

The European Arrest Warrant – Conflicts between European and German Constitutional Law?

by Beate Hoppe, Kai Werner and Jan Asmus Bischoff, Hamburg (Germany)

I. Introduction.....	1
II. The European Arrest Warrant under the Treaty of Nice	2
1. <i>Third pillar as the legal basis for the EAW</i>	3
2. <i>Provisions of the EAW</i>	4
3. <i>Aims and Benefits of the EAW</i>	6
III. The German Implementation Legislation and the Judgment by the Federal Constitutional Court	7
1. <i>The European Arrest Warrant Act of 21 July 2004</i>	8
2. <i>Federal Constitutional Court Judgment of 18 July 2005</i>	8
3. <i>Changes in Legislation and their Constitutionality</i>	12
IV. The Treaty of Lisbon	15
1. <i>Legislative Competences under the Treaty of Lisbon in the field of Judicial Cooperation in Criminal Matters</i>	15
2. <i>Legislative Acts and their effect in the Member States' legal orders</i>	17
3. <i>Consequences for the Arrest Warrant</i>	18
V. Conclusion.....	19

I. Introduction

More than ever before, the European Union influences national criminal law and national criminal procedure. Actual trends include ever closer harmonization of criminal provisions and especially of criminal procedure. The multitude of Framework Decisions (in future: Regulations and Directives) concerns mutual recognition of judicial decisions in criminal matters. However, criminal law is a sensible area which is fraught with constitutional law

implications. The constitutional guarantees concerning extradition of its own citizens concern the core of the state's sovereignty. This became apparent in case of the German Constitutional Court's judgment on the European Arrest Warrant (in the following: EAW). The Court invalidated the German law implementing a framework decision based on the then valid provisions of the Treaty on European Union (TEU) on judicial cooperation in criminal matters. In the following, we will take a closer look on the relation between the EAW and German constitutional law and discuss whether there is a potential conflict. First, we will elucidate the legal basis of the EAW and its structure (II.). We then will turn to the German implementing legislation and to the judgment by the German Constitutional Court annulling this law (III.). Having a closer look at the reasoning of the court, we will show the roots of the constitutional problems of implementing the measures of European co-operation in criminal matters. Third, we also discuss the revised version of the law, before we will turn to potential changes by the Treaty of Lisbon (IV). Finally, we will draw some conclusions (V.).

II. The European Arrest Warrant under the Treaty of Nice

During its Tampere summit in October 1999, the European Council called on the Member States to make the principle of mutual recognition the cornerstone of an effective European law-enforcement area¹. To implement this agenda, the Commission proposed to enact an European arrest warrant as a measure within the third pillar. On June 13, 2002, the Council adopted the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States² (hereafter called Framework Decision). It was introduced to serve the purpose of establishing a unified extradition system within Europe which enables a faster and simplified surrender procedure. The system was built upon the assumption that the concept of mutual recognition functions fairly well throughout the EU and that Member States have confidence in each others' criminal law systems³. In fact, not only the Preamble emphasized this last point, but the Commission as well stressed the meaning by calling the warrant 'the first and most symbolic measure applying the principle of mutual

¹ Hackner, in: Schomburg/Lagodny/Gleiß/Hackner (eds.), *Internationale Rechtshilfe in Strafsache*, 4th ed. 2006, Vor § 78, para. 4.

² Council Framework Decision 2002/584/JHA on the European Arrest Warrant and the Surrender Procedures between Member States of June 13, 2002, OJ L 190, 18.7.2002, p. 1; amended by: Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009, p. 24.

³ Knoops, *International Terrorism: The Changing Face of International Extradition and European Criminal Law*, 10 Maastricht Journal 161/162 (2003).

recognition'⁴. In the following section, we will explain the legal basis of the EAW (1.). Then we will turn to the actual design of the Framework Decision (2.) and give a short assessment (3.).

1. Third pillar as the legal basis for the EAW

The Framework Decision is a measure of the so called third pillar. The third pillar contains 'Provisions on Police and Judicial Cooperation in Criminal Matters' and is regulated in Title VI (Art. 29 – 42) of the Nice version of the Treaty on European Union. According to Art. 29 TEU, the main objective is the creation of an area of freedom, security and justice by providing a high level of safety and by combating and preventing racism and xenophobia. This shall in particular be achieved by developing a common action among Member States.

Legal instruments available under the third pillar among others are the so called framework decisions. Framework decisions shall serve as a means for harmonizing the laws of the Member States. A framework decision is binding, however it shall not entail direct effect. Also, Member States are free to choose the form and method of transforming a framework decision into national law as long as the desired result is achieved (Art. 34 para. 2 TEU).

The process of enacting a measure under the third pillar needs to be distinguished from the legislative procedure under the former EC Treaty. Third pillar measures are mere intergovernmental acts, whereas first pillar measures are considered 'supranational' legislation. According to Art. 34 para. 2 TEU, Member States have a right to propose third-pillar measures, but the Council nevertheless acts by unanimous voting. The European Parliament is informed on a regular basis, but is only authorized to give comments and recommendations under the third pillar. It thus plays a rather passive role (Art. 39 TEU).

