

Bedanna Bapuly

The European Arrest Warrant under Constitutional Attack

INTRODUCTORY REMARKS

European constitutional law is, *inter alia*, aiming at establishing an Area of Freedom, Security and Justice. The integration of these policy fields into the dimensions of European constitutional law can bring about far reaching constitutional dynamics: The EU has advanced from its original economic focus to a widespread supranational entity with competences and functions far beyond economics and trade. While building an Area of Freedom, Security and Justice within the EU, judicial cooperation in criminal matters is a key element.

Today criminal threats to society are globalising. Interaction and cooperation between the different constitutional levels are obviously indispensable in order to respond to the challenges. The European Arrest Warrant (EAW) is one of the EU's answers to these threats. Precisely the EAW turned out to be one of the most striking examples interlinking international, European and domestic, in particular, constitutional law. Where these systems collide we perceive forms of constructive cooperation on the one hand and frictions on the other.

Following the ambition of the ICL approach of linking various systems and levels of constitutional law and analysing their interrelations in the constitutional network this contribution seeks to depict some of the fundamental legal questions at stake when it comes to the implementation and enforcement of the EAW.

I ASPECTS UNDER INTERNATIONAL LAW

The mechanism traditionally called extradition¹ has been in the past and still is the subject of numerous bi- and multilateral international agreements.² This part of the article will give an outline on the agreements and conventions governing extradition which paved the way for the FD on the EAW. The FD on the EAW changes the extradition relations of the EU-MS and brings them under a new system.

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- 1 The etymological origin of extradition derives from the Latin words "ex" and "traditio" (hand over), it means the surrender of an alleged criminal usually under the provisions of a treaty or statute by one authority (as a state) to another having jurisdiction to try the charge
 - 2 In 2004 a Model Treaty of the UN was presented as a useful framework that could be of assistance to States interested in negotiating and concluding bilateral agreements aimed at improving co-operation in matters of crime prevention and criminal justice. See http://www.unodc.org/pdf/model_law_extradition.pdf.

The European Convention on Extradition (ECE 1957)³ entered into force in 1960 was ratified⁴ by 47 states, including Israel and South Africa. It established the dual incrimination requirement instead of the list model which was quite common in bilateral agreements. It provided for the extradition of persons wanted for criminal proceedings or for the carrying out of a sentence. However, it does not apply to political or military offences and any Party may refuse to extradite its own citizens. With regard to fiscal offences (taxes, duties, customs), extradition may only be granted if the Parties have decided so in respect of any such offence or category of offences. Extradition may also be refused if the person claimed risks the death penalty under the law of the requesting State.

To a limited extent the ECE is still applicable even after the FD on the EAW came into force. First of all two questions arise: 1. as to whether a FD can be considered a treaty in terms of the Vienna Convention of the law of treaties (1960). According to art 59(2) Vienna Convention a treaty is suspended by a later treaty; 2. Can a Convention be replaced by a FD without having properly denounced (art 31 ECE)? The answers must be negative.

Second, transitional provisions e.g. in relation to Romania demand their application in the event that the person sought has been arrested before 1 January 2007 on the basis of a request for provisional arrest issued by a Member State, and the request for extradition has not yet reached in Romania, the extradition procedure set forth in the ECE (1957) will continue to apply.

Third, based on art 32 FD France made a declaration according to which, as a requested (executing) state, it will continue to deal with requests relating to acts committed before November 1, 1993 in accordance with the extradition system applicable before January 1, 2004 (ordinary extradition law).

Austria applies the old regime on facts occurred prior to August 7, 2002 (which is the date of entry into force of the FD and the retroactive effect of the EuJZG is not provided for).

The Czech Republic did not make any statement under art 32 FD nevertheless applies the EAW only as of (and as to cases committed after) 1 November 2004. The Czech Republic made a notification to the Council of Europe under art 28(3) ECE⁵ which resulted in the very unpleasant fact that ten/six EU-MS informed the Ministry of Justice that they deny cooperation under the extradition regime regarding offences committed before November 1, 2004, if the Czech Republic is

3 See this Council of Europe Convention <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=024&CM=8&CL=ENG>.

4 For the ratification list see: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=024&CM=8&DF=&CL=ENG>.

5 Art 28 (3) Where, as between two or more Contracting Parties, extradition takes place on the basis of a uniform law, the Parties shall be free to regulate their mutual relations in respect of extradition exclusively in accordance with such a system notwithstanding the provisions of this Convention. The same principle shall apply as between two or more Contracting Parties each of which has in force a law providing for the execution in its territory of warrants of arrest issued in the territory of the other Party or Parties. Contracting Parties which exclude or may in the future exclude the application of this Convention as between themselves in accordance with this paragraph shall notify the Secretary General of the Council of Europe accordingly. The Secretary General shall inform the other Contracting Parties of any notification received in accordance with this paragraph.

the requesting/requested State. Only Austria, Hungary, Germany, France, Lithuania, Slovakia and Slovenia agreed to cooperate in such old cases.⁶

Fourth, constitutional prohibitions to extradite own nationals partly prevent(ed) the full application of the ECE. In some of the Member States (parts of) the Implementation Acts have been declared void (in Germany the whole act was annulled; in Cyprus and Poland parts of the implementing rules infringed constitutional rights)⁷ and so the ECE resumed applicability (between these states). Consequently, some other MS (Hungary and Spain) refuse(d) surrender of their nationals to those states (Germany) as a matter of reciprocity. They considered EAWs as classic extradition requests and consequently applied the ECE. Naturally, this amounts yet to further breaches of EU law.

Fifth, as a matter of course the ECE still applies to relationships between EU-MS and third countries being parties to the ECE.

Two Additional Protocols were concluded. The Additional Protocol of 1975⁸ reduced the political offences exception⁹ and extended the *ne bis* exception to judgements rendered in 3rd states parties to the Convention:

It should be noted that the Protocol supplements the original Articles 3 and 9 of the Extradition Convention (concerning, respectively, political offences and *ne bis in idem*) but does not modify the existing texts of those articles.

The Additional Protocol of 1978¹⁰ brings a novelty with regard to the communication line instead of the diplomatic channel the ministries of the states concerned communicate directly. Furthermore, the protocol contains provisions relating to the extension of accessory extradition to offences carrying only a pecuniary sanction (Chapter I); the extension of the Convention to fiscal offences (Chapter II); judgments *in absentia* (Chapter III); amnesty (Chapter IV); and the communication of requests for extradition (Chapter V).

