

THE EUROPEAN ARREST WARRANT AND THE NECESSARY BALANCE BETWEEN MUTUAL RECOGNITION AND FUNDAMENTAL RIGHTS IN THE EU

-ROMANIA 1-



FOREWORD

The European legal system is nowadays influenced by the two major European courts- the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and both their jurisprudence acknowledges their coexistence and the interdependence of their jurisdiction. In this bipolar legal frame the achievement of an Area of Freedom, Security and Justice has to be based on mutual trust in the criminal justice systems of the Member States, founded on the principles of liberty, democracy and the rule of law and respect of fundamental rights as guaranteed by the ECHR and by the Charter of Fundamental Rights of the European Union (CFREU)¹.

Starting from this thesis, the present paper aims to analyze the coexistence of EU law and European Convention on Human Rights (ECHR) in the field of European Arrest Warrant (EAW) by taking a view of the safeguards and human rights that are guaranteed in the EAW proceedings. While not exhausting the subject, we chose to present on one hand the evolution of the principles applicable in this legal field and on the other hand the legislative and jurisprudential aspects that we observed in relation to safeguarding human rights in the EAW proceedings.

The first chapter of our paper deals with the historical evolution of mutual recognition principle, the relation between this principle, mutual trust principle and fundamental rights and a short presentation of EAW Framework Decision (FD) while the second chapter analyzes the guarantees offered by the EAW FD, the connexion with ECtHR jurisprudence and the conduct of Member States in this field. As a conclusion we chose to identify a set of solutions that can insure a fair balance between the purpose of the EAW and the protection of human rights in the EU.

CHAPTER I - The principle of mutual recognition – a method to achieve a high level of trust and cooperation in the EU

I. 1. A short history of mutual recognition in the EU

The doctrine of mutual recognition between the Member States emerged out of the ECJ “Cassis de Dijon” case as a solution to the obstacles to the free movement of goods, due to the disparities between legal systems that existed within the Community. The ruling stated that “there is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State” and that “Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defense of the consumer”².

The principle developed by the ECJ was later recognised by European Union` (EU) institutions in several documents and it were extended to criminal matters as well. In this respect, the issue of mutual recognition was raised at the Cardiff European Council on June 1998, when the Council was asked to

¹ Proposal for a Council Framework Decision on the EAW and the surrender procedures between MSs /* COM/2001/522 final/2.

² ECJ, C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* - par. 14 and par. 8.

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identify the scope for greater mutual recognition of decisions of the Member States' courts. Subsequently, it was stated that a process should be initiated with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters³. In the Tampere Program of 1999, the European Council endorsed the principle of mutual cooperation as future “cornerstone of judicial co-operation in both civil and criminal matters within the Union”⁴. The EU Ministers confirmed the important role that mutual recognition plays in judicial cooperation and held that enhanced mutual recognition of judicial decisions and judgments would facilitate cooperation between authorities and improve the judicial protection of individual rights. The Hague Program of 2004 called for the completion of the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in all phases of criminal procedures and stressed the interconnection between the development of the mutual recognition and the development of equivalent standards for procedural rights in criminal proceedings⁵.

Despite the large number of documents expressing the importance of mutual recognition at EU level, none of the treaties adopted before the Lisbon Treaty contain any direct reference to this principle, although some forms of mutual recognition were already embodied in the instruments of judicial cooperation adopted before the Maastricht Treaty.

The Treaty of Lisbon, signed on 13 December 2007 and entered into force on 1 December 2009, consists of a number of amendments to the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC), the latter renamed “Treaty on the Functioning of the European Union” (TFEU). With this treaty, the “pillar structure” of EU legislation is abolished and the area of police and judicial cooperation in criminal matters will follow the rules of the former first Pillar. The provisions on judicial cooperation in criminal matters are found in Part Three, Title V, Chapter 4 of the TFEU (Art. 82 to 86).