Framework decisions under the third pillar correspond to some extent to directives under the first pillar. In its judgment in *Pupino*⁵, the ECJ even established the obligation to interpret national law consistently with the framework decision. After *Pupino*, it is clear that national courts, interpreting national law, are obliged to strive to achieve a consistent meaning not only with EC law, but also with third pillar framework decisions.

⁴ Commission Report COM (2005) 63 final of February 23, 2005.

⁵ ECJ, 16.06.05, C-105/03 *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

2. Provisions of the EAW

The EAW was designed to replace the former extradition system. It requires each national judicial authority (the executing judicial authority) to recognize, and with a minimum of formalities, requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority). Since January 1, 2004, the Framework Decision therefore replaces⁶ the existing regime under, *inter alia* the 1957 European Extradition Convention⁷, the 1978 European Convention on the suppression of terrorism as regards extradition⁸, the 1995 Convention on the simplified extradition procedure⁹ and the 1996 Convention on extradition¹⁰.

a. Scope of application

The Framework Decision defines the term ‘European arrest warrant’ as any judicial decision issued by a Member State with a view to the arrest or surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution, executing a custodial sentence or executing a detention order¹¹.

The EAW applies where a final sentence of imprisonment or a detention order has been imposed for a period of at least four months and for offences punishable by imprisonment or a detention order for a maximum period of at least one year¹².

If the offences are punishable in the issuing Member State by a custodial sentence of at least three years, the following offences, among others, may give rise to surrender without verification of the double criminality of the act: terrorism, trafficking in human beings, corruption, participation in a criminal organization, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, and fraud, including that affecting the financial interests of the Communities¹³. For other criminal acts, surrender may be subject to

⁶ Schomburg, in: Schomburg/Lagodny/Gleß/Hackner (eds.), *Internationale Rechtshilfe in Strafsache*, 4th ed. 2006, Vor § 68, para. 26.

⁷ European Convention on Extradition, of 13 December 1957, ETS 24.

⁸ European Convention on the suppression of terrorism, of 27 January 1977, ETS 90.

⁹ Convention on simplified extradition procedure between the Member States of the European Union drawn up on the basis of Article K.3 of TEU by Council act, of 10 March 1995.

¹⁰ Convention relating to Extradition between the Member States of the European Union drawn up on the basis of Article K.3 of TEU by Council act, of 27 September 1996, OJ C 313, 23.10.1996, p. 12.

¹¹ Article 1 para. 1 of the Framework Decision.

¹² Article 2 para. 1 of the Framework Decision.

¹³ Article 2 para. 2 of the Framework Decision.

the condition that the act for which surrender is requested constitutes an offence under the law of the executing Member State (double criminality rule)¹⁴.

b. Procedures

The European arrest warrant must contain *inter alia* information on the identity of the person concerned, the issuing judicial authority, the final judgment, the nature of the offence, the penalty¹⁵. A specimen form is attached to the framework decision. As a general rule, the issuing authority transmits the EAW directly to the executing judicial authority. Moreover a cooperation with the Schengen Information System (SIS) and with Interpol is provided¹⁶.

When an individual is arrested, he must be made aware of the contents of the arrest warrant and is entitled to the services of a lawyer and an interpreter¹⁷. The executing authority may decide to keep the individual in custody or to release him subject to certain conditions¹⁸.

Pending a decision, the executing authority (in accordance with national law) hears the person concerned. The executing judicial authority must take a final decision on execution of the European arrest warrant no later than 60 days after the arrest. It then immediately notifies the issuing authority of the decision taken¹⁹. However, if the information provided by the issuing authority is insufficient, the executing authority may ask for additional information.

The arrested person may consent to her surrender. Consent may not be revoked and must be given voluntarily and in full knowledge of the consequences²⁰. In this specific case, the executing judicial authority must take a final decision on execution of the warrant within a period of ten days after consent has been given²¹.

c. Grounds for refusal to execute a warrant and refusal to surrender

According to Article 3 of the Framework Decision, each Member State shall refuse to execute a European arrest warrant if:

- final judgment has already been passed by a Member State upon the requested person in respect of the same offence (*ne bis in idem* principle);
- the offence is covered by an amnesty in the executing Member State;

¹⁴ Article 2 para. 4 of the Framework Decision.

¹⁵ Article 8 para. 1 of the Framework Decision.

¹⁶ Article 9 of the Framework Decision.

¹⁷ Article 11 of the Framework Decision

¹⁸ Article 12 of the Framework Decision

¹⁹ Articles 15 para. 1, 17 para. 3, 22 of the Framework Decision

²⁰ Article 13 of the Framework Decision.

²¹ Article 17 para. 2 of the Framework Decision.

- the person concerned may not be held criminally responsible by the executing State due to her age.