Since these Protocols were not ratified by all parties to the Convention its impact remained limited:

A few states cooperated more intensively based on the Benelux Convention 1962 on extradition and cooperation in criminal matters which foresaw the dual incrimination requirement with a minimal maximum penalties of six months instead of one year as under art. 2 ECE. It did not foresee the military offense exception but an absolute nationality exception as opposed to the optional one under art 6 ECE. Bi- and multilateral facilitating agreements have been concluded as well. The agreement of 26 May 1989 (Donostia – San Sebastian Agreement) on simplifying the transmission of extradition requests by fax and the Brussels

6 This results in the unpleasant result that the ten countries are now as save haven for offenders wanted for crimes committed prior to 1 November 2004 by the Czech Republic and the Czech Republic is so with regard to the six countries. See Svetlana Kloučková, The European Arrest Warrant and its Implementation in the Member States of the European Union http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_The_Czech_Republic.pdf.

7 See chapter III.

8 <http://conventions.coe.int/Treaty/en/Treaties/Html/086.htm>.

9 The European Convention on the suppression of terrorism (1977) also reduced the applicability of the political offence exception. See <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=090&CL=ENG>.

10 <http://conventions.coe.int/Treaty/en/Treaties/Html/098.htm>.

Convention of 1995 on the simplified extradition procedure¹¹ which provided for an accelerated extradition with the consent of the requested person did not enter into force however and thus worked only between the MS making declarations on its preliminary effect.

The same holds true for the EU Dublin Convention on extradition between Member States (1996).¹² This Convention entered into force between only twelve EU Member States on 29 June 2005. Most of the Member States that have ratified the Convention have made reservations. It supplemented international agreements such as the European Convention on Extradition (1957), the European Convention on the Suppression of Terrorism (1977) and the European Union Convention on Simplified Extradition Procedure (1995). Despite the entering into force of the FD on the EAW on 1 January 2004 the Convention was and is still applicable in exceptional cases.

The Convention aims to facilitate extradition between the Member States; it indicates the circumstances in which the extradition procedure is applicable. These cover offences which are punishable under the law of the requesting Member State by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested Member State by deprivation of liberty or a detention order for a maximum period of at least six months. Conspiracy to commit certain crimes and membership in a criminal organisation were recognised as extraditable offences. (art 3).¹³ The Convention temporary (for five years) provided for an option not to extradite own nationals (art 7), subsequently and subject to a reservation nationality is no ground for refusing extradition any longer. Furthermore the Convention abandoned the political and fiscal offence exception. Extradition may not be refused on the ground that an offence is statute-barred in the requested state, except for cases though where the offence falls under amnesty.

Whereas the ECE established the so-called "rule of speciality" which prohibits the prosecution of an extradited person for any offence committed prior to his surrender other than that for which he was extradited (provided there is no exceptional consent by the requested state). The EU Convention on Extradition distinctly departs from this speciality rule as it allows prosecution and punishment for offences other than those having effected the extradition, and without the consent of the requested state, when the acts concerned are not punishable by imprisonment or when the extradited person consents (art 10 para 1) or when a corresponding declaration was made by the respective MS (art 11).

11 OJ 1995 C 78, 2; http://www.imolin.org/doc/amlid/Belgium_Convention_10_March_1995_English.pdf.

12 Council Act of 27 September 1996, adopted on the basis of Article K.3 of the Treaty on European Union, drawing up the Convention relating to extradition between the Member States of the European Union (<http://europa.eu/scadplus/leg/en/lvb/l14015b.htm>).

13 The requested member state must extradite, even if "conspiracy" and involvement in a "criminal association" are no punishable acts under its national law (Article 3.1). In assessing whether a conspiracy or an association is actually aimed at committing a crime, the requested state shall refer to "information in the arrest warrant or another decision to the same effect" (Article 3.2). This means, remarkably, that a person shall be extradited, even if she is not accused, or even suspected, of having herself committed any crime.

Besides that the EU has concluded Extradition Agreements with third countries (e.g. USA in 2003). Apart from this there exist bilateral extradition agreements i.a. between the USA and Austria.¹⁴ A protocol to the EU-US Agreement provides for rules when an EAW and an extradition request simultaneously issued.¹⁵

The ever growing number of international bilateral agreements and multilateral conventions was accompanied by Additional Protocols some of which did not or only partially enter into force. Besides that numerous declarations and reservations were made. Consequently, a highly complicated and dynamic web of treaty relations combined with the traditional lengthy procedures of diplomatic channels made the extradition system difficult to handle and enforce and little efficient.

II THE EUROPEAN UNION LAW PERSPECTIVE

From a Common Market to an Area of Freedom, Security and Justice

It was only with the Treaty of Maastricht that the EU cooperation in criminal matters was institutionally given a home in the third pillar and started to gain cloud. The Treaty of Amsterdam proclaimed the objective of creating an Area of Freedom, Security and Justice, thus judicial cooperation in criminal matters constitutes a fundamental feature in order to achieve this goal. Parts of the third pillar (immigration and asylum) were shifted into the first pillar restricting the competence of the ECJ though to preliminary rulings initiated by courts against whose decisions there is no judicial remedy (art 68 EC). As regards parts of the third pillar MS could nevertheless opt for full jurisdiction of the ECJ. With the Treaty of Amsterdam the Schengen *acquis* relating to immigration and asylum matters was incorporated into EC law and since then falls under the Communitarian regime¹⁶ with some opt-outs though (DM, UK, IRL)¹⁷. However the policing elements thereof and the Schengen Information System fell under the third pillar. Admittedly, sometimes these fields overlap which makes it difficult to achieve consistent enforcement and interpretation of rules and thus legal certainty.

The European Council in Tampere (1999) concluded¹⁸ with a road map in order to realise an Area of Freedom, Security and Justice. Mutual recognition¹⁹ of

14 The Convention on the surrender procedure between the European Union on the one hand, and the Republic of Iceland and the Kingdom of Norway on the other was subject of a judicial preview initiated by the President of Hungary. The Constitutional Court of Hungary declared some provisions of the act transposing the international treaty into Hungarian law unconstitutional (Decision 32/2008). Thanks to Petra Bard for providing me with this recent information.

15 http://www.parlament.gv.at/PG/DE/XXII/BNR/BNR_00595/imfname_060256.pdf.

16 See *infra*.

17 On the other hand Switzerland acceded to the Schengen regime.

18 http://www.europarl.europa.eu/summits/tam_en.htm.

19 The principle of mutual recognition was inserted on a British (!) initiative (Cardiff 1998) and gained Scandinavian support due to a high degree of substantial similarity of norms in the countries concerned. The British proposed that extradition should be replaced by arrest warrants

judicial decisions was declared as the cornerstone of judicial cooperation in civil and criminal matters:

VI. Mutual recognition of judicial decisions

33. Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities.

35. With respect to criminal matters, 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. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement.

36. 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; 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.

37. The European Council asks the Council and the Commission to adopt, by December 2000, a programme of measures to implement the principle of mutual recognition. In this programme, work should also be launched on a European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.