The Lisbon Treaty enhances mutual recognition of judicial decisions and judgements and the new Art. 82 in the TFEU, unlike the former Art. 31 TEU, provides explicitly the principle of mutual recognition and declares it the cornerstone of the judicial cooperation in criminal law. In the post-Lisbon European Union, the judicial cooperation in criminal law should, according to the Lisbon Treaty, be based on two pillars – the mutual recognition of judicial decisions and the approximation of the criminal law of Member States. The mechanism of mutual recognition occupies a clearly more prominent position as it is declared a general principle of cooperation without implicit limitations, while the harmonization of the national criminal law is either interconnected with the development of the mutual recognition (art. 82 par. 2 TFEU) or restricted to selected offences (art. 83 TFEU). The hierarchy of the mutual recognition vs. harmonization approach is also indicated by the art. 67 of the TFEU which states that “The Union shall endeavour to ensure a high level of security through (...) the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws”⁶.

I.2. The relation between mutual recognition, mutual trust and the concerns regarding fundamental rights

Pursuant to the principle of mutual recognition, Member States shall execute and enforce each others` decisions unless they can invoke one of the limited exceptions laid down in the legal instruments. Mutual trust is an important element, not only trust in the adequacy of one`s partners rules, but also trusts that these rules are correctly applied. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions⁷.

³ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice - 3 December 1998 - Point 45(f).

⁴ Presidency Conclusions - Tampere European Council - 15 and 16 October 1999.

⁵ The Hague Programme – Strengthening freedom, security and justice in the EU– Presidency Conclusions, Brussels, 4-5 November 2004

⁶ I. Šlosarčík, *The Lisbon Treaty and the mutual recognition in criminal law: The European Momentum and the National Limits*, Dept. of European Studies, Charles University, Prague, <http://micro5.Member Statecc.huji.ac.il/~iasei>, 28 July 2010.

⁷ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters /* COM/2000/0495 final */.

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The mutual trust Member States give to each others` legal system is inseparably bound to the principle of mutual recognition. The ECJ formally endorsed the relation between mutual trust and mutual recognition and in a series of cases concerning “ne bis in idem principle” established by Art. 54 of the Convention implementing the Schengen Agreement (CISA). The Court held that “ne bis in idem” principle implies that “Member States have mutual trust in their criminal justice systems and that each other of them recognises the criminal law in force in the other Member State, even when the outcome would be different if its own national law was applied”⁸.

It is obvious that the smooth operation of the principle of mutual recognition requires a high level of mutual trust between Member States, grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights. One concern in this mutual trust mechanism regards the safeguard of human rights and at the Tampere Council in 1999 it was stated that EU-wide safeguards would need to be elaborated to support the mutual recognition programme and improve the protection of individual rights. Enhanced mutual recognition of judicial decisions would facilitate not only the co-operation between authorities, but also the judicial protection of individual rights.

Forty years ago the ECJ recognized that fundamental rights form part of the general principles of Community law and the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the European Union⁹. With the Maastricht Treaty and the Amsterdam Treaty it was established, as a general principle, that the EU should respect human rights and fundamental freedoms, upon which the Union is founded (former Art. 6 of TEU). A major step towards the recognition of fundamental rights throughout the EU was made by the Treaty of Lisbon, under which the CFREU, proclaimed by the EU institutions at the inter-governmental conference in Nice in December 2000, became legally binding. The Lisbon Treaty also requires the EU to become a formal party to the ECHR, rather than simply treating its substantive rules as a source of the fundamental rights that are respected in the EU. It is intended to make sure that EU regulations and directives do not contradict the ECHR, which is ratified by all Member States. By giving the Charter's provisions binding legal force, the Lisbon Treaty formalises the principle that fundamental human rights are part of EU law.

The content of the Charter is broader than that of the ECHR and it sets out the political, economic, social and civil rights recognised by the EU. The rights contained by the Charter are divided into seven chapters and 54 Articles, related to dignity, freedom, equality, solidarity, citizens' rights, justice and a chapter of general provisions. Although the text of the Charter is not contained within the Treaty, Art. 6 of the TEU elevated the Charter to the same legal value as the TEU and the TFEU. However, the fact that the CFREU is now legally binding for the Member States should be an adequate ground for the reinforcement of mutual trust, which is the key to making mutual recognition operate smoothly¹⁰.