In certain other circumstances, Article 4 of the Framework Decision provides that the executing Member State may refuse to execute the arrest warrant when for instance criminal prosecution or punishment is statute-barred according to the law of the executing Member State or when a final judgment has been passed by a third State in respect of the same act. It may also refuse to execute the warrant if the person concerned did not personally appear at the trial where the decision was rendered, unless the appropriate safeguards were taken. In all cases grounds for the refusal must be given. Especially, in case that there is a closer territorial link to the executing Member State or no sufficient territorial link to the issuing Member State Article 4 para. 7 Framework Decision provides a ground for non-execution. The executing State may refuse execution:

“where the European arrest warrant 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.”

The Framework Decision also provides for the possibility of seizing or handing over certain property that may be required as evidence or has been acquired as a result of the offence²². On presentation of certain information (relating to the arrest warrant, the nature of the offence, the identity of the person concerned, etc.), each Member State must permit the transit through its territory of a requested person who is being surrendered²³.

3. Aims and Benefits of the EAW

The purpose of the Framework Decision is to introduce a simplified system for the surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or conducting criminal proceedings²⁴.

²² Article 29 of the Framework Decision.

²³ Article 25 of the Framework Decision.

²⁴ Compare Recital No. 5 of the Framework Decision.

Certain offences listed in the Framework Decision, as defined by the law of the issuing Member State, give rise to surrender on the basis of a European arrest warrant without verification of the double criminality of the act, on condition that the offences in question are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years. According to the ECJ the removal of verification of double criminality complies with the principle of legality and with the principle of equality and non-discrimination²⁵.

The Framework Decision is more precise as regards *ne bis in idem*. It has strengthened the right to the assistance of a lawyer (Art. 11 para. 2, 13 para. 2, 27 para. 3 lit. f and 28 para. 2 lit. b), to examine the appropriateness of keeping a person in detention (Art. 12), and to the deduction from the term of the sentence of the period of detention served (Art. 26).

Generally speaking, as a result of the speed with which it is executed, the arrest warrant contributes to better observance of the ‘reasonable time limit’ principle. Through its effectiveness, in particular in obtaining the surrender of nationals of other Member States, it makes it easier to decide to release individuals provisionally irrespective of where they reside in the European Union (Art. 12).

III. The German Implementation Legislation and the Judgment by the Federal Constitutional Court

With the ‘European Arrest Warrant Act’²⁶ (*Europäisches Haftbefehlsgesetz*, hereafter called EAWA) of July 21, 2004, which amended the *Gesetz über die internationale Rechtshilfe in Strafsachen*²⁷ (Law on International Judicial Assistance in Criminal Matters, hereafter called the IRG) by part eight of the IRG (Articles 78 to 83 k IRG), the German legislature complied with its obligation to implement the Framework Decision according to Article 34 para. 2 sentence 2 (b) TEU and Article 31 of the Framework Decision. The EAWA came into effect on August 23, 2004 and was then used on a regular basis.

However, in its judgment of July 18, 2005²⁸, the Second Senate of the Federal Constitutional Court (FCC) declared the original implementing act, the German ‘European Arrest Warrant Act’ of 21 July 2004 void.

²⁵ Cf. ECJ Judgment of 3.5.2007, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, Case C-303/05. ECR 2007, I-3633.

²⁶ BGBl. 2004 I 1748.

²⁷ BGBl. 1994 I 1537.

²⁸ BVerfG, 2 BvR 2236/04, BVerfGE 113, 273.

In the following section, we will elucidate the German legislation implementing the Framework Decision (1.). We will then discuss the judgment remanding the law (2.). Finally, we will discuss the revised implementation legislation and its constitutionality (3.).

1. The European Arrest Warrant Act of 21 July 2004

§ 80 IRG old governed the extradition of German nationals. Paragraph 1 of this provisions reads as follows:

“The extradition of a German national for the purposes of prosecution is permissible only when it has been ensured that, after a legally binding sentence or another such sanction has been handed down, the requesting Member State transfers the accused back to the area of application of this law to serve the sentence, should the accused so wish.”

According to § 80 para. 3 IRG old, this provisions were also applicable to certain permanent residents. The German legislature did not exhaust the scope of afforded to it by the Framework Decision especially under Article 4 para. 7 of the Framework Decision. As has been said above, the Framework Decision permits the executing judicial authorities to refuse to execute the EAW if it relates to offences that have been committed in the territory of the requested Member State. The EAWA did not provide such a possibility of refusing the extradition. Moreover the EAWA shows a gap of protection concerning the possibility of refusing extradition due to criminal proceedings that have been instituted in the same matter in the domestic territory or because proceedings in the domestic territory have been dismissed or because the institution of proceedings has been refused.

In addition, the § 74 b IRG old excluded judicial review against the grant of extradition to another Member State.