As Keijzer argues in Community law the principle of mutual recognition originates from the Common Market.²⁰ In civil law the concept of mutual recognition exists, too and is laid down in the Brussels Convention 1968 and the Lugano Convention (1988) which later on became EC-Regulation 44/2001. In criminal law the principle of mutual recognition is realised by the rule of *ne bis in idem* which is applied in favour and not to the detriment of the accused and can be found in art 54-56 Schengen Implementation Convention.

Recognition of foreign criminal court decisions to the detriment of the accused also exists only if the dual incrimination requirement is fulfilled. This holds true for the ECE (1957) and the European Convention on the International Validity of Criminal Judgements (The Hague 1970). The Convention on the transfer of sentenced persons (Strasbourg 1983) establishes conditions and procedures for an optional recognition and defines the conversion of a foreign sentence according to the values of the administering state. So far, the EU Convention on the

based on mutual recognition with abolition of the dual incrimination requirement. The UK and IRL had gained experience in the past with "backed warrants" and wanted all but being forced to uniformity.

20 The following passage on the principle of mutual recognition is largely inspired by Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 17-20.*

enforcement of foreign criminal sentences (Brussels 1991) is only provisionally applied between the Netherlands, Germany and Latvia.

A COM Communication on mutual recognition of final decisions in criminal matters²¹ and a Programme of Implementing measures²² containing a list of 24 measures followed the Tampere Conclusions. In 2003 the adoption of a FD of the execution of orders freezing assets or evidence²³ paved the way for the FD on the EAW and the surrender procedures between Member States.²⁴

In times of insecurity following 9/11²⁵ and the biggest enlargement *ante portas* the FD on the EAW and the surrender procedures between Member States²⁶ (henceforth FD-EAW) was adopted.²⁷ Highly contested issues such as the dual criminality requirement and nationality exceptions had to be overcome. What remains to be mastered are persistent frictions between providing security on the one hand and guaranteeing fair trials based on procedures pending (at least partial) harmonisation.

The Framework Decision being a third pillar instrument "for the purpose of approximation of laws of the MS" is based on art 34 (2) b EU.²⁸ It is binding upon the MS as to the result to be achieved, but leaves to the national authorities the choice of form and methods. It does not entail direct effect (art 34 (2) b) and thus requires implementation in the MS.²⁹ Despite the fact that the FD had to be implemented by 31 December 2003 only half of the MS did so on time, only by the end of 2004 all EU member states but Italy, Germany and the Czech Republic had implemented it. Generally, they implemented the EAW correctly, partly, the implementing acts deviated from the FD and e.g. added grounds for mandatory refusal of an extradition.

As far as the interpretation of the FD is concerned, despite the fact that it was drafted in French, all language versions are equally authentic. As a legal instrument of the third pillar .

21 COM (2000) 495 fin.

22 OJ 2001, C 12, 10.

23 OJ 2003, L 196, 45.

24 Steve Peers, Mutual Recognition and Criminal Law in the European Union: Has the Council got it Wrong?, CMLR (2004), 5-36 (26 et seqq).

25 The COM made its proposal two weeks after 9/11. Under pressure the EP was consulted twice without the three weeks time provided for in art 39(1) EU. National parliaments had little influence. See Nico Keijzer, The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 24.

26 2002/584/JHA, OJ C 364, 18.12.2000, p. 1.

27 Matthias J. Borgers, Implementing Framework Decisions, CMLR (2007) 44, 1361-1386.

28 This was questioned by the Belgium Cour d' Arbitrage in a preliminary reference to the ECJ. See *infra* in chapter III.

29 Consequently the entry into force differs from country to country. Data on the entry into force of the country specific implementation acts was summarised by Nico Keijzer, The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 62, fn 154. For BG and RO it entered into force on the day of their accession i.e. 1.1.2007

MS may declare that the ECJ shall be empowered to give preliminary ruling on the validity and interpretation of the FD (art 35 EU). Such declaration must specify which court(s) may request for a preliminary ruling. Amongst the EU-15 Denmark, France, Ireland and the UK have not accepted the jurisdiction of the ECJ, amongst the new MS only the Czech Republic has opted-in (art 35(3) b EU). Spain opted-in on the basis of art 35(3) a. Accordingly, only courts against whose decisions there is no judicial remedy are entitled to refer to the ECJ. The obligation to refer to the ECJ was laid down in Austria, Belgium, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain and the Czech Republic.³⁰

An unexpected integrational moment for the Area of Freedom, Security and Justice happened with *Pupino* when the ECJ approximated the third pillar to the first one by holding that the application of national law needs to be in conformity with the wording and purpose of a framework decision (it must not be *contra legem*).³¹ *Peers*³² argues convincingly that general principles of Community law apply to the third pillar as well. These include obviously the application of human rights as stipulated by art 6 (2) EU (including of course equality and non-discrimination) and interpreted in the light of the ECHR: Furthermore, the ECJ ruled on the applicability of the principles of legal certainty and non-retroactivity. The principles of subsidiarity and proportionality, of conferred powers and the right to defence do also apply.

What is new under the EAW?

The FD-EAW brought along some major changes four of which are addressed to in the following:

1. Principle of mutual recognition and thus, partial abolition of dual criminality
2. Judicialisation of the procedure
3. Simplified and quicker extradition procedures
4. Surrender of nationals

As to the scope of an EAW it may be issued in compliance with art 7 ECHR for acts which were punishable under the law of the issuing Member State at the time when they were committed as well as at the moment of the issuing of the EAW by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months. The content of an EAW is summarised in art 8 and a model form is attached to the FD on the EAW.³³

30 Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006)*, 62, fn 164.

31 ECJ 16 June 2005, case C-105/03, *Pupino*, ECR (2005) I-5285 para 47.

32 Steve Peers, *Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments*, CMLR (2007) 44, 883-929, (926 et seqq.).

33 For detailed comments on art 8 see Nico Keijzer, *The European Arrest Warrant Framework Decision between Past and Future in: Elspeth Guild, A Challenge for European Law: The*

1. The Principle of Mutual Recognition and the Partial Abolition of Dual Criminality

Pursuant to the list of art 2 (2) 32 offences no longer need to fulfill the dual criminality requirement. Dual criminality was abolished due to the long validation procedures in order to find out what the offender actually did. In the past, some elements of facts may not have been relevant under the law of the issuing MS and were thus not investigated. This information may have been decisive for the sentencing state, though. Consequently the old system requiring dual criminality in any case was often characterised by the failure to submit requested and indispensable information.

The new system however brings along a number of problematic issues and challenges as well. The list of 32 offences³⁴ contains numerous vague terms³⁵ that need authoritative clarification. Non-verification presupposes dual criminality, and therefore must be based on agreed definitions of extraditable offences. For some offences it might not be difficult to agree on terms based on existing international agreements. For others like murder, rape, racketeering it will not be easy to find common denominator definitions of conduct for which dual criminality needs not to be checked.

