systématique des circonstances de leur réussite ou des causes de leur échec, qu'il convient de chercher à surmonter les obstacles éventuels au transfert et à la centralisation des poursuites. Il est d'ailleurs

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[89] Voy. à cet égard les contributions de M. Chinova et M. Assenova et de Á. G. Zarza au présent ouvrage. A notre connaissance, seuls UK, DE, SE et NL ont indiqué, conformément à l'article 23 de la DC sur le MOP, leur intention de retenir la première, ou les deux options, de la clause territoriale en tant que motif de refus (voir Doc. 1541/1/08 REV1 COPEN 220 du 18 novembre 2008).

[90] Voy. sur ce point aussi la contribution de M. Poelemans au présent ouvrage.

[91] Voy. notamment les contributions au présent ouvrage de F. Stretanu et D. Ionescu, de S. Braum, de I. Šlosarčík, de T. Wahl, et de R. Kert.

[92] Voy. par exemple la contribution de G. Švedas et D. Mickevičius au présent ouvrage.

[93] Voy. notamment les contributions au présent ouvrage de W.van Ballegooij, de T. Wahl, de R. Kert, et de A. Weyembergh et V. Santamaria.

significatif qu'un accord sur une approche globale a été enregistré au Conseil tout récemment sur un projet de DC relative à la prévention et au règlement des conflits de compétence, présenté par cinq Etats membres en décembre 2008 [94], et qui concrétise cette tendance.

On doit s'attendre en outre à ce que des développements dans d'autres domaines, comme le rapprochement éventuel des règles en matière de collecte de preuve, ait un effet de levier sur les possibilités de coordonner les poursuites.

F. Reconnaissance mutuelle et traitement des nationaux

L'abolition du refus d'extradition des nationaux [95], qui était la règle dans la plupart des Etats membres, a été présentée comme l'une des avancées majeures du mandat d'arrêt européen. Cette innovation a fait l'objet d'intenses débats au regard des prescrits constitutionnels dans plusieurs Etats membres [96], avec pour conséquence parfois des révisions de la Constitution [97], si elle n'avait pas déjà été modifiée avant la transposition de la DC sur le MAE [98] ou des aménagements de la loi de transposition [99].

La situation actuelle montre néanmoins encore de nombreuses différences de traitement, plus ou moins marquées, entre nationaux et résidents, dans la loi ou dans la pratique. C'est le cas, on l'a vu au point précédent, dans le contexte de la mise en œuvre de la clause territoriale. C'est parfois le cas dans la mise en œuvre de la condition de retour ou des dispositions permettant d'exécuter la peine prononcée au lieu de remettre la personne qui fait l'objet d'un MAE [100]. Indirectement, cela peut également être l'effet de l'application de l'article 4(4) de la DC sur le mandat d'arrêt européen relatif au motif de refus tiré de la prescription lorsque l'EM d'exécution l'invoque en fonction d'une compétence fondée sur la nationalité de l'auteur des faits

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[94] Projet de DC sur la prévention et le règlement des conflits de compétence dans les procédures pénales (accord politique le 6 avril 2009 (8478/09 (Presse 83), dernier état du texte Doc. 5208/09 COPEN 7 du 20 janvier 2009).

[95] Sous réserve de la dérogation temporaire autrichienne, voir article 33 de la DC 2002/584/JAI du 13 juin 2002 (*JO*, n° L 190, 18 juillet 2002, p. 1).

[96] Cour constitutionnelle roumaine, arrêt 445 du 10 mai 2007 ; Cour d'appel lituanienne, n° 1N-11/2006 ; Cour suprême grecque, n° 591/2005 ; Cour constitutionnelle tchèque, Pl. Us 66/04 du 3 mai 2006 ; Cour constitutionnelle polonaise, P 1/05 du 27 avril 2005 ; Cour suprême chypriote, aff. *Attorney General v. Konstantinou* du 7 novembre 2005 ; Cour constitutionnelle allemande, B verfG 2 BvR 2236/04 du 18 juillet 2005 ; Cour constitutionnelle hongroise, décision n° 733/A/2007 du 8 mars 2008.

[97] Comme en HU et PL, voy. respectivement les contributions de K. Ligeti et de A. Łazowski au présent ouvrage.

[98] Comme au PT, en BG et en RO, voy. respectivement les contributions de P. Caeiro et S. Fidalgo, de M. Chinova et M. Assenova, et de F. Streteanu et D. Ionescu au présent ouvrage.

[99] Suite à l'arrêt de la Cour constitutionnelle allemande, voy. la contribution de T. Wahl au présent ouvrage.

[100] Comme en FI, au DK, en AT ou en SE (voy. les contributions de A. Suominen, de J. Vestergaard et S. Adamo, de R. Kert, et de L. Surano au présent ouvrage).

incriminés. Enfin, la rétroactivité de l'application de la loi sur le MAE est parfois différente pour les nationaux [101].

Cette problématique a fait l'objet de deux renvois préjudiciels à la Cour de justice [102]. Le premier arrêt n'a pas abordé la question d'un éventuel traitement discriminatoire [103]. A la date du 31 mars 2009, la Cour ne s'était pas encore prononcée dans la deuxième affaire. Si une jurisprudence se développait, elle conduirait peut-être à de nouvelles modifications. Il n'est pas exclu toutefois que cette problématique très sensible appelle à une réflexion qui déborde des circonstances propres à ces affaires et demande une réponse législative d'ensemble au niveau de l'Union.

G. Questions méthodologiques

1. Dans le cadre de la négociation

Il ressort des contacts et entretiens que le clivage entre *civil law* et *common law* se marque dans les discussions, que ce soit à l'occasion de la négociation d'un instrument particulier ou plus généralement dans des débats d'orientation [104]. La rédaction du traité de Lisbonne et de ses protocoles ne fait que le confirmer. D'autre part, les négociations se font parfois dans un climat de défiance plutôt que de confiance réciproque.

Les praticiens ne sont que rarement impliqués dans l'élaboration d'un instrument de reconnaissance mutuelle [105], ce qui fait que certains choix relèvent d'une approche trop théorique, abstraite et arbitraire.

L'esprit dans lequel ces instruments sont préparés et discutés n'est pas nourri par un sentiment de confiance réciproque suffisamment solide. Le dernier élargissement, très rapide, est ressenti comme un bouleversement. Il n'a pas été précédé d'une maturation des mentalités, tant parmi les Etats déjà membres, où certains *a priori*, renforcés parfois par quelques dérapages, restent bien ancrés [106], que parmi les nouveaux Etats membres, où l'imposition d'un acquis volumineux et complexe est ressenti comme brutal, et ne prenant pas en compte les sensibilités de jeunes démocraties, leurs intérêts et leurs valeurs propres.

2. Dans le cadre de la transposition

Le cadre juridique actuel, en particulier l'absence de possibilité d'entamer une procédure d'infraction devant la Cour, fait que l'exercice de transposition ne revêt pas nécessairement la priorité que l'Union attendrait.

Les instruments à transposer sont nombreux, complexes, et leur transposition en droit interne demande à la fois une bonne vue d'ensemble et une grande maîtrise technique, surtout lorsque ces instruments touchent à des matières réglées dans plus

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[101] Comme en CZ : voy. la contribution de I. Šlosarčík au présent ouvrage.

[102] Aff. C-66/08*, Kozlowski*, aff. C-123/08, *Wolfzenburg*.

[103] CJ, 17 juillet 2008, aff. C-66/08, *Kozlowski*.

[104] Voy. aussi la contribution de S. Braum au présent ouvrage.

[105] Voy. entre autres les contributions de P. Caeiro et S. Fidalgo, de K. Šugman Stubbs et M. Mihelj Plesničar, de S. Braum, de R. Kert, et de L. Surano dans le présent ouvrage.