2. Federal Constitutional Court Judgment of 18 July 2005

In its landmark decision on the EAW of July 18, 2005, the FCC declared the EAWA unconstitutional and thus void. The reasoning of the court as well as the disputes within the court and in literature appear to be an example to demonstrate the difficulties of the implementation of European Law – particularly under the third pillar – in general and mutual recognition in criminal matters in specific. Again the FCC pointed out, that all European acts have to be implemented according to the constitutional guarantees of the German Basic Law.

a. The facts of the case

The complainant of the case had German and Syrian citizenship. He was supposed to be extradited to the Kingdom of Spain for prosecution and had been in custody pending extradition since 15 October 2004. A “European arrest warrant” was issued against the complainant by the Central Court of Investigation in Criminal Matters (*Juzgado Central de Instrucción*) No. 5 of the *Audiencia Nacional* in Madrid on 16 September 2004. The complainant was charged with participation in a criminal association and with terrorism, punishable under Art. 515.2 and Art. 516.2 of the Spanish Penal Code, with a maximum sentence to be expected of 20 years. He was alleged to have supported the terrorist Al-Qaeda network in financial matters and was said to be a key figure organizing the European part of the network. In the European arrest warrant, these charges were based on detailed descriptions of visits to Spain that the complainant had made and of meetings and telephone calls with suspected criminals during 1993-2001. Under German Criminal Law at the time, his acts were not punishable by law. Membership in an international terrorist association became punishable under § 129b of the German Penal Code afterwards, on 30. August 2002.

Before the ‘European arrest warrant’ could be issued under EAWA, Spanish authorities had already tried to issue an ‘International arrest warrant’ in September 2003, which was denied because of the German citizenship of the complainant. After the EAWA came into force, the procedure of extradition was taken up again, now on supposedly proper legal grounds.

After unsuccessfully running through all opposition proceedings, the complainant filed a constitutional complaint. The FCC issued interim measures immediately, so he had not to be extradited to Spain before the final decision of the court.

b. Reasoning of the Court

In reviewing the German implementation legislation, the Court did not directly consider the constitutionality of the Framework Decision. Rather, it criticized that the legislature has not exhausted the scope of afforded to it by the Framework Decision. Thus, in the first place there was not a not a collision of EU law and German constitutional law, but merely a “bad” implementation. The decision was based on two grounds: First, Article 16 para. 2 of the Basic Law on non-extradition of German citizens was violated by the EAWA. Second, the exclusion of judicial review by Section 74 b IRG old was not in conformity with the guarantee of recourse to the courts under Article 19 para. 4 of the Basic Law.

Article 16 para. 2 of the Basic Law reads as follows:

“No German may be extradited to a foreign country. The law may provide otherwise for extraditions to a member state of the European Union or to an international court, provided that the rule of law is observed.”

Article 16 of the German Basic Law guarantees a basic right not to be denaturalized nor extradited as a special alliance of a citizen to his free democratic basic order. The German Basic Law (constitution) historically guaranteed it as an absolute right²⁹. Exceptions from this absolute right were not allowed until November 29, 2000, when a second sentence was added to Article 16 para. 2 of the Basic Law that would allow extraditing German citizens to International Criminal Courts of the United Nations, such as the ICC in The Hague, and under the European co-operation, at the time based on former Art. 31 para. 1 lit. b TEU. This understanding of the basic right shows that the issue is not about withdrawing own citizens from criminal prosecution but guaranteeing them protection within the laws of their state – including the foreseeability of punishability and criminal liability of their actions in advance.

The Court in general assumes the power to control whether an act of the EU exceeds its jurisdiction („ausbrechender Rechtsakt“), in order to ensure the principles of conferral of competences and subsidiarity in European law³⁰. The principle of subsidiarity is a gentle way to preserve national identity and statehood in a consistent area of justice in Europe, which also applies under the so called Third Pillar. For the national state there have to remain duties of substantial severity³¹. However, according to the Court the practice of co-operation in criminal matters as practiced under the Framework Decision and under EU law in general is a way to ensure both interests – the interests of the national states and their right of sovereignty, and the development of single area of law in Europe. The Court leaves no doubt that the Framework Decision is valid and balances the interests adequately.

But the German legislator had the obligation to implement the Framework Decision in a way that its objectives could be achieved without violating basic constitutional rights. The legislator had therefore to guarantee the essence of the fundamental rights, and limit the restrictions of their scope to a minimum. Doing this, the legislator had to take into consideration that the constitutional prohibition of extradition especially protects the

²⁹ *Randelzhofer*, in: *Maunz-Dürig*, Grundgesetz Kommentar, Art. 16 I, No. 2).

³⁰ BVerfGE 89, 155 (Maastricht).

³¹ BVerfGE, 123, 267 (Lissabon).

principles of legal certainty and reliance on existing law. According to the Court, Article 16 para. 2 of the Basic Law and the principle of the rule of law provide a special protection of the reliance on the own legal order. This applies in particular in cases which involve merely a criminal offence that are closely linked to the home country.