It is true that mutual recognition per se does not require the abolition of dual criminality. Values in extradition law differ on several points between the MS. If Cassis is acceptable in France it cannot be poisonous in Germany. Offences like "murder, grievous bodily injury" are interpreted quite controversially in the MS. If euthanasia is performed in accordance with the regulations it is acceptable in the Netherlands, it is still illegal in Poland. If abortion is performed lawfully in the Netherlands and Belgium,³⁶ it is still considered unconstitutional in Ireland.

Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 58-61.

- 34 Participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorised entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism, xenophobia, organised or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.
- 35 What exactly falls under the term of "fraud", "racism and xenophobia", "sabotage", "racketeering and extortion"?
- 36 The Belgian Implementation act declares abortion and euthanasia not to be covered by "murder, grievous bodily injury" of the list of art 2(2) FD and constituting a mandatory ground for refusal of the EAW. The Dutch approach is different, therefore if an EAW is sent to the Netherlands concerning a physician who has in the state of issue performed an act of euthanasia that under Dutch law is lawful, the requested person will be arrested and surrendered. However

Because of these differences, extradition without respecting the dual incrimination requirement may eventually amount to violations of those different values. Having to surrender individuals for acts that are not punishable, even lawful, the infringement of rights and values is at stake. This sensitive issue contains plenty of potential for tension.

To some extent arbitrariness with regard to the listed offences occurs.³⁷ Some elements of a crime cover a broader spectrum in one country than in another.³⁸ Additionally, discrepancies between the different language versions create confusion to the law applicants and ultimately can lead to the refusal of an extradition for felonies that are labelled identically but do not fall under the said offense in the requested country, thus in reality dual criminality is assumed but not fulfilled.³⁹

For offences other than those covered by para 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute (at the moment when the authority decides on surrender, not at the moment of commitment) an offence under the law of the executing (requested) Member State, whatever the constituent elements or however it is described (irrespective of legal qualification, type of penalty, labelling of the crime).

The fundamental rights standard guaranteed by art 6 EU⁴⁰ and art 3 FD establish mandatory grounds for refusal of the EAW. These apply

territoriality and extraterritoriality exceptions exist and can lead to an optional non-execution if the EAW relates to offences which:

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

37 This may lead to complicating instead of simplifying things: e.g. illicit trafficking in cultural goods is on the list, but possession of stolen cultural goods is not, robbery is, receiving stolen property is not. Whether the accused has robbed or traded in such goods can only be discovered in the course of the trial. (Nico Keijzer op.cit., p. 38).

38 Nico Keijzer op.cit., p. 36 lists examples such as "computer-related crime" which constitutes a larger term than the French term of "cyber criminalité"; "rape" (in French "viol") covers in England & Wales and France penetration involving genital organs or the anus, in Germany no such requirement is needed, in the Netherlands any sexually motivated penetration is punishable, in other states compulsion or threat of physical force are elements of the crime, in others lack of consent of the victim suffices. In case of such discrepancies the EAW will be refused if the offence does not fall under the category in the list version of the implementing act of the requested state which in the end can lead to frustration between MS.

39 "Compulsion" (in German "Nötigung") in Austria and Germany includes threatening someone with making a false report of crime, whereas such the threat as such is not punishable in the Netherlands. Escaping from prison is a crime under German, but not under Dutch law, the suppression of documents constitutes a crime under Austrian and German law, but not under Dutch law, giving a dud cheque amounts to a crime in Belgium and Germany but not in France and the Netherlands, mailing pornographic material to non-minors is no crime in the Netherlands (unless it includes child pornography) but it is one in England and Wales. Furthermore differences may arise with regard to inchoate crimes or the preparation (not having resulted in an attempt) of a serious crime.

40 Art 1 (3) FD-EAW

- "1. if the offence on which the arrest warrant is based is covered by amnesty in the executing Member State, where that State had jurisdiction to prosecute the offence under its own criminal law;
2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;
3. if the person who is the subject of the European arrest warrant may not, owing to his age, be held criminally responsible for the acts on which the arrest warrant is based under the law of the executing State."

Some MS have laid down additional grounds for a mandatory refusal in their implementing act.⁴¹

2. Judicialisation of the procedure

Lengthy and cumbersome administrative procedures via diplomatic hierarchic channels belong to the past. Direct communication lines between judicial authorities constitute a true accomplishment. According to art 2(1) the EAW is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

3. Simplified and quicker extradition procedures

By introducing time limits the FD made another major step in adjusting procedures to current needs. A final decision must be taken within 60/90 days, surrender within 10/exceptionally 20 days after the final decision (art 17, 28). Unfortunately, the FD is silent on remedies. The Implementation acts of Austria and the Netherlands do not offer legal remedies at all which must be deplored in terms of the rule of law aspects. Considering the fact that judgments *in absentia* as well as the different interpretation of the *ne bis* principle in the various MS may have heavy implications on the guaranteeing a fair trial. Neither should one forget that MS are quite sometimes convicted for violating art 6 ECHR by the Strasbourg Court.

4. Surrender of nationals

In continental Europe the extradition of own nationals was constitutionally banned in many countries as opposed to the UK's legal world. The idea behind

41 E.g. Cyprus Art 13 (d) (e) (f) of Law 133(1)/2004. See Elias A. Stefanou, Andreas Kapardis, The First Two Years of Fiddling around with the Implementation of the European Arrest Warrant in Cyprus in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006), 79.

this ban was the protection of citizens from trial under foreign law and language. The extradition of nationals was agreed by the international community in order to try the most cruel and inhuman crimes before International Criminal Tribunals (e.g. ICTY The Hague). International agreements between parties of the Council of Europe like the ECE provided for a nationality exception and many parties to the ECE made use of respective declarations. The Dublin Convention was the first EU's attempt to abolish this protection in the long run: According to art 7 declarations could only be made temporarily.

In general, the FD on the EAW does not protect nationals from extradition of their country. However art 5 (3) allows MS to subject surrender of their nationals (including residents) for purpose of prosecution to the condition that the requested person is returned after trial to serve the sentence back home in the requested state. This optional ground for refusal has been made mandatory by many implementing acts. Similarly art 4 (6) FD-EAW states that if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.⁴²

Under art 33 (1) FD a special provision applies to Austria that may refuse the enforcement of an EAW with regard to Austrian citizens until 31 December 2008. As a matter of reciprocity Czech authorities do not surrender Czech suspects to Austria.⁴³ The Czech Republic and Luxembourg have, for their part, made statements that are inconsistent with Article 32 of the FD in that they concern European arrest warrants for which CZ and LU are both issuing States and executing States. In the case of CZ, this difficulty has been resolved by the adoption of an amendment to the transposition law which came into force on 1 July 2006. In addition, CZ now accepts and issues arrest warrants for offences committed before 1 November 2004, except in the case of its own nationals.⁴⁴ In several MS⁴⁵ constitutional conflicts infringing upon constitutional rights and principles arose which will be analysed in the following chapter.

