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The judicial cooperation in criminal matters in the European Union: the discipline of the European Arrest Warrant

Dottorando

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PhD

"Business, State and Market"

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The judicial cooperation in criminal matters in the European Union: the discipline of the European Arrest Warrant

PhD student

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"…Un uomo fa quello che è suo dovere fare.

Quali che siano le conseguenze personali.

Quali che siano gli ostacoli, i pericoli e le pressioni.

E questa è la base di tutta la moralità umana".

John Fitzgerald Kennedy

Author's Declaration of Originality

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Gaetano Sorcale

PhD timeline

The three year's of research of the PhD that led to the drafting of this work began during the first semester by attending the didactic activities organized by the Council of the Professors of the PhD program "Business, State and Market", which included Seminars and Conferences on topics related to areas of public and private law, in the former Juridical Sciences Department "C. Mortati" of the University of Calabria.

At the same time began the work of retrieving bibliographic material from the library of the University of Calabria; a period of studying such data source also began at this time.

After discussions with Prof. Massimo Fragola, it was decided to carry out the duration of the PhD under a regime of international joint supervision, giving an international slant to the research and to the work. The University of Calabria entered into a stipulation with St. Anthony Catholic University of Murcia (UCAM). The agreement named Prof. Pablos S. Blesa Aledo, as co-director of thesis, so that he could follow carefully and competently the work of research of the bibliographic material first, and then of writing of the doctoral thesis.

During the second semester of the first year, continued a careful and fruitful work of researching the bibliographical material of the prevailing doctrine, which was necessary for the elaboration of the work. The first period of research at the St. Anthony Catholic University of Murcia, established by the international joint supervision, took place. Prof. Pablo S. Blesa Aledo followed with attention and interest the work of the retrieval of the bibliographic material.

Moreover, there was a continued attendance of the Seminars and Conferences related to the issues of the research, organized by the UCAM and also by other Universities or Institutes. The central library of the University, of the Faculty of Law, the public libraries of the University of Murcia and the Institute of International Law based in Murcia were also consulted.

There was also a brief visit to the juridical library of the Complutense University of Madrid where interesting and useful bibliographic researches took place.

During the second year of the PhD there was research of the bibliographic material of the prevailing doctrine, necessary for the drafting of the work. More specifically, during the first semester there was the participation of the didactical activities organized by the Council of the Professors of the PhD including Seminars and Conferences on topics related to both areas of public and private law of the former Juridical Sciences Department. The work continued at the same time retrieving and studying the bibliographic material at the library of the University of Calabria. Attendance of the IV Cycle of Seminars and European "Roundtable" organized by the Prof. Fragola within the Faculty of Political Science occurred.

In addition, as a member of the club "ex-alumni" LUISS Guido Carli, due to the granting of a degree in International Relations from that institution, it was possible to access the central library and the library of the Faculty of Law, where research on the specific work took place with the collaboration of the Prof. Melina DeCaro.

During the second semester the work of researching the bibliographic material continued at the St. Anthony Catholic University of Murcia, as required by the regime of the international joint supervision established for the PhD, always collaborating with Prof. Pablo S. Blesa Aledo, as well as continued the participation of Seminars and Conferences.

In agreement with the co-directors of thesis, Prof. Fragola and Prof. Blesa, in the first semester of the third year (specifically during the stay in Murcia), an opportunity was presented for a suitable period to carry out research abroad under the international joint supervision of the Doctorate at the Loyola School of Law and the Department of Political Sciences at the Loyola University of Chicago, a prestigious and specialized place for the research of the themes of the doctoral thesis. By establishing a fruitful collaboration with Prof. Schrader, Dean of Department of Political Sciences, and with Prof. Katz, Professor of International Law, and other PhD students of the Faculty of Political Sciences at Loyola University of Chicago, it was possible to compare various issues of International Law as well as International Policy in general. There was the possibility, received with interest and enthusiasm, to participate in "A series of talks on how political processes and attitudes contribute to or frustrate efforts to build a just society in the U.S. and around the world" entitled "Approaches to Understanding Social Justice", organized by the Department of Political Sciences of the Loyola University of Chicago.

The second, and last semester of the third year of the doctoral program was entirely dedicated to the writing of the doctoral thesis in English and updating the latest judgments of the courts, the tribunals of the Member States and of the courts of the European Union relating to the topics discussed in the work.

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Abbreviations

AC	Law Reports Appeal Court
AER	All England Law Reports
BMLR	Butterworth's Medical Law Reports
BVerfG	BundesVerfassungsgericht
CED	Centro Elettronico Documentazione
CEDU	European Charter of Human Rights
CFI	Court of First Instance
CFREU	Charter of Fundamental Rights of the European Union
CFSP	Common Foreign and Security Policy
CISA	Convention Implementing the Schengen Agreement
CPS	Crown Prosecution Service
CUP	Cambridge University Press
EAW	European Arrest Warrant
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EGP	European General Prosecutor
EPP	European Public Prosecutor
ETS	European Treaty Series
EU	European Union
EWCA	England and Wales Court of Appeal
FATF	Financial Action Task Force on Money Laundering

FBI	Federal Bureau of Investigation
GA	United Nations General Assembly
HCJAC	High Court of Justiciary (Appeal Court)
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILM	International Legal Materials
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
OLAF	European Anti-Fraud Office
OUP	Oxford University Press
QB	Queen's Bench (Division)
S.D.N.Y.	Southern District of New York
SIS	Schengen Information System
SOCA	Serious Organised Crime Agency
StGB	StrafGesetzBuch
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UK	United Kingdom
UKHL	United Kingdom House of Lord
ULB	Université Libre de Bruxelles
UN	United Nations
UNGA or GA	United Nations General Assembly
UNTS	United Nations Treaty Series
US or USA	United States of America
WLR	Weekly Law Reports

Introduction

The field of judicial cooperation in criminal matters in the European Union is of extreme interest to all judicial authorities from different Member States, as it enhances national judicial capacity through the understanding and use of the EU legal system. Within this system of legal principles, enforcement procedures, diverse instruments and various substantive areas, one of the most innovative and complex aspects is given by the European Arrest Warrant (EAW), which is the object of this doctoral thesis entitled "*The judicial cooperation in criminal matters in the European Union: the discipline of the European Arrest Warrant*".

This issue is tackled by first considering the introduction of judicial cooperation in criminal matters. Ever since the creation of a European community judicial cooperation in criminal matters has been one of the major objectives pursued by the European Union. This can be linked to the implementation of the four fundamental principles of freedom, which are the free circulation of goods, capitals, services and people. Although apparently marginal, this aspect may have contributed to the exponential growth of transnational crimes[1].

At the same time, the opening of national borders without subsequent border controls, has allowed for a totally free movement, assured by the Treaty. On the one hand, this has unarguably fostered economic growth and social progress; on the other, it may be seen as an extraordinary opportunity for criminal

[1] On this issue, cfr. J. APAP, S. CARRERA, *Judicial Cooperation in criminal matters. European Arrest Warrant: A good testing ground for mutual recognition in the enlarged EU?*, Centre for European Policy Studies, CEPS for Policy Brief n. 46/February 2004, available at and retrieved on the 10th of May 2012 from http://www.ceps.be. Also see E. BARBE, *Justice et affaires intérieures dans l'Union européenne,* La Documentation Française, Paris, 2002, p. 120 and ff.

organizations in exploiting the free market and the movement of people, capitals, goods and services for their own profits.

In this scenario we witness the steady increase of tools introduced to cater to the needs of trans-border cooperation and a subsequent europeanisation. Searches, documents, information, and individual guarantees and rights have been confirmed within the national territories unless they have been compromised by the introduction of the principle of mutual recognition. This applies also to criminal matters[2].

Without a doubt, the goal set by the European Union in preserving and developing a space of freedom, security and justice (objectives coded in the new Title V TFEU) across the entire EU territory should be pursued and attained. Concerns and doubts arise, however, when the current modes and means of implementation are analyzed. It is clear that the European Union is creating a system of judicial cooperation in criminal matters based on the sole pillar of the principle of mutual recognition. This is even clearer when we realise that fundamental individual guarantees and rights are levelled in order to reach the incontrovertible objective of preserving and developing a space of freedom, security and justice[3].

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[2] On this issue, see M. CARTABIA, *Gli obblighi di cooperazione giudiziaria degli Stati con le giurisdizioni penali internazionali e la tutela dei diritti dell'uomo*, in C. ZANGHÌ e L. PANELLA (eds.). *Cooperazione giudiziaria in materia penale e diritti dell'uomo,* Giappichelli, Torino, 2004, p. 292 and ff.; and also C. GÓMEZ-JARA DÍEZ, *Orden de Detención Europea: Reflexiones sobre su fundamento en el principio de reconocimiento mutuo*, Diario La Ley, julio 2004, n. 6069, p. 2 a 23.

[3] There is a vast bibliography regarding this point, amongst which refer to G. TESAURO, *Diritto comunitario,* Padova, 2013, p. 128 and ff.; A. TIZZANO - R. ADAM, *Lineamenti di diritto dell'Unione europea,* Torino, 2012, p. 167 and ff.; P. MENGOZZI, *La tutela dei diritti umani nella giurisprudenza comunitaria,* in L. S. Rossi (ed.). *Carta dei diritti fondamentali e costituzione dell'Unione europea,* Milano, 2002, p. 43 and ff.; C. ZANGHÌ, *La protezione internazionale dei diritti dell'uomo,* Torino, 2006, p. 329 and ff.; A. TIZZANO, *L'azione dell'Unione europea per la promozione e la protezione dei diritti umani,* in *Il Diritto dell'Unione Europea*, 1999, p. 149; M. FRAGOLA, *Sovranità statale e diritti umani nel sistema giuridico europeo comunitario,* in F. A. Cappelletti *Diritti umani e sovranità,* Torino, 2000, p. 163 and ff.; M. IOVANE, *La tutela dei diritti fondamentali nel diritto internazionale,* Napoli, 2000, p. 134 and ff.

For this reason, the present study addresses four main issues:

1) eliciting the concept of judicial cooperation in criminal matters;
2) analyzing the principle of mutual recognition of criminal sentences, as the current cornerstone of judicial cooperation in criminal matters, in order to provide a historical overview of the contexts in which the principle of mutual recognition originated and how it has therein been applied;
3) examining the Framework Decision in relation to the European Arrest Warrant, highlighting potential weaknesses in its application[4];
4) investigating current difficulties encountered in the implementation of the space of freedom, security and justice so as to evaluate possible alternative solutions which ensure the protection of fundamental individual rights with particular reference to the CEDU.

The renowned metaphor, comparing the criminal process to a "*sword*" which punishes, but also (and above all) to a "*shield*" which protects, will guide me throughout this work, and will follow a stance that a new balance between repressive priorities and guaranteed needs must be reached.

The development of judicial cooperation in criminal matters between Members States does not have the same strong sense of identity that marked the creation of a European Union of citizens and markets that began in the seventies. At a unitary European level the impacting factor has been the effective need to deal with both the phenomenon of international terrorism and the process of demolition of borders in accordance with Schengen Agreement[5].

[4] Framework Decision related to the European Arrest Warrant and to the surrender procedures between Member States of the 13th of June 2002, available at and retrieved on the 24th of June 2012 from http://europa.eu/legislation.

[5] On this topic cfr. D. M. CURTIN, H. MEIJERS, *The principle of open government in Schengen and the*

As part of the issues explored in my thesis, it is worth mentioning the well-known fact that the intergovernmental experience between Member States came to an end (at least formally) with the Treaty of Maastricht. Judicial cooperation in criminal matters is not contemplated by this Treaty simply as *communitarian* (that is managed by the EU legislative institutions), but rather solely "institutionalized", (or inserted in the general EU institutional frame), which privileged the representative governmental agencies of the Member States.

Specifically, it can be said that these forms of judicial cooperation are inadequate as they lack the goal of establishing real objectives and effective development within national systems. This further implies that in order to ascribe a more salient role to the European Union in terms of justice and common security, it is crucial to implement actions of real and effective normative harmonisation of national crime rights (at the European level)[6].

The turning point in judicial cooperation in criminal matters between the Member States of the European Union occurs in 1997 with the signature of the Treaty of Amsterdam. It is important to recall that the following Treaty of Nice did not give a fresh impetus, but only modest innovations to the Third Pillar. The Treaty of Nice did not impinge upon the structure revised in Amsterdam. The only changes in the Treaty of Nice refer to the introduction of some references to Eurojust (at that time) in articles 29 and 31 TUE and the reform of article 40

European Union: democratic retrogression? in *CMLR*, 1995, p. 391 and ff., and also cfr. J. MONAR, *The impact of Schengen on Justice and home affairs in the European Union: an assessment on the threshold to ist incorporation*, in M. DER BOER, *Schengen still going strong*, European Institut of Public Administration, Maastricht, 2000, p. 21 and ff.

[6] For an initial deeper analysis of the issue, refer to A. DAMATO, *Il mandato d'arresto europeo e la sua attuazione nel diritto italiano (II)*, in Diritto dell'Unione europea, 3/2010, p. 210 and ff.; L. S. ROSSI, *Le Convenzioni fra gli Stati membri dell'Unione europea*, Giuffrè, Milano, 2000, p. 54 and ff.; and M. LIROLA DELGADO MARTÍNEZ, *La coopereación penal internacional en la detención y entrega de personas: El Estatuto de Roma y la Orden Europea*, Anuario de Derecho Internacional, 2004, pp. 173- 240.

related to reinforced cooperation that make its application easier[7].

The results achieved by the European Union in the criminal justice field with the tools made available to it by the Treaty of Amsterdam are relevant, especially when compared to the modest results of the previous years. These results are attributable to both the strong will manifested by the States in cooperating with one another and to the efficacy of the normative tools made available to the European Union.

Following this general outline, which is core to the main topic of my work, it is now worth turning to the European Arrest Warrant[8].

The action plan of Vienna, which had preceded the revision of the Treaty of Amsterdam, solicited Member States to proceed in the prompt ratification and implementation of those tools already existing in relation to matters of extradition. The conclusions of the 1999 European Council of Tampere indicate that the formal procedure of extradition, regarding persons who escape justice after having been definitely sentenced, should be abolished between Member States and substituted by transferring such persons in accordance with article 6 of the TEU. It is also worth considering speedy extradition procedures, while still

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[7] On the topic, see the Council of Europe's Decision (of Tampere) of the 28th of February 2002, which establishes Eurojust to reinforce the fight against serious forms of criminality in Official Journal (OJ) EU L 63 of the 6th of March 2002; modified by Decision 2003/659/GAI, of the 18th of June 2003, and in particular, for further details on the issue, refer to L. SALAZAR, *L'Unità di cooperazione giudiziaria "Eurojust" in seno al Trattato di Nizza*, in *Diritto penale e processo*, 2002, n. 8, p. 978 and G. DE AMICIS, *La costruzione di Eurojust nell'ambito del "terzo pilastro" dell'Unione europea*, in Cassazione penale, 2001, p. 1985 and ff.

[8] For an initial general approach to the topic, refer to J. DE MIGUEL ZARAGOZA, *Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de la extradición*, Actualidad Penal, n. 4, 2003, pp. 139-158; C. GÓMEZ-JARA DÍEZ, *Orden de Detención Europea: Reflexiones sobre su fundamento en el principio de reconocimiento mutuo*, Diario La Ley, julio 2004, n. 6069, pp. 2-23; D. MANZIONE, *Il mandato d'arresto* europeo, in Leg. Pen., 2002, p. 976 and also E. ROSI, *L'elenco dei reati nella decisione sul mandato di arresto europeo: l'UE "lancia il cuore oltre l'ostacolo"*, in Dir. penale e processo, n. 3, 2004, p. 378.

maintaining the principle of a fair process.

A similar distinction, which in any case is not an effective justification, cannot be traced in any bilateral document. In order to simplify the current legal system, the European Arrest Warrant must be applied in the same areas that applied to extradition. It must cover the phase that precedes the sentence in the criminal procedure, and the one that follows the sentence.

It is on these grounds that the choice was made to turn to a Framework Decision in order to create the European Arrest Warrant (at that time, included in the Third Pillar and thus a compulsory choice). The number of conventions drafted by the Council of Europe (which is distinct from the EU) on European political cooperation or by the European Union were unsuccessful, as indicated by the state of the ratifications. Both the legal system resulting from the Treaty of Amsterdam and the advanced state of judicial cooperation between Member States justify the need to elaborate the European Arrest Warrant through a Framework Decision. Article 34 of the Treaty is "binding for Members States in terms of the result to be achieved, except for the competence of national authorities with regards to the form and the means" [9].

In this respect, I will stress some means of protection by highlighting different aspects including the presence of legal counsel and, where necessary, of interpretation, which are provided for from the very moment a person is arrested

[9] The proposed system has a twofold objective. In terms of the efficacy of repressing criminal activities; On the one hand, it draws on the consequences of the opening of borders within the European judicial space, fostering judicial action of each Member State, as well as that of the borders. For this aspect, the proposed mechanism represents an important contribution toward the fight against transnational organised criminality. On the other hand, this system should respond to the European citizens' concerns regarding the guarantee of individual rights if applied appropriately within the entire EU. For further details on this point, see A. TIZZANO, *Il Trattato di Amsterdam*, CEDAM, Padova, 1998, p. 57 and ff.; E. PACIOTTI, *Quadro generale della costruzione dello spazio di libertà, sicurezza e giustizia*, in G. AMATO, E. PACIOTTI (eds.). *Verso l'Europa dei diritti. Lo spazio europeo di libertà, sicurezza e giustizia*, Il Mulino, Bologna, 2005, p. 13 and also F. IRURZUN MONTORO, *La Convención Europea. Líneas de desarrollo en materia de cooperación judicial penal*, en Cuadernos de Derecho Judicial, n. XIII 2003, Ed. Consejo General del Poder Judicial, Madrid, 2003, pp. 506-538.

in execution of the European Arrest Warrant (article 11). Moreover, when a person is arrested on the basis of the European Arrest Warrant, the judicial authority of the executing State must express the fulfilment of the person's state of detention according to the guarantees provided by the same person in surrendering. If these guarantees are satisfactory, the person who has been arrested through the execution of the European Arrest Warrant can be released. This release must meet certain conditions in the executing State until the person surrenders to the judicial authority that has issued the warrant on the established date for the due procedure (article 14). This mechanism avoids prolonged pretrial detention, which can result from a person's geographical location.

Whenever the arrested person has voluntarily surrendered, the authority that has issued the warrant may decide whether to suspend the execution of the European Arrest Warrant (article 13, paragraph 3). Those who have been sentenced "*in absentia*" must appear in front of the prosecuting judicial authority (article 35). Cases of prolonged pretrial detention, which have been ordered to ensure that the persons residing in another Member State are completely available, should decrease.

These issues are addressed by the European Arrest Warrant in that it improves the guarantees of surrender and reappearance in front of the judicial authority that issued the warrant (article 17). Useless or inappropriate transfers are avoided by using a videoconference (article 34) tool. Similarly, sentencing is facilitated in the place in which the sentenced person's reintegration can occur under the best conditions (articles 33 and 36). The length of criminal procedures are accelerated, thanks to a major appeal to the temporary transfer from one State to the other (articles 39 and 40). This will lead to respecting the rights of individuals, who are involved in a legal action, by having a judicial decision

within a reasonable length of time[10].

The restriction of the use of the European Arrest Warrant, to a time period of ninety days (article 20), is an important contribution to respecting reasonable time length. The abolition of the principle of double criminality does not hinder those States, which have less repressive legislation. Due to the negative list, Member States, that have chosen to depenalise some behaviours, are allowed to exclude these from the area of application of the European Arrest Warrant (article 27).

Furthermore, a Member State has the chance to influence the execution of the European Arrest Warrant by ensuring that life imprisonment will not be applied (article 37) [11].

Finally, when issuing and executing European Arrest Warrants, national judicial authorities are subject to the general norms on the protection of fundamental rights. They are subject to the European Convention related to the protection of human rights and to the fundamental principles of freedom ratified by the 47 Member States belonging to the Council of Europe, besides being subject to the Charter of Fundamental Rights of the European Union (2000/C 364/01). The Charter currently has the same legal effect as the Treaties, in accordance with article 6 of the TEU[12].

In addition, the European Arrest Warrant requires the forced transfer of a person from one Member State to the other. This proposed procedure replaces the

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10 Cfr. *Ibidem*.

11 Protocol of the Convention related to judicial assistance regarding criminal matters between Member States and the European Union, of the 16th of October 2001, in *O. J.* of the EU C 326 dated on the 21st of November 2001.

12 On this point, refer to the Framework Decision concerning the consideration of sentence decisions between Member States of the European Union in occasion of a new criminal procedure dated on the 24th of July 2008, available at and retrieved on the 16th of May 2012 from: http://eur-lex.europa.eu.

traditional procedure of extradition but is similar in the interpretation of article 5 CEDU regarding the right to freedom and security. In other words, the procedure is featured as a horizontal system, which replaces the current system of extradition. This new procedure does not restrict some crimes, which differs from the provisions of the previous bilateral Treaty between Italy and Spain[13].

The mechanism is grounded in the mutual recognition of judicial decisions[14].

The executing procedure of the European Arrest Warrant is judicial in nature[15]. The politics that characterized the procedure of extradition were abolished. Consequently, the phase of filing administrative complaints against political decisions is abolished as well. The elimination of both of these procedures should substantially improve the efficacy and speed of the provision.

The European Arrest Warrant will take the principle of equality of all European citizens into account by virtue of Union citizenship set forth in articles 9 and 19 TEU. The exception that favours citizens belonging to a Member State

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[13] Cfr. the Bilateral Treaty between the Republic of Italy and the Reign of Spain for the pursuit of serious crimes by overcoming extradition in a common legal space, signed in Rome on the 28th of November 2000 by the respective Ministers of Justice, available at and retrieved on the 14th of March 2013 from: http://www.giustizia.it/italia-spagna/.

[14] The basic idea is as follows: when the judicial authority of a Member State requests the surrender of a person due to either a final sentence or as the person is subjected to a penal measure, its decision must be recognized and executed automatically across the entire territory of the Union. The refusal to execute the European Arrest Warrant must be restricted to a number of circumscribed hypotheses. On this issue, some authors have expressed their position, such as, for example, M. CEDEÑO HERNAN, *De la extradición a la Euroorden: Un cambio necesario*, Revista General del Derecho Europeo, 2004-5, pp. 1-25; M. DE HOYOS SANCHO, *Il nuovo sistema di estradizione semplificata nell'Unione europea. Lineamenti della legge spagnola sul mandato d'arresto europeo*, in Cass. penale, 2005, p. 133 and also P. GUALTIERI, *Mandato d'arresto europeo: davvero superato (e superabile) il principio di doppia incriminazione?*, in Dir. penale e processo, 1/2004, p. 115 and ff.

[15] See for example the "normative context" in *Il diritto dell'Unione* in Judgment of the European Court of Justice (ECJ) of the 14th of September 2000, case C-238/98, Hocsman, in Raccolta, 2000, pp. I-6623, and also in that of the Judgment of the European Court of Justice (ECJ) of the 13th of September 2005, case C-176/03, *Commissione v. Consiglio*, in Raccolta, 2005, pp. I-7879.

no longer makes sense. The most pertinent criteria is not nationality, but rather the persons' main place of residence, especially in regards to the execution of a criminal sentence.

The execution of an imposed punishment, for which a provision is made by the State where the arrest takes place, is facilitated when the person's reintegration in that State is made possible. When the decision is taken to execute the European Arrest Warrant the person's return for the sake of executing the punishment imposed by the foreign authority is secondary[16].

The accetable reasons for refusal to execute the European Arrest Warrant are explicitly stated so as to maximize the simplification and speed of the procedure[17]. The principle of double criminality as well as the principle of speciality are abolished.

Member States are, however, given the possibility of elaborating a negative list of crimes for which they can state their refusal to exercise European arrest warrants on their territories.

Similarly, it is possible to re-establish the need to exercise double criminality in those cases where the State, which issues an arrest warrant, has extraterritorial competence.

The elements that form the European Arrest Warrant are homogeneous throughout the Union. They should enable the authority of the executing State to proceed in handing over the person without any further controls, exceptions are

[16] In this regard, refer to the reading of the Framework Decision related to the European Arrest Warrant and to the procedures of surrender between Member States, dated on the 13th of June 2002, available at and retrieved on the 10th of May 2012 from: http://eur-lex.europa.eu.

[17] For a more detailed discussion on this matter, see the Framework Decision related to the European search warrant for direct proof of the acquisition of objects, documents and data to use in criminal proceedings, dated on the 18th of December 2008, available at and retrieved on the 18th of May 2012 from: http://eur-lex.europa.eu.

made for special cases[18].

In drafting this thesis, particular attention is given to the analysis of the Framework Decision on the European Arrest Warrant. It is through this framework that Member States have decided to move from assistance toward collaboration, or better, from a system of national interrelated spaces to an idea of a single European space.

Despite the sensitivity and delicacy of the matter, the Framework Decision was adopted in a short span of time. During the extraordinary session of the Council of Europe, held on the 20th of September of 2001 and summoned following the attacks of the 11th of September 2001, the act was adopted in order to launch a EU Action Plan against terrorism. The proposal presented by the European Commission met the approval of the Member States. A political agreement was reached within the Council in a few months, riding the emotional wave of the terrorist attacks and subsequent reinforcement of repressive mechanisms. The formal implementation of the act took place, however, only in June 2002 due to the slowdown caused by the concerns manifested by the Italian government and the Parliaments of the United Kingdom, Denmark, Ireland, Holland and Sweden[19].

The Commission's initiative was inspired by the bilateral agreements between Spain and Italy, and between Spain and the United Kingdom, which considered certain types of "super-simplified" extradition requests[20]. The request,

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[18] Cfr. S. CALAZA LÓPEZ, *El procedimiento europeo de detención y entrega*, Ed. Iustel, Madrid, 2005, p. 56 and ff. and S. BARIATTI, *La cooperazione giudiziaria in materia civile dal terzo pilastro dell'Unione europea al titolo IV del Trattato CE*, in A. TIZZANO (reviewed by), *Il Trattato di Nizza*, Giuffrè, Milano, 2003, p. 267 and ff.

[19] See the Framework Decision related to the fight against terrorism of the 13th of June 2002, available at and retrieved on the 6th of May 2012 from: http://eur-lex.europa.eu.

[20] Convention related to judicial assistance in criminal matters between Member States of the European Union of the 29th of May 2000, in *Official Journal* (OJ) of EU C 197 of the 12th of July 2000.

included in the conclusions of the European Council of Tampere, to replace the extradition procedure in force with the simple transfer of those persons who escape justice after having been definitely sentenced lies at the basis of the legislative proposal.

The Framework Decision on the European Arrest Warrant embraces this request and makes some additions[21]. It introduces a simplified system of the handover of persons who have been sentenced or charged with a crime and are sought for the purpose of exercising a criminal action and the execution of a punishment, or a security measure restricting the persons' freedom. The Framework Decision establishes that the removal, expulsion or extradition of any person toward a Member State should not take place when there are serious risks that the person can be exposed to death penalty, to torture, or to any other inhumane or degrading treatment.

In the present doctoral thesis, all the topics cited in this report will deal in detail with the claims of the legal doctrine and praxis.

Furthermore, focus will be placed on the issue of harmonisation of criminal sanctions in the Green Paper[22]. The obligation to proceed toward harmonisation of criminal sanctions finds its direct origins in the EU Treaty. It is also provided for in article 31, paragraph 1 letter e) of the TEU, which establishes that the common action in the area of judicial cooperation in criminal matters include the gradual adoption of measures for fixing norms related to the sanctions.

It is through the harmonisation of criminal sanctions that the various legal

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[21] See also the "normative context" in *Il diritto dell'Unione* of the Judgment of the European Court of Justice (ECJ) of the 11th of February 2003 case unified C-187/01 e C-385/01, *Procedimento penale a carico di Huseyin Gozutoka e procedimento penale a carico di Klaus Brügge*, in Raccolta, 2003, pp. I-134 and of the Judgment of the European Court of Justice (ECJ) of the 16th of June 2005, case C-105/03, *Pupino*, in *Diritto penale e processo*, in Raccolta, 2005, p. 1178.

[22] Cfr. the Green Paper by the Commission of Harmonisation, Mutual Recognition and execution of penal sanctions in the European Union, COM (2004) 334, of the 30th of April 2004, available at: http://europa.eu/documentation/official-docs/green-papers/index_it.htm.

systems are respected. Instead, the goal is to overcome the differences that may represent serious impediments in creating a European judicial space. The identification of common sanctions referring to certain forms of crime would contribute to the creation of a common sense of justice in all citizens, and would further prevent the authors of such crimes from benefitting from the differences in penalties. In addition, the application of the principle of *ne bis in idem* would appear less problematic[23].

Judicial assistance can be defined as the collaboration provided by the State that uses the judicial procedure and by the State where the request was made. This judicial assistance makes it possible for the execution of rogatory committees, for the release of procedural acts, for the appearance of witnesses or consultants, and for the transmission of excerpts of criminal records[24].

The final part covers the empirical research conducted for this thesis devoted to the *Corpus Juris*. Following the initiative launched by the European Commission between 1995 and 1996, a team of experts in the areas of criminal law and procedures were summoned by M. Delmas-Marty to work on drafting the *Corpus Juris*. The purpose was to develop some fundamental principles regarding the matter of criminal protection of the European Union's financial interests within the frame of a European judicial space. The development of a Model Penal Code or of a Model Penal Procedure Code at the European level was not included

[23] It is worth reminding that this principle is a fundamental principle of International criminal law which establishes that a person cannot be processed twice for the same crime. For a detailed discussion on this issue, refer to C. AMALFITANO, *Bis in idem per il "ne bis in idem": nuovo quesito alla Corte di giustizia*, in Rivista Dir. Internazionale privato e processuale, 2004, n. 1, p. 97 and ff. and to D. FLORE, *Double incrimination et territorialité*, in G. DE KERCHOVE, A. WEYEMBERGH (reviewed by), *La reconnaissance mutuelle des décision judiciaires pénales dans l'Union européenne*, Editions de l'Université de Bruxelles, Brusselles, 2001, p. 75 and ff.

[24] Member States have always shown a certain "reluctance in providing mutual judicial assistance in criminal matters". However, the increasing mobility of people together with the gradual expansion of transnational criminality, has induced them to abandon this position and to reach international agreements aiming at institutionalizing such instrument.

in this task.

The study *Corpus Juris* was published in 1997, in English and French, and has been translated into most of the European languages. The proposals included in the work have attracted great attention within the Member States and at the European level at both professional congresses and among the media, as well as in political settings. The *Corpus Juris* has fulfilled, however, an important function: the launch of a public debate on the role of criminal law and criminal procedure in European integration. It has outlined those legal assets that are noteworthy of penal protection and the ways in which such protection can be organized so that efficacy and penal protection are ensured within the European space.

The essence of the *Corpus Juris* is based on a mixed system. The national and communitarian components are joined in light of penal trials within Member States and not at the Union level. Eight crimes, dealing with the European Union's financial interests, with their related punishments are considered for penal protection.

Regarding the issue of inquiry, a decision was made to establish a European Public Prosecutor (EPP), including a European General Prosecutor and European Prosecutors, in Member States. The EPP can exert their power of inquiry across the entire European territory. While the figure of the EPP is widely decentralized, it is endowed with the same power in all the states of the Union. The judicial control during the preliminary phase is exercised by an independent and impartial judge, the so-called "judge of freedom", designated by each Member State within its own legal authorities. The crimes included in the *Corpus Juris* are adjudicated by national jurisdictions.

The *Corpus Juris* is restricted to the provision of some norms connected to the principles of judicial guarantee and to the principle of adversarial

proceedings. The mixed system characterizing the *Corpus Juris* includes proposals that have the purpose of improving the efficacy of the legal protection of the national systems of criminal law and criminal procedure within the European legal space in regards to European finances.

On this matter, common denominators have been sought between the different legal traditions in force in the Member States where possible. However, the proposals have important consequences in the area of international criminal law. Instead of a classical model of cooperation between States (legal cooperation, extradition etc.), a penal intervention based on European territoriality has been chosen. (See for example, the European Arrest Warrant, measures of inquiry within the European space, and transfer of detained persons, etc)[25].

Last but not least, this research done during the writing of the thesis will provide an in-depth analysis of judgments that are relevant in terms of the judicial decisions of the courts of the Member States as well as those decisions made under the jurisdiction of the European Union.

[25] In this regard, for an initial approach to the issue, refer to M. DELMAS MARTY, *Nécessité, légitimité et faisibilité du Corpus Iuris*, in Agon, 2000, n. 25, p. 5 and ff.; to G. GRASSO, *Il Corpus Iuris: profili generali e prospettive di recepimento nel sistema delle fonti e delle competenze comunitarie*, in Scritti in onore di A. Pavone La Rosa, vol. II, Giuffrè, Milano, 1999, p. 1811 and ff.; and to A. PERDUCA, *Corpus iuris e tendenze della politica penale dell'Unione europea*, in Rivista italiana dir. pubblico comunitario, 1999, p. 493.

FIRST PART

JUDICIAL COOPERATION IN CRIMINAL MATTERS BETWEEN EUROPEAN COUNTRIES

Section One - The creation of a European judicial space

Chapter I. Judicial cooperation in criminal matters: justificatory reasons

The need for a judicial co-operation in criminal matters within the European Union sprung from the achievement of the first goals in the community building process and is still strongly felt because of the spreading of transnational crime.

The realization of a single market[26], that is, a boundless space where four essential freedoms are ensured (free movement of goods, persons, services and

[26] The single market objective was identified during the proceedings of the intergovernmental conference, carried out in Luxemburg, from the 9th of September 1985 to the 28th of February 1986, ending with the adoption of the Single European Act, which entered into force on the 1st of July 1987 following the ratification of the Member States (in Italy through the n. 909 law of the 23rd of December 1986). Despite the inevitable difficulty deriving from the necessity to proceed towards a thorough harmonization of the diverse national legislations in order to get rid of all barriers (physical, technical and fiscal) which prevented the integration process, the objective was eventually achieved and since the 1st of January 1993 all bureaucratic and tariff obstacles that prevented the movement of goods and services have fallen.

capital), has indeed caused an exponential increase in crime and in its quantitative and spatial extension.

On the one hand, the globalization of socio-economic relations, the liberalization of the rules concerning the movement of persons and goods and the development of human relationships due to the use of ICT tools have allowed a fast growing social progress, on the other hand they have facilitated the spreading of crime beyond national boundaries, thus involving both individual and collective interests in different countries[27].

In such a context, a crucial role is played by the difference between the criminal laws of member States, which, in combining with the *de quibus* freedom of circulation, has given way to a sort of criminal *forum shopping*, allowing criminals to select the most convenient jurisdiction in order to shun justice as well as to protect their illicit gains and possible incriminating evidence[28].

In this new and complex social and criminological reality, the principles of the territoriality of law and jurisdiction have become obsolete, as well as the instruments traditionally used within international judicial cooperation (characterized by the request principle, according to which a sovereign State makes a request to another sovereign State, which in turn decides whether to meet it or not) are inadequate, due to both their slowness and their complexity in respect to the *criminal* development of the European Union.

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[27] Cfr. AVV. GEN. COLOMER in Conclusions presented on the 19th of September 2002, cases C-187/01 and C-385/01, *Case against Huseyin Gozutoka* and *case against Klaus Brügge,* in *Collection* 2003, pp. I-1345 (points n. 44-45): *"The gradual suppression of inspections at common borders is a necessary step (towards the creation of a space of freedom, security and justice). However the suppression of bureaucratic obstacles eliminates these barriers for everyone without distinction, including those who take advantage of the reduction in the vigilance threshold to expand their illicit activities. This is the reason why suppression of inspections should be compensated by an increased cooperation among States, particularly as far as police and security matters are concerned".*

[28] A. PASQUERO, *Mutuo riconoscimento delle decisioni penali: prove di federalismo*, Giuffrè, Milano, 2007.

Transnational cooperation was therefore forced to resort (at least in its intentions) to innovative instruments, such as:

1. simplification and increased celerity of the relations between judicial authorities;
2. mutual recognition of the efficacy of measures adopted by each authority;
3. integration of criminal judicial systems of Member States, in regard to both the substantial and the procedural aspects.

The organization and subsequent adoption of such new cooperative instruments have met a series of uncertainties and perplexities, mostly due to:

- the traditional approach of criminal policy, where the sanctioning intervention was, and still is, perceived as one of the most typical expressions of sovereignty of the State. An idea of criminal justice which carries with it a jealous defense, on each State's part, of the jurisdiction in criminal matters within one's own territory, which has consequently long conditioned and compromised cooperation between different judicial authorities, confining it to the cramped space of diplomatic relations;
- the abovementioned diversity of the norms contained in national judicial systems, as well as the striking cultural and linguistic diversity of the subjects called upon to cooperate[29].

The path the European Union was "*forced*" to undertake in the field of judicial cooperation in criminal matters requires an overall analyzation of the

[29] E. APRILE, *Diritto Processuale Penale Europeo ed Internazionale*, Cedam, Padova, 2007.

steps that have led to concrete responses that have been implemented through the years to cope with the spreading of transnational crime.

Chapter II. Judicial cooperation in criminal matters: evolution

II. a) The intergovernmental cooperation in the '70s and '80s

Although judicial co-operation in criminal matters was not mentioned in the original text of the Constitutive treaties[30], the European Community has shown interest towards the question since the second half of the 1970s when the expression "*Espace judiciaire européen*"[31] was first coined by the then French President Giscard d'Estaing.

It was not so much a European consciousness, thriving for a European citizenship as well as a European market[32], that was decisive in developing a judicial cooperation in criminal matters, but rather the contingent need to deal in an organic manner at the European level with both the phenomenon of international terrorism and the abolishment of frontiers achieved through the Schengen Agreement.

In the 1970's and 1980's, the criminal judicial cooperation was therefore developed along with the community activity, following two main courses of action:

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30 Before 1992, the year the European Union was instituted, such question was not part of the Community competences and the relationships between judicial authorities of Member States were regulated by principles and norms similar to those regulating relations between Italy and any other foreign country.

31 Cfr. French President Giscard d'Estaing's speech during the European Council in Brussels, December 1977: *"Les traités de Paris et de Rome ont jeté les bases d'un espace économique: le Marché commun, et aussi d'un espace commercial. Nos peuples se rendent compte qu'il faut que la construction européenne ne se limite pas à cela"* (in *Doc. Fse*, P.E.F, 4° tr., 1977, p. 65).

32 In particular, with the Single European Act the idea was taking shape of a European Union not only concerned with market interests, but also with the contribution to a wider judicial cooperation between Member States in all areas dealing with personal status, and ensuring that the promotion of a democratic development would keep into account the protection of basic rights ratified by both the constitutional documents of Member States and by the European Convention for the protection of human rights and freedom. Cfr. N. PARISI, *Competenze dell'Unione e i principi regolatori,* in *Elementi di diritto dell'Unione Europea*, U. DRAETTA - N. PARISI (eds.), Giuffrè, Milano, 2008.

- first, with the adoption of embryonic forms of technical cooperation, aimed at facilitating the cooperation within the investigating bodies to combat international terrorism, drug trafficking and organized crime[33];
- second, with the establishment of agreements in criminal judicial matters which are "alternative" to the already existing conventions prescribed by the European Council[34]. The *goal* was to facilitate the application of the European Council's criminal instruments in judicial cooperation, to improve their rules and regulations, to eliminate any reservations against them, and to exploit the greater affinity of mutual values and political objectives of the EEC States.

However, the low number of ratifications of the abovementioned conventions by the EU Member States, along with the chaotic proliferation of working groups, prevented the achievement of a merely intergovernmental

[33] In such a context, networks were set up, informal meetings of Member States' Ministers, aimed at discussing common action plans in the fight against the most worrying criminal phenomena. Of particular importance was the TREVI Group, which had its origin in the mid-seventies, when, during the European Council meetings, a series of private consultations took place among the Ministers of the Interior of the nine member States, with the objective of analyzing the problems related to public order and national security. In particular, the proposal of establishing a "confrontation and co-ordination network" sprang from the British Prime Minister within the European Council Summit held in Rome in December 1975. The birth of the TREVI network responded to the need of establishing a form of police cooperation between member States in order to prevent and combat terrorism more efficiently than the Interpol had done until then. The TREVI group was therefore envisaged as a *forum,* with an intergovernmental character, where ministers of Justice and of Interior of each member States participated. Indeed, despite being established by the European Council, it mostly remained an informal autonomous initiative of Member States. Since 1993 the group's objectives have been addressed by the Maastricht Treaty provisions regarding cooperation in internal and judicial affairs (CGAI).

[34] The establishment of such agreements was aimed to facilitate the application of the European Council's criminal judicial cooperation instruments and to improve their rules and regulations. See Agreement between the Member States of the European Community concerning the simplification and modernization of the methods of transmission of extradition requests (25th of May 1987); the Agreement concerning the application among Member States of the transfer of proceedings in criminal matters (6th of November 1990); the Convention between the member States of the European Community on the enforcement of foreign criminal sentences. On this issue, cfr. A. PASQUERO, *Mutuo riconoscimento delle decisioni penali: prove di federalismo*, Giuffré, Milano, 2007.

integration, thus paving the way for the institutionalization of judicial cooperation in criminal matters.

II. b) The Maastricht Treaty

The Maastricht Treaty marks the end of the intergovernmental experience between Member States (at least at a formal level)[35]. The Maastricht Treaty represents a significant step within the European integration process, its innovative strength lay in the configuration of the European Union based on a three-sided structure[36].

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[35] It is worth mentioning that the awareness of the necessity to adopt compensative measures against the emerging criminal phenomenon sprung with the realization of a single European market and the abolishment of national frontiers. This necessity had already emerged during the Schengen Agreement (signed on the 14th of June 1985) and the subsequent Convention for the application of the Schengen Agreement (subscribed on the 19th of June 1990 and ratified in Italy through the n. 388 law of the 30th of September 1993), in which the abolishment of all forms of control of people in the act of crossing internal frontiers of Member States along with the adoption of a series of common police and judicial measures with the aim of compensating for the security gap that had arisen. For these reasons, the Convention devoted numerous articles to the issue of judicial cooperation in criminal matters, such as mutual judicial assistance (artt. 48-53), application of the *ne bis in idem* principle (artt. 54-58), transmission of the enforcement of criminal sanctions (artt. 67-69). The Convention and the subsequent articles strived to reconcile two apparently contradictory principles: the complete freedom of movement within a well-determined geographical space and the maintenance of a new security level.

[36] This pillar structure is the result of a compromise laboriously achieved between the conflicting wills of Member States at the moment of subscribing the Maastricht Treaty. At that time, some States, fearing that a clear-cut separation could cause the disintegration of the Community building process, tended toward the integration of the three pillars within a single legal text. Included both the new policies and those catered to by the original treaties. On the other hand, others sustained the need to protect the decisional power of Member States in Home, Justice, and Foreign Affairs. The result was this original structure assigning different roles to different institutions according to the pillar in which they operate. In short, the main difference between the three pillars is the fact that within the first pillar the so-called communitarian method is applied, marginalising the role of national governments in favour of Communitarian institutions. The governments of Member States can, in fact, intervene merely to the extent and according to the procedures indicated by the treaties, balancing their role with that of the other institutions. This means, for instance, that no act can be adopted within the first pillar of the Council of the Union, the most representative of the Member States' interests, without prior legislative initiative of the Commission of the European Communities. As is well known, the constitutive treaties grant the legislative initiative only to the Commission which exerts a sort of *a priori* control over the Communitarian legislative activity. The cooperation between the remaining pillars has an

According to the allegoric description which envisions the European Communities Union system as a Greek temple, the first pillar stands for the Communitarian sector (the one including the European Communities and the now ceased European Coal and Steel Community (ECSC) and Euratom. The second stands for the common foreign and security policy (CFSP), and the third for cooperation in the field of justice and home affairs (JHA).

The choice to not include within the reformed EC Treaty the area of police and judicial cooperation in criminal matters resulted in the subsequent creation of a third pillar. The third pillar was created due to the need to maintain at an intergovernmental level issues which had always interfered with the national sovereignty.

Through the Maastricht Treaty, therefore, judicial cooperation is not only communitarized but also institutionalized: confined within the general international law field and managed not directly by member States, but by the Communitarian institutions.

In this way, a virtually complete system sprung. This system had a well-defined application field, the so-called "K-system" artt. from K to K9, (the nine "issues of common interest" included in art. K1[37]) regulating the role of Member States and of communitarian institutions and which promoting a series of new types of juridical acts aimed to achieve cooperation (joint actions, joint views and conventions lacking any binding effect on Member States).

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intergovernmental character and attributes all decisional power to the Member States. For a general analysis of the Maastricht Treaty see: R. ADAM, *La cooperazione nel campo della giustizia e affari interni: da Schengen a Maastricht*, in *Dir. Un. Eur.*, 1994, p. 225 ss.; N. PARISI e D. RINOLDI (eds.), *Giustizia e affari interni nell'Unione europea: il terzo pilastro del trattato di Maastricht*, Torino, Giappichelli, 1996; A. TIZZANO, *Brevi note sul "terzo pilastro" del trattato di Maastricht*, in *Dir. Un. Eur.*, 1996, p. 391 ss.

[37] Dealing with the following issues: asylum policy, rules governing the crossing by persons of the external borders of the Member States and the exercise of controls therein, immigration policy, combating unauthorized immigration, residence and work by nationals of third countries, combating drug addiction, combating fraud on an international scale, judicial co-operation in civil matters, judicial co-operation in criminal matters, customs co-operation, police co-operation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

From a pragmatic viewpoint, it seems quite clear that, from 1993, the year of the ratification of the Maastricht Treaty, to 1997 the cooperation within the third pillar had not realized any significant objectives nor had it achieved any relevant results. Only since 1998 some significant joint actions [38] were deliberated, worthy of note are those concerning the fight against organized crime[39], those concerning corruption in the private sector[40], those concerning money laundering and those concerning the confiscation of illicit gains[41], as well as the institution of the *European Judicial Network*[42].

Apart from a few significant results, the Maastricht Treaty still remains an unaccomplished experiment. Despite the praiseworthy effort to institutionalize judicial cooperation in criminal matters between Member States, the lack of parliamentary controls and jurisdictional controls by the Court of Justice and the uncertain efficacy of the adopted regulatory tools, not only make the third pillar

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[38] By this expression it is meant the convergence of positions by the various Member States which defines a common strategy and not a series of diverse strategies.

[39] In G.U.C.E (*Official Journal*), L 351 of the 29th of December 1998.

[40] In G.U.C.E., L 358 of the 31st of December 1998.

[41] In G.U.C.E., L 333 of the 9th of December 1998.

[42] In G.U.C.E., L 191 of the 7th of July 1998. Officially inaugurated on the 25th of September 1998, the Network is constituted by the central authorities responsible for the international cooperation and by the judicial authorities responsible for the specific areas of cooperation. It basically consists of a judicial network of points of contact which resorts to the following branches: the central authorities responsible for judicial cooperation at the national level the liaison magistrates as in Joint Action 96/277/JHA of the 22nd of April 1996, the capacity of *Eurojust* correspondents, and a contact person nominated by the Commission. They provide judicial and practical information to the local judicial authorities of single States as well as to the contact persons and the judicial authorities of the other States. The content of information exchanged through the Network includes: the complete details of the contact persons of each Member States, including their competences at the internal level: the simplified list of judicial authorities and the register of local authorities of each Member State; concise juridical and practical information on the judicial and procedural systems of Member States; the texts of the pertaining juridical instruments and, as concerns the conventions in force, the text of declarations and provisions. Cfr. E. APRILE, *Diritto processuale penale europeo e internazionale*, Cedam, Padova 2007. In recent times, the European Judicial Network has been the object of amendment with the Council Decision 2008/976/JHA of the 16th of December 2008 (published in *Official Journal* of the 24th of December 2008, L 348/130). For further reading, cfr. E. APRILE e F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, 2009.

essentially an intergovernmental environment, but also undermine the incisiveness, the democratic nature and the transparency of the Union's actions.

Apart from the results achieved by the abovementioned common actions, when confronted with a lack of real objectives and actual development within national systems, it is clear that such forms of judicial cooperation are not sufficient. In order to assign to the European Union a more significant role in regard to common justice and security issues, it is necessary to work out harmonization procedures (at a European level) of national legislations in criminal matters.

II. c) The Amsterdam Treaty

The turning point in judicial cooperation in criminal matters between Member States takes place in 1997 with the Amsterdam Treaty[43].

Through the Amsterdam Treaty:

- a part of the areas pertaining to the third pillar among which immigration, Visas, asylum, custom cooperation, judicial cooperation in civil matters, and all issues concerning the free movement of persons in general is transferred within the first pillar, communitarizing them and, thus, guaranteeing the effectiveness of the instruments and forms of cooperation

[43] It is necessary to point out that the subsequent Treaty of Nice has only brought about a few amendments to the third pillar, without affecting the main structure as established by the Amsterdam Treaty. The few amendments concerned the inclusion of some references to Eurojust within the artt. 29 and 31 of the TEU and the amendment of art. 40 regarding the reinforcement of cooperation to make its application easier. For further reading on the Amsterdam Treaty see: R. ADAM, *La cooperazione in materia di giustizia ed affari interni tra comunitarizzazione e metodo intergovernativo*, in *Il Trattato di Amsterdam*, Giuffré, Milano, 1998; U. DRAETTA - N. PARISI, *Elementi di diritto dell'Unione europea (parte speciale)*, Giuffré, Milano, 2008; F. POCAR, *Commentario ai Trattati della Comunità e dell'Unione europea*, Cedam, Padova, 2001.

operating in the first pillar at a European level, while the second and third pillars operate in an intergovernmental manner[44];

- a heightened efficacy is promoted also within the third pillar, setting as the Union's objective the realization of an effective space of freedom, security and justice between Member States and devoting an entire title to the dispositions concerning police and judicial cooperation in criminal matters.

Given the revolutionary scope attributed to judicial cooperation in criminal matters by the Amsterdam Treaty, it is important to focus our attention on the most important and innovative aspects, such as the objectives set, the role of institutions and the adopted normative acts.

II. c) (1) The third pillar's new objectives

The Amsterdam Treaty is therefore responsible for a structural reform, which constitutes an attempt to compensate the lack of a "guiding light"[45] in Justice and Home Affairs cooperation, entrusting the third pillar with a specific objective: "to provide citizens with a high security level within a space of freedom, security and justice, promoting a joint action between Member States in the fields of police and judicial criminal matters"[46] (art. 29 first para. TEU).