The EAWA, however, would not fulfill these requirements. When implementing the Framework Decision into German law, the German legislator did not consider that a fair balance of interest would have to take into consideration both the place where a crime is committed and the place where the effect of the crime occurred. No doubt, a delinquent will have to expect to be held liable for his actions in another country by that other country. But living in a legal system that he had a chance to exert influence upon by democratic means and in which he lived in accordance with his duties, he has the right to rely upon this state to protect him from extradition into another legal system that might pose upon him difficulties of a foreign language, legal process and cultural differences. Because he would not know the cultural context of the country where he will be punished, he could not reliably predict what is punishable in this foreign country. He can rely upon the law of his home country and that living in accordance to the laws of his home country his actions will not be disqualified as illegal in hindsight (*nulla poena sine lege praevia, scripta, certa et stricta*). These principles of certainty and reliance on existing laws are – under the rule of law in a constitutional state – to be valued higher than what is felt to be justice in the single case of a criminal action.

By not using the scope of discretion that he had in implementing the Framework Decision the German legislator violated the constitutional rights of his citizens. In the German law, there were no special exceptions from extradition in cases where the offender could not foresee the consequences of his actions. In the Framework Decision, there were exceptions in cases where the culprit acted within the country (Art. 4 para. 7 lit. a Framework Decision) and in cases where he acted out of the country, but his home country would not consider these acts punishable (Art. 4 para. 7 lit. b Framework Decision). Furthermore, the Framework Decision offered the right not to extradite a person who is held liable to prosecution in his home country (Art. 4 para. 2 Framework Decision) or in cases where his home state authorities decided not to prosecute his case (Art. 4 para. 3 Framework Decision). In not making any difference between those cases in which the culprit acted in his home state, and those cases in which he acted in a foreign state, the legislator offer an adequate balance of interests.

In the process of implementation of the Framework Decision, the German legislator has not exhausted the wide scope he had, and thus violated German constitutional law, making his acts void. The use of Framework Decisions resulted, at the time, in the ineffectiveness of European law. The doctrine of direct application of directives developed by the Court of Justice of the European Union³² could not be transferred to Framework Decisions as acts of intergovernmental co-operation. As has been explained above, in this form of co-operation the Council took a unanimous decision without any rights of the European Parliament, except for a hearing.

On the other hand, however, Judge Gerhardt does not even consider the law as unconstitutional, for the principles of loyal co-operation and effective implementation of European law, especially in the sphere of criminal co-operation, would pose a duty upon Germany to effectively guarantee the implementation and application of decisions made on the European level. To reach this aim, and at the same time to guarantee the basic rights of the addressees, it would have been sufficient to interpret the law with regard to both the constitution and the Framework Decision, when applying it to the specific case.

Additionally, the German law did not provide any measures of defeasibility and judicial control of the act of extradition. By giving authorities a wide scope of discretion, the addressee of the act has to be guaranteed measures of control of this discretion. This basic constitutional right, guaranteed by Art. 19 para. 4 of the Basic Law, was another reason to declare the law as void.

3. Changes in Legislation and their Constitutionality

As a consequence of the ruling the extradition of a German citizen to a Member State of the European Union was not possible until the German legislature adopted a new act implementing the Framework Decision³³. At that time Germany was the only Member State of the European Union which at had not effectively implemented the Framework Decision. However, extradition of German citizens could be performed on the basis of the IRG in the

³² See *infra*.

³³ BGBl. 2006 I 1721.

version that was valid before the entry into force of the EAWA, namely applying the European Convention on Extradition from 1957³⁴.

Meanwhile, the Second European Arrest Warrant Act entered into force on August 2, 2006³⁵. The new Act implemented what the FCC had criticized. Additionally, the Second Act filled a gap left open by the First European Arrest Warrant Act concerning the goal of the Framework Decision to allow the extradition of nationals under simplified conditions (so called 'fast-track' proceedings).

Regarding Article 16 para. 2 of the Basic Law, the new implementing law specifies the conditions under which Germans, or similarly positioned foreigners, would be extradited (Section 80 of the IRG). In paragraph 1 and 2 of Section 80 of the IRG, the criteria set out by the FCC for the extradition of Germans are integrated. The proportionality of the extradition will have to be checked in individual cases. This procedure will also apply to foreigners legally residing in Germany who are registered in a partnership with a German citizen.

Concerning the compulsorily and optional negative premises of surrender the Second German European Arrest Warrant Act tries to comply with the provisions of the Framework Decision to the most possible extent, as now stated in Sections 80-83, 83 b of the new IRG. The compulsory reasons to deny a European arrest warrant (Article 3 Framework Decision) are to be found in Section 80 to 83 of the IRG. The optional reasons (Article 4 Framework Decision) are to be found in Section 80 paras. 1 to 3 IRG (for German citizens) and especially in Section 83b IRG. It is concerned with the facultative ('can-do') reasons to deny approval within the proceeding for approval. Section 83b para. 1 lit. a to c IRG equals Article 4 paras. 2, 3, 5 Framework Decision. The compulsory reasons to deny the European Arrest Warrant according to Article 3 paras. 2 and 3 Framework Decision are to be found in Section 83 para. 1 and 2 IRG (extradition of German nationals). The guarantees that have to be granted according to Article 5 Framework Decision were implemented in Section 83 paras. 3 and 4 IRG.