42 For an analysis of these two articles see: Nico Keijzer op. Cit. p. 42-45.

43 Contrary to that attitude the Portuguese Supreme Court stated that the lack reciprocity can not be an obstacle to cooperation in the EU. See Case A, p 2 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Portugal_Constitutional_Court.pdf.

44 <http://www.libertysecurity.org/article1576.html>.

45 Portugal and Slovenia anticipated and overcame these difficulties before transposing the Framework Decision. France also carried out a constitutional revision by means of a law of March 2003. This constitutes the first revision of the constitution caused by secondary EU legislation and it reads as follows: art 88(2) "Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted under the Treaty of the European Union. Before the amendment art 5 (1) Statute of 1927 prevented the extradition of French nationals. However bilateral conventions provided for the extradition of nationals. Art 6(1) ECE allowed for the refusal of extradition of own nationals. In 1994 the Conseil d'Etat declared that the prohibition to extradite nationals is not a constitutional rule. In 2002 the Prime Minister consulted the Conseil d'Etat's opinion on the transposition of the FD. The Constitutional Law Committee of Parliament of Finland previews bills and scrutinizes EU measures as to their constitutionality. § 9 (3) Constitution "Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their

III CONSTITUTIONAL CHALLENGES

The Case of Germany

A citizen of double German and Syrian nationality was kept in custody in Hamburg and supposed to be extradited to Spain for prosecution for participation in a criminal association and with terrorism (financial and logistical support of Al-Qaeda network, activities in Spain, Great Britain and Germany) awaiting in Spain an imprisonment up to 20 years. Already in 2003 Spain requested his extradition based on an International Arrest Warrant. In 2004 an arrest notice was issued via SIS, i.e. an EAW for extradition. In Germany he was under investigations for acts between 1993 and 2001. The arrest warrant was issued and the judicial authority of Hamburg declared the extradition admissible on the condition that the execution of the sentence would take place in Germany.

The complainant challenged the order at the CC (BVerfG)⁴⁶ which issued a temporary injunction suspending the surrender to Spain. The CC held⁴⁷ that the EAW Act⁴⁸ infringes fundamental rights since under art 16(2) GG German citizens are protected from extradition, it is therefore unconstitutional as it concerns substantive law. The entire Act was declared void, the challenged decision held unconstitutional and overturned. In its reasoning the BVerfG stated that the German legislator did not use its discretion allowed by the FD, it did not transpose the optional grounds for refusal (i.e. refuse execution if it relates to offences committed on German territory or which were committed outside German territory in a EU MS requiring extradition and German law does not allow prosecution for the same offense when committed outside German territory) and stated the lack of sufficient legal protection in the surrender procedure. Furthermore the principle of non-retroactivity of criminal laws was breached by the act but the FD (art 34) provided for temporal limitations which were ignored by the legislator.

Dissenting opinions were attached: these had regard to abolishing the entire act, argued that the voidness should have been grounded on the principle of subsidiarity and that the declaration of nullity was unfounded (Judge Gerhardt).⁴⁹

The EuHbG was fully annulled and the old legal framework governed extradition again.

Clearly this led to a failure to comply with EU obligations.

will" was in evident conflict with the EAW and therefore urgent constitutional reform was needed and resulted in a timely and conform implementation of the FD, too.

46 Simone Mölders, European Arrest Warrant Act is Void – The Decision of the German Federal Constitutional Court of 18 July 2005, German Law Journal (2005) vol 07, 01, 45 -57 (46 et seq).

47 Judgement of 18 July 2005, 2 BvR 2236/04 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Germany_Constitutional_Court_e.pdf.

48 The German constitution was modified in 2000 in order to allow for the extradition of own nationals. This became necessary in order to fulfill UN Sec. Res. establishing ICTY, ITCR and in order to join the ICC and to comply with art 31 (1b) EU. Art 16 (2) "No German may be extradited to a foreign country. The law can provide otherwise for extraditions to a EU MS or to an international court as long as the rule of law is upheld."

49 NJW, 58 (2005), 2297, 2299, 2302 et seqq.

The new act addresses CC's central complaints maintaining some of the defects of the old act, adding even new ones:⁵⁰ the two-stage extradition procedure is maintained, it incorporates the implementing act into the existing law instead of creating a single coherent piece of legislation. The executive continues to play a crucial role in the procedure. A complicated system is created, according to which the executive shall declare in advance whether it plans to grant extradition or not. Then the courts have to check permissibility and at the same time review the ex ante envisaged granting decision. The practicability and constitutionality of this system remain questionable.

Germans can be extradited only if the criminal acts show a genuine link to the territory of the requesting state. Is this not the case: dual criminality is required, again the compatibility with European law is questionable. Furthermore, long term residents are disregarded in the new law, although the CC did not object to the equal treatment of Germans and long term residents.

The Case of Poland

The Circuit Court of Gdansk examined based on an EAW a request for surrendering the Polish national Maria D. for the purpose of criminal proceedings against her in the Netherlands.

Art 55 forbids the extradition of Polish nationals. The FD was transposed by amending the Code of Criminal Procedure (Chapter 65a governs the Polish courts issuing an EAW, and chapter 65b refers to EAW issued by another MS concerning a person staying in Poland). The Tribunal⁵¹ stated that "extradition" is defined in such manner as to exclude "surrender" under the EAW from its scope. Art 607s § 1 CCP stipulates that the EAW may not be executed in respect of a Polish national if she does not consent to surrender. Art 607t § 1 "In the case an EAW was issued for the purpose of prosecution of a person who is Polish or enjoys asylum in Poland, surrender may take place upon the condition of sending the person back to Poland after final judgement."

Art 607t § 1 is inconsistent with art 55(1). The Polish Tribunal unanimously decided to postpone the binding force of the challenged provision for 18 months and demanded a constitutional amendment.⁵²

The Amendment of art 55 reads as follows:

Article 55

(1) The extradition of a Polish citizen shall be prohibited, except in cases specified in paras 2 and 3.

50 Florian Geyer, *The European Arrest Warrant in Germany – Constitutional Mistrust towards the Concept of Mutual Trust in: Elspeth Guild, A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant (WLP, Nijmegen 2006)*, 121 et seq.

51 Judgement of 27 April 2005, P 1/05 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Poland_Constitutional_Court.pdf.

52 Adam Gorski, Piotr Hofmanski, Andrzej Sakowicz, Dobrosława Szumiło-Kulczycka, *The European Arrest Warrant and its Implementation in the Member States of the European Union*, http://www.law.uj.edu.pl/~kpk/eaw/raports/Questionnaire_Poland.pdf.

(2) Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offense under the law in force in the Republic of Poland or would have constituted an offense under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request.

(3) Compliance with the conditions specified in para. 2 subparas 1 and 2 shall not be required if an extradition request is made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body.

(4) The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens.