In order to facilitate the application of the principle of mutual recognition, common standards concerning particularly the right to a fair trial, the right to legal assistance and the right to an interpreter may be necessary. This is what the Commission`s Proposal for a Framework Decision on certain procedural rights in criminal proceeding throughout the EU aimed but, after three years of discussion, it appeared impossible to reach an agreement on the text¹¹. The protection of the rights of suspected and/or an accused person in criminal proceedings is a fundamental value of the Union in order to maintain mutual trust between the Member States and public confidence in European Union”¹². This is why, in the in the context of a cooperation based upon the principle of mutual recognition and particularly in the process of enforcement of

⁸ ECJ, C-187/01 and C-385/01 *Hüseyin Gözütok and Klaus Brügge*, par. 33.

⁹ ECJ, C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, par. 4.

¹⁰ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters and the strengthening of mutual trust between Member States / COM/2005/195 final /.

¹¹ Proposal for a Council Framework Decision on certain procedural rights in criminal proceeding throughout the EU, /COM/200/328 final.

¹² The Stockholm Programme – *An open and secure Europe serving and protecting the citizens*, Brussels, 2 December 2009.

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the mutual recognition instruments, national authorities should make sure that procedures applied or to be applied are human rights-compliant.

I.3. The EAW Framework Decision – a blueprint for legal instruments enforcing the mutual recognition principle

The first actual measure in the field of criminal law implementing the principle of mutual recognition was the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FD), which was adopted in 2002 and came into force on 1 January 2004. The EAW FD replaced the existing instruments on extradition between the Member States, including the 1957 Council of Europe Convention on extradition, the provisions of Title III of the CISA which concern extradition and several bilateral conventions. The previous conventions were based on the “request principle”: extradition request had to be addressed to the national ministries which had a wide margin to deny these requests on political grounds. The main purpose of the EAW was to simplify and speed up the surrender procedures, avoiding the delays of the former extradition system.

The EAW is considered to be a key ingredient for effectively building trust in the EU and progressively establishing a genuine EU judicial area, based on the principle of mutual recognition of judicial decisions. The EAW is described as “the first and most symbolic measure applying the principle of mutual recognition” and it is defined in Art. 1 of the FD as 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”¹³. The conditions for the issue of a EAW are set out in Art. 2, according to which the warrant may be issued for acts punishable by the law of the issuing Member State 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 offences specified in Art. 2.2. (for example, participation in a criminal organisation, terrorism, corruption, fraud, murder etc.) give rise to surrender without verification of the double criminality of the act, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State. For offences other than those covered by Art. 2.2., surrender may be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State. Art. 3 and 4 of the FD provide grounds for mandatory and optional non-execution of the EAW. Art. 27 and 28 stipulate the rule of speciality, which is intended to protect the right of the person surrendered not to be prosecuted or to have to serve a sentence with regard to facts committed prior to his surrender, other than those for which his surrender was granted. The whole procedure takes place between the judicial authorities of the Member State, with no executive or administrative discretion to refuse surrender and no exception for nationals.

According to recital 12 and 13 of the Preamble, the FD respects fundamental rights and observes the principles recognised by Art. 6 of the TEU and reflected in the CFREU, in particular Chapter VI thereof. These recitals, which have not been expressly included in the main body of the FD, have a non-binding character. The only direct reference to the obligation to respect fundamental rights and principles is that from Art. 1 (3) which states that the FD “shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 of the TEU”. These provisions make it clear that both the issuing and executing states within the EAW scheme are bound to fulfil their international treaty obligations as well as those resulting from their common constitutional traditions regarding human rights. The question arises whether these references are enough to fully guarantee the protection of the surrendered person’s rights.

The fundamental rights affected by an EAW are the right to liberty, the right to a fair trial and the right to private life. The ECtHR stated clearly in its case law that member states have an obligation to protect

¹³ Report from the Commission based on Art. 34 of Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures between MEMBER STATE, Brussels 24.1.2006, COM(2006)8 final.

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human rights when extraditing a suspect. In *Soerig v. UK*, and later in *Mamatkulov and Askarov v. Turkey*¹⁴, ECtHR noted that a state would be in violation of its obligations under ECHR if it extradited an individual to a state where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Art. 3 ECHR. The problem that arose in these cases was whether the extradition would itself engage the responsibility of a Contracting State under Art. 3. The ECtHR stated that extradition in such circumstances, while not explicitly referred to in the brief and general wording of Art. 3, would plainly be contrary to the spirit and intent of the article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article"¹⁵.