Eventually, the new European Arrest Warrant Act opens recourse to the court against the administrative decision approving surrender. It maintains the split between the decision

³⁴ Non-German citizens could still be extradited on the basis of the Framework Decision, see: BVerfG, Judgment of October 4, 2005, 2 BvR 1667/05.

³⁵ European Arrest Warrant Act (EuHbG, Europäisches Haftbefehlsgesetz) v. 20.7.2006, BGBl. I (2006), 1721.

allowing surrender and the decision approving surrender. In Article 83 b IRG, the grounds for refusing to approve surrender are mentioned. In accordance with the FCC's ruling, the decision approving surrender must be subject of appeal. According to Article 79 para. 2, the authority of approval will intervene before it renders its decision and motivates it, whether it sees a ground for refusal in an Arrest Warrant declared illegal by the tribunal or not. If the authority of approval sees a ground for refusal, the Arrest Warrant procedure is stopped at this stage. If it does not see any, it sends the grounds of motivation to the Regional Court of Appeal with the request to decide about the admissibility of the extradition.

It seems that under the current version, there is little reason to be afraid of a collision between the German law (Constitution and implementation legislation) and European law, since the Framework Decision leaves lots of leeway and the IRG in current version is largely based on the ruling of the FCC in the above mentioned judgment. However, the OLG Stuttgart [Regional Court of Appeal] in a recent decision³⁶ held that even an Arrest Warrant based on the new implementing legislation would have to be assessed in the light of the fundamental rights and the principle of proportionality guaranteed by the German Basic Law. It held:

“An arrest warrant, even if it is made in execution of the European Arrest Warrant according to the principle of mutual recognition, remains an act of German sovereignty. As such, it is subject to the guarantees provided by the fundamental rights of German constitutional law to the full extent.”

Though the admissibility of a proportionality check with regard national fundamental rights is at least doubtful, it concluded that such a check would have to be done even if the act is based on European law. It held:

“The arrest warrant could be disproportionate especially in a case, if the alleged offence has a minor relevance and the expected penalty is not in proportion with the inconveniences of the accused by the arrest and extradition as well as the efforts for the procedure.”

Thus, even if the legislation implementing the Framework Decision is now *prima facie* constitutional and also in accordance with the Framework Decision, the German courts have to check in every case whether German standard of proportionality is taken account of and thus the single act is in accordance with German constitutional standards. Therefore, there is still a potential for upcoming conflicts between European law and German constitutional law.

³⁶ OLG Stuttgart, Decision of February 25, 2010, 1 Ausl. (24) 1246/09.

IV. The Treaty of Lisbon

On December 12, 2009, the Treaty of Lisbon entered into force. The EC ceased to exist and the EU succeeded into the position of the former³⁷. The EC-Treaty was now renamed Treaty on the Functioning of the EU (TFEU) and the articles renumbered. But apart from these mere formal changes, there were also substantial changes. The provisions on Judicial Cooperation in Criminal matters were shifted from the TEU to the TFEU and thus subject to “communitarization”. The Judicial Cooperation in Criminal Matters is now governed by the Articles 82 to 86 TFEU. It is described by Article 82 para. 1 TFEU as being based on the principle of mutual recognition of judgments and judicial decisions, including the approximation of the laws and regulations of the Member States in certain areas. Thus, the Articles 82 to 84 provide for legislative competences in the field of judicial cooperation. Article 85 defines the mission of Eurojust. Eurojust had already been established on the basis of a decision by the European Council in 1999 and its work had been acknowledged by Article 31 TEU under the Treaty of Nice. But Article 85 TFEU also contains legislative competences as regards Eurojust’s structure, operation, field of action and task. Finally, Article 86 TFEU provides a legal basis for establishing a European Public Prosecutor’s Office.

1. Legislative Competences under the Treaty of Lisbon in the field of Judicial Cooperation in Criminal Matters

The legislative competences contained in the Articles 82 to 84 TFEU can be distinguished as follows. While Article 82 TFEU more or less concerns the procedural aspects of judicial cooperation in criminal matters, Article 83 TFEU authorizes certain measures of approximation of criminal laws and regulations of the Member States by the EU. Since the competences of the Union and the member States regarding the area of freedom, security and justice – the latter also containing the judicial cooperation in criminal matters – are shared according to Article 4 para. 2 lit. j TFEU, the legislative competences provided by Articles 82 and 83 are also shared. However, Article 84 TFEU entrusts the EU with supporting

³⁷ Compare Article 1 para. 3 subpara. 2 TEU (Lisbon).

competences in the sense of Article 2 para. 5 TFEU concerning crime prevention. Therefore, harmonization in the field of crime prevention is excluded.