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44 The rubric of the new Title VI of the TEU (artt. 29 - 42) reads "*provisions on police and judicial cooperation in criminal matters*". Title VI therefore assumes an "essentially repressive" character, aiming to contribute to the area of freedom, security and justice by means of essentially judicial instruments; see L. SALAZAR, *La costruzione di uno spazio di libertà, sicurezza e giustizia dopo il Consiglio europeo di Tampere*, in *Cass. Pen.* 2000, p. 685.

45 The term is taken from A. PASQUERO, *Mutuo riconoscimento delle decisioni penali: prove di federalismo*, Giuffré, Milano, 2007, p. 14.

46 According to the Vienna Action Plan on the most appropriate way to apply the Amsterdam Treaty provisions concerning a space of freedom, security and justice, co-adopted by the Council and the Commission on the 3rd of December 1998 (in *Official Journal* C 1999 of the 19th of January

Besides this more general objective, other more specific objectives are identified:

- developing a joint action between Member States in the area of police and judicial cooperation in criminal matters;
- preventing and combating racism and xenophobia (art. 29 first para. TEU);
- preventing and combating "*organised or otherwise crime, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud"* (art. 29 second para. TEU).

It is clear that the formulation of the new art. 29 TEU is scarcely homogeneous, since it places general objectives (such as the creation of a space of freedom, security and justice) next to more specific objectives (such as the prevention of xenophobia, the fight against terrorism, the trafficking of persons, drug or arms). Furthermore, it is not clear why the opening norm, by the programmatic aim, such as art. 29, is so specific, whereas other subsequent articles are concerned with accurately defining police (art. 30 TEU[47]) and judicial

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1999): "*… these three notions are closely interlinked. Freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all Union citizens and residents can have confidence. These three inseparable concepts have one common denominator, people, and one cannot be achieved in full without the other two*".

[47] *Art. 30 TEU - 1: The joint action in the area of police cooperation includes: a) the operational cooperation involving all the Member States' competent authorities, including police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences; b) the collection, storage, processing, analysis and exchange, through Europol, of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data; c) the cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research; d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime. Art. 30 TEU - 2: The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam: a) enable Europol to facilitate and support the preparation, and to encourage the*

cooperation in criminal matters (art. 31 TEU[48]). The five points regulating the action of the Union in judicial matters in Art. 31 of TEU contributes to the heightened confusion regarding the third pillar's objectives. These five points are:

> a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions;
> b) facilitating extradition between Member States;
> c) ensuring compatibility in rules applicable in the Member States to improve cooperation;
> d) preventing conflicts of jurisdiction between Member States;
> e) progressively adopting measures establishing common minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

It is quite obvious a listing of very diverse areas and thus far from being exhaustive. For example, the first two points are concerned with some typical areas of judicial cooperation (recognition of judicial decisions and extradition), while the other three points are more innovative.

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coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity; b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime; c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol; d) establish a research, documentation and statistical network on cross-border crime.

[48] Art. 31 TEU - *Common action on judicial cooperation in criminal matters includes: a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions; b) facilitating extradition between Member States; c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation; d) preventing conflicts of jurisdiction between Member States; e) 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.*

Of particular interest is the approximation of the laws and regulations mentioned in e), which represents a pivotal issue that is pointedly referred to in the Framework Decision. At the same time, the prevention of jurisdictional conflicts, as in d) is an issue that involves one of the most delicate aspects of judicial cooperation - the coordination of the judicial authorities of the different Member States.

Point c) of art. 31 of TEU is difficult to interpret, if the norm seems to urge an approximation of laws and regulations between Member States to facilitate cooperation[49] it is not clear why it is included within an article dealing with the instruments used in judicial cooperation in criminal matters.

In short, articles 29 and 31 of the EU Treaty represent a failed attempt to prescribe clear aims of cooperation within the third pillar and instead created a rather chaotic system of guidelines. Because of the lack an organic unity and an analytic nature an intervention by the institutions is necessary to specify more clearly the third pillar's objectives[50].

II. c) (2) The role of institutions

In the attempt to approximate the third pillar's mechanisms to the communitarian law so as to reduce its intergovernmental character, the Amsterdam Treaty deeply amends the roles and powers of institutions by means of Title VI.

[49] F. POCAR (ed.), *Commentario breve ai Trattati della comunità europea e dell'Unione europea*, Milano, 2001.

[50] On the issue, cfr. A. PASQUERO, *Mutuo riconoscimento delle decisioni penali: prove di federalismo*, Giuffré, Milano, 2007.

One of the main competences of the Commission, namely the legislative initiative, is strengthened in all areas of the new third pillar (art. 34 para. 2 TEU[51]).

It is a competence shared with other Member States (and not exclusive, as in the first pillar), which has been widely used in recent years[52]. Furthermore, the Commission constantly interacts with the Council by formulating communications and monitoring the results achieved in the area of freedom, security and justice.

One last power, which the Commission has at its disposal, is that of activating the legality of the jurisdiction regulated by art. 35 para. 6 TEU[53].

Even the European Parliament, whose substantial absence from the *"K-system"* institutional framework highlighted a strong democratic *deficit* of the old third pillar, witnesses a growth in its powers.

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[51] *The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: a) adopt common positions defining the approach of the Union to a particular matter; b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; and d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council.*

[52] As for the most important see the Commission's White Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor - COM (2001) 715 of the 11th of December 2001; the Commission's Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union - COM (2004) 334 of the 30th of April 2004. On the initiative of the Commission many framework decisions have been adopted, among which the one concerning the European Arrest Warrant - COM (2001) 522 of the 19th of September 2001 - and the one concerning the European Evidence Warrant - COM (2003) 688 of the 14th of November 2003.

[53] *The Court of Justice shall have jurisdiction to review the legality of framework decisions brought by a Member State or the Commission on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of power. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.*

The Amsterdam Treaty maintains that the Council must not only inform the European Parliament but that it also must mandatorily consult it before issuing any normative act which differs from common practice. The European Parliament can be called to deliver its (non binding) opinion within a time limit that the Council may determine but shall not be less than three months (art. 39 para. 1 TEU[54]).

We are dealing with insignificant powers that do not allow the Parliament to assert its opinion on the content of the acts issued by the Council. The provisions indicating that "*the Presidency and the Commission shall regularly inform the European Parliament of discussions*" in the area of the third pillar (art. 39 para. 2 TEU[55]) or indicating that the Parliament "*may ask questions of the Council or make recommendations to it*" (art. 39 para. 3 TEU[56]) are of no use in increasing the scarce weight of the citizen representative institution.

The control of the democratic nature of the Council's work is thus referred to the plans of each Member states at a national level and to the national Parliaments. The national Parliaments must apply it to the framework decisions (or to the ratifications of conventions) established by the Council.

The Council is, therefore, the institution that plays the most important role. Not only is it the site in which the States "*shall inform and consult each other (…) with a view to coordinate their action*" but it is also the body that regulates

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[54] *The Council shall consult the European Parliament before adopting any measure as in article 34, paragraph 2, letters b), c), and d). The European Parliament shall express its opinion within a time limit which the Council may lay down; such a time limit cannot be less than three months. In the absence of an opinion within that time limit, the Council may act.*

[55] *The Presidency and the Commission shall regularly inform the European Parliament of discussions in the areas covered by this title.*

[56] *The European Parliament may ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in the areas referred to in this title.*

the legislative power (art. 34 para. 1 TEU[57]). Such power is exerted according to intergovernmental logic. Although Governments' political will is largely safeguarded by the unanimous consent (art. 34 para. 2 TEU[58]), it does not apply to the adoption of applicative measures of decisions or conventions.

The voting procedure within the Council clearly shows that, apart from the marginal role played by the European Parliament and the Commission, the political will of Member States prevails in the third pillar. This is an obvious sign of its distance from the communitarian method.

The Maastricht Treaty gives the power to interpret the conventions agreed upon between Member States, according to art. K 3 of the third pillar but only if the Member States had explicitly included their power in the conventions.

If the Amsterdam Treaty fails in filling the democratic *deficit* that the Maastricht Treaty had pointed out, it does instead fill in the jurisdictional gap through a thorough reform of the Court of Justice.

The Amsterdam Treaty delegates to the Court of Justice a series of broader competences, similar to those exerted within the communitarian pillar:

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[57] *In the areas referred to in this title, the Member States shall inform and consult each other within the Council, with a view to coordinate their action. To that end, they shall establish collaboration between the relevant departments of their administrations.*

[58] *The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: a) adopt common positions defining the approach of the Union to a particular matter; b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods; They shall not entail direct effect; c) adopt decisions for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States. These decisions shall be binding and shall not entail direct effect; the Council, acting by a qualified majority, shall adopt measures necessary to implement those decisions at the level of the Union; and d) establish conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States shall begin the procedures applicable within a time limit to be set by the Council. Unless they provide otherwise, conventions shall, once adopted by at least half of the Member States, enter into force for those Member States. Measures implementing conventions shall be adopted within the Council by a majority of two thirds of the Contracting Parties.*

1. preliminary ruling on the interpretation and validity of decisions and framework decisions and on the interpretation of conventions agreed according to art. 34 (art. 35 para. 1 TEU[59]). It is worth noting that the competence of the Court to give preliminary ruling is contingent on art. 35 para. 1 TEU, which indicates that each Member State can decide whether to accept or not the Court jurisdiction, choosing between granting the power to refer questions for a preliminary ruling either to any of its national jurisdictions or only to those which give a final decision. Basically it is not a binding deferment, but one contingent on the national courts. Art. 35 TEU indicates that national courts of final appeal can, but are not obliged to, refer to the Court. Declaration n. 10 adopted by the intergovernmental Conference of 1997 indicates that each State, in accepting the Court jurisdiction according to art. 35 para. 1, can declare that, when the interpretation or validity of an act adopted as in art. 34 is discussed before a judge of final appeal, the latter is obliged to refer to the Court[60];

2. jurisdiction to review the legality of decisions and framework decisions (art. 35 para. 6 TEU[61]). In this case, the Court's task is to ensure that the act is not vitiated due to it being issued by an incompetent body, or because it infringes on essential procedural requirements, or on the requirements of

[59] *The Court of Justice of the European Union, in the areas covered by this article, can give preliminary rulings on the validity of decisions and framework decisions and on the interpretation of conventions established under this title and on the validity and interpretation of the measures implementing them.*

[60] Only nine States out of twenty-seven (among them Italy) have agreed to refer their national courts of final appeal to the Court.

[61] *The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.*

the treaty or any other rule of law relating to its application, or because of a misuse of power. These uses of power differ from those established. Whenever the Court finds one of these flaws, it has the power to invalidate it from the moment of its promulgation. The only subjects entitled to promote this kind of recourse are the Commission and the Member States;

3. jurisdiction to rule on any dispute between two or more Member States or between Member States and the Commission regarding the interpretation or the application of normative acts by the third pillar (art. 35 para. 7 TEU[62]). However, a first attempt to settle the dispute within the Council must be made. If within six months of it being referred to the Council the dispute cannot be settled, it must be referred to the Court.

II. c) (3) Typical normative acts

Another significant reform promoted by the Amsterdam Treaty concerns the new typology of normative acts that the Council can adopt within the third pillar. The common actions are cancelled, just when the Council was starting to significantly apply them, to give way to two new instruments: the framework decision - whose main task was that of approximating the laws and regulations and the decision - which is a residual instrument aimed to pursue "*any other aim in compliance with the objectives*" (art. 34 lett. b) TEU) of Title VI, with the exception of the alignment of laws and regulations.

[62] *The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of normative acts according to article 34, para. 2 whenever such disputes cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34 para. 2, lett. d).*

The importance of these instruments rests in the jurisdictions for all Member States, although they do not entail direct effect (art. 34 lett. b) and c) TEU).

Besides the decisions and the framework decisions, there are two types of acts inherited from the past. One refers to the conventions and the common positions, contained in the Maastricht Treaty, which the Amsterdam Treaty amends to some degree. The addition to the ability of the Council to establish a (non sanctioned) time limit for the Member States to set up the adoption procedures "*according to the respective constitutional norms*", confirms that the Amsterdam Treaty is embracing some semblance of the Maastrict Treaty. Morenover, "early" entering into force of the conventions and the legacy of the classical intergovernmental cooperation show the historical implications of the Maastrict Treaty on the Amsterdam Treaty. Only the political character of the common positions is clarified (art. 34 lett. a) TEU).

Focusing our attention on the framework decisions (keeping into account their fundamental role within criminal judicial cooperation), it is quite clear that such normative acts cover a very important role: both because they represent binding acts, and because they play the important role of aligning the laws and regulations of Member States.

(…) the Framework Decision and its binding character

In regards to the first aspect - namely their binding character (an unusual feature within the third pillar) - it is useful to point out that the framework decisions bind the Member States to the same result, yet leave to the national authorities the right to chose the form and methods to be applied on an internal level, and do not entail direct effect, as established in art. 34 TEU.

In particular, the term "*direct effect*" was coined by the Court of Justice, when in regard to the question of directives, it stated that once the term for their implementation elapsed, these directices could, in certain conditions, produce certain effects within the system of the infringing Member State[63]. Such effects include the possibility for the individual subjects to claim their own rights against the State, granted to them by the directive (so-called vertical direct effects)[64].

The direct effect of the directives was conceived by the communitarian Judge as a way to cope with the frequent phenomenon of the not implementing the directives from Member States. Thus it is clear why art. 34 TEU explicitly excludes these effects. Such a solution is in perfect agreement with the exclusion of the infringement claims, in the case of non-implementation of a framework decision and with the respective *rationale* of national sovereignty that characterizes the third pillar.

It is now clear that the Amsterdam Treaty, in devising a new a non-invasive instrument such as the framework decision, has envisioned a directive deprived of the Court of Justice law and modeled on the original directive as conceived by the compilers of the Treaty of Rome. This choice represents a clear

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63 Such conditions - clarity, precision and unconditioned nature of the norm - were elaborated by the Court of Justice with reference to the communitarian norms, drawing on the Judgment of the Court of Justice of the 5th of February 1963, case 26/62, *Van Gend en Loos*, in *European Court reports* 1963, I-0003. On the conditions required for the production of direct effects by the no implementation of directives cfr. *ex plurimis* judgment of the Court of Justice of the 4th of December 1974, case C- 41/74, *Van Duyn v Home Office*, in *European Court reports* 1974, p. I-1354; judgment of the Court of Justice of the 17th of December 1970, *Spa Sace vs Ministero delle finanze*, case C-33/70, in *European Court reports* 1970, p. I-1213; judgment of the Court of Justice of the 22nd of June 1989, *Fratelli Costanzo*, case n. C- 103/88, in *European Court reports* 1989, p. I-1839.

64 In some sentences, the Court established the possible compensation for the prejudice suffered by the individual subject because of the no implementation of a directive by the State (cfr. Judgment of the Court of Justice of the 19th of November 1991, *Francovich e Bonifaci vs Italia*, collective cases C-6/90 e C-9/90, in *European Court reports* 1991, p. I-5357), whereas it has always been inflexible in excluding direct effects between private subjects so-called horizontal direct effects (cfr. Judgment of the Court of Justice of the 14th of July 1994, case c-91/92, *Faccini Dori*, in *European Court reports* 1994, p. I-3325).

expression of the "*institutional impatience of the States towards a spreading mechanism of integration via the law, which is out of the States' control*"[65].

However, given the similarity between the framework and the directive, some principles (differing from those relating to direct effects) elaborated by the Court of Justice's jurisprudence regarding directives should be applied to the framework.

In particular, the renowned principle of the so-called conformed interpretation falls under this theory. It refers to the obligation of national jurisdictions to interpret both the internal implementation normative and the preceding or subsequent national law consistently with the directive[66], in order to reach the objective of the directive itself, guaranteeing a minimal direct effect.

The Court of Justice has recently affirmed the application of the conforming interpretation of the framework decisions. The Court of Justice[67] was called to explain, following art. 35 para. 1 TEU, their interpretation of the framework decision on the standing of victims in criminal proceedings[68].

The underlying issue concerned the fact that the Italian criminal code does not take into account the testimony of minors as witnesses through pre-trial investigation; this testimony is allowed under rules of the framework decision. The Court of Florence, judge *a quo*, allowed the potential admission of such

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65 See M. CHITI, *Verso lo spazio giudiziario europeo*, in *Riv. Italiana Dir. Pub. Com.*, 1997, p. 787 ss.

66 *Judgment of the Court of Justice* of the 16th of December 1993, case C-334/92, *Wagner Miret vs Fondo de garantia salarial*, in *European Court reports* 1994, p. 6911; Judgment of the Court of Justice of the 13th of November 1990, case C-106/89, *Marleasing vs Commercial Internacional de Alimentacion*, in *European Court reports* 1990, p. I-4135.

67 Judgment of the Court of Justice of 16th June 2005, case C-105/03, *Pupino,* in *Diritto penale e processo* 2005, 1178. As to this issue cfr. A. GAITO, *Procedura penale e garanzie europee*, Utet, Torino, 2006; E. APRILE, *Diritto processuale penale europeo ed internazionale*, Cedam, Padova, 2007.

68 Framework Decision on the standing of victims in criminal proceedings, of the 15th of March 2001, in *Official Journal* L 82 of 22nd March 2001.

evidence into the Italian judicial system, under the principle of conforming interpretation. The Court, on the basis of the similarity between framework decisions and directives, established that the principle of conforming interpretation should also be applied to the framework decisions, as this is widely recognized within directive matters. The Court in fact underlined "*the binding nature of framework decisions, formulated in compliance with art. 249, para. 3 EC entailing, for the national authorities, and in particular for the national judges, the obligation to a conforming interpretation of national law"* within the term of a contra legem interpretation. Indeed, the Court pointed out, *"it would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfillment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters"*.

As shown by the Court's decision, the similarity between the framework decision and the directive can represent an important interpretative tool. However, it should be applied keeping into account the political-juridical context of which directives and framework decisions are an expression. Specifically, the former are expressions of the communitarian law, whereas the latter are in some ways still ruled by international law.

In light of such observations, the Court has concluded that the principle of conforming interpretation should also be applied to the framework decisions adopted within Title VI of the Treaty of EU. In order to comply with art. 34 n. 2 lett. b) TEU, a national court must interpret national law in light of the wording and purpose of the framework decisions.

It should be noted that the obligation for the national court to refer to a framework decision when interpreting the relevant rules of its national law is

limited by general principles of law, particularly those of legal certainty and retroactivity.

The principles of legal certainty and retroactivity prevent the criminal liability of persons who prevent contravene the provisions of a framework decision from being applied or aggravated on the basis of such a decision alone, independently of an implementing law.

The principle introduced by the Court of Justice through the aforementioned *Pupino* sentence has been corroborated by the activity of national courts, which refer to the decision when settling delicate interpretative questions[69].

The rationale underlying the principle of conforming interpretation as formulated by the Court of Luxembourg is at the heart of important rulings by the Supreme Court of Cassation in regards to the European Arrest Warrant issue (EAW)[70].

One of the most debated questions (which has found an interpretative solution based on the conformity principle) concerns the evaluation of serious circumstantial evidence of guilt. After some interpretative uncertainties, the Court of Cassation has established a principle regulating the arrest warrant. The

[69] On the possibility of an interpretation of national judicial provisions in conformity with the regulations indicated by the Union acts issued within the third pillar, cfr. notes by V. MANES, *L'incidenza delle decisioni-quadro sull'interpretazione in materia penale: profili di diritto sostanziale* and E. APRILE, *I rapporti tra diritto processuale penale e diritto dell'Unione europea, dopo la sentenza della Corte di Giustizia sul caso Pupino in materia di incidente probatorio,* in *Criminal Cassation (Cass. Pen. Henceforth),* 2005, p. 1150.

[70] The interpretative difficulties of the provisions indicated by law n. 69 of the 22nd of April 2005, through which framework decision 2002/584/JHA of the Council of the European Union regarding the European arrest warrant was implemented, are attributed to the controversial genesis of that law. Its discipline of surrender procedures was "re-written" with the introduction of very detailed rules that, at times, did not correspond to the framework indication, for the purpose of ensuring the safeguard of certain constitutional principles and defensive guarantees. The Italian courts were faced with the possibility to either apply the internal implementation norm, acknowledging its opposition to the framework decision provisions, or to operate a creative interpretation whose result could prove respectful of European norms and compliant with the European Union Law.

principle is based on serious circumstantial evidence of guilt with respect to the mutual juridical civilization principle characterizing the European judicial space.

However, only in cases of serious circumstantial evidence of guilt can the Court of Appeals issue a sentence enforcing the surrender procedure. It has been pointed out that the norm must be interpreted in the light of art. 9 of the law that clearly excludes the applicability of the provisions contained in art. 234 para. 1 and 1-bis, art. 274 para. 1 lett. a) and c), and art. 280 of the Criminal Procedure Code. A different interpretation would result in backtracking the extradition procedure.

Within the EAW, a positive assessment of such assumptions by the judicial authorities of the executing State is not a required element given the mutual judicial background of Member States. The elements that are required are the recognition of serious circumstantial evidence of guilt by the Italian judicial authority, meaning that the warrant should be issued for its intrinsic content. Namely the warrant is issued for the data gathered during the investigative and procedural phases. Such data must be on a list of circumstantial evidence that the authority considers evocative of a criminal offence, and the evidence must prove that the crime is pepretated by the person for whom the surrender procedure is requested[71]. Furthermore, it appears that the rationale for the European Arrest Warrant cannot be strictly compared to the rationale of the traditional Italian judicial system. It is merely sufficient that the issuing Italian authority agrees upon the adopted procedure. Such circumstance can also be achieved through the production of factual evidence against the person for whom surrender procedure is required[72].

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[71] Judgment Cassazione Penale Sec. Fer., of the 13th of September 2005, *Hussain*, in *Cassazione Penale*, 2005, p. 3766.

[72] In these terms, Cassazione Penale Sec. VI, of the 8th of May 2006, *Cusini*, in *Cass. Pen.*, 2007, p. 1166; Judgment Cassazione Penale Sec. VI, of the 23rd of September 2005, *Ile Petre*, *ivi*, 2005, p. 3772 notes by E. SELVAGGI, *Il mandato di arresto europeo: la conformità con la decisione-quadro quale criterio ermeneutico … e altre questioni*; conf. Judgment Cassazione Penale Sec. VI, of the 3rd

Another crucial point emerging from the jurisprudence of legitimacy, and wich highlights the dialogue between national and supranational fronts as well as the need to achieve a conforming interpretative operation, concerns the relationship between the European Arrest Warrant and the lack of preventive detention time limits for certain judicial systems. In this regard, the renowned *Ramoci*[73] case clarifies that the executing Italian judicial authority's role should be limited. This limitation exists to ensure that the procedural system of the issuing State offers, from the viewpoint of the length of preventive detention, equivalent guarantees in respect to the maximum time limit of pre-trial detention. In particular, as concerns the provision in lett. e) of art. 18 l. n. 69 of 2005, which establishes that grounds for refusal exist if the issuing State does not provide for a maximum time limit for pre-trial detention. Before carrying out any surrender procedure, the executing judicial authority must ensure that the issuing State has set a time limit for pre-trial custody for at least the first instance sentence, or where missing, a time limit to be derived from other procedural mechanisms set with predetermined deadlines. Judicial control is key to the legal prosecution of pre-trial detention or to its annulment[74].

Another recent application of the conforming interpretation principle can be found in the *Melina* sentence. Through the *Melina* sentence, the Court of

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of March 2006, *Napoletano*, in *CED* n. 233706; Judgment Cassazione Penale Sec. VI, of the 13th of October 2005, *Pangrac*, *ivi* n. 232584.

[73] Judgment Cass. Pen. Sec. Unif., of the 5th of February 2007, *Ramoci*, in *Cass. Pen.*, 2007, p. 1911.

[74] In short, the motivational apparatus developed by the Joined Chambers of the Court of Cassation, relies on the following assumptions: 1) a perfect equivalence between judicial procedures and systems of Member States is impossible to achieve; 2) the framework decision concerning the European Arrest Warrant, substituting the conventional extradition procedure with a simplified mechanism of arrest and surrender of wanted persons and integrating the new procedure within an exclusively techno-judicial dimension shunning any governmental influence, has applied the principle of mutual recognition to any judicial cooperative relationship, invoking for the purpose the mutual adherence of the States' judicial systems to the general principles of the European Convention on Human Rights (ECHR); 3) for what concerns the framework decisions adopted within the European Union's third pillar, the national judge is compelled to adopt a conforming hermeneutic criterion of national laws implementing framework decisions, thus interpreting the national law in compliance with the supranational provisions.

Cassation specified that, for surrender procedure purposes, art. 2 para. 1 l. n. 69 of 2005 does not require the issuing State to offer the same guarantees to a fair trial as those offered by the Italian system. It does require the issuing state to respect the relevant principles as guaranteed by the supranational documents and in particular by art. 6 ECHR, on which art. 111 Const. is based[75].

The rationale behind the *Ramoci* sentence is that the rights and guarantees acknowledged by the Italian system cannot in themselves be grounds for surrender refusal, since the very foundation of the EAW (namely the mutual recognition principle) imposes a "*per equivalent*" evaluation so that it is sufficient to ascertain the existence, in the issuing State, of equipollent procedural mechanisms which can offer a guarantee comparable to that of the Italian judicial system. On this basis, the judge affirmed that "*there is a substantial similarity between the affirmations about the need to respect the fundamental rights contained in law n. 69 and in the framework decision"* and that *"the reference of the national law to the principles and regulations provided by the Italian Constitution (art. 2 lett. b) seem to express the need for the safeguard of those values which are a common legacy of the European juridical society)"*.

The idea of a transnational jurisdiction is then confirmed by the Court's decisions, specifically when the relationship between judge and criminal law changes in accordance with a new source system.

The national court becomes more and more international and especially more and more communitarian. The national court becomes both the author and co-protagonist of that supranational dimension which constitutes the main feature of the current juridical system.

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[75] Judgment Cassazione Penale Sec. VI, of the 3rd of May 2007, *Melina*, in *Cassazione Penale* 2008, p. 2932. In application of such principle, the Court has considered the right of the person, for whom surrender procedure had been issued, non violated on the grounds of a sentence based on a co-defendant's accusation who exerted his right to remain silent, since a confrontation was not solicited by the defendant.

The internationalization and Europeanization process of law, in particular criminal law, brings about a sort of osmosis between supranational and internal law and provides the national court with new evaluative criteria.

This is confirmed, particularly from a domestic viewpoint, in the amendments of the constitutional text whose potential repercussions, even in terms of the interpretation of the primary norm, are still to be fully explored[76]. This refers to art. 117 para. 1 and 2 Const.[77], as amended by constitutional law n. 3 of the 18th of October 2001. The amendment requires the Italian legislator to observe the norms contained in international agreements. This further requires that the Italian legislator attempt an interpretation of the internal norm in compliance with the international provision, and where this is not possible to use the provisions in art. 117 para. 1 as a guideline for interpretation. Such an obligation is due, in the first place, to the norms regulating the human rights and fundamental freedoms as found in the 1950 European Convention on Human Rights and in the Council of Europe Protocols, as well as in the interpretations of such norms by the European Court of Strasbourg.

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[76] E. APRILE - F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, 2009.

[77] Art. 117 Const. Section 1. The legislative power is exerted by the State and the Regions in compliance with the Constitution and with the restrictions deriving from the communitarian system and the international obligations. Section 2. The State has exclusive legislative power on the following: a) foreign policy and international affairs of the State; relationship between the State and the European Union; asylum rights and juridical condition of non European citizens; b) immigration; c) relationship between the Republic and religious denominations; d) defense and Armed Forces; State security; arms, munitions and explosives; e) currency, safeguard of national savings and financial markets; safeguard of competitive system; monetary system; fiscal and accountancy system; equalization of financial resources; f) State institutions and related electoral laws; referenda; election of the European Parliament; g) administrative organization of the State and of national public institutions; h) public order and security, with the exception of the local administrative police; i) citizenship, marital status and registry office; l) jurisdiction and procedural norms; civil and criminal system; administrative justice; m) determination of the level of basic services concerning the civil and social rights which should be guaranteed throughout the national territory; n) general norms concerning Education; o) national Insurance; p) electoral legislation, government bodies and main functions of Communalities, Provinces and Metropolitan Areas; q) customs, protection of national boundaries and international prophylaxis; r) weights, measurements and determination of time; informative statistics and information coordination of public, regional and local administration data; intellectual work; s) protection of the environment, ecosystem and artistic heritage.

This principle was clearly stated in sentences n. 348 and 349 of 2007 of the Constitutional Court, declared in the judgment of the constitutional legality of art. 5 bis para. 7 bis of the d.l. of the 11th of July 1992 n. 333 ("Urgent measures for the restoration of public finance") converted by means of amendments of the l. 8th of August 1992 n. 354, introduced in turn by art. 3 para. 65 l. on the 23rd of December 1996 n. 662 ("Measures for the rationalization of public finance")[78]. The main points are as follows:

a) the ECHR is not "auto-applicative" and it is neither communitarian in norms, nor does it refer to art. 11 of the Constitution given that it does not introduce any sovereignty limitations. It is an international pactional norm that binds the State but does not produce any direct effect on internal regulations. It does not validate the national judges' application of these norms in the controversies before them, while not applying at the same time the contrasting internal norms. Art. 117 para. 1 Const. clearly distinguishes, in the text introduced through the 2001 amendment, the restrictions derived from the communitarian regulations from those that are ascribed to the international obligations;

b) the ECHR norms, as pactional norms, are also excluded from the operational field of art. 10 para. 1 Const., by the expression *"generally recognized international law norms"*, which refer to customary norms only and establishes the automatic adaptation of the Italian Juridical system to these;

c) art. 117 para. 1 Const. establishes that the exertion of legislative power by the State and Regions that should comply with the international obligations, among those which are included in the European Convention on Human Rights. The theory that the norm should be considered

[78] Published in *Cass. Pen.*, 2008, 2296. Also, cfr. notes by P. TONINI, *Processo penale e norme internazionali: la Consulta delinea il quadro d'insieme*, in *Diritto penale e processo*, 2008, p. 417.

operational merely in the relationship between State and Regions should be rejected. The possibility for each norm contained in an international treaty to assume the role of constitutional norm, through art. 117 para. 1, is denied.

d) art. 117 para. 1 presents a similar structure to that of other constitutional provisions that develop their concrete operational nature only if put in direct contact with other sub-constitutional norms, with the purpose of defining a criterion limited to express, in a general way, a quality which the laws included must possess. The norms serving this purpose are subordinate to the Constitution. They occupy an intermediate place between the latter and the ordinary legislation. In common language they are defined interposed sources. Art. 117 para. 1 Const. becomes operational only in case the international obligations that bind the legislative power of the State and Regions are determined. The ECHR therefore fulfills the international obligations of the State;

e) the ECHR has, unlike other international treaties, the peculiar characteristic of including the competence of a jurisdictional body. The European Court of Human Rights, which serves the purpose of interpreting the Convention's norms, via art. 32 para. 1, establishes that: "*The Court's competence encompasses all the questions concerning the interpretation and implementation of the Convention and of its Protocols submitted to it in compliance with the conditions as in artt. 33, 34 and 47"*. It is not a jurisdictional competence overlapping with the judicial authorities of the Italian state; instead it is an eminent interpretative function that the contracting States have acknowledged by specifying their international obligations in these matters;

f) the ECHR's norms, as interpreted by the Court of Strasbourg, do not acquire the same strength as constitutional norms and are therefore not

immune from the legal control of the Italian Constitutional Court. It is strictly necessary that these norms conform to the Constitution as they integrate the constitutional criterion, while maintaining their sub-constitutional position. The peculiar nature of these norms, which differ from both the communitarian and the conventional ones, require a constitutional scrutiny that is not limited to the possible breaching of fundamental or supreme rights but that can encompass all conflicts between interposed and constitutional norms. In order to avoid the paradox of declaring a legislative norm unconstitutional because of a subconstitutional norm that contradicts the Constitution, the norms integrate the constitutional criterion to conform to norms of the Constitution. Only the norm that contradicts with an interposed criterion, and whose conformity with the Constitution is positively assessed, is considered illegitimate;

g) the ECHR's norms are effective because of their interpretation by the Court of Europe. The assessment of their constitutional compatibility must be an interpretative product and not the provision in and of itself. Furthermore, the idea that the Court of Strasbourg's rulings are unconditionally binding, as to the constitutional control of national law, is rejected. Such control should always aim to be a reasonably balance between the binding force derived from international obligations, as stated by art. 117 para. 1 Const., and the safeguard constitutionally protected interests as stated by other articles of the Constitution;

h) in summary, one should verify: 1) if there is an actual contrast, not resolved through an interpretation, between an internal norm and ECHR's norms as interpreted by the Court of Europe and working together as complementary sources of the constitutionality criterion as in art. 117 para. 1 Const.; 2) if the ECHR's norms are an integration of the criterion, in the

interpretation by the Court itself, and are compatible with the Italian constitutional system.

(…) Framework Decisions and the approximation of laws and regulations

As previously pointed out, the importance of the framework decisions lies, not only in their binding nature but in their final purpose. The final purpose is the alignment of the laws and regulations of the Member States[79] and the framework decisions. The approximation of laws and regulations is first identified in art. 29 TEU as one of the main tools, along with judicial cooperation, used to fulfill the third pillar's objectives. In art. 31 TEU it is mentioned as an instrument of judicial cooperation in and of itself.

Despite the normative data, the approximation of laws and regulations does not stand out for its systematic nature. It appears quite clearly from the abovementioned provisions that the alignment of the laws and regulations occupies a pivotal place in the third pillar's economy. It represents, in fact, one of the most important tools that the institutions have at their disposal to improve judicial cooperation between the States.

The Amsterdam Treaty limits the context for the approximation of laws to only three areas: organized crime, terrorism and illicit drug trafficking (art. 31 TEU). However, a wider interpretation of such norms, sought after by many parties[80] and embodied in many programmatic documents such as the Vienna Action Plan and the Conclusions of the Tampere European Council, has broadened the areas of interpretation.

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[79] Cfr. L. SALAZAR, *La costruzione di uno spazio penale comune europeo*, in *Lezioni di diritto penale europeo*, G. GRASSO - R. SICURELLA (eds.), Giuffré, Milano, 2007.

[80] F. POCAR (ed.), *Commentario breve ai Trattati della comunità europea e dell'Unione europea*, Milano, 2001.

Some of the framework decisions adopted by the Council cannot be attributed to these three areas (organized crime, terrorism and drug trafficking). More examples of this are the framework decision on the protection of the environment[81]; the framework decision on combating fraud and counterfeiting of non-cash means of payment[82]; the framework decision against counterfeiting in connection with the introduction of the euro[83]; the framework decision on combating trafficking in human beings[84]; the framework decision on combating corruption in the private sector[85]; the framework decision on combating the sexual exploitation of children and child pornography[86].

As to the extent of approximation that the Union can achieve through the Framework decisions, the Treaty points out that the process can entail "*progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties*" (art. 31 TEU).

In this regard, the use of the clause "if necessary" emphasizes the approximation of laws and regulations as the last resort in matters of possible instruments available to the Council for judicial cooperation in criminal matters.

However, an analysis of the procedural process shows that since the first framework decisions, the Council has adopted a broader interpretation of art. 31 lett. e) TEU.

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81 Framework Decision on the protection of the environment, of the 27th of January 2003, in *Official Journal,* L 29 of the 5th of February 2003.

82 Framework Decision on combating fraud and counterfeiting of non-cash means of payment of the 28th of May 2001, in *Official Journal,* L 149 of the 2nd of June 2001.

83 Framework Decision against counterfeiting in connection with the introduction of the euro, of the 29th of May 2000, in *Official Journal,* L 140 of the 14th of June 2000.

84 Framework Decision on combating trafficking in human beings of the 19th of July 2002, in *Official Journal,* L 203 of the 1st of August 2002.

85 Framework Decision on combating corruption in the private sector of the 22nd of July 2003, in *Official Journal,* L 192 of the 31st of July 2003.

86 Framework Decision on combating the sexual exploitation of children and child pornography of the 22nd of December 2003, in *Official Journal,* L 13 of the 20th of January 2004.

One of the most significant examples is the Framework Decision on Terrorism of the 13th of June 2002[87]. First of all, it states that Member States adopt the "necessary measures" to ensure that terrorism is punished. To this end, the framework decision identifies a series of behaviors whose material elements are defined (ranging from kidnapping to the unlawful seizure of aircraft/ships, to the manufacturing and possession of weapons) as well as the psychological ones (the specific crime of seriously intimidating the population, of unduly compelling a Government to perform or abstain from performing any act, …). For example, Art. 2 provides for a clear definition of "terrorist organization"[88]. The Council did not merely identify "*measures for the establishment of minimum rules*" concerning the constituent elements of criminal offences. Instead the Council clearly defined the actual elements of criminal offences. The framework decision not only prescribes that terrorist offences be punished more severely than other criminal offences, but also establishes that those who direct or participate in a terrorist organization be punished with an imprisonment sentence of respectively no less than fifteen and eight years. This provision not only affects the criminal policies of single Member States, but can also be incompliant with the proportionality criteria of judicial choices of national legislators. The framework decision on terrorism is not an isolated example. The Council has also employed similar choices in the framework decision against counterfeiting in relation to the introduction of the euro[89], in the framework decision on combating the sexual

87 Framework Decision on combating terrorism of the 13th of June 2002, in *Official Journal,* L 164 of the 22nd of June 2002.

88 A terrorist organisation is a "structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences". Structured group shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

89 Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro of the 29th of May 2000, in *Official Journal,* L 140 of the 14th of June 2000, after having identified a series of behaviours which are to be banned by Member States (counterfeiting of money, place in circulation of counterfeit currency, … art. 3-4 and 5), provides for dissuasive criminal penalties, including custodial

exploitation of children and child pornography[90], in the framework decision against illicit drug trafficking[91] and in the framework decision on combating trafficking in human beings[92]. In these cases minimum sentences for certain kinds of offences are applied by Member States.

The results achieved in the harmonization of procedures, as in art. 31 para. 1 lett. c) of TEU, entailing the adoption of norms aimed to guarantee "*compatibility in rules applicable in the Member States, as may be necessary to improve (…) cooperation*" are less evident.

Among these are the framework decision on the standing of victims in criminal proceedings[93]; the framework decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime[94].

Of particular relevance is the innovative framework decision proposal concerning the introduction of minimum procedural standards within Member

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penalties whose maximum time of imprisonment being no less than eight years (art. 6) and includes criminal liability of legal persons (art. 7 and 8).

90 Framework Decision on combating the sexual exploitation of children and child pornography of the 22nd of December 2003, in *Official Journal,* L 13 of the 20th of January 2004, in artt. 1, 2 and 3, this provides for exact definitions of constituent elements of the criminal offence of pornography and other offences to it related.

91 Framework Decision laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking of the 25th of October 2004, in *Official Journal,* L 335 of the 11th of November 2004.

92 Framework Decision on combating trafficking in human beings of the 19th of July 2002 in *Official Journal,* L 203 of the 1st of August 2002, which gives a definition of the offenses related to the trafficking of human beings for work or sexual exploitation purposes and establishes penalties and aggravating circumstances, includes criminal liability of legal persons and applicable sanctions, and requires that Member States ensure that offences be punishable by effective, proportionate and dissuasive criminal penalties.

93 Framework Decision on the standing of victims in criminal proceedings of the 15th of March 2001, in *Official Journal,* L 82 of the 22nd of March 2004.

94 Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, of the 26th of June 2001, in *Official Journal,* L 182 of the 5th of July 2001.

State's judicial system[95]. The objective of the proposal is to reinforce the protection of citizens' rights through the adoption of common minimum standards for procedural safeguards for persons suspected or accused of criminal offences throughout the EU territory. A further effect is to ensure, through the reinforcement of mutual trust, the functionality, of the mutual recognition of criminal sentences. However, the diverse national views on the aforementioned rights and the resistance of some Member States to yield such a delicate part of national sovereignty to the Union rendered it improbable to reach a political agreement on the proposal (given that more than four years have elapsed since it was first presented).

The lively debate and the negotiations within the Council, carried out by all the various presidencies, did not result in a common agreement between the Member States. In some cases, the disagreement arouse because the States denied any normative power to the Union in regard to this issue. In other cases disagreement arose because the content of the proposal was not considered adequate. One of the main causes for disagreement was the fact that only certain guarantees were to be regulated and that extremely detailed rules were to be established. Many thought this would cause a loss of coherence within national procedural regulation.

II. d) Cooperation in criminal matters in the years 1999-2006

The results achieved so far by the European Union in criminal matters through the instruments provided by the Amsterdam Treaty are outstanding,

[95] Doc. COM (2004) 328 def. of the 28th of April 2004. On the issue, cfr. C. FANEGO, *Proposta di decisione quadro su determinati diritti processuali nei procedimenti penali nel territorio dell'Unione Europea, in Cass. Pen. 2008,* p. 303.

especially if compared to those achieved in the previous years. Credit for this is due to both to an increased will on all States' part to cooperate and to a higher efficacy of the normative instruments offered by the Union.

II. d) (1) Normative acts: conventions, decisions and framework decisions

A short review of the use of the various normative instruments has highlighted a gradual diminishing of the conventional instrument that in the past had, in fact, represented the main instrument of cooperation within the third pillar.

Among the agreements established within the Amsterdam Treaty only the Convention on mutual assistance of 2000[96] (with the related integrative Protocol of 2001[97]), aims to substitute the one issued by the Council of Europe dating back to 1959[98].

As far as the instruments of decisions are concerned, two of them are of great importance. The first instrument allows the Council to set up the Provisional Judicial Cooperation Unit[99], the second instrument established its successor, *Eurojust*[100].

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[96] Convention on mutual assistance in criminal matters between the Member States of the European Union of the 29th of May 2000, in *OJ* C 197 of the 12th of July 2000.

[97] Protocol on mutual assistance in criminal matters between the Member States of the European Union of the 16th of October 2001, in *OJ* C 326 of the 21st of November 2001.

[98] European Convention on mutual assistance in criminal matters of the 20th of April 1959; implementation order for Italy through l. of the 23rd of February 1961 n. 215.

[99] Council Decision on setting up a Provisional Judicial Cooperation Unit of the 14th of December 2000, in *OJ* L 324 of the 21st of December 2000.

[100] Council decision of the 28th of February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, in *OJ* L 63 of the 6th of March 2002, amended through Council Decision 2003/659/JHA of the 18th of June 2003 in *OJ* L 245 of the 29th of September 2003. In short, Eurojust is a body of the Union with legal personality aimed at reinforcing the fight against serious crime. It is composed of national prosecutors, magistrates, or police officers of equivalent

Strictly speaking, these bodies cover important roles in judicial cooperation. Among their objectives is to improve the co-ordination of investigations and prosecutions between the national authorities in the Member States. Another objective is to improve the cooperation between these authorities, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests.

Within the Council's normative activity of recent years, outstanding qualitative and quantitative results have been achieved due to the framework decision, which has played a key role in reaching the goals of the system introduced by the Amsterdam Treaty as opposed to that introduced by the Maastricht Treaty. Below is a listing of the main framework decisions issued for the purpose of contributing to the creation of a European space of freedom, security and justice. Such a listing, apart from providing preliminary information, also highlights the diversity of areas that the European Union intervened through the adoption of normative regulations aimed to affect the internal judicial systems.

In this regard, worthy of note are:

- Framework Decision of the 29th of May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;

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competence, detached from each Member State. Eurojust has jurisdiction over such matters as: 1) the types of crime and offences in which Europol is competent to act; 2) cybercrime; 3) fraud, corruption and any other offence affecting the economic interests of the European Community; 4) laundering of the proceeds of crime; 5) environmental crime; 6) participation to a criminal organisation. For crime typologies different from those abovementioned, Eurojust has a complementary jurisdiction in that it can assist in investigations and prosecutions at the request of the competent authority of a Member State. Cfr. E. APRILE, *Diritto processuale penale europeo e internazionale*, Cedam, Padova, 2007. Recently, Eurojust has been amended with the Decision of December 2008 (forthcoming publication). On the issue, cfr. E. APRILE - F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, 2009.

- Framework Decision of the 15th of March 2001 on the standing of victims in criminal proceedings;
- Framework Decision of the 28th of May 2001 on combating fraud and counterfeiting of non-cash means of payment;
- Framework Decision of the 26th of June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime;
- Framework Decision of the 6th of December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro;
- Framework Decision of the 13th of June 2002 on joint investigation teams;
- Framework Decision of the 13th of June 2002 on the European arrest warrant and the surrender procedures between Member States;
- Framework Decision of the 13th of June 2002 on combating terrorism;
- Framework Decision of the 19th of July 2002 on combating trafficking in human beings;
- Framework Decision of the 28th of November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence;
- Framework Decision of the 27th of January 2003 on the protection of the environment (annulled by the Judgment of the Court of Justice[101]);
- Framework Decision of the 22nd of July 2003 on combating corruption in the private sector;
- Framework Decision of the 22nd of July 2003 on the execution in the European Union of orders freezing property or evidence;

[101] Judgment of the ECJ of the 13th of September 2005, Case C-176/03, *Commission v. Council*, in *Racc.* 2005, p. I-7879.

- Framework Decision of the 22nd of December 2003 on combating the sexual exploitation of children and child pornography;
- Framework Decision of the 25th of October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking;
- Framework Decision of the 24th of February 2005 on confiscation of crime-related proceeds, instrumentalities and property;
- Framework Decision of the 24th of February on attacks against information systems;
- Framework Decision of the 24th of February 2005 on the application of the principle of mutual recognition to financial penalties;
- Framework Decision of the 6th of October 2006 on the application of the principle of mutual recognition to confiscation orders;
- Framework Decision of the 18th of December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

II. d) (2) The programmatic documents

An essential component of cooperation within the third pillar is considerable number of programmatic documents whose function it is to spell out the objectives set up in art. 29 and 31 of the Treaty of the European Union.

Among the most relevant are the Vienna Action Plan of 1998 and the Tampere Conclusions of 1999.

In particular, the Vienna Action Plan was the first document to point out that judicial cooperation in criminal matters within the European Union was *"hard pressed today to deal with phenomena such as organised crime, unless*

there is facilitation of procedures and where necessary approximation of legislation" and was also the first to observe that *"in concrete terms this means first of all that criminal behaviour should be approached in an equally efficient way throughout the Union"*. To this end, the Vienna Action Plan has identified specific actions to be implemented within given terms (from 2 to 5 years), among which are the simplification of extradition procedures, the establishment of a judicial assistance in criminal matters and the approximation of legislations.

The Tampere Conclusions have subsequently established, on the basis of the Vienna Action Plan, some fundamental principles. Two of which provide some guidelines: the mutual recognition of judicial decisions and the alignment of legislations of Member States.

According to the European Council, the mutual recognition of judicial decisions, which will be discussed in the next section, "*should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union"*[102].

The same principle is the basis of three important objectives, expressly defined in the Conclusions:

- suppression of the formal extradition procedure: *"the European Council urges Member States to speedily ratify the 1995 and 1996 EU Conventions on extradition. It considers that the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial"* (point 35);

[102] Cfr. point 33 of the Tampere Conclusions.

- adoption of a mutual recognition system of regulations to secure evidence and seize assets: ***"****The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable"* (point 36);
- exchange of evidence: "*Evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there"* (point 36).

With reference to the abovementioned alignment of legislations, the European Council has affirmed: *"with regard to national criminal law, efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, Euro counterfeiting), drugs trafficking, trafficking in human beings, particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime"*[103].

Accordingly what emerges from the Tampere Conclusions, the principle of mutual recognition, supported by the alignment of legislations, becomes pivotal within the third pillar and in judicial cooperation in criminal matters.

As we shall see, the decision to refer to the principle of mutual recognition in the field of the free movement of judicial decisions sprang from what happened in previous years in regard to the free movement of goods, persons, capital and services.

The mutual recognition principle was particularly applied in the internal market, specifically to the free movement of goods and services, leading to the decision by the jurisprudence of the European Court of Justice of 1979,

[103] Cfr. point 48 Tampere Conclusions.

commonly known as *Cassis de Dijon*[104], as an alternative antidote to the obvious limits of the harmonization of national legislations.

The subsequent tragic terrorist events that occurred on September 11th 2001 ("9/11") in the United States and later on in Spain and the United Kingdom have obviously sped up the process for an implementation of the mutual recognition principle.

For instance, as a consequence of the reaction triggered by the 9/11 attacks, the framework decision on the European Arrest Warrant (the first instrument implemented in matters of mutual recognition of judicial decisions) and the framework decision on combating terrorism (which represents one of the most relevant achievements in matters of approximation of judicial legislations) were adopted.

In this context the establishment of a Judicial Cooperation Unit *Eurojust* takes place. Eurojust becomes the first permanent instrument for facilitating and improving the supranational cooperation and coordination between magistrates of Member States.

However, during the following years, the European Union had its highs and lows, with some settling-down periods, where the unconditional acceptance of the mutual recognition principle seemed to be decreasing[105].

The reactionary urge of 9/11 has slowly faded, not so much because of the important role played by national sovereignty, but because of the increased awareness of the need to protect fundamental rights and freedoms.

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104 Judgment of the 20th of February 1979, Case n. 120/78 (*Rewe - Zentral AG vs Bundesmonopolverwaltung für Branntwein*).

105 Cfr. L. SALAZAR, *La lotta alla criminalità nell'Unione: passi in avanti verso uno spazio giudiziario comune prima e dopo la Costituzione per l'Europa ed il Programma dell'Aia*, in *Cass. Pen. 2004,* p. 3510.

The new EU Plan of Action on Combating Terrorism adopted by the European Council after the Madrid bombing of the 11th of March 2004 has strengthened the European Union's actions against terrorism and organized crime. The much anticipated implementation of the new European Constitution, may provide more efficient and practical instruments, as well as a coherent framework where the objectives are easily identifiable.

Finally the Multiannual Plan, adopted on the 5th of November of 2004 under the name of The Hague Programme, has led the European Commission's actions in the areas of Justice, Security and Freedom from 2005 to 2010. These actions confirm the guidelines set by the Tampere Council and reassert the significance of the mutual recognition principle, supported by an approximation of legislations[106].

In particular, the Programme establishes (besides intervening in the fields of immigration, integration of immigrants, asylum rights for refugees, management of the external borders of the Union) operation in six other directions.

In the strengthening of fundamental rights, policies were elaborated in order to facilitate the control and promotion of such rights, in connection with their safeguard as established by the ECHR. Such policies include the transformation of the European Monitoring Centre on Racism and Xenophobia into a Human Rights Agency; the special vigilance on the protection of the rights of children and abused women; and combating all discrimination and the realization of a framework programme on "*Fundamental Rights and Justice*".