In relation to the right to a fair trial, in a recent decision concerning an EAW issued by a Magistrates' Court in the UK against an Irish national and executed by the Irish authorities, the ECtHR held that "the right to a fair trial in criminal proceedings, as embodied in Art. 6, holds a prominent place in a democratic society so that the Court does not exclude that an issue might, exceptionally, be raised under Art. 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country"¹⁶. The principle of safeguarding the right to a fair trial in the extradition procedures was anticipated in the *Soerig v. UK* and *Mamatkulov and Askarov v. Turkey* cases, which referred to extradition based on other legal instruments, not on an EAW.

Keeping in mind that the above-mentioned principles apply to EU Member States as well as third states, Member States must ensure that the legitimate aim of security does not undermine the respect of human rights and they must achieve a balance between procedural safeguards and the suppression of transnational crime while enforcing extradition rules.

CHAPTER II - Guarantees for fundamental human rights enclosed in the EAW Framework Decision

II.1. The need to ensure a vital balance between efficiency and human rights

Mutual recognition can only operate effectively in a spirit of trust, whereby not only the judicial authorities, but all actors in the criminal process see decisions of the judicial authorities of other Member States as equivalent to their own and do not call in question their judicial capacity and respect for fair trial rights. As one respected judge and scholar said, "we are bound by the existence of an extradition treaty to assume that the trial will be fair"¹⁷.

All Member States are contracting parties to the ECHR and have criminal justice systems that meet the requirements of this Convention, using a variety of procedural safeguards. This is sometimes cited as adequate grounds for mutual confidence. However experience has shown that, despite the need for such confidence, there is not always sufficient trust in the criminal justice systems of other Member States and this notwithstanding the fact that they are all signatories to the ECHR¹⁸. For example, in *Ramda*, the England and Wales High Court said that France's status as a signatory to the ECHR could not be invoked as a complete answer to complaints about the fairness of his trial¹⁹. Likewise, in *Irastorza Dorronsoro*, the Cour d'Appel de Pau (France) refused to accede to an extradition request from Spain on the ground that there was a suspicion that a co-defendant had been "tortured" by Spanish police officers²⁰. This can be easily explained, as the number of applications to the ECtHR demonstrates that compliance with the ECHR is not universal and the ECHR is implemented to very differing standards in the Member States²¹.

¹⁴ ECtHR, 4 February 200, *Mamatkulov and Askarov* (no. 46827/99 and 46951/99).

¹⁵ ECtHR, 07 July 1989, *Soering* (A 161), par. 88.

¹⁶ ECtHR, 4 May 2010, *Robert Stapleton* (no. 56588/07), par. 25.

¹⁷ Justice Holmes in *Glucksman v. Henkel*, in E.v.Sliedrecht, *The EAW: Between Trust, Democracy and the Rule of Law*, European Constitutional Law Review, 2007, p. 244-252.

¹⁸ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM/2000/328 final.

¹⁹ *Ramda*, R (on the application of) v Secretary of State for the Home Department, 27 June 2002, www.bailii.org, 10 August 2010.

²⁰ Cour d'Appel de Pau, Chambre de l'Instruction, Arrêt 16.05.03, No. 238/2003, www.legifrance.gouv.fr, 10 August 2010.

²¹ European Parliament resolution on the situation as regards fundamental rights in the European Union, (2000/2231(INI)).

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Therefore, bearing in mind that the principle of mutual recognition is envisaged not only to achieve an improvement in the level of trust and cooperation in the EU, but also to considerably enhance the protection of individual fundamental rights in judicial proceedings, the need to ensure a fine balance between efficiency in fighting cross-border criminality and ensuring human rights was stringently felt.

As a premise, judicial celerity and simplicity should not be favoured to the detriment of human rights. The abolition of the principle of double criminality, as well as some other new features seeking to enhance the efficiency of the system, may indeed add positive improvements to hasten and simplify the extradition procedure. Nevertheless, we should not forget that a simpler transfer of persons fleeing from justice needs to be carried out along with the respect of human rights. The existence of a legal domain for procedural safeguards may be viewed as being in the interest of justice; it is also crucial for the establishment of a genuine Area of Freedom, Security and Justice and for the ambition to give citizens a common sense of justice as well as safety in their exercise of the right of free movement throughout the Union²².