For the sake of this paper, the legislative competences in the field of criminal procedure under Article 82 TFEU are of special interest. Article 82 para. 1 and para. 2 TFEU both contain a basis for legislation by the Parliament and the Council according to the ordinary legislative procedure. However, while Article 82 para. 1 TFEU generally allows the adoption of “measures”, the second paragraph only permits the adoption of minimum rules by means of directives. Analogous to the terminology under the Brussels Regulation, Article 82 para. 1 TFEU can be said to concern the jurisdiction as well as the recognition and enforcement of decisions. It includes: (a) rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; (b) prevention and settlement of conflicts of jurisdiction between Member States; (c) training of the judiciary and judicial staff; (d) facilitation of cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

The scope of Article 82 para. 2 TFEU, however, is broader as it concerns rules that are necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. According to Article 82 para. 2 TFEU these rules “shall concern”: (a) the mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime. Furthermore, Article 82 para. 2 lit. d TFEU provides a legislative basis for rules concerning “any other specific aspects of criminal procedure which the Council has identified in advance by a decision”. However, such a decision has to be made unanimously and the Council has to obtain the consent of the European Parliament in advance.

The European Arrest Warrant, as it has been established under the Framework Decision, would clearly fall under Article 82 para. 1 lit. a and d TFEU, because it would cover questions concerning the recognition of judicial decisions as well as the enforcement of decisions. Thus, unlike under the prior versions of the Treaties, the EU is not limited to the adoption of mere framework legislation. Since Article 82 para. 1 TFEU covers all kinds of measures, the EU can adopt directives, but also regulations as defined by Article 288 TFEU. Since they are adopted under the ordinary legislative procedure, they are also called legislative acts (compare Article 289 para. 3 TFEU). The ordinary legislative procedure involves the participation of

the European Parliament (compare Article 294 TFEU). Thus, unlike under the prior versions of the Treaties, the Parliament participates in the legislation process concerning the judicial cooperation in criminal matters.

2. Legislative Acts and their effect in the Member States' legal orders

There are considerable differences between a regulation and a directive concerning their effects in the Member States' legal orders. According to Article 288 TFEU, a regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. Conversely, a directive shall be binding upon each Member State to which it is addressed as to the result to be achieved, but it shall leave to the national authorities the choice of form and methods. Since a regulation is directly applicable, it can create rights and obligations for the national authorities as well as individual persons³⁸. An implementation legislation is not only unnecessary; rather it is inadmissible³⁹. On the contrary, a directive only creates a framework that needs to be implemented by the Member State legislation. With regard to the principle of effectiveness, however, the ECJ has developed certain criteria in its jurisprudence that allow a direct application of a directive, if it has not or not properly been implemented by a Member State. In order to be directly applicable, a directive needs to be sufficiently specific and the time limit for the implementation of the directive must have elapsed⁴⁰. Though a Member State, who has not or not properly implemented a directive, cannot invoke the direct applicability to the detriment of an individual⁴¹, the Courts of the Member State have to interpret the national legislation in conformity with the directive's aims as far as possible⁴².

In its famous case *Costa/ENEL*, the ECJ inferred from the Community's aim and purpose that Community law would enjoy supremacy⁴³. National laws that are not in accordance with Community law would thus be inapplicable⁴⁴. This would even affect constitutional law⁴⁵.

³⁸ ECJ, Judgment of March 28, 1985, *Commission of the European Communities v Italian Republic*, Case 272/83, ECR 1985, 1057.

³⁹ ECJ, Judgment of 28 March 1985, Case 272/83, *Kommission/Italien*, ECR 1985, S. 1057, Para. 27.

⁴⁰ ECJ, Judgment of 6 October 1970, Case 9/70, *Grad/Finanzamt Traunstein*, ECR 1970, S. 825, Para. 10; ECJ, Judgment of 4 December 1974, Case 41/74, *van Duyn/Home Office*, ECR 1974, S. 1337, Para. 12.

⁴¹ ECJ, Judgment of 5. April 1979, Case 148/78, *Ratti*, ECR 1979, S. 1629, Para. 23f.; ECJ, Judgment of 19. Januar 1982, Case 8/81, *Becker*, ECR 1982, 53, Para. 24.

⁴² ECJ, Judgment of 10. April 1984, Case 14/83, *von Colson und Kamann*, ECR 1984, S. 1891, para. 26; ECJ, Judgment of 10 April 1984, Case 79/83, *Harz/Tradax*, ECR 1984, 1921, para. 26; ECJ, Judgment of 13. November 1990, Case C-106/89, *Marleasing/La Comercial Internacional de Alimentación*, ECR 1990, I-4135, para. 6 ff.

⁴³ ECJ, Judgment of 15. Juli 1964, Case 6/64, *Costa/ENEL*, ECR 1964, 1253[1270].

After the Lisbon Treaty, these principles of Community law now can claim to be generally applicable to Union law as far as the rules and procedures under the TFEU are concerned. However, as to the legal effects of measures adopted by the EU before the entry into force of the Lisbon Treaty, Article 9 of the Protocol (No 36) on Transitional Provisions⁴⁶ provides for special rules. Article 9 reads as follows:

„The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. [...]“

According to Article 10 of the Protocol concerning measures which have been adopted before the entry into force of the Treaty of Lisbon in the field of judicial cooperation in criminal matters, the Commission is not allowed to initiate an action for failure to fulfill obligations under Article 258 TFEU. Furthermore, the powers of the ECJ shall remain the same.

3. Consequences for the Arrest Warrant

As the Council Framework Decision 2002/584/JHA on the European arrest warrant has been adopted before the entry into force of the Lisbon Treaty, the Framework Decision will “preserve” its legal effects. One could question whether the legal effects addressed by the Protocol cover the direct applicability as well as the supremacy or only one of these. However, as the Article 9 of the Protocol makes clear, it is possible to amend “in implementation of the Treaties” those acts that were adopted under the old regime. For instance, the European Parliament has proposed to amend the Framework Decision 2002/584/JHA in 2008⁴⁷. Such an amendment would have to be made either by way of

⁴⁴ ECJ, Judgment of 4. April 1968, Case 34/67, *Gebriüder Lück*, ECR 1968, 364, Para. 3; ECJ, Judgment of 9 March 1978, Case 106/77, *Simmenthal II*, ECR 1978, 629, para. 21/23; Ipsen, *Gemeinschaftsrecht*, 1972, § 10 para. 55.

⁴⁵ See for instance: ECJ, Judgment of 11 January 2000, Case C-285/98, *Kreil*, ECR 2000, I-69, para. 26; but see for example the provisions concerning fundamental rights in Article 3 para. 1 of the (Draft) European Defense Community Treaty, of May 27, 1952, BGBl. 1954 II 343: “The Community shall accomplish the goals assigned to it by employing the least burdensome and most efficient methods. It shall intervene only to the extent necessary for the fulfilment of its mission and with due respect to public liberties and the fundamental rights of the individual. It shall see to it that the proper interests of Member States are taken into consideration to the full extent compatible with its own essential interests.”

⁴⁶ Protocol (No 36) on Transitional Provisions, OJ C 83 of 30.3.2010, p. 322.

⁴⁷ European Parliament legislative resolution, of 2 September 2008, on the initiative by the Republic of Slovenia, the French Republic, the Czech Republic, the Kingdom of Sweden, the Slovak Republic, the United Kingdom and the Federal Republic of Germany with a view to adopting a Council Framework Decision on the enforcement of decisions rendered in absentia and amending Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties, Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders and

regulation or directive under Article 82 para. 1 TFEU. Assuming that the EU would adopt only a minor amendment to the Framework Decision, it is first questionable which consequences this would have as to the effects of the Decision in the legal order in the Member States. Still a Framework Decision would be a Framework Decision and thus it would be doubtful whether one could simply treat a framework decision like a directive though they are comparable in general. It is not possible to apply only those provisions directly that have been amended either by way of regulation or directive and to treat them as supreme.

But anyhow it would be possible to replace the Framework Decision by a new measure based on Article 82 para. 1 TFEU. Since this provision allows the adoption of regulations and directives, the European legislator would have to decide which instrument to use. Though the subsidiarity and proportionality principle would require adopting measures that are least intrusive, doubts may be raised as to whether a mere directive would really be as effective as a regulation.

V. Conclusion

As we have shown, the law of extradition touches the very heart of constitutional law and the protection of fundamental rights provided therein. On the other hand, international criminal cooperation is indispensable to face the new quality of menaces in form of international terrorism, trafficking in human beings and sexual exploitation of children and other forms of transnational crimes. Therefore, the courts and especially the constitutional courts will have to balance these basic protections under the constitution and the needs of international criminal cooperation by the Member States of the EU. From the viewpoint of EU law two interests are involved: First, the effective implementation of EU law in general and specifically a Framework Decision based on the so-called Third Pillar, as required by EU law (Article 4 TEU/Art. 10 ECT). Second, the principle of subsidiarity (Article 5 para. 2 TEU) which leaves a role to play to the national legislation. After the decision of 2005 by the German Federal Constitutional Court, which invalidated the national implementation legislation, had to find a way to balance these interests as well as the requirements of constitutional law. Though it seems that the legislator has found a way, there is still potential for a conflict in case of the application of the law by the respective courts. In each and every case, the application of these

Framework Decision 2008/.../JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (5598/2008 — C6-0075/2008 — 2008/0803(CNS)), OJ C 295E, 4.12.2009, p. 120.

laws by the courts and each arrest warrant based on the national German law is subject to review in light of national fundamental rights. Thus, a Court might have to reject a request for extradition even if there is no ground therefore under the Framework Decision. While there might still be problems under the current regime, a future solution under the Lisbon Treaty will supersede the even the national constitution. However, the conflict between the rights of the individual and the needs of criminal cooperation will still be there: But the balance of these interests will then have to be found on the European level, involving the fundamental rights as developed by the ECJ and the European Charter of Human Rights.