[106] Voy. notamment la contribution de J. R. Spencer.

d'un corpus législatif. L'impact de leur introduction en droit interne n'a pas toujours été pleinement mesuré.

L'expertise requise est réduite : les personnes qui négocient les instruments sont souvent les seuls experts qui puissent en assurer une correcte transposition. L'absence de rapport explicatif, la qualité parfois médiocre de certaines versions linguistiques, l'inexistence d'un mécanisme de suivi après l'adoption du texte par le Conseil de l'UE, contribuent à la lenteur et à la qualité inégale des législations de transposition. Pour les nouveaux Etats membres, le fait de ne pas avoir participé à l'élaboration des instruments adoptés rend malaisée la compréhension des équilibres et compromis qui ont dicté leur rédaction [107], ce qui a amené à des ajustements des lois de transposition [108].

La nécessité de modifier les constitutions dans certains cas, entre autres pour permettre la remise des nationaux, a bien entendu également retardé le processus de transposition.

3. Dans le cadre de l'application

Tout d'abord il convient d'utiliser dans chaque cas individuel l'instrument le plus approprié à son utilisation. On peut à cet égard espérer qu'au fur et à mesure que l'arsenal de l'Union se complète, l'abus d'utilisation du mandat d'arrêt européen, du moins c'est ainsi que le phénomène est ressenti par bon nombre de praticiens, disparaîtra au profit d'outils mieux proportionnés à l'objectif recherché, tels que les DC sur l'exécution des peines privatives de liberté ou sur la décision européenne de contrôle judiciaire pré-sentenciel.

Mais surtout l'application correcte, effective et complète nécessite la mise en place d'une assistance efficace, l'amélioration des connaissances linguistiques, l'instauration de connexions personnelles simplifiées, de relais fiables et d'outils informatiques conviviaux. En d'autres mots, des mesures d'accompagnement sont indispensables en ce qui concerne l'information, la formation, le *feedback* et la mise en réseaux.

a) Information

Sans surprise, tous nos interlocuteurs soulignent la nécessité de renforcer l'information des professionnels appelés à appliquer les nouveaux instruments. L'objectif est que les praticiens s'approprient ces nouveaux mécanismes. Pour ce faire, il est important de mettre à leur disposition des outils pour en faire le meilleur usage (manuels, directives, modèles, site web renvoyant à la jurisprudence des cours compétentes dans tous les EM…).

De ce point de vue, les avis sont partagés sur les avantages et inconvénients respectifs de la décentralisation. Pour les uns, c'est au détriment d'une spécialisation

[107] Voy. par exemple la contribution de K. Šugman Stubbs et M. Mihelj Plesničar au présent ouvrage.

[108] Voy. entre autres les contributions de M. Chinova et M. Assenova et de S. Filletti et A. Gatt au présent ouvrage.

qui serait garante d'une application correcte et cohérente [109] et c'est une des raisons pour lesquelles les motifs de refus facultatifs ont été rendus obligatoires dans la loi de transposition [110], pour les autres, une décentralisation au moins partielle permet le développement d'une véritable culture commune en matière de coopération judiciaire, ou la proximité au bénéfice de la personne recherchée [111]. Certains instruments ne se prêtent guère à une centralisation, et le double objectif de rapidité et de contacts directs entre autorités judiciaires plaide en faveur de la décentralisation.

b) Formation

L'accent est mis partout sur le besoin aussi de développer les connaissances linguistiques et la connaissance des systèmes judiciaires des autres EM et des instruments de coopération et de reconnaissance mutuelle dans la formation initiale et continue des praticiens. Les efforts déjà accomplis en ce sens sont salués mais sont insuffisants. Le besoin de formation est encore plus important et concerne un plus grand nombre de personnes si l'on a opté pour un système décentralisé plutôt que centralisé.

Plusieurs initiatives méritent être soutenues : développer des modules de formation communs, envoyer les futurs praticiens en stage dans un autre EM, offrir cette possibilité à ceux qui sont déjà en exercice, inviter des experts d'autres EM à participer aux séances de formation, éventuellement créer une école de formation judiciaire européenne,…

L'effort doit porter spécialement sur les nouveaux Etats membres, où les professionnels en charge de l'application de ces instruments n'ont pas toujours eu l'occasion d'acquérir des réflexes de coopération directe efficace.

c) Feedback

Les mécanismes de reconnaissance mutuelle sont mis en place de manière extrêmement variable, et cela explique, en partie, que le retour d'information n'est pas, ou très mal organisé [112].

Partant, les enquêtes sur la mise en œuvre sont parcellaires et aléatoires, et l'évaluation *ex post*, si elle n'est pas impossible, manque en tout cas de rigueur, en ce sens que l'appréciation sur la base de témoignages et de sondages n'est pas étayée par des données chiffrées fiables. Il faudrait insister sur une réelle discipline sur le plan du *feedback*, de manière à pouvoir dresser le bilan de la mise en œuvre de chaque instrument, détecter les mauvaises applications aussi bien que les lacunes, et identifier les améliorations à y apporter le cas échéant.

Au-delà des informations sur l'utilisation des instruments de l'Union, l'impact des mécanismes de coopération sur l'efficacité de la justice, la réduction du phénomène criminel, la population carcérale, le sentiment général de justice et d'équité devrait

[109] A cet égard voy. les contributions de K. Ligeti, de G. Švedas et D. Mickevičius, de V. Mitsilegas, et de M. Chinova et M. Assenova au présent ouvrage.

[110] Voy. par exemple la contribution de Á. G. Zarza dans le présent ouvrage.

[111] Voy. entre autres les contributions de A. Weyembergh et V. Santamaria, de Á. G. Zarza, de A. Suominen, et de K. Šugman Stubbs et M. Mihelj Plesničar au présent ouvrage.

[112] Voy. par exemple la contribution de R. Kert au présent ouvrage.

pouvoir être estimé et des outils appropriés, statistiques et enquêtes d'opinion par exemple, devraient être mis au point et combinés.

d) Mise en réseaux

Les professionnels demandent également à se rencontrer et à se connaître. La qualité et la simplicité des instruments, pour autant qu'elles se vérifient, ne suffisent pas. Toutes les expériences réussies dans le domaine de la reconnaissance mutuelle reposent sur l'attitude positive des intervenants et le dialogue, bases de la confiance réciproque.

En particulier, les avocats de la défense éprouvent un réel malaise face à une évolution à laquelle ils ne participent guère [113].

3. Conclusions et propositions pour l'avenir de la reconnaissance mutuelle en matière pénale dans l'UE

Les pages qui suivent développent les conclusions de l'*étude sur l'avenir de la reconnaissance mutuelle en matière pénale dans l'UE*, dont le présent ouvrage est le fruit. On trouvera les diverses options présentées sous forme de tableaux, avec leurs avantages et inconvénients respectifs, dans le rapport final, accessible sur le site web de la Commission [114].

A. Rapprochement du droit matériel et politique pénale de l'UE

Le rapprochement du droit substantiel effectué jusqu'ici ne répond ni à un programme préétabli, ni à une stratégie d'ensemble. Si le nombre d'instruments de l'UE à ce sujet est impressionnant, leur impact sur le phénomène criminel qu'ils entendent combattre reste aléatoire.