As a result, the FD of 13 June 2002 on the EAW and the surrender procedures between Member States doesn't merely aim at strengthening cooperation in the fight against transnational criminality, but also at protecting the fundamental rights and civil liberties of the requested person, as well as respecting the Member States' constitutional provisions on fair trial principles by establishing a minimum set of safeguards in this respect.

For the purpose of the present paper, we have focused our attention on the following guarantees: the mandatory and optional grounds for non-execution of the EAW, the right to a fair trial, the right to liberty and security and, finally, the speciality rule.

II.2. Grounds for non-execution of the EAW

Articles 3 and 4 of the FD set out the grounds upon which the execution of the EAW shall or may be refused by the executing state. In this regard, two features of the EAW - the partial abolition of the principle of double criminality and the almost complete abolition of the nationality exception as grounds for refusal to surrender - led to debates at the national level in the Member States.

Firstly, Art. 2(2) abolishes the principle of double criminality for 32 listed offences, in respect of which, if they are punishable in the issuing state by at least three-year custodial sentence, and an EAW must be enforced by the executing state even if it does not consider the act in question a criminal offence. Double criminality may still be required for other than these 32 offences and also for listed offences that fall below the three-year limit. The abolition of this double criminality check for the serious offences provided in Art. 2.2. is an inherent application of the principle of mutual recognition within a single area of criminal justice. The basic idea is that Member States share a sufficiently common approach towards basic elements of criminality which led to a high level of mutual trust and the differences in approach related to this list of more serious crimes should not be an obstacle to judicial cooperation. However, some concerns, related to the state's sovereign right to decide upon what acts should be criminalised in national law, appeared in the Member States in response to this development. This situation is a consequence of the fact that there are some considerable differences of approach across national jurisdictions and they may lead to a situation where a state is required to surrender an own national to face trial for an offence which it does not itself criminalise. The Art. 2(2) list has also been criticised for being overly generic and imprecise and thus it may offend the principle of the legality of criminal offences and penalties because it deprives individuals of knowing precisely whether acts they have committed constitute a criminal offence and, if so, what are the penalties for that. Such a claim was one of several made before the ECJ challenging the validity of the EAW in *Advocaten Voor de Wereld*²³. The ECJ recognised that the principle of the legality of criminal offences and penalties (*nullum crimen, nulla poena sine lege*) is one of the general legal principles underlying the constitutional traditions common to the Member States and it implies that legislation must define clearly

²² J. Apap and S. Carrera, *The European Arrest Warrant – A Good Testing Ground for Mutual Recognition in the Enlarged EU?*, Centre for European Policy Studies, February 2004, www.ceps.be, 5 August 2010.

²³ ECJ, C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, par. 52-54.

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offences and the penalties which they attract in which situation the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable. However, the Court rejected the claim on the basis that the EAW does not seek to harmonise the constituent elements of the criminal offences in question. Rather, as stipulated in Art. 2(2), it enables surrender for certain listed offences without verification of the double criminality if they attract certain punishments in the issuing Member State “and as they are defined by the law of the issuing state”. It follows that, in so far as it dispenses with verification of the requirement of double criminality in respect of the offences listed in that provision, Art. 2(2) of the FD is not invalid on the ground that it infringes the principle of the legality of criminal offences and penalties.

Secondly, the FD does not provide as a ground for refusal the nationality exception, hence Member States cannot refuse to surrender a person on ground that he is an own national. In a single area of criminal justice built upon shared values and hence mutual trust, all criminal suspects should be treated equally, regardless of geographical location and nationality. However, nationality can constitute an optional ground for refusal to execute an EAW in circumstances where the executing state undertakes to enforce a previously issued sentence itself and an executing state may make surrender of an own national conditional upon return of that individual so that any sentence may be served locally²⁴.

a) Mandatory grounds for non-execution of the EAW

According to Art. 3, the judicial authority of the Member State of execution shall refuse to execute the EAW if amnesty covers the offence in its national legislation, if the requested person has already been tried for the same offence in another Member State and if the offender has not reached the age of criminal responsibility under its national law. In what concerns the most common and important mandatory ground for refusal provided by Art. 3(2), the FD on the EAW has made considerable progress in the efforts to deal with the problem of multiple prosecutions within the EU. The introduction of the *ne bis in idem* principle encompassing the final judgements of all Member States as a mandatory requirement for refusal is a major accomplishment. The *ne bis in idem* principle is a general principle of criminal law which has been established as an individual right in international legal instruments and it was enshrined in Art. 54 of CISA²⁵.