(5) The courts shall adjudicate on the admissibility of extradition.

The Polish case shows that the conformity with EU law was considered more important than the constitutionality.⁵³ The violation of the constitution was accepted for a maximum time of one and half years according to art 190 (3) of the Polish Constitution. Certainly one never knows how legislative projects develop especially in times when the government lacks respective Parliamentary majorities or does deny or ignore the position of the "negative legislator". In this case, fortunately a corresponding amendment was passed in time. Had the legislator not acted in time or in compliance with European requirements this had led after the expiry of the 18 months to a violation of EU law. This had been a violation under the third pillar thus initiating an infringement procedure would not have been an option neither.⁵⁴

The Case of the Czech Republic⁵⁵

A petition was lodged by a group of parliamentarians challenging provisions of the Criminal Code and the Code of Criminal Procedure (CCP) implementing the

53 This was heavily criticised in literature and it seems that it was even ignored by ordinary courts. See Kazimierz Bem, *The European Arrest Warrant and the Polish Constitutional Court Decision of 27 April 2005* in: Elspeth Guild, *A Challenge for European Law: The Merging of Internal and External Security Constitutional Challenges to the European Arrest Warrant* (WLP, Nijmegen 2006), 133.

54 With regard to judicial protection under the third pillar see Steve Peers, *Salvation Outside the Church: Judicial Protection in the Third Pillar after the Pupino and Segi Judgments* in CMLR (2007) 44, 883-929. Should the Treaty of Lisbon enter into force from 2014 onwards, the COM will have the power of initiating infringement procedures against MS failing to transpose FDs in the field of judicial cooperation in criminal matters. However the UK opted out of this novelty increasing judicial protection in the EU.

55 Judgement of 3 May 2006, PI ÚS 66/04 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Czech_Constitutional_Court.pdf.

FD as to their violation of fundamental rights guaranteed in the Charter of Fundamental Rights and Freedoms, in particular art 14(4) stipulating that "No citizen may be forced to leave his homeland". The petitioners aimed to construe a constitutional principle banning the extradition of one's nationals and referred to the constitutions of Estonia (art 36 para 2), Lithuania (art 13 para 2), Poland (art 52 para 4), Hungary (art 69 para 1), Slovenia (art 48), Germany (art 16 para 2), Finland (art 9 para 3), France (art 88 para 2 no 3), Italy (art 26), Portugal (art 33 para 3) and Spain (art 13 para 3) which prevent nationals from extradition. The Constitutional Court however took into consideration that some countries had already modified their constitutions (Germany and France), that in other countries like Greece and Denmark this matter was governed by statutory law only and that in many countries there had not existed any ban at all (Belgium, the Netherlands, Luxembourg, Sweden, UK and Ireland and Malta).

The CC also referred to *Pupino* stipulating that "the interpretation of domestic law must be in conformity with the FD". However it makes no mention of what if this is not possible but points to "loyal cooperation in the third pillar."

CC emphasised that "if Czech citizens benefit from the advantages relating to the law of EU citizenship, it is natural that along with the advantages they should also accept a certain measure of responsibility.", "EU citizenship brings also obligations along" and that since the "Human Rights protection at the EU level corresponds to MS level" a "fair trial up to Czech standards suffices", and quoted in para 86:

"In 2003 the ECJ stated that 'Member States have a mutual trust in each other's criminal justice systems, and each of them recognises the criminal law that applies in the other Member States, and this is so even in cases where the application of their own law would produce a different result' (Cases C-187/01 and C-385/01, the criminal proceedings against *Hüseyin Gözütok* (C-187/01) and *Klaus Brügge* (C-385/01), [2003] ECR I-1345, Paragraph 33)."

Interestingly the CC also took into consideration:

"96. In drawing these conclusions we must have regard not only to the protection of the rights of persons suspected of having committed crimes, but also to the interests of the victims of crimes. From the standpoint of protecting the rights of the victim and those suffering damages, it would generally appear to be more practical and more just for the criminal proceedings to take place in the State in which the crime was committed ..."

The Czech legislator, like the German, also failed to provide for additional grounds for refusing to execute an EAW, if it relates to offenses committed on Czech territory (art 4 (7) FD). Czech courts would indirectly rely on the FD and refuse to execute Czech citizens as well as long term residents.

The CC declared that there was no incompatibility with art 39 Charter neither according to which "only the law determine which conducts constitute a crime and what punishment, ... can be imposed" a provision that was alleged of being incompatible with the abolishment of dual criminality art 2(2) FD. Finally, the implementing act (CCP) was upheld.

The dissenting opinions pointed out that the concept of values connected with criminal proceedings varies from MS to MS, and in the same way varies the assessment of what is permissible. All that despite the fact that all are signatories to the ECHR. "we cannot lower the HR standards laid down in the Constitution".

Judge Wagnerova even deplored that the "implementation act was carried out carelessly".

The Case of Cyprus

On 7 November 2005, the Supreme Court of Cyprus has taken a significant decision with regard to the implementation and enforcement of the Framework Decision on European Arrest Warrant.⁵⁶

The Supreme Court of the Republic of Cyprus upheld the decision of a District Court of Limassol in an appeal brought before it by the Attorney General against that decision which concluded that the arrest of a Cypriot national charged of tax fraud and his surrender to the United Kingdom's judicial authorities on the basis of a European arrest warrant, cannot be effected, as the national law transposing the Framework Decision into the domestic legal order⁵⁷ is incompatible with art 11(2)f of the Constitution prohibiting the extradition of Cypriot nationals to any other country:

Art 11(2) "Nobody is deprived of her liberty except where law provides so

(f) for the arrest or detention of a person in order to prevent his entry into the Republic without a permit or in the case of an alien against whom procedures have been instituted to have him expelled or extradited."

The two main arguments submitted by the Attorney General in the appeal, namely that the European arrest warrant procedure does not amount to an extradition but constitutes just the surrender of the sought person and, that, in any case the principle of the supremacy of Community law over the domestic legislation of the Member States should apply *mutatis mutandis* with regard to the law of the European Union, were rejected by the Court with the following reasoning:

"a. even though the nature of the European arrest warrant was discussed, mainly through references to the decision of the Polish Tribunal on the same matter, the Court decided that irrespective of its nature and whether that amounts to extradition or not, it could not find an appropriate legal basis in the Constitution justifying the arrest of a Cypriot national for the purpose of surrendering him/her to the competent judicial authorities of another Member State on the basis of a European arrest warrant. The reasons justifying the arrest of persons are exhaustively enumerated in the Constitution and none of them may be interpreted as allowing the arrest and surrender of Cypriot nationals to another member state. It could not therefore interpret national law in conformity with the law of the European Union.

b. Framework decisions issued on the basis of art 34 of the Treaty on European Union, are not directly effective. The expected results which are binding on the Member States, may be achieved only through transposition 'with the appropriate legitimate procedures existing in each Member State'. According to the Court, this has not been done in Cyprus, as the provisions of the relevant legislation transposing the framework

56 Attorney General vs *Konstantinou*, Full Bench of the Supreme Court summarised by Elias A. Stefanou, Andreas Kapardis op.cit., 83 et seq.

57 Law 133(1) /2004.

decision on the European arrest warrant are in conflict with the provisions of the Constitution. With this reasoning, the Court concludes, even though not explicitly, that framework decisions may not be considered superior to the Constitution."⁵⁸

Following the decision of the Supreme Court and taking into account the consequences this entails for the fulfillment of the obligations of the Republic of Cyprus under the Treaty on European Union, the Government has decided to proceed with the submission to the House of Representatives of a proposal for the amendment of the Constitution.

In the meantime and until the Constitution was amended, the Cypriot competent authorities were not be in a position to execute any European arrest warrants issued by the competent authorities of other Member states, against Cypriot nationals. This means that the international law instruments (ECE 1957, European Convention for the Fight against Terrorism of 1997 and the Dublin and Brussels Convention) were still applied until the 5th Amendment was adopted on 27 June 2006,⁵⁹ which confers precedence to European Union legislation over provisions in Cyprus Constitution. According to the basic provision inserted as Article 1A of the Constitution:

"No constitutional provision shall be construed as invalidating laws enacted, acts resolved or measures taken by the Republic, which become necessary as a result of the obligations undertaken by Cyprus as a European Union member state, nor shall they hinder from Regulations, Directives or other acts or binding legislative measures enacted by the European Union or European Communities or their institutional organs or competent authorities on the basis of the founding Treaties of the European Union or the European Communities , from producing legal effect in the Republic."

Art 1A in combined reading with art 179⁶⁰ acknowledges the supremacy of EU law over the domestic provisions, be they constitutional or derivative. More precisely, the precedence of EU provisions of either primary or secondary nature over the derivative Cypriot law is contemplated. Even when discussing the amendment of art 11(2)⁶¹ no distinction was made between EC and EU law.⁶²

Art 11(2) f now reads as follows:

"No person shall be deprived of his liberty save when and as provided by law in the following cases: ...(f) ... arrest or detention of a citizen of the Republic for extradition or surrender purposes, save that the following provisions are respected: (i) The arrest or detention of a citizen of the Republic for extradition purposes on the basis of a European arrest warrant is possible only with respect to facts that postdated or acts that were performed after the date of the Republic's accession to the European Union".

58 http://www.law.uj.edu.pl/~kpk/eaw/judicial_decisions/Cyprus_Constitutional_Court.pdf.

59 Law 127(I)/2006.

60 Art 179 "No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as Member State of the European Union".

61 Alexandros Tsadiras, Case Law Cyprus Supreme Court, CMLR (2007), 44, 1515-1528 (1527). Tsadiras writes of the "depillarisation" in the arguments of the SC as well as Cypriot Parliament.

62 Ibid. 1526.

This amendment makes it now possible that Cypriot nationals are extradited following an EAW. Besides the delayed amendment a further critique is indispensable: the possibility of extraditing Cypriots is restricted to offences committed after Cyprus' accession which is in blatant violation of new MS's obligations.

The Case of Belgium

In answer to the preliminary reference of the Belgium Cour d'arbitrage⁶³ the ECJ ruled for the first time on the FD-EAW.⁶⁴ As opposed to the doubts of the NGO arguing that the issue should have been settled by a Convention instead of a FD the ECJ held, that the EAW could have been governed by a Convention as per article 34 (2)(d), but at the same time it stated that the Council enjoys discretion to decide upon the appropriate legal instrument, and confirmed that the adoption of this third pillar legal act was in conformity with art 34(2) b EU. With regard to the second set of questions alleging the violation of the principle of legality the ECJ held that the FD does not seek to harmonise the criminal offences in question in respect of their constituent elements or of the penalties which they attract. Although art 2 (2) FD-EAW dispenses with verification of double criminality for the categories of offences mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State. In response to the third argument concerning the EAW alleged violation to the principles of equality and non-discrimination, owing to the unjustified differentiation between the offences listed under article 2 (2) providing for the abolition of double criminality requirement on one hand, and all the other crimes where surrender is conditional on the executing Member State's recognition of the criminal liability on which the arrest warrant is based, on the other hand, the ECJ justified the rationale behind the differentiation by the principle of mutual recognition and the high degree of trust and solidarity between the MS.

IV. THE EUROPEAN DIMENSION OF THE CONSTITUTIONAL DECISIONS

Since the FD on the EAW is a third pillar instrument the jurisdiction of the ECJ is first dependent on MS's explicit acceptance and second, its scope is limited as compared to the one within the supranational first pillar. Even before the ECJ ruled on the effect and consistent interpretation of a FD in *Pupino* some laws implementing the FD on the EAW were constitutionally challenged.

63 The first question related to the conformity of the Framework Decision on the European arrest warrant with Article 34 of the TEU, which says that Framework Decision may be adopted for the purpose of approximation of the laws and regulations of the Member States.

The second one related to the conformity of the partial derogation of the dual criminality requirement with Article 6 of the TEU, and more specifically with general principles of equality and non-discrimination.

64 ECJ 3 May 2007, case C-303/05, *Advocaten voor de Wereld*, ECR (2007) I-3633.

In the past, rarely and few⁶⁵ Constitutional Courts sought the judicial dialogue with the ECJ. Observing the case-law of the "European Constitutional Court" (and a good number of arguments can be brought forward to call it like this) over the years, one can not deny its impressive integrative power. Mainly preliminary references made European law look like it is today. This procedure is the expression of cooperation in the multi-level European system. Thus, domestic judges being European judges at the same time contribute to this development. This judicial dialogue is not characterised by hierarchical thinking but by mutual inspiration and it intends to contribute to an emerging European legal culture leaving behind statism and interpretative tools confined to the nation-state.

The Belgium Cour d'arbitrage encouraged by an NGO was the first to seek interpretative help regarding the FD on the EAW from the ECJ under art 35 EU. The reference challenged the validity of the FD and alleged the violation of the principle of legality, equality and non-discrimination by abolishing the dual criminality requirement in art 2(2) FD on the EAW. From a European perspective this reference attacked even more than the core of the FD touching upon substantive and procedural grounds. The ECJ taking account of the ongoing constitutional debate in the MS upheld the FD, explicitly referred to the solemnly declared Fundamental Rights' Charter and to the mutual trust being indispensable for and third pillar action justifies dispensing with the verification of double criminality.

It is interesting to note that the Constitutional Courts of the new Member States of Poland and the Czech Republic as well as the Supreme Court of Cyprus exercised a kind of "de-pillarisation" in their legal reasoning by highlighting in this context the supremacy of EU(!) law,⁶⁶ thus proving – consciously or unconsciously – their EU-friendliness.

"The same reasons that led the Court in *Costa v ENEL* to proclaim the primacy of EC law are easily transposed to the EU legal order. The EU is similarly established for an indefinite period, and provided with its own organs (actually the same organs as the EC), and, in a functional sense, legal personality.

Furthermore, the Union has practical competences, transferred to it by the Member States, allowing the Union to do such diverse things as adopting a common definition of terrorism, imposing sanctions against third states, helping out victims of crime and sending troops and policemen on peacekeeping missions across the Globe after concluding international treaties solely in the name of the Union. As a corollary, it can thus be argued that in those areas the sovereignty of the Member States has been limited. From there it does not take much imagination to submit that the Member States have thus created a legal order which is binding upon them, even if no enforcement mechanism similar to Arts 226 to 228 TEC is available. Moreover, in light of the duty to abstain laid down in Art. 11(2) TEU and the presence of the preliminary

65 The Austrian did so three times, the Lithuanian and the Italian once.

66 The ECJ has not yet ruled on the supremacy of the third pillar. The following elements justified the supremacy of EC law in *Costa/ENEL*: Community has its own institutions (now Art. 7 EC), its own personality, its own legal capacity and capacity of representation on the international plane (Art. 281, 282, 291 and 300 EC) and real powers stemming from a limitation of sovereignty or transfer of powers from the States to the Community (Art. 5 EC and the relevant EC Treaty provisions).

reference procedure in Art. 35 TEU one would be hard pressed to deny that the drafters of the Treaty shared the concern that the executive force of EU law 'cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty' ".⁶⁷

However, when severe constitutional conflicts arise we witnessed in the past that the question as to who is the final arbiter does not bring satisfying solutions in a system where constitutional, international and supranational rules are intertwined. Cooperative constitutionalism⁶⁸ can bring constructive and viable solutions and find "harmony in diversity".

Poland and Cyprus annulled the implementing rules conflicting with their constitution. Poland postponed the effect of declaring the rules unconstitutional and asked ordinary courts to rule in compliance with European obligations even if this infringes the constitutional right of Polish citizens not to be extradited assuming that the legislator would repair the constitutional defect within 18 months despite of forthcoming elections. Cyprus violated its duty to loyally cooperate in time "It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, (...) were not also binding in the area of police and judicial cooperation in criminal matters, which is moreover entirely based on cooperation between the Member States and the institutions."⁶⁹. So did Germany, where the Constitutional Court underlines the intergovernmental character of the third pillar, openly distrusts the legal systems of the other Member States and declared void the implementing act in its entirety, although only parts of it were challenged (non-implementation of art 4 (7) FD,⁷⁰ missing judicial review and containing retroactive effects).

As opposed to that the Czech Constitutional Court emphasised on the mutual trust among the Member States (and referred to respective judgements of the ECJ para 86) sharing common values and human right standards (this can be challenged however i.a. considering the number of convictions of MS by Strasbourg, further reasons are given in the dissenting opinion by Judge Wagnerová), focused on the Czech Republic's obligation to fulfill international obligations (art 1(2) of the constitution) and to loyally cooperate according art 10 EC, proved openness with regard to other constitutions (para 74, 75), the Polish CC (para 81) and academic writing (para 88).

Poland and Cyprus admitted the impossibility of a consistent interpretation of the ban of extraditing own nationals (when Poland ruled on that question *Pupino*⁷¹ has not even been delivered yet). Komárek criticises that Poland missed

67 Koen Lenearts, Tim Corthaut, Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU Law (2006) 31 *European Law Review* 3, 287.

68 András Sajó, Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy (2004) 2 *Zeitschrift für Staats- und Europawissenschaften* 3, 351.

69 *Pupino*, para 42.

70 The Czech legislator also renounced on implementing another optional refusal ground with regard to offences committed on Czech soil (art 4 (7) FD on the EAW).

71 One must bear in mind that consistent interpretation can only refer to criminal procedure and not to substantive criminal law. See also Opinion of AG Kokott in *Pupino* para 42.

its chance of interpreting the ban in conformity with EU law since art 31(3) of the Polish Constitution provides for grounds limiting the scope of the ban in order to protect public security and public order.⁷² Yet, the Constitutional Tribunal successfully escaped an open constitutional conflict and sets an outstanding example as to how to reconcile conflicting situations and simultaneously protect the coherence of the European legal order.

The Czech CC found a European way of interpretation and avoided any constitutional conflict by rewriting the constitution,⁷³ arguing with the inherent dynamism of legal concepts (the responsibility that necessarily came along with the rights of European citizens and modified the constitutional ban, the contemporary standard of human rights and shared values) and with the fact that the principle of legal certainty suffices for Czech citizens and lawful residents to expect trial in the Czech Republic for offenses committed on its territory. *Pollicino*⁷⁴ praises the Czech CC for its "acceptance of the idea of constitutional pluralism as a paramount parameter for constitutional conflicts settlement" as to substantive law on the one hand, and as to methodology and procedural law for its application of a "dialogic and communicative theory of inter-constitutional law" on the other.

Contrary to what was expected or feared from enlargement sceptics the new MS, thanks to their constitutional judges, prove to be truly European, getting inspiration from their colleagues elsewhere and willing to enter into comparative arguments. The Polish Tribunal referred to constitutional amendments and practise in other MS and took account of the impact of its decision on a European level by emphasising on the importance of realising an Area of Freedom, Security and Justice and thus intensified cooperation in criminal matters. But then, it did neither recall ECJ decisions, nor could it consider a preliminary reference since Poland did not opt to submit to the ECJ's jurisdiction under the third pillar.

Reference to *Pupino* was made by the Czech CC which took into consideration a reference but then renounced considering that the case could be resolved by mere interpretation.

Karlsruhe, traditionally self-referential, fully neglected the *Pupino* judgement despite the fact that it had been delivered recently before its judgement and considered the German Constitution as the only standard for measuring third pillar instruments. Additionally, its decision provoked Spanish Courts to henceforth treat requests for surrender from the German side as conventional ones, thus multiplying the non-compliance factor. In the past the jurisprudence of the German Constitutional Court served as an orientation for many, especially

72 Jan Komárek, European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles", CMLR 44 (2007) 9-40 (18).

73 The CC stated that the implementation of the FD is not unconstitutional, however an individual EAW might be, but a "hypothetical and unlikely" situation does not provide ground for annulment.

74 Oreste Pollicino, European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems 9/10 (2008) 1314-1355 (1348).

some of the new Member States.⁷⁵ But in terms of European constitutionalism, Germany can still learn from the new Member States.

- *Dr. Bedanna Bapuly works for the Austrian Academy of Sciences. For comments please send an email to bedanna.bapuly@oeaw.ac.at .*

75 The Czech CC when ruling on the constitutionality of the challenged provisions indirectly even questioned some statements of the German CC.