Inévitablement, l'incidence réelle de ces instruments est tributaire d'un certain nombre de données qui, elles, échappent à tout rapprochement. C'est le cas, en particulier, de la politique en matière de poursuites. Selon que l'Etat membre connaît le principe de légalité des poursuites ou qu'il existe des instructions de tolérance des infractions dites « mineures », le résultat de la mise en œuvre de l'instrument de l'UE concernant une incrimination commune sera bien entendu différent. C'est ensuite le cas en ce qui concerne le niveau de peine encouru, puisque le rapprochement a pris la forme de la fixation d'un minimum de peine maximale, lui-même déterminé dans le cadre d'une fourchette [115] : en d'autres termes, il est toujours possible de sanctionner plus sévèrement. C'est aussi le cas en ce qui concerne la décision du juge dans des cas particuliers : l'incidence des circonstances atténuantes ou aggravantes fait quelquefois, mais rarement, l'objet d'un rapprochement et, si c'est le cas, la latitude laissée aux juges reste considérable. C'est enfin le cas des règles et pratiques au niveau de l'exécution des peines. Si l'on peut dire que toutes les peines visent à sanctionner l'acte délinquant, mais en même temps à rééduquer et à réintégrer l'individu dans la

[113] Ce malaise a été confirmé lors de la présentation du rapport intérimaire au Sous-groupe Justice pénale du Forum Justice le 10 juillet 2008.

[114] http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/docs/mutual_recognition_en.pdf.

[115] Voy. les conclusions du Conseil des 25 et 26 avril 2002 (7991/02 (Presse 104)).

société, certaines modalités sont toutefois plus individualisées et mobilisent d'autres moyens de contrôle et de soutien. Tous ces aspects relèvent de la responsabilité des Etats membres et il est douteux d'ailleurs que les bases légales existantes et futures permettraient d'aller très avant dans leur rapprochement, si tant est qu'on estime ce développement souhaitable.

Il n'en demeure pas moins que si certaines circonstances ont amené le Conseil à adopter une DC relative à un comportement criminel particulier, cela traduit un souci de lutter ensemble contre ce phénomène, généralement parce qu'il met en péril les valeurs ou les politiques de l'UE. Par conséquent, on s'attendrait à ce que le Conseil se penche sur l'effet concret de la DC qu'il a adoptée. Une telle discussion pourrait prendre la forme d'un débat ouvert ou se baser sur un rapport qui s'inscrirait dans le cadre d'un mécanisme d'évaluation.

On remarque au passage que la démarche est, par définition pourrait-on dire, toujours répressive. Aux termes mêmes des traités, actuels comme futurs, le but poursuivi est de lutter contre la criminalité, surtout contre la criminalité grave. Il n'existe pas de rapprochement dans le sens d'une dépénalisation. Les bases légales ne le prévoient pas, et c'est évidemment intentionnel. En conséquence, tous les instruments d'harmonisation du droit pénal substantiel fixent des règles minimales. Dans la définition, en ce sens que rien n'interdit d'incriminer au-delà, comme dans la fixation du seuil de peine, suivant en cela les conclusions du Conseil d'avril 2002 citées ci-dessus.

L'absence de politique pénale commune a cependant pour effet d'entraver parfois la coopération judiciaire entre Etats membres : on observe en effet que c'est essentiellement dans les domaines où l'Etat membre d'émission et celui d'exécution ne partagent pas la même approche (absence de double incrimination, bien sûr, mais également réticence à l'égard de poursuites considérées comme hors de proportion avec les faits), que les motifs de refus sont, en quelque sorte, « surexploités ». A cet égard, on suivra avec intérêt l'application concrète de la DC sur les sanctions pécuniaires, qui trouvera à s'appliquer dans des domaines où les divergences entre Etats membres sont bien plus significatives encore que dans le cadre des MAE : cette DC fournira l'occasion de démontrer le niveau d'adhésion au principe de reconnaissance mutuelle entre Etats membres.

Certains sujets « transversaux » nécessiteraient d'être analysés plus avant, comme l'âge de la responsabilité pénale et le traitement des jeunes délinquants, l'éventail et les modalités des sanctions alternatives, l'échelle des peines, les interdictions et déchéances, la responsabilité pénale des personnes morales. Si une harmonisation n'est pas toujours possible, d'un point de vue juridique ou politique, le dialogue permettrait sans doute de faciliter la compréhension mutuelle et la bonne application des instruments de reconnaissance mutuelle.

B. Droits individuels et garanties procédurales

L'harmonisation des garanties procédurales est un complément attendu et même perçu comme indispensable par la majorité des praticiens. L'objectif est de garantir que les décisions judiciaires rendues dans l'UE répondent à un degré élevé de protection des individus, qu'elles correspondent aux standards de la CEDH, tels que

développés dans la jurisprudence, que cette protection soit efficace et justifie le niveau de confiance nécessaire pour assurer la reconnaissance et l'exécution de ces décisions dans tous les Etats membres de l'UE.

Pour ambitieux qu'il paraisse, cet objectif n'amène pas à imposer un rapprochement substantiel des systèmes procéduraux. Cela ne serait ni réaliste ni souhaitable. L'échec des négociations sur la proposition de DC sur les droits fondamentaux présentée par la Commission en avril 2004 [116] a montré la résistance des pays de *common law* à s'aligner sur des régimes différents [117]. Le traité de Lisbonne, lorsqu'il sera ratifié, encadrera et limitera d'ailleurs strictement le rapprochement du droit procédural : par le test de nécessité, l'exigence d'une dimension transfrontière, la nécessité de respecter les diverses traditions juridiques, l'énoncé limitatif des domaines ouverts au rapprochement, et enfin la possibilité d'actionner la « sonnette d'alarme » [118].

Dans ce contexte, ce vers quoi il faudrait tendre, c'est l'adoption d'un instrument (une DC, ou une directive une fois le TFUE en vigueur) qui fixe des règles sur des éléments-clés du procès équitable sans trop entrer dans le détail des modalités pratiques.

La conformité de la proposition de DC avec la CEDH et ses développements prudentiels avait été globalement reconnue par le Conseil de l'Europe en 2006, bien que l'avis rendu [119] fût critique sur deux points en particulier : d'une part, l'absence dans la proposition de DC d'une confirmation du droit de l'accusé à communiquer avec son avocat en l'absence de tiers, de l'autre le grand nombre de renvois aux législations nationales, élément qui introduisait trop de flexibilité là où précisément on tentait de rapprocher les garanties procédurales. La version de juin 2007 [120] tenait compte de ces observations et la grande majorité des Etats membres pouvait l'accepter. Cette version, enrichie éventuellement de règles de base concernant la présomption d'innocence [121], serait un point de départ relativement consensuel. A l'époque, toutefois, il n'avait pas été possible de dégager un accord unanime, et les partisans du texte n'ont pas voulu s'engager sur la voie d'une coopération renforcée. Pourtant une telle option ne devrait être regardée ni comme un échec, ni comme une sanction, mais au contraire comme une façon de démontrer la plus-value de l'instrument, au besoin de l'amender à la lumière de l'expérience, et d'entrainer l'adhésion à terme des Etats membres qui ne pourraient pas s'y rallier d'emblée. Il serait en revanche très regrettable d'en limiter l'application à des situations transfrontières particulières telles que les procédures de MAE ou celles qui suivent l'exécution d'un MAE, qui sont

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[116] Proposition de décision-cadre du Conseil relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'UE (COM (2004) 328, 28 avril 2004).

[117] A l'époque, UK, IE, MT, CY, SK et CZ n'avaient pas pu se rallier à la majorité favorable au texte.

[118] Article 82 (3) TFUE.

[119] Note du Secrétariat du Conseil de l'Europe sur la proposition de décision-cadre du Conseil relative à certains droits procéduraux accordés dans le cadre des procédures pénales dans l'UE, datée du 9 octobre 2006.

[120] On trouvera cette dernière version au document DROIPEN 56 du 5 juin 2007.

[121] La Commission a publié un livre vert sur *la présomption d'innocence*, COM (2006)174, 26 avril 2006.

sans pertinence pour nombre de décisions sujettes à la reconnaissance mutuelle, par exemple des décisions de confiscation ou imposant des amendes. S'il est nécessaire de rechercher un critère de dimension transfrontière, l'exemple de l'article 2 de la directive sur l'aide judiciaire serait plus approprié [122]. Cependant, l'application de la DC sur le statut des victimes [123], basée sur l'article 31 UE, n'est pas limitée à des situations transfrontières, et d'ailleurs l'affaire *Pupino* [124], dans laquelle la Cour a été invitée à interpréter cette DC, concernait une situation purement interne.

L'harmonisation n'est pas exclusive d'un contrôle du respect des droits de la défense dans l'EM d'exécution. En effet, quelle que soit la loi, il est toujours possible qu'elle n'ait pas été respectée. On ne peut exiger d'une autorité judiciaire qu'elle ferme les yeux sur une violation patente des droits fondamentaux. De ce point de vue, il conviendrait de tolérer le contrôle résiduel du respect des droits fondamentaux dans les cas particuliers, nécessairement exceptionnels, où une violation serait invoquée et étayée d'indices. Cette possible violation pourrait renvoyer au non-respect des dispositions de la DC. La compétence de l'autorité d'exécution se limiterait à constater que les droits n'ont pas été violés ou que, s'ils l'ont été ou risquent de l'être, il existe des remèdes ou recours appropriés dans l'EM d'émission.

Cette double option devrait permettre :

- de soumettre la matière des garanties procédurales au contrôle de la Cour de justice, par le biais de la compétence préjudicielle que 17 Etats membres ont déclaré lui reconnaître, ou dans le cadre de procédures d'infraction une fois le traité de Lisbonne en vigueur ;
- d'encadrer le contrôle marginal qu'une autorité judiciaire d'exécution peut exercer au cas où une violation des droits fondamentaux serait invoquée à l'occasion de l'application d'un instrument de reconnaissance mutuelle ;
- d'établir un lien entre la mise en œuvre de l'instrument pour les droits fondamentaux par les Etats membres d'émission et la reconnaissance par les Etats membres d'exécution des décisions émanant des autorités d'émission, et donc de tirer les conséquences d'une coopération renforcée, le cas échéant ;
- de ne pas alourdir la démarche par des dispositions très précises, et peut-être hors de portée de certains Etats membres dans l'état actuel des choses.

Dans une situation où soit le procès, soit une mesure concrète pré-sentencielle (par exemple le gel des avoirs) ou d'exécution (par exemple la confiscation) a lieu dans un EM autre que celui où réside le défendeur, il n'est guère contesté que ce dernier

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[122] Directive 2002/8/CE du 27 janvier 2003 visant à améliorer l'accès à la justice dans les affaires transfrontalières par l'établissement de règles minimales communes relatives à l'aide judiciaire accordée dans de telles affaires, *JO*, n° L 26, 31 janvier 2003, p. 41. L'article 2 définit les litiges transfrontaliers comme suit : « (…) tout litige dans lequel la partie qui présente une demande d'aide judiciaire au titre de la présente directive a son domicile ou sa résidence habituelle dans un Etat membre autre que l'Etat du for ou que l'Etat dans lequel la décision doit être exécutée ».

[123] Décision-cadre 2001/220/JAI du 15 mars 2001 relative au statut des victimes dans le cadre des procédures pénales, *JO* n° L 82, 22 mars 2001, p. 1.

[124] CJ, 16 juin 2005, aff. C-105/03, *Pupino*.

peut rencontrer des difficultés additionnelles à faire valoir ses droits ou à exercer un recours. Les dispositions concernant les voies de recours et les responsabilités respectives de l'EM d'émission et de celui d'exécution ne sont de surcroît pas toujours cohérentes dans les divers instruments en vigueur. Un relevé préalable des cas concrets permettrait de mesurer l'ampleur de ce problème et d'apprécier l'utilité ou non d'une initiative législative spécifique.

Ceci étant, c'est surtout dans le soutien concret à apporter à la défense, grâce à l'établissement de réseaux de points de contact et de correspondants, et par la facilitation de la « double défense », que la réponse est probablement à rechercher. Soutien qui suppose non seulement la mobilisation de fonds, mais aussi un minimum de coordination et d'encadrement pour optimiser les ressources.

C'est dans ce même contexte de l'exercice des droits, qu'il conviendrait d'encourager le renforcement des garanties procédurales par des bonnes pratiques. Dans un premier temps, il s'agirait de mettre en exergue des modèles d'application du texte législatif, de recueillir les données de l'expérience et d'en dégager une étude d'impact. Sur cette base, rien n'empêcherait ensuite d'envisager de compléter cet arsenal par un ou deux instruments ayant le même champ d'application, qui viendraient préciser les contours de l'assistance et de l'aide judiciaire, de l'interprétation et de la traduction (article 6(3) (b)(c) et (e) de la CEDH).

L'impact de la reconnaissance mutuelle sur les victimes n'a guère été pris en considération jusqu'ici. Il serait utile d'avoir cette dimension à l'esprit dans la réflexion sur l'ensemble des options ouvertes. En particulier, les moyens de concilier les intérêts des personnes lésées et la bonne administration de la justice pénale, notamment à l'égard des infractions transfrontières faisant de nombreuses victimes, mériteraient d'être examinés plus avant.

C. Recueil de la preuve : assistance mutuelle et admissibilité

La transposition de la DC sur le MAE n'est pas toujours correcte, et cet instrument mériterait d'être « revisité », soit pour en clarifier l'application, soit pour corriger certaines interprétations ou dérives, soit pour combler ses lacunes, soit enfin pour assurer sa complémentarité avec d'autres instruments de reconnaissance mutuelle. Quoi qu'il en soit, on s'accorde à considérer que le remplacement des mécanismes d'extradition par le MAE est globalement un succès.

Il ressort en revanche des consultations et entretiens menés avec les praticiens que l'application « mécanique » des dispositions de la DC sur le MAE au domaine de l'assistance mutuelle, en particulier à celui de l'obtention de la preuve, ne constitue pas une réelle amélioration. D'une part, la fragmentation des instruments, ciblés sur des mesures spécifiques, ne correspond pas, la plupart du temps, à la réalité de la pratique judiciaire, et leur intégration dans un cadre législatif par rapport auquel ils représentent un « corps étranger » est particulièrement difficile. De l'autre, la reproduction plus ou moins fidèle des motifs de refus retenus dans la DC sur le MAE représente parfois un recul par rapport à l'assistance mutuelle traditionnelle. Enfin, là où le MAE était contraint de s'imposer, dans la mesure où l'extradition était abolie, la coexistence des nouveaux instruments de reconnaissance mutuelle avec les procédures déjà en place ne joue pas en faveur de ces DC. Bien entendu, l'expérience concrète de ces

instruments est encore limitée à ce jour. Mais le manque d'enthousiasme à les mettre en œuvre et à les utiliser est significatif du clivage entre l'esprit dans lequel les textes sont négociés et les attentes des praticiens. Ceux-ci ne s'approprieront réellement les mécanismes de reconnaissance mutuelle que s'ils représentent un progrès, s'ils sont d'un emploi facile et s'ils répondent à leurs besoins de manière souple, exhaustive et aisément accessible.

Par ailleurs la convention de mai 2000 [125] et son protocole d'octobre 2001 [126] constituent à certains égards une étape intermédiaire entre assistance mutuelle traditionnelle et reconnaissance mutuelle. Or l'expérience de leur mise en œuvre est à ce jour très limitée et ces instruments ne sont toujours pas d'application dans trois Etats membres au moins. Une première option, réaliste, serait de mettre au plus tôt ces instruments en pratique et de réévaluer d'ici cinq ans les progrès restant à faire en termes de reconnaissance mutuelle.

Si l'on souhaite au contraire poursuivre, sans attendre, ou en parallèle, la réalisation du programme de reconnaissance mutuelle dans ce domaine, le choix qui se présente est de suivre la séquence proposée par la Commission en 2003 [127], ce qui risque cependant de maintenir et de compliquer encore la fragmentation critiquée aujourd'hui, ou de s'attaquer d'emblée à un instrument global couvrant toutes les modalités d'obtention de la preuve.

Cette deuxième approche partirait d'une conception légèrement différente de la reconnaissance mutuelle, ou plutôt elle serait envisagée sous un autre angle : il s'agirait, plus que de reconnaître une décision, de reconnaître la nécessité pour l'autorité d'émission d'obtenir les éléments de preuve nécessaires à la poursuite de sa procédure, et de les recueillir le cas échéant selon des formes requises pour pouvoir en faire valablement usage dans l'Etat membre d'émission. Une telle démarche répondrait aux critères suivants :

- prévoir des conditions d'émission et d'exécution en principe communes aux différents types de mesures ;
- proposer un formulaire « multifonctionnel » permettant d'émettre une demande « sur mesure » fondée sur les besoins de l'autorité d'émission ;
- s'interdire tout recul par rapport aux conditions de l'octroi de l'assistance judiciaire actuelle, et donc renoncer à certains motifs de refus contenus dans la DC sur le MOP ;
- respecter les formes requises par l'Etat membre d'émission, sauf au cas exceptionnel de contradiction avec les principes fondamentaux de l'Etat membre d'exécution ;

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[125] Convention du 29 mai 2000 relative à l'entraide judiciaire en matière pénale entre les EM de l'UE, *JO*, n° C 197, 12 juillet 2000, p. 3.

[126] Protocole du 16 octobre 2001 à la convention relative à l'entraide judiciaire en matière pénale entre les EM de l'UE, *JO*, n° C 326, 21 novembre 2001, p. 2.

[127] Proposition de décision-cadre du Conseil relative au mandat européen d'obtention de preuves tendant à recueillir des objets, des documents et des données en vue de leur utilisation dans le cadre de procédures pénales (COM (2003) 688, 14 novembre 2003).

– permettre au maximum la participation directe des autorités de l'Etat membre d'émission dans la collecte de la preuve ;
– éventuellement, encadrer le recours à certains modes d'obtention de la preuve de conditions protectrices des individus, au respect desquelles la reconnaissance et l'exécution seraient subordonnées.

Sur la base d'un examen des exemples de difficultés éprouvées dans la pratique, un autre instrument pourrait répondre à l'objectif de reconnaissance et d'admissibilité mutuelle de la preuve, c'est-à-dire la recevabilité des éléments de preuve légalement recueillis dans un EM, en dehors de toute demande d'assistance, devant les juridictions des autres Etats membres [128]. On notera au passage qu'en vertu de l'article 4(4) de la DC sur le MOP, cet instrument s'applique à la transmission d'objets, documents ou données déjà en possession de l'Etat membre d'exécution. Mais bien entendu la DC ne se prononce pas sur la validité de ces éléments de preuve dans le cadre de la procédure en cours dans l'Etat membre d'émission. On objectera peut-être qu'il revient à chaque Etat membre de décider du sort à réserver à ces preuves. Mais ce serait sans compter que dans l'espace européen de justice aujourd'hui, rendre une justice efficace est devenu l'affaire de tous. En effet, à ce jour de nombreux facteurs, dont les moyens de communication actuels, ou le nombre croissant d'infractions non instantanées, ou continues, conduisent à multiplier les juridictions (potentiellement) compétentes. Les DC concernant le rapprochement du droit substantiel ne sont d'ailleurs pas étrangères à ce phénomène. Il faut par conséquent s'attendre à ce que les situations où des enquêtes sont entamées parallèlement dans plus d'un Etat membre se multiplient. Dès lors le besoin de les rationaliser, partant de rassembler dans un seul Etat membre les éléments de preuve collectés ailleurs, se fera nécessairement sentir plus fréquemment.

Parvenir à un instrument sur la collecte et l'admissibilité de la preuve est peut-être un exercice difficile, compte tenu des différences entre les systèmes judiciaires et entre les règles en matière probatoire, mais il semble indispensable pour assurer l'efficacité de la justice dans l'espace européen.

Plutôt que de s'essayer à un travail de rapprochement procédural ardu, cet instrument pourrait développer un double principe : d'une part, l'application des règles de l'Etat membre où la mesure est exécutée (où la preuve est recueillie) ; de l'autre, l'acceptation de la valeur de la preuve recueillie dans un autre EM en conformité avec les règles de ce dernier, sauf s'il y a rupture de l'équité globale du procès, laquelle doit être appréciée par les juridictions de l'Etat membre où celui-ci a lieu.

D. Conflits de juridiction, non bis in idem *et transfert de procédures*

Dans le domaine civil, le Règlement dit « Bruxelles I » [129] est un outil extrêmement important, qui fonctionne bien et dont le succès est largement dû, selon ses utilisateurs,

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[128] Conseil européen de Tampere des 15 et 16 octobre 1999, conclusions de la présidence, par. 36 (Document Presse 200/1/99).

[129] Règlement CE/44/2001 du Conseil du 22 décembre 2000 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commercial *JO*, n° L 12, 16 janvier 2001, p. 1.

au caractère double de l'instrument, en ce sens qu'il fixe à la fois les critères de compétence et les conditions de reconnaissance et d'exécution.

En matière pénale, le premier programme de reconnaissance mutuelle[130] mentionnait les normes de compétence juridictionnelle parmi les paramètres qui conditionnent l'efficacité de la reconnaissance mutuelle. L'élaboration d'un instrument favorisant le règlement des conflits de compétence entre Etats membres était d'ailleurs prévue à moyen terme (avec un indice de priorité 4). Comme on l'a vu, cet instrument n'existe pas encore, mais un accord politique s'est dégagé sur un projet de DC relative à la prévention et au règlement des conflits de compétence[131]. La future DC prévoit l'obligation de notifier l'existence de procédures en cours aux autorités du ou des autres Etats membres avec lesquels les faits revêtent un lien significatif, selon des critères de rattachement indicatifs. Elle invite les autorités concernées à entamer des consultations, avec l'assistance d'Eurojust le cas échéant, aux fins de déterminer le lieu le plus approprié pour centraliser si possible les procédures, en fonction de ces critères. A ce stade, on doit saluer la rapidité avec laquelle un consensus a pu se dégager sur ce texte. Reste à espérer qu'il soit promptement mis en place et puisse faire la preuve de son efficacité.

Une solution d'ensemble devrait sans doute aller au-delà et pourrait passer par la combinaison de différentes initiatives :

- développer les mécanismes et, si besoin, créer des outils informatisés permettant d'identifier les procédures qui risquent de conduire à des conflits de juridiction et/ou qui méritent d'être coordonnées, voire centralisées ;
- vérifier à la lumière de l'expérience si le mécanisme de consultation permet, lorsqu'un transfert ou une centralisation des procédures s'avère souhaitable, de faciliter le consensus sur l'exercice de la compétence juridictionnelle, en fonction notamment :
  - de la prévisibilité pour l'auteur que l'acte commis est punissable (équilibre à trouver parfois entre lieu où l'acte a été commis et celui où les effets sont intentionnellement recherchés),
  - de la bonne administration de la justice, de l'existence et de l'incidence des instruments de reconnaissance mutuelle (par exemple, la disponibilité des preuves et l'exécution ultérieure de la peine, le cas échéant),
  - des intérêts des victimes ;
- compléter les attributions d'Eurojust, dans les limites de son domaine de compétence, sachant qu'en tout état de cause, Eurojust ne saurait se voir confier un rôle d'arbitre avant que la CJ ne puisse exercer un contrôle sur ses décisions, c'est-à-dire avant l'entrée en vigueur du TFUE ;
- organiser le transfert de procédures, et la transmission des preuves en liaison avec ce qui est dit ci-dessus sur l'admissibilité des preuves ;

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[130] Programme de mesures destiné à mettre en œuvre le principe de reconnaissance mutuelle des décisions pénales, *JO*, n° C 12, 15 janvier 2001, p. 10.

[131] Projet de DC sur la prévention et le règlement des conflits de compétence dans le cadre des procédures pénales (accord politique le 6 avril 2009 (8478/09 (Presse 83), dernier état du texte Doc. 5208/09 COPEN 7 du 20 janvier 2009).

- évaluer les obstacles ou préalables à la fixation d'un principe simple, fonctionnel et non controversé de litispendance ;
- dresser le bilan de la jurisprudence de la CJ sur le *non bis in idem*, préciser les contours de ce principe à la lumière de ces décisions et de l'article 50 de la charte.

E. Méthodes de négociation, de transposition, de mise en œuvre et d'évaluation

Si l'on veut que les instruments de l'UE soient largement utilisés et qu'ils atteignent leur objectif, il est essentiel d'associer à leur élaboration et à leur transposition ceux qui vont devoir les utiliser.

Au stade de l'élaboration des textes, les moyens de consultation sont multiples : livres verts, auditions, enquêtes, consultations électroniques, … Le Forum Justice [132] devrait aussi pouvoir jouer un rôle de relais, servir de « chambre d'écoute » et contribuer ainsi à préparer des textes correctement documentés et éclairés par le point de vue des professionnels. La valeur de son apport est évidemment fonction de la représentativité des opinions qui y sont émises, et dépend dans une large mesure des consultations menées à l'intérieur des organisations représentées. Pour en tirer réellement profit, il faudrait idéalement, d'une part, respecter la planification des travaux futurs, et de l'autre, recevoir l'engagement de ces organisations qu'elles lanceront un débat interne selon un calendrier convenu et une procédure qu'elles détermineraient et veilleraient à respecter.

Dans le cadre de la négociation elle-même, il faudrait arriver à plus de transparence et de discipline. Les négociateurs pourraient indiquer clairement les contraintes qui limitent leur marge de manœuvre, leur nature et leur importance. Ils pourraient aussi s'efforcer de respecter plus fidèlement les orientations politiques, lesquelles ne devraient pas être purement déclaratoires, mais se traduire dans des consignes, ou des obligations de résultat, imposées par le Conseil aux groupes de travail concernés, sur les exigences essentielles de la reconnaissance mutuelle, ce qu'elle implique et ce que l'on en attend, et sur les objectifs, propres et précis, à atteindre par chaque nouvel instrument proposé.

A défaut d'accord, la coopération renforcée ne devrait pas être regardée comme une menace, encore moins comme une sanction, mais comme une alternative qui demande audace et modestie à la fois. Elle devrait permettre d'expérimenter à moins de 27 Etats membres, de démontrer le bien-fondé d'une mesure et de convaincre de sa faisabilité, mais aussi, le cas échéant, de la corriger avant d'en proposer l'extension aux autres Etats membres.

Les DC de reconnaissance mutuelle adoptées jusqu'ici ne sont contraignantes que d'une manière très relative, et les législations de transposition sont loin d'être homogènes, ce qui n'en facilite ni la lisibilité, ni la comparabilité. Une plus grande fidélité au texte de référence serait certainement bienvenue.

Il convient d'observer à cet égard qu'à l'image de ce qui s'est fait dans le domaine de la coopération judiciaire civile, le TFUE permettrait d'adopter des règlements en

[132] Communication de la Commission, *relative à la création d'un forum de discussion sur les politiques et les pratiques de l'UE en matière de justice*, COM (2008) 38, 4 février 2008.

matière de reconnaissance mutuelle. Dans la mesure toutefois où l'accord ne pourrait se faire que sur un instrument non directement applicable, mais nécessitant une transposition, en raison du choix qui serait fait de laisser plusieurs options ouvertes – et donc où on s'accorderait sur l'adoption d'une directive et pas d'un règlement –, il serait souhaitable d'accompagner le processus de transposition d'une assistance, qui pourrait prendre des formes diverses. Le réseau de coopération législative créé par résolution du Conseil le 27 novembre 2008 [133] est un moyen parmi d'autres. Ce réseau a vocation à échanger entre ministères de la Justice des informations cohérentes et à jour sur la transposition des instruments de l'UE, sur les développements jurisprudentiels, les recherches de droit comparé, les grands projets de réforme législative, etc. Un sous-groupe du Forum Justice de son côté pourrait fonctionner comme un comité de suivi. S'agissant de reconnaissance mutuelle, et donc de coopération entre Etats membres, il est d'ailleurs primordial que l'information sur la transposition et sur les modalités organisationnelles de mise en œuvre soit fournie sans délai aux autres Etats membres, avec toutes les explications de nature opérationnelle voulues.

Mais il faut avant tout que chaque Etat membre organise convenablement l'information sur les nouvelles modalités de coopération introduites par les instruments de reconnaissance mutuelle. Quelle que soit la qualité des instruments adoptés par l'UE ou ailleurs, leur bonne application dépendra toujours du niveau de préparation et de la motivation des personnes qui en font usage. Si elles les connaissent mal ou n'en voient pas l'intérêt, l'application sera naturellement médiocre. Tout devrait être mis en œuvre pour faciliter et rendre automatique et aisé le recours aux nouveaux instruments.

Les informations et modèles disponibles sur le site du RJE de leur côté pourraient être encore améliorés et fournir, entre autres :

- un logiciel d'application direct et convivial des formulaires ;
- une information à jour de l'état de transposition de chaque instrument par chaque Etat membre ;
- la liste actualisée en permanence des autorités d'émission et d'exécution et leur champ de compétence ;
- des instructions et recommandations répondant aux situations souvent rencontrées et aux questions fréquemment posées ;
- des liens vers les sites où trouver les législations nationales de transposition et la jurisprudence pertinente.

La plupart de ces informations présentent aussi, en principe, un intérêt pour les avocats (par exemple, pour l'obtention d'une preuve à décharge), et il conviendrait d'assurer que les informations qui sont utiles pour eux leur soient ou leur restent accessibles.

Sur le plan de l'évaluation, si, en l'absence d'une procédure d'infraction, la CJ ne dispose que d'une compétence limitée à l'heure actuelle, elle n'hésite pas à en faire quelquefois un usage que l'on pourrait qualifier de « progressiste ».

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[133] Résolution du Conseil et des représentants des Etats membres, réunis au sein du Conseil, sur l'institution d'un réseau de coopération législative des ministères de la Justice des Etats membres de l'UE, *JO*, n° C 326 du 20 décembre 2008, p. 1.

D'autre part, la rédaction par la Commission d'un rapport sur la mise en œuvre des DC est dorénavant entérinée par les textes : ces rapports sont utiles comme référence et comme source d'information, et ont quelquefois fourni l'occasion d'un réexamen par les Etats membres de leur législation.

L'évaluation par les pairs, fondée sur l'action commune de 1997[134], a le mérite de s'attacher à la pratique au-delà des textes législatifs auxquels se cantonne jusqu'ici le rapport de la Commission. Il s'agit d'un mécanisme lourd et lent, inadapté à l'ensemble des instruments, qui s'est néanmoins révélé riche en enseignements, tant d'ailleurs pour les évaluateurs que pour les évalués, et ne devrait être ni trop vite, ni inconsidérément écarté. D'une manière ou d'une autre, il est nécessaire en effet de développer une formule d'évaluation qui permette d'apprécier, non seulement si les instruments sont correctement transposés, mais encore comment ils fonctionnent en pratique, quel est leur impact sur les systèmes juridiques des Etats membres, et dans quelle mesure ils ont permis d'atteindre les objectifs poursuivis[135]. Ceci est particulièrement approprié dans la phase évolutive actuelle de la reconnaissance mutuelle, où l'évaluation de l'effet de l'acquis et celle des besoins restant à couvrir, sont inextricablement liées.

Enfin, l'évaluation correcte de la mise en œuvre des instruments passe par des protocoles appropriés sur la collecte de données statistiques et la remontée d'informations, à moduler par chaque Etat membre selon qu'il a opté pour une application centralisée ou au contraire décentralisée.

Reste la question d'une éventuelle codification.

Certains Etats membres ont créé un cadre général dans leur législation, destiné à accueillir progressivement l'ensemble des instruments de reconnaissance mutuelle. Cette démarche positive est à saluer. Elle devrait faciliter le processus de transposition et accélérer la mise en application concrète des textes. Cela ne dispense pas néanmoins de procéder tôt ou tard à un exercice du même type au niveau de l'UE. La première question qui se pose à cet égard est d'ailleurs : quand faut-il consolider ou codifier ?

Une consolidation des instruments existants, quelle que soit leur nature, leur contexte ou leur portée , au sens où, au-delà d'une simple compilation, l'impact des uns sur les autres serait mis en exergue, de sorte que le « résultat final » en deviendrait plus immédiatement lisible, représenterait un travail important, dont le principal avantage serait de détecter les failles ou incongruités éventuelles entre instruments. On peut craindre qu'un tel travail absorberait des ressources, en temps et en personnes, qui seraient autrement plus utilement dévolues à la poursuite du programme de reconnaissance mutuelle.

D'un autre côté, une codification parfaitement homogène de tous les instruments de reconnaissance mutuelle supposerait, soit qu'ils soient tous adoptés, soit que la codification elle-même comporte un nouveau volet législatif substantiel. Dans le

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[134] Action commune 97/827/JAI du 5 décembre 1997 instaurant un mécanisme d'évaluation de l'application et de la mise en œuvre au plan national des engagements internationaux en matière de lutte contre la criminalité organisée, *JO*, n° L 344, 15 décembre 1997, p. 7.

[135] Voy. le modèle préconisé et son application à un cas pilote dans A. Weyembergh et V. Santamaria (éd.), *The evaluation of European criminal law*, Bruxelles, Editions de l'Université de Bruxelles, 2009.

premier cas, l'exercice serait reporté à une date encore lointaine, dans le deuxième, il s'agirait d'un ouvrage de grande envergure qui risquerait de n'avoir les faveurs d'aucune présidence, souvent attachée à des résultats plus immédiats sinon plus spectaculaires. Qui plus est, si la Commission s'y attelait, elle courrait le risque d'être entretemps court-circuitée par des initiatives d'Etats membres centrées sur une problématique particulière plus porteuse sur le plan politique ou médiatique. Dans un cas comme dans l'autre, cet exercice ne porterait que sur le cadre de référence, puisque les règles concrètement applicables sont celles qu'édictent les législations de transposition, et que les Etats membres font souvent un usage extensif de la marge d'appréciation qui leur est laissée, s'ils ne vont pas au-delà. De sorte que consolidation ou codification ne seraient pas directement d'utilité pour les praticiens.

La consolidation des mesures existantes, pour autant que de besoin mises à jour ou complétées, formant un ensemble cohérent et exhaustif autour d'un thème défini (comme le gel et la confiscation des produits du crime), représenterait pourtant une option convaincante, susceptible d'améliorer la transposition et de recevoir le support des professionnels.

Dans la foulée, la simplification et la rationalisation des formulaires, en particulier en évitant la multiplication de formulaires trop ciblés, augmenterait la diffusion et encouragerait l'utilisation des instruments de reconnaissance mutuelle.

En parallèle, et au vu de leur usage, les instruments de reconnaissance mutuelle, en particulier le MAE qui est celui qui connaît la plus grande diffusion et la meilleure application, mériteraient d'être « revisités », soit pour en clarifier l'application, soit pour corriger certaines interprétations ou dérives, soit pour combler ses lacunes, soit enfin pour assurer sa complémentarité avec d'autres instruments de reconnaissance mutuelle.

F. Mesures pratiques d'accompagnement : formation et mise en réseau

La reconnaissance mutuelle fait de toute autorité judiciaire un juge européen.

Cette qualité requiert une plus grande familiarité avec la réalité et l'intégration européennes. Dès la formation initiale, les magistrats devraient se sentir investis, responsables et parties prenantes de la réalisation d'un espace européen de justice.

Le potentiel de levier du Réseau européen de formation judiciaire doit être exploité au maximum, et permettre de multiplier l'impact des activités menées par les écoles nationales. La formation des professionnels sur les instruments, leur but et leur contexte, devrait être aussi large et rapide que possible. Elle consiste tout autant en un effort de sensibilisation à la philosophie de la coopération, à la démarche de reconnaissance mutuelle, qu'en un exercice pratique d'utilisation d'outils et de procédures. Les autres acteurs de la justice, avocats mais aussi interprètes, traducteurs, gestionnaires de l'administration des tribunaux, devraient pouvoir en bénéficier dans leur propre domaine d'action.

La reconnaissance mutuelle implique aussi que se constitue une « toile » de professionnels, vecteurs d'une culture judiciaire européenne commune et défenseurs de valeurs partagées, interlocuteurs privilégiés dans l'examen de la qualité de la justice dans l'UE. Information et formation devraient être confortées par des contacts directs entre praticiens, dans leur travail quotidien, mais aussi et plus encore, par le biais de

visites et de rencontres permettant, d'une part, d'appréhender *in situ* et *de visu* les diverses manières de travailler, de repenser les raisons de ces différences et d'échanger les meilleures pratiques, et de l'autre, de se créer un réseau de personnes de confiance et de référence, à même de conseiller et de donner les explications nécessaires dans des cas particuliers.

List of abbreviations

ADN	Acide désoxyribonucléique
AEAW	Act on the European Arrest Warrant and Surrender Procedures
AFSJ	Area of Freedom, Security and Justice
AICCM	Act on International Co-operation in Criminal Matters between Member States of the European Union
AJP	Aktuelle Juristische Praxis
BEPI	Bureau d'entraide pénale internationale
BGBl	Bundesgesetzblatt
BIRS	Division for Criminal Cases and International Judicial Cooperation
BOE	Boletin Oficial del Estado
Bull. crim.	Bulletin criminel
BVerfG	Bundesverfassungsgericht
BVR	Bundesverfassungsgericht
Cass.	Cassation
Cass.	Cassazione
Cass. crim.	Cour de Cassation Chambre criminelle
Cass. pen.	Cassazione penale
CC	Criminal Code
CCBE	Council of Bars and Law Societies of Europe
CCC	Czech Constitutional Court
CCP	Code of Criminal Procedure
CEDH	Convention européenne des droits de l'homme
CFREU	Charter of Fundamental Rights of the European Union
CIC	Code d'instruction criminelle
CISA	Convention Implementing the Schengen Agreement
CJ	Cour de justice des Communautés européennes puis Cour de justice de l'Union européenne
CJEL	Columbia Journal of European Law

CMLRev.	Common Market Law Review
CMLR	Common Market Law Reports
Cons. Const.	Conseil constitutionnel
Coreper	Comité des représentants permanents
Cour eur. DH	Cour européenne des droits de l'homme
CP	Code pénal
CPC	Code de procédure criminelle
CPP	Code de procédure pénale
CRP	Constitution of the Portuguese Republic
CRS	Slovenian Constitution
CYELP	Croatian Yearbook of European Law and Policy
DC	Décision-cadre
DC MAE	Décision-cadre relative au mandat d'arrêt européen et aux procédures de remise entre les Etats membres de l'Union européenne
Dig. disc. pen.	Digesto delle discipline penalistiche
Dir. e Giust.	Diritto e giustizia
Dir. pen. e proc.	Diritto penale e processo
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
EAW	European Arrest Warrant
EC	European Communities
EC	European Community
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLAN	European Criminal Law Academic Network
ECR	European Court Reports
EEW	European Evidence Warrant
EHRR	European Human Rights Reports
EJN	European Judicial Network
ELRev.	European Law Review
EM	Etat membre
ENM	Ecole nationale de la magistrature
EPP	European Public Prosecutor
ETA	Euskadi Ta Askatasuna
ETS	European Treaty Series
EU	European Union
EuConst.	European Constitutional Law Review
Eu GRZ	Europaïsche Grundrechte Zeitschrift
EuHbG	Europäisches Haftbefehlsgesetz
EUIN-Act	Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway
EU-JZG	Bundesgesetz über die justizielle Zusammenarbeit in Strafsachen mit den Mitgliedstaaten der Europäischen Union
EUR	Euro
Eur. Court HR	European Court of Human Rights
Europol	European Police Office

EU-VStVG	EU-Verwaltungsstrafvollstreckungsgesetz
EWHC	High Court of England and Wales
FD	Framework Decision
GA	Goltdammers Archiv für Strafrecht
Giur. it.	Giurisprudenza italiana
Giur. merito	Giurisprudenza di merito
GLJ	German Law Journal
Guida dir.	Guida al diritto
HCCJ	Haute Cour de Cassation et de Justice
ICC	International Criminal Court
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the Former Yugoslavia
IJCL	International Journal of Constitutional Law
Interpol	International Criminal Police Organization
IRA	Irish Republican Army
IRG	Gesetz über die Internationale Rechtshilfe in Strafsachen
JAI	Justice et affaires intérieures
JECL	Journal of European Criminal Law
JFT	Juridiska föreningens tidsskrift
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
JO	Journal officiel des Communautés européennes (jusqu'au 31 janvier 2003) Journal officiel de l'Union européenne (à partir du 1er février 2003)
JT	Journal des tribunaux
JTDE	Journal des tribunaux. Droit européen
Juris-cl. Europe	Juris-classeurs Europe
JZ	Juristenzeitung
LeEAW	Law 3/2003 of 14 March 2003, on the European Arrest Warrant and surrender procedures
LeFP	Ley 1/2008, de 4 de Diciembre, para la ejecución en la Unión Europea de resoluciones que impongan sanciones pecuniarias
Leg. pen.	Legislazione penale
LeOFP	Ley 18/2006, de 5 de Junio, para la eficacia en la Unión Europea de las resoluciones de embargo de bienes y de aseguramiento de pruebas en procedimientos penales
LIACM	Law on International Assistance in Criminal Matters
MAE	Mandat d'arrêt européen
MB	Moniteur belge
MLA	Mutual Legal Assistance
MLA-Act	Act no. 38 of 1996 on International Cooperation in Criminal Matters
MOP	Mandat d'obtention de preuves
MP	Member of Parliament
MR	Mutual Recognition
MS	Member State(s)
NAW	Nordic Arrest Warrant
NGO	Non Governmental Organisation
NJW	Neue juristische Wochenschrift
OJ	Official Journal of the European Communities (until 31 January 2003) Official Journal of the European Union (since 1 February 2003)

OLG	Oberlandesgericht
PolYBIL	Polish Yearbook of International Law
PTL EAW	Law 65/2003 of 23 August 2003
QC	Queen's Counsel
RDPC	Revue de droit pénal et de criminologie
Rec.	Recueil des arrêts de la Cour de justice des Communautés européennes (puis de la Cour de justice de l'Union européenne)
REJUE	Red Judicial Española de Cooperación Judicial Internacional
Rev. dr. pén.	Revue de droit pénal
Riv. it. dir. proc. pen.	Rivista italiana di diritto e procedura penale
Riv. dir. proc.	Rivista di diritto processuale
RiVASt	Richtlinien für den Verkehr mit dem Ausland in strafrechtlichen Angelegenheiten
RJE	Réseau judiciaire européen
RM	Reconnaissance mutuelle
RSC	Revue suisse de criminologie
SAEI	Service des affaires européennes et internationales du ministère de la Justice
SIRENE	Supplementary Information Request at the National Entries
SIS	Système d'information Schengen − Schengen Information System
SPF	Service public fédéral
STCE	Série des traités du Conseil de l'Europe
StraFo	Strafverteidiger-Forum
STE	Série des traités européens
StV	Strafverteidiger
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TFUE	Traité sur le fonctionnement de l'Union européenne
TUE	Traité sur l'Union européenne
UE	Union européenne
UKHL	United Kingdom House of Lords
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties 1969
WLR	Weekly Law Reports
YEL	Yearbook of European Law
YPES	Yearbook of Polish European Studies
ZIS	Zeitschrift für Internationales Strafrecht
ZRP	Zeitschrift für Rechtspolitik
ZStW	Zeitschrift für die Gesamte Strafrechtswissenschaft

List of Member States

AT	Austria/Autriche
BE	Belgium/Belgique
BG	Bulgaria/Bulgarie
CY	Cyprus/Chypre
CZ	Czech Republic/République tchèque
DE	Germany/Allemagne
DK	Denmark/Danemark
EE	Estonia/Estonie
EL	Greece/Grèce
ES	Spain/Espagne
FI	Finland/Finlande
FR	France
HU	Hungary/Hongrie
IE	Ireland/Irlande
IT	Italy/Italie
LT	Lithuania/Lituanie
LU	Luxemburg/Luxembourg
LV	Latvia/Lettonie
MT	Malta/Malte
NL	The Netherlands/Pays-Bas
PL	Poland/Pologne
PT	Portugal
RO	Romania/Roumanie
SE	Sweden/Suède
SI	Slovenia/Slovénie
SK	Slovakia/Slovaquie
UK	United Kingdom/Royaume-Uni

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The future of mutual recognition in criminal matters in the European Union / L'avenir de la reconnaissance mutuelle en matière pénale dans l'Union européenne

In the EU's fast-growing Area of Freedom, Security and Justice, the principle of mutual recognition should play a key role in the field of judicial cooperation in criminal matters.

Since mutual recognition was enshrined as a cornerstone of judicial cooperation in the EU by the European Council of Tampere in 1999, an increasing number of binding instruments based on this principle have been adopted in the framework of the EU's Third Pillar.

The considerable impact of those instruments on national criminal legal systems has often required a major effort by Member States in adjusting their national legislation so that it complies with the new mechanisms agreed at EU level.

What are the real difficulties encountered by Member States in the transposition of these legislative texts into national law and, even earlier, when the texts are being negotiated within the Council of the EU? What lessons can be learned from the early years of their practical implementation by the competent judicial authorities? And, above all, what will be the future role and scope of the principle of mutual recognition in criminal matters in Europe?

The entry into force of the Lisbon Treaty and the adoption of a new multi-annual programme (replacing the Hague Programme) to strengthen the EU's Area of Freedom, Security and Justice are both pending. In this crucial time of transition and uncertainty, the book seeks to provide answers to the above questions and many other related issues.

Through its country by country approach covering the vast majority of the Member States, it intends to provide policymakers, practitioners, academics and researchers with a comprehensive analysis of the problems that have emerged and the solutions envisaged by each State in their implementation of mutual recognition instruments. The country chapters are followed by a final EU-wide analysis that seeks to identify common themes and obstacles and to consider future options and possible scenarios.

The whole study, based on in-depth research combined with interviews conducted with hundreds of practitioners and experts from across the EU, amounts to a remarkable team performance carried out together with academics and researcher members of ECLAN (European Criminal Law Academic Network).

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