In the EAW FD there is a distinction between final judgements, prosecution and pending proceedings. In the case of final judgements the *ne bis in idem* principle leads to a mandatory ground for refusal – whenever a final judgement has been passed in a Member State, all other states should abide by this decision. The executing authority will have to assess all prior judgements in respect of the act under scrutiny, irrespective of whether they derive from the issuing state, the executing state or another Member State.

The ECJ dealt with *ne bis in idem* principle several times related to art. 54 of CISA stating that “it is settled case-law that Art. 54 of the CISA has the objective of ensuring that no one is prosecuted for the same acts in several Contracting States on account of the fact that he exercises his right to freedom of movement (...). It ensures that persons who, when prosecuted, have their cases finally disposed of are left undisturbed. They must be able to move freely without having to fear a fresh prosecution for the same acts in another Contracting State”²⁶. Later, it ruled that “the *ne bis in idem* principle (...) is applicable to criminal proceedings instituted in a Contracting State against an accused whose trial for the same acts as those for which he faces prosecution was finally disposed of in another Contracting State, even though, under the law of the State in which he was convicted, the sentence which was imposed on him could never, on account of specific features of procedure such as those referred to in the main proceedings, have been directly enforced”²⁷.

²⁴ M. Fletcher, R.Löff, B. Gilmore, *EU Criminal Law and Justice*, Edward Elgar Publishing Limited, UK, 2008, pag. 114-115.

²⁵ A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

²⁶ ECJ, C-467/04, *Criminal proceedings against Giuseppe Francesco Gasparini and Others*, par. 27.

²⁷ ECJ, C-297/07, *Criminal proceedings against Klaus Bourquain*, par. 52.

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Regarding the criteria for deciding whether an act can be deemed the same as the act an extradition request refers to, the ECJ decided that “the relevant criterion for the purposes of the application of that article is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected”²⁸. This is the similar interpretation of the notion of “same acts” as the one from another judgment, where is also mentioned that it is for that national court to assess whether the degree of identity and connection between all the facts to be compared is such that it is possible, in the light of the said relevant abovementioned criterion, to find that they are “the same acts” within the meaning of Art. 54 of the CISA²⁹.

Also, the ECJ has interpreted “finally judged” to include transactions and other out-of-court settlements, stating that “where (...) further prosecution is definitively barred, the person concerned must be regarded as someone whose case has been ‘finally disposed of’ for the purposes of Art. 54 of the CISA in relation to the acts which he is alleged to have committed. In addition, once the accused has complied with his obligations, the penalty entailed in the procedure whereby further prosecution is barred must be regarded as having been ‘enforced’ for the purposes of Art. 54”³⁰.

b) Optional grounds for non-execution. Guarantees to be given by the issuing Member State in particular cases

In addition to the mandatory grounds for non-execution, there are eight optional grounds for non-execution listed in Art. 4, which provides that the executing judicial authority may in some cases refuse to execute the EAW³¹.

Concerning the decision of a judicial authority not to prosecute the person for the offence on which the EAW is based, what is in fact meant in Art. 4(3) is the situation of out-of-court settlement. Non-execution in this case is optional, which means that cumulative proceedings are still possible within the EU. In *Turanský* ECJ settled that “the principle *ne bis in idem* (...) does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State”³².

Therefore, the EAW regime allows for the optional application of the *ne bis in idem* principle in the case of out-of-court settlements. Still, it is not clear whether the decision by the prosecutor must be approved by a court, who the judicial authorities mentioned in the article are and which decisions are covered. Indeed, Art. 6(3) states that Member State define who the competent judicial authorities are for the EAW. Article 4(3) refers to the same judicial authorities.

The major asset of these rules is that, in recognizing *res judicata* as a bar to surrender, the final judgements and out-of-court settlements in all Member States are considered to be equivalent with those emanating from the executing state³³.

²⁸ ECJ, C-288/05, *Criminal proceedings against Jürgen Kretzinger*, par. 37.