In regards to the fight against terrorism, an increased cooperation with third-countries, with an integrative and global view, and an improved information exchange system within the Union were urged in relation to "*the recruitment and*

[106] COM (2005) 184, in *OJ* C 236 of the 24th of September 2005. For further reading, cfr. B. PIATTOLI, *Il programma dell'Aja per il futuro dell'Europa*, in *Dir. e giust.* 2005, n. 31, p. 122.

financing for terrorist purposes, the prevention, analysis of risks, protection of critical infrastructures and management of consequences".

For this reason, the so-called principle of availability was adopted. The principle of availability regulates the exchanges between police and judicial authorities of Member States concerning any relevant information. Focus was put on preventing the illicit use of charitable organisations for the financing of terrorism and on the implementation of the pilot-programme in the protection and assistance to victims of terrorism.

Illegal immigration, aiding and abetting illegal immigration and trafficking in human beings, especially women and children, are strongly opposed within the Union.

As far as the protection of *privacy* is concerned, the need for information exchange aimed at combating terrorism and other cross-border criminal phenomena that safeguard collective interests should be balanced by the need to protect private personal data.

A strategy promoting and strengthening of cooperation between national police and judicial authorities of Member States was implemented in cases dealing with organized crime.

Finally, as it concerns a European judicial space, minimum procedural rules were defined to guarantee the right to legal advice and assistance. In judicial matters, the adoption of initiatives for the approximation of legislations was promoted; particularly in relation to the procedure of the criminal offence report, the definition of charges and the compilation of specific judicial actions.

The European Council has affirmed the need for an optimization of the judicial cooperation instruments, based on the principle of mutual recognition of decisions issued by national judicial authorities, and for the need to strengthen the

means to protect the Union's financial interests. This can also be achieved through the training of judges and the cooperation between legal professions, as well as through an optimization of the functions and objectives of Eurojust and Europol.

Chapter III. Judicial cooperation in criminal matters: recent developments

III. a) The Lisbon Treaty: an overview

The objective adopted by the European Union with the Amsterdam Treaty, mainly the creation of a space of freedom, security and justice, was confirmed in its strategic and propulsive dimension of the European Union law. The Treaty Establishing a Constitution for Europe of 2004[107] repealed this law. Unlike the Union and its economic and institutional subjects, the Treaty Establishing a Constitution for Europe of 2004 became a unitary political subject based on a series of shared values.

[107] Treaty Establishing a Constitution for Europe of the 29th of October 2004, in *OJ* C 310 of the 16th of December 2004. The Treaty in question, after the failure of its ratification process, still offers useful opportunities for reflection. In particular, judicial cooperation in criminal matters is confirmed by the instruments for building an area of freedom, security and justice, which are part of the priority policies of the new Union. The Treaty affirms that cooperation in judicial matters *"shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States".* Articles III-270 and III-273 include a series of specific actions of the Union, such as supporting the training of the judiciary and judicial staff, facilitating cooperation between judicial authorities, preventing and settling conflicts of jurisdiction, establishing minimum rules in both procedural and substantive criminal law; These measures that can facilitate the mutual recognition procedure. However, the most important reform is the repeal of the pillar subdivision and the apparent consequent extension of the community method to all the third pillar's areas of interest. In trying to simplify the Union's structure, the Constitution operates a merging of the existing Treaties, thus creating one single subject assimilating the European Union and the old Union's subject matters. An absolute novelty, starting from their very denomination, is represented by those legislative acts that can be adopted in judicial cooperation matters such as: art. I-33 that states that, in order to exercise the Union's competences, the institutions shall use as legal instruments European laws, European framework laws, European regulations, European decisions, Recommendations and Opinions. This mechanism also undergoes a substantial simplification process: the codecision procedure, renamed the ordinary legislative procedure, becomes the generalized method for the adoption of European laws. The cooperation procedure is repealed, whereas the consultation, assent and simple procedures remain unvaried. The powers of the Court of Justice remain those established by the Amsterdam Treaty: the new development is that they are also extended to the old third pillar's areas of interest.

After the failure of the Treaty Establishing a Constitution for Europe[108], interesting developments are to be expected from the recent entry into force of the Lisbon Treaty[109].

The Lisbon Treaty is at once similar and different from the other European treaties that follow the constitutional treaties. It is similar in that it is the product of an intergovernmental negotiation and bearer of amendments to the pre-existing legislative framework. However, it very much differs from the previous amending treaties in at least two aspects. The inspiring political motive is the compelling urgency to adapt the European Constitution to the broadening of the Union. The new Treaty is the result of a process of reform where the intergovernmental Conference, carried out through a political preliminary agreement on the subject matters, confined itself to adding the closing titles to an already written script, though taking care of fixing the punctuation and giving the new protagonists a certain visibility.

The reform Treaty has two terms of reference and comparison: the constitutional treaty, from which it derives most of its provisions, and the treaties to be reformed to which it adds, with some variations, the provisions taken from the former.

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[108] Cfr. G. DE AMICIS - G. IUZZOLINO, *Lo spazio comune di libertà, sicurezza e giustizia delle disposizioni penali del Trattato che istituisce una Costituzione per l'Europa*, in *Cass. pen.*, 2004, p. 3067.

[109] In *OJ* of the 17th of December 2007, n. 306. Italy has already ratified the Lisbon Treaty, following l. of the 2nd of August 2008 n. 130 named "Ratification and implementation of the Treaty of Lisbon amending the Treaty of the European Union and the Treaty Establishing a Constitution for Europe and related acts, with final act and declarations carried out in Lisbon on the 13th of December 2007". The overall normative system established by the Amsterdam and Nice Treaties will continue to regulate, for some time to come, the relationship between Member States and their relations with the third pillar's areas of interest. The ultractivity of the acts adopted before Lisbon is, indeed, envisioned by art. 9 of Protocol n. 10 of the Lisbon Treaty, containing the transitional provisions. Specifically "*the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union".*

In actuality, the reform presents itself as a series of additions of the constitutional treaty project to the current treaties, with some exceptions, and some movements from the basic text to the Protocols or the Declarations; there are some new entries, particularly in the area of freedom, security and justice.

The overall structure of institutions is fundamentally is reformed because of the amendments to the legislative procedures and the institutional profiles with relevant consequences on the fundamental issues of supranational criminal law and judicial cooperation[110].

The Treaty amends the existing Treaties with the aim of strengthening the democratic efficiency and legitimacy of the enlarged Union as well as the coherence of its external action. It pursues four general objectives:

a. setting the main principles regulating the functioning of the Union, assigning a leading role to the protection of fundamental rights;
b. strengthening the democratic legitimacy of the system;
c. fulfilling the institutional framework set up by the Amsterdam Treaty and the Nice Treaty;
d. improving the external and internal actions of the Union.

Such objectives do not coincide with the constitutional project, which envisioned the abrogation of all existing Treaties and their substitution by a single text named *"Constitution"*, an option that was eventually discarded.

The merit of the new Treaty is two-fold: on the one hand it puts an end to a period of uncertainty about the developments of the integration process; on the

[110] Cfr. E. APRILE - F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, 2009; V. MUSACCHIO, *Il Trattato di Lisbona e le basi per un nuovo diritto penale europeo*, in *Rivista penale*, 2008 n. 5; S. ALLEGREZZA, *L'armonizzazione della prova penale alla luce del Trattato di Lisbona*, in *Cass. Pen.*, 2008, p. 3882.

other hand, in points of law, it provides a sufficiently coherent frame of reforms of the Union's institution and of its functioning[111].

From this point of view, the Treaty contains two substantive clauses amended respectively; the Treaty on European Union and the Treaty Establishing the European Community. The Treaty on European Union maintains its current title (TEU), whereas the Treaty Establishing the European Community becomes the "*Treaty on the Functioning of the European Union*" (TFEU), in compliance with the single legal personality of the Union. The term Community is substituted by the term Union and it is established that "*the two Treaties constitute the Treaties on which the Union is founded*".

The terms European laws and European framework laws contained in the treaty of constitutional reform of 2004 are repealed. The terms regulations, directives, and decisions are not repealed, thus overcoming the pillar structure. More precisely, thanks to the single legal person, the third pillar disappears from the home affairs area after a period of transition of five years. The common policies within the spaces of freedom, security and justice, Schengen included, fall within the first pillar.

As concerns the supremacy of the European Union law, the intergovernmental Conference has adopted a declaration containing a reference to the jurisprudence of the Court of Justice of the European Union. Despite the article on the primacy of the Union, laws are not included in the EU Treaty. The IGC has adopted the following declaration: "*the Conference reminds that, for constant jurisprudence of the Court of Justice of the EU, the Treaty and the law adopted by the Union on the basis of the Treaties prevail on the law of Member States at the conditions established by the abovementioned jurisprudence"*.

111 On the issue cfr. R. BARATTA, *Le principali novità del Trattato di Lisbona,* in *Diritto dell'Unione Europea,* 2010, p. 21.

Furthermore, the opinion of the Council's juridicial services (doc. 11197/07) are annexed to the final act of the Conference.

Of particular relevance to this issue are the amendments introduced in the area of judicial cooperation, layed out in chapter IV of the Lisbon Treaty (art. 82-86 TFEU). Such amendments are as drastic as those included in the Constitutional Treaty.

Art. 82 of TFEU emphasizes one of the cornerstones in the evolution of the area of judicial cooperation: *"Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83"*.

The European Parliament and the European Council, acting accordingly to these new legislative procedures, adopted measures for the following purposes:

> *a. "laying down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;*
> *b. preventing and settling conflicts of jurisdiction between Member States;*
> *c. supporting the training of the judiciary and judicial staff;*
> *d. facilitating cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions" (art. 82 TFEU para. 1).*

Furthermore, paragraph 2 of art. 82 TFEU clarifies the early application of the European Arrest Warrant. It states that, in facilitating the application of the mutual recognition principle and in encouraging police and judicial cooperation in transnational criminal matters, the Parliament and the Council may adopt

directives establishing *"minimum rules"*, respectful of the ordinary legislative procedures and of the differences between the legislative systems and traditions of Member States.

Such norms concern:

a. mutual admissibility of evidence between Member States;
b. the rights of individuals in criminal procedure;
c. the rights of victims of crime;
d. any other specific aspects of criminal procedure which the "d" Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

The adoption of such minimum procedural rules does not prevent Member States from maintaining or introducing a higher level of protection of individual rights. However, in the case of a disagreement between Member States and with the consent of at least nine Member States, enhanced cooperation procedures are taken into account, following the renewed procedures as stated in art. 20 TEU and art. 329 TFEU.

As concerns the aspects of substantive criminal law, in accordance with art. 83, the European Parliament and the European Law, a legal definition is established for criminal offences and sanctions in the areas of particularly serious offences. These definitions are deliberating by means of directives adopted in accordance with the ordinary legislative procedure, and keeping in mind a cross-border dimension that results from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime.

As crimes change and develop, the Council may adopt a definition identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Furthermore, an area that has been subject to harmonisation measures is the approximation of criminal laws and regulations of the Member States. If the approximation of these criminal laws prove to be essential in order to ensure the effective implementation of a Union policy, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Procedures for the safeguard of national instances are taken into consideration in paragraph 3 of the abovementioned article, stating that where a member of the Council considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended.

After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Finally, even in substantive criminal matters of the abovementioned cases, if at least nine Member States wish to do so, enhanced cooperation can be established on the basis of analogous procedures as established in procedural context.

The overall analysis of the aforementioned norms concerning the realization of a space of freedom, security and justice allows for the following considerations.

If the components of the space of freedom, security and justice remain unaltered in respect to the law in force, they appear integrated in the Lisbon Treaty, due to the community method.

The impact of the Lisbon Treaty on the third pillar's areas of interest is therefore quite deep and allows for new instruments to combat organized crime and terrorism, thus responding to a need for a safer Europe.

As concerns the decisive procedure and the intergovernmental method, which required the unanimous consent of Member States within the Council, it is surpassed.

Member States or the European Commission may submit proposal. Moreover, before making a decision, the Council is obliged to consult the European Parliament (which expresses a non-binding opinion). The Court of Justice has, in turn, a limited jurisdiction on the basis of the provisions stated in art. 35 TEU and cannot launch an infringement against Member States that fail national transposition of the acts adopted by the Council.

From this viewpoint, the Lisbon Treaty simplifies the legal and institutional contexts, since it transfers police and judicial cooperation matters under the new title IV, merging them with the areas of residence permit, asylum rights, border and migration policies.

All this entails:

- the repeal of the Union's pillar structure. In this regard, the Lisbon Treaty generalizes the monopoly of the Commission's legislative initiative,

although it is the European Council that is entitled to define the strategic orientation of the legislative and operative programme. Furthermore, the Lisbon Treaty in art. 76 TFEU requires that legislative acts in police and judicial cooperation matters be adopted on a proposal by the Commission or on the initiative of at least one fourth of Member States;

- qualified-majority voting becomes a general rule within the Council as concerns the space of freedom, security and justice. It requires a double majority of 55% of the States' representatives and 65% of the population, in order to form a blocking minority at least four States are needed. An exception to the qualified majority rule is exists in the extensions of the Union's competences to other aspects of procedural norms as stated in art. 82 that is to other criminal areas 83 TFEU. The rule of the unanimous consent also regulates the bridging clause in judicial cooperation in civil matters and for the adoption of family law measures with transnational implications. The same rule is applied to the establishment of the European Public Prosecutor's Office by Eurojust (differing from the constitutional Treaty), where enhanced cooperation procedures are required, with an initiative power of at least nine Member States as stated by art. 86 TFEU;

- the attribution of a non-marginal role to the European Parliament in the legislative procedure with its direct participation (with a few exceptions) in compliance with a co-decision procedure. The European Parliament, thus, becomes co-legislator in almost all areas of European legislation, apart from police cooperation when the adoption of operational cooperation measures are required; in such cases, consultation procedure is required. This is also the case when establishing the conditions and limits within which national police and judicial authorities may operate within one Member State in cooperation or agreement with its authorities;

- one of the most innovative aspects is represented by the possibility of enhanced cooperation, arising from the agreement of at least nine Member States. The procedure is quite complex: whenever a member of the Council considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. The authorisation to proceed with enhanced cooperation referred to in Article 20 of TEU and Article 329 of TFEU shall be deemed to be granted and the provisions on enhanced cooperation shall apply;
- the overcoming of the lack of direct effect of the third pillars' acts. The measures adopted within Title IV of the TFEU have direct effect and may be enable single individuals to bring cases before national courts. This also supercedes the current practice of national parliamentary reservations, according to which some Member States may adopt a new legal instrument only after the approval by their own national Parliaments. However, according to art. 8 TEU, national Parliaments play an active role in the functioning of the Union through the attribution of powers aimed to the observance of the subsidiarity principle in the space of freedom, security and justice. They also take part in the evaluation and implementation procedures in that area, in compliance with art. 61 TEU. Finally, they are

involved in the political monitoring on the functioning of bodies such as *Europol* and *Eurojust*, as established in art. 85 TFEU;

- the increasing power of the Court of Justice, far beyond that stated in art. 35, assigning the Court a limited jurisdiction in areas such as preliminary ruling or legality and legitimacy control of decisions and framework decisions. Indeed, apart from the five-year transitional period for those third pillar's measures adopted prior to the entry into force of the new Treaty, and excluding the *opt out* procedures adopted by the United Kingdom, Ireland and Denmark, the Court of Justice exerts a jurisdiction on all acts adopted within judicial cooperation, as well as, after the transitional period, on the infringement procedures launched against Member States for failing to apply measures in this regard.

In the light of such observations, the Lisbon Treaty may be interpreted as a text indicating the highest objectives of the European Union's action in criminal matters, without establishing the minimum ones.

We may thus envision two scenarios for the near future of European criminal justice: the first, less ambitious, moves along the cooperation path through *Eurojust* and *Europol*, with the principle of mutual recognition playing the leading role. The second more audacious scenario assumes the adoption of the great innovation of the constitutional Treaty, integrally adopted by the Lisbon Treaty, and that create the European Public Prosecutor's Office[112].

Let us start from taking the former into consideration to investigate how the differences between national systems affect the criminal evidence issue. If a political agreement on the most innovative profiles cannot be reached, the European integration will follow old patterns. Following the framework decision on the European Arrest Warrant, it is likely that those initiatives aimed at

[112] On this topic see S. ALLEGREZZA, *L'armonizzazione della prova penale alla luce del Trattato di Lisbona*, in *Cassazione Penale,* 2008, n. 10, p. 3882B.

guaranteeing the free movement of evidence through the adoption of the mutual recognition principle, disregarding the harmonization principle, will soon receive wide consensus.

Art. 82 TFEU follows this line of action, by foreseeing the possibility to adopt, in accordance with the ordinary legislative procedure, directives containing minimum rules on mutual admissibility of evidence between Member States, directives on human rights in criminal proceedings, on directives on the rights of the victims of crime and, by unanimous consent, directives on other specific elements of criminal procedure preliminarily identified by the Council through a decision.

The implementation of such policies is gaining prominence and since the introduction of minimum rules, which can be ascribed to the procedure of harmonization, is taken into consideration only inasmuch as it may *"facilitate mutual recognition of judgments and judicial decisions"* (art. 82 TFEU).

Along with this horizontal intervention, aimed at guaranteeing the free movement of evidence between Member States, a vertical pressure is also applied. In regulating *Eurojust'*s activities, based on coordination procedures, art. 85 TFEU predicts the adoption of rules regulating *Eurojust*'s tasks, among which stands out "*the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union*". In such cases, the official acts of judicial procedure are executed by the competent national officials, according to the regulations in force in that specific system.

In this context, the analysis of the probative rules focuses on the points of contrast. With a view for mutual recognition, it is a top priority to identify and remove all obstacles to the free movement of evidence, although it is more about

the breaking down of all obstacles than about the process of building a shared system. The main objective is neither that of identifying the prevailing orientation, nor that of working out a common strategy promoting those procedural rules which best ensure the right balance between the need for justice and the protection of human rights. Such criminal policy favors the imposition of a result - the recognition of a legislative act issued by a foreign State - to the elaboration of a shared ideology. It represents the typical expression of the functionalist method adopted by the European Union from the beginning, which implies an unavoidable effect, the fragmentary nature and the instability of European criminal justice.

This does not rule out the possibility for the mutual recognition strategy to produce results that may prove useful in terms of a progressive merging of the different systems. This process does not occur directly but rather through the work of judges who are called to recognize the external act and are faced with the difficult task of resolving the contrasting points that the community legislator cannot resolve. Clear examples of this are found in the European Arrest Warrant jurisprudence, especially in regard to the maximum time limits of custodial detention an issue discussed within the Joint Chambers of the Court of Cassation[113].

The main protagonist of this judicial harmonization, the national court, is bound to the conforming interpretation principle as established by the Court of Justice in the renowned case *Pupino* and immediately adopted by the national court. The combination of the mutual recognition principle and the obligation for a conforming interpretation of this principle by national laws gave way to statements of the following type: "(*a flexible interpretation of the norm is acceptable in that it may adapt to the various procedural systems to which it is addressed, resisting the temptation to compare the meaning of evocative notions*

[113] Judgment Cassazione Penale Section Unified n. 41614 of the30th of January 2007, ric. *Ramoci* in *Cassazione Penale,* 2007, n. 5, p. 1911.

or expressions of specific institutions of the internal system to normative regulations conceived by Italian legislators for interstate projection)"[114]. Such affirmation is correct beyond any doubt, as no system can claim the legislative choice most protective of civil rights, especially in those cases where, as in our country for instance, there is so huge a gap between *law in books* and *law in action* as to cause complete inefficiency of the system[115].

As far as criminal evidence is concerned, it is clear that such an approach is incapable of promoting, in the long term, flexible systems that are less formal in regulating certain procedural aspects. This is even more evident with regard to witness statement procedures, where a line can be drawn between systems bound to a strict formalization of the admission and acquisition procedures, and others that refer the decision to the judges. This line also drawn between countries that do not apply strict divisions between phases and others that do not admit the debate of the investigation acts; and between systems which respond to codified probative rules and others which elaborate procedural rules on the basis of the Charter of Fundamental Rights. This leads to the parties confiding in the careful consideration of the judge.

More stimulating, though more uncertain, is the other perspective, wich is the assumption of the adoption of the European Public Prosecutor.

The idea of this institution has taken shape for over a decade. The first act, explicitly referring to the need for increased coordination in criminal matters, is the so-called Geneva Appeal of the 1st of October of 1996, a document through which *"seven European magistrates intended to draw the attention of the public opinion and demanded a vigorous intervention by the States emphasising the*

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114 Cfr. A. RAUTI, "*La Cerchia dei Custodi"* in C. SALAZAR and A. SPADARO *"Riflessioni sulle sentenze 348-349/2007 della Corte Costituzionale".*

115 S. ALLEGREZZA, *L'armonizzazione della prova penale alla luce del Trattato di Lisbona*, in *Cass. Pen.,* 2008, n. 10, p. 3882.

inadequacy of the judicial instruments provided by the European legislative systems in a time where, despite opening borders to men, goods and capital, judicial action remains limited and crime and criminals flourish". From these words, one can grasp the link between the territorial dimension of the Union and the new demands of criminal justice. The European Public Prosecutor is a compensatory measure for the imbalance aroused from the opening of borders and the subsequent broadening of the Union's borders.

The Lisbon Treaty offers only legislative support in that it refers to the actual establishment of the body to a future normative law (more specifically, a regulation). It represents a pivotal legal basis that strengthens the idea of a European Public Prosecutor, but that does not inform on the actual possibilities of such an initiative.

The entry into force of the Lisbon Treaty has allowed more tangible opportunities for the creation of a European Public Prosecutor's Office in the near future. Besides the pressures coming from the same community bodies, especially OLAF, there is another decisive factor: the possibility of enhanced cooperation between nine Member States where there is no unanimous consent (art. 86 TFEU)[116].

It has been said that enhanced cooperation increases the chances of success, but it also presents other problems. In particular, the elaboration of substantive and procedural common rules will undoubtedly follow the adoption of the European Public Prosecutor. It is therefore likely that the European

[116] The idea of enhanced cooperation does not meet the favour of all State Members: some think this may entail a further fragmentation of the European judicial space (J. BACQUIAS, *Freedom, Security and Justice: the new Lisbon (Treaty) Agenda*, in *European Policy Center*, 2008); whereas others claim it would be illogic that the financial interests of the Union be safeguarded by only a restricted group, since the juridical heritage - the financial interests of the Union - constitutes a common interest (D. FLORE, *Le ministère public européen*, presentation held at ERA on the 12th of February 2008).

regulation will refer to the paralegislative initiatives implemented throughout the last decade, in particular to the renowned *Corpus Juris* project and the subsequent Green Paper. A sort of micro codification for a sectional European judicial system will entail a real unification of fragments of law and procedure well beyond harmonization. It is likely, then, that enhanced cooperation will be first implemented in those countries where homogenous systems are already present due to historical or cultural reasons.

In the future we may witness an enhanced cooperation between similar systems that for the adoption of common rules will not imply the revision of basic choices in the judicial area. Free to act in partial autonomy, with no need to get the consensus of all Member States, some particularly proactive States may promote "regional" agreements with countries that are traditionally situated under their economic and jurisdictional influence. This process could be driven to its utmost degree, improbable but not ruled out by the Lisbon Treaty, of a creation of several microcosms.

If a majority of countries create the Office of the European Public Prosecutor other countries may consequently decide to join the initiative. It is a strategy already used throughout Europe, even in the judicial area. (See for instance the Schengen Agreement or the Prüm Treaty). A "magnet effect" occurs to those who are excluded from such agreements because they are subject to prejudice, at least insofar as their international image is concerned.

This could have several effects as far as criminal evidence is concerned. Even in the case where micro codification affects the preliminary phase only, the impact of common rules will not confine itself within the geographical and subject limitations foreseen in the first part (the European Public Prosecutor exerts judicial action before national jurisdictions, therefore the judgment phase should follow the rules of the various systems). In fact, for biphasic systems, as

the Italian one, it would be advisable to regulate also the debate aspects of the evidence acquired by the European Public Prosecutor, so as not to undergo the pressure of an act issued by a super prosecutor, which our system tends to reject.

However, there is the risk that, as stated in art. 86 TFEU, the European Public Prosecutor will only be competent in the first instance for those offences that affect the financial interests of the Union. Art. 86 TFEU establishes, though, that an agreement is established to broaden the European investigating body's subject matters to include all those offences falling under the category "*serious crime with a transnational dimension*". This could include organised crime, terrorism, trafficking of human beings, and internet crime. Basically all criminal phenomena already subject to a partial harmonization in their substantive aspect and on which the Union is prone to find a political solution may be included.

As regards to the procedural aspect, there is a risk that convergence may occur around those *ad hoc* rules, which the various systems exclusively apply to the aforementioned criminal offences. In other words, the choice of unifying some areas of criminal justice could trigger the collateral effect by which the *ad hoc* rules become the norm within the Union. For instance, if the emerging phenomenon is organized crime or terrorism, then the very rules aimed at combating them will prevail. In short, the spreading of specific types of criminal offences will in turn affect the choice of regulations.

This will inevitably lead to a flattening of civil rights and to the affirmation of rules which do not protect such rights, unless the Union reconsiders its criminal policies, based on a punitive dimension and urged by pressing criminal emergencies, by promoting civil rights and procedural guarantees and by rethinking harmonization more as an end than as a means. In this way, the European Union may establish common rules with the purpose of promoting a

policy as a defender of civil rights in a very sensitive area, namely the relationship between citizens and power.

III. b) The next steps: an overview

While waiting for the entry into force of the Lisbon Treaty, the European Union has continued its work in the area of police and judicial cooperation following the mutual recognition instrument (regardless of any prior harmonization action). Many are the initiatives, under the various Presidencies, in regard to both the harmonization of national legislations and judicial cooperation, through the launch of essential instruments based on the mutual recognition of judicial decisions. In particular the Council has adopted[117]:

- Council Framework Decision 2008/675/JHA of the 24th of July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings;
- Council Framework Decision 2008/841/JHA of the 24th of October 2008 on the fight against organised crime;
- Council Framework Decision 2008/909/JHA of the 27th of 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;
- Council Framework Decision 2008/919/JHA of the 28th of November 2008 amending Framework Decision 2002/475/JHA on combating terrorism;

[117] Cfr. E. APRILE - F. SPIEZIA, *Cooperazione giudiziaria penale nell'Unione europea prima e dopo il Trattato di Lisbona*, Ipsoa, 2009.

- Framework Decision 2008/947/JHA of the 27th of 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;
- Council Framework Decision 2008/913/JHA of the 28th of November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law;
- Council Decision 2009/426/JHA of the 16th of December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime;
- Council Framework Decision 2008/978/JHA of the 18th of December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters;
- Council Decision 2008/976/JHA of the 16th of December 2008 on the European Judicial Network.

While waiting for the national transposition of the abovementioned decisions and framework decisions adopted by the Council at the end of 2008, the operational aspects that mark the European scenario are established in the Stockholm Programme[118].

[118] European Council, Brussels of the 2nd of December 2009 (17024/09). With the purpose of identifying the contents of the new Plan, in January 2007, under German Presidency, a *High Level Advisory Group* was established with the aim of discussing the future of judicial policy in Europe after The Hague Programme. The acts issued so far have once again stressed the need for implementing measures aimed at solving the challenges the Union has still to face. The main objective, however, is the preservation of security, as well as the protection of civil rights through the recognition of minimum procedural rights in criminal investigation. Increased importance is assigned to the protection of children and the victims of crime, as well as the fight against organized crime and terrorism. Further initiatives are launched to strengthen the Union's external dimension, as well as the internal security, deepening coordination so as to approximate national policies to the supranational policy of the Union. The Commission, as institution in charge of defining the Union's strategies, has proposed a series of possible priorities for 2010-2014. The communication (COM (2009) 262) *"An area of freedom, security and justice serving the citizen"* proposes the following four priorities: 1) promoting citizens' rights: a Europe of rights. Citizen's privacy must be preserved beyond national borders, especially by protecting personal

In particular, the Stockholm Programme focuses on the following political priorities:

- Promoting citizenship and fundamental rights: through the observation of the Charter of Fundamental Rights of the European Union and the European Convention for the protection of Human Rights; citizens' privacy must be preserved beyond national borders, especially by protecting personal data; citizens of the Union and other persons must be able to exercise their specific rights to the fullest extent within, and even outside the Union; allowance must be made for the special needs of vulnerable people;
- a Europe of law and justice: priority should be given to mechanisms that facilitate access to justice, eliminating barriers to the recognition of legal decisions in other Member States and promoting and improving training among public professionals;
- a Europe that protects: an internal security strategy should be developed in order to improve security in the Union, tackling organised crime, terrorism and other threats, strengthening cooperation in law enforcement,

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data; the special needs of vulnerable people must be kept into account; citizens must be able to exercise their specific rights to the full; 2) making life easier: a Europe of justice. The objective is to promote mechanisms that facilitate people's access to the courts, so that they can enforce their rights throughout the Union. Cooperation between legal professionals should also be improved to put an end to barriers to the recognition of legal acts in other Member States; 3) protecting citizens, cooperation in police matters and law enforcement should be strengthened, making entry to a more secure Europe. A domestic security strategy should be developed in order to further improve security in the Union against organized crime and terrorism; 4) promoting a more integrated society for the citizen: a Europe of solidarity. It is necessary to promote a policy on immigration and asylum that guarantees solidarity between Member States and partnership with non-Union countries. A closer match should be developed between immigration and the needs of the European labour market, along with targeted integration and education policies. The practical use of the tools available to combat illegal immigration should be improved. The Communication was preceded by a public consultation phase involving more than 800 contributions by citizens, international and non-governmental organizations, as well as the same Governments of Member States, by means of cooperation between the Future Group and the European Parliament in regard to police, immigration and justice issues during the annual debate on the progress achieved in 2008 in the area of freedom, security and justice.

border management, civil protection, disaster management as well as judicial cooperation in criminal matters;

- access to Europe in a globalised world: access to Europe has to be made more effective and efficient through integrated border management and visa policies;

- a Europe of responsibility, solidarity and partnership in migration and asylum matters: the development of a Union migration policy, based on solidarity and responsibility, and based on the European Pact on Immigration and Asylum with the objective of establishing a common asylum system in 2012 to guarantee access to legally safe and efficient asylum procedures; the necessity to control and combat illegal immigration as the Union faces increasing pressure from illegal migration flows, and particularly the Member States at its external borders, including at its Southern borders;

- the role of Europe in a globalised world - the external dimension - the importance of the external dimension of the Union's policy in the area of freedom, security and justice underlines the need for increased integration of these policies into the general policies of the Union.

The European Council has urged the Commission to present an action plan to be adopted in June 2010, as well as an intermediate revision in June 2012.

III. c) The principle of the mutual recognition

Observations on the European Evidence Warrant confirm what emerged through the early application of the European Arrest Warrant[119], namely that the

[119] Communication from the Commission to the European Parliament and the Council, *Communication on the mutual recognition of judicial decisions in criminal matters and the*

mutual recognition transposition process from the internal market to criminal justice is far less straightforward than one could expect. In the face of such difficulties, three options are available[120].

The first is admitting the failure of the experiment and returning to the "old" system of intergovernmental cooperation. This is the less likely option, mainly because Member States, despite the difficulties encountered, are not prone to reject the choices made in Tampere. In fact, in The Hague Programme for 2005-2010 the Heads of State and Government confirmed mutual recognition as the *cornerstone* of cooperation in criminal matters.

The other option, in opposition to the former, would be to not only decentralize the Union's wide legislative jurisdiction in criminal matters, but to also establish an efficient control system to ensure the full respect of obligations by Member States. It seems obvious that such a solution would imply a rethinking of the relationship between the Union and the Member States in the federal sense.

The third option, the only realistic approach, is the one that places the mutual recognition principle as the main protagonist of judicial cooperation within the Union for many years to come.

It is thus necessary to identify weaknesses within the judicial cooperation in criminal matters to address possible measures to improve its function. It is

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strengthening of mutual trust between Member States COM (2005) p. 195, of the 19th of May 2005. Such difficulties are highlighted in the Communication from the Commission to the European Parliament and the Council, *Report on the implementation of the Hague Programme for 2005*, COM (2003) p. 333, of the 28th of June 2006, which points out that the measures envisaged by the European Council of The Hague 2004 regarding judicial cooperation in criminal matters are in delay with respect to the original schedule; this is particularly true in regard to the adoption of two fundamental measures, such as the framework decisions regarding the European Evidence Warrant and the minimum rights of defendants. Object of the Commission's critique are also, on the one hand the insufficient implementation of the minimum harmonization principle as established in the framework decision on terrorism, on the other the difficulties encountered in regard to the European Arrest Warrant.

120 On the issue read A. PASQUERO, *Mutuo riconoscimento delle decisioni penali: prove di federalismo*, Giuffrè, Milano, 2007.

particularly necessary to understand the reasons of the difficult implementation of the mutual recognition principle.

We could explain such difficulties by pointing out that judicial cooperation is a sensitive issue, very much linked to the sovereignty of Member States, who do not always share the same views on criminal policies. Member States, in short, would not be ready to fully accept the mutual overture that the mutual recognition principle requires. In other words, to accept the idea of not being "*Sovereign states which cooperate in single cases, but members of the Union with an obligation to help each other*"[121].

This is undisputedly true and explains from a political viewpoint the reasons for the limited success of the mutual recognition principle in criminal matters. It is, however, not sufficient to explain the reasons behind the limited success of the mutual recognition principle. It is therefore necessary to comprehend the specific reasons which make criminal matters so different from the internal market, so that we can see why a principle that has worked so well in the latter, has met so many difficulties in the former.

Here we will try to understand, in light of what is stated in the previous chapters, if the roots of the implementation problems of the mutual recognition principle lay in the lack of one or more elements, which were originally identified as prerequisites of mutual recognition itself. We will do so in order to verify if these are the conditions for this principle to function in criminal matters as well.

[121] Advocate-General Colomer, Conclusions regarding case C-303/05 of the 12th of September 2006.

III. c) (1) The evolution of the mutual trust

Focus should be placed on one of the main causes of the difficulties encountered by the mutual recognition principle in criminal matters, namely the level of trust existing between Member States.

Mutual trust represents, in a sensitive area such as the judicial one, the essential condition for the free movement of judicial decisions. For instance, within the free movement of evidence, it is clear that the decrease (or abolition) of political and jurisdictional controls in such procedures is acceptable only to the extent to which it occurs within States that mutually trust the functioning of their respective judicial systems. It is not the case that the framework decision concerning the European Evidence Warrant (as well as the former framework decision on the European Arrest Warrant), finds its foundations (or legitimacy) in the underlying mutual trust between the States involved.

Mutual trust is intimately linked to the belief that all Member States of a system are able to provide adequate protection of the same guarantees. If, for instance, in the area of the free movement of goods, the guarantees are consumers' protection and healthcare, than in the judicial area the guarantees are linked to the protection of fundamental rights. A Member State can execute a foreign judicial decision if it can be trust that their own authorities would ensure all the rights and guarantees promoted by the foreign authorities.

III. c) (2) The European system

If it is true that the framework decision regarding the European Evidence Warrant (as well as other instruments based on mutual recognition) finds its justificatory reason in the mutual trust existing between Member States, it is also

necessary to question oneself on the existence of such "*high level of mutual trust*".

The Community institutions, Commission and Council above all, show no doubts in this regard. Such a firm belief is supported by the fact that the execution of a European Arrest Warrant occurs within a system that is founded on human rights. A system in which all States guarantee the observation of basic human rights, such as the right to a fair trial, the death penalty ban, or the banning of torture and other cruel, inhuman or degrading treatment or punishment. The very fact of belonging to the European Union, an organization founded on human rights[122], embodies that fundamental rights are protected by all Member States. Finally, it should be observed that in order to guarantee the protection of such principles (or to sanction the lack of protection) Member States benefit from efficient mechanisms, both internal (such as the procedure as in art. 7 TEU[123]), and external (such as the recourse to the ECHR) Mutual trust between Member States, in and of founded on the mutual belief of the pivotal role of fundamental rights, would be further strengthened by such control instruments.

Another token of mutual trust between Member States is found in the asylum requests by Member States' citizens. Protocol n. 29 of the Treaty Establishing the European Community addressing the issue, reinforces that all States agree with the ECHR and the Geneva Convention on the refugee *status*, and affirms that "*Given the level of protection of fundamental rights and*

122 Cfr. art. 6 TEU - The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of the 7th of December 2000, as adapted at Strasbourg, on the 12th of December 2007, which shall have the same legal value as the Treaties.

123 Cfr. art. 7 TEU - On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6 para. 1, and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters".

This issue shows that Member States believe that, within the Community territory, there is no ground for a violation of fundamental rights, except in exceptional situations. Adherence to international instruments of safeguard and control mechanisms makes of Member State a "safe country". Finally, we can observe that in judicial cooperation in civil matters the hyper-simplified procedure proscribed by regulation 44/2001 and 2201/2003 are based on the mutual trust between Member States[124].

However, the community institutions' position in regard to the existence of a "*high level of mutual trust*" and of the impossibility of the violation of fundamental rights between Member States is too optimistic.

It is not possible to change the system of *"protection of human rights / mutual trust / mutual recognition"* because the European Union lacks a Constitution common to all its States.

It is not acceptable to use the guarantee system as a substitute for a Constitution (with its jurisdictional safeguard system). Sanctions, as seen in ex art. 7 TEU do not represent a satisfactory guarantee. Essentially it is political procedure, unfit to satisfactorily respond in terms of human rights protection.

The protections offered by the ECHR system are not sufficient to justify, on their own, the mutual trust between Member States. This is significantly true in the transition from a theoretical to a practical level.

Drawing attention to the *modus operandi* followed by the Court of Strasbourg, it emerges that the fairness of the procedure is appreciated according to a global evaluation. Indeed, the European Court considers the procedure as a

[124] Cfr. Regulation 44/200 n. 16 and 17 and also Regulation 2201/2003 n. 21.

whole and evaluates whether its results are compatible, in regard to their fairness of judgment, with the provisions and rationale of art. 6 of ECHR.

Such conceptual perspective also finds its explanation in its effects on the fair trial principles as structured by convention law, which largely differ from those constitutionally conceived.

While by our Constitution the fair trial is considered as an objective principle for the functioning of the proceedings and is the most suitable method for the determination of truth[125], in supranational provisions, this is as a subjective right and is safeguarded as such[126]. The judgment of the Court considers the fairness of procedure as a whole. If, as a whole, the procedure is fair[127], no fault in the national procedure can violate the Convention. This is particularly evident in regard to the admissibility of evidence[128].

The Court is not interested in legislative solutions in and of themselves, but rather on the effects of their practical implementation. This standpoint favors the actual protection of fundamental rights, leaving the formal regularity/irregularity aspects in the background.

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125 Cfr. G. UBERTIS, *Sistemi di procedura penale I - Principi generali*, Torino, Utet giuridica, 2007, p. 132, cit. On the heuristic value of the contradictory principle the Constitutional Court pronounced itself, defining the *"contradictory principle as a means for knowledge"* (Judgment of the Constitutional Court of the 20th of February 2002, n. 32 in *Giur. Cost.* 2002 p. 291).

126 Cfr. C. CESARI, *Prova irripetibile e contraddittorio nella Convenzione europea dei diritti dell'uomo*, comment to ECHR judgment of of the 5th of December 2002, Craxi *v.* Italia, in *Riv. It. Dir. Proc. Pen.* 2003 p.1036 s.

127 Reference of art. 6 of the Convention to *"fair trial"* is enriched by developments deriving from the European Court jurisprudence. Examples of this can be found in the integration of a list of conditions necessary for a fair trial, pinpointing other implicit or presupposed conditions, such as the right of access to a court (according to judgment *Golder v. United Kingdom* of the 22th of February 1975) on which the jurisprudence of immunity is founded (in detail *Avid v. United Kingdom*, of the 17th of December 2002; *Cordova (n. 1 e n. 2) v. Italia*, of the 30th of January 2003; and (non definitive) *Kart v. Turkey*, of the 8th of July 2008.

128 V. ZAGREBELSKY, *Corte europea dei diritti dell'uomo e "processo equo"*, Presentation at XX Convegno Nazionale Associazione tra gli studiosi del processo penale Gian Domenico Pisapia - Torino 26-27 settembre 2008.

The adherence of internal institutions (legislative, jurisdictional) to the principles of the Convention will be hardly applied unless legislative technique and judicial culture take into account the European Court's attitude.

Such critical observations are confirmed by the judgment of the European Court in response to the appeal filed against the different countries of the European Council in terms of judgment by default and admissibility evaluation of evidence (in particular in regard to witness evidence).

III. c) (3) Critical remarks

The implementation problems of the European Arrest Warrant - the very first instrument based on the mutual recognition of judicial decisions - and those which will be encountered in the implementation of the European Evidence Warrant expose the contradictions which characterize judicial cooperation in criminal matters as established by the Amsterdam Treaty, and then by the Lisbon Treaty. This highlights a system that is halfway between what is no longer a mere intergovernmental cooperation and what it aspires to be (a system based on a federal model).

The option of adopting the mutual recognition principle as foundation of such system is pivotal to the reform. But the mutual recognition principle, which encouraged the development of the internal market as well as cooperation in civil matters, has worked well in these fields because they were less sensitive and had undergone a more or less significant approximation of legislations. It has been observed that "*until it was about recognizing bank and insurance activities, diplomas and qualifications, the mutual recognition principle did not show any inconvenience which could not be compensated by the advantages it offered*"[129].

[129] Cfr. U. DRAETTA, *L'Europa nel 2002*, Milano, 2002.

In the light of the research carried out, there is no doubt that this was not the case within cooperation in criminal matters, where the institutions' enthusiasm had to deal with the States' attachment to their own, often divergent, conventions and juridical traditions. It is easily understood that such observations legitimize the position of those who believe that the European Arrest Warrant and other initiatives such as the European Evidence Warrant are based on mutual recognition and represent "*fughe in avanti*"[130] *(a leap forward)*.

We cannot but agree with such a remark, not much because the framework decisions adopted so far are too advanced an instrument *per se*, but because the prerequisites for the functioning of the mutual recognition principle (above all mutual trust) are lacking.

Despite all the difficulties encountered, the mutual recognition of criminal decisions is destined to play a leading role in the functioning of judicial cooperation in criminal matters within the European Union for two reasons.

The first is that, once the idea of a serious constitutional reform of the Union vanished, the possibility of making the reforms needed for the establishment of a real "European judicial space" are fading. In other words, the system envisioned by the third pillar (based on the mutual recognition principle) will possibly represent for many years to come the political-institutional frame work for cooperation between Member States in criminal matters (as the recent legislative provisions of the Lisbon Treaty show).

The second, more radical, reason is that even if such a reform is successful, the relationship between Member States will still be governed by the mutual recognition principle.

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[130] Cfr. M. DE SALVIA, *Il mandato d'arresto europeo: una fuga in avanti?*, in M. Pedrazzi (ed.), *Il mandato d'arresto europeo e garanzie della persona*.

However, the very principles of judicial cooperation should be rexamined. The mutual recognition principle cannot alone carry the weight of an enlarged, thus more heterogeneous European Union.

The situation could worsen with the entry into force of the Lisbon Treaty which revolutionizes the entire judicial cooperation discipline. The Community method will, in fact, be extended to the third pillar acts and the adoption of a qualified majority will be implemented as an ordinary voting regimen.

Framework decisions will leave their place to directives and regulations, with obvious effects on the internal sources system. The European Court of Justice will assume broader subject matters, with the possibility to judge criminal procedure rules, which it has not so far done.

Despite the fact that the Lisbon Treaty states that mutual recognition, as well as the approximation of legislations, will remain the guiding principles in the field, a clash between the strengthening of the European legislation and the permanence of serious divergences between national systems can be foreseen.

In order to avoid this, a change in priorities is desirable. A change that emphasizes harmonization, and recycles the framework decision project aimed to guarantee the legal rights of the defendant[131].

[131] O. MAZZA, *Il principio del muto riconoscimento nella giustizia penale, la mancata armonizzazione e il mito taumaturgico della giurisprudenza europea,* in *Rivista del diritto processuale* 2009, Milano, p. 393 ss.

SECOND PART

THE EXECUTION OF THE EUROPEAN ARREST WARRANT IN THE EUROPEAN UNION: LAWS, POLICIES AND PRACTICES

Section Two - European Arrest Warrant (EAW)

Chapter IV. Cooperation in criminal matters within the European context

In this chapter it will be analyze the cooperation in criminal matters through a historical perspective, with the goal of examining the European Arrest Warrant in its developing phases. We will do this in three stages:

1. by offering an outline of the principal forms of cooperation in criminal matters;
2. by focusing on the European extradition model as the established form of cooperation to the extent in which it affects the principles of sovereignty and jurisdiction;

3. by offering a historical overview of the developments of European cooperation from the early informal structures to the EU legislative framework.

IV. a) European forms of cooperation in criminal matters

Four main methods of cooperation in criminal matters are generally recognized: mutual assistance in criminal matters, transfer of proceedings, enforcement of foreign judgments, and extradition[132]. Mutual assistance in criminal matters was first implemented through the European Convention on Mutual Assistance[133], which encouraged the Ministries of Justice or, where urgent, the judicial authorities of the States Parties to cooperate.

Upon request, assistance took place for a number of measures seeking the punishment of offences that fell under the jurisdiction of the issuing State at that given time. Requests could concern the hearing of witnesses before a court of the requesting State, the gathering of evidence through a rogatory, or the exchange of information on judicial records. Refusal of acting upon the request could occur in cases where the executing State considered the offence as extraditable under its domestic law and/or responded to the double criminality requirement, or else where the execution of the request might harm its interests. Due to the many grounds for refusal, a Convention was proposed in 2000 to make cooperation

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132 On this issue cfr. D. MC CLEAN, *International Co-operation in civil and criminal matters* (OUP 2002); E. MULLER - RAPPARD, "Inter-State Cooperation in Penal Matters Within the Council of Europe Framework", in M. C. BASSIOUNI (ed.), *International Criminal Law, Procedural and Enforcement Mechanisms* (2nd ed. Transnational Publishers 1999) p. 331.

133 European Convention on Mutual Assistance in Criminal Matters, 20/04/1959, Strasbourg, ETS n. 30. As of the 18th of February 2009, it has been ratified or acceded to by 47 States, 27 of which EU Member States. See also retrieved on the 10th of May 2012 from http://conventions.coe.int/.

more effective[134]. This, however, did not offer a solution, since it did not allow refusal for offences that are considered non extraditable under the law of the executing State or are not defined by its internal law. Furthermore, it does not apply to political, fiscal, and military offences. As stated in the Preamble, provisions for the present Convention arise from the mutual trust the State Parties have in their legal systems[135] and include innovative measures, among which the interception of terrestrial and satellite communications and hearings of witnesses by videoconference or telephone. Such measures are considered essential, even though they are at times at odds with the protection of the rights of individuals.

As concerns the transfer of proceedings and the enforcement of foreign judgments, we might affirm that they have in some ways been governed by a tacit principle of mutual recognition of judicial decisions. The challenges faced by the States in tackling new forms of crime urged them, in the last two decades, to diminish the role played by the principle of sovereignty to focus on the development of new cooperative instruments. The Union is confronted with many issues related to the recognition and enforcement of judgments[136]. For instance, some States apply three different kinds of penalties involving deprivation of freedom (penal servitude, imprisonment, and detention), while others only recognize one or two. Also, minimum and maximum sanctions consistently vary.

Adoption of early instruments occurred within the Council of Europe, among them the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders and the European Convention on

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134 Council Act of the 29th of May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *OJ* C 197 12/07/2000 and Protocol, *OJ* C 326 16/10/2001 and Explanatory Report, *OJ* C, 30/11/2000. Ratified by 23 Member States and entered into force of the 23th of August 2005.

135 Cfr. E. DENZA, "The 2000 Convention on Mutual Assistance in Criminal Matters" (2003) 40 *Common Market Law Review,* p. 1047.

136 D. MC CLEAN, *International Co-operation in civil and criminal matters, supra.*

the Punishment of Road Traffic Offences, both of the 30th of November 1964[137]; the European Convention on the International Validity of Criminal Judgments, agreed upon at The Hague, May 1970; the Convention on the Transfer of Sentenced Persons of the 21st of March 1983. Other measures were adopted within the European Communities, as in the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of the 13th of November 1991. All of the abovementioned Conventions have a regional or sub-regional scope[138].

These Conventions converge on a series of points, such as the acceptance that enforcement be regulated by the executing State; the provision of a series of grounds for refusal; the possibility for States to arrest the offender and seize their assets on behalf of another State; and the possibility for a State to convert a penalty applied in another State into a comparable penalty in accordance with its national law, (excluding any aggravation of the penalty in question).

The principle of mutual recognition was then moved within the European Union framework through a proposal made during the Cardiff European Council[139], which eventually resulted in the inclusion of the principle in the Third Pillar within the Tampere European Council. However, despite the fact that the principle of mutual recognition represents "the cornerstone of judicial cooperation in both civil and criminal matters within the Union"[140] in an area of

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137 ETS n. 51 and n. 52, entered into force respectively on 22/8/1975 and 18/7/1972.

138 See respectively The Hague, 28/5/1970, ETS n. 70; Strasbourg, 15/5/1972; ETS n. 73; Strasbourg, 21/3/1983; ETS n. 112, ratified by 11, 13 and 27 EU Member States respectively as of the 18th of February 2009. Also cfr. E. MULLER - RAPPARD, "Inter-State Cooperation in Penal Matters Within the Council of Europe Framework", in M. C. BASSIOUNI (ed.), *supra*.

139 Cardiff European Council (15th – 16th June 1998) Presidency Conclusions, para. 39, available at http://europa.eu/european_council/conclusions/index_en.htm. The UK was the main promoter of the principle of mutual recognition. Tampere European Council (15th – 16th October 1999) Presidency Conclusions, para. 33, see link above.

140 Tampere European Council (15th – 16th October 1999) Presidency Conclusions, para. 33, see link on the above note.

freedom, security and justice, in actual facts its definition is quite blurred and does not offer much related case law[141]. This leads us to conclude that mutual recognition remains more an abstract political concept than an actual juridical one.

The Vienna Action Plan[142] urged for the adoption of those measures, already established by the Treaty of Amsterdam, aimed at facilitating mutual recognition of decisions and enforcement of judgments in criminal matters[143]. The Action Plan also pointed out the convergence between Article 32 lett. e) TEU regarding the prevention and fight against crime and Article 61 lett. a) TEC related to the free movement of persons[144] with the need to establish minimum rules about the elements of penalties in relation to organized crime, drug trafficking and terrorism[145]. A Communication from the Commission on the Mutual Recognition of Final Decisions in Criminal Matters reports on the developments of the abovementioned agenda[146] and highlights the unsuitability of the instruments used so far to establish mutual recognition. It also highlights the weakness of the request principle on which judicial cooperation in criminal matters is founded. Common rules on jurisdiction were needed, and grounds for refusal had to be lowered. The establishment of a European registry of criminal sentences and proceedings represents a step forward in solving *ne bis in idem* and

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141 However, the ECJ sustained in Joint Cases C-187/01, *Gozutok and Brugge* (2003) ECR I-01345 that the *ne bis in idem* principle according to Art. 54 of the 1990 Schengen Convention that the Member States "have mutual trust in their criminal justice systems and that each of them recognized the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied" (par. 33).

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

143 *Ibid.* point 45 lett. (f).

144 *Ibid*. points 5 and 25.

145 *Ibid.* points 18 and 46 (a) and (b).

146 Communication from the Commission to the Council and the European Parliament - Mutual Recognition of Final Decisions in Criminal Matters, COM (2000) p. 495 final.

jurisdiction issues, while catering to data protection[147]. The idea of drawing on what is already established within the area of civil and commercial matters was also proposed by the Commission when trying to establish common rules on jurisdiction and envisaging the competence of a single Member State. These minimum rules should serve as a translation of the text and a control on the competence of the issuing authority. In conclusion, international cooperation at this stage seems to be characterized by a heightened efficiency and less discretion.

In November 2000, the European Council issued a Programme of measures with the view of implementing mutual recognition of decisions in criminal matters[148]. The main priority of the Programme was that of drawing up an instrument on mutual recognition of decisions on the freezing of evidence and of an instrument on mutual recognition of orders freezing assets. The implementation of an arrest warrant constituted only a secondary priority and was proscribed only for the most serious offences, as in Art. 29 TEU, i.e. terrorism, trafficking of persons and offences against children, ilicit arms trafficking, ilicit drug trafficking, corruption and fraud[149].

However, following the events of 9/11, the Council Framework Decision on the European Arrest Warrant[150] became an overriding need and was extended to a wider range of crimes punishable by the law of the issuing State through a custodial sentence or detention of at least 12 months, or where a sentence or a

147 The Vienna Action Plan, point 49 (e) already established a register of pending cases, a measure to take place within five years of the entry into force of the Amsterdam Treaty.

148 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, *OJ* C 12/02 15/01/2001.

149 The Programme also refers to Recommendation n. 28 of the European Union's Strategy for the beginning of the new millennium, which envisaged the possibility to create a single European legal area for extradition.

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

detention order have been made, of at least four months. This Framework Decision was post dated by the Council Framework Decision on the freezing of assets, confiscation of crime-related proceeds, and on the application of mutual recognition to financial penalties.

A multiannual programme, first developed by the Tampere Programme, was further developed by the Hague Programme at the European Council of the 4th and the 5th of November 2004. The purpose was to establish ten priorities and evaluate the implementation of measures in the field of freedom, security and justice for the periods from 2005-2009. Priority n. 9 stated that, "(…) Approximation will be pursued, in particular through the adoption of rules ensuring a high degree of protection of persons, with a view to building mutual trust and strengthening mutual recognition, which remains the cornerstone of judicial cooperation"[151].

The Action Plan[152] implementing the Hague Programme provides a greater number of measures, as part of a wider framework including the Drugs Action Plan, the Action Plan on Combating Terrorism and the Strategy on the external aspects of the area of freedom, security and justice. A "scoreboard plus", an annual report on the implementation of the Hague Programme, was first introduced in 2006[153].

Of course, the debate on mutual recognition is ongoing and all but straightforward. During an informal JHA Ministerial Meeting in Tampere, from the 20th through the 22th of September 2006, the Commission and the Parliament

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151 Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten Priorities for the next five years - COM (2005) p. 184 final.

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

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

supported the use of the "bridging" clause. The "bridging" clause was backed by Finland and France while Germany, Ireland, the Netherlands and Slovakia were in favour of retaining their veto power. The UK firmly opposed the proposal[154]. A compromise was made in order to apply the so-called "emergency break" procedure, already established by Art. III (270 and 271) of the European Constitution, allowing Member States to opt out of proposals at odds with their national penal systems[155].

However, an in-depth analysis of mutual recognition will occur in the next chapter, while the next section focuses on extradition as the most traditional form of cooperation. This will be done with the purpose of demonstrating how the EAW constitutes a point of convergence between mutual recognition and extradition.

IV. b) The European extradition model

Extradition is a mechanism of international cooperation where two or more States agree to assist each other in criminal matters[156]. This entails surrendering a person to the issuing State to be prosecuted. Extradition can take place either on the basis of a bilateral or a multilateral Treaty, or without any prior agreements.

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154 Assemblé Nationale, Rapport d'information n. 2829 sur les conséquences de arret de la Cour de Justice 13 septembre 2005, 25 janvier 2006; House of Lords European Union Committee, 42nd Report, Session 2005-06, of the 28th of July 2006, p. 35; *EU wants more power in criminal matters*, EUObserver.com, of the 8th of May 2006; *EU to clash on National justice vetoes*; EUPolitix.com, of the 20th of September 2006.

155 *Interview with F. Frattini*, EUPolitix.com, of the 26th of June 2006; *Drive to give European court a role in settling asylum cases*, Financial Times, of the 28th of June 2006. Also cfr. Treaty Establishing a Constitution for Europe, OJ C 310 16/12/2004.

156 M. C. BASSIOUNI, *International Extradition: United States Law and Practice* (5th ed., Oceana Publications Inc. 2007); M. C. BASSIOUNI, "Reforming International Extradition: Lessons of the Past for a Radical New Approach" (2003) on the 25th *Loyola International and Comparative Law Review,* p. 389; G. GILBERT, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff, The Hague-Boston-London, 1998); I. SHEARER, *Extradition in International* Law (Oceana Publications Inc., Manchester 1971).

Most common law countries agree on extradition exclusively on the basis of a Treaty[157]. Existing agreements generally impose the executing State to extradite the offender, or alternatively, to prosecute him/her (*aut dedere aut judicare* principle[158]), thus relying on reciprocity and comity[159].

The extradition process normally begins with a request formally transmitted via diplomatic or governmental channels. The Treaty or National Act of the executing State usually reference the documents needed.

Treaties normally enable States to obtain provisional arrest of the requested person by means of an exchange of information between the competent authorities or through a "red individual notice" issued by Interpol[160]. However, the law of the executing State controls the extradition procedure[161]. Although the judiciary can exercise some control, the executive's intervention is decisive. Due to the differences existing between civil law countries, where surrender procedure must be validated by a criminal court[162], and common law countries where its

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157 However, the UK also allows *ad hoc* extradition. Cfr. The UK Extradition Act 2003 (c. 41) and Explanatory Notes.

158 M. C. BASSIOUNI, E. WISE, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, London-Dordrecht 1995), suggesting that this rule could be considered not only part of a customary International law, but also a *jus cogens* norm. The term is a modern version of the maxim *aut dedere aut punire*, used by H. GROTIUS, *De Jure Belli ac Pacis* (Book II, Chapter XXI, para. III and IV 1625) p. 526-528 (*Classics of International Law* 1925). See again M. C. BASSIOUNI, *International Extradition, supra*, p. 5.

159 See M. C. BASSIOUNI, *International Extradition, supra.*

160 A "red notice" is based on an arrest warrant (if a person is wanted for prosecution) or a court order (if a person is wanted for the purpose of serving a sentence). On the basis of the information contained in the "red notice", the competent authority decides whether to allow provisional arrest. After that, the issuing country is notified of the person's detention and starts the formal extradition procedure. See www.interpol.int.

161 These rules differ from one State to another. For instance, some States, (e.g. Austria, Germany) have established a comprehensive piece of legislation dealing with any form of cooperation in criminal matters. Other countries (e.g. Italy) have included it in a specific section of their criminal procedural codes. Yet others (e.g. UK) have enacted separate legislations for each form of international cooperation in criminal matters.

162 Cfr. G. VERMEULEN, T. VANDER BEKEN, "Extradition in the European Union: State of the Art and Perspectives" (1996) on *European Journal of Crime, Criminal Law and Criminal Justice* p. 200.

admissibility can be reviewed in *habeas corpus* proceedings[163], requests must be submitted to a local magistrate or the government. An administrative phase where a final decision is made by the executive branch follows this judicial phase. A negative decision made by a court is in many cases binding upon the government[164].

There are many different extradition models. The European model stands out due to the dramatic changes it has undergone. This section provides a broad overview of these dramatic changes and explores the fundamental principles and exemption rules of extradition law (*prima facie* evidence, nationality, speciality, territoriality, double criminality, extraditable offences, military, fiscal and political offence exceptions, *ne bis in idem*, fair trial or asylum clause, death penalty).

Early examples of multilateral arrangements in Europe can be traced back to 1957 with the European Convention[165] due to the increasing legal and political homogeneity of the European States[166]. This process included the partial dismissal of the old model and the adoption of a more modern view that emphasizes the role of the offender as a subject, rather than the mere object of

163 Cfr. I. A. SHEARER, *Extradition in International Law, supra.*

164 For further information on national extradition procedures, see European Committee on Crime Problems, European Convention on Extradition - *A Guide to Procedures*, of the 2nd of October 2003, PC-OC INF 4 at www.coe.int.

165 European Convention on Extradition and related Explanatory Memorandum, ETS n. 24, Paris 13/12/1957.

166 M. MACKAREL, S. NASH, "Extradition and the European Union" (1997) 46 *International and Comparative Law* Quarterly p. 984; G. VERMEULEN, T. VANDER BEKEN, "Extradition in the European Union, *supra*; H. J. BARTSCH, "The Western European Approach" (1991) on the n. 62 of the *International Review of Penal Law* p. 499.

criminal proceedings[167]. It also offered a general framework to which each State could contribute to by means of bilateral or multilateral arrangements[168].

The abovementioned Convention introduced a number of pivotal changes, including the refusal to provide evidence of a *prima facie* case of guilt, unless the executing State has made specific requests[169]. Some sort of evidence is needed to evaluate if the conduct for which the request has been issued for is punishable through the deprivation of liberty or through a detention order for a maximum of at least one year, or (in case a sentence or detention order have already been issued) for which a punishment of at least four months applies. We are dealing with the "minimum maximum penalty threshold", a traditional mechanism aimed at confining extradition to the most serious offences[170]. This option was preferred over the "enumerative" method, which consisted of a listing of offences for which extradition can be requested. The "minimum maximum penalty threshold" is considered to be more adaptable to the changing priorities within the criminal policy of the States. However, for the eliminative method to function correctly it is necessary that the different legal systems involved apply similar penalties. The requirement of double criminality, for which offences must be punishable under

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167 European Convention Explanatory Memorandum, ETS n. 24, Paris 13/12/1957. During the negotiations Scandinavian delegates pointed out the model followed by their countries, based on mutual trust and facilitated by the "great similarity between the penal codes of Scandinavian countries in their definition of offences".

168 G. GILBERT, *Transnational Fugitive Offenders in International Law, supra.*

169 This is a typical requirement of common law countries, although Israel, for instance, still requires the making of a *prima facie* case by virtue of a reservation made on the 27th of September 1967. Interestingly, the 1988 Criminal Justice Act and the 1989 Extradition Act allowed the UK to make agreements with foreign States whose domestic law did not require *prima facie* evidence. Hence, the UK was able to ratify the Convention on the 13th of February 1991. See D. PONCET, P. GULLY-HART, "The European Approach" in M. C. BASSIOUNI (ed.), *International Criminal Law, Procedural and Enforcement Mechanisms* (2nd ed., Transnational Publishers 1999) p. 277.

170 Two exceptions are outlined in Article 2: 1. extradition may be granted below this threshold whenever the request includes offences punishable by at least one year's imprisonment (accessory extradition); 2. a State Party can exclude specific offences from the application of this rule.

the laws of both States involved[171], is respected by the States on the grounds of reciprocity and is a consequence of the *nulla poena sine lege* principle (no crime without a law).

Some changes occurred also in regards to the grounds for refusal, whose rationale consists in preserving State sovereignty and individual rights. However, a secondary effect is that they may hinder cooperation in the suppression of criminality. The result of a compromise between different approaches to the grounds for refusal as established by the Convention provision had the opposite effect of what was expected, the speeding up of the procedure. The overabundance of grounds for refusal in the 1957 Convention, which allowed the States a wide discretion in allowing surrender procedure, were an obstacle to cooperation. Specifically, as concerns nationality, the right to refuse extradition is allowed (Article 6), although it is combined with the *aut dedere aut judicare* principle[172]. In case of a refusal, the issuing State can require that the case be submitted to the competent authorities, excluding legal proceedings if not appropriate.

The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[173] included a similar procedure. Here, however, options to limit or exclude this exception were taken into consideration, but were eventually dropped[174]. The mechanism outlined in Articles 6 para. 5, 4 para. 2 lett. a) and 6 para. 9 of this Convention implies that, in the case where

171 M. PLACHTA, "The Role of Double Criminality in International Cooperation in Penal Matters", in N. JAREBORG (ed.), *Double Criminality Studies in International Criminal Law* (Iustus Forlag, Uppsala, 1989).

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

173 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances available at http://www.unodc.org/pdf/convention_1988_en.pdf in date of the 13th of May 2012.

174 Commentary on the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances, United Nations Publications, New York 1998, p. 157.

extradition is rejected on grounds of nationality, the various States establish jurisdiction for the offences committed by the person, whom may be prosecuted or serve the sentence imposed on them. Such a provision, however, is not the equivalent of the extradition Convention, which means that they only refer to existing or future extradition Treaties without an obligation for the Parties. All extradition Treaties have been amended in order to include drug trafficking offences, as established by Article 3 para. 1, to be included as extraditable offences in future Treaties. Inter alia, paragraph 3 (addressed to those States that only apply extradition procedure on the basis of a Treaty) states that the Convention *may* be used as the legal basis for extradition and not as a Treaty in and of itself[175].

Under the European Convention, States can refuse a request for political, military or fiscal offences (Articles 3, 4, 5). In the first case, we are dealing with the remainders of a historical period where surrender procedure was mostly applied in cases where the political stability of a State was threatened. It is a concept deriving from the principles of freedom and democracy, which in the 18th century constituted a "weapon" for Europe against the oppression of absolutist States[176], and it is limited by two rules:

1. the so-called "Belgian clause", which excludes its application in the cases of murder or attempted murder of a Head of State or their family members;

[175] J. SCHUTTE, "Extradition for drug offences: new developments under the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotic Substances" (1991) 62-1/2 *Révue International de Droit Penal* p. 137; N. BOISTER, Penal Aspects of the UN Drug Conventions (Kluwer Law International, The Hague 2001) p. 260.

[176] M. C. BASSIOUNI, *International Extradition, supra*, p. 33 and p. 594-676; G. GILBERT, *Transnational Fugitive Offenders, supra,* p. 203-334; C. VAN DEN WYNGAERT, *The Political Offence Exception to Extradition: the Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Kluwer 1980).

2. the amendment of the First Additional Protocol, which excludes it in regard to crimes against humanity as according the UN Genocide Convention and war crimes (included in the 1949 Geneva Conventions and also regulated by customary law)[177]. This is also accompanied by the fair trial, non-discrimination or asylum clause, where refusal is possible where there are grounds for believing that prosecution is sought for reasons of race, religion, political opinion or nationality. Political offence is mostly defined by the courts of the different State Parties. This in turn gives rise to a series of differences over its interpretation[178]. The exclusion of cases of fiscal offences are based on the theory that States do not traditionally assist each other in this issue.

Article 5 presents a restriction by which extradition is allowed only on the basis of previous arrangements, where applicable. Although the Second Additional Protocol (Article 2)[179] grants surrender where there is an uniformity of the offence in the law of both Parties involved, that is when the essential elements are identical. It also rejects refusal on the basis of the executing State not complying with the tax in question.

Refusal of surrender can also occur whenever the issuing State is making a request that does not patently correspond to its actual intentions, namely prosecuting the offender for a purpose other than that for which the request has

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[177] Additional Protocol to the European Convention on Extradition, Strasbourg, 15/10/1975, ETS n. 86 and related Explanatory Report (ratified by 17 Member States); Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, New York 9/12/1948; the Geneva Conventions available and retrieved on the 10th of April 2012 from http://www.unhchr.ch/html/intlinst.htm.

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

[179] Second Additional Protocol to the European Convention on Extradition, Strasbourg, 17/3/1978, ETS n. 98 and relate Explanatory Report, ratified so far by only 21 Member States.

been issued. This rule of specialty (Article 14) allows the wanted person to leave the territory to which they were surrendered to within 45 days of final discharge. If this does not occur, the rule does not apply.

Furthermore, surrender does not apply if the issuing State intends to surrender the offender, for offences committed before their surrender, to a third Party out of the executing State's consent (Article 15).

Articles 7, 8 and 9 provide for the *ne bis in idem* or double jeopardy principle[180], which does not allow more than one prosecution for the same offence, thus protecting individual rights. However, it is not accepted at an international level, given that the various States retain their right to prosecute for offences provided for their internal legal systems. Similarly, it does apply to the Council of Europe extradition system. In this sense, it represents both a mandatory and an optional ground for refusal. It is a mandatory ground for refusal if a competent authority of the executing states makes a final judgment[181] in regard to the same offence. It is optional whenever: a) the relevant authorities of the executing State decide not to initiate or to terminate proceedings for a same person or offence (*ordonnance de non lieu*); b) the relevant authorities are already proceeding for the same offence. A further amendment to the First Additional Protocol allowed refusal of extradition in regards to persons whose final judgment for the same offence is given by third State Parties.

In the 1957 Convention, capital punishment and lapse of time also constitute grounds for refusal. The former establishes that a State where death penalty is not applied can refuse surrender unless the issuing State gives assurance that it will not be applied by their authorities either (Article 11)[182]. The

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[180] See, *inter alia*, C. VAN DE WYNGAERT, G. STESSENS. "The International Non Bis in Idem Principle: Resolving Some of the Unanswered Questions" (1999) 48 *International and Comparative Law Quarterly* p. 779. On this principle, see also *infra*, chapter 4 p. 131.

[181] As final judgment is intended an acquittal, conviction or pardon.

[182] The issue of extradition for death penalty was particularly relevant in ECtHR *Soering v. UK*, 7 July 1989, Application n. 14038/88, in which the ECtHR stated that a lengthy wait before

latter grants the offender immunity from prosecution or punishment (Article 10). The Second Additional Protocol (Article 3) also caters to individual rights in that a surrender request issued after a judgment *in absentia* can be refused by the executing State where it recognizes that minimum rights of defense were not granted.

Overall, it can be affirmed that the 1957 Convention was not particularly effective [183] and, therefore, was frequently revisited. The 1977 European Convention brought about significant changes. One significant change is the Suppression of Terrorism[184], which intervened particularly on political offences by proposing a double formula.

This implied that:

execution falls within the definition of "inhuman and degrading punishment" under Article 3 ECHR, also in the light of both age and mental conditions of the sought person. Indeed, capital punishment is not prohibited by Article 2 of the European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4/11/1950; ETS n. 5); Protocols n. 6 and 13 later abolished the death penalty. Although the ECHR does not grant the fugitive a right not to be extradite, it is believed that he/she can rely on Article 3 ECHR to argue that his/her fundamental rights may be violated by the requesting country. See W. SCHABAS, *The abolition of the death penalty in International Law*, (3rd ed. CUP 2002).

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

184 European Convention on the Suppression of Terrorism and Related Explanatory Reports, ETS n. 90, Strasbourg, 27/01/1977, ratified by all Member States; Protocol Amending the European Convention on the Suppression of Terrorism, ETS n. 190, Strasbourg, 15/05/2003 (ratified by only 10 Member States and not yet in force).

a) a list of exemptions for serious terrorism-related offences was provided for (including, for example, the taking of hostages, seizure of aircraft, use of bombs, and kidnapping)[185], upon which the States agreed;
b) States that have made a reservation retain the right to qualify political offences as such, although they must take into account some criteria as established by Article 13 when evaluating the nature of the offence[186].

Criticism about this approach was quite harsh, since political offence was considered an outdated concept within democratic States bound by the rule of law. However, the approach was supported by a number of the States on humanitarian grounds, stating that the right to a fair trial should be granted notwithstanding the nature of the offence[187]. A gap also emerged in considering the difference between political or serious crimes committed against repressive regimes, which could be safeguarded by the non-discrimination clause, a clause which would not apply when the same crimes are committed within the European Union (due to the partial homogeneity of its legal systems)[188].

The increase of cross-border organized crime and the abolition of borders within the EU and towards the East made the rethinking of the old extradition

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

186 At the same time, Article 2 allowed Contracting State to exclude from the scope of this exception all other serious offences involving an act of violence against the life, physical integrity or liberty of an individual, an act against property creating a collective hazard against persons and any attempt to commit these offences or participation as an accomplice.

187 For more details on this debate, see C. VAN DEN WYNGAERT, "The Political Offence Exception to Extradition: How to Plug the 'Terrorist's Loophole' Without Departing from Fundamental Human Rights" (1991) n. 62 *International Review of Penal Law* p. 291. Also, the 1997 International Convention for the Suppression of Terrorist Bombing, G. A. RES p. 164 1998, denies the possibility of invoking the political offence exception as a ground for refusal for a number of offences related to terrorist bombings (see Articles 2 and 11).

188 J. DUGARD, C. VAN DEN WYNGAERT, Report of the Committee on Extradition and Human Rights to the International Law Association, Helsinki, 1996, pp. 142-170.

system quite urgent in the last two decades. As a consequence, two Conventions were set up for this purpose: the 1995 Convention on simplified extradition procedure, and the 1996 Convention relating to extradition between Member States of the EU[189]. Both Conventions were meant to supplement the 1957 and 1977 Conventions by making surrender procedures more effective. For instance, Article 2 of the 1995 Convention establishes that where an agreement takes place between the person sought and the executing State, a simplified procedure is followed. This is connected to the Schengen mechanism[190] and finds application only where favourable agreements have already taken place between Member States.

Detailed information about offenders and offences committed should be provided whenever they are included in the Schengen Information System (SIS) or a provisional arrest is requested, in order to allow the executing State sufficient elements to consider the case and provide extradition. The latter is normally accompanied by a renunciation to the specialty rule (Article 7). Legal counsel should also provide a fair procedure before the competent authorities.

Several innovative elements are provided by the 1996 Convention. One that stands out is the exception to double criminality according to Article 3. Extradition requests should mandatorily be granted in two cases: 1. conspiracy or association to commit the crimes referred to in Articles 1 and 2 of the European

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

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

Convention on the Suppression of Terrorism, and 2. any other serious offence punishable by deprivation of liberty or detention order of a maximum of at least 12 months, in the areas of drug trafficking or other forms of organized crime or acts against the life, physical integrity, or liberty of a person, or offences that pose a collective danger. However, the attempt made by the provision to drop the dual criminality requirement had two main flaws: First, it allowed Member States to reserve the right not to apply this exception, or to do so only in certain cases. Secondly, the ambiguity in defining the two concepts of "organized crime" and "conspiracy" hindered cooperation between common law and civil law countries[191].

However, paragraph 4 aimed to limit the Member States' right to make reservations and imposed on them an obligation to extradite persons who aided in one of the abovementioned offences with a group of other persons, even if aid did not lead to committing the crime, provided that the aid was intentional and that the offender was knowingly aware of the group intention to commit the offence.

Another important addition in the 1996 Convention concerned extraditable offences. Article 2 lowers the threshold established by the 1957 Convention in that the maximum term for imprisonment is at least six months under the law of the executing State, even if the one-year term was kept by the issuing State.

As far as the political offence exception is concerned, Article 5 para. 1 dropped it altogether. This move is not fully exploited because of the conditions allowed by paragraph 2 enabling Member States to refer to paragraph 1 in that it only applies to the offences in Articles 1 and 2 of the European Convention on the Suppression of Terrorism as well as conspiracy or association to commit offences, included in the abovementioned Articles. It appears quite clear, however, that the political offence exception was losing ground. It had, in fact,

[191] V. MITSILEGAS, "Defining Organised Crime in the European Union: The Limits of European Criminal Law in an Area of Freedom, Security and Justice" (2001) 26 *European Law Review* p. 565.

been remarked that "the political offence exception is a double-edged sword. While it is intended to protect individual rights and personal freedom, it imposes national standards and values on other states"[192]. Among countries sharing a common history and common legal and political values, this exception is of no use.

The other two provisions, the first included in Article 7, abolished the ground for refusal based on nationality, and the second, in Article 6, concerned fiscal offences, follow the path established by Article 5 of the 1957 Convention (as amended by the Second Additional Protocol). This path established that whenever there is an agreement between offences under the law of the executing State, extradition is mandatory and no refusal is accorded on the ground that it does not share the same taxes or duties as the issuing State. Both Articles, though, grant a clause that can exclude or limit the applicability of such provisions[193]. A new approach on towards these issues was needed and all Parties felt it was time to act on that.

For instance, a debate around the necessity of the nationality exception[194] was taking place. This debated centered around wheter or not a person should be allowed to stay in their own country responding to its national court. There was debate surrounding the issue of whether a foreign State's penal system should be completely trusted, wether a person should be prosecuted in a foreign environment, and whether gathering evidence and coping with cultural and language differences is too difficult and expensive[195]. Also, the question of social

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192 M. C. BASSIOUNNI, *International Extradition, supra* p. 674.

193 In details, according to Article 6 para. 3, any Member State may declare that it will grant extradition for fiscal offences only for acts or omissions constituting an offence in connection with excise, value-added tax or customs; according to Article 7 para. 2, any Member State may declare that it will not grant extradition of its nationals or will authorise it only under certain conditions.

194 On this issue cfr. *inter alia* I. A. SHEARER, *Extradition in International Law, supra*, p. 94-132; M. C. BASSIOUNI, *International Extradition*, supra p. 682-689.

195 Z. DEEN-RAESMANY, R. BLEKXTOON, "The Decline of the Nationality Exception in European Extradition?" (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* p. 317; I. A. SHEARER, *Extradition in International Law, supra,* 98. They both quote a Report of the British

rehabilitation and reintegration of the offender in their own society is taken into account[196]. Of course, the debate revolves around the sovereignty issue; through this exception, each State can in fact claim the right to judge its citizens for offences committed within its territory. This confirms the States' willingness to maintain the judicial integrity of their legal systems, which is not justifiable when accompanied by political pressure to intensify efforts to combat transnational crime in the European Union, even less justifiable given the common culture and geographical proximity of Member States. For the same reason, the maintenance of the fiscal exception strongly clashes with the increasing cooperation between Member States in fiscal matters.

The 1996 Convention also applies the specialty rule differently. For example, Article 10 states that a person may be prosecuted for offences other than those for which extradition is required in the executing State's consent. This only applies to offences that are not punishable through deprivation of liberty; conversely this applies to the person for which extradition is requested and may waive the specialty rule. This must be done before the relevant authorities and must be made clear that the person is fully aware and responsible for their choice.

We should therefore underline how, despite the Member States' common wish to simplify extradition procedures, the 1995 and 1996 Convention entered into force only within a few of them and following a very long ratification process[197] [198]. Therefore, the attempt to transfer these from the Council of Europe

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Royal Commission on Extradition, Parliamentary Papers, 1878, vol. 24, p. 907-17. The chair was Lord Cockburn.

196 Cfr. Article 19 para. 2 European Convention on extradition, supra, allowing conditional extradition (i.e. extradition on the condition that a person who is serving a sentence in the executing State is returned there). According to Article 18 para. 3 of the Benelux Treaty, supra, the time spent in detention in the territory of the issuing State must be deducted from the sentence to be served in the executing State.

197 Available at and retrieved on the 11th of July 2012 from: http://ec.europa.eu/justice_home/doc_centre/criminal/extradition/doc_criminal_extradition_en.htm. The 1996 Convention entered into force between 12 Member States on the 29th of June 2005.

system into the EU framework was destined to fail in the absence of a common project that could effectively pave the way for inter-State cooperation in criminal matters. This requires a political input followed by other forms of legitimacy that were lacking in that period. In a Resolution drawn up in relation to the 1996 Convention, even the European Parliament recognized that the traditional extradition system should be rethought:

(…) the system of extradition seems to have less and less justification and *raison d'etre* within a Union of States governed by the rule of law and equally respectful of human rights (…) in which internal borders seem gradually losing their significance. This system should ultimately be abandoned in favour of an automatic extradition procedure or the simple handing over of the person sought

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

198 ECJ C-296/08 PPU *Ignatio Pedro Santesteban Goicoechea* of the 12th of August 2008 dealt with the case of a Spanish citizen living in France, who was sought by Spanish authorities for offences committed in Spain. One of the requests was based on the 1996 Convention. This Convention is included by Article 31 para. 1 of the Framework Decision on the EAW in the list of international instruments that have been replaced by the EAW as of the 1st of January 2004 (i.e. the date by which all States should have enacted the corresponding legislation), although under para. 2 of the same Article, Member States can continue to apply bilateral or multilateral agreements or arrangements, as long as these allow to expand the objectives of the Framework Decision and are notified to the Council and Commission. Under this provision, the Spanish request could not be acceded to, as Spain had not notified the Convention even when this had entered into force in the State after the 1st of January 2004. In conclusion, while Article 31 regulates the relationship between the Framework Decision and existing extradition agreements, Article 32 deals with cases where the EAW regime does not apply.

and subject to respect for fundamental rights and the judicial nature of the procedure (…)[199].

Here the Parliament also showed its disappointment in realizing that the Convention had been adopted by the Presidency of the Council without any prior consultation, thus clashing with what was established by Article K 6 of the Treaty on European Union (TEU)[200]. The Parliament also remarked that the Convention did not provide any form of control by the European Court of Justice, as opposed to what established by the new Article K 7 TEU and introduced by the Amsterdam Treaty[201]. For all of the abovementioned reasons, paragraph 19 of the Resolution assumes an important role in the creation of an "area of freedom, security and justice" by trying to eliminate the differences between the legal systems of Member States. In the next section we will see the steps that should be taken in that direction as well as an analysis of the challenges of future developments.

IV. c) Developments in European cooperation in criminal matters until the Maastricht Treaty

Two main phases distinguish the gradual development of a single European framework of cooperation in criminal matters: the first starting with the

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

[200] Maastricht Treaty, original version, *OJ* C 191, 29/07/1992.

[201] Treaty amending the Treaty on European Union and the Treaty Establishing the European Community, Amsterdam, *OJ* C 340, 2/10/1997. As will be shown in the present chapter, the Court of Justice had under this provision (which corresponds to current Article 35 TEU) a role of supervision over the Conventions.

Maastricht Treaty dealt with in the present section, and the second from the Maastricht Treaty to the Lisbon Treaty is discussed in the next section.

In order to analyse the first development, it is necessary to take into account the Justice and Home Affairs area (JHA). The JHA is the most sensitive area concerning the sovereignty of States and covers a series of issues ranging from customs cooperation, immigration, visas, external boundaries, asylum, refugee policy and cooperation in civil and criminal matters. The amount of issues covered by JHA conveys the sense of sensitivity in this area and how it can affect the cultural and identity issues of the various States. However, Member States have always recognized the need to enhance cooperation mechanisms in order to mutually tackle the challenges of a globalizing world.

Conventions, Resolutions, and Recommendations were the first instruments adopted, starting in the '60s, for judicial cooperation in civil matters[202] or customs cooperation.[203] In the '70s these instruments were adopted for police and judicial cooperation in criminal matters[204]. In this context, cooperation developed by means of informal committees and took place outside the European Communities framework. The most important among these committees was the Trevi Group, established in Rome in 1975, and was based on a Dutch proposal, that followed a special meeting of the European justice and home affairs ministers. The original purpose of the committee was to enhance cooperation in the fight against terrorism and organized crime and had a purely

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

[203] The Customs Union was established in the European Economic Community in 1968.

[204] For an overview of the evolution of cooperation in criminal matters in the EU, see S. DOUGLAS-Scott, "The rule of law in the European Union - putting the security into the "area of freedom, security and justice" (2004) 29 *European Law Review*; P. J. KUIJPER, "The evolution of the Third Pillar from Maastricht to the European Constitution: Institutional aspects" (2004) 41 *Common Market Law Review* 609; M. JIMENO-BULNES, "European Judicial Cooperation in Criminal Matters" (2003) *9 European Law Journal* p. 614.

intergovernmental nature[205]. However, these informal mechanisms, without a stable structure, could not deal with the growing phenomenon of cross-border crime, since there was neither a legal basis nor a clear strategy to cope with the issue within the EU. In 1977, the French President Giscard d'Estaing proposed the creation of a "European judicial space", by means of a system of judicial cooperation. Extradition assumed new forms, in that it would operate, regardless of the nature of the offence, with a minimum penalty threshold of five years and a judicial control that would determine the execution of the offence. This was named "convention d'extradition automatique" and was applied not merely to terrorist offences but also to serious crimes in general[206].

It is interesting to notice that the areas of internal market, judicial cooperation in civil matters, and police and judicial cooperation in criminal matters developed almost simultaneously but at a different pace. The internal market was established in 1986 by the Single European Act[207], which implied the abolition of controls at the internal borders of the Member States and the consequent enhancement of security measures to reduce the flow of illegal immigration and the growth of crime. This encouraged the adoption of the Schengen Agreement (1985) which gradually reduced and finally abolished controls at common borders. The adoption of the Convention of 1990[208] provided, in the area of cooperation in criminal matters, common rules on crossborder surveillance, common rules on the fight against drug trafficking, common rules on hot pursuit and the *ne bis in idem* principle.

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205 M. ANDERSON *et al.*, *Policing the European Union* (Clarendon Press, Oxford 1995) p. 53. Four Trevi groups were established over the years: Trevi I and II (1975), Trevi III (1985) and Trevi '92 (1988). See J. PEEK, "International Police Cooperation within Justified Political and Juridical Frameworks: Five Theses on Trevi", in J. MONAR, R. MORGAN (eds), *The Third Pillar of the European Union: cooperation in the fields of justice and home affairs* (EIP Brussels 1995) p. 85.

206 Conseil Européen, Proposition de M. Veléry Giscerd d'Estaing concernant l'espace judiciaire européen, Bruxelles, 5/12/1977, and Conférence de presse du Président Giscard d'Estaing à l'issue du Conseil, retrieved on the 17th of May 2012 available at http://www.diplomatie.gouv.fr.

207 Single European Act, *OJ* L 169 29/06/1987.

208 Schengen Agreement of the 14th of June 1985, *supra note 67.*

The ambitious plan of developing a "close cooperation in justice and home affairs"[209] was taking shape with the establishment of the European Union through the Maastricht Treaty of 1992[210]. This process started with the Rhodes European Council, which identified the need for enhancing inter-governmental cooperation in the fight against terrorism, cross-border crime, drug trafficking or trafficking in general[211]. This need arose from the consequences triggered by the creation of a single market which led to the free movement of persons. Addressing this issue, a group of coordinators[212] made up of the representatives of each Member State arranged a series of meetings between February and June in Brussels and Palma de Mallorca. The goal was to replace informal committees, such as the Trevi group, with a more structured organization in order to tackle issues such as immigration, asylum and visa, as well as cooperation in criminal matters, encompassing both enforcement of law and judicial aspects. This new group of coordinators presented a report to the European Council (the Palma document[213]), that confirmed differences in the kinds of legal and political frameworks to be adopted, but at the same time, suggesting practical measures to establish priorities for Member States. Referenced for the first time was the possibility of harmonizing a series of provisions concerning judicial cooperation and of approximating national laws in order to create a single judicial area. However, the document in question did not have enough legal strength to achieve the desired effects.

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[209] Article B of the Treaty of Maastricht, original version, *supra*.

[210] Treaty of Maastricht, OJ C 191 29/07/1992. See also consolidated version of the Treaty on the European Union (TEU) and of the Treaty Establishing the European Community (TEC), OJ C 325 24/12/2002.

[211] Rhodes European Council (2nd – 3rd of December 1988) Presidency Conclusions: available at http://europa.eu/european_council/conclusions/index_en.htm on the 12th of May 2012.

[212] This group was later replaced by the *K4 Committee*, made up of senior civil servants assisting the Council and established by the Maastricht Treaty.

[213] The report is retrieved on the 24th of May 2012 from www.statewatch.org.

This approach brought with it a series of implications, as stated in Article F of the 1992 Treaty, emphasizing both the "respect (for) the national identities of its Member States" and the need to "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms" (1950)[214]. For this reason the creation of a Third Pillar encompassing these new areas was promoted.

This step led to an "even closer Union among the peoples of Europe". Where decisions were to be made in full respect of all citizens (Article A). However, a divide between a federalist view and a more skeptical view on EU cooperation was quite evident. Article A itself became object of debate and was frequently amended by decisions taken without consulting the EU citizens (as will be shown later[215]).

This had a series of consequences added an intergovernmental nature to the new Pillar[216], similar to decision-making mechanisms of international law. The main characteristics of this new Pillar were: the unanimous consent requirement of the Council (adopting all legal acts apart from Conventions, which are adopted by Member States); the limited role of the European Parliament[217]; the lack of control by national parliaments; the limited jurisdiction of the Court of Justice[218]; and the adoption of binding instruments (joint actions, joint positions, common positions, Conventions)[219]. These are the result of a "horizontal" relationship

214 ETS n. 5; Rome, on the 4th of November 1950 and subsequent amendments.

215 See *infra*, Chapter 2.

216 Articles K to K9 (Title VI) Treaty of Maastricht, original version, *supra*.

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

218 Article K para. 3 lett. 2) Treaty of Maastricht established that provisions could be included in a Convention attributing competence to the ECJ to make an interpretation and establish disputes deriving from their application.

219 Article K 3 Treaty of Maastricht for the first three; Article K 5 for the common positions. Further non-binding instruments were Resolutions and Recommendations (already existing).

between the States, rather than of a "vertical" relationship between supranational and national authorities.

As to the distribution of "legislative powers", Member States kept the monopoly of initiative in the areas of customs cooperation, judicial cooperation in criminal matters, and police cooperation for combating terrorism, unlawful drug trafficking and other serious forms of international crime (Article K1 (7 - 8) and K3). These categories of crimes were broadened by the 1998 Statute of the International Criminal Court (ICC), and included the crimes of genocide, war crimes, crime of aggression, and crimes against humanity[220], as well as the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993), and the International Criminal Tribunal for Rwanda (ICTR, 1994)[221]. These steps were necessary to build a common approach given that Member States were not able to cope with the abovementioned issues on an individual basis.

As regards to the types of instruments adopted, it is important to mention the 1995 Convention on the protection of EC financial interests and the 1997 Convention on the fight against corruption involved EC officials or officials of the EU Member States[222]. However, the unanimous consent required by the Council, as well as the ratification process by Member States in agreement with their constitutional requirement, slowed the adoption of the abovementioned

[220] Article 5 of the Statute of the International Criminal Court, Rome (17/07/1998) UN Doc. A/CONF. 183/9, 37 ILM 999 (1998), amended by UN Doc., PCNICC/1999/INF/3.

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

[222] 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 316 27/11/1995; Convention drawn up on the basis of Article K 3 para. 2 lett. c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or official of Member States of the European Union OJ 195 25/6/1997.

Conventions. A series of pivotal joint actions were, on the other hand, adopted. Among them is the fight against organized crime[223].

As a consequence of the creation of this new intergovernmental structure, the informal groups of coordinators operating in the preceding years were dissolved.

IV. d) A new agenda for the area of freedom, security and justice

Cooperation in criminal matters is currently going through its second phase. This phase is commonly known as "freedom, security and justice". The result of the many efforts made in order to consolidate the rule of law and attain a political union, as well as an economic one. Indeed, as early as the '70s, Member States promoted a European Political Cooperation[224]. In 1988 they were "(…) determined to make full use of the provisions of the Single European Act in order to strengthen solidarity among them, coordination on the political and economic aspects of security, and consistency between the external policies of the European Community and the policies agreed in the framework of the European Political Cooperation". This process had to be implemented by respecting human rights and fundamental freedoms, as well as the "free circulation of people and ideas". At the same time establishing "a secure and stable balance of conventional forces in Europe at a lower level" and strengthening "mutual confidence". This political project was important for EU external relations, especially in view of a new geo-

[223] Joint Action 97/827/JHA of the 5th of December 1997 adopted by the Council on the basis of Article K 3 of the Treaty on European Union, establishing a mechanism for evaluating the application and implementation at the National level of International undertakings in the fight against organised crime, OJ L 344 15/12/1997; Joint Action 98/733/JHA of the 21st of December 1998 on making it a criminal offence to participate in a criminal organisation in the member States of the European Union, OJ L 351 29/12/1998.

[224] The European Political Cooperation (EPC) was created as an informal cooperation structure and was later reformed as Common Foreign and Security Policy (CFSP) with the Maastricht Treaty.

political balance in the distribution of power. Indeed, the European Council urged the Member States to "(…) embark with the European Community as world partner on a historic effort to leave to the next generation a Continent and a world more secure, more just and more free"[225]. As a consequence, the Maastricht Treaty (1992) established a Second and Third Pillar[226].

Through the Maastricht Treaty, the EU acquired new subject matter jurisdiction as regards to criminal matters. Prior to Maastricht, two important steps were taken by France, Germany and Benelux. One is the Schengen Agreement (1985) and the other is the Convention implementing the Schengen Agreement (CISA, 1990). These instruments were included in the Amsterdam Treaty in 1997 through a Protocol[227] and had the advantage of promoting mutual assistance in the areas of police and judicial cooperation.

Some clear signs of an improved judicial cooperation, which went beyond the simple political inter-State cooperation, came from a series of criminal law instruments that were approved during the years preceding the Amsterdam Treaty. Their effectiveness was irrelevant, mainly due to the lack of a coherent European criminal policy and to the weakness of the Third Pillar[228].

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225 Cfr. The Rhodes Declaration on the International Role of the European Community, attached to the Rhodes European Council; Conclusions of the Presidency, *supra*.

226 The Treaty of Maastricht, OJ C 191 29/07/1992. Also, consolidated version of the Treaty on European Union (TEU) and of the Treaty Establishing the European Community (TEC), OJ C 325 24/12/2002.

227 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; Convention implementing the Schengen Agreement, OJ L 239 22/09/2000; Treaty of Amsterdam, OJ C 340 10/11/1997. Benelux, Germany and France were the first countries to adopt the agreement, but more countries were to join later on. About this issue, cfr. J. MONAR, "The Impact of Schengen and Home Affairs in the European Union: An Assessment on the Threshold to its Incorporation", in M. DEN BOER (ed.) *Schengen Still Going Strong: Evaluation and Update* (EIPA Maastricht 2000) p. 21; M. DEN BOER (ed.) The *implementation of Schengen,* Maastricht (EIPA Maastricht 1997).

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

With the Amsterdam Treaty[229], the creation of an area of freedom, security and justice had the effect of enhancing the European institutions' subject matter jurisdiction in cooperation in criminal matters by means of more targeted legal instruments, among them the legally binding Framework Decisions and Decisions.

The creation of an area of "freedom, security and justice"[230] by means of the 1999 entry into force of the Amsterdam Treaty is a fundamental step for judicial cooperation. The proclamation triggered a series of risks, such as that of excessively raising citizens' expectations and concealing a series of contradictions difficult to solve.

The inherent repressive nature of the measures adopted under the new framework, which pay very little attention to human rights, stands out. From a constitutional viewpoint, the Amsterdam Treaty was meant to spell out the Third Pillar's objectives, reinforce the legal effects of the measures adopted, and facilitate the decision-making process.

The Amsterdam Treaty also entailed a transfer of a substantial part of the Third Pillar's competences to the First Pillar (process known as *communautarisation*). These competences were namely migration policy, external borders' control, asylum, the status of third country nationals and judicial cooperation in civil matters (Title IV, Articles 61 - 69 TEC, entitled "Visas, Asylum, Immigration and other policies related to the free movement of persons")[231]. The effect of this transfer is twofold: on the one hand, these areas

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[229] Treaty amending the Treaty on European Union and the Treaty Establishing the European Community, *supra.*

[230] The Treaty of Amsterdam turned Article B, which listed as objectives of the EU that of developing close cooperation on justice and home affairs, into Article 2, aimed to maintain and develop "(…) the Union as an area of freedom, security and justice, in which the free movement of persons is assures in conjunction with appropriate measures with respect to external border control, asylum, immigration and the preventing and combating of crime".

[231] This process proved successful in the area of civil cooperation, in which many Third Pillar instruments were translated into Community instruments, such as EC Regulation 44/2001, OJ L

were now under the control of the European Court of Justice, on the other, the adoption of legislative instruments and decision-making procedures were sped up. The Schengen *acquis* was also incorporated within the European Union framework[232]. As a result what was left of the Third Pillar, namely Title VI of TEU (Articles 29 - 42), was completely devoted to "Provisions on Police and Judicial Cooperation in Criminal Matters". In this context, some community elements were left up to the intergovernmental structure (with some limitations), such as the Commission's right of initiation and the Court of Justice's subject matter jurisdicton (Article 35). In a way, the whole area was eligible for *communautarisation* by means of the "passerelle" procedure. The Council, out of a proposal by the Commission or a Member State, could act upon what stated in Article 42 TEU[233]. However, when it came to using this instrument to compensate for the unsuccessful ratification of the Constitutional Treaty, differences between States emerged and the plan was dropped[234]. Similarly, plans to exploit "implied powers" under Article 308 TEC or enhanced cooperation as in the new Title VII (Articles 43 - 45), Articles 40 - 41 TEU and Article 11 TEC were never implemented.

Although the Amsterdam Treaty was primarily aimed at promoting European integration in the first place, it also offered opt-in/opt-out clauses for countries such as Denmark, Ireland and the UK, which opted-out of the

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12/1, 16/1/20001 (the "Brussels I Regulation") or EC Regulation 1347/2000 OJ L 160/19 replaced by EC Regulation 2201/2003, OJ L 338/1 23/12/2003 (the "Brussels II Regulation").

232 Protocol incorporating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty of Amsterdam ("the Schengen Protocol").

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

234 Brussels European Council (15th - 16th of June 2006) Presidency Conclusions, retrieved on the 16th of June 2012 available at http://europa.eu/european_council/conclusions/index_en.htm.

communautarisation of justice and home affairs and the Schengen *acquis*[235]. This position is indicative of an underlying issue that could threaten cooperation. This mainly threatened the protection of the profound cultural and political differences between the Member States of the European Union.

Another important change brought about by the Amsterdam Treaty was the introduction of two legally bounding instruments to replace the joint actions: the Framework Decisions and the Decisions (Article 34)[236]. Framework Decisions are adopted for the approximation of laws and regulations of the Member States, while Decisions deal with any other objectives in accordance with the provisions in Title VI. Neither Framework Decisions nor Decisions entail a direct effect, although they are both binding. Framework Decisions, which follow the same pattern as the First Pillar's Directives, delegate the choice of forums and methods to the national authorities.

These instruments differ from the joint actions in that they are not directed to national Governments and Parliaments. Article 34 also provides other legal instruments, such as the common positions and the conventions. Article 31 emphasises the importance of common actions in facilitating extradition and ensuring compatibility of rules between Member States. This promotes measures establishing minimum rules on the constituent elements of criminal offences and consequent penalties in the areas of terrorism, organized crime, and illicit drug trafficking. Article 31 lays the foundation for a possible approximation of criminal laws and regulations within the Union.

The Amsterdam Treaty also strengthened the Court of Justice's role by means of Article 35, which allowed the ECJ to give preliminary rulings on the

235 See Protocol on the position of UK and Ireland and on the position of Denmark annexed to the Treaty of Amsterdam.

236 "Article 36 Committee" replaced "Article K 4 Committee" in the task of contributing to the preparation of the Council's discussions in the areas referred to in Article 29 TEU, including *inter alia* cooperation in criminal matters and substantive criminal law.

interpretation and validity of Framework Decisions, Decisions, and Conventions. However, the powers of the ECJ are limited by decisions of Member States as to whether they recognize the Court's jurisdiction and whether they require requests for preliminary rulings to be sent by any court or by a court of last instance only[237]. The ECJ was enabled, by paragraph 6 of Article 234 TEC, to review the legality of Decisions and Framework Decisions in case a Member State or the Commission brings an action on the following grounds: lack of competence, infringements of essential procedural requirements in regard to a Treaty provision, or misuse of powers.

However, neither single individuals nor other institutions are allowed the right to bring annulment proceedings. Furthermore, the ECJ had jurisdiction power over any dispute arising between Member States in regard to the interpretation or application of Third Pillar acts, as well as over disputes arising between Member States and the Commission regarding the interpretation and application of Conventions. However, the ECJ had no power in reviewing the validity of police operations or other law enforcement services, and could not interfere with the maintenance of law and order and the safeguarding of internal security as established by Member States.

The ratification of the Amsterdam Treaty took place at a time of an intense series of reforms in the Third Pillar. Indeed, in July 1999 Europol was established[238] (even though a Europol Drugs Unit had already been set in 1993).

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[237] As to 2004, only the UK, Denmark and Ireland have declined the Court's jurisdiction. As to the Member States that joined the Union in 2004, only Hungary and the Czech Republic have accepted the ECJ jurisdiction. Until now, only Spain and Hungary allow only final courts to make a reference for preliminary ruling. Nine States have reserved the right to include in their national law an obligation for the final court to bring the matter before the ECJ. See information regarding the entry into force of the Amsterdam Treaty, OJ C 120/24 1999 and OJ L 114/56 1999; Declaration by the Czech Republic on Article 35 of the EU Treaty, OJ L 236/980 2005; information on France and Hungary, OJ L 327/19 2005.

[238] Council Act drawing up the Convention based on Article K 3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316 27/11/1995.

A list of Europol's activities is provided in Articles 3 and 5 of the Convention. These include: data collection, exchange of information, crime analysis, and coordination of investigations. They do not refer to arresting suspects or carrying out autonomous investigations. The Annex to the Convention[239] also contains a list of acts connected to international crimes, which Europol can act upon. Among these are: drug trafficking and trafficking in human beings, terrorism, money laundering, and fraud against the EU. A cooperation agreement was also signed between Europol and the US, in the light of the events of 9/11. The cooperation agreement was followed by a supplemental agreement on the exchange of information in 2002[240]. These agreements were strongly criticized as they highlight the lack of control over Europol's activities[241] and the impossibility of the ECJ to supervise police activities.

In 1999 another important event took place: the Tampere European Council, which focused in particular in this area and placed emphasis on the principle of mutual recognition[242]. At point 46 it also encouraged the establishment of Eurojust, with the goal of providing support to national judges in regard to cross-border crime. The previous year the European Judicial

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The Convention entered into force in 1998. Also cfr. the more recent Proposal for a Council Decision establishing the European Police Office, Brussels, 20/12/2006, COM (2006) p. 817 final.

[239] Council Decision of the 6th of December 2001 extending Europol's mandate to deal with serious forms of International crime as listed in the Annex to the Europol Convention, C 362 18/12/2001.

[240] Agreement between the USA and Europol, of the 6th of December 2001; Supplemental Agreement between Europol and the USA on the Exchange of Personal Data and Related Information, Doc. 13689/02 Europol 82 and 13689/02 Europol ADD 1, both retrievable on the 24th of March 2012 from http://www.europol.europa.eu/.

[241] Statewatch, on February 2002, The Activities and Development of Europol. Towards an Unaccountable FBI in Europe, and also Statewatch, Europol: The Final Step in the Creation o fan Investigative and Operational European Police Force, January 2007, available at and retrieved on the 24th of May 2012 from http://www.statewatch.org/.

[242] Tampere European Council (15th - 16th of October 1999) Presidency Conclusions, retrievable from http://europa.eu/european_council/conclusions/index_en.htm.

Network[243], namely a network of contact points of all Member States, had been established with the purpose of facilitating coordination between States in their investigations. However, Eurojust started to be effective only after 9/11 with the adoption of a Council Decision[244]. At the same time, the First Pillar set up the OLAF. The aim of OLAF was to combat fraud, corruption and any other illegal activity adversely affecting the financial interests of the Community[245]. It is interesting to notice the parallel between the Eurojust Decision's objectives, as pointed out in its preamble, and those indicated in the EC Regulation concerning OLAF[246]. In order to protect the financial interests of the Union, a supranational structure was preferred to an intergovernmental one.

We should also notice how despite the fact that Eurojust is not allowed to carry out investigations or to prosecute on an autonomous basis, it has a legal personality and can operate according to a wider series of subject matters than Europol[247]. These areas include fraud and corruption and any other criminal offences affecting the Community's financial interests, computer crime, environmental crime, money laundering, and participation in a criminal

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

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

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

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

247 On the relationship between Eurojust and Europol, cfr. P. BERTHLET and C. CHEVALLIER-GOVERS, "Quelle relation entre Europol et Eurojust? Rapport d'égalité ou rapport d'autorité?" (2001) *Revue du Marché Commun de l'Union européenne* 450. See now Article 85 Lisbon Treaty, Consolidated version of the Treaty on European Union (TEU) and of the Treaty on the functioning of the European Union (TFEU) OJ C 115 09/05/2008.

organization. Also, national authorities can require Eurojust's assistance in investigating and prosecuting other crimes that are not included in that list. Eurojust's task is, at present, mostly about collecting and exchanging information. Its future development is closely connected to the establishment of a European Public Prosecutor, as indicated in the attempt to set up a European Constitution (Article III-274) and within the Lisbon Treaty (Article 86 TFEU)[248].

Even though amendments in the areas of asylum, immigration and cooperation in civil matters were made by the Treaty of Nice, no significant innovations were introduced[249]. However, a Draft Constitutional Treaty was finally signed in October 2004.[250] The purpose of the draft was to dramatically modify the cooperation mechanisms in criminal matters. Although the project failed because of the refusal of France and the Netherland to adhere following the negative referenda of 2005, most of its contents were recycled in the Lisbon Treaty[251]. One example is the removal of the Pillar structure. This was a necessary move for reducing frictions and uncertainties about the legal basis and about decision-making within the Third Pillar[252]. However, in the area of police and judicial cooperation in criminal matters, the Commission does not have

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248 Treaty amending the TEU and the TEC, OJ 306 17/12/2007. The Treaty was signed on the 13th of December 2007 after the failed approval of the European Constitution. It needs to be ratified by all 27 Member States before it can enter into force. Ireland voted against it in a referendum held in June 2008. See also Consolidate versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), *supra*.

249 Treaty of Nice, OJ C 80 10/03/2001, signed on the 26th of February 2001 and entered into force on the 1st of February 2003.

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

251 See Lisbon Treaty *supra* note above.

252 Cfr. D. THYM, "The Area of Freedom, Security and Justice in the Treaty establishing a Constitution for Europe" – WHI Paper 12/04; J. MONAR, "Towards a New Framework of Co-operation in EU Justice and Home Affairs? The Results of the European Convention", Contribution to the Conference "Plenty of News in the East, Poland and the Union's Area of Freedom, Security and Justice" organized by the Centre for International Relations on the 17th - 18th of October 2003, Warsaw.

exclusive right of initiative since this is also a prerogative of the single Member States (Article III-264 Constitution and Article 76 TFEU).[253] Besides unanimous consent is still partly required and the European Parliament only plays a consultative role. Although the co-decision procedure and qualified majority voting (QMV) apply to the area of freedom, security and justice, there is still a series of exceptions as regards more sensitive issues[254].

Six relevant innovations are:

1. the enhanced role of the European Council in regard to the right of initiative, which allows it to define strategic guidelines for legislative and operational planning (Article III-258 Constitution and Article 68 TFEU);
2. the strengthening of the role of the European and of the national Parliaments, which can now participate in the evaluation of the activities of Eurojust and Europol, as well as of the national authorities (Articles III-260, III-273, and III-276 Constitution; Articles 70, 71 and 88 para. 2 TFEU);
3. the protection of fundamental rights through the incorporation of the Charter of Fundamental Rights[255] in part II of the Constitution, which will acquire binding legal value with the entry into force of the Lisbon Treaty;

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

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

255 Charter of Fundamental Rights of the European Union, OJ 364/1, 18/12/2001, (it does not currently entail binding legal value).

4. the broadening of the ECJ's jurisdiction to the area of police and judicial cooperation in criminal matters, where it can give preliminary ruling with one limitation, as in Article III-377 of the Constitution and Article 35 para. 5 TEU, retained by Article 276 of the Lisbon Treaty;
5. The establishment of a European Public Prosecutor, whose jurisdiction will only include crimes affecting the EU financial interests, although the European Council is taking into account the possibility to extend it also to other serious cross-border crimes;
6. the possibility for Europol to also take part in the coordination and implementation of joint actions between national authorities, along with its traditional role of collecting and exchanging data.

In the present chapter we have dealt with the constitutional aspects of the Third Pillar, which will prove useful in our subsequent discussion on the implementation of the EAW. The next chapter will be devoted to the principle of mutual recognition of judicial decisions.

IV. e) Conclusions

The current chapter has dealt with the origins and main characteristics of the inter-State cooperation system after the Amsterdam Treaty, where extradition and the principle of mutual assistance play a fundamental role. It is in this context that the European Arrest Warrant operates, a context where innovative approaches go side by side with a series of frictions that can potentially undermine all the efforts made to achieve an area of freedom, security and justice. A general outline of the areas of friction will be given in order to provide a background for the analysis of the features and functions of the EAW. Overall,

they concern: a) the notion of freedom, security and justice in and of itself; b) mutual trust among Member States; c) the legitimacy issue, connected to the development of the European Union; and d) the interaction between the First and the Third Pillar.

As to the first area of tension, namely the notion of freedom, security and justice, we can affirm that we are not dealing with an innovative concept. Instead, this concept is a result of many years of reflection within political and legal contexts.

The innovation of this tension lays in its expansion outside the sovereign State's borders, to the advantage of the Community and the detriment of the single States. Let us consider the three notions separately. In regards to "justice", the main point is whether it can operate for the Community as effectively as it operates under the rule of single States. Another point is whether the sources of justice, i.e. the Council, the Commission, the Court of Justice, can be trusted as democratic sources of law providing equal treatment and correct applications of procedures. As to the idea of "freedom", the reasons for uncertainty are numerous, especially in the light of the limited number of measures adopted to protect fundamental rights, such as the right to a fair trial, the treatment of personal information, etc. The idea of "security", however, occupies a predominant role in the EU agenda. The interpretation of the notion of security is often twofold: it can be positively posed as an individual or collective right, or it can be viewed in negative terms as a means to justify the adoption of repressive measures. An alternative position has been proposed by Loader & Walker (2007), arguing that "(…) the good of security is not to be found (…) in a situation in which 'security' is 'shallow' and 'wide' - a precarious, routinely fretted-over effect of the supply and presence of (ever) increasing numbers of policing and crime-control measures. Nor is the good of security to be found in a situation

where it is 'deep' and 'wide' - where it is regarded as the overweening end rather than the modest beginning of social policy (…) The pursuit of security, in other words, is best thought of as 'deep' and 'narrow' (…) understood and configured not as a form of perpetual *striving*, but as a state of well *being* - a state in which we are able to live - and live together - securely with risks"[256]. However, we cannot but acknowledge that the EU criminal policy has, in actuality, developed towards a shallow and wide definition of security, as is confirmed by the establishment of Europol and Eurojust.

The second area of tension is embodied by mutual trust. Mutual trust is a prerequisite for the effective functioning of cooperation in criminal matters that should be promoted both at the institutional level and at the operational level. It has been remarked that this concept is closely related to security and differs from the idea of confidence, as it "(…) is instead viewed as that in which we must invest when we do not - or do not yet - have confidence in the workings of institutions or the behavior of other agents. In other words, while confidence is an accomplished state upon which we can more or less passively rely, trust is an active way of building confidence or otherwise dealing with the absence of confident expectations"[257]. The next chapter will attempt, thereby, to analyse the principle of mutual trust and the extent to which it operates within the European Union.

The third area of friction is legitimacy. Legitimacy is a necessary prerequisite for the establishment of a European criminal law and can only take place if the parts involved are in the position to claim some sort of legitimacy.

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[256] I. LOADER - N. WALKER, *Civilising Security* (Cambridge University Press 2007) pp. 168-169.

[257] On the topic cfr. N. WALKER, "The Problem of Trust in an Enlarged Area of Freedom, Security and Justice: A Conceptual Analysis", in M. ANDERSON, J. APAP (eds.), *Police and justice cooperation and the new European borders* (Kluwer Law International, The Hague 2002) p. 22.

This is not currently applicable, given that cooperation in criminal matters still falls within the Third Pillar's competence.

The fourth issue is the problematic interaction between the First and the Third Pillar. A proposal for moving forward the traditional intergovernmentalism/supranationalism dichotomy [258] has been made, but confusion about the legal basis of the measures to be applied has prevented the Union from achieving this ambitious goal.

[258] Read F. SNYDER, "Institutional Developments in the European Union: Some Implications of the Third Pillar, in J. MONAR, R. MORGAN (eds), *The Third Pillar of the European Union: cooperation in the field of justice and home affairs* (European Interuniversity Press, Brussels 1995) p. 85.

Chapter V. Mutual recognition in judicial cooperation: an overview introduction

The present chapter deals with the evolution of the mutual recognition principle from its early application to its inclusion within the Lisbon Treaty. To do so, an overview of the mutual recognition measures so far adopted, encompassing their implementation and effectiveness will be taken into account. The mutual recognition principle will be analysed in relation to the Third Pillar structure, as well as to the harmonization principle. It will also be discussed in its relation to the developments of the EU and international laws, in particular in its role within the European integration process.

V. a) Recent trends in mutual recognition

After the Amsterdam Treaty two trends developed within inter-State cooperation:

1. The 2000 Convention on Mutual Legal Assistance, emphasizing the role of the national judge, urged judges to cooperate and assist each other and establishing the joint investigative teams[259]. The Convention also allowed the issuing State, by means of the *forum regit actum* principle, to give indications on how evidence should be gathered by the executing State, so as to be recognized by the former[260].

[259] Council Act of the 29th of May 2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. *OJ* C 197 12/07/200, Protocol, OJ C 326 16/10/2001.

[260] E. DENZA, "The 2000 Convention on Mutual Assistance in Criminal Matters" (2003), n.32 of *Common Market Law Review* p. 1047.

2. Mutual recognition is the principle by which any judicial decision by a national authority is recognized by another Member State.

Until now Framework Decisions have been the main legislative instrument within the Third Pillar. The first mutual recognition instrument to be established was the European Arrest Warrant in 2001[261]. Further instruments followed within the Mutual Recognition Programme and were separated on the basis of the procedural stage they referred to. For instance, for the pre-trial stage the following apply: the execution of orders freezing property or evidence, non-custodial pre-trial supervision measures, confiscation orders, and the European Evidence Warrant[262]. A draft Framework Decision on taking account of previous convictions in the course of new criminal proceedings has been introduced[263]. Also, the mutual recognition principle is valid for judgments imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union[264].

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

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

263 Draft Framework Decision on taking account of convictions in the course of new criminal proceedings, Brussels, on the 11th of June 2008 Doc. 9960/08 COPEN 103.

264 Council Framework Decision 2008/909/JHA of the 27th of 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 L 327 5/12/2008.

The execution of orders freezing property or evidence is targeted at securing evidence to be adopted by the issuing State and can be used for the purpose of confiscation. Freezing orders should be informally recognized and immediately executed upon according to the indications established by the judicial authority of the issuing Member State[265]. The non-custodial pre-trial supervision measures are applied to persons in their country of origin, thus allowing them to undergo supervision measures in their natural environment. The European Evidence Warrant is issued in order to obtain objects, documents, and other data to be used in criminal proceedings. Double criminality regarding thirty-two crime typologies is void.

As far as final judgments are concerned, the Framework Decision on the mutual recognition of financial penalties[266] represents the main instrument, which should be informally recognized and immediately executed. Here, double criminality is lifted for an increased number of offences[267]. A further important measure of the final phase of criminal proceedings is the Framework Decision on the mutual recognition of judgments and probation decisions with an opinion on the supervision of probation measures and alternative sanctions[268].

All of the abovementioned measures share a series of common features. These features are include the speeding up of recognition procedures and execution of decisions, as well as a restricted list of grounds for refusal. But does not include the protection of human rights. This caused tension that could only be solved through the intervention of the European Court of Justice.

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265 Art. 5 lett. 1) of the Framework Decision.

266 Council Framework Decision 2005/214/JHA of the 24th of February 2005 on the application of the principle of mutual recognition to financial penalties *OJ* L 76 22/03/2005.

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

268 Council Framework Decision 2008/947/JHA of the 27th of November 2008 on the application of the principle of the mutual recognition of judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *OJ* L 337 16/12/2008.

The mutual recognition of judgments imposing custodial sentences is aimed at the enforcement of a sentence in the executing Member State, rather than the issuing State, where the latter promotes reintegration of sentenced subjects. Recognition of judgment and enforcement of the sentence are contrary to what was established by the 1983 Convention on the Transfer of Sentenced Person, compulsory[269] to the extent in which it responds to the need of the sentenced person stated under the law of the issuing State[270]. A series of grounds for refusal are established, such as when less than six months of a sentence are to be served, or in case the sentence includes psychiatric or other health care measures which cannot be offered by the executing Member State[271].

At last it is worth pointing out the clash between what is stated in recital one of the preamble to the Framework Decision stating that mutual recognition "…*should become* the cornerstone of judicial cooperation", and what is stated in priority n. 9 of the Communication from the Commission to the Council and the European Parliament on The Hague Programme[272], stating that mutual recognition "(…) *has become* the cornerstone of judicial cooperation".

One of the main obstacles for the implementation of the mutual recognition principle is the disillusionment of some of the Member States due to its lengthy approval process.

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[269] Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentence supra Article 3 lett. a).

[270] Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences supra Article 5 lett. a) and Article 6. When the person is still in the issuing State, he must be given the opportunity to state his opinion. The provision not requiring consent when the judgment is sent to the State where the person lives is not applicable to Poland in case the judgment has been issued within five years from when the Framework Decision applies (see Article 6 lett. s)).

[271] Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences supra Article 9.

[272] Communication from the Commission to the Council and the European Parliament - The Hague Programme: Ten Priorities for the next five years - COM (2005) p. 184 final.

Obstacles have also been met in regard to the Framework Decision on the European Arrest Warrant, among which are the delay of its entry into force and the addition of further optional and mandatory grounds for refusal.

Because they did not recognize the surrender procedures involving their nationals[273], further constitutional problems were faced by some Member States such as Poland, Germany and Cyprus. Moreover, the Belgian Constitutional Court also referred to the European Court of Justice the question of the compatibility of the Framework Decision with Article 34 para. 2 let. b) TEU and Article 6 para. 2 TEU; which established the principles of legality, equality and non-discrimination. The European Court of Justice has affirmed that the Framework Decision is in compliance with the abovementioned principles.

Difficulties were also encountered in regard to the Framework Decision on the freezing of assets and evidence, as well as to the European Evidence Warrant, which faced a very slow implementation process[274].

While in recent years the Third Pillar has witnessed significant developments in its prosecution and enforcement powers, the protection of human rights still has a long way to go to fully achieve its goals. Indeed, the failure to approve Framework Decision on procedural rights[275] demonstrates the

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273 Polish Constitutional Court, Judgment P 1/05 of the 27th of April 2005; German Constitutional Court BVerfG, 2 BvR 2236/04 of the 18th of July 2005; Cyprus Constitutional Court Judgment of the 7th of November 2005.

274 Justice and Home Affairs Council, Luxembourg, on the 1st - 2nd of June 2006, see Council of the European Union Document 10081/06 Presse 168. The negotiations met many obstacles: The Netherlands pushed for a partial application of the principle of territoriality so as not to comply with an EEW regarding offences carried out in its territory. Germany can, through a declaration, make execution of an EEW conditional on the ascertainment of double criminality in regard to six categories of offences: racism and xenophobia, terrorism, sabotage, computer-related crime, racketeering and extortion, swindling. This does not apply in case the issuing authority has stated that the offence concerned under its own national law is covered by the criteria established in the declaration. See Council Framework Decision 2008/978/JHA on the European Evidence Warrant *supra* note 5.

275 Draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, Brussels, 28/04/2004, COM (2004) 328 final. See M. JIMENO-BULNES, "The Proposal for a Council Framework Decision on Certain Procedural Rights in Criminal Proceedings

obstacles the proposal is encountering. This theory is confirmed by the exclusion of basic rules on the presumption of innocence, the right to bail, double-jeopardy and admission of evidence[276].

The main obstacles to the implementation of the mutual recognition principle lay in the slowness of the negotiation process, in the lack of transparency by the Third pillar, in the lack of regulations in jurisdictional conflicts and *ne bis in idem* principle, in the lack of rules on procedural guarantees, in the lack of minimum standards in evidence-gathering and presumption of innocence, and in the uncertain definition of grounds for refusal. All of the above are linked to the issue of competence of the European Community in criminal law.

This is also questioned by the European Court of Justice's response to a conflict of competence between the Council and the Commission over the environmental protection issue[277], that confirmed that neither substantive nor procedural criminal law form part of the European Community's competence.

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throughout the European Union" in E. GUILD, F. GEYER (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Ashgate Aldershot, 2008.

[276] The original proposal included the right to legal advice, the right to free interpretation and translation, the right to receive appropriate attention if not able to understand or follow the proceedings, the right to communicate, inter alia, with foreign authorities in the case of foreign suspects, and the right to be notified of one's own rights by means of a written "Letter of Rights". Many further rights were taken into consideration during the consultation process preceding the adoption of the Green Paper. See M. JIMENO-BULNES, "The Proposal for a Council Framework Decision on Certain Procedural Rights" *supra* p. 174-175. The right to bail might be the object of a forthcoming Green Paper. On the presumption of innocence, see European Commission Green Paper: The Presumption of Innocence, Brussels, 26/04/2006, COM (2006) p. 174 final. On double jeopardy, see European Commission Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, Brussels 23/12/2005, COM (2005) p. 696 final. A Green Paper on the handling of evidence and a Proposal on minimum standards concerning the gathering of evidence were initially envisaged in the Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union, OJ C 198 12/08/2005.

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

V. b) Mutual recognition or harmonization ?

The Council of Europe had already reflected on the mutual recognition principle even before the European Union strengthened its subject matter jurisdiction in criminal law. It did so by means of a series of Conventions that were not implemented mainly because of a lack of mutual trust between the countries belonging to the Council at that time.

Mutual recognition and harmonization constitute essential principles in the development of a common European criminal law, therefore in the present section we will be looking at these both *per se* and in their relation to the Treaty provisions.

Harmonization differs from mutual recognition in that its purpose is to diminish the differences between national systems and give life to one single system with one criminal code and one judicial court. Mutual recognition acknowledges the differences between the systems within and is based on cooperation and mutual trust. Harmonization implies a common normative standard agreed upon by all subjects, while in mutual recognition diverse normative standards co-exist and subjects can require other subjects to incorporate their own standards into their systems[278].

It is however important to make a few points. Since both terms, *harmonization* and *mutual recognition* are at times used incorrectly. For instance, harmonization is often interpreted as an approximation of rules[279], bringing the laws of the different countries closer to each other and is interchangeably used in terms of substantive criminal law and procedural criminal law. Others view

[278] On this issue cfr. I. BANTEKAS, "The Principle of Mutual Recognition in EU Criminal Law" (2007) n. 32 *European Law Review* p. 365.

[279] A. WEYEMBERGH, "Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme" (2005) n. 42 *Common Market Law Review* p. 1567.

harmonization more as a device to avoid conflicts between the diverse legal systems, rather than as a real attempt to eliminate all differences[280]. However, one can eventually assume that most of the differences in the various legal systems should be eliminated for the correct functioning of a common system. A clearer idea of harmonization can be attained through the distinction of its various degrees, ranging from the lowest (approximation) to the highest (unification), which is the level we have referred to so far.

Mutual recognition refers to both previous and final decisions. The latter have been defined on the basis of previous texts, such as the provisions of the 1968 Brussels Convention[281]. Final decisions are therefore acts that give a solution to a series of issues and have a binding effect with no possibility of appeal. They can be adopted by a court, as well as by other bodies, and may take the shape of extra-judicial agreements between the prosecution and the defendant[282].

Other types of decisions, including the questioning of suspects or witnesses or further methods of evidence gathering, the freezing of assets, non-custodial supervision measures or house arrest are mainly adopted during the pre-trial stage.

The distinctions between criminal and non-criminal matters have also been the object of debate for some time. The 1970 Hague Convention on the International Validity of Foreign Criminal Sentences and the 1991 Convention on the Enforcement of Foreign Criminal Sentences have established in the inclusion of decisions of a non-criminal nature.

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[280] F. M. TADIC, "How harmonious can harmonisation be? A theoretical approach towards harmonization of (criminal) law", in A. KLIP and H. VAN DER WILT (eds).

[281] Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ C 27 26/1/1998 (consolidated version).

[282] Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters, Brussels, COM (2000) p. 495 final.

Harmonization and mutual recognition have always been seen as two opposing principles. Harmonization detractors are firmly convinced that criminal law should remain an internal question. They question the repressive nature of the principle, which does not take into account the different States' position on specific crimes and consider the institutional framework of the Third Pillar as contradictory with the principles of democratic legitimacy. They, therefore, see harmonization as not applicable to cooperation in criminal matters[283].

On the other hand, supporters of harmonization argue it represents the most appropriate solution against transnational crime (given that a single *corpus iuris* would be more effectively applied), as well as the most effective system of guarantees of human rights. They argue that mutual recognition is not sufficient to guarantee a fair trial, especially as far as evidence gathering in another State is concerned[284].

In considering the main differences between the functioning of the First and the Third Pillar, it is easy to observe that in the latter the co-decision procedure is lacking. In fact, the Council has the main legislative power, whereas the European Parliament only plays a consultative role. The Commission shares its initiative with Member States, and the European Court of Justice's powers depend on the consent of Member States[285]. The Council (executive body) is

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283 T. VANDER BEKEN, "Freedom, security and justice in the European Union. A plea for alternative views on harmonization", in A. KLIP, H. VAN DER WILT (eds.), *supra* p. 95.

284 A. KLIP, "European integration and harmonisation and criminal law", in D. M. CURTIN *et al.* (eds.), *European integration and Law* (Intersentia METRO, Antwerpen-Oxford 2006) p. 134; J. R. SPENCER "Why is the harmonization of penal law necessary?", in A. KLIP, H. VAN DER WILT (eds.), *supra* p. 43. Against mutual recognition, cfr. B. SCHUNEMANN, "Alternative Project for a European Criminal Law and Procedure", (2007) p. 18, *Criminal Law Forum* p. 227. Also A. WEYEMBERGH, *L'harmonisation des legislations: condition de l'espace penal européen et révélateur de ses tensions* (Institut d'etudes européennes, Brussels 2004).

285 In detail, Member States can accept the Court's jurisdiction for preliminary ruling through a declaration. The power to request preliminary ruling can be attributed either to a national court or to a court against whose decision there is no judicial solution under national law (Article 35 TEU).

entitled to deal with criminal matters by means of Framework Decisions that do not require citizens' approval or ratification by a national Parliament.

These acts do not entail direct effect[286] and their implementation is hardly made efficient by the unanimous consent requirement in decision-making. Title VI of TEU establishes the harmonization principle only for certain areas and only with the purpose of encouraging an increasing inter-State cooperation. This is made clear in Art. 29; which establishes that the area of freedom, security and justice shall be achieved, *where necessary*, through the approximation of rules in criminal matters, in accordance with Art. 31 lett. e) TEU[287].

As a consequence, we can assume that in the Treaty of the European Union harmonization:

a) is intended as approximation;
b) is meant to establish common minimum rules, while other rules will be established directly by Member States;
c) refers more to substantive criminal law than to procedural criminal law, especially in areas such as organized crime, illicit drug trafficking and terrorism.

Hence, we can assume that the original idea in TEU was to make approximation a means to decrease the most striking differences in the criminal

[286] In fact, they have an *indirect* effect. See ECJ C-105/03 *Pupino* (2005) ECR I-5285.

[287] Art. 31 lett. e) promotes the adoption by Member States of measures establishing minimum rules in regard to the constituent elements of criminal acts and to penalties in the field of organized crime, illicit drug trafficking and terrorism. The Framework Decision represents the legal instrument for the approximation of laws and regulations of Member States as established by Art. 34 para. 2 lett. b).

law of the various Member States[288] in order to make judicial decisions more acceptable between the different Member States.

We can thus conclude that the mutual recognition principle represents a problematic issue along a horizontal line (in the relationship between Member States), just like the EC law supremacy[289] principle constitutes an issue along a vertical line (the relationship between the EC institutions and its States).

We will have to wait until the Lisbon Treaty[290] to have clearer indications on the principles of mutual recognition and approximations of laws and regulations. Art. 83 of the Treaty on the Functioning of the European Union (TFEU), which replaced Art. 31 TEU, established minimum standards on the definition of criminal offences and sanctions within areas of serious cross-borders crimes. Included among these serious cross-border crimes (besides the already mentioned offences of terrorism and organized crime) is the trafficking in human beings, money laundering, and computer crime, all which are subjected to approximation measures[291]. The fight against these crimes requires a closer cooperation between Member States. The Member States are called to fight them on a common basis.

Through the Lisbon Treaty, the mutual recognition principle attains a legal basis as the approximation of the laws of criminal procedure are regulated by Art. 82 TFEU, which paves the way for the creation of a European criminal law. The

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288 F. M. TADIC, "How harmonious can harmonisation be? A theoretical approach towards harmonization of (criminal) law", in A. KLIP, H. VAN DER WILT (eds.), *supra 1 et seq.*

289 Judgment of ECJ Costa v. ENEL Case 6/64 (1964) ECR 585.

290 Treaty amending the TEU and the TEC, OJ 306 17/12/2007. The Treaty was signed on the 13th of December 2007 after the failed approval of the European Constitution (see Treaty establishing a Constitution for Europe, CIG 87/2/04 Rev 2, Brussels on the 29th of October 2004).

291 Cfr. Council Framework Decision 2002/475/JHA of the 13th of June 2002 on combating terrorism; new Council Framework Decision 2008/841/JHA of the 24th of October 2008 on the fight against organized crime, *OJ* L 300 11/11/2008. Approximation will be achieved by means of a new procedure involving the European Parliament and the Council (i.e. the co-decision procedure renamed "ordinary legislative procedure"), as well as by new acts (named directives, instead of framework decisions).

European Parliament and the Council can establish minimum rules (in agreement with the ordinary legislative procedure)[292].

What we are undoubtedly looking at here is a lower degree of harmonization, requiring mutual respect on the Member States' part of the different legal systems, as stated by Art. 82 TFEU. This is mirrored by the States' choice of a combination of approximation and mutual recognition promoting the creation of a minimum criminal law, rather than of a radical harmonization approach[293].

The question therefore arises of whether a single "European judicial space" can be achieved on this basis. As a matter of fact, we have witnessed a series of disagreements between Member States. For instance, between Sweden and the Netherlands on a drug trafficking issue, the Netherland's policy on drugs being far less restrictive than in Sweden.

It is therefore worth looking at mutual recognition within the broader contexts of EU and international law to understand the reasons it still represents a "journey into the unknown"[294].

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[292] Such rules concern: 1. the mutual admissibility of evidence between Member States; 2. the rights of individuals in criminal procedure; 3. the rights of victims of crime; 4. any other aspect of criminal procedure (where the Council many act by unanimous voting after the Parliament's consent).

[293] According to Article 84 TFEU, the European Parliament and the Council may establish measures to promote the action of Member States in crime prevention, out of any harmonisation of their laws and regulations.

[294] V. MITSILEGAS, "The Constitutional Implication of Mutual Recognition in Criminal Matters in the EU" (2006) n. 43 *Common Market Law Review*, p. 1277.

V. c) Mutual recognition: context and foundations

The principle of mutual recognition has its roots in areas other than criminal law. Its first application occurred within the Community law for the purpose of recognition of diplomas and other qualifications, and was subsequently applied to the internal market law for the recognition of civil and commercial matters[295]. The principle of mutual recognition was introduced at the European Court of Justice after a series of failed attempts in encouraging free trade through harmonization and to promote the free movements of goods in its renowned judgment *Cassis de Dijon*[296]. Through this judgment the Court established that products sold in a Member State could be marketed in another State. Nonetheless, this does not aply to criminal law in that its products are merely "a legal fiction that represents no economic value"[297].

Thus, the risk is that when applied to criminal law, the mutual recognition principle may be interpreted according to a functional approach, recognizing judicial decisions as "products" without taking into account their cultural and legal background.

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295 In civil and commercial matters the principle of mutual recognition was first introduced with the Convention of the 27th of September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Brussels Convention) retrieved on the 26th of May 2012 from http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux_idx.htm. Also, cfr. D. BOYTHA, "La libre ciruculation des jugements dans l'espace judiciare européen en matière civile et commercial" (2006), *Revue de Droit de l'Union Européenne* p. 629. As to recognition of diplomas and other professional qualifications, see *inter alia* Council Directive 89/48/EEC of the 21st of December 1988, OJ L 19 24/01/1989 and Directive 2005/36/EC of the 7th of September 2005 on the recognition of professional qualifications OJ L 255/09/2005.

296 ECJ Case 120/78 *Rewe (Cassis de Dijon)* (1979) ECR 649. The approach subsequently adapted was a mixture of mutual recognition and harmonisation. Cfr. Commission White Paper "Completing the Single Market" COM (85) p. 310.

297 A. KLIP, "European integration and harmonisation and criminal law" *supra* p. 133; see also S. PEERS, "Mutual recognition and criminal law in the European Union: has the Council got it wrong?" (2004) n. 41 *Common Market Law Review*, p. 23.

We will, instead, try to analyse the principle of mutual recognition from a different viewpoint; we will insert it in the European integration context.

For the present analysis we will use a four-dimensional approach that will consider the principle in the following terms: a) historical, as a form of cooperation; b) as a conflict rule; c) as a policy option; d) as a legal principle.

The historical dimension takes into account the developments of inter-State cooperation throughout the last decades. Such critical analysis may help identify the reasons (legal or political) behind the failure of this process, although it is not sufficient to explain the distinction between its theoretical and functional aspects.

The conflict rule dimension focuses on the functional benefits of the principle, promoting legal certainty and reliability by establishing criteria regulating the application of rules or subject matters. However, we will concentrate on mutual recognition as a form of governance and link it to the issue of sovereignty[298]. These two aspects are particularly interdependent within international law[299], where diplomatic recognition of States is based on mutual binding trust.

The same recognition occurring in the sovereignty link (one State recognizing another State as equal sovereign), can be found in criminal law, where one State accepts another State's monopoly of the use of force in its own territory, unless: a) the former is not allowed to produce the same effects outside its territory; b) this conflicts with its basic values. A similar pattern can be identified in other traditional forms of cooperation, such as extradition. However, what distinguishes mutual recognition from other forms of cooperation is its bond with similarity. This also explains the implication of the sovereignty principle and confirms the existence of differences in all those cases where mutual

[298] Cfr. M. P. MADURO, "So close and yet so far: the paradoxes of mutual recognition" (2007) n. 14 *Journal of European Public Policy*, p. 814.

[299] K. NICOLAIDIS, "Trusting the Poles? Constructing Europe through mutual recognition" (2007) 14 *Journal of European Public Policy*, p. 682.

recognition applies. Permeability therefore characterizes inter-State relations allowing, in the case of mutual recognition, a higher degree of interaction between the States involved.

This mutual exchange of rights and obligations should trigger a sort of approximation "by default" based on the development of contact points and networking aimed at encouraging mutual understanding and trust. The Third Pillar is already working for this purpose (for instance, through the 2008 Council Decision on the European Judicial Network)[300]. This can only take place where differences between legal systems are not too dramatic[301]. The principle of similarity also serves the purpose of delineating a border between members and non-members[302], so that only insiders are recognized. This, however, entails a series of constitutionally defined values based on the protection of human rights. These are values on which the European Union is founded.

The system established by the Third pillar undoubtedly affects national legal systems. The question is on what basis the Third Pillar exercises this right by imposing minimum rules. There is undoubtedly a legitimacy issue that is enhanced by a EU democratic deficit. Two paths can be followed in regard to mutual recognition and approximation: the first, a coercive path, is based on the establishment of a legal framework focused on a pre-determined system of cooperation; the second, an informal path, is established by default. In the current context, where a monopoly of the use of force is not attainable within a single European criminal law, a combination of the two would be advisable.

As a whole, the principle of mutual recognition involves a series of issues concerning the question of sovereignty, which goes beyond the simple

300 Council Decision 2008/976/JHA of the 16th of December 2008 on the European Judicial network, OJ L 348 24/12/2008.

301 M. P. MADURO, "So close and yet so far: the paradoxes of mutual recognition" *supra* p. 823.

302 J. HABERMAS, *The Inclusion of the Other: Studies in Political Theory* (2000 The MIT Press) p. 203.

jurisdiction conflicts and which can weaken the single States' monopoly on their right to enforce the law.

Hence, the necessity to reflect on the fourth dimension, that is mutual recognition as a legal principle. The current situation is that national systems are asked to recognize as equivalent not only single acts but also the values of another system as a whole[303]. This represents a contradiction in terms. If the sets of values between two systems were identical, we would be dealing with harmonization not recognition. Given that no system is identical to another recognition will under no condition be absolute.

Overall, the first three dimensions focus on the States, rather than on the citizens. This position clashes with the emphasis put on the rights of individuals by the Union; a union that envisions itself as an autonomous legal order that is based on the protection of human rights and effective judicial review[304]. Equally as to the first three dimensions, mutual recognition as a legal principle refers to the principles of legality and human rights in respect to State authority. Although is not exempt from ambiguities.

Indeed, apart from the Framework Decision on the European Arrest Warrant which, in Article 1 para. 3 establishes the need to respect fundamental rights and legal principles (as according to Article 6 TEU), Framework Decisions do not generally bear any indications on the issue, given that the relevant provisions are contained within their Preambles. As a consequence, no judicial authority can refuse a request that breaches individual rights, apart from enforcing the EAW. It is possible to deny surrender procedure where there is an obvious breach of human rights. The question of finding justifications for the

303 S. LAVENEX, "Mutual recognition and the monopoly of force: limits of the single market analogy" (2007) n. 14 *Journal of European Public Policy*, p. 762, 765.

304 Cfr. ECJ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi, AL Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (on the 3rd of September 2008).

implementation of the mutual recognition principle for a universal recognition, which encompasses citizens' acceptance, remains.

V. d) Conclusions

Mutual recognition as both a form of governance and a legal principle still has a long way to go in order to be recognized as an important constituent in the building of a European criminal law. Generally, cooperation in criminal matters is far from constituting a common criminal approach, especially as far as the protection of human rights and the use of force are concerned[305].

While the latter offers flexible solutions and can be adapted to the EU entity, the former represents a delicate issue, where the lack of adequate provisions is bound to undermine mutual trust between Member States.

Mutual recognition still has to face the issue of a clear definition as well as the issue of a series of grounds for refusal. These issues constitute an obstacle to mutual trust and cooperation. Therefore, despite the urge for an approximation of both substantive and procedural law, the mutual recognition principle still presents legitimacy issues and shows a rather incoherent scenario in its implementation.

In theory, mutual recognition should pave the way for a horizontal, network-based order, founded on interaction and mutual exchanges, as opposed to a vertical order, based on a hierarchical structure. As a result, the principle of sovereignty appears increasingly diffused, the source of decisions no longer resting on the single States, but on other bodies which are quite removed from its citizens.

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[305] Cfr. M. FLETCHER, R. LOOF, B. GILMORE, *EU Criminal Law and Justice* (Edward Elgar 2008) p. 108.

A process of constitutionalisation, which does not necessarily involve the question of federalization, should be carried out within the EU. This leads to an analysis of the "behavioural expectations"[306] triggered by a redistribution of sovereignty.

[306] Cfr. J. HABERMAS, *The Divided West*, Polity Press, Cambridge, 2006, p. 130.

Chapter VI. European Arrest Warrant: origin and nature

VI. a) Introduction

In this chapter the political and legal reasons behind the adoption of the Framework Decision on the European Arrest Warrant is illustrated. Its adoption and implementation, as the result of a long process of reflection within European institutions and as a consequence of the terrorist attacks of the last decades, is discussed.

VI. b) Towards a simplified extradition

Judicial cooperation has always looked at the simplification of extradition procedures. Indeed, a series of arrangements have been made since the 1950s, based on the moderation of the main principles of classic extradition law, among which stand out the Nordic Extradition Scheme, and the Australia - New Zealand and Ireland - UK backing of warrants systems[307].

These situations share common features with the European Arrest Warrant. Since prosecution could be enacted by the issuing State only, the former operated out of the dual criminality requirement. Furthermore, assessment of guilt was not carried out by the executing State. Although reasons for the extradition request

[307] For further information on the Nordic Extradition Agreement check the Swedish Government website, available at and retrieved on the 24th of May 2012 from www.sweden.gov.se/sb/d/a/15435;jsessionid=aJiWcTLGMrY; on the Australia-New Zealand backing of warrants, see *A new extradition system. A review of Australia's extradition law and practice* - Federal Attorney-General's Department, Commonwealth of Australia, 2005; on the Ireland-UK backing of warrants, see J. R. SPENCER, "The European Arrest Warrant" (2003) p. 6 *The Cambridge Yearbook of European legal studies* p. 201; P. JACKSON "Backing of Warrants (Republic of Ireland) Act 1965" (1966) 29/2 *The Modern Law Review* p. 186.

had to be sent to the appropriate authorities. This process was based on the direct contact with the judicial authorities of the States in question and a reduction in power of the executive. Being neighbouring countries and sharing many legal similarities allowed the development of many diverse types of surrender procedures.

Member States had already agreed to simplify the transmission methods in 1989 through the "Fax Agreement", which constituted a first step towards simplification[308]. However, after the failed attempts to simplify extradition procedures through the 1995 and 1996 Conventions and lack of the establishment of the principle of mutual recognition of judicial decision within the Tampere European Council[309], new agreements were made in an effort to move forward with traditional forms of extradition. The development of new forms of criminal offences made the need for new instruments all the more urgent.

The agreements in question were the Treaty between the Italian Republic and the Kingdom of Spain on the prosecution of serious offences and the Treaty between the Kingdom of Spain and the United Kingdom concerning the same issue[310].

The Preamble mentions that "confidence in the structure and functioning of their respective judicial systems and in their ability to ensure a fair trial" is the basis of the Treaty between Italy and Spain. The intent to establish "(…) a common area of freedom, security and justice between the two countries to

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[308] Read about it Acuerdo entre los Estados Miembros de las Comunidades Europeas relativo a la simplificación y a la modernización de las formas de trasmisión de las solicitudes de extradición, Donostia-San Sebastian, Spain, on the 26th of May 1989 - Boletin oficial del Estado 17/05/1995. The agreement introduced a system of transmission of requests for extradition by fax.

[309] Tampere European Council (on the 15th – 16th of October 1999) Presidency Conclusions, available at http://www.europarl.eu.int/summits/tam_en.htm.

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

guarantee, through mutual assistance, the exercise of the rights and freedoms of citizens, with the removal of any obstacles or impediments that might give rise to areas of impunity within their territory"[311] had been previously undersigned in a Joint Declaration by the Italian and Spanish Ministers of Justice in Madrid on the 20th of July 2000. The Treaty was ratified with the purpose of extraditing Italian citizens charged *in absentia* more easily from Spain to Italy, especially in the case of subjects charged with mafia-related crimes[312].

The Parties were inspired by the principles ordained in the European Convention for the Protection of Human Rights and referenced the Tampere European Council. This met their goal of creating an area of freedom, security and justice, consistent with Article 29 TEU. In other words, the Treaty appears to pave the way to those measures on mutual recognition taken thereafter by the European Union. The Treaty can be said to be the first concrete instance of how mutual recognition originally conceived in Tampere should be applied. More specifically, the Treaty targets those critical areas of crime affecting both countries, such as the principal trafficking routes operated by both European and non-European organised crime[313]. To this end, the Parties reached the agreement of abolishing extradition procedures "(…) for the serious offences of terrorism, organised crime, drug trafficking, trafficking in human beings, sexual abuse of minors and illegal arms trafficking"[314].

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311 Read Italy-Spain Treaty, *supra*, Preamble.

312 For further details, see the report drafted by the Ministry of Justice on the law proposal: "Ratifica ed esecuzione del Trattato tra la Repubblica Italiana ed il Regno di Spagna per il perseguimento di gravi reati attraverso il superamento dell'estradizione in uno spazio di giustizia comune, fatto a Roma il 28 novembre 2000, nonché norme di adeguamento interno", available at : www.giustizia.it/dislegge/relazioni/tratItaliaspagnarelazione.htm.

313 Cfr., for example, G. TURONE, *Il Delitto di Associazione Mafiosa* (2nd ed. Giuffrè, Milano, 2008); J. L. DE LA CUESTA, "Organised Crime Control Policies in Spain: a Disorganised Criminal Policy for Organised Crime", in C. FIJNAUT, L. PAOLI (eds.), Organised Crime in Europe: concepts, patterns and control policies in the European Union and beyond (Springer, Dordrecht 2004) p. 795.

314 Again see at Italy-Spain Treaty, *supra*, Preamble.

Although the UK - Spain Treaty has the same Preamble and a similar pattern, its range of application appears to be wider. A noticeable difference is seen in Article 2, where reference is made to judicial decisions that cover more than "criminal convictions and court orders". Article 2 para. 2 states that judicial decision encompasses any detention order, criminal sentence, enforcement or other decisions with the same effect, which are issued by the State requesting the pursued person's detention and surrender.

The second main difference is the fact that the specific areas of crime are unrestricted. This unrestriction makes the Treaty potentially applicable to all crimes under the condition that the "minimum maximum" penalty threshold is observed.

VI. c) The origins of the European Arrest Warrant

The ratio behind the warrant can be seen in the differences between USA and Europe and Middle East countries in terms of risk. In this respect, "surely the uncertainty of the danger belongs to terrorism (…). In Israel people at least know what can happen to them if they take a bus, go into a department store, discotheque, or any open area - and *how frequently* it happens. In the USA or Europe one cannot circumscribe the risk; there is no realistic way to estimate the type, the magnitude, or probability of the risk, nor any way to narrow down the potentially affected regions"[315].

Following the 9/11 attacks on the Twin Towers exceptional political pressure was placed on innovative and more effective measures seeking to fight

[315] Read about this G. BORRADORI, *Philosophy in a Time of Terror: Dialogue with Jürgen Habermas and Jacques Derrid*a, University of Chicago Press 2003, p. 27 (Interview with J. Habermas).

the threat of terrorism. By the late 90s[316], European countries had already started a Programme of mutual recognition, responding to the need of creating new mechanisms of cooperation. In this scenario, global action against terrorism was unsurprisingly a top priority. Solidarity and emotional reactions manifested to US citizens by the European Union were soon turned into a shared sense of unity and prompted a need to take urgent actions[317]. The scope of the first documents of the mutual recognition agenda was unclear at the start. As mentioned earlier, the first rating was attributed to two instruments in the 2000 Programme on Mutual Recognition[318]. One instrument was accorded to the mutual recognition of decisions on freezing evidence and the other to the mutual recognition of orders to freeze assets. Only priority of the second rating was assigned to the adoption of an arrest warrant, which was restricted to the most serious offences included in Art. 29 TEU, namely, terrorism, drug trafficking, trafficking in human beings and offences against children, trafficking in weapons, corruption and fraud[319]. Further documents drafted in the same year indicate the prevailing uncertainty of which approach should be adopted. The options available were either "pure" or "absolute" mutual recognition (which was principally endorsed by the UK government[320]) limited to formal grounds for non-execution and/or applied to a

316 See *supra* chapter 1 p. 28 and ff.

317 For further details on the implications, see M. BYERS, "Terrorism, the Use of Force and International Law After the 11th of September", (2002), n. 51 *International and Comparative Law Quarterly*, p. 401. See also B. GILMORE, 'The Twin Towers and the Third Pillar: Some Security Agenda Developments", *EUI Working Paper* n. 2003/7.

318 Programme of measures for the implementation of the principle of mutual recognition of decisions in criminal matters, OJ C 12/02 15/01/2002.

319 On this matter, also see the European Union Strategy for the Beginning of the New Millennium. OJ C 124, 03/05/2000, in which recommendation n. 28 draws attention to considering the *long-term* possibility, rather than the short-term one, of creating a single European legal area for extradition.

320 The actual idea of mutual recognition sprang from a British proposal, opposing complete harmonisation. See Cardiff European Council (on the 15th - 16th June 1998) Presidency Conclusions available at: http://europa.eu/european_council/conclusions/index_en.htm. Also H. NILSSON, "Mutual Trust and Mutual Recognition of Our Differences, a Personal View", in G. DE KERCHOVE, A. WEEYEMBERGH (eds.) *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne* (Brussels Editions ULB 2001), p. 155.

restricted number of "serious" offences or approximation using the "minimum maximum" method and mutual recognition beyond this threshold. The option of complete harmonisation was considered unrealistic in the short term and thus rejected. Numerous issues arose from the concept of "serious" offences such as the purpose of mutual recognition, the specific offences to which mutual recognition was to be applied, and from the grounds for refusal. The parameter of the "minimum maximum" threshold was introduced to define the "seriousness" of an offence. Moreover, the list of offences varied over time. At one point, the list encompassed drug trafficking, trafficking in human beings, money laundering, fraud and participation in a criminal organisation and excluded terrorism, showing different political priorities at the time. In other occasions, crimes like counterfeiting of the euro and corruption rather than participation in a criminal organisation were included in the list.

Political pressure changed dramatically as a consequence of the 9/11 terrorist attacks on the Twin Towers. Subsequently, priority was given to the adoption of the European Arrest Warrant over other measures. A noticeably diverse list of offences was created in the mutual recognition documents at the same time. This was much more extensive than the previous list, as it included offences for which an approximation measure had already been applied[321], as well as different offences which were not (and are still not) commonly defined at a European level[322]. For the sake of partly handling this oddity, a double-track approach was introduced: the double-criminality requirement for those offences was abolished but maintained for all the crimes excluded from the list (even though the list is not complete and may be enlarged by the Council). More

[321] Particularly to terrorism (the corresponding Framework Decision was adopted the same day as the EAW: see Council Framework Decision 2002/475/JHA, of the 13th of June 2002, on fighting terrorism, OJ L 164, 22/06/2002), as well as to drug trafficking, money laundering, counterfeiting of euro, trafficking in human beings, fraud against the European Communities, organised crime.

[322] Instances include murder, extortion, and racketeering, swindling.

grounds for refusals were incorporated compared to previous drafts[323]. The resulting combination of mutual recognition and approximation by means of the "minimum maximum" method appears to reflect the negotiation between the diverse approaches that were pursued by Member States[324]. Interestingly, a somewhat similar but reduced version of the list appears in Articles 40 and 41 of the Schengen Convention (CISA)[325] in the chapter on police cooperation dealing with special rules on surveillance and hot pursuit without any need for prior authorisation in cases that are deemed urgent. While some categories of offences are only on this list, such as aggravated burglary, or illicit transportation of toxic and hazardous waste, others, such as organised crime and terrorism, are omitted. Article 2 of the 1995 Europol Convention and related Annex also includes a similar list, although organised crime as such is not mentioned. The new proposal, however, contains the exact list of offences to which the EAW is applied[326].

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

324 For further detail on the origin of the European Arrest Warrant and, more in general, on mutual recognition instruments, see also N. KEIJZER, "The European Arrest Warrant Framework Decision between Past and Future" in E. GUILD (ed.) *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers Nijmegen 2006) (hereinafter N. Keijzer A); V. MITSILEGAS, "The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU" (2006) p. 43 *Common Market Law Review* 1277; S. PEERS, "Mutual Recognition and Criminal Law in the European Union: Has the Council Got It Wrong? (2004) n. 41 *Common Market Law Review* p. 5; S. ALEGRE, M. LEAF, "Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - The European Arrest Warrant" (2004) n. 10 *European Law Journal* p. 200; W. GILMORE, The EU Framework Decision on the European Arrest Warrant (2002) *3 ERA-FORUM* p. 144.

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

326 Convention based on Article K3 of the Treaty on European Union, on the Establishment of a European Police Office OJ C 316 27/11/1995; Proposal for a Council Decision establishing the

It was the UK government that again proposed that extradition be replaced with an arrest warrant, permitted by the abolition of the double-criminality requirement[327]. Members of the European Council were summoned in an extraordinary meeting held on the 21st of September 2001 and were encouraged to emphasise their intention of cooperating with the US and to draft the guidelines of an action plan against terrorism[328]. The introduction of the EAW and the adoption of a common definition of terrorism were key in the action plan. The meeting led to the conclusions that extradition procedures did not "(…) reflect the level of integration and confidence between State Members of the European Union".

In this regard, the European Commission had elaborated and presented the proposal for the Framework Decision together with the other proposal for a Framework Decision on fighting terrorism[329] on the 19th of September, i.e., only eight days after the attack on the US had taken place. Prior to the attack, however, the proposal was scheduled for adoption on the 26th of September[330].

Furthermore, the European Council summoned the Justice and Home Affairs (JHA) Council to refine the proposal "as a matter of urgency and at the latest at its' meeting on the 6th and 7th of December 2001". The JHA Council was

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European Police Office, Brussels, 20/12/2006, COM (2006) p. 817 final; consolidated text, Brussels, on the 10th of April 2008 Doc. 8296/08.

327 Note addressed to the K4 Committee by the UK Delegation, 7090/99 on the 29th of March 1999. The UK has, in fact, experience of a similar mechanism: the "backing of warrants". Cfr. *supra* p. 68.

328 Conclusions and Plan of Action established by the Extraordinary European Council Meeting held on the 21st of September 2001, SN 140/01.

329 Draft Framework Decision on fighting terrorism, Brussels, 19/09/2001, COM (2001), 521 final; Draft Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, Brussels, 19/09/2001, COM (2001), 522 final (a slightly revised version is dated 25/09/2001).

330 The information was gathered through the interviews held with EU officials.

further prompted to implement the Tampere measures on mutual recognition as fast as possible. The JHA Council on the 20th of September identified these priorities[331]. The "handing over" of "perpetrators of terrorist attacks" and "the need to overcome the requirement of double criminality in terrorist cases" were the key issues identified in the Conclusions of the JHA Council. Enforcement of the two Conventions on extradition was still considered feasible by the 1st of January 2002. The use of a specific fast-track surrender procedure (following the model of the previous bilateral Treaties) and the elimination of "traditional" extradition only in the long term had been the former goals[332]. This adhered to the initial idea of making this procedure applicable only to convicted criminals and not also to suspects[333]. Conversely, the Conclusions of the European Council used the broader term of handing over "wanted persons" and referred to replacing the entire system of extradition the day after. In pushing for a more radical change, this more ambitious project promptly emphasised that fundamental rights and freedom needed to be protected. At the informal meeting of the European Council, which took place in Ghent on the 16th of October, this diverse approach was clearly declared by the Heads of State and Government and again emphasised in the resolve to abolish double criminality "for a wide range of actions"[334].

Drawing on former Conventions on extradition and mutual assistance, and on both the Italy-Spain and UK-Spain bilateral Treaties, the European

331 Conclusions adopted by the Council (Justice and Home Affairs), Brussels, on the 20th of September 2001, Doc. 12156/01, 25/09/2001.

332 For example, see the European Union Strategy for the Beginning of the New Millennium, *supra*, note 14.

333 According to point 35 in the Tampere Conclusions, *supra*, chapter 1 p. 8, extradition should be abolished as "(…) far as persons are concerned who are fleeing from justice after having been finally sentenced".

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

Commission proposed an innovative and somewhat complex instrument. The main EAW elements were already featured in the version known today, despite the fact that the version had not yet been finalised. Article 3 defined the EAW as a "request, issued by a judicial authority of a Member State, and addressed to any other Member States, for assistance in searching, arresting, detaining and obtaining the surrender of a person, who has been subjected to a judgement or a judicial decision (…)". This appeared as a broader definition compared to the one in the final version, and also to that of the Italy-Spain and UK-Spain Treaties. More than as a judicial decision, the definition was conceived as a request for mutual assistance, recalling the words of the 2000 Convention on Mutual Assistance in Criminal Matters, which included surrender for investigative purposes. The scope here was to combine the provisional arrest warrant and the request for extradition, i.e., the two phases of the traditional extradition procedure. In detail, the EAW itself was divided into four main actions. Namely, search, arrest, detention and surrender, in which the first three featured the classical arrest warrant in the extradition Conventions. In addition, the actions of search and arrest could not be refused on the grounds of double criminality, extraterritoriality, amnesty and immunity[335]. Detention was the object of an autonomous decision (Article 14). In such case, the executing judicial authority could decide to provisionally release the person arrested, based on the belief that such a person would not escape, persist in committing offences, or destroy evidence, and would remain available for the execution of the EAW.

The requirement of double criminality and the speciality principle were both expunged, even though the modification was not complete. Regarding double criminality, single Member States were able to create their own optional lists for refusal of execution on the grounds that it would be contrary to

[335] See Draft Framework Decision on the European Arrest Warrant, *supra*, note 124, Explanatory Memorandum.

fundamental principles of its legal system (Article 27) thus declaring in advance their intentions. Furthermore, in the case of extraterritorial jurisdiction, exercised by the issuing State for offences that were not, at least partly, committed on its territory, double execution could be applied by the executing State (Article 28). The mechanism of the "negative list" was introduced to enable Member States to eliminate those offences from the new system that could potentially be decriminalizable, such as drug possession and use, euthanasia and abortion. The list further allowed for the consideration of the minimum age for criminal liability[336]. As for speciality, the principles for the offences inserted in the "negative list" and for cases of extraterritoriality and amnesty were still preserved in Article 41.

Direct contact between judicial authorities was established (Article 7) and provisions on the use of the Schengen Information System (SIS, Articles 8 and 9) were included. Time limit restrictions were provided: the 90-days limit on the execution decision was adopted from the Italy-Spain Treaty (Article 20). Although authorities could together choose the date for surrender, it was established in terms of 20 days in particular cases such as when consent is given by the arrested person (Article 23).

Following this two-phase procedure, the Proposal highlights limited distinctions between the grounds for the non-execution of the arrest warrant and those for the refusal of surrendering. These were more numerous than those in the Italy-Spain and UK-Spain Treaties. Apart from the extraordinary cases in which double criminality could be applied grounds for non-execution (Articles 26-32) encompassed *ne bis in idem*, amnesty, immunity and lack of necessary information. The first was applicable in the two cases when the executive judicial authority passed final judgement, and when the decision not to institute or

[336] *Ibid.*

terminate proceedings in respect to the offence referred to in the EAW was taken. The second was applicable in all cases in which the executing Member State was competent under its own criminal law to prosecute the offence. The Proposal did not consider limitation periods that were a grounds for refusal under the 1996 Convention on extradition. As in the conventional extradition procedure, which was a matter concerning the executive, immunity was included as a result of the "jurisdiction" of the surrender. This followed the same provision that was in the Italy-Spain Treaty. In the case in which the EAW had no pertinent information, such as the requested person's identity or the issuing judicial authority, or the nature of the judgement, or the nature and legal classification of the offence, or the description of the circumstances of the committed offence, execution could be refused. In these terms, the principle of integration and the system of videoconference are referred to in Articles 33-34. Execution refusal was allowed when the executing authority believed that the requested person would have better possibilities of reintegration in the executing Member State where the person had consented to serve the sentence. When a videoconference mechanism could be used, and was agreed upon by both States, surrender for the purpose of trial could be similarly seen as excessive. In this case, the 2000 Convention on Mutual Assistance was evidently a model of reference.

Besides the cases in which EAWs were issued on the basis of judgements *in absentia*, requiring a new hearing of the case, and on the basis of execution conditional on return to the executing Member State, the Proposal included the so-defined "special cases". Among these, the possibility of requesting assurance by the issuing State that the sentence of life imprisonment would not be implemented (Article 37) was included in the Proposal, which thus reflected the declaration attached to the 1996 Convention by the country of Portugal. Nevertheless, there is no trace of this Article in the final version of the Proposal.

The provision of deferring the execution on humanitarian grounds represented another special case that was based on the belief that the person's life or health were endangered by age, health factors or other specific humanitarian reasons (Article 38). This provision did not survive the negotiations. The regulation of deferment of surrender and multiple requests was also implemented (Articles 39 - 40).

Agreement on the number of offences that should be considered and, more broadly, the purpose of applying mutual recognition was not as simple to reach as previously mentioned. Negotiations were mainly concerned with the issues of double criminality, nationality exception, rule of speciality, grounds for refusals, time limits, and the rights of the defendant[337]. A number of Member States considered the complete exclusion of double criminality as an extreme action proposed by the Commission and the countries in its support, including UK and Spain. This explains the Belgian Presidency's decision to reach a compromise on the 31st of October. This considered a list of offences for which double criminality was eliminated and a list of other offences for which it is currently applied, such as offences against public decency and sexuality, offences against the freedom of expression and association, abortion and euthanasia[338]. The Italian Government insisted on a list that was restricted to those six offences included in the Italy-Spain Treaty. Moreover, the decision to concentrate on *categories* of offences rather than on specific crimes was made to allow the Member States some discretion when the Framework Decision was transposed into their national legal systems. This is one of the main objections made to the EAW. This will be discussed later.

[337] For further details on this matter, see N. A. KEIJZER, *supra* p. 20-23.

[338] See Document 13425/01, of the 31st of October 2001.

Following the amendments made by the European Parliament, some important modifications were brought to the Commission proposal[339] particularly in regards to the increased number of grounds for refusals and to the reintroduction of speciality. The objectives of the EAW were limited to the conduction of a criminal prosecution, or to the execution of a custodial sentence or detention order, while the videoconference mechanism was abolished. Eventually, the abolition of nationality as a ground for refusal appeared incomplete. Furthermore, the rights to the free assistance of legal counsel and interpreting, in case of inadequate means to cover costs, were not preserved.

The proposal was submitted to the JHA Council on the 6th and 7th of December and political agreement on the Framework Decision was eventually reached before the Laeken European Council[340]. After its initial claim of not intending to support the proposal[341], the Italian Government withdrew on the 11th of December 2011. The EU Council of Ministers adopted the Framework on the 13th of June 2002 (only nine months after the Al-Qaeda terrorist attack).

339 See, for example, the European Parliament Report on the Commission Proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States (COM (2001) 522 - C5-0453/2001 - 2001/0215 (CNS)), on the 14th of November 2001 ("Watson Report").

340 Laeken European Council (on the 14th - 15th of December 2001) Presidency Conclusions, especially point 17 which praised the EAW as a forceful step in the fight against terrorism, available at and retrieved on the 24th of July 2012 from: http://europa.eu/european_council/conclusions/index_en.htm.

341 Read "*Berlusconi urged to support Europe-wide Arrest Warrant*", The Observer, of the 9th of December 2001; *Italy U-turn on Arrest Warrant*, BBC News, of the 11th of December 2001, available at and retrieved on the 24th of May 2012 from : http://news.bbc.co.uk/1/hi/world/europe/1704168.stm; cfr. also *infra*, chapter 5 p. 147 and ff.

VI. d) The main characteristics of the European Arrest Warrant

Currently, the EAW is interpreted as a judicial decision, whereby a Member State, as the issuing State[342], moves forward with a request for the arrest and surrender of a person, who is permanently or temporarily in another State, to the latter State (the executing State). Because a prosecution of the person includes the execution of a custodial sentence, or a detention order, and is the main reasons for using this measure. The EAW can also be used as a tool when an issuing State is seeking the return of a person that has committed of the accuse of an offence for which a maximum of least one year of imprisonment is established by the law, or when that person has already been sentenced to a prison term of at least four months[343].

In implementing the principle of mutual recognition of judicial decision and pre-trial orders, the EAW is considered to be the first and most important measure in the field of European criminal law[344]. The EAW was introduced in 2002 in accordance with point 35 of the Conclusions of the Tampere European Council held on the 15th - 16th of October 1999[345], which aimed at abolishing the formal extradition procedure between EU Member States.

The abolition of the extradition procedure, replaced by "a system of surrender between judicial authorities" to favour the free movement of judicial decisions in criminal matters, was the main reason for adopting the EAW, as clearly stated in recital 5 in the Preamble. Thus, the traditional principles of extradition seem to be no longer applicable. The EAW can be contextualized in

342 The terms "State of issue", "issuing State" or "requesting State", and respectively, "State of execution", "executing State" or "requested State" will be used interchangeably henceforth.

343 Article 2 para. 1 Council Framework Decision, *supra*.

344 Cfr. G. DE KERCHOVE, A. WEYEMBERGH (eds.) *La Reconnaissance Mutuelle des Décisions Judiciaires Pénales dans l'Union Européenne* (Brussels Editions ULB 2001).

345 Cfr. *supra*, note 3.

the evolution of the European model, but it is niether a simple surrender[346], nor a traditional extradition in its scope.

The ways in which the political, cultural and geographical connections between specific countries can shape long-established extradition procedures, adapting them to the particular needs of a regional or sub-regional area, are clearly exemplified by the European Model[347]. Due to the Member States' increasing confidence in each other's legal systems[348], a gradual abolition of traditional barriers and a simplification of procedures have occurred at the same time, strongly determined by the increasingly closer relationships between European States. As a precondition to mutual recognition, this concept of confidence has now been elaborated as "mutual trust".

The EAW lies at the end of this transformative process, although its applicability is limited to certain cases as aforementioned. It is applied only to acts that are punishable by the law of the State of issue in terms of a custodial sentence or a detention order for a maximum term of at least 12 months, or in the case in which a sentence has been passed or a detention order has been established for sentences of at least 4 months. However, doubts remain on whether aggravating circumstances or statutory reductions, where, for example, a person is merely charged for an attempt of a crime, are worthy of the EAW[349]. Features, which are independent from traditional extradition, are observable, *inter*

346 The "surrender" as a form of international cooperation in criminal matters is believed to differ from "extradition" according to some authors, principally due to the fact that it operates between a State and an international criminal tribunal, rather than between States.

347 See also M. MACKAREL, S. NASH, "Extradition and the European Union" (1997) n. 46 *International and Comparative Law Quarterly*, p. 948.

348 On this issue, see Preamble to the 1996 Convention referring to extradition between the Member States of the EU, OJ C 313, 23/10/1996: "The High Contracting Parties (...) EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial (...)".

349 These circumstances are not considered by Article 7 of the Italian Implementing law. See F. IMPALÀ, *Le mandat d'arrêt européen et la loi italienne d'implementation* (Fondazione Giovanni e Francesca Falcone 2005), available at: http://www.eurowarrant.net.

alia, in the rules governing the nationality exception, the human rights clause and double criminality. The centralised role of the judge *may* induce a *politicisation* of the judiciary, as already observed[350], and certainly expresses a presumption of a high degree of trust. This presumption is so robust, as in recital 10 of the Preamble of the Framework Decision that it is only in cases of serious and persistent violation of human rights that suspension of the implementation of the EAW may occur[351].

VI. d) (1) General tenets

The elimination of the nationality exception is the first significant modification produced by mutual trust. In principle, the surrender of a suspected or convicted person cannot be refused by any Member State of the European Union on grounds of nationality. Numerous bilateral or multilateral arrangements contain this traditional ban of extradition, which is usually optional for the State Party[352]. This is due to the fact that it is included in the domestic laws of most civil law countries, at times even at a constitutional level, expressing both the sovereignty of a State and guaranteeing fundamental individual rights. Although common law countries generally ignore the grounds for non-execution, there are other fundamentally equivalent requirements that are not included in civil law

350 E. GUILD, "Drawing the Conclusions: Constitutional Concerns regarding the European Arrest Warrant", in E. GUILD (ed.), *supra*, p. 267-272.

351 See *infra* chapter 5 pp. 156 and 169, and chapter 6 p. 196.

352 It is optional, for example, under Article 6 of the European Convention on Extradition and related Explanatory Memorandum, ETS n. 24, Paris, 13/12/1957, and Article 4 of the UN Model Treaty on Extradition, A/RES/45/116, of the 14th of December 1990, amended by A/RES/52/88, of the 12th of December 1997. Under Article 5 of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters, undersigned in Brussels on the 27th of June 1962, UNTS n. 8893, 120, refusal on this ground is, however, mandatory. Under Article 4 of the Extradition Treaty between US and Italy, undersigned in Rome on the 13th of October 1983 991 UNTS 285, refusal is on the other hand not allowed.

systems (e.g. the need for *prime facie* evidence of guilt) are provided by these countries.

Articles 5 para. 3, Art. 4 para. 6 and Art. 25 para. 1 corroborate that the nationality exception has not been entirely abolished and that the Member State still has a residual possibility of availing itself of this requirement. In detail, nationality as a *guarantee* is referred to in the first provision. In the cases of a request for surrender made by the issuing State for the *purposes of prosecution*, a conditional execution may be made by the executing State to assure that the person is returned to the State of nationality or residence upon conviction so as to serve the sentence in that State.

Nationality as *ground for optional non-execution* is qualified in the second provision. This allows a refusal of execution by the Member State upon issue of an EAW for the *purposes of execution* of a custodial sentence or detention order regarding a national, a resident, or a person who is actually in the executing State, when the execution of the sentence or detention order is undertaken by this State according to its domestic law.

Finally, nationality as a "*conditional transit*" is introduced in Article 25 para. 1. A State may issue a conditional transite for the *purposes of prosecution* of a sought person who is a national or resides in the State of transit. The condition involves the person's return to the State to serve the custodial sentence or detention order. However, problems related to double criminality may be determined by these provisions, as has already noted[353].

According to several international conventions[354], a sentenced person can only be transferred when the law of the administering State, or the executing

[353] Z. DEEN - RACSMANY, R. BLEXTOON, "The Decline of the National Exception in European Extradition?" (2005) p. 13 *European Journal of Crime, Criminal Law and Criminal Justice* p. 337 and ff; N. KEIJZER A, *supra*, p. 43.

[354] Art. 3 para. 1 lett. e) of the Convention on the Transfer of Sentenced Persons, Strasbourg, 21/03/1983 ETS n. 112; Art. 4 of the European Convention on the International Validity of

State in this case, can punish the act or omission for which the sentence has been imposed. Whenever double criminality is lifted it is impossible to guarantee the return of a sentenced person under Article 5 para. 3. Furthermore, a person cannot serve a sentence for an act that is not a crime in the State of residence or nationality. Under these circumstances it is not possible to execute a custodial sentence or detention order, as under Article 4 para. 6. The residual elements of nationality, which are still found in the Framework Decision, result in potential sources of conflict.

Under Article 2 para. 4 and Article 4 para. 1 of the Framework Decision[355], double criminality remains an optional ground for refusal as both are applied in the *simple* and *qualified* versions of the Framework. More specifically, double criminality is applied to all acts included in the list under Article 2 para. 2, and which are punishable by the law of the issuing Member State by a custodial sentence or detention order for a maximum term of *less than* three years. Double criminality can also be applied to all acts excluded from the list within the boundaries of applicability determined by para. 1 of the same Article to any type of offence, including those comprising minor criminal offences or those subject to administrative or pecuniary sanctions. As already pointed out[356], problems related to the temporal aspect of duality criminality are not completely solved in the wording of Article 2 para. 4. As stated in the provision, surrender is subject to the condition that the acts mentioned in the EAW are an offence under the law of the executing Member State for those offences that are not on the Framework list.

Criminal Judgements, The Hague, 28/05/1970 ETS n. 70; Art. 5 lett. b) of the Convention between the Member States of the European Communities on the Enforcement on Foreign Criminal Sentences. The first two are the only ones in force.

355 N. KEIJZER, "The double criminality requirement", in R. BLEXTOON, W. VAN BALLEGOOIJ, *supra*, p. 137-163 (henceforth N. Keijzer B).

356 Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte (n. 3) (1999) 2 WLR 827. See C. WARBRICK, "Extradition Law Aspects of Pinochet 3" (1999) p. 48 *International and Comparative Law Quarterly*, p. 958.

This remains largely ambiguous in temporal terms as to whether the conditions refer to the time period when the act was committed, or to the time period of the request.

In Article 4 para. 1, double criminality is not applicable to cases where the law of the executing State does not impose an identical kind of tax or duty. Nor is it applicable where the law of the executing State does not consider the same kind of rules concerning taxes, duties, customs and exchange regulations as the law of the issuing State. The fiscal offence exception is excluded. It is also not applicable in cases in which the way an act, such as participation or inchoate crimes or an attempt, is qualified and punished in the Member States differently[357].

For the list of the 32 categories of offences cited in Article 2 para. 2, there are no requirements for verifying double criminality, as long as these offences are punishable in the issuing State, or by a custodial sentence or detention order for a maximum term of at least three years. In these cases, the ruling definition is determined by the domestic law of the issuing State. In principle this is the only definition that matters as confirmed by the Court of Justice[358]. Nevertheless, several acts on the list are not qualified as crimes in every Member State, leading to a "disharmonization", which will be dealt with in the subsequent chapters[359].

The *ne bis in idem*, or double jeopardy principle, is covered in Articles 3 para. 2 and Art. 4 para. 2, 3 and 5 of the Framework Decision. It is a first ground for mandatory non-execution. This is the case when the judicial authority acquires information concerning the fact that the person against whom the EAW has been issued has been judged by a Member State for the same act. This

[357] See N. KEIJZER A, *supra*, p. 33-34 for details on this matter.

[358] ECJ C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad*, of the 3rd of May 2007.

[359] For further details, see *infra*, chapter 5.

implies that where there has been a sentence, it has been passed, is being currently served, or may not be executed any longer under the law of the sentencing Member State. Judgements from third Member States are included in this wording.

Secondly, the principle provides grounds for non-execution in three specific cases:

1. the executing Member State is prosecuting the requested person for the same act as that for which the EAW is issued;
2. the judicial authorities of the executing Member State have reached the decision either to not prosecute for the offence, or to halt proceedings when a final judgement has been passed in a Member State on the requested person for the same acts, thus preventing further proceedings;
3. the requesting authority is informed that the requested person has eventually been judged by a third non-Member State for the same acts, and provided that there is a sentence, that has been served, is currently being served, or may not be executed any longer under the law of the sentencing country.

The abolition of the political offence exception is another effect of the declaration of mutual trust, despite recital 12 of the Preamble, which preserves the fair trial or asylum clause. At the same time, Article 1 para. 3 respects fundamental rights and fundamental legal principles based on Article 6 TEU. Reference to cases in which there is serious risk of subjecting the sought person to the death penalty, torture or any other forms of inhuman treatment or punishment, is made in recital 13. There are two possible interpretations. The first

one is reading the combined articles on the basis of the *Soering* judgement[360]. Following this interpretation, the obligations of extradition and respecting fundamental rights, as guaranteed by the European Convention of Human Rights[361], should be weighed against each other on the basis of a single case; this makes the standard of proof for demonstrating the violation of human rights extremely high. The second interpretation is based on the Framework Decision and accounts for an exception of human rights. Eleven State Members have chosen this latter option in implementing their laws, albeit the aforementioned provision as well as recitals 10, 12 and 13 have not been always been included in the implementation of domestic laws[362]. The effectiveness of the degree of mutual trust between Member States is once more exposed as it can be legitimately presumed that less mutual confidence is fostered by the EAW when human rights are used more often as grounds for refusal. In at least a few occasions, it is expected that on this ground surrender will be refused. This becomes one of the principal parameters in evaluating the effectiveness of how the EAW functions. Running the risk of having a high number of cases of refusal, whether legitimate or not, represents a serious danger for the process of building mutual trust in the European Union.

Moreover, the rule of speciality, one of the traditional principles of extradition law is noticeably restricted by the EAW[363]. This does not, however, represent a radical change. In the former version of the Framework Decision, this

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360 Judgment of the ECtHR of the 7th of July 1989, Soering v. UK of the 7th of July 1989, Application n. 14038/88.

361 Cfr. Art. 6 para. 2 TEU.

362 The eleven State Members include Austria, Belgium, Cyprus, Germany, Greece, Ireland, Italy, Lithuania, the Netherlands, Slovenia and the United Kingdom. For further details, see the Report from the Commission on the implementation of the European Arrest Warrant and the surrender procedures between Member States in 2005, 2006 and 2007, COM (2007) p. 407 final and Annex to the Report, SEC (2007) p. 979. Also, cfr. *infra*, chapter 5.

363 Cfr. *supra*, chapter 1 p. 17.

rule was almost made void but was eventually reintroduced, as previously noted[364]. In the current Article 27, the rule is first qualified as a general principle. Paragraph 2 clarifies the concept of the surrendered person in a different way compared to the EAW: the surrendered person may not be prosecuted, sentenced or otherwise be subject to deprivation of liberty for an offence committed before surrender. This is restricted by two categories of exceptions. The first is the effect of a form of reciprocity. Members States can implement a special regime (Paragraph 1) to notify the General Secretariat that (consent is presumed) the rule has been abolished. Unless otherwise decided by the executing judicial authority in particular cases, this regime would operate only for these States. While a judicial authority can still preserve speciality, its exclusion is a result of political will.

As for the second category of exception, it appears to operate *automatically* as there are several cases in which the principle is not applicable, i.e., when it is possible to prosecute and convict a person for an "other" offence. These are listed in Paragraph 3 and occur when: the person has not left the territory of the Member State to which he or she is surrendered to within forty-five days of the final discharge, despite given the opportunity to leave the territory, or even when they return to that territory after departure; when the offence is not punishable by a custodial sentence or detention order; when a measure of restricting personal liberty is not applied following the criminal proceedings; or when a penalty or a measure to which the person may be liable, does not involve depriving the person's liberty, especially in the case of a financial penalty or a similar measure, even if the penalty or measure may determine the restriction of the person's liberty.

[364] Cfr. *supra*, pp. 77 - 79.

Another exception in accordance with Paragraph 4 occurs in cases when the executing judicial authority, which surrendered the person, gives its consent. This paragraph states that consent must be requested to the executing judicial authority and includes the same documentation as that required for an EAW. Within thirty days of its receipt, the judicial authority makes the decision of whether to give or refuse consent. The authority gives its consent when the offence is itself subject to surrender; it refuses consent, based on one of the mandatory or optional grounds cited in Articles 3 and 4. The provision of the guarantees mentioned in Article 5 is obligatory for Member States.

The surrender person can expressly waive the entitlement to speciality. This must be done before the competent authority of the issuing State, and the decision must be recorded based on the rules of the legal system of that State. The person is entitled to the minimum requirements of having the right to legal counsel, of expressing voluntary consent and full awareness of the consequences. These must be guaranteed to the person.

The Court of Justice in *Leymann* and *Pustovarov* has examined the precise nature of application and implications of the rule of speciality[365]. The Court clarified that first it is necessary to consider the constitutive elements of the offence in order to identify an offence that falls in the other category than that for which the person was surrendered, and then to verify the correspondence between the information in the warrant and that cited in the later procedural measures[366]. Time and place can be modified in this context as long as they can be traced in the data gathered during the investigations in the issuing State, and there is no

[365] Judgment of the ECJ C - 338/08 PPU *Leymann* and *Pustovarov*, of the 1st of December 2008. The Court dealt with two specific cases. In the first case, a Finnish prosecutor sent a request to Poland for the surrender of Mr. Leymann, regarding the offence of introducing a considerable quantity of amphetamines illegally into Finland for commercial purposes. Thereafter, Mr. Leymann was, however, prosecuted in Helsinki for the illegal introduction of haschisch, based on the consultation held with the Polish representative in Eurojust.

[366] Judgment of the ECJ *Leymann* and *Pustovarov*, para. 59.

alteration to the nature of the offence and no grounds for refusal[367]. Secondly, the Court claimed that it is not sufficient to declare an offence as "other" (see Article 27 para. 1) when the modification describing the offence is merely regarding the kind of drugs[368]. Thirdly, the interpretation of the Court of the exception to speciality, as provided in Article 27 para. 3 lett. c) (criminal proceedings do not lead to the application of a measure restricting personal liberty), refers to a case where a coercive measure is not applied. The Court interpreted this to mean that the person may be prosecuted and convicted for an "other" offence before the consent based on the procedure described in Paragraph 4 is actually given. Even in the case when a coercive measure is applied, the person can be subjected to this measure if it is justified in relation to other offences cited in the EAW before actual consent is given[369].

VI. d) (2) EAW procedure

According to Article 1 para. 2, the EAW must be executed on the basis of the principles of mutual recognition. However, it appears strange that only six Member States make explicit mention of this article[370], despite the fact that an EAW is issued and executed by judicial authorities (Article 6). Each Member State sends a list of the competent authorities, designated by its domestic law, to the General Secretariat of the Council. The role of the executive is restricted to mere assistance (as restated in recital 9 of the Preamble), as opposed to traditional extradition. Member States are allowed by Article 7 to designate one or more central authorities to assist the competent judicial authorities, and all indications

367 *Ibid.*

368 Judgment of the ECJ *Leymann* and *Pustovarov*, para. 63.

369 Judgment of the ECJ *Leymann* and *Pustovarov*, para. 76.

370 Annex to the Report from the Commission, *supra*, p. 44.

thereof must be communicated to the Council. Furthermore, central authorities can be appointed as responsible for the administrative transmission and reception of an EAW, or of any related correspondence.

Overall, the entire procedure regulated by the Framework Decision[371] can be divided into four phases: *i*. issuing the EAW; *ii*. transmitting the EAW to the competent authorities of the executing State; *iii*. deciding to Execute; *iv*. deciding to Surrender. Each phase is treated separately under the Framework Decision with its own rules and exceptions. This division is reflected in the following paragraphs.

VI. d) (2)i Issuing of the EAW

A judicial decision, issued by a judge or a public prosecutor according to the procedural law of his own State, generates the first phase. As the decision is judicial, a police body cannot issue a decision (e.g. as in the Australia-New Zealand backing of warrant systems), nor can a political or diplomatic authority issue a decision, as was allowed under previous European extradition models. The term "judicial authority" is directly sourced from the 1957 Convention on Extradition, which in turn was taken from the Bilateral Convention that was established between France and Germany in 1951. The rationale behind the decision of requesting surrender derives from the need to start a criminal trial against a suspected person, or to execute a custodial sentence or a detention order. The latter implies "any order involving deprivation of liberty which has

371 The actual procedure of implemented in the domestic law of each Member State does not always find a correspondence with the scheme outlined in the Framework Decision, as will be discussed later on.

been made by a criminal court in addition to or instead of a prison sentence"[372]. This instrument can, however, be used by the competent authority for acts which are punishable by the authority's national law by a custodial sentence or detention order of at least one year maximum, or for sentences of minimum four months when the sentence has already been passed or the detention order made.

VI. d) (2)ii Transmitting of the EAW

The EAW, which is transmitted by the issuing authority to the executing authority (Articles 9 and 10), dependent upon whether or not the sought person's location is known. If the location of the sought person is known, the EAW is sent directly. If the location of the sought person is unknown an alert is issued in the Schengen Information System (SIS)[373]. The alert adheres to the provision of the CISA and has an effect that is equivalent to an EAW[374]. As the SIS is still not capable of transmitting all the information needed, the alert has only a temporary equivalence until the original "in due and proper form" is received by the executing judicial authority. Transmission may take place indirectly through Interpol in cases where the SIS cannot be used. The issuing authority may also choose to use the telecommunications system of the European Judicial Network.

The issuing authority may encounter problems if they have difficulty determining which is the competent authority. For this reason, enquiries will be appropriately carried out and the European Judicial Network may prove helpful

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372 This definition can be found in Article 25 of the 1957 Convention on Extradition, which replicates Article 21 of the Bilateral Convention between France and Germany. In this regard, see the European Convention on Extradition, Explanatory Memorandum, ETS n. 24.

373 The possibility of using the SIS is also available, even in the case in which the location of the person is known.

374 Specifically, cfr. Article 95 of the Convention of the 19th of June 1990, which implements the Schengen Agreement dated on the 14th of June 1985, *supra*, note 202.

to this end. A request may be sent by mistake, of course, to an authority that is not competent. This authority has the duty of forwarding the EAW to the competent authority of its own State, and of communicating the mistake to the issuing authority. The authenticity of one or more of the documents sent in attachment to the request may also be questioned. Generally, these problems should be handled in one of two ways: either through direct contact between the judicial authorities, or through central authorities[375].

The content and form of the EAW are described in Article 8. In detail, an EAW must include the following information: the requested person's identity and nationality; the issuing judicial authority's name, address, telephone and fax numbers, as well as his email address; proof of an enforceable judgement; an arrest warrant or other enforceable judicial decisions with the same effect; the nature of the offence and its legal classification; a description of the situation in which the offence was committed, specifying the time, place and the requested person's degree of participation in the offence; the penalty imposed, if there is a final judgement, or the prescribed scale of penalties for the offence under the law of the issuing Member State, and where possible, other consequences exist due to the offence.

The warrant must be translated into the official language(s) of the executing State. In any case, a declaration may be filed, with the General Secretariat of the Council by Member States, stating their acceptance of a translation into one or more of the other official languages of the European Union[376].

[375] Article 10 para. 5 of the Framework Decision on the EAW.

[376] Article 8 para. 2 of the Framework Decisionon the EAW.

VI. d) (2)iii Deciding to execute

Upon the executing judicial authority's receipt of a request for surrender, the arrest of the requested person should, where possible, be the first step taken. In accordance with the national law of the executing Member State, the person is entitled to the assistance of a legal counsel and an interpreter. The person must further be informed of the EAW and of its content, according to Article 11. The executing authority considers may decide to detain the arrested person, if necessary. Conversely, the authority may provisionally release the person at any time, as long as all appropriate measures are taken to avoid the person from fleeing (Article 12).

Moreover, the arrested person must be informed of the opportunity to consent to surrender. In accordance with the law of the executing State, a hearing is arranged when consent is not expressed (Article 14). Article 13 applies to cases where consent is expressed before the competent judicial authority. All required measures must be taken to ensure that the person has expressed consent of his own will, and is fully aware of the consequences. At the same time of consent to surrender, it is possible to renounce the speciality rule along the same procedure, and both must be recorded. As a general rule, these cannot be revoked, unless Member States inform the General Secretariat of the Council about their intention to do so as soon as they adopt the Framework Decision. The time span between the dates of consent and its revocation are taken into account when determing the scope of the time limits in deciding to execute.

VI. d) (2)iv Deciding to surrender

The phase of surrender is subject to severe time limits for a two reasons. First, it shows the urge to accelerate the proceedings and to foster an efficient cooperation between States. In a way this strengthens mutual trust, given that the suspect or sentenced person's prompt handover will certainly satisfy the issuing State. This prompt surrender, on the other hand, also guarantees the person subject to the EAW will not undergo unreasonably long detention, pending the court's decision. The decision to execute the EAW must be made within the limit of 60 days from the arrest in accordance to Article 17, which states that an EAW must be executed "as a matter of urgency". When the person expresses consent, time limits are shortened to 10 days after the actual consent has been given.

As an EAW may be totally or partially incomplete, the Framework Decision claims that the executing judicial authority may ask the issuing State for additional information when the information previously acquired is believed to be insufficient. In this particular case, it is important to integrate information relating to the existence of mandatory or optional grounds for refusal, guarantees established by Article 5, or by one or more among the essential elements of an EAW as in Article 8. The request needs to be treated "as a matter of urgency" in the case of these inconveniences. Power is given, in fact, to the judicial authority by Article 15 to set a deadline for the receipt of information, considering the general temporal limits of the entire procedure.

Broadly-speaking, when the time limit cannot be respected the executing judicial authority is obliged to inform the issuing judicial authority straightaway, explaining the causes for such delay. It follows that an extension of thirty more days may be given to the time limit as a result. Member States must additionally inform Eurojust. There may exist particularly negligent States that will breach these provisions repeatedly. In these cases, it is up to the issuing State to report this to the Council. It appears, however, that there is no provision for other legal

consequences. Article 17 para. 7 plainly states that this fact will be considered for the purpose of evaluating the way in which the EAW is implemented.

The surrender itself must occur "as soon as possible" on the date agreed upon by the States involved. Article 23 establishes the general criterion of a 10-day term, starting from the final decision on executing the EAW.

The provision is again flexible in stating that Member States must contact each other in order to determine a new date when circumstances lying beyond the control of the States themselves have impeded them in keeping to the time limit. The person must be surrendered within ten days of the newly established date. If this is not likely to occur, the person must be released immediately. The exception is outlined in Article 23 para. 4. The exception states that surrender may be postponed in extraordinary cases for *serious humanitarian reasons*, as indicated in the example provided. This refers to the case where there are concrete grounds leading to the belief that the sought person's life or health would be seriously endangered by the operation. The executing judicial authority must inform the issuing authority immediately upon cessation of the reasons causing the delay in order to determine a new date. Surrender in this case must occur within ten days. If these provisions are not observed, there are no legal solutions. Potentially *Pinochet*[377] could be replicated here, thus deferring the surrender a number of times. Theoretically, the procedure could entail a political interference, despite the fact that its "judicialisation" could be disputed to guarantee an impartial balance between the demand for assuring justice and the protection of the individual. Besides, the provision of Article 23 para. 5, which

[377] Judgment of the ECJ *Regina v. Bow Street Stipendiary Magistrate ex parte Pinochet Ugarte* (n. 3) (1999) 2 WLR 827. It should be noted that this case is somewhat diverse, as extradition was refused rather than deferred, and it was the executive rather than the judiciary that made the decision (i.e., the UK Home Secretary) by referring to the "serious humanitarian reasons argument". Also, see *supra* p. 84.

grants immediate release when any of the established time limits expires, may potentially be exercised to escape prosecution and/or imprisonment.

Another chance of deferring surrender is mentioned in Article 24 in the cases where the decision of the executing State has already been made. This may be done by the judicial authority to enable the requested person to be prosecuted in the executing Member State, or to favour the person's serving a sentence there, or for some other act, that is not comprised in the EAW. The same authority may further decide for a *temporal* or *conditional* surrender, after reaching an agreement in writing with the issuing judicial authority.

Deducting all periods of detention, deriving from the execution of the EAW, from the total period of detention supposed to be served in the that State after a custodial sentence or a detention order have been passed (Article 26), lies in the hands of the issuing State. This may be seen as one of the major impacts of surrender. The executing authority (or the central authority, where this has been established) is obliged to transmit all the information concerning the length of the detention on the basis of the EAW, to the issuing authority when the surrender takes place.

Particular cases are governed by the specific mechanism mentioned in Article 28. These occur when the General Secretariat of the Council is notified by Member States. By adjoining similar notification made by other Member States, the surrender of a person to another State other than the executing one is taken for granted, unless differently declared in the decision to surrender. This is applicable to EAWs that have been issued for offences committed before surrender. Extradition to a third (non-Member) State can, however, only take place when prior consent is given by the competent authority of the executing State, based on the provisions of its domestic law and on related Conventions.

A person, who has already been surrendered to the issuing State, may be handed over (pursuant to an EAW) under extraordinary circumstances to a third Member State *without the consent of the executing State*.

These circumstances are applicable in three cases:

1. when the sought person has been given the possibility of departing from the territory of the Member State to which they were surrendered to and has not taken advantage of this within 45 days, or has made a return to that territory after having left it;
2. when the sought person gives consent to being further surrendered. In this case, the right to a legal counsel is without doubt assured. In addition, consent must be further given before the competent judicial authorities of the issuing Member State and needs to be recorded according to the domestic law of that State. It is distinctly necessary to make sure that consent has been voluntarily given and that there is full awareness of its consequences;
3. when the speciality rule is not applicable, and more specifically in those cases mentioned in Article 27 para. 3 lett. a), e), f) and g).

The consent given by the executing judicial authority to another Member State must comply with particular rules. In detail, transmission of the request for consent must be made in observance of Articles 8 and 9. It is within 30 days upon receiving the request that the decision must be made. It is possible to claim grounds for refusal and the guarantees relating to the EAW. Consent is mandatory only in cases when the offence that it refers to is subject itself to surrender.

VI. e) Conclusions

The EAW cannot be considered as a completely new entity in the field of cooperation in criminal matters, as has been pointed in this chapter. Some continuity can be identified between the actual EAW and traditional extradition, or those forms of surrender that were acknowledged bilaterally at the start of this century. In many ways the Italy-Spain Treaty and the UK-Spain Treaty were both innovative, but at the same time less complete. Innovation can be found, for example, in the grounds for refusal, which were noticeably restricted in comparison to traditional extradition. When accounting for the fact that provisions on speciality, territoriality, or *ne bis in idem* were ommitted; the Treaties are considered incomplete. The project initially advanced by the Commission to identify a surrender scheme for EU countries was even more daring to some extent. It deemed the new mechanism as a powerful instrument, which absorbed the search, arrest, detention and surrender of a person at the same time. The response to the demand for an effective and rapid procedure was given by the provisions that inflicted strict time limits and settled direct contact between judicial authorities. The abolition of double criminality was one of the most noteworthy accomplishments, despite the Commission draft, which struggled to compensate this audacious step with some space left to the Member States. This draft was promptly discarded so that a quite different approach predominated, as earlier shown.

The outcome was a somewhat strange compromise between the guidelines pinpointed by the European Council and the conditions set by the European Parliament. While the guidelines clearly promoted cooperation with the United States in the battle against terrorism, the Parliament's conditions restricted, *inter*

alia, the application of the EAW to prosecution or execution of a sentence (or a detention order), while increasing the number of grounds for refusal. This event took the shape of a Third Pillar instrument, which as is known, has a weaker compelling force compared to the traditional First Pillar acts.

Double criminality was discarded more remarkably for a large number of categories of offences. This is an obvious contradiction with earlier proposals on the application of mutual recognition referring to a much more limited list of crimes[378], and will be considered in another chapter. Here it is worth noting that the lack of transparency, as well as the political pressures, hindered the adoption of a rational and balanced measure so that no accurate reflections were made on the consequences and risks represented by such a strategy.

The distinction that can be made between the EAW and extradition are the main characteristics of the former, which can be entirely accounted for in terms of mutual trust in the foreign legal systems, at least at a theoretical level. Nonetheless, due to its internal structure and functioning, and to its effective context of operation, namely, judicial cooperation in criminal matters, the EAW has not been expounded in a coherent manner. The shift from the inter-governmental level, where extradition belongs, toward the judicial level is not complete. This is due to the fact that the EAW has been created within a framework, namely, the Third Pillar, which has proven to be flawed and has been the object of criticism from different viewpoints. Some of these problems presented by the EAW can be seen as related to the substantive law, which is the object of detailed analysis in the following chapter.

[378] See infra chapter 4 p. 131.

Chapter VII. European Arrest Warrant implementation in Member States of the EU: overview and case studies

VII. a) Introduction

Many EU Member States did not believe it necessary to alter their own Constitution to permit the surrender of their nationals[379]. This, however, did not create problems of a constitutional nature. Analysis of the extent of Member State Framework Decision implementation highlights some short fallings of the EAW at lower levels, such as the different statutes which have been adopted in different EU Member States.

This chapter will identify and describe what could be described as a strange contradiction in that the very same Member States that concurred on the adoption of an instrument which substantially modified the traditional principles of judicial cooperation neglected to correctly transpose it or to correctly adapt their respective national legal systems prior to its introduction. This took place in the domestic legal systems hierarchy of norms at all levels. The Constitutional Courts of Germany, Poland, Cyprus, Czech Republic and some other countries were requested to rule on the conformity of the Framework Decision and/or the implementing statute with national Constitutions. Furthermore, many of the national "versions" differed considerably from the model which was approved by the Council with the resultant system being non-uniform. The scope of this chapter is to analyse the degree to which the existing lack of harmony could lead to the ineffective implementation of the EAW from a practical view point. Since it is not always possible to provide a

[379] With regards to France, refer to *Avis du Conseil d'Etat n. 368-282* of the 26th of September 2002.

detailed analysis of the procedural and constitutional obstacles encountered by all the Member States, this work will look at the judgments of the previously mentioned constitutional courts (which can be interpreted as a physical reaction to the removal of the exception of nationality as well as a test of mutual trust). It will then concentrate on two of the EU Member States, namely the United Kingdom and Italy. Lastly, with regards to the context of cooperation in criminal matters, a non-legal notion of mutual trust will be elaborated within this specific context.

VII. b) The reaction of the National Constitutional Courts to the removal of the nationality exception

This section will demonstrate that there is no real rational consideration on the basis of which a State can deny the surrender of a national. As stated previously in this work[380], many supporting statements can be made in favour of the nationality exception, which will be considered in more detail below[381]. There is, of course, the risk that nationals may attempt to use their own states as a "safe haven", and this is the precise reason for the existence of some safeguards. Countries which refuse to extradite their subjects often leave the duty of prosecuting, or convicting individuals (principle of *aut dedere aut judicare*) and the establishment of extraterritorial, personal jurisdiction over acts committed by their subjects in another State, to their domestic courts[382]. Instead, the States that usually permit the extradition of their subjects generally

380 See *supra*, chapter 1 p. 23. For a history of the nationality exception, see e.g. I. A. SHEARER, *Extradition in International Law* (Oceana Publications, Manchester University Press, 1971) p. 94-131.

381 See *infra*, p. 139-141.

382 See *supra*, chapter 1 p. 12.

apply territorial jurisdiction[383]. It is possible to justify the non-extradition of subjects on the basis of the principle of active personality, where a State has jurisdiction over its nationals[384], which has a tendency to lead to an offender not receiving punishment. It is possible to illustrate this point by providing an extreme example, but which is, nevertheless, useful.

For this purpose let us consider the hypothetical case of subject X who has dual citizenship in State A and State B. National X has lived in State A for a lengthy period of time. After some time he becomes a member of a criminal organisation along with other people. Subsequently, he flees to State B which officially recognises only one nationality. Following an extradition request from State A, State B refuses to surrender Subject X due to the nationality rule. It becomes impossible to prosecute Subject X because the act they committed in State A is not considered as an "organised crime" nor is it considered under the definition of any other criminal offence in State B. To further expound this hypothesis we will presume that evidence collection and analysis is not possible in a State which is different from the *locus commissi delicti* (the nation where the crime occurred)[385].

Despite the risks implied in the application of the nationality exception, it has been given a "sentimental" or "patriotic" value in civil law in many countries. For example, the Benelux Treaty on Extradition and Mutual Assistance in

383 Cfr. I. A. SHEARER, *Extradition in International Law* (Oceana Publications Inc., Manchester University Press, 1971) p. 96-97; C. SHACHOR - LANDAU, "Extra-territorial Penal jurisdiction and extradition", 1980, p. 29 *The lnternational and Comparative Law Quarterly* p. 274 - 295.

384 For a critique of the active personality principle, see M. PLACHTA, "(Non) Extradition of Nationals: A never ending Story?", 1999, n. 13 *Emorylnt" Law Rev* p. 121-123.

385 It worth noting that nationality does not result as being grounds for the refusal of mutual legal assistance. Refer to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20/04/1959, ETS n. 030; Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12/07/2000.

Criminal Matters provides for the complete prohibition on the extradition of nationals (Article 5) and *aut dedere aut judicare* does not apply[386]. This exception was officially adopted in Italy as early as 1889[387].

The nationality exception, in a broad sense, can be viewed as the expression of both State sovereignty and individual rights. On the one hand, State authorities maintain the right to judge their nationals for acts which they have committed. On the other hand, a person has the right not to be physically removed from his natural judge (*ius de non evocando*) and enjoy protection from the far reaching jurisdiction of another Member State, particularly for criminal acts the nature of which were neglected at the time of their execution[388]. Member States with Common Law, which do not apply this rule, have traditionally set other requirements, such as the necessity to provide a *prima facie* case of guilt (a requirement to provide adequate evidence in support of the extradition request)[389].

It is possible to identify different approaches regarding the non-extradition of nationals with individual rights.

Justification of refusal of the application to extradition on the basis of freedom of movement in the European Community (Articles 39, 43 and 49 TEC) has been justly denied in some national law cases, as a different judgment "would

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386 Treaty on Extradition and Mutual Assistance in Criminal Matters, 1962, *Moniteur Belge*, on the 24th of October 1964.

387 See also C. GHISALBERTI, *La codificazione del diritto in Italia 1865/1942*, Laterza Roma – Bari, 2000. See Article 9 Italian Criminal Code R. d. of the 30rd 1889, n. 6133.

388 Cfr. Z. DEERN - RACSMANY, R. BLELXTOON, "The Decline of the Nationality Exception in European Extradition?", 2005, p. 3 *European Journal of Crime, Criminal Law and Criminal Justice* p. 317 e p. 319, citing other authorities; M. PLACHTA, *supra*, p. 77-158; also I. A. SHEARER, *supra,* p. 98 and 105, where the clarification is provided that this is an application by German academics of the *Treupflicht* principle (*Treupflicht* being the duty of the state to protect all its citizens). See also *infra*, p. 143 on the German Constitutional Court's decision.

389 Again cfr. I. A. SHEARER, *supra.*

emasculate the entire process of extradition"[390]. Previously, some authors have suggested relying on Article 3 para. 1 of Protocol 4 of the European Convention on Human Rights[391]. This provision does refer to the concept of expulsion of nationals, which if interpreted in a very general sense may also include extradition. This is why the Explanatory Report specifies that "(...) it was understood that extradition was outside the scope of this paragraph"[392]. Even though this clarification was made, some authors are still uncertain as to the most appropriate interpretation of Article 3 para. 1. They believe that the unclear and ambiguous nature of the wording of this Article prevents the use of the Explanatory Report as an interpretative tool in the application of the general principles under Article 31 of the Vienna Convention on the Law of the Treaties. As a result, the extradition of nationals would not be allowed[393]. Other authors are of the more reasonable opinion that, even though the reference to the expulsion of nationals is ambiguous and unclear, the interpretation provided by the Explanatory Report ought to be taken into account. Thus the 1957 European Convention Approach, which does not completely prohibit the extradition of nationals, but rather allows State Parties to decide should be the preferred approach[394].

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390 See Regina v Secretary of State for the Home Department, ex-parte Launder (1997) 1 W. L. R. 839; and also Regina v Governor of Pentonville Prison, ex - parte Budlong (1980) W. L. R. 1110. These cases are prior to Amsterdam articles 48, 52 and 59 TEC.

391 Protocol 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS n. 46, retrievable and retrieved on the 16th of May 2012 from http://conventions.coe.int/ Article 3 para. 1 states that "No one shall be expelled by means either of an individual or of a collective measure, from the territory of the State of which he is a national".

392 Explanatory report to Protocol n. 4, *ibid.*

393 F. JACOBS, R. WHITE "European Convention on Human Rights" (3rd ed. OUP 200) p. 343; Vienna; Convention on the Law of the Treaties (adopted on the 23rd of May 1969, which came into force on the 27th of January 1980) 1155 UNTS 331.

394 J. MERRILS, A. ROBERTSON, "Human Rights in Europe" (Manchester 2001) p. 256; P. VAN DIJK, G. VAN HOOF *et al.*, "Theory and Practice of the European Convention on Human Rights", (4th Ed. Intersentia Antwerpen - Oxford 2006) p. 947; for the 1957 Convention see *supra* Chapter 1, p. 14.

With regards to the duty of protection owed by the state, this would appear to be more of a political principle than a legal principle[395]. This is difficult to justify if it is only applicable to nationals and not extended to lawful residents. Likewise, the case for the right not to be removed from one's own natural jurisdiction and all other arguments of a similar nature are of little relevance in the modern world in which freedom of movement from one country to another (and the consequent possibility of committing a crime there) is much easier than in earlier times. It is possible to conclude that a much more realistic and efficient solution would be that of prosecuting and punishing an individual in the location where the crime occurred since the crime violated the values of the society where it was committed.

One of the aims of the 1996 EU Convention was to provide a more flexible approach[396]. It established a series of limits to the period of validity, renewal, and expiration of the prohibition to surrender while allowing the Member States the possibility to choose whether or not to actually authorise the surrender of a national under certain conditions. Ultimately, the aim of the 1996 EU Convention was to not "burn bridges" and to build the foundations for the gradual removal of this antiquated requirement. However, this delicate approach did not succeed as we have seen[397]. After just a few years the EU Member States were ready to take a more direct approach with the introduction of the Framework Decision on the EAW[398].

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395 Cfr. I. A. SHEARER, *supra,* p. 119.

396 Article 7 para. 3 Convention drawn up on the basis of Article K 3 of the Treaty on European Union, relating to extradition between the Member States of the European Union, OJ C 313 23/10/1996.

397 See *supra*, chapter 1 p. 24 - 25.

398 See *supra*, chapter 3.

The nationality rule, when applied, is traditionally coupled with an extension of the States' jurisdiction to a large number of extraterritorial offences committed by their nationals. It is interesting to compare whether Member States that previously refused to surrender their nationals still exercise that jurisdiction to the same extent. In 2000, the first indications of change were beginning to show when German Basic Law was amended to comply with obligations arising from the Statute of the International Criminal Court (ICC)[399]. The general prohibition of the extradition of nationals was substituted by a system which provided for an exception in the case of extradition to another EU Member State or extradition to an International Court of Justice if "constitutional principles are respected"[400]. It can be said that the new system was specifically created not only for the ICC surrender scheme, but also in order to comply with new EU cooperation schemes. The EAW, which according to German opinion is a form of extradition, was among the new EU cooperation schemes. Yet, the French *Conseil d'Etat* did not find it necessary to modify the Constitution in order to allow the surrender of its nationals (even though the EAW was regarded as a form of extradition as well)[401].

Shortly after the Framework Decision entered into force, Poland, Germany and Cyprus, by means of their Constitutional Courts, challenged the compatibility of this measure with national constitutions. This highlights the lack of clarity in the rapport between State sovereignty and mutual recognition/mutual trust. Member States unanimously approve a Framework

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399 Statute of the International Criminal Court, Rome, (17/07/1998) UN Doc. A/CONF. 183/9, 37 ILM 999 (1998), amended by UN Doc, PCNICC/1999/INF/3. See also the obligation to surrender as established by the Rwanda and former Yugoslavian courts, UN Doc. S/RES/808 (1993) and UN Doc. S/RES/827 (1993), as well as Annex and S/RES/955 (1994) and subsequent amendments UN Doc. S/RES/1329 (2000) and S/RES/1503 (2003).

400 Judgment "*soweit rechsstaatliche Grundsiitze gewahrt sind*", Article 16 para. 2 sentence 2 German Constitution (*Grundgesetz)*.

401 *Avis du Conseil d'Etat, supra.*

Decision with consequent important changes to their system of judicial cooperation. When tested against their own Constitutions or (as will be shown later in this chapter) when it is time to implement it, Member States are both reluctant and unsure.

The Polish Court was required to decide if the surrender of a Polish national to the Netherlands for prosecution (under Article 607t of the Code of Criminal Procedure) was in accordance with the provisions of their constitution which prohibits the extradition of nationals[402]. The court reached the conclusion that "extradition" and "surrender", which both involve the handing over of a prosecuted or convicted national to a foreign country, should not be interpreted as distinct categories in their substance. Consequently, surrender is forbidden[403]. Poland has an obligation to interpret domestic law in a manner consistent with EU law which is limited by cases where it may determine either the introduction or aggravation of criminal liability. Furthermore, EU citizenship may not result in the lessening of Constitutions guarantees relating to individual rights and freedoms. The result of this was that Article 607t para 1 of the Polish Code of Criminal procedure was found to be incompatible with the Polish constitution. However, the legal force of this provision was extended for a further eighteen months: due to Poland's obligations towards the EU, the Polish Constitutional Court advised an appropriate amendment of the constitution which would allow a correct implementation of the Framework Decision. In November 2006 a new

[402] Judgment of the Polish Constitutional Tribunal, P 01/05 27 on the April 2005. The provision is in Article 55 para. 1 of the Polish Constitution. See K. BENI, "The European Arrest Warrant and the Polish Constitutional Court Decision of the 27th of April 2005", in E. GUILD (ed.) *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers Nijmegen 2006) p. 125 - 139; K. KOWALIK - BANCZYK, "Should We Polish it Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", 2005, n. 6 *German Law Journal* p. 1355 - 1366.

[403] The distinction between the two concepts was one of the arguments used before the judgment by those who were of the belief that there was no requirement for a constitutional amendment. See K. KOWALIK - BANCZYK, *supra*, p. 1359.

law was approved and it came into force in December, in the meantime the new constitutional provision was directly applied to the case[404].

The German Federal Constitutional Court (*Bundesverfassungsgericht*) found the whole German implementing law to be incompatible with Article 16 para. 2 of the German constitution (despite the abovementioned amendment)[405]. The Court held that the extradition of a German national would go against the principles of legality set out in the constitution, which prevents citizens from being handed over against their will to a legal system that they are unfamiliar with and that they have no confidence in. The Court emphasized that the German implementing law had not, *inter alia*, incorporated Article 4 para. 7 lett. a) and b). Article 4 has a number of optional grounds for refusal and paragraph 7 addresses the principles of territoriality and extraterritoriality. In July 2006, a new law was promulgated which took this decision into account[406]. In accordance with this law, it is only possible to extradite German nationals for prosecution if a genuine link (*maβgeblicher Bezug*) of the criminal act can be demonstrated to the requesting Member State territory. A mandatory ground for refusal exists when there is an existent national link to the German national territory. But if foreign link exists, surrender is compulsory. In cases where "mixed law" is present, the law necessitates a verification of double criminality and requires the court to evaluate effectiveness of the prosecution, of the alleged offence, and on the guarantee of fundamental rights. In any outcome, it is

404 The constitutional amendment took place on the 7th of November 2006 and became effective on the 26th of December 2006. See Report from the Commission on implementation of the EAW and surrender procedures between Member States in 2005, 2006 and 2007, Brussels, 11/07/2007, COM (2007) 407 final and Annex to the Report, SEC (2007) p. 979 final.

405 Judgment of the BVerfG, of the 18th of July 2005 2 BvR 2236/04. See F. GEYER, "The European Arrest Warrant in Germany - Constitutional Mistrust towards the Concept of Mutual Trust", in E. GUILD (ed.) *supra* p. 101 - 123; S. MOLDERS, "European Arrest Warrant is Void - The Decision of the German Federal Constitutional Court of the 18th of July 2005", (2005) 7 *German Law Journal* p. 45-58.

406 Judgment of the *Bundesgesetzblatt Jahrgang 2006 Teil I Nr.36 p. 1721,* of the 25th of July 2006.

necessary to guarantee the return of the national after sentence completion. This presents some of the concerns of the Court relating to the non-retroactivity principle. It is possible that an offence committed in another Member State of the EU by a German national is criminalised subsequent to an amendment of the law of that State. In such cases it would be absurd if the Court were to consent to surrender if the act in question was not actually considered to be a crime in Germany at the time its execution and if there is no valid connection to the other Member State. It is important to note that in the Court's decision, reference was made to "extradition" (*Auslieferung*) rather than "surrender" (*Ùbergabe*)[407].

The Supreme Court of Cyprus also found the surrender of a Cypriot national unconstitutional[408]. Although constitution Article 14 states that no citizen will be banished or excluded from the Republic of Cyprus for any reason, no direct decision was made regarding the compatibility of the Cypriot implementing statute with this provision. Instead, the Court put forward the point that the constitution only allows for the arrest of a Cypriot national on conditions set out in Article 11 para. 2, which states that a person may only be deprived of his freedom in a distinct set of limited set of circumstances. For example during detention after conviction or during detention based on the reasonable suspicion of their having committed an offence[409]. Even though an amendment took place in June 2006, Cypriot citizens are only eligible for

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[407] The same occurs in the implementing law. Austria also adopted the first term and, until the 31st of December 2008, reserved the right to deny execution of an EAW if the person subject of the EAW was an Austrian national and if the crime for which the EAW had been issued were not punishable under Austrian law (Article 33 of the Framework Decision).

[408] Judgment of the Supreme Court of Cyprus n. 295/2005, Council Document n. 14281/05, 11/11/2005.

[409] Art. 11 Cypriot Constitution, retrieved on the 24th of May 2012 from http://servat.unibe.ch/icl/cy00t.html, last visited on the 5th of November 2012. For EAW implementation in Cyprus, see E. A. STEFANOU, A. KAPARDIS, "The First Two Years of Fiddling with the Implementation of the European Arrest Warrant in Cyprus", in E. GUILD (ed.), *supra* p. 75 - 88.

surrender if the criminal act was committed successive to the accession of Cyprus to the EU, on the 1st of May 2004[410].

These constitutional decisions highlight the lack of uncertainty of the application of the EAW. Given the nature of the EU, some academics have observed how it is not possible to employ common procedural and substantive standards and, at times, the division of powers is unclear, and confidence in the effectiveness and functioning of the EAW is undermined[411]. The German Court was reliant on both legality and non-retroactivity. The Court argued that both are relevant to extradition as this, despite its procedural features, is of a punitive nature[412]. For some unclear reason, the German court chose to restrict its limitation of mutual recognition only to cases regarding nationals, actively excluding long-term residents. This can be described as a very traditional approach and is reminiscent of *Solange* jurisprudence[413]. By linking the notion of citizenship to the notion of nationality and bestowing them with special protection, the Court defines judicial cooperation boundaries in terms of State sovereignty instead of in terms of defendant rights. A more traditional approach was adopted by the Polish Court which paid tribute to the supremacy principle of EC law, even though it did not proclaim prevalence of Third Pillar law over national law (a decision made by the European Court of Justice, which ruled on *Pupino* [414] shortly afterwards). Yet, other constitutional challenges to the Framework Decision, made in Greece and the Czech Republic, did not cause real

[410] Cypriot Law of the 18th of June 2006 amending Article 11 of the Constitution. See Commission Report, *supra*.

[411] E. GUILD, "Introduction", in E. Guild (ed.), *supra*.

[412] Judgment of the BVerfG, of the 18th of July 2005 2 BvR 2236/04, para. 97.

[413] Starting from BVerfG of the 29th of May 1974, *Solange*, n. 37 BvR 271. See also *infra*, note 54.

[414] Judgment of the ECJ C-105/03, *Pupino*, 2005 ECR I-5285.

obstacles to its implementation[415]. The Czech judgment is particularly interesting as it developed the concept of mutual trust, relying explicitly on *Gozutok and Briigge*[416], and made use of mutual trust in its arguments. A proposal was made by a group of parliamentarians to annul the Czech implementing statue. This proposal was consequently rejected by the court. There were two main complaints in this regard. The first was the incompatibility of the statute with Article 14 para. 4 of the Czech constitution, which states that no national can be made to leave his homeland. The second was the lack of specific definitions for offences for which double criminality does not apply (which would be in violation of the *nullum crimen sine poena* principle). The Court's reasoning was based on a teleological interpretation of the constitutional provisions. The Court argued that under the EAW, traditional extradition and surrender are notably different and thus subsequently essential to distinguish between them[417]. Where in the former the *ratio* lay in the mutual distrust that existed between many European nations (and formed the basis for the justification of non-extradition of nationals as an expression of State sovereignty over its nationals), in modern times this is no longer the case. Nowadays, there is high mobility of European people within the EU. Consequently, there is increasing inter-state cooperation. With regards to the "right of citizens not to be forced to leave their homeland" under Article 14 para. 4 it simply reflects the former Communist regime experience, where "undesired" people were often expelled against their will and solely for political reasons. This provision can be interpreted in a different manner if viewed from a contemporary point of view. Furthermore, the Czech

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415 *inter alia* read Decision n. 591/2005 of the *Areios Pagos*, Council Document n. 11858/05, 09/09/2005; Czech Constitutional Court Decision, of the 3rd of May 2006, No. Pl.LTS 66/04, retrieved on the 8th of May 2012 from http://www.law.uj.edu.pl/~kpk/eaw.

416 ECJ Joined Cases C-187/01 and C-385/01 *Gozutok and Brugge*, 2003 ECR I-01345.

417 Czech Constitutional Court Decision, *supra*, para. 48. This also provides an analysis of the problematic issue of the distinction between extradition and surrender. See *supra*, p. 161.

Court did not restrict its judgment just to its nationals, as "(...) the Czech constitution does not protect only the trust of Czech citizens in the Czech law, but also protects the trust and the legal certainty of other persons that are lawfully residing in the Czech Republic (e.g. foreign nationals who are permanently resident in the Czech Republic)"[418]. When deciding upon the exclusion of double criminality, the Czech Court, ruled that the legality principle is not violated since EU Member States reach such a high degree of proximity that, ultimately, all the Member States have common values and are bound by the "rule of law". Furthermore, the Czech Court also ruled that territoriality is applicable in this context. Despite Article 4 para. 7 of the Framework Decision not being incorporated by the Czech implementing statute, Section 377 of the Code of Criminal Procedure was interpreted, subsequent to that provision, by the judges. Consequently, a Czech national will not be handed over to another Member State if the criminal act for which he is under investigation was committed in his own country. However, he will be surrendered if it is necessary, due to the particular circumstances in which the crime was committed, to prioritise the conducting of criminal prosecution in the requesting Member State.

VII. c) Italian implementing legislation

VII. c) (1) Introduction

The final section of the chapter will discuss how implementation of the Framework Decision is, at best, fragmented, at times incomplete, and even out the boundaries established by the European instrument. The following sections will provide a detailed overview of the legal systems in Italy. While the following

[418] Czech Constitutional Court Decision, *supra*, para. 113.

analysis does not claim to be representative of the extremely varied reception of the EAW in all of the EU Member States, it is an attempt to provide an insight into how the new system is being applied both in civil law and common law jurisdictions. This will be carried out by means of an overview of legislations (in the current section) and case law (in the subsequent section).

VII. c) (2) The Italian system

The surrender procedure as currently applied in Italy brings up particular issues when compared to all other Member States. This is attributed to the critical and sceptical attitude of experts towards the surrender procedure and also to the ambiguous and difficult approval of the national act. A description of the main issues and of the rather ambiguous "being" that came to life following these criticisms is below.

VII. c) (2)i Transposition of the Framework Decision in the Italian system

As previously mentioned in this work[419], transposition of the Framework Decision in Italy was not a simple task. Initially, the Italian Government did not support the proposal to introduce Article 2 para. 2 list[420], unless the list of offences underwent a reduction and became six, namely terrorism, organised crime, drug trafficking, trafficking in human beings, sexual abuse of minors and illegal arms trafficking. The following were omitted: corruption, money laundering and

[419] See *supra*, chapter 3 p. 71.

[420] This took place at the JHA Council in December: see JHA Conclusions of the 6th – 7th of December 2001 and L. SALAZAR, "Il mandato d'arresto europeo: un primo passo verso il mutuo riconoscimento delle decisioni penali" (2002) 8 *Diritto penale e processo* p. 1042.

fraud[421]. On the 11th of December of 2001, after intense negotiations with the Belgian Presidency (above all with the Belgian Prime Minister[422]) Italian representatives relented. However, at the Laeken European Council, held on the 14th – 15th of December, Italy clearly stated that the implementation of the Framework Decision would necesitate its adaption to the fundamental principles of the Italian Constitution, while subjecting the domestic legal system to modification in order to bring it closer to European models[423].

Italy's ambiguity regarding the EAW continued even after political agreement had been reached at a European level. A number of draft Bills were proposed by different parliamentary groups during the Framework Decision transposition phase. The Government refrained from taking any legislative initiative[424]. The draft Bills were proposed by the opposition. One of the draft Bills proposed by the opposition contained a finite number of grounds for refusal and did not lead to the creation of obstacles for the removal of double

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421 The reduced list corresponds to that in the Italy-Spain Treaty on extradition, see *supra*, chapter 3 p. 80. See e.g. V. GREVI, "Il mandato d'arresto europeo tra ambiguità politiche e attuazione legislative", 2002, *Il Mulino*, p. 122.

422 L. SALAZAR, *supra* 1043. See also *Berlusconi urged to support Europe-wide arrest warrant*, The Observer, of the 9th of December 2001; *Italy U-turn on arrest warrant*, BBC News, of the 11th of December 2001 retrieved on the 24th of May 2012 from http://news.bbc.co.uk/1/hi/world/europe/1704168.stm. The Italian Government backed down gradually, first by accepting a list of 16 instead of 6 categories, then by agreeing on all 32, provided that half of them would be applicable immediately and the other half from 2007 onwards. See "La Repubblica", of the 8th of December 2001, interview with A. Vitorino.

423 Laeken European Council (of the 14th – 15th of December 2001) Presidency Conclusions, retrieved from http://europa.eu/european_council/conclusions/index_en.htm. See e.g. E. SELVAGGI, "Il mandato d'arresto europeo alla prova dei fatti" (2002) 10 *Cassazione penale* p. 2979; E. BRUTI LIBERATI, I. JUAN PATRONE, "Sul mandato di arresto europeo" (2002) *Questione giustizia*, available at www.forumcostituzionale.it. They both query the legal value of such a statement, which was included in the minutes of the meeting.

424 For a detailed analysis see A. MASTROMATTEI, "La decisione quadro dell'Ue relative al mandato d'arresto europeo davanti al Parlamento italiano" (2004) 3 *I Diritti dell'Uomo, cronache e battaglie* p. 60-66; A. MASTROMATTEI, "La fase finale dei lavori parlamentari per l'attuazione in Italia della decisione quadro sul mandato d'arresto europeo" (2005) 2 *I Diritti dell'Uomo, cronache e battaglie* p. 34-43.

criminality[425]. The other two proposed draft Bills were more restrictive, mentioning a series of conditions to occur in order for the surrender to take place. For example, it would be necessary for the legislation of the requesting State to provide for maximum terms of custodial detention, and surrender for a political crime could not be carried out (except in some rare cases, including e.g. terrorism as provided for by Article 1 of the 1977 Convention and Article 11 of the 1997 Convention)[426]. Additionally, with regards to EAWs for crimes included in the Article 2 para. 2 list it was necessary to meet a few minimum requirements as established by Italian legislation[427]. At the end, a new draft Bill was introduced that merged the two previous ones[428]. This led to the consequent considerable limitation of the application of the principle of mutual recognition, as can be clearly argued from Article 2 para. 1 lett. b), in accordance with which Italy would only comply with surrender requests received from Member States that respected "(...) the principles and the provisions of the Constitution, including those referring to the judiciary as an autonomous and independent power (...)". However, this as well as other perplexing restrictions were abolished in the final version of the law. The law received approval in April 2005 during the final debate in the lower House with 191 votes in favour, 13 against, and 185 abstentions[429]. Of all the EU Member States, Italy was the last country to

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425 Read the *Proposta di legge* n. 4246 (Kessler), of the 30rd of July 2003. Available at and retrieved from and Seen at www.camera.it retrieved on the 6th of June 2012.

426 See the *Proposta di delega* al Governo n. 4431 (Buemi), of the 28th of October 2003 and n. 4436 (Pisapia), of the 29th of October 2003, retrived from www.camera.it. These two Bills differed from previous ones in that they were relating to a delegating statute which would only list general principles and guidelines which were to be followed by the Government. For terrorist Conventions, see *supra* chapter 1 p. 19-20.

427 *Ibid.*

428 Cfr. *Proposta di legge* n. 4246 – 4431 – 4436 (A. Pecorella), on the 3rd of November 2005.

429 A. MASTROMATTEI, "La fase finale dei lavori parlamentari", *supra* p. 43. See Italian law of the 22nd of April 2005, n. 69 (hereinafter Italian law), published in *Gazzetta Ufficiale* of 29th April 2005 n. 98.

introduce EAW to its legal system, with the adoption occurring sixteen months after the deadline[430].

The implementing procedure in Italy took so long for a variety of political reasons. From a legal viewpoint, issues arose from the intense debate that occurred in Italy after the approval of the Framework Decision. The new instrument was the subject of strong criticism by both academics and practitioners[431]. Their objections originated from a profound concern for respect of the principle of legality and other fundamental principles. This concern is attributable to the specific features of the constitutional and penal systems of Italy (which partly explains past reluctance of the Italian Constitutional Court to accept EC law supremacy of EC law[432]). Indeed, two main arguments were presented. One argument presented stated there are some provisions in the Italian Constitution that clearly set out guarantees for individual liberty, which can only be limited by law. The second argument presented stated that any measure that may attempt to restrict individual liberty must be reasoned and can always be appealed to the Supreme Court (*Corte di Cassazione*) on points of law[433]. According to the Italian Constitution, no one can be removed from their natural

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430 Notification of the Italian law took place on the 14th of June 2005, not respecting the deadline for transposition which had been set for the 1st of January 2004. For this, see the revised first Commission Report EAW implementation and surrender procedures between Member States and its Annex, COM (2006) p. 8 and SEC (2006) p. 79.

431 See, e.g., V. CAIANELLO, G. VASSALLI, "Parere sulla proposta di decisione-quadro sul mandato di arresto europeo" (2002) n. 2 *Cassazione penale* p. 462, the legal opinion was requested by the Italian Prime Minister on the 11th of December 2001. Both are former Constitutional Court Presidents. The Committee for Parliament Constitutional Affairs also expressed concerns: see e.g. E. MARZADURI, sub Article 1-2, in M. CHIAVARIO et al. (ed.) *Il mandato d'arresto europeo. Commento alla l. 22 aprile 2005 n. 69* (UTET Milano 2006).

432 The Constitutional Court of Italy explicitly recognised the principle of supremacy of EC law in 1973 (Corte Cost. Case 183/73, *Frontini*) although this was limited by respect for human rights and fundamental constitutional principles ("dottrina dei controlimiti" or theory of counterlimits). See also *inter alia* Corte Cost. Case 170/84 *Granital*; Case 117/94 *Giurisprudenza costituzionale* 994; Case 73/01 *Giurisprudenza costituzionale* p. 428. A similar approach followed in Germany: see BVerfG of the 29th of May 1974 (*Solange I*) 37 BvR 271; on the 22nd of October 1986, (*Solange II)* 73 BvR 339; on the 12th of October 1993 (*Maastricht*) 89 BvR 155; 7 June 2000 (*Banana Dispute/Bananen-Entscheidung*) 102 BvR p. 147.

433 See Articles 13, 104 and 111 of the Italian Constitution.

jurisdiction and be punished by a law which became effective after the offence was committed[434]. Furthermore, extradition of foreign nationals and Italian citizens for political offences is prohibited. Extradition of nationals is not allowed unless expressly provided for by International Conventions. This is the reason given for maintaining the political offence exception[435].

Other scholars expressed concerns regarding one particular aspect of the principle of legality. The concerns were centered around the fact that the principle of specificity would be subject to violation. More specifically, it was argued that from the substantive legal viewpoint, the offences categories in Article 2 para. 2 were much too generic and non-specific. The nature of their abstract formulation did not take into consideration the variety of models which exist in each Member State. Furthermore, the long list would not be in compliance with Article 31 lett. e) TEU, which sets a limit to the adoption of minimum rules to the fields of organised crime, terrorism, and illicit drug trafficking[436]. From the procedural viewpoint, the Framework Decision would be harmful both for the constitutional principle that renders prosecution obligatory and the rights of the defendant, as the accused would be faced with an accusation which could be both imprecise and ambiguous[437]. The last argument centered around the equality principle. Since EAW implementation would discriminate between Italian nationals who

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434 See Article 25 of the Italian Constitution.

435 See Articles 10 para. 4 and 26 para. 1 and 2 of the Italian Constitution, as well as Article 698 Italian Code of Criminal Procedure; for this opinion see P. GUALTIERI, "Mandato d'arresto europeo: davvero superato (e superabile) il principio di doppia incriminazione?" (2004) 1 *Diritto penale e processo* p. 115 - 121.

436 Cfr. V. CAIANELLO, G. VASSALLI, *supra*; N. BARTONE, *Mandato d'arresto europeo e tipicità nazionale del reato* (Giuffrè, Milano 2003); P. GUALTIERI, *supra* p. 117 suggested that the implementing law should the judge should be invested with the power to check if an EAW could be carried out in accordance with principles of legality and fair trial.

437 V. CAIANELLO, G. VASSALLI, *supra*; See Articles 112 and 24 of the Italian Constitution. In Italy, a public prosecutor does not have the right to refuse to put before the judge any allegations of which he has been informed, whenever they refer to the committing of an offence as defined in the Criminal Code.

committed a crime in domestic territory and those who commit a crime in another EU Member State territory, the equality principle would be breached. With the latter there is an obligation to surrender even when the requirements restricting individual liberty (such as risk of escape, risk of evidence destroying, or risk of repeat offending) do not exist, or where the penalty threshold which justifies detention is less than in Italy[438]. After these objections were raised it was suggested that in cases where refusal was motivated on diplomatic grounds *a communiqué* should be sent to the requesting authority. In case where the death penalty is applicable in a requesting State, a ground for refusal should be explicitly introduced[439]. It is necessary to hereby state that these opinions are in distinct opposition to the philosophy of both the spirit of the Framework Decision and of the "European legal area" as a whole.

Still other scholars objected to these approaches on the grounds that they can be described as negative and, in regards to double criminality, stated that, even though the executing judicial authority does not need to verify whether the material conduct corresponds to one of the thirty-two categories as defined by domestic legislation, it still has to ensure that such conduct has been correctly identified due to the *nomen iuris* included in the list (that is to say, that the right box has been ticked). This view is founded on the interpretation of the following expression: "The following offences (...) as they are defined by the law of the issuing Member State" in Article 2 para. 2 of the Framework Decision as referred to conduct as qualified in the EAW instead of in the list. This is confirmed in Article 8 of the Framework Decision, which requires that request issued by the

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438 G. VASSALLI, "Il mandato d'arresto europeo viola il principio di uguaglianza", (2002) p. 28 *Dir. e Giust.* p. 8; G. VASSALLI, "Mandato d'arresto e principio di uguaglianza" (2002) *Il Giusto Processo p.* 129; G. FRIGO, "Uno strumento senza efficacia diretta" (2005) n. 19 *Guida al Diritto* p. 69; T. E. FROSINI, "Subito una procedura penale comune" (2005) n. 19 *Guida al Diritto* p. 74.

439 See, e.g., M. CHIAVARIO, "Appunti 'a prima lettura' sul mandato di arresto europeo", Milano, 2003, *Questione giustizia*, *supra*.

issuing authority includes a description of the circumstances in which the offence was committed, inclusive of the time, place, and extent of participation in the aforementioned offence, as well as the nature and legal classification of the offence, particularly in respect to Article 2. It follows that an Italian judge would reserve the right to refuse to surrender a person accused of homicide where it would be possible to argue that from the description of circumstances the conduct amounted to abortion. Likewise, a Dutch colleague could refuse execution of an EAW if it were obvious that the subject of the EAW, the fugitive, "simply" aided the suicide of an Italian citizen (euthanasia is not a punishable offence under Dutch law)[440]. This is not wholly convincing; it is not in line with the principle of mutual recognition as it was conceived by the Commission. This principle clearly necessitates the radical abolition of dual criminality with regards to a limited number of cases yet its application does not appear to allow for exceptions. This could be considered counter-productive and could even compromise smooth cooperation between Member States unless explicit derogations are established in the Framework Decision.

Other scholars insist that the Framework Decision list was problematic, as the greater part of the offence categories are not a new concept for Italian criminal law nor have they already been harmonised at a European and international level. Fair trial and the protection of human rights have both been ensured by point 12 of the Preamble[441]. With regards to offences which have yet to be harmonised, the Council of the European Union has already pledged to

[440] E. SELVAGGI, O. VILLONI, "Questioni reali e non sul mandato d'arresto europeo" (2002) n. 2 *Cassazione penale* p. 445; E. SELVAGGI, "Il mandato europeo di arresto alla prova dei fatti" (2002) n. 10 *Cassazione penale* 2978; A. MAMBRIANI, "Il mandato di arresto europeo. Adeguamento dell'ordinamento italiano e diritti della persona", in M. PEDRAZZI (ed.), *Mandato d'arresto europeo e garanzie della persona*, Milano, 2004, p. 69.

[441] L. SALAZAR, *supra* 1048; V. GREVI, "Mandato d'arresto europeo, ecco i vantaggi e le garanzie", *Corriere della Sera* of the 7th of August 2002; M. BARGIS, "Analisi della decisione quadro sul mandato d'arresto europeo: aspetti processuali e garanzie fondamentali", (2004) *Diritti e giustizia* p. 8.

adopt the necessary measures to ensure harmonisation[442]. Moreover, cooperation principles in criminal matters imply that Italian authorities ought not to refrain from the surrendering of nationals for offences which occurred in another Member State, provided that it does not result from an arbitrary measure[443]. Instead, fears concerning discriminatory treatment were overcome by the highlighting of the fact that the European Convention on Human Rights (ECHR) explicitly provides for guarantees in the case of arrest or detention that can be considered as being substantially similar to those established by Italian law. Nevertheless, when an Italian citizen commits a crime in another country he does so in violation of the values of the host society and, consequently, should be held liable according to the laws of that country[444]. Finally, with regards to the prohibition of extradition for political offences, there should not be issues surrounding the surrender of the wanted person for any of the offences to which the EAW is applicable[445] as the legal systems of all the Member States of the EU are founded on the rule of law.

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442 See Doc. 9958/02 ADD1 REV1 JAI 138, containing a statement in which the Council stated that it would "continue, in accordance with Article 31 lett. e TEU, the work on approximation of the offences contained in Article 2 para. 2", such as in the areas of counterfeiting, trafficking of illicit arms, fraud, in particular tax fraud and identity theft, environmental crime, racketeering and extortion. For the issue of double criminality, see *supra*, chapter 4.

443 A. CASSESE, "Mandato d'arresto europeo e Costituzione" (2004) *Questione giustizia*, *supra*.

444 A. CASSESE, *supra*. Article 5 ECHR states that "no one shall be deprived of his liberty save in the following cases (...) c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so". See Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, as amended), Rome, 4/11/1950, ETS n. 5.

445 A. CASSESE, *supra*, highlights that the difference between constitutional provisions (inspired by a desire for personal freedom) and Article 8 para. 3 of the Italian Criminal Code (elaborated during the Fascist era), according to which the definition of political offence served a repressive purpose and was so wide sweeping that it included common offences committed for political reasons and offences committed in other nations.

VII. c) (2)ii The main features of the EAW in Italy

The transposing legislation in Italy has several remarkable differences when compared with the model created by the Framework Decision. This is largely reflected in the criticisms that were outlined in the previous section.

Some interesting idiosyncrasies can be identified in Articles 1 and 2, which are reminiscent of a series of general principles that inspired the operation of the surrender mechanism, such as those established by the ECHR and by the Italian Constitution, with a particular onus on personal freedom, equality, defendant rights and criminal liability. Even if Article 6 TEU and point 12 of the Preamble of the Framework Decision are mentioned[446], the explicit reference to the national principles and fundamental rights confers a particular significance upon them as an interpretation tool in order to guide the judicial authorities[447]. Even though some scholars consider this concern to be necessary, since the ECHR framework does not guarantee uniform protection of human rights across Europe[448]. For some, this excessive concern can only be viewed as a barrier to the promotion of mutual trust.

Additionally, and above all more importantly, Article 1 para. 3 explicitly states that surrender to another State for prosecution is subject to the condition that the custodial measure on which the EAW is based has been both rationalized and signed by a judge. It is possible to wonder if the term "judge" is interpretable as being able to cover cases where the issuing authority is a public prosecutor. Furthermore, where the EAW was issued in order to execute a custodial sentence,

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[446] Article 6 para. 1 TEU states that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". The following paragraphs subordinate the EU action to the ECHR and of the national identities of the member States. Point 12 of the Framework Decision refers to both this Article and the EU Charter of Fundamental Rights (OJ C 303 14/12/2007) and contains the *non-discrimination clause*.

[447] See M. CHIAVARIO *et al.* (ed.) *supra*.

[448] See e.g. G. FRIGO, "Uno strumento senza efficacia diretta", *supra.*

the same Article requires that it is a final order. This has the potential to give rise to problems as it may constitute grounds for refusal in the event that the legal system of the issuing State holds non-final judgments to be enforceable.

Italian domestic legislation presents an extremely long list of grounds for refusal[449]. They are all (including those provided for by Article 3 and 4 of the Framework Decision) mandatory. The grounds can be divided into categories and sub-categories. Twenty of the grounds are contained within Article 18. It is possible to make a further distinction in this provision between those that loosely reflect the original list and those that were inserted or significantly modified.

The latter are applicable in the following instances: where there are objective reasons to believe that an EAW has been issued for purposes that can be considered discriminatory (the so-called *non-discrimination clause*), where the act was committed through the exercising of the freedom of association, the freedom of the press as well as the freedom of expression by means of other media, or where the EAW is based on a final decision which was issued without due process[450]; where there is a serious risk that the person subject to the EAW could be subjected to the death penalty, torture, or any other treatment or punishment which can be considered to be inhuman or degrading[451]; where the victim has supplied their consent to the act or where the facts relate to the exercising of a right or a duty, or if the offence was committed due to fortuitous events or *force majeure* ("*caso fortuito*" or "*forza maggiore*")[452]; where *non lieu* is established by an Italian judge or, where the person requested is either pregnant

[449] For a summary of the grounds for refusal see table on *supra*.

[450] See Article 18 para. 1 lett. a), d) and g) of the Italian law. These grounds repeat point 12 of the Framework Decision Preamble. Its inclusion in this provision could be interpreted as an indication of deep mistrust on behalf of the Italian legislative authorities towards the legal systems of other Member States.

[451] See Article 18 para. 1 lett. h) of the Italian law, which reproduces point 13 of the Preamble.

[452] See Article 18 para. 1) lett. b) and c) of the Italian law, which reproduce typical defences in Italian criminal law (Articles 50, 51 and 54 of the Criminal Code).

or is the mother of a child under the age of 3, except in the case of a trial which is pending and serious reasons justifying detention exist[453]; where the suspect or the accused was under the age of 14 at the time the offence was committed, or under the age of 18 and the maximum penalty which can be given is less than 9 years imprisonment; where the legal system of the issuing State does not provide for the special treatment of minors, or for special means to verify if the fugitive is fit to plead or in any case where the person cannot be held criminally responsible under Italian law[454]; where the request concerns a political offence (except for crimes of terrorism under Article 11 of the United Nations Convention for the Suppression of Terrorist Bombings and Article 1 of the European Convention for the Suppression of Terrorism)[455] or where immunity is applicable[456]; and finally, where the legal system of the requesting State does not provide for maximum terms of preventive custody or where the custodial measure which forms the basis of the EAW is not justified[457].

Given such a detailed description of the circumstances in which a refusal can be given to a request for surrender, it is easy to comprehend how far the domestic system differs from the EU system. Taking the requirement of maximum terms of preventive custody as an example, which is entirely comprehensible to an Italian lawyer (since it is in compliance with general provisions under Articles 13 para. 5 and 27 para. 2 of the Constitution) it may sound unfamiliar, if not completely alien, to legal practitioners from the majority

[453] See Article 18 para. 1 lett. q) and s) of the Italian law.

[454] These cases of non-surrender are provided for by Article 18 para. 1) lett. i) and considerably broaden the scope of application of Article 3 para. 3 of the Framework Decision.

[455] See Article 18 para. 1 lett. f) of the Italian law, UN 1998 Convention for the Suppression of Terrorist Bombings 389 U.N. GA Res. 164 and 1977 European Convention on the Suppression of Terrorism, Strasbourg, 27/01/1977 ETS n. 90.

[456] See Article 18 para. 1 lett. u) of the Italian law.

[457] See Article 18 para. 1 lett. e) and t) respectively of the Italian law.

of EU member States[458]. Article 18, in addition to the previously mentioned grounds, reiterates those which are already included in the Framework Decision, such as amnesty (given that the State is can prosecute the offence under its own criminal law)[459], *ne bis in idem* (rendered compulsory, not solely relating to final judgments - as in EU provisions - but also when an EAW is issued when the trial is pending in the executing State)[460], statute of limitation (when either the criminal prosecution or punishment of the person is statute-barred and the acts fall under Italian jurisdiction)[461], along with territoriality and extra-territoriality principles[462].

This list which can be referred to as "personalized" ends with a rather excessive "safeguard clause", which prohibits surrender in any instance in which the sentence upon which the request is founded contains provisions that can be held to be against the fundamental principles of the Italian legal system. This reintroduces an expression found in Article 27 of the draft Framework Decision (which was subsequently amended)[463].

Another category for mandatory non-execution cases is established by Italian law, and relate to both substantive and procedural aspects.

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458 For an interpretation of this requirement by Italian courts, refer to *infra*, p. 173-174.

459 See Article 18 para. 1 lett. l of the Italian law and Article 3 para. 1 of the Framework Decision (which renders it a mandatory ground for refusal).

460 See Article 18 para. 1 lett. m) and o) of the Italian law as well as Articles 3 para. 2 and 4 para. 2, 3 and 5 of the Framework Decision. On *ne bis in idem*, see more in detail *supra*, chapter 4 p. 131.

461 See Article 18 para. 1 lett. n) of the Italian law and Article 4 para. 4 of the Framework Decision. Under the principle of territoriality, the requested State has the right to refuse execution if the law of that State regards the offence as having been either wholly or partly committed in its territory, or in a place treated as such. Instead, under the extra-territoriality principle, the same principle applies when the offence was committed out with the territory of the requesting State and the requested State consequently cannot prosecute that person for that offence under its domestic law when the offence was committed outside its borders.

462 See Article 18 para. 1) lett. p) of the Italian law and Article 4 para. 7 lett. a) and b) of the Framework Decision.

463 See Article 18 para. 1 lett. v) of the Italian law and Article 27 of the Proposal, *supra* chapter 3 p. 77.

First, a judicial authority can deny surrender where the Council of the European Union has verified that a serious and persistent violation of one of the principles set out in the ECHR, and in particular in Articles 5 (right to freedom and security) and 6 (right to fair trial)[464] has been committed by the requesting Member State. The requirement for such a provision could be questioned, as it effectively reproduces point 10 of the Framework Decision Preamble. Moreover, it allows for the application of the procedure that the Council may follow under Article 7 para. 1 and 2 TEU whenever Article 6 para. 1 TEU is violated and does not make any mention of Article 6 para. 2 TEU (referring to the ECHR). Point 10 of the Preamble is based on the presumption that these principles are shared by the Member States, and therefore considers that any violation would, in itself, be considered to be an exceptional event[465]. This is the reason why no explicit mention of this is provided in the Framework Decision. A further elaboration of a ground for refusal would be a very clear sign of having misunderstood the rationale.

A second form of refusal can be attributed to the complex procedure provided for by Article 6 para. 6 and Article 16 para. 1. As will be illustrated later, Article 6 requires the attachment of a series of documents to the EAW. Moreover, the Italian Court of Appeal reserves the right to ask for additional information where it considers that the documents received from the issuing authority are insufficient, and it can set a time limit of a maximum of thirty days for the request for supplementary information to be satisfied. Consequently, Article 6 para. 6 allows Italian courts to refuse surrender when the time limit for the reception of additional information is not complied with.

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464 See Article 2 para. 3 of the Italian law.

465 See also *infra* chapter 6 p. 175 – 176.

The application of dual criminality, which is applicable to both non-listed offences (Article 7 para. 1) and, to a certain degree, listed offences (Article 8), gives rise to the creation of a third group of grounds for non-execution. With regards to the former, an exception is provided for in Article 7 para. 2 in relation to offences of a tax nature, when domestic law does not levy the same type of taxes or duties, customs or exchange or even does not have the same type of rules as the issuing State law. However, in order for this exception to be applye it is necessary that taxes and duties be comparable by analogy to the taxes and duties and, in the case of violation, the law provides a penalty of a maximum of a minimum of three years custodial sentence (with the exclusion of aggravating circumstances). This can be considered to be a vestige of the fiscal offence exception, which is a classic case of refusal in extradition law[466].

Concerning listed offences, Article 8 para. 1, while recalling the general provision of Article 2 para. 2 of the Framework Decision, also adapts it to the features of the domestic context and consequently alters its very concept. First of all, it fails to take aggravating circumstances into account when taking into consideration the three year penalty threshold (something which is overlooked in the Framework Decision). Secondly, for some offences (such as organised crime, corruption or murder) the Italian list corresponds to Article 2 para. 2. This is not the case *from a substantive point of view* for several other offences (such as various types of fraud, falsification of documents or slavery).

In general terms, EU *categories* of offences are turned into concrete offences, with a detailed description of their constituent elements. The Italian judge is called upon to verify whether the act as it is defined in the request

[466] See e.g. Article 5 of the European Convention on Extradition ETS n. 24, Paris 13/12/1957.

actually corresponds to any of those crimes[467]. Furthermore, an EAW is issued against a citizen for an act which does not actually constitute a criminal offence in the eyes of Italian law. Surrender can be justly refused if the defendant is able to demonstrate that they ignored without fault that they had committed a crime according to the law of the issuing State[468]. Finally, Article 17 para. 4 also includes an aspect of dual criminality, which provides for the surrender of the suspect (for prosecution purposes) only when there is sufficient evidence of the crime. The phrase "serious evidence of guilt" was used to substitute the previously used "sufficient evidence of guilt" in the draft Bill, as it was believed that it would serve as an aid to avoid abuse of process[469].

Although a similar dual criminality requirement is described in both the Italian Criminal Code and the Criminal Procedure Code[470], no mention of it is made in the Constitution. This is not typically the case with other principles of extradition. Reintroduction of dual criminality in the implementing Act is quite peculiar if one were to consider the most recent bilateral extradition arrangements agreed to by Italy, where this specific requirement was abolished[471]. Moreover, it is necessary to state that Article 705 para. 1 of the Criminal Procedure Code (which refers to extradition) requires an assessment of the Court of Appeal to verify that there is serious evidence of guilt (in accordance with Italian law,

467 See Article 8 para. 2 of the Italian law.

468 See Article 8 para. 3 of the Italian law.

469 A. MASTROMATTEI, "La fase finale dei lavori parlamentari", *supra*, 39. Article 17 para. 4, which applies *prima facie* (or probable cause) to the EAW, has received a more flexible interpretation from the Italian courts: see *infra*, p. 198 - 199.

470 See Article 13 para. 2 of the Criminal Code and Article 705 of the Criminal Procedure Code.

471 Extradition Treaty between the United States of America Government and the Government of the Republic of Italy (USA-Italy Treaty) Rome 13/10/1983 991 UNTS 285; Treaty between the Italian Republic and the Kingdom of Spain on the prosecution of serious offences without the need for extradition in a common area of justice, Brussels, on the 15th of December 2000, Council Document 14643/00 COPEN 85.

necessarily implies a reference to the offence) only in the absence of a Convention or where it does not state differently.

The deep-seated distrust on behalf of the Italian legal system is not just directed towards foreign legal systems, but also (and perhaps even more reasonably) towards what is referred to as the "democratic deficit" of the Third Pillar. Article 2 para. 3 of the Framework Decision endows the Council with the power necessary to extend or shorten the list by acting unanimously and by merely consulting the European Parliament. Italian Law has a balance of power in that is as it requires that the Government ask permission from Parliament in order to approve any such modification[472].

The guarantees mentioned in Article 5 of the Framework Decision were inserted in Article 19 of the Italian Act. Consequently, when an EAW is formed on the basis of an *in absentia* decision and the person has not actually been summoned in person or informed in any way of the date, time and place of the hearing, then surrender is subject to the condition that the judicial authority that issued the EAW provides assurance. This assurance must be found adequate in order to guarantee that the person will be permitted to apply for retrial of the case in the issuing Member State, and to be present upon judgment. Likewise, when the offence at issue is subject to punishment by a custodial life sentence or life-time detention order, then execution of the EAW must meet the condition that the issuing Member State has provisions in its legal system consenting the review of the imposed penalty or measure, upon request or within a period of twenty years, or even for the application of clemency measures to which the fugitive has the right to apply for under the law or practice of the issuing Member State, in order to allow non-execution of such a penalty or measure. Finally, when the EAW concerns an Italian national or Italian resident, and the EAW was issued for the

[472] See Article 3 of the Italian law.

purpose of prosecution, then execution is only possible if a guarantee exists that the person will be returned to Italy, after having been heard, in order to complete their custodial sentence or detention. However, in all of these cases, contrary to what is prescribed by the Framework Decision, no discretion exists in allowing or not allowing surrender, as it is possible to argue by use of the expression "(...) *is* subject to" rather than "(...) *may*be subject to".

To conclude, the Italian legal system consists of extremely high burden of proof and constitutional obstacles that seriously hinder the efficient functioning of the new surrender mechanism. It is interesting to note that the current EAW version is much more restrictive than traditional extradition used to be. Consequently, Italian laws form an extremely different procedure that depends on the origin of the request and whether the request originates from a Member or a non-Member State.

An analysis of the different surrender stages would be interesting. With regards to passive surrender, when Italy is executing a request received from another State, the surrender of either an accused or convicted national takes places following a decision made by the Court of Appeal[473]. It is the responsibility of the competent judicial authority to verify that the EAW actually contains all the information required[474]. Most of the information required is essential. When some of this information is missing, or is considered to be inadequate, then the Court of Appeal has the right to request further details

[473] See Article 5 of the Italian Constitution, which reproduces almost entirely Article 701 of the Code of Criminal Procedure, relating to extradition. It is important to observe that the competence of the Court of Appeal is determined on the basis of a few criteria, such as the residence of the fugitive at the moment of reception of the EAW. Where these criteria are not applicable, the Court of Appeal of Rome is competent; where an alert has been inserted in the Schengen Information System (SIS), the competence is determined on the basis of the place where the person has been arrested. See E. MARZADURI, sub Article 5, in M. CHIAVARIO et al. (ed.) *Il mandato d'arresto europeo supra* p. 105.

[474] See Article 6 para. 1 of the Italian law, which reprodces Article 8 para. 1 of the Framework Decision.

either directly or indirectly through the Minister of Justice[475]. However, the Italian authority is under no obligation to refuse surrender when, for example, there is no indication of a minimum penalty (when referring to an offence which is punishable by a custodial sentence or detention order for a maximum period of at least one year)[476]. Instead, with regards to active surrender (when the issuing State is Italy), then the Italian implementing Act identifies two competent issuing authorities: the judge that ordered the accused person to be remanded into custody, or to be placed under house arrest, where the purpose is to prosecute a fugitive[477]; the public prosecutor that issued an enforcement order for a custodial measure (for at least one year) or a detention order, where the aim is to enforce a final decision[478]. If there are no grounds existing for its enforcement, the defendant has the right to request the revocation of the EAW issued by the public prosecutor in order to enforce a custodial measure. If, however, the public prosecutor were to reject this request, then no appeal can be made[479]. It is interesting to note that when the judge responsible for preliminary investigations has refused precautionary measure request and, instead, a "Tribunal

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475 See Article 6 para. 2 and 16 of the Italian Constitutional Law.

476 This was established by Cassazione Sec. VI of the 21st of November 2006 n. 40614 (Arturi) (2007) *Cassazione penale* 2912.

477 This is the judge responsible for preliminary investigations ("*giudice per le indagini preliminari*") in most cases, as well as any other judge, including the Court of Appeal. See minutes of the meeting of *Procura generale della Repubblica presso la Corte d'Appello di Roma*, on the 5th of April 2007 Prot. 124/07 Prot. Gab., retrieved on the 4th of May 2012 from www.giustizia.lazio.it.

478 See Article 28 para. 1 of the Italian Constitutional law. It is necessary to observe that with regards to the first types of measures, Article 280 of the Code of Criminal Procedure bites. This Article effectively limits the application of all measures restricting personal freedom to offences punishable by life sentence or a maximum of at least three years of imprisonment. Moreover, pre-trial detention can only refer to offences which can be punished by a maximum sentence of at least four years imprisonment. This threshold is much higher than the "minimum maximum" penalty threshold provided for by Article 2 para. 1 of the Framework Decision for these cases. In addition, with regards to the enforcement order for a custodial measure issued by the public prosecutor, Article 28 para. 1 states that an EAW cannot be issued if a reason for suspending the enforcement order exists.

479 Cassazione Sec. VI n. 9273 of the 5th of February 2007, Shirreffs Fasola, *CED Cassazione* n. 235557.

for Re-examination" ordered it, subsequent to appeal made by the public prosecutor, the responsibility for issuing an EAW lies with the Tribunal[480].

This work will not provide an in-depth description of procedural rules[481]. It is sufficient to say that different rules can be applied dependent on whether the location of the requested person is either known or unknown. In the latter case, the person is arrested by the police following a request sent through the Schengen Information System (SIS)[482]. This system was set up through the Schengen Convention[483] with the aim of facilitating operational cooperation between the police and judicial authorities in criminal matters. According to Article 9 para. 3 of the Framework Decision, an alert in the SIS, carried out in accordance with Article 95 of the Schengen Convention, should be considered as being equivalent to an EAW accompanied by the information indicated by Article 8 of the same Decision[484]. This was confirmed by the recent Council Decision establishing a second generation SIS (SIS II)[485], in which Article 31 para. 1 states that a SIS

480 Cassazione Section I n. 16478 of the 19th of April 2006 (Abdelwahab Guerni) *CED Cassazione* n. 233578. The "Tribunal for the Re-examination" is responsible for deciding when the decision of a court applying a measure restricting liberty is appealed (so-called *de libertate* appeal) The hearing takes place in chambers. For further information see A. PERRODET, "The Italian system", in M. DELMAS - MARTY, J. SPENCER (eds.) *European Criminal Procedures*, Cambridge University Press, 2006, p. 348 - 412.

481 For more information, see e.g. A. SCALFATI, "La procedura passiva di consegna" (2005) *Diritto penale e processo* p. 948; G. DE AMICIS, G. IUZZOLINO, "Al via in Italia il mandato d'arresto UE" (2005) 19 *Diritto e Giustizia* p. 11; R. BRICCHETTI, A. BARAZZETTA, "Misure cautelari: rinvii al rito da decifrare" (2005) n. 19 *Guida al Diritto* p. 84; R. BRICCHETTI, A. BARAZZETTA, "Procedura passiva con termini da ricavare" (2005) n. 19 *Guida al Diritto* p. 90; M. BARGIS, "Il mandato d'arresto europeo: aspetti processuali problematici della normative di attuazione italiana" (2005) 2 *I Diritti dell'Uomo, cronache e battaglie* p. 44.

482 See Article 11 of the Italian law, which reproduces Article 9 para. 3 of the Framework Decision.

483 Convention of the 19th of June 1990 which implements the Schengen Agreement of the 14th of June 1985 between the following governments: the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic regarding the gradual abolition of checks at their common borders, OJ L 239 22/09/2000 as amended by EC Regulation n. 1160/2003 of the European Parliament and of the Council, OJ L 191 22/07/2003.

484 Also see Article 13 para. 3 of the Italian law recalling Article 6 para. 1 of the same law.

485 Council Decision 2007/533/JHA of the 12th of June 2007 on the establishment, operation and use of the second generation Schengen Information System OJ L 205 07/08/2007.

alert has the same effect as an EAW. According to the new system, such an alert will also include the fugitive's personal data along with a copy of the original EAW, or of a translation of the EAW into one, or more, of the official EU institutional languages (Articles 26 and 27 of the Council Decision).

VII. d) National level practice

VII. d) (1) Italy

The provision allowing for additional grounds for refusal in the implementing statute has led to issues of interpretation in Italy. The Italian Supreme Court, the *Corte di Cassazione*, has demonstrated a changing attitude towards this issue. Specifically, with regards to the provision of a ground for refusal where the law in the Member State that has issued the request does not provide for maximum terms of pre-trial detention and preventive custody in general (Article 18 lett. e) of the Italian law). Initially, the approach was very theoretical. The Court ruled that this was a mandatory ground for refusal, however it did allow that it cannot be held to be a condition for warrant provided that the issuing judicial authority (in that specific case, a Belgian authority) provide the relevant national provisions to the executing judicial authority[486]. The judge recognized that such a ground is out of touch with the Framework Decision and also out of touch with the 1957 Convention. This means that the European Court of Human Rights in its case law held that judicial systems that do not include limits to pre-trial detention are compatible with Article 5 para. 3) ECHR[487]; and

[486] Cassazione Sec. VI penale n. 16542 of the 8th of May 2006, Cusini, para. 9. This ruling subsequently led to the release of an Italian citizen in Belgium, who had been charged with fraud, being released.

[487] See e.g. Judgment of the ECtHR *Letellier v. France* of the 26th of June 1991, n. 12369/86; *W. v. Switzerland* of the 26th of January 1993, n. 14379/88.

that fundamentally the most important aspect is that the rights of the defendant are protected. Despite these considerations, the national provision had to be respected. It is reflected in the principle that the accused is presumed innocent, a principle which is enshrined in Article 13 para. 5 of the Italian Constitution[488]. This was an obstacle in the application of the EU law principle of consistent interpretation, as any other action would be akin to an interpretation of national law which could be described as *contra legem*[489]. It was evidently a dangerous application of the surrender procedures. There was a high risk that Italy could become a "safe haven" for criminals who could rest assured that the custodial measures adopted in other states could not be enforced within its borders[490]. This was the reasoning the Court used, in a subsequent ruling, and adopted a much more "Europhile" view. The case regarded a Serbian national whom the German authorities suspected of attempted murder. In the German judicial system, pre-trial detention periods are not well defined; that is to say they can be extended after a review of the necessary conditions. The sixth chamber of the *Corte di Cassazione*, where the appeal had been made, referred the issue to the *Plenum* for an interpretation of Article 18 lett. e. According to the *Plenum*, the high level of mutual trust between Member States indicates that all pre-trial detention systems ought to be considered as equal. The *Plenum* sided with the provision stating that the inclusion of such ground for refusal, even though it is not specifically provided for in the Framework Decision, is in line with its *ratio* and serves as a guarantee

[488] According to this provision the maximum terms of preventive custody are established by law. In Italy preventive custody time limits are binding until final judgment is reached (which only takes place once all appeal avenues have been exhausted). See Constitutional Court n. 64 of the 23th of April 1970 para. 3, which refers to the principle of presumption of innocence established by Article 27 of the Constitution.

[489] Judgment of the ECJ C-105/03 *Pupino*, 2005, ECR I-5285.

[490] In two cases, the Supreme Court ruled that it is the requested person's duty to produce all the evidence that individual rights, as provided for by Article 5 of the ECHR, are not protected in the issuing State. See Cassazione Sec. VI on the 7th of April 2006 *CED Cassazione* n. 233544 (Cellarosi); Cassazione Sec. VI of the 3rd of March 2006 *CED Cassazione* n. 233706 (Napoletano). Instead, the Supreme Court adopted a different view in other cases, finding that it is the duty of the Court of Appeal to request additional elements deemed to be relevant for the decision: see *infra*, note 165.

of a fair trial[491]. The high level of trust which exists within the European Union does not however exclude a minimum degree of control by the executing judicial authority regarding the protection of the fundamental rights of the defendant. The provision granting pre-trial detention limits can be subject to broad interpretation, in such a way as to include periodical review measures of the conditions for extending such detention. The appeal was subsequently turned down[492].

In any case, when determining the length of the custodial sentence to be served in Italy, it is necessary to take into consideration any length of time that the person spent in custody in another Member State following the issue of an EAW[493].

In the two abovementioned decisions (*Cusini* and *Ramoci*) another formalistic interpretation of the Framework Decision was also rejected. In accordance with the provision that states that sending the original warrant or even an authenticated copy would be held to be admissible, the Court ruled that mutual recognition and free movement of judicial decisions imply that transmission by fax is also permitted[494].

Italian legislation needs an EAW to be accompanied by additional documents, including a copy of the applicable provisions, the issuing authority decision which forms the basis of the EAW, all personal data available, and

[491] However, some scholars believe that Article 18 lett. e) is unconstitutional as it would violate the obligation imposed by Article 117 para. 1 of the Constitution upon the Italian legislative power to respect the limits established by EC and international law. As a result, the "theory of counter-limits" (see *supra* note 105) should be readapted. See E. APRILE, "Mandato di arresto europeo e presupposti per l'accoglimento della richiesta di consegna: alcuni chiarimenti ad ancora qualche dubbio", 2007, *Cassazione penale*, p. 115.

[492] Cassazione Sezioni Unite of the 5th of February 2007 n. 4614 (*Ramoci*), *CED Cassazione* n. 234272, para. 7 - 10. This also reflects the interpretation of the ECtHR in the cases mentioned above, note 143. The Italian Constitutional Court (Case 109/08 18 April 2008) ruled that the issue of the compatibility of Article 18 para. 1 lett. e) of the Italian law with the Constitution (*inter alia* for breach of the principle of "reasonableness") is inadmissible.

[493] Italian Constitutional Court Case 143/08 of the 7th of May 2008, which declared Article 33 of the Italian Constitutional Law to be partially unconstitutional.

[494] Cassazione Sec. VI (*Cusini*), *supra*, para. 6; Cassazione Sezioni Unite (*Ramoci*), *supra*, para. 2.

evidence source information. However, the executing judicial authority has no obligation to assess the existence of serious evidence of guilt[495]. A description of the facts that is both clear and coherent (and any information relating to conduct) from the requesting authority will suffice. It cannot request new sources of proof from the foreign authority, as this would be in contravention of the sovereignty of each State and would lead to a slowing down of the entire proceedings[496]. This interpretation doubtlessly leads to an improvement in the relationship between the different judicial authorities, and as such must be welcomed[497]. It is clear that there is no requirement that the "reason behind" a surrender request be equivalent to that usually intended according to Italian law. It is sufficient that the issuing authority provides a reasoning that is considered to be adequately argued by the

[495] Indeed, Article 17 para. 4 of the Italian Constitutional Law prescribes that the Court of Appeal decides on surrender where serious evidence of guilt exists. Initially, this would appear to be a very strict *prima facie* requirement. However, case law has apparently "lessened" this provision.

[496] See Cassazione Sec. VI n. 34355 of the 23th of September 2005 (*Ilie Petre*), para. 11; and also e.g. Cassazione, Sec. feriale penale, n. 33642 of 13th – 14th September 2005 (*Hussain*); Cassazione, Sec. VI (*Cusini*), *supra*, para. 8; Cassaz. sez. VI of the 13th of October 2005 *CED Cassazione* n. 232584 (*Pangrac*); Cassazione Sec. VI of the 3rd of April 2006 n. 7915 (*Nocera*); Cassazione Sec. VI of the 12th of June 2006 *CED Cassazione* n. 234166 (*Truppo*); Cassazione Sezioni Unite (*Ramoci*), *supra*; Cassazione Sec. feriale penale, of the 13th of September 2007 n. 35000 (*Hrita*). This interpretation is based on the fact that Article 17 para. 4 of the Italian law, while requiring that "serious evidence of guilt" is assessed, must be connected with Article 9 para. 5, which explicitly excludes those provisions of the Italian Code of Criminal Procedure prescribing such requirement: see Articles 273 para. 1, 273 *bis*, 274 para. 1 lett. a) and c) and 280. From these provisions it also follows that the Court of Appeal (when adopting a coercive measure) and the President of the Court (when validating an arrest made by the police) do not need to verify that there is a risk that evidence may be altered or that the offender may commit the same or other serious crimes, or that the maximum term of imprisonment provided for by Italian law for that specific offence is respected. Of course, the risk that the fugitive flees will still need to be assessed: otherwise the person will be released (Cassazione Sec. VI n. 42803 of the 10th of November 2005 (*Fuso*) para. 4). This provides confirmation that, notwithstanding the interpretative efforts of the Supreme Court, the Italian EAW system is stricter than the domestic extradition procedure, in which, when validating an arrest, the President of the Court does not have to assess this element.

[497] Article 17 para. 4 of Italian Constitutional Law can be considered to be one of the most evident signs of Italian "phobia" towards foreign models. While some degree of caution is necessary when dealing with individual rights, an overzealous protection of domestic values can lead to imbalanced results. It has been argued that it is unclear whether the criteria to be used in line with Article 17 para. 4 should refer to the domestic criminal system, the foreign one or both and that the Court's control is even harder in relation to offences for which double criminality has been removed. See E. APRILE, "Note a margine delle prime pronunce della cassazione in tema di mandato d'arresto europeo: dubbi esegetici e tentativi di interpretazione logico-sistematica della materia" (2006) *Cassazione Penale* p. 2515 e p. 2522.

relevant domestic authority[498]. However, it is not yet clear to what extent this "sufficient control" of the contents of the EAW will be effected[499].

The issue is quite delicate and should neither be underestimated nor overlooked. In one case an Italian citizen was sought by German authorities for prosecution purposes in relation to an offence of fraud (she, along with her husband, stood accused of having purchased 16 cars using bad cheques). The Venice Court of Appeal, after the application of a precautionary measure (in this specific case house arrest) made a decision upon her surrender. On appeal she argued that, although the company formed by her husband had been registered in her name, she was not actually responsible for its management and that this could be demonstrated by a series of documents that had been ignored by the first instance Court (for example, the cheques had not been signed by her). The *Corte di Cassazione* overturned the decision of that court, as it found evidence against her to be lacking. In the view of the *Corte di Cassazione*, this did not constitute an evaluation of the quality of the German investigation, but rather was simply based on the analysis of the available documentation. Even though reasoning is provided in this case, it is not detailed[500]. However, it does demonstrate that where a surrender procedure is purely formal, abolishing *exequatur* is misleading since a minimum level of judicial control will always be required given that the execution of the EAW is based on objective criteria. The main reference point for this control are the ECHR guidelines. In the *Melina* case, an Italian citizen was

[498] See e.g. Cassazione Section VI (*Pangrac*) *supra*. In this view, Articles 18 para. 1 lett. t) and 1 para. 3 of the Italian law must not be interpreted as an obligation to the foreign authority to provide a reasoned account of the exact meaning and implications of the evidence collected. The Court of Appeal must however make a request for any additional information when necessary.

[499] The issue is whether the control under Articles 18 lett. t) and 1 para. 3 should be formal or whether it should assess the facts. See E. APRILE, "Note a margine delle prime pronunce della cassazione in tema di mandato d'arresto europeo: dubbi esegetici e tentativi di interpretazione logico-sistematica della materia" *supra* p. 2525.

[500] Cassazione Sec. feriale penale, n. 34999 of the 11th of September 2007 (*Nonnis*).

convicted of a drug trafficking offence based *inter alia* on the statements of a police officer and on the basis of information received from another person. Even though the person who informed the police officer refused to repeat those statements in court, this did not hinder the surrender, as it is sufficient that the fair trial criteria as provided for by Article 6 of the ECHR are respected[501].

In the famous *Osman Hussain* case, Osman Hussain being one of the participants in the London bombing attacks of the 21st of July 2005, was sought by the British authorities. He argued *inter alia* that he was the object of persecution on one of the grounds mentioned by recital 12 of the Framework Decision (reproduced as grounds for refusal according to Italian law). The Court responded that a violation of a person's fundamental rights must be considered from objective circumstances and that the tradition of the requesting State, the United Kingdom, excluded the existence of such a violation. This was an extremely important judgment. Differing from the previously mentioned *Cusini* case, it clearly demonstrates that it is possible to encounter mutual trust in certain circumstances (where delicate and extremely political issues are at stake). British authorities were extremely satisfied that it was possible to expedite the surrender procedure so quickly[502].

With regards to the SIS alert, which is held to be equivalent to an EAW given that the elements indicated in Article 6 of the Italian Constitutional Law

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501 Cassazione Sec. VI, n. 17632 of the 3rd of May 2007 (*Melina*), recalling Cassazione Sezioni Unite (*Ramoci*), *supra*.

502 Cassazione Sec. feriale penale, of the 13th – 14th of September 2005 n. 33642 (*Hussain*). Hussain was arrested in Italy one week following the London bombings, he lost his appeal on the 15th of September 2005 and was returned to the UK on the 22nd of September. See also comment in *Bomb suspect arrested on British soil*, The Independent, on the 22nd of September 2005, as well as UK House of Lords European Union Committee Report n. 30 Explanatory Memorandum *supra* 9-10, which mentions both terrorist cases in which the procedure was slow, and the issuing of a UK EAW against a Portuguese national who was accused of murder, in which the surrender occurred rapidly (seven days post arrest).

are contained within it, the Supreme Court has ruled that the elements of Article 6 to which it refers are those referred to in the first paragraph (e.g. details of the person, classification of the offence etc.) and not the more detailed provisions contained in the fourth paragraph (i.e. the text of the norm applicable, a description of the facts, an indication of the evidence sources, etc.)[503]. One case concerned the issuing of a SIS alert accompanied by the request for the arrest of a Romanian national prior to Romania's accession to the EU and prior to the entry into force of the EAW system (1st of January 2007). The defendant stated that their case should be decided based on the rules of extradition. The Court of Appeal accepted this view, consequently annulling the procedure. Upon appeal by the *Procuratore generale*[504], the Supreme Court upheld that the search for an individual by means of a SIS alert (and also by means of the Interpol system) does not act as a catalyst for the surrender procedure since the actual arrest of the fugitive is a fundamental aspect of the surrender procedure. Since the EAW was issued on the 16th of February 2007, the defendant was subject to the new system[505].

VII. e) Member States' general attitude to the Framework Decision and concept of mutual trust

Both, e.g, the United Kingdom and Italian legal systems have adopted and enforced two different types of legislation and reacted in different manners to the adoption of the new surrender model. Despite their differences, there are some

503 Cassazione Sec. VI, of the 12th of December 2005, n. 46357.

504 The *Procuratore generale della Repubblica* is the prosecuting authority representative in the Court of Appeal. He is responsible for the coordination of relations between public prosecutors and police, as well as between both Italian and foreign authorities. See A. PERRODET, "The Italian system", in M. DELMAS-MARTY, J. SPENCER (eds.) *European Criminal Procedures supra.*

505 Cassazione Sec. V, n. 40526, of the 24th of October 2007 (*Stuparu*).

similarities. In both cases, the EAW has been viewed as a form of extradition and several guarantees to ensure the protection of individual rights have been integrated as part of the national Act. This is the consequence of a certain level of disquiet regarding implementation of the scheme of mutual recognition. This is one of the reasons why the European instrument was initially met with notable skepticism. Criticism expressed in several sectors, by parliamentarians, legal experts, NGOs, and other non-profit organizations which were reported by the press, did not originate from public opinion. The average person was, and continues to be, unaware of the intricacies and main issues relating to EAW and instead, have born witness to a media campaign. This media campaign amounts presents the negative aspects to the detriment of objectivity and clarity. Just a few commentators presented what was actually at stake. Some noteworthy dissimilarities between the two countries are shown here.

The first important difference regards the political environment in which the EAW was introduced. The UK Government, which has always been traditionally stronger than its Italian counterpart, was successful in pushing the Act through by diluting it with some compromises in order to render it more palatable to their Parliaments. Whereas, perhaps one can even say unsurprisingly, the Italian Government demonstrated little enthusiasm for transposing the Framework Decision into national law. This situation, taken together with the intense debate that lasted much longer than was expected, offers an explanation as to why Italy failed to comply with the deadline. In the former case, the outcome was a result "substance surrender" (essentially changing the concept of extradition). Instead in the latter case, the term "EAW" is used to refer to a system which can only be described as an extremely classical extradition. The reason for this is partly attributable to culture: Italian criminal law is extremely concerned with the defendant's rights at each stage of the proceedings.

On a more practical note, it is possible to identify a political reason for this. The majority of the Italian parliament was, at that time, comprised of mostly lawyers who have a tendency to give priority to defendant's rights.

The second relevant difference is attributable to the extremely high number of grounds for refusal and guarantees that can be granted according to Italian law. This serves as an obstacle to smooth judicial cooperation, as it enhances the discretionary power of the executing judge to such a point that they could almost substitute their foreign colleague and dictate their own standards. One may question if this element of disaccord in EAW functioning is due to negative reactions in some delicate cases and harm the relationship between judicial authorities, resulting in the exact opposite outcome of that desired. This attitude is rather curious, given the large amount of European Court of Human Rights rulings against Italy (indeed, Italy had the highest number of rulings against them in Europe between 1999-2006)[506]. On the other hand, British judges have had a lesser panoply, but have continued to have significant powers, above all in relation to the assessment of the issues of human rights or "national security".

A third difference can be attributed to the procedural steps during the executive phase. It would appear, at least from an analysis of the time limits and appeal options, that the British mechanism results as being more compliant with the urgency and streamlining requirements. Slower surrenders give rise to the possibility of controversies and reprisals between Member States. One of the main problems in the United Kingdom is in relation to time factors. Some prosecutors issued EAWs for older cases; cases for which they could have used requested the original extradition. In these instances, if the person had been

[506] Mainly the violations of Article 6 ECHR (fair trial). See table on the violations by Article and by Country 1999-2006, retrieved on the 28th of March 2013 from www.echr.coe.int.

resident in the UK for an extended period of time, and the issuing State was aware of their residency status, then it is unlikely that they will be surrendered[507].

With regards to case law, while a very theoretical approach was initially adopted by the Italian judicial authorities, a more open attitude has been adopted by the Supreme Court. In more recent rulings national provisions were interpreted in a manner which results as conforming more with the guidelines of the European Court of Justice. In the United Kingdom, the House of Lords was sufficiently flexible from the beginning and its decisions prompted significant legislative change.

It can be said that cooperation in criminal matters, which is pursued through mutual recognition, does not always operate uniformly. This is certainly attributable the nature of Framework Decisions, which are less binding than the two classical First Pillar instruments, i.e. the Directive and the Regulation[508]. However, a relevant factor arises from the properties of criminal law, which is closely connected to the national context in which it was created and in which it developed. This is even more evident if one compares common law and civil law substantive and procedural aspects.

However, it is possible to observe how the non-uniform implementation of the surrender scheme is not limited to the United Kingdom and Italy. Similar discrepancies exist to different extents in many, if not all, Member States. This may be one of the reasons for the uploading of a standard EAW form to the European Judicial Network website which can be easily downloaded[509].

To begin, it is curious that Article 1 para. 2, according to which the EAW must be executed on the basis of the principle of mutual recognition, has only

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507 Information obtained from interviews with practitioners. See also *supra*, p. 167.

508 See *supra* Chapter 2, p. 56 – 57.

509 Retrieved on the 16th of March 2012 from http://www.ejn-crimjust.europa.eu/forms.html (last visited on the 14th of February 2013).

received an explicit mention in six EU Member States. It would appear that this is indicative of the issues arising at the implementation level. This section provides examples of a few of them.

First, with regards to the double criminality requirement, the Netherlands will not extradite a citizen to be prosecuted for an offence for which they cannot be punished for under Dutch law[510]. Decisions taken by national Constitutional Courts, analysed later in this chapter, have not provided a solution to all the issues. Double criminality has been reintroduced in Germany in some specific cases. New legislation in Poland has not removed this requirement with regards to its nationals and has not replicated the list from Article 2 para. 2 in its entirety. Furthermore, Ireland has chosen to apply double criminality each time that it issues an EAW, requiring the return of its own citizens; whereas Estonia adopts it in practice, however an explicit abolishment is expected soon. The question of whether the Framework Decision list includes attempt and complicity has not been entirely addressed[511].

Second, with regards to reciprocity, the consequences relating to the German Constitutional Court's decision[512] are a good example of this issue. Germany's refusal to extradite was applied to Darkazanli, who was a citizen with both German and Syrian nationality. Darkazanli was wanted by the Spanish authorities for the crime of belonging to a terrorist organization. He was accused of being a member of *Al-Qaeda*, and as such was the subject of an EAW issued by the aforementioned Spanish authorities. Consequently, the Criminal Chamber of the Spanish *Audiencia National*, the competent Spanish authority responsible for dealing with EAWs, stated that, while there was no change in German

510 Report from the Commission on the implementation of the European Arrest Warrant and the surrender procedures between Member States in 2005, 2006 and 2007, Brussels, 11/07/2007, COM, 2007, p. 407 final and Annex to the Report, Brussels, 11/07/2007, SEC, 2007, p. 979 final.

511 For complete information see the Report from the Commission, *supra.*

512 See *supra*, p. 143.

legislation it would handle German EAWs as if they were traditional extradition requests. This meant that Spanish authorities could refuse the surrender of Spanish citizens to Germany based on the international reciprocity principle. Likewise, the Szczecin Regional Court in Poland refused to surrender a Polish national to Germany. A similar decision was made by the *Areios Pagos*[513] in Greece. Hungary has also refused to recognize EAWs issued by Germany[514]. The questions remains regarding whether reciprocity may once more be used in the future in similar cases in this regard, or with other grounds for non-execution, as a form of retaliation. For example, reciprocity is applied by the Czech Republic to the surrender of its citizens in line with circumstances as detailed in Article 4 para. 6 and Article 5 para. 3[515].

Third, a further question addresses the handling of minors. Article 3 para. 3 of the Framework Decision clearly states that it is not possible to hold minors legally responsible for acts on which the EAW is based on under the law of the executing State. Yet it is unclear whether this statement refers to full or limited responsibility. This has the potential to create implementation difficulties in countries where minors are held to have some degree of criminal responsibility[516].

Fourth, with regards to grounds for refusal, many EU Member States have raised a number of issues to the mutual recognition of an arrest warrant deriving from other Member States. Some of them include grounds that are not part of the Framework Decision, and in some cases even modified optional grounds

513 Cfr. *Audiencia National*, order of the 20th of September 2005; Decision of the Greek Supreme Court 2483/2005, *supra*; for the Polish decision, see K. BENI, *supra* p. 133.

514 Annex to the Report from the Commission, *supra*.

515 *Ibid.*

516 For instance, in Scotland the age of criminal responsibility is 8, while it is 10 in England and Wales and 12 in the Netherlands. See G. MAHER, "Age and Criminal Responsibility", 2005, p. 2 and *Ohio State Journal of Criminal Law* p. 493.

rendering them mandatory ones[517]. Estonian authorities decided that they can evaluate the merits of the EAW even though they do not have an explicit provision to do so. *Ne bis in idem* is only applied by the United Kingdom if the act also qualifies as an offence according to its domestic legislation. As far as time limits are concerned, not all EU Member States respect the ninety day time limit in their statues, and not all the Member States included the language in their statute that obliges them to inform Eurojust in the case of a delay[518].

Furthermore, in the case of positive or negative conflicts of jurisdiction, for example when several jurisdictions are either simultaneously asserted or denied over the same offences, there exists no guarantee that the jurisdiction chosen is the most appropriate one[519].

For the definition of "competent judicial authority", the Framework Decision allowed Member States the freedom to establish this authority according to their domestic law. In some of the Member States this definition was broadly interpreted. For example, Denmark and Germany both referred to the Ministry of Justice, whereas Cyprus chose to bestow the power to provide written consent prior to the issue of the EAW to the Office of the Attorney General[520]. It is

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[517] It is possible to wonder if the principle *pacta sunt servanda* could be applicable in this context, in the sense of not permitting grounds for refusal which are only provided for according to domestic law. This relates to the nature of a Framework Decision.

[518] Annex to the Report from the Commission, *supra.*

[519] To date, there are no clear rules and a reference to territoriality would be welcome. The "first come first served" principle applies. See Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings, COM, 2005, p. 696 final and the recent Draft Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings, Doc. 5208/09, Brussels on the 20th of January 2009.

[520] Annex to the Report from the Commission, *supra.* Information regarding the competent judicial authorities in each State is obtainable from the European Judicial Network website, http://www.ejn-crimjust.europa.eu (last visited on the 14th of February 2009). Some courts may apply a decidedly flexible approach when deciding who the competent authority is. In Scotland the general view is that the warrant cannot be considered invalid for the simple reason that the issuing authority would not be considered a judicial authority according to Scottish law. See *Goatley v. HMA*, 2006, SCCR 463 para. 25 per Lord Justice Clerk.

important to mention, in relation to the supplementary requirements included by some Member States, that the authorities in both the United Kingdom and Ireland have established a requirement for an additional certification that is necessary for a valid EAW[521].

Proportionality during the EAW issuing phase is another problematic area. Occasionally, requests for surrender have been made for what could be considered minor offences such as the theft of a piglet[522]. This is representative of the different values attributed to different crimes in different EU member states, particularly those that are less economically developed. A solution could exist by obliging the issuing authority to evaluate if the action is in proportion to the objective that it ultimately aims to achieve (i.e. securing the offender to be tried for an act which is held to be particularly harmful)[523]. Although it is possible to consider this principle to be a specific application of the more general principle which was established by Article 5 TEU, there is, however, no explicit reference made to it in the Framework Decision[524].

The surrender scheme, when compared to the traditional European extradition model, is of a more fragmented nature which consequently raises genuine doubts regarding its sustainability. With this objective, given that mutual trust is the cornerstone of cooperation in criminal matters under the EAW, the development of a concept at a theoretical level and subsequent attempt to verify that it truly exists, would be useful. The first point of the following analysis will

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521 *Ibid.* For the UK, see *supra*, p. 179 – 180.

522 Cfr. M. FICHERA, C. JANSSENS, "Mutual recognition of judicial decisions in criminal matters and the role of the nationnal judge", 2007, n. 8 *ERA Forum* p. 177, p. 188. Other examples are: the detention of small amounts of drugs, driving a car under the influence of alcohol, where the alcohol limit was not significantly exceeded, and the theft of two car tyres.

523 This was the proposal made by Portugal: see Doc. n. 10975/07 Brussels, on the 9th of July 2007.

524 For criticism of this principle, see *infra* p. 204-205.

be the distinction between trust and confidence as made by Neil Walker: trust should therefore be considered as an "active way of building confidence"[525].

There is a plethora of studies regarding the definition of mutual trust and especially its relation to cooperation[526]. While some argue that cooperation can evolve without trust, some instead agree that a degree of minimum trust is necessary for cooperation to function effectively. They also refer to constraints (i.e. a set of rules with the aim of increasing behavior predictability) and shared interests towards reaching a specific goal such as harmonising factors which improve cooperation between individuals and/or groups of individuals[527]. It is also possible to express this in legal terms, since the basis of mutual trust and mutual recognition is found in the loyal cooperation principle under Article 10 TEC, which also operates in the Third Pillar[528].

Mutual trust can be understood as the reciprocal belief that other people's behaviour will not violate the basic shared principles that are at the very centre of the EU legal system. Regarding cooperation in criminal matters, it is possible to further refine the concept of mutual trust in relation to both its *subject* and its *object*. It is possible for the subjects to be Member States or judicial authorities, and the object will vary accordingly. In the first case, it is necessary that a State trust another State's behaviour and trust that it will behave according to the rules and the general principles of the EU. This type of trust is much more significant in the intergovernmental cooperation context (and, especially, extradition and mutual legal assistance). In the second case (which is more relevant for this

525 See *supra* chapter 1, p. 44.

526 In the social sciences see: J. ELSTER, *Explaining Social Behaviour*, Cambridge University Press, New York, 2007, p. 344; G. A. BIGLEY, J. L. PEARCE, "Straining for Shared Meaning in Organisational Science: Problems of Trust and Distrust" (1998) 23 *Academy of Management Review* p. 405; D. GAMBETTA (ed.) *Trust: Making and Breaking Cooperative Relations*, Blackwell, Oxford, 1988; R. Axelrod, *The Evolution of Cooperation*, Basic Books, New York, 1984.

527 D. GAMBETTA, "Can We Trust Trust?" in D. GAMBETTA (ed.) *supra* p. 113.

528 Judgment of the ECJ C-105/03, *Pupino*, ECR I-5285, 2005.

work), it is necessary that judicial authority within a State places its trust in a foreign legal system and more specifically: a) the product of that legal system, that is to say the EAW and all the additional information attached to it and, dependent on the case, and b) the skill and ability of either the issuing or executing authority and all other relevant authorities to perform their tasks in accordance with that declared in the EAW and not diverging radically from that which would be carried out in similar circumstances in the State's own domestic legal system (in other words, EAW implementation according to the Framework Decision).

It is importatnt to state that absolute trust is not blind. Instead it is *conditional*, dependent upon the biding of rules. For example, the absence of elements that could be considered as being so extraneous as to require the executing authority to reject the request. However, since trust is mutual, it is fundamental that the conditions, upon which this trust is based, are agreed upon. Moreover, since trust automatically presumes a high level of *good faith*, only in exceptional cases would it be justifiable to unilaterally or bilaterally withdraw this trust. This leads to the implication that a detailed examination of the facts of the case leading to a surrender procedure, should not to be allowed. Instead this examination should be rended unnecessary. Furthermore, relative (cultural, legal, political) homogeneity and common values should be considered as preconditions of trust[529].

The main parameters useful in the assessment of whether mutual trust truly exists are compliance with agreed rules and shared interests. Let us assume as a starting point that the current Member States of the EU are sufficiently similar

[529] Some comparative studies do show that trust is much higher in Scandinavian European countries, i.e. Norway, Sweden, Denmark and Finland due to *inter alia* higher homogeneity. See J. DELHEY, K. NEWTON, "Predicting Cross-National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?", 2005, p. 21, *European Sociological Review*, p. 311. It could be interesting to verify the degree to which this may be causally related to the adoption of their special surrender scheme: see *supra* chapter 2, p. 68.

from a legal, political, and cultural perspective; even though there are naturally some differences relating to specific aspects (such as substantive criminal law[530]). There is a common interest in prosecuting certain types of crimes especially, in relation to terrorism or even organised crime. An agreed set of rules (particularly at a procedural level) is, as yet, still missing. Evidently former experience is an important influencing factor in the building up of trust. Instances of good practice with a specific State will help to reinforce the belief in that State's trustworthiness and will consequently lead to a general improvement in cooperation. This is a reason why anecdotal evidence is helpful. Interviews conducted with limited sample of practitioners from the United Kingdom and Italy (the countries which have been the focus of this chapter) have highlighted that, broadly speaking, a higher degree of trust exists in the United Kingdom, although UK judicial authorities do normally expect a very high standard regarding EAWs issued by other States, which does result in a high number of requests for additional information. Instead, Italian judges (regardless of past experience) have a tendency to be wary of foreign judicial authorities regardless of the State or type of legal system. UK judges tend to view the EAW as a positive development when compared to extradition: although they do highlight frequent problems with Eastern European countries (especially Poland) which often fail to include all the necessary information when issuing an EAW or even issue requests for minor offences[531].

The comparison between the systems in the United Kingdom and Italy and the relative brief analysis of legislation in other EU Member States as described above demonstrates that while there is a minimum degree of mutual trust, it is

[530] This is the reason why, as stated *supra*, p. 130-131 the removal of dual criminality should be restricted to the categories of offences in relation to which a stronger shared interest of Member States is more likely to form.

[531] Other issues occurred with Poland arising from a lack of direct flights within a three-weeks period after the final decision to surrender was made.

unevenly distributed in at least two States. There are indications suggesting that this may be the case for the relationship between those States and other EU Member legal systems. Therefore, it could be said that repeated negative episodes in EAW implementation between countries will contribute to the prevention of the strengthening of trust and a consequent undermining of cooperation in criminal matters at a more general level.

This highlights how, despite the evident success during the first years of implementation of EAWs as indicated by Commission statistics[532], it is possible to detect numerous flaws which were probably not foreseen by the original Framework Decision writers. It is only possible to identify appropriate solutions through an intense bottom-up process involving the exchange of information, best practices, training, mutual evaluation, practical guidelines, setting up of networks, and other similar mechanisms.

[532] Report from the Commission, *supra*. In 2005, 6900 EAWs were issued, the majority through Interpol or the SIS; more than 8500 were received; more than 1770 individuals were arrested and 86%, of them i.e. 1532 people were surrendered. The average time for executing a request is 43 days, compared to one year for traditional extradition. According to the Commission, a considerable improvement has taken place compared to 2004.

Conclusions

In this final chapter, conclusions will first be drawn from the findings of this work, and then some policy recommendations will be suggested so as to eventually outline the areas in which future research should develop.

° Summing up research findings

For prosecuting and convicting criminals across the European Union, the EAW appears to be an extremely valuable instrument. From a theoretical point of view, the development of cooperation between European nations to achieve the EAW is a tangible improvement in comparison to traditional extradition. When attention is drawn to the EAW through the lens of the standards of "effectiveness" introduced by the European Commission, it is impossible not to welcome to this modification. Based on these standards, the EAW is considerably effective as the average length of time needed to surrender a person upon request is significantly reduced compared to that of the previous system. Furthermore, it is worth pointing out that the elimination of political controls and the creation of direct contacts between European judicial authorities have contributed to reducing formalities.

A deeper analysis, which moves beyond the simple elaboration of statistics published as of now, shows nonetheless that there are several significant gaps and flaws. These especially disclose the lack of an appropriate "safety net" for the defendant. This is not only attributed to the shortage of sufficient guarantees of human rights within the body of the Framework Decision on the EAW. The haste with which the EAW was adopted hindered the chance to thoroughly reflect on

its introduction. A deeper analysis should have occurred before adopting the EAW especially in the areas of international law, criminal law, and European constitutional law. The new mechanism, the EAW, mirrors a pattern that is similar in function to the Third Pillar in its earlier years. Mainly the EAW serves to fight terrorism and to address the whole lot of cross-border crimes.

The alteration of the principles of traditional extradition law, including double criminality, nationality, and the speciality rule, which can currently be applied in a flexible manner, should have been associated with a parallel arrangement of an appropriate framework protecting human rights. Such principles would have made sense not only in terms of asserting State sovereignty but also as a bond against potential abuses. This can be positioned within the general tendency of deeming the extradited person as a subject, instead of the actual object of the proceedings. Addressing a depoliticised system does not exempt Member States from the responsibility of providing individuals with instruments whereby they can defend themselves.

A crucial role is still played ultimately by the principle of "equality of arms", which requires that the defendant and the prosecutor should be treated on equal terms in the trial. By analogy, this should be applicable also to the EAW, although it cannot be considered by any means a "trial measure". This work has shown that there is no consistency in the standards of protection of human rights within the European Union. There are several examples in both the new and old Member States that breach the provisions of the ECHR. This should be understood as a warning signal in setting up the area of freedom, security, and justice.

Along with the inadequacy in addressing "human rights", there is also an inadequancy in addressing "prosecution". As we saw in this work, in spite of

recent amendments, the somewhat weak role of Eurojust and the lack of rules governing conflicts of jurisdiction markedly threaten inter-State cooperation. This implies that the aspect of "effectiveness", previously noted, has not been suitably established.

Lastly, under the general conditions of transition from an international law to an EU law cooperation system, it is possible to assert that the Third Pillar has gained a fairly hybrid status arising from a combination of intergovernmental and supranational characteristics. The effect is unsatisfactory, as shown by the weak powers held respectively by the ECJ and the European Parliament in contrast to the strong influence still exerted by Member States. Member States show no concern with being sanctioned by the Commission. It is easy to ponder whether this fruitful for European criminal law, or whether it would be better to maintain the status quo (inter-State cooperation). Whichever choice is made, the EAW undoubtedly is as the key element in an incoherent system that urgently requires major legislative intervention in order to promote legitimacy and democracy.

On its own the hailed principle of mutual recognition cannot be put into effect in the area of criminal matters. Approximation should be insisted upon more convincingly to render foreign legal systems more ascertainable. It is in the area of substantial law that some of the most extraordinary contradictions in the functioning of the EAW can be noted. In several cases, both penalties and offences can significantly differ. As herein highlighted, penalties can bear a different criminal "stigma" that are determined by the legal system in which the trial takes place. This is true even in the case of penalties associated with murder, one of the crimes whose definition is almost generally agreed upon by EU Member States. As an example, a German judge may impose between six months and five years of imprisonment in the case of "killing on demand", while an

Italian judge may impose between six and fifteen years of imprisonment or life imprisonment if aggravating circumstances have been established.

As for the basic elements of an offence, differences may (and have) emerged in instances, related to the most conspicuous cases such as, cases concerning euthanasia, abortion, drug possession, racism and xenophobia, racketeering and extortion, and swindling and sabotage. There are two explanation for these problems. First, some of these offences convey a strong value judgement, and the criteria used to criminalise a particular behaviour and to define its elements depend on various factors. These factors are not only legal, but also political, social, economic and so forth. For example, some EAWs have been issued for offences that are regarded as "minor" in richer countries, but that in poorer countries are considered serious enough to warrant an EAW.

Second, the lack of definitions for those offences listed in the Framework Decision makes the EAW weak and results in legal uncertainty. It appears that the drafters of the Framework Decision did not evaluate the potential risks of this approach exhaustively.

Furthermore, a common bond is crucially needed to strengthen mutual trust and legitimacy. The two are complementary, in that where there is legitimacy, there is trust and vice versa. The need to reinforce trust not only through a top-bottom approach, but also through a bottom-top approach has been outlined in this thesis. This latter approach involves exchange of information and best practices, mutual evaluation, training, the adoption of practical guidelines, the creation of networks and so forth. The former approach involves reducing the list of the categories of offences for which double criminality has been eliminated to a few "core" offences. The reduction in the list of categories would allow for approximation to be more effectively pursued and would represent a step ahead in promoting confidence and trust.

Another possible way to strenghten the EAW is by the enforcement of the Treaty of Lisbon. By doing so some major impediments emphasised in this work would be likely to be overcome by combining the First and the Third Pillar, especially enhancing the role of the European Parliament and that of the Court of Justice. Furthermore, the Treaty demands that all Framework Decisions are transformed into Directives (i.e. their equivalent in the First Pillar) within five years. Nevertheless, there would still be a need for legitimacy and trust, making the aforementioned problems more obvious and, probably, even more acute. This is evidently an additional variable that complicates the issue and requires reflection on whether a suitable system of European criminal law is attainable in the long run.

In this respect, the present work has further focused on the implications of implementing the EAW for the whole European Union. This issue is put in context within a broader consideration on the expectations deriving from the new developments of the Third Pillar. It is thus crucial to identify the need for freedom, security and justice. The question here is whether Member States are expected to unconditionally trust one another's freedom, security and justice. Since EU official documents do not provide any direct responses to this question, it is strongly felt that some considerations need to be made on this issue.

First and foremost, by briefly analysing the mutual recognition instruments, this study has revealed that all the flaws found in the EAW scheme have been replicated in every one of these instruments. An adequate mechanism for protecting individual rights is missing in all of the Framework Decisions. All Decisions entail the list of thirty-two categories of offences (these have been expanded to thirty-nine categories in the case of mutual recognition of financial

penalties). Compared to the EAW, their negotiation has been slower and at times, it appears to encounter unsurmountable obstacles. A specific instance is given by the adoption of the European Evidence Warrant. The German perplexity regarding six offences, which included swindling or racketeering and extortion, represents a symbolic example of this case.

Secondly, this thesis has investigated the extent to which mutual recognition and/or harmonisation can be considered as a solution from the viewpoint of substantive criminal law. This matter is connected with the issues of identity and sovereignty. There is always at least one different element when mutual recognition operates, whereas in the case of harmonisation, no differences are postulated at all. The question that needs to be addressed here is whether the EU is able to speak a common language of crime and punishment. Alternatively, is it feasible to envision a network-like system, based on reciprocal exchanges of rights and obligations between equal sovereigns, without any dominating authority and with a plurality of monopolies on the use of force. This latter alternative appears to be more pragmatic in the short term, as it would involve adopting principles of international law for the scope of a singular experimental integration within the European Union. This does not mean, however, that the two alternatives are not mutually exclusive. It is possible to debate that a long-established practice of mutual recognition can ultimately bring harmonisation. In this respect, a fundamental condition is that of combining the development of mutual recognition and approximation, i.e., a step-by-step approach, as aforementioned.

An attempt has been made in this work to show that the EAW was introduced as the outcome of the strong political pressure in the aftermath of 9/11. It has sought to highlight how there has been a drive toward a more radical

approach, combining a restricted number of grounds for refusal with a far-reaching abolition of double criminality, by taking advantage of those circumstances. The *rationale* Third Pillar is the enhancment of security at the EU level, assuming that Member States are not capable of attaining effective results on their own. There are, in fact, several reasons for advocating this point. There is a common belief that, as a result of globalisation, increasing interdependence, and permeable borders within the territory of the European Union, traditional nation-States are no longer capable of assuring an adequate degree of security to their citizens. This may be the situation in cases of immigration, drug-trafficking, terrorism and other cross-border offences, as well as serious cases of murder and theft. The question here is whether this is sufficient to create a procedural and substantive criminal legal system.

The present work has argued that the issues of identity, legitimacy and sovereignty need to be taken into much deeper consideration. A constitutional discourse, which supports the shift from simple cooperation toward effective integration and arises in a number of areas (institutions, citizens, informal networks etc.), is in much need. In this scenario, mutual recognition and mutual trust are key concepts, which are strongly related to the rule of law, without considering whether the final goal is to attain full harmonisation. For this reason, this work has made an effort in defining mutual trust as a first step in future discussions.

Basically, it is important to assume that elaborating a concept of mutual trust from a mere legal point of view, as done by the Court of Justice, is not useful. The suggestion is to adopt a sociological approach. Mutual trust has thus been analysed in its nature and scope, following studies targeted at people's attitude and behaviour in interpersonal relations. Some of the literature in the field of social sciences has, in fact, found a connection between trust and

cooperation. This work has argued that a deeper understanding of the features of trust can shed light on the scope and advantages of the EAW mechanism and European Criminal Law.

Consequently, mutual trust is conceived as the reciprocal belief that the common principles underlying the EU legal systems will not be violated. The subjects can be either Member States or judicial authorities. Furthermore, trust will always be affected by other variables, including the absence of serious reasons that would explain a refusal to cooperate. In order to evaluate the extent to which mutual trust is implemented in the United Kingdom and Italy, which belong to the common law and civil law tradition, a number of interviews were carried out with practitioners. These interviews have indicated that there is still not an appropriate degree of trust, and that more actions need to occur in order to promote its importance.

° Recommending policies

Based on the previous discussion, the following six specific suggestions are proposed:

1. the adoption of a new Framework Decision dealing with the rights of the defendant or else the incorporation of a consistent number of provisions in the actual body of the Framework Decision on the EAW that address defendant's rights, and in a similar manner, of the other mutual recognition instruments;
2. a boost in the role of Eurojust in the context of the EAW by offering, for example, a system of sanctions applicable to those States which fail to cooperate;

3. the adoption of clear rules concerning conflicts of jurisdiction. A salient criterion could be territoriality, namely, the place where the offence has been committed, unless its grave effects are perceived elsewhere;
4. the reduction of the list in Article 2 para. 2 to a small number of "core" offences whereby it is easier to reach an agreement on the definition of the act and penalties to be imposed;
5. the advanced approximation of both the substantive and procedural rules, or the constituent elements of offences and penalties *where this is feasible* on the one hand, and rules assuring sufficient protection for the individual on the other hand;
6. an increase in the use of informal methods of evaluation, exchange of best practices and, in general, the adoption of guidelines and soft law measures in order to contribute to raising awareness and mutual understanding.

° Prospective research areas

In this final section, emphasis is placed on the importance of explaining possible benefits deriving from European Criminal Law. Major issues in this regard can be summarised in terms of normative claims and purposes. The questions that should be addressed are:

a. whether there is a need for more integration of our criminal legal systems, and what normative claims are made in this model, that is currently emerging;

b. whether the main scope of the EAW and the rest of the mutual recognition instruments is to enhance cooperation, or to further represent the foundation for a more integral legislation to be created in a near future.

A trend in this latter direction seems to be indicated by the recent case law of the ECJ, the official documents of the Commission, and the provisions of the Treaty of Lisbon. A number of scholars have advocated that the problems related to the development of European Criminal Law, including legitimacy, consensus, common public sphere and so on, are of ethical nature and as such, cannot be adequately addressed by institutions of the EU. In other words, the debate needs to focus on the wider picture of the EU legal order. The extent to which the EU can attain characteristics of a State should be evaluated. This leads to the question of whether our analysis of the future of EU criminal law ought to be conducted following the traditional State-centred paradigm of sovereignty.

An additional question concerns the model of integration that is being pursued. The guarantee of common standards is a fundamental condition for the legitimacy and credibility of the European Criminal Law project of integration, assuming that this is the direction that the EU is inclined to follow. This is not really different, after all, from the actual purpose of modern criminal law in avoiding abuses and distortion. A surrender scheme, implemented differently across Europe is not, of course, an optimal step in that direction.

It is further important to explain the meaning of freedom, security and justice, and to consider whether they really matter as values, general principles and/or as aspirations. Further questions that need to be posed concern the identification of beneficiaries, and whether these should include the concept of freedom as self-determination; implying that there should be as little interference as possible in the constitutional dimension of the Member States.

Overall, a few definitional issues within the EU have still not been solved. A predominant issue is to determine whether the EU has a common notion of rule of law. Further research is required in order to define the boundaries of crime and punishment, as well as to seek whether it is possible, or even desirable, to accord the EU the right to punish. Thus the notion of mutual trust should be further investigated in this regard to establish if it is applicable not only to the area of judicial cooperation, but to police cooperation, and to EU criminal law as well.

It is extremely important in this context to analyse how the EU's emerging system of criminal law and procedure and the general principles of international law work together. It would also be useful to discover how the EU model can relate to other regional and institutional models, such as the US model or the International Criminal Court, which *inter alia*, depend on particular mechanisms of surrender. These are known as "interstate rendition" or "interstate extradition" in the US.

A last comment on this final point of the discussion regards the sense of alarm that arises when there is even the vaguest suspicion that a State attempt to increase security is done for the sake of concealing its weaknesses.

Appendix. The Corpus Juris

The *Corpus Juris* springs from the need to set rules for regulating a common judicial and procedural system. The main purpose is that of unifying European substantive criminal laws, in order to give life to a real European criminal trial.

As concerns the evidence dimension, the *Corpus Juris* presents, within a limited number of articles (artt. 29, 31, 32 and 33), complex and articulated aspects and quite a few uncertainties in regards to its limits.

Focus has been placed on the exclusion of evidence, since the principle of legality of evidence plays an important role in justifying accusations.

Such phenomenon is not easily detectable, in contrast to what is stated in the introduction, emphasizing the pivotal role of the approximation of laws and regulations within the future scope of European criminal procedure. The *Corpus Juris*, in fact, welcomes a mechanical conception of evidence, regardless of the physiological limits of proceeding dynamics or of the argumentative context, which gives evidence life and plays an important role in all those systems characterized by an accusatory structure. This has a tendency to methodologically limit the search for judicial truth.

Particularly, the addition of the principle of proceedings, which are "contradictoire" does not effect the principle of legality of evidence. The concept of "contradictoire" differs from that appearing in art. 111 Const. and represents a mere individual guarantee for the defendant, rather than a method for the historical reconstruction of facts.

Such choice affects the usability for debating purposes of the material acquired during the investigations. The lack of a transmigration ban of the

evidence acquired during the preparatory stage of proceedings weakens the "contradictoire's" potentials as an investigation technique. Within the *Corpus Juris* there are no rules regarding the evaluation of evidence or circumstantial evidence, nor specific indications as to the methodologies of formation of evidence. "*Formation of evidence is for prosecution use only"*. Such a statement causes inevitable consequences on the legality of the material acquired, above all on the right to a fair trial, a principle to which the entire project is based upon.

The only exhaustive provision is the one devoted to the exclusion of evidence, stated in art. 33.

The first paragraph of the provision explains that evidence must be excluded when obtained in violation of the set of rules. In this case, we are dealing with evidence already acquired but unusable in the proceeding.

Evidence is excluded if was acquired by violationing the fundamental rights enshrined in the ECHR. Bans are applied in regard to evidence obtained against individual rights, for example, when testimony is obtained by means of torture or degrading and inhumane treatment as stated by art. 3 ECHR or interceptions carried out against art. 8 ECHR.

The second criterion is that evidence should be excluded if it violates the regulations of the *Corpus Juris* (art. 33 para. 2).

The third case of exclusion responds to the open nature of community procedure, which is always in need of integrations by national systems. In other terms, the national law that is used to determine whether the evidence has been obtained legally or illegally must be the law of the country where the evidence was obtained. When evidence has been obtained legally, the evidence must be deemd admissible. The State should not oppose the use of the evidence on the basis that it was obtained in a way that would have been illegal in the country of use. It should always be admissible to object to the use of such evidence, even

where it was obtained in accordance with the law of the country where it was obtained, if it was obtained in violation of the rights enshrined in the ECHR or the European rules.

The exclusion of illegal evidence exists after having verified that a fair trial is accorded to the defendant. The legality issue is not posed at the first stage but rather in the final stage of the trial, when the judge is called to evaluate the elements at their disposal.

Each violation, as already stated, is reported within the ECHR.

ECHR article 6 presents the only evaluation criterion that can find operational application. All discipline regarding the ban of evidence takes the shape of a blank procedural norm, since the content of each rule is in need of amendments by the European jurisprudence as regards the right to a fair trial.

This is in direct contrast with what is affirmed by Strasbourg jurisprudence stating that the evaluation and admissibility of evidence pertains to the national law and in verifying that the procedure is respectful of the right to a fair trial, through an overall evaluation of the whole proceeding.

Suitable criteria for use in a criminal trial and freed of the principles imposed by national legislations are difficult to attain through the inadequate rules contained in the *Corpus Juris* that relate to evidence proceeding at a European level. Coherence is lacking in regard to the use of conceptual categories that are able to identify which limits must be applied as concern the admissibility, evaluation, and usability of the collected evidence. The only certainty is that the creation of a European criminal trial should address how to deal with evidence that emerges from several Member States.

The refusal of rogatory procedures is implicit since, as will be shown in the new European sources on criminal evidence, they are unsuitable for the purpose of cooperation within a single area: Europe.

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