

**Harmonize, Recognize or Minimize: A Borderless European Judicial Space? The Application of the European Arrest Warrant and Its Effect on EU Integration**

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## **ABSTRACT**

One of the core objectives of the European Union promotes the creation of a functioning area of freedom, security and justice. To that end, the EU has introduced various legal frameworks that create a judicial area with limited internal borders, based on the principle of mutual recognition of judicial decisions and acts as the foundation of strong judicial cooperation. The European Arrest Warrant (EAW) serves as the linking mechanism of this common area in which EU Member States are required to arrest and extradite alleged criminals at the request of other Member States' judicial authorities for serious crimes such as murder, terrorism, or trafficking in human beings. The EAW is a legal mechanism through which EU Member States pool a core sovereign right to decide on criminal matters in order to achieve a supranational court-to-court regime based on mutual recognition. Such an interconnected horizontal judicial regime strengthens the common EU identity as a space based on the rule of law and no impunity and prevents a possible collapse of the EU.

The article reflects upon the role and function of the common judicial space, based on and facilitated by the EAW in the attempt to create an area where serious crime is sought to be minimized and penalized. Such a highly interconnected judicial regime strengthens the common identity of Europe as a space based on the rule of law and might exert strong force against the collapse of Europe. Through direct judicial cooperation Europe may be seen as an area of accountability, transparency and legitimacy.

## **Introduction**

One of the core objectives of the European Union (EU) is the creation of a functioning Area of Freedom, Security and Justice (AFSJ). To that end, the EU has introduced various legal frameworks that specifically attempt to create a judicial area, based on the principle of mutual recognition of judicial decisions, with limited application of internal borders. This paper aims to analyse an aspect of the EU Criminal Law and its effect on EU integration, namely the European Arrest Warrant (EAW). The EAW arrangement is measured in terms of effectiveness and necessity against the gravity of the ever increasing intra-EU cross-border criminal activities. The EAW serves as a mechanism of compromise through which EU Member States transfer or pool a core sovereign right to exclusively decide on criminal matters within their territories in order to achieve a supranational court-to-court regime based on mutual recognition. Such a highly interconnected judicial regime strengthens the common identity of the EU as a space based on the rule of law and contributes to the protection of fundamental rights within EU borders.

### **1. A Brief History of EU Criminal Law**

In order to understand the role of the EAW in the terms of effective functioning of the EU, a brief recourse to the history and structure of EU Criminal Law is required. EU Criminal Law is placed under the chapeau of the Area of Freedom, Security, and Justice (AFSJ), currently found in Title V of Part Three of the Treaty on the Functioning of the European Union (TFEU). Before the Lisbon Treaty, the AFSJ was split between the Third Pillar of Justice and Home Affairs under Title VI EU and First Pillar Title IV European Community (EC) Treaty. The original purpose of EC initiatives in Criminal Law was primarily structured as a reaction to the threatening gravity of cross-border criminal activities. Additionally, in the mid-1980s the Schengen Agreement, subsequently supplemented by the Schengen Implementing Convention in 1990, promulgated a common border control policy and crime information database to effectively respond to trans-border crime.

The intergovernmental cooperation on AFSJ matters could be traced back to the Maastricht Treaty in areas such as transnational crime and terrorism.<sup>1</sup> The pre-Amsterdam Third Pillar promulgated an intergovernmental approach to decision-making in comparison to the more communitarian, supranational First Pillar. Amsterdam changed the structure of the Third Pillar, reshuffling many of the areas related to fundamental human rights issues under the Pillar like immigration and asylum policies. As a result, the Treaty of Amsterdam split the former JHA Third Pillar: a large portion relating to the free movement of persons, asylum and immigration were incorporated under the Community (First) Pillar while the remaining policies were restructured under the Third Pillar with institutional checks closer to the ones applied in the First Pillar.<sup>2</sup> JHA was essential for the three-pillar structure as there was a clear segmentation in the political attitude of the Member States especially in the Second and Third Pillar structures<sup>3</sup> as well as disinclination or a period of transition for the Member States to extensively communitarize the Pillars.

The expansion of the free movement of persons and the removal of internal frontiers in the Schengen *acquis* inevitably created problems of internal security for the whole Community. The JHA Council realized that a delicate balance must be achieved at the EU level as ‘lifting the frontiers between Member States to permit people to pass freely cannot take place to the detriment of the security of the population, of public order and of civil liberties’.<sup>4</sup>

This trifocal balancing position aided the push for an EU-level approach to cross-border crimes and increased mobility of criminals.<sup>5</sup> As ‘drugs, organized crime, international fraud, trafficking in human beings...are all problems of great concern to all the Member States of the European Union’, the AFSJ would evolve around the common vision of an increased peace, security and prosperity of the EU.

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<sup>1</sup> See Paul Craig and Grainne de Burca, *EU Law: Texts, Cases and Materials* (Oxford: Oxford University Press, 2011), p. 924. Numerous mechanisms also existed prior to 1992 such as the Trevi Group in 1975, focusing on the goal of combating terrorism and serious international crime of drug and arms trafficking.

<sup>2</sup> See PJ Kuijper, ‘Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis’, *Common Market Law Review*, 37 (2001), 345-366.

<sup>3</sup> Joseph Weiler, Ulrich Haltern, and Franz Mayer, ‘European Democracy and Its Critique’, in Jack Hayward (ed.), *The Crisis of Representation in Europe* (London: Frank Cass, 1995), pp. 29-31.

<sup>4</sup> JHA Council, cited in Craig and de Burca, p. 927.

<sup>5</sup> *Policy Making in the European Union*, ed. by Helen Wallace, William Wallace, and Mark Pollack, (Oxford: Oxford University Press, 2005), pp. 460-462.

The major breakthrough occurred at the Tampere European Council in October 1999 which established that ‘people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime’ as ‘European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions, and the rule of law’.<sup>6</sup> The general security deficit was addressed by the Tampere rhetoric on increased institutional cooperation in order to develop a common policy field in the areas of Common EU Asylum and Migration Policy, a Genuine Area of Justice, a Union-wide Fight against Crime and Stronger External Action and Cooperation.<sup>7</sup> The solution was found in the applicability of the principle of mutual recognition in relation to the far-reaching judicial cooperation regime of the EAW, as explored below.<sup>8</sup>

The Treaty of Lisbon completed the gradual transition initiated in the Amsterdam framework through dismantling the Pillar system with ASFJ falling under the shared competence of the Union.<sup>9</sup> Article 67 TFEU is the primary ASFJ provision and the EU’s competence to pass criminal law measures is laid down in Article 83 TFEU. After 1 December 2014, at the end of the transitional period in the Lisbon Treaty, any amendment to the Council Framework Decision will be taken under the ordinary legislative procedure between the European Parliament and the Council with the possibility for an application of enhanced cooperation.<sup>10</sup> Additionally, pertinent legal developments include the Lisbon Treaty introducing the binding EU Charter of Fundamental Rights<sup>11</sup> and EU becoming a party to the European Convention on Human Rights in the foreseeable future.<sup>12</sup> As evidenced above, the history and development of the AFSJ indicates a gradual solidification and consistency in the attempt to respond to criminal practices

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<sup>6</sup> Tampere European Council, Presidency Conclusions (15-16 October 1999), pts.1, 6. Accessed 1 March 2014 <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)> .

<sup>7</sup> Neil Walker, *Europe’s Area of Freedom, Security and Justice*, (Oxford: Oxford University Press, 2004), p.7.

<sup>8</sup> See Valsamis Mitsilegas, ‘The Constitutional Implications of Mutual Recognition in Criminal Matters in the European Union’, *Common Market Law Review*, 43 (2006), 1277-1311.

<sup>9</sup> Article 4(2)(j), Treaty of the Functioning of the European Union. Shared competence means that Member States lose their powers in the given area only to the extent that the EU exercises its own competence. Hence, the EU may choose to pass regulations, harmonize national laws, utilize minimum harmonization or use mutual recognition as legal tools. See Craig and de Burca, p. 933.

<sup>10</sup> See Protocols 21 and 22 of the Lisbon Treaty. The UK, Ireland and Denmark do not participate in measures in the area of Justice and Home Affairs. The UK and Ireland have the possibility to opt in to a measure.

<sup>11</sup> Article 6(1), Treaty of the European Union.

<sup>12</sup> Article 6(3), Treaty of the European Union.

which threaten the core functioning of the EU and its Member States. The EAW was the next logical step in the pan-EU project of making it easier to respond to trans-border crime.

## 2. What is the European Arrest Warrant?

The European Arrest Warrant was established pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002. The Framework Decision<sup>13</sup> came to fruition in 2002 as a result of the initiative of the Tampere European Council in October 1999 which promulgated the replacement of the formal extradition procedure among EU Member States with a simplified surrender procedure.<sup>14</sup> The EAW can be summed up as a horizontal judicial cooperation regime of surrender of persons where a Member State (the issuing State) requests from another Member State (the requested State) the arrest, detention and surrender of a person who is located on the territory or is under the effective control of the latter. The 'system of surrender between judicial authorities' aims at facilitating the free movement of judicial decisions in criminal matters in a timely and effective manner. The EAW creates a judicial network where courts of various Member States communicate and directly execute each other's decisions without the participation of the executive branch, a traditional participant in the classic extradition process. Thus, politicization of the surrender of the relator is sought to be minimized.

The EAW forms the most significant legal and institutional measure for criminal law cooperation on EU level, centered on the principle of mutual recognition of judicial decisions and pre-trial orders of the Member States.<sup>15</sup> The underlying driving force was to develop a closer relationship among the EU Member States through 'gradual abolition of traditional bars and caveat and a parallel simplification of procedures as an effect of the growing Member States' confidence in each other's legal system'.<sup>16</sup> The surrender system espoused in the EAW Framework decision is structured around the 'high level of confidence between Member States'<sup>17</sup> and the foundational

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<sup>13</sup> A Framework Decision requires the Member States to alter or create the necessary national legislation in accordance with the content of the framework decision. See Article 288 TFEU.

<sup>14</sup> Luisa Marin, 'The European Arrest Warrant and Domestic Legal Orders. Tensions between Mutual Recognition and Fundamental Rights: The Italian Case', *Maastricht Journal of European and Comparative Law*, 15-4 (2008), 473-492 (p. 474).

<sup>15</sup> Massimo Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?', *European Law Journal*, 15-1 (2009), 70-97 (p. 71).

<sup>16</sup> *Ibid.*, p. 78.

<sup>17</sup> EAW Framework Decision 2002/584/JHA, preamble 10.

mutual trust indicates a push towards an obligation to render assistance among EU Member States.<sup>18</sup>

The EAW is issued either for the purposes of prosecuting the relator (the person to be surrendered), for the execution of a custodial sentence already passed in the form of a conviction by the judicial organs of the requesting State or for a detention order. The warrant is issued by the appropriate organs of the requesting State when the offence for which the person is sought carries a sentence for a maximum of at least one year in prison or when an entered conviction is a prison term of at least four months.<sup>19</sup> Correspondingly, the so-called minimum maximum threshold of gravity of the crime introduced the creation of a dual-track classification of crimes. In the first category, double criminality was eliminated for the non-exhaustive list of crimes. In the second category, the dual criminality remained a possibility along with other extradition requirements. Four additional Council Framework Decisions have supplemented the EAW FD, namely those concerning the transfer of sentences, *in absentia* judgments, conflicts of jurisdiction and recognition of supervision orders.<sup>20</sup>

The Framework Decision on EAW was fully transposed by all Member States in early 2005.<sup>21</sup> Initially, the 2000 Programme on Mutual Recognition presented a limited surrender regime related to supranational crimes of terrorism, drug trafficking, trafficking in human beings, arms trafficking, corruption, and EU funds fraud.<sup>22</sup> The latest available statistics for the period between 2005 and 2009 indicate a total of 54689 EAWs issued with 11630 EAWs executed.<sup>23</sup> During the same period, approximately 51% to 62% of the fugitives consented to their surrender.

### 3. The EAW, Mutual Recognition, and Harmonization

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<sup>18</sup> Matthias Borgers, 'Mutual Recognition and the European Court of Justice', *European Journal of Crime, Criminal Law and Criminal Justice*, 18-2 (2010), 99- 114 (p. 99).

<sup>19</sup> Article 2(1), Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, (2002) OJ L 190.

<sup>20</sup> Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 11 April 2011, COM(2011) 175 final, p. 9.

<sup>21</sup> The implementation deadline was set on 1 January 2004 but some Member States faced minimal delays in the transposition process. Romania and Bulgaria implemented the Decision before 1 January 2007 when they joined the EU.

<sup>22</sup> European Union Strategy for the Beginning of the New Millennium, (2000) OJ C124/1.

<sup>23</sup> Commission Report 2011, p. 3.

In order to understand the horizontal integration effect of the EAW regime, it is essential to examine how it replaces the traditional extradition cooperation of the European Extradition Convention with a simplified surrender, court-to-court cooperation model, characterized by the elimination of the double criminality requirement and built around the notion of mutual trust of the judicial organs of the current 28 Member States. Mutual trust in criminal justice systems is recognized in the EU legal order as ‘each of [Member States] recognizes the criminal law in force in the other Member State even when the outcome would be different if its own national law were applied’.<sup>24</sup>

Mutual recognition and harmonization in the sphere of judicial cooperation and criminal law are traditionally seen as two alternatives. Mutual recognition allows for domestic criminal law to retain its specificity. Mutual trust avails the domestic legal tradition and structure to retain its independence and legal heritage. The principle is usually perceived as a shortcut legal mechanism which avoids the legally demanding and politically problematic unification and standardization of criminal law across the board.<sup>25</sup> Mutual recognition serves as ‘a quasi-automatic process’ in the EAW system as judicial state organs execute a legal act of another State after applying minimum checks, thus providing the original legal decision with an extraterritorial effect.<sup>26</sup> In practical terms, mutual recognition is a legal mechanism applicable to both pre-trial decisions such as investigation stages, evidence collection, freezing of assets, detention during investigation, and final decisions like a court decision against which no recourse to appeal is available.<sup>27</sup> The TFEU states that ‘judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions...of the Member States’<sup>28</sup>, a horizontal legal construction in the sense that it directly concerns the legal relations between the EU Member States.

Although mutual recognition is often seen as a problematic and uncertain legal tool for integration, it has achieved a status of ‘an effective method of European integration in criminal

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<sup>24</sup> Joined Cases C-187/01 and C-385/01 *Gozutok and Brugge*, (2003) ECR I-01345, para.33. The case in this particular part concerns the double jeopardy principle according to Art.54 of the 1990 Schengen Convention.

<sup>25</sup> Marin, p. 475.

<sup>26</sup> *Ibid.*, p. 482.

<sup>27</sup> Fichera, p. 75.

<sup>28</sup> Article 82 (1), TFEU.



matters...accompanied by the reach of the principle in an ever wider range of aspects of the domestic criminal justice system, which now include evidence, probation and alternative sanctions and the transfer of sentenced persons'.<sup>29</sup> Precisely because framework decisions are binding on Member States in respect to the general goals and results to be achieved, leaving to each State the means and forms of implementation, the principle of mutual recognition matches so well the successful functioning of the EAW.<sup>30</sup> In the eyes of the Commission, 'the principle of Mutual recognition...means that each national judicial authority should *ipso facto* recognise requests made by the judicial authority of another Member State with minimum formalities'.<sup>31</sup>

The applicability of the principle in the area of AFSJ has also come under criticism as there is a cross-application difference between the goal of single market integration where 'mutual recognition eases the cross-border movement of societal interaction' and 'the case of judicial co-operation in JHA [where] the introduction of mutual recognition does not expand the rights of individuals vis-à-vis the state [as] it facilitates the cross-border movement of sovereign acts exercised by states' executives and judicial organs'.<sup>32</sup> The free movement of judgments is criticized to impose criminal law provisions of another Member State as its own by the executing State, thus enforcing the requesting State's system of law. Other scholars have noticed the necessity for a delicate balance between mutual recognition and legality and legitimacy of criminal law at national and EU level. As criminal law, so essential for the rule of law on domestic level, directly concerns the relations between the State and the individual in terms of 'accepted behaviour and reach of State power and force', it is alluded that 'criminal law and its limits...must be openly negotiated and agreed via a democratic process, and citizens must be aware of exactly what the rules are'.<sup>33</sup>

Hence, it could be envisaged that a situation might arise where domestic legislation does not converge with the application of mutual recognition. In order to reconcile the seeming conflict, it is suggested that when a domestic court is facing contradicting or divergent rules of different

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<sup>29</sup> Valsamis Mitsilegas, 'The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?', *European Law Review*, 34 (2009), 523-560 (p. 560).

<sup>30</sup> Borgers, p. 99.

<sup>31</sup> See Craig and de Burca, p. 947.

<sup>32</sup> See Sandra Lavenex, 'Mutual Recognition and the Monopoly of Force: Limits of the Single Market Analogy', *Journal of European Public Policy*, 14-5 (2007), 762- 779 (p.764).

<sup>33</sup> Mitsilegas, 'The Constitutional Implications of Mutual Recognition', p. 1287.

legal orders within the EU, the judicial organ must attempt to reconcile the differences by utilizing the ‘functional equivalence’ doctrine. Functional equivalence, known for its origin in the expansion of the Internal Market and a form of teleological interpretation, stipulates that ‘a regulation of one legal order can be deemed equivalent to the legislation of another legal order because it expresses the same line of policy, or, better, it protects the same values through different instruments’.<sup>34</sup> Essentially, the principle shares the same characteristics of mutual recognition as if the functional equivalence is positively applied, then the courts must recognize the foreign judicial decision in a case of an EAW; if the test is not met, then the process of mutual recognition would be significantly compromised or it would serve as an indicative that the EAW has been incorrectly applied.<sup>35</sup> In this manner, an additional requirement is imposed on the judicial organs of the requested State: on top of the principle of consistent interpretation of domestic law in light of the EAW and the obligation to avoid conflicting application between the domestic law and the Framework Decision, the court is asked to actively search for functional equivalences of the applicable procedural guarantees in the surrender process, i.e. to look beyond the form and compare the substance of a norm or rule. In this manner, mutual recognition is enforced as the aim of the whole interpretive process is to ‘clarify and restrict the possibility of refusing the execution of an arrest warrant’.<sup>36</sup> The crucial element is that the domestic judge needs to be proactive in applying the functional equivalence comparison of the diverging or different domestic legal orders within the EU judicial space.<sup>37</sup> The true meaning of mutual recognition requires truly compatible legal systems to be trusted in the EAW regime of criminal cooperation.

In contrast to mutual recognition, harmonization seemingly entails approximation of criminal procedural and substantive law across borders. In this manner, a single body of law would be achieved, effectively responding to the transnational nature of organized crime as well as

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<sup>34</sup> Marin, p. 487. See also, Joseph Weiler, ‘Mutual recognition, functional equivalence and harmonization in the evolution of the European common market and the WTO’, in Fiorella Schioppa et al (eds.), *The Principle of Mutual Recognition in the European Integration Process* (London: Palgrave Macmillan, 2005), pp. 25–84.

<sup>35</sup> Marin, p. 488.

<sup>36</sup> Ibid.

<sup>37</sup> *Corte di Cassazione*, ‘Sezioni Unite’, Judgment 30.1.2007–5.2.2007, No. 4614, Ramoci Vllaznim, para. 8, cited in Marin, p. 478-479.

adequately guaranteeing human rights safeguards on equal level.<sup>38</sup> EU-level intervention was necessitated as transnational crime seriously impacted the whole EU and negative externalities were created throughout the Union. Approximation of criminal procedures, the process of bringing diverging domestic rules closer together, was appropriate as ‘certain crimes have a transnational dimension and cannot be addressed effectively by the Member States acting alone’.<sup>39</sup> The ultimate harmonization would mean unification of an EU-wide judicial system on criminal matters, the so-called ‘one criminal code, one court’ system.

Harmonization may be categorized on a sliding scale of approximation of the legal rules and norms: from the lowest, approximation, to the complete, unification of the whole legal order. If necessary for the facilitation of the mutual recognition of judgments, judicial decisions and police and judicial cooperation in criminal matters of cross-border dimensions, the European Parliament and the Council may establish minimum rules in the form of Directives through the ordinary legislative procedure, taking into account the differences between the legal traditions of each Member State in the areas of mutual admissibility of evidence among Member States, the rights of individuals in criminal procedures, the rights of victims of crimes and any other specific aspect of criminal procedure.<sup>40</sup> Additionally, Article 83 TFEU allows the European Parliament and the Council by means of a Directive passed through the ordinary legislative procedure to ‘establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimension’ such as ‘terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime’. Such approximation is driven by the transnational nature and the negative effect of such crimes and the interest of the supranational community to fight such criminality as the effects of the offence are felt across borders. Hence, mutual recognition can be bolstered by certain procedural approximation in the area of judicial cooperation on European level, albeit States are left free to adapt additional, higher levels of protection.

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<sup>38</sup> Andre Klip, ‘European Integration and Harmonisation and Criminal Law’, in Deirdre Curtin et al (eds), *European Integration and Law* (Antwerp/Oxford: Intersentia METRO, 2006), p. 134. See also, Fichera, p. 74.

<sup>39</sup> Final Report of Working Group X on Freedom, Security and Justice, 2 December 2002, (2002) CONV 426/02, p. 9.

<sup>40</sup> Article 82(2), TFEU.

The core of the approximation provisions laid down in Articles 82 and 83 TFEU attempts to eliminate the most obvious disparities in the criminal law systems of the Member States and promote the recognition of the non-domestic decision as its own.<sup>41</sup> Such an interplay between mutual recognition and minimum harmonization based on the gravity, nature and effect of transnational crimes creates the complex matrix of a unified European judicial space. The purpose of future unifying efforts based on Articles 82 and 83 TFEU in the form of Directives would be to ‘enable effective and efficient cooperation between the Member States in criminal matters...[with] the shift of attention more and more from harmonisation of substantive criminal law and the law of criminal procedure of the Member States to harmonisation with a view to cooperation in criminal matters’.<sup>42</sup> The underlying rationale is that the EU involvement in the area of criminal procedures rests on the balance that ‘criminal procedure measures- and the human rights implications which they may have- are thus subordinated to the efficiency logic of mutual recognition’.<sup>43</sup> Indeed, once a Member State has proclaimed its trust in the EAW system, then little discretion is provided for ‘putting breaks on this process, and certainly not beyond the checks provided for in the European Framework Decision’<sup>44</sup>, a clear push towards essential integration.

#### **4. The Role of the EAW in Responding to Serious Crime and Double Criminality**

Starting with the major novelty of the EAW and its role in preventing the eventual collapse of Europe, the limited application of the double criminality requirement, a brief definition of the term must be provided. Dual criminality is a requirement for extradition, defining that the relator’s criminal acts or alleged offense must constitute an offense both in the requesting and requested Member States. In short, a crime charged in the surrendering State must be a crime in the requesting State as well, thus applying the eliminative approach to extradition with its

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<sup>41</sup> Fichera, p. 76.

<sup>42</sup> Borgers, p. 110.

<sup>43</sup> Valsamis Mitsilegas, *EU Criminal Law* (Oxford: Hart, 2009), p. 109.

<sup>44</sup> Marin, p. 482. See also, Report from the Commission on the EAW of 24 January 2006, COM/2006/0008 final. But also note the ‘emergency brake’ espoused in Article 83(3) TFEU when fundamental, essential aspects of the Member State’s criminal justice system is affected, allowing the affected State to refer the draft directive to the European Council.

flexibility and capability to adopt to transnational crimes. The rationale of dual criminality assures that suspects rely on similar legal treatment in both States and that no State shall be bound to hand over a person for non-criminal acts.<sup>45</sup> Dual criminality is satisfied if the conduct of the perpetrator is criminal at the time of the request in both Member States.<sup>46</sup>

Under the EAW regime, double criminality is an optional ground for refusal to surrender the fugitive under Articles 2(4) and 4(1) of the Decision. The most innovative element of the EAW is the elimination of the double criminality test for the list of 32 non-exhaustive categories of offences according to Article 2(2) as long the crimes are punishable in the issuing State by a sentence or detention order for a maximum period of at least three years.

The elimination of double criminality under Article 2(2) of the EAW FD directly concerns the level of sovereignty which each Member State retains in defining what crimes must serve as a ground for a transfer of a fugitive found in its jurisdiction. The traditional perception is that the decision for the surrender of the person issued by the appropriate authorities of the foreign State undergoes a careful examination by the organs of the requested State which possess the ultimate discretion to rule on whether the offence at issue is of criminal nature or not. The EAW chips off a large discretionary power of the executive and judicial authorities in terms of their power to review foreign judicial decisions, thus eliminating a hurdle to the mutual recognition of judicial decisions at EU level. As outlined above, the ultimate goal behind such a transfer of sovereignty through limitation of customary judicial powers is linked to the general aim of facilitating cooperation on criminal matters within the EU in light of the ever-diminishing internal borders among the Member States. Nonetheless, the transposition of the Decision in the domestic legal orders of the EU Member States has exposed different definitions of the offences listed in the non-double-criminality category. The limitation of the applicability of the double criminality test on first sight contributes to a further integration in the criminal law approach across the 28 EU Member States. The non-exhaustive 32 offences list under Article 2(2) of the FD EAW is an unprecedented achievement in the process of establishing a united judicial space of Europe

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<sup>45</sup>There are three accepted approaches to determining if the offense passes the dual criminality rule: 1) if the act is charged in both states as a criminal offense; 2) if the act is chargeable and also prosecutable in both states; and 3) if the act is chargeable, prosecutable and convictable in both states.

<sup>46</sup>*R v. Governor of Pentonville Prison, ex p. Budlong*, (1980) 1 WLR 1110, pp. 1118-1123. See *US v. Saccoccia*, 18 F.3d 795, 800 n.6 (9<sup>th</sup> Cir. 1994).

where judicial enforcement is based on mutual trust in the decisions of the other Member State(s).

Nonetheless, such integration through mutual recognition is slow as some Member States are unwilling to open their jurisdictions for immediate applicability and execution of non-domestic judicial decisions. For example, Belgium has explicitly reintroduced the dual criminality test.<sup>47</sup> The Dutch implementation law includes a provision that the Netherlands would not extradite a national for the purposes of prosecution for an offence which is not punishable under Dutch law.<sup>48</sup> Ireland follows a similar suit by running the test of dual criminality whenever the arrest warrant concerns its own nationals. Seemingly, mutual trust is not as firmly established as it was promoted to be.<sup>49</sup>

The ECJ had a chance to rule on the pertinent EAW issue relating of the dual criminality principle in the *Advocaten voor de Wereld* case.<sup>50</sup> Dual criminality did not contravene the principle of legality as the purpose of the Decision was not to harmonize criminal offences. The ECJ concluded that ‘the Framework Decision does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract’.<sup>51</sup> The ECJ affirmed that as regards the interplay of elimination of double criminality, the definition of the listed offences and fundamental rights remains grounded on the premise that the issuing Member State ‘must respect fundamental rights and fundamental legal principles as enshrined in Article 6 EU, and, consequently, the principle of legality of criminal offences and penalties’ in light of Article 1(3) of the EAW.<sup>52</sup> The ECJ also affirmed that the non-dual-criminality list of 32 offences is rooted on the gravity of the crimes ‘in terms of adversely affecting public order and public safety’.<sup>53</sup> The principle of legality is not abrogated since the principle applies at national level in respect to the definition of offences while the EAW creates a judicial cooperation regime

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<sup>47</sup> Loi du 19 December 2003, published on *Moniteur Belge* (22 December 2003).

<sup>48</sup> Annex to 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 of 11 July 2007, COM (2007) 407 final, SEC(2007) 979.

<sup>49</sup> Fichera, p. 80.

<sup>50</sup> Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* (2007) ECR I-3633. The ECJ utilizes its power to give preliminary rulings on mutual recognition issues in various decisions as a legal tool to direct or guide national courts to the appropriate and correct implementation in the domestic legal order.

<sup>51</sup> *Ibid.*, para.52.

<sup>52</sup> *Ibid.*, para.53.

<sup>53</sup> *Ibid.*, para.57.

among Member States which happen to be parties to the European Convention on Human Rights.<sup>54</sup> Such interpretation on the part of the ECJ is not unusual as the Court traditionally focuses on the uniform and autonomous meaning of the applicable rules and norms as the preliminary ruling path intends to guarantee such uniform interpretation.<sup>55</sup>

Overall, the process of elimination of the condition of double criminality for a narrow group of serious crimes such as terrorism, trafficking in human beings, drugs and weapons, corruption, sexual exploitation of children, EU fraud, murder, racism and xenophobia, rape, illicit trade in human organs and tissue, and counterfeiting the currencies including the Euro, illustrates that Member States realize that resources must be pooled in efforts of fighting these cross-border, EU-wide criminal activities. Additionally, integration is not only based on notions of intra-EU public security but also indicates a readiness to create a common judicial space where grave crimes would not go unpunished and where serious criminals would not enjoy safe havens and protection. In this category, integration is furthered by the will on EU level to compromise certain core sovereignty discretions in order to contribute to a common good of elimination of serious crime within the EU, which obviously might have a positive spill-over effect abroad as well and affirm the commonality within the vision and determination of all EU Member States to tackle serious trans-border criminal activities in effective and unequivocal manner.

## **5. Sovereignty and the EAW**

As analyzed above, the EAW serves as a facilitator of closing the impunity gap and allowing a closer judicial and law enforcement cooperation among the EU Member States. Nonetheless, it is pertinent to examine whether the EAW has resulted in limiting the sovereign discretion of Member States when it comes down to criminal law and constitutional domestic arrangements in order to improve the cohesion on criminal enforcement level in the EU. The EAW was put to a test in several last instance courts in regards to the compatibility of the domestic transposition measures with the respective national constitutions. Constitutional or last instance courts have traditionally occupied a peculiar position in the EU legal order for such judicial organs are

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<sup>54</sup> Fichera, p. 85.

<sup>55</sup> See Borgers, p. 103. See also, Case C-66/08 Szymon Kozłowski (2008) ECR I-6041.

traditionally perceived as protectors of national sovereignty. The following examples serve illustrative purposes of the overall debate on the subject-matter.

### 5.1 Poland

In the case of Poland, the main issue was whether the surrender of a Polish national to the Netherlands for the purposes of prosecution pursuant to an EAW can be reconciled with a Polish constitutional provision prohibiting extradition of own nationals.<sup>56</sup> The Constitutional Court delivered an intriguing interpretation, opening with the assertion that extradition and surrender, including the physical transfer of the accused or convicted person to a foreign jurisdiction, should not be considered as two distinct processes and, correspondingly, the prohibition of surrender of nationals applied. The court applied a rather simplistic approach to analyzing the relation between traditional extradition and the EAW: it simply concluded that the new intra-EU surrender regime was comparable to extradition. The Polish Court duly noted that Poland was obliged to interpret domestic law in consistent manner with EU law<sup>57</sup> and to apply the domestic transposing law as far as possible in conformity with the Framework Decision even in cases of introduction or aggravation of criminal liability according to the ECJ's *Pupino* case.<sup>58</sup> The conclusion of the Constitutional Court indicated that the implementation clause, namely Article 607t(1) of the Polish Code of Criminal Procedure, was incompatible with the Polish Constitution. As a result both the transposition law and the Constitution were amended.<sup>59</sup>

The decision draws justified and reasonable criticism as the Constitutional Court should have considered the issue in light of the doctrine of primacy and its applicability under the provisions of the former Third Pillar. Hence, the pertinent question which had to be addressed was whether the national transposition should have disapplied or excluded another conflicting domestic rule if

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<sup>56</sup> Judgment of the Polish Constitutional Tribunal, P 01/05, 27 April 2005. The provision is Art 55(1) of the Polish Constitution.

<sup>57</sup> The obligatory doctrine of consistent interpretation requires the domestic court to interpret the domestic provision in conformity with the EU directive or decision, if the former is within the scope of application of the latter. Additionally, the consistent interpretation extends to the whole domestic body of law, not just to the transposing measure, albeit the domestic court is not obliged to interpret the national law *contra legem* in light of the EU measure in order to respect the general principles of legal certainty and non-retroactivity. See Borgers, p. 102.

<sup>58</sup> Case C-105/03 *Pupino* [2005] ECR I-5285. See also Fichera, p. 82.

<sup>59</sup> The Constitutional amendment entered into force on 26 December 2006. See Fichera, p. 82. Note that the Polish Constitutional Tribunal did not rule for the provision to be annulled but rather to be amended as such annulment would have violated the constitutional provision to respect international law as regards the EAW Framework Decision.



the latter was based on an independent source of the EU legal order.<sup>60</sup> Although such interpretation is limited in cases of criminal liability as it goes against the principles of legal certainty and retroactivity,<sup>61</sup> surrendering a person might be perceived as part of procedural law. Moreover, the Constitutional Court ducked the issue of interpreting the Polish law in conformity with EU legal provisions. It might have also looked at Article 31(3) of the Constitution which limits constitutional rights and freedoms such as the right of non-extradition when it is necessary for the protection of democracy, public order and security.<sup>62</sup>

## 5.2 Germany

The German Federal Constitutional Court (FCC) has traditionally taken a strong stand as the ultimate arbiter of EU competences through the prism of the German Constitution.<sup>63</sup> The legality of the EAW FD transposition was raised in a case pertaining to non-surrender of own nationals.<sup>64</sup> An EAW for a dual German-Syrian national was issued by the Spanish authorities for alleged membership in a terrorist organization. The FCC declared the whole German transposition law incompatible with Article 16(2) of the German Constitution. The Court reached its decision through asserting that the extradition of a German runs against the principle of legality espoused in the Basic Law because nationals cannot be surrendered against their will to a jurisdiction which they do not trust.<sup>65</sup> The FCC interpreted this provision as availing a German national with a special link to the domestic legal order and the State in general.<sup>66</sup>

One of the main criticisms of the requirement of non-extradition of nationals is that it pertains to ‘a jealously guarded conception of national sovereignty, and it presupposes the existence of sharp contrasts in the administration of criminal justice between states, resulting in potentially

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<sup>60</sup> See Case 6/64 *Flaminio Costa v ENEL* (1964) ECR I 141. See also, Jan Komarek, ‘European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony’, *Jean Monnet Working Paper 10/05*, p. 10.

<sup>61</sup> Case 80/86 *Kolpinghuis* (1987) ECR 3969 recently confirmed in Case C-60/02 X (2004) ECR I-651.

<sup>62</sup> Komarek, p. 12

<sup>63</sup> Komarek, p. 6. See also, Mattias Kumm, ‘Who is the final arbiter of constitutionality in Europe?’, *Common Market Law Review*, 36 (1999), 351-386 (pp. 362-37)4.

<sup>64</sup> European Arrest Warrant Act case, BVerfG judgment of 18 July 2005, 2 BvR 2236/04.

<sup>65</sup> Article 16 of the Basic Law states, “[n]o German may be extradited to a foreign country. The law can provide otherwise for extraditions to a member state of the European Union or to an international court of justice as long as the rule of law is upheld.”

<sup>66</sup> Komarek, p. 16.

unfair treatment'.<sup>67</sup> The FCC declared the transposition provision void and reversed the original lower instance decision to extradite the relator. A new law was promulgated in mid-2006 in order to incorporate the decision.<sup>68</sup> In response, the FCC decision prompted the Spanish judicial authorities, *Audiencia Nacional*, the competent body of handling EAWs to regard German EAWs as a reciprocal extradition request, thus refusing to surrender Spanish nationals to Germany based on the principle of reciprocity.<sup>69</sup> Such tug-o-war presents the ultimate test for the integrationist approach of the EAW system.

The FCC decision was clearly based on a minimalist application of mutual recognition. The driving force stemmed from the principle of subsidiarity which serves as a protection of the national identity and sovereignty in the unified EU legal order.<sup>70</sup> The FCC attempted to reconcile these two essential principles by asserting a check on the individual's rights in each single case as mutual trust does not necessarily mean that 'state law structures of the EU Member States are materially synchronised and that proportional national review of individual cases is nugatory...The effect of the strict principle of mutual recognition and the wide mutual trust connected thereto cannot limit the constitutional guarantee of fundamental rights'.<sup>71</sup> In essence, the double criminality test was sneaked in through the jurisprudential interpretation promoted by the FCC that each EAW request would be examined in light of the Basic Law, a standard against which German authorities measure the legality and legitimacy of the EAW of other Member States.

The FCC decision also goes against the principle of pluralism according to which no hierarchy exists among the equal legal orders of the EU Member States.<sup>72</sup> Domestic courts must aim at

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<sup>67</sup> Michael Plachta, '(Non-)Extradition of Nationals: A Neverending Story?', *Emory International Law Review*, 13 (1999), 77- 159 (p. 88).

<sup>68</sup> Bundesgesetzblatt Jahrgang 2006 Teil I n. 36, 25 Juli 2006. According to this law, German citizens can only be extradited if the criminal act shows a genuine link ('*massgeblicher Bezug*') to the territory of the requesting Member State. Where a national link to the German territory exists, a mandatory ground for refusal is provided for; where a foreign link exists, surrender is mandatory. In 'mixed cases' the law requires to check double criminality and to weigh up effectiveness of the prosecution, the alleged offence and the guarantee of fundamental rights. In any case, return after sentence must be guaranteed. See Fichera, p.83.

<sup>69</sup>Ibid., p. 87.

<sup>70</sup> Komarek, p. 17.

<sup>71</sup> European Arrest Warrant case, para. 118.

<sup>72</sup> Miguel Maduro, 'Europe and the Constitution: What If This Is As Good As It Gets?', in: Joseph Weiler and Marlene Wind (eds.), *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003), p. 532.

consistency and universality of the whole EU and domestic legal orders, a goal which was absent from the FCC's reasoning.<sup>73</sup> In manner, the unilateral frivolous interpretation undermines Kumm's principle of best fit, claiming that both the EU and domestic legal orders are founded on the same normative bases like liberty, democracy, equality before the law, the rule of law and protection of fundamental rights. Correspondingly, 'the task of national courts is to construct an adequate relationship between the national and the European legal order on the basis of the best interpretation of the principles underlying them both'.<sup>74</sup> There was no need to find the German provisions irreconcilable as the political process of the EAW regime had already been utilized with the Framework Decision. Moreover, although criminal law is perceived as the bastion of state sovereignty in the sense that it protects the most coveted fundamental values and rights of every society, the EU Member States have affirmed that a common, shared perception and determination exist on supranational level for minimizing impunity in the EU legal criminal law space. Such common attitude on crime cooperation could be seen as a public good from which every single European citizen benefits.<sup>75</sup>

### 5.3 The Czech Republic

In contrast, a decision by the Czech Constitutional Court offered a different interpretation of the compatibility of the EAW transposition and the Czech constitutional provisions. Two major aspects were put before the Czech Constitutional Court.<sup>76</sup> First, whether there was a violation of Article 14(4) of the Czech Constitution which prohibits nationals to be forcefully removed from the State, and, second, the lack of a clear definition of the offences for which the dual criminality was non-applicable, a *per se* violation of the *nullum crimen sine lege* principle. As regards the first challenge, the Czech court applied a rather teleological interpretation, leading it to conclude that traditional extradition to which Article 14(4) of the Czech Constitution applies was not the same as the newly established EAW regime within the EU. In this manner, the Constitutional Court upheld the mutual trust doctrine firmly established in the *Gozutok and Brugge* case. Additionally, Article 14(4) was passed as a protection clause of no expulsion of undesired people who were victims of the Communist regime for purely political reasons. Hence, the purposeful

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<sup>73</sup> Komarek, p. 19.

<sup>74</sup> Kumm, p. 286.

<sup>75</sup> Komarek, p. 28.

<sup>76</sup> Decision of the Czech Constitutional Court (3 May 2006) No.Pl.ÚS 66/04.

approach indicated its inapplicability to the transposition of the EAW Decision.<sup>77</sup> Concerning the legal certainty of the crime definitions, the principle of legality was not violated as the underlying purpose of the removal of the dual criminality test was based on the EU ‘rule of law’ as ‘the degree of proximity reached by the...EU Member States is so high that they all share the same values’.<sup>78</sup> Hence, the commonality on EU level as regards criminal law and human rights law were affirmed in a categorical manner, and, thus, the collapse of the Europe in terms of diverse interpretations of how to respond to trans-border crime was prevented. The pooling of certain sovereign discretionary capabilities lead to a unified position on EU level against serious threats to the overall functioning of the EU and its Member States such as serious trans-border criminal activities.

#### **5.4 The EAW and ECJ’s *Advocaten voor de Wereld***

The ECJ had a chance to rule on two pertinent EAW issues relating to the legal base form and dual criminality legality, as explored above, in the *Advocaten voor de Wereld* decision upon referral for preliminary ruling by the Belgian Constitutional Court.<sup>79</sup> The Belgian Court posed two issues before the ECJ: first, whether the Framework Decision is the appropriate legal instrument in light of ex-Article 34(2)(b) and (d) TEU instead of a convention, and, second, if the principle of legality espoused in Article 6 TEU covers and does not contradict the non-applicability of the dual criminality test for the offences listed in Article 2(2) of the EAW Framework Decision, which was explored above.<sup>80</sup> As regards the legal base of the Framework Decision, the ECJ stated that the Council enjoyed a wide margin of freedom in choosing the appropriate legal instruments in order to achieve the necessary envisaged level of cooperation in the development of the area of freedom, security and justice. There was no restriction on the types and form of instruments to be adopted in the discussed Articles. Hence, the Court concluded that appropriate instruments are either a treaty or convention or a Decision and it is up to the Council to decide on the more adequate form.<sup>81</sup>

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<sup>77</sup>Ibid., paras.48 and 113.

<sup>78</sup>Fichera, p. 84.

<sup>79</sup> The ECJ utilizes its power to give preliminary rulings on mutual recognition issues in various decisions as a legal tool to direct or guide national courts to the appropriate and correct implementation in the domestic legal order.

<sup>80</sup> Case C-303/05 *Advocaten voor de Wereld v Leden van de Ministerraad* (2007) ECR I-3633.

<sup>81</sup> Ibid., paras.28-44.

The ECJ also stresses the effectiveness and purposefulness of the Framework Decision as the EAW system is founded on the principle of mutual trust but in essence not prone to being widely interpreted leaving much margin of discretion to the Member States.<sup>82</sup> By doing this, the ECJ attempts to ascertain that domestic courts would perceive the conformity interpretation of domestic transposition with the wording and purposes of the framework decision as obligatory in order to achieve a uniform application, definition and purpose of the norms and rules enshrined in the decision, ‘an *erga omnes* effect of preliminary rulings’.<sup>83</sup> In other seminal cases concerning the EAW, the ECJ established that essential terms in the Framework Decision such as ‘surrender’ must be given autonomous EU legal meaning.<sup>84</sup> In this manner, the Court affirmed on several occasions the value of uniform application of the mechanism of judicial cooperation in the area of criminal law at EU level as expressed in the functioning of the EAW.

## **Conclusion**

In a recent EAW report, the Commission concluded that the EAW ‘has undoubtedly reinforced the free movement of persons within the EU by providing a more efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice’.<sup>85</sup> The horizontal EAW model of EU Criminal Law integration indicates that effective combat against trans-border EU criminality could be achieved along with sufficient protection of human rights, freedom of movement, and ensuring security for all EU citizens and residents of the EU. Without flexible and unifying institutional arrangements, the EU might fall behind the alarming increasing cross-border criminal activity.

The ECJ has firmly stood behind the application of the EAW in the EU legal order. As seen, the applicability of the horizontal EAW regime is a novel judicial mechanism which aims to suppress cross-border impunity, to increase the security in the EU legal space along with firmly protecting the fundamental rights of all EU citizens, be they victims or perpetrators of crimes. The trifocal balance of the EU judicial space envisaged through the years at highest EU level has been bolstered in its construction and function. Albeit some Member States increasingly voice intentions to opt out of the EAW regime, such move as shown above is hardly substantiated in

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<sup>82</sup> Case C-66/08 Szymon Kozłowski (2008) ECR I-6041.

<sup>83</sup> Borgers, p. 104.

<sup>84</sup> See Case C-261/09 Mantello (2010) ECR I-11477.

<sup>85</sup> Commission report 2011, p. 3.

terms of protection of national sovereignty and human rights guarantees. The EAW has successfully laid down the horizontal, court-to-court foundations of an EU legal space where cross-border criminal activity or absconding from justice would not be tolerated.