²⁹ ECJ, C-367/05, *Criminal proceedings against Norma Kraaijenbrink*, par. 36.

³⁰ ECJ, C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, par. 30.

³¹ If, in one of the cases referred to in Art. 2(4), the act on which the EAW is based does not constitute an offence under the law of the executing Member State; where the person is being prosecuted in the executing state for the same act; where the judicial authorities of the executing state have decided either not to prosecute for the offence on which the warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings; where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law; if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts; if the EAW 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 State and it undertakes to execute the sentence or detention order in accordance with its domestic law; where the EAW relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in its territory or have been committed outside its territory and the law of the executing state does not allow prosecution for the same offences when committed outside its territory.

³² ECJ, C-491/07, *Criminal proceedings against Vladimir Turanský*, par. 45

³³ J.A.E. Vervaele, *The transnational ne bis in idem principle in the EU. Mutual recognition and equivalent protection of human rights*, <http://www.utrechtlawreview.org/>, 02 August 2010

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Another one of the grounds listed in Art. 4 (par. 6) sets out a ground for optional non-execution of the EAW pursuant to which the executing judicial authority may refuse to execute such a warrant issued for the purposes of execution of a sentence 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 that sentence in accordance with its domestic law. This ground for non-execution is also a guarantee of the right to family life, because there is a possibility that the EAW would lead to significant periods of custody on remand at a great distance from ones family or residence and this could eventually give rise to breaches of Art. 8 of ECHR.

Having recalled that the terms “resident” and “staying” – which determine the scope of application of the provision in question – must be interpreted in a uniform manner, the ECJ explained that this ground for optional non-execution “has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person’s chances of reintegrating into society when the sentence imposed on him expires. Accordingly, the terms ‘resident’ and ‘staying’ cover, respectively, the situations in which the person who is the subject of an EAW has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence (...). In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term ‘staying’ within the meaning of Art. 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State”³⁴.

In *Wolzenburg* ECJ ruled that “Art. 4(6) (...) must be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of an EAW laid down in that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration”³⁵.

Finally, the execution of the EAW by the executing judicial authority may be subject to one of three conditions listed in Art. 5. First, if the sentence had been passed against the individual in absentia and he has not been summoned to the trial or otherwise informed of the trial, he must have an opportunity to apply for retrial. Second, where a life sentence could be imposed for the crime in question, the execution of the arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure. Lastly, where a person who is the subject of an EAW for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing state in order to serve there the custodial sentence or detention order passed against him in the issuing state. These conditions are in fact situations when the execution of an EAW may be refused if such a condition is provided by the national law of the executing Member State and it is not fulfilled in that certain case.

Regarding the first of these three conditions, related to an EAW issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia, it must be pointed out the adoption of the 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. The provisions of this Framework Decision amend FD 2002/584/JHA through the insert of a new Article (4a) which provides a new optional ground for

³⁴ ECJ, C-66/08, *Criminal proceedings against Szymon Kozłowski*, par. 45, 46, 54.

³⁵ ECJ, C-123/08, *Criminal proceedings against Dominic Wolzenburg*, par. 53.

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refusal related to decisions rendered following a trial at which the person was not present. Also, the first paragraph of Art. 5 is repealed. Still, the provisions of the FD on EAW shall continue to apply in the versions in which they were adopted originally, until 28 March 2011 at the earliest. However, taking into account that the right of the accused person to be present in person at the trial is included in the right to a fair trial according to Art. 6 of the ECHR, the changes brought up by this new Framework Decision will be analyzed subsequently, together with the other guarantees of the right to a fair trial provided by the FD on EAW.

c) The breach of human rights - a domestic ground for refusal?

In the context of the EAW, the question is if, despite the absence of any provision in the FD for refusing or conditioning surrender of an individual on human rights grounds, a broad reading of other provisions that refer to rights protection (Art. 1(3) with the 12th and 13th recitals of the Preamble), empowers national legislatures and national judicial authorities to do that. In some Member States, the legislation implementing the FD includes a human rights safeguard. Section 21 of the UK Extradition Act 2003, for example, obliges national judges to consider whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 and where it is deemed incompatible, the person must be discharged.

This is one of the concerns raised by the 2007 Commission's Report, where it mentions that "some Member States have provided for additional mandatory grounds for refusal. Many of these correlate to the Art. 4 optional ground for refusal or to fundamental rights and are discussed under their respective headings (...). However, (...) they go beyond Framework Decision"³⁶. The report mentions the additional grounds, among which some concern human rights. For example, it is submitted that: an executing authority from Italy may refuse to execute an EAW if the requested person is pregnant or is the mother of a child less than 3 years old, except in circumstances of an exceptional gravity; Denmark shall refuse surrender on the ground of possible threat with torture, degrading treatment, violation of due process as well as if the surrender appears to be unreasonable on humanitarian grounds; in Lithuania, the Criminal Code provides for a mandatory ground for refusal in case where the surrender of the person would be in breach of fundamental rights and (or) liberty³⁷. These are some of the many examples mentioned in the 2007 Commission's report. In 2009, in a final report adopted by the Council of the EU, it is stated that "there are diverging tendencies in the transposition by the Member States of the optional and mandatory grounds for non-execution laid down in the FD (...) Some experts noted the different approaches to incorporating Art.1(3) and related recitals 12 and 13 of the FD into the implementation law and the creation of a specific mandatory ground for refusal on this basis in some Member State.(...)The Council, however calls upon Member States to review their legislation in order to ensure that only ground for non-execution permitted under the FD may be used as a basis for refusal to surrender"³⁸.

Thus, a study of the EAW in practice concludes that courts in general trust that the individual rights are respected and therefore execute warrants unless they have evidence to the contrary. For example, a British court refused to follow the argument of a Spanish terrorist-suspect that he will be maltreated in Spanish prisons by arguing: "If our courts were to accede to such arguments, they would be defeating the assumption which underpins the FD that Member States should trust the integrity and fairness of each other's judicial institutions. This is a course that we should not take." In a similar case, the British court held that "Spain is a western democracy, subject to the rule of law, a signatory to the ECHR and party to the FD; it is a country which applies the same human rights standards and is subject to the same international obligations as

³⁶ Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 12 July 2007, COM(2007) 407 final.

³⁷ Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, 12 July 2007, COM(2007) 979.

³⁸ Final report on the fourth round of mutual evaluations "The practical application of the EAW and corresponding surrender procedures between Member States", 18 May 2009.

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the UK. These are surely highly relevant matters which strongly militate against refusing extradition on the grounds of the risk of violating those standards and obligations”³⁹.

In respect to Romania, although the law implementing the FD does not provide as a ground for non-execution the breach of fundamental rights, fact which is observed in Council’s report on Romania, still there are courts who refuse to execute an EAW on grounds of human rights protection⁴⁰. For example, in a decision given by a Romanian Court of Appeal it is stated that “Art.1 (3) of the FD refers to Art. 6 of TEU which, in par.2, provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. It appears, without any doubt, that the execution of the EAW shall be done under the condition that fundamental rights and liberties – in this case the right to liberty– are respected at the level of the guarantees offered by ECHR and it is the court’s obligation to ensure this respect, before the verification of any other bars to surrender which may result from national law”⁴¹. In this case, the Romanian court decided that there had been a breach of Art. 5 par. 3 of ECHR and refused the execution of the EAW. Though, this is not the opinion of the Romanian High Court which stated in a decision that “the Romanian court, as an executing judicial authority, doesn’t have the jurisdiction to verify the lawfulness of the arrest decided by another Member State and it cannot state that this arrest has been imposed by the competent authorities through a breach of Art. 5 of ECHR”⁴².

There has been reluctance on the part of certain national legislatures and judicial authorities to remain within the agreed and stipulated confines of management of the mutual recognition principle and many have gone beyond the contours of the permissible conditions and exceptions outlined above when implementing the FD. Acting in this manner is incompatible with the terms, but especially with the spirit of the FD, in that it evidences a degree of mutual distrust among the Member States⁴³.

II.3. Fair trial rights

Generally, the right to a fair trial is understood as the array of procedural safeguards enshrined in Art. 6 (1) of the ECHR, namely the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Similarly, Art. 47 and 48 of the CFREU refer explicitly to the right to a fair trial, as well as the presumption of innocence and the right of defence. In accordance with Art. 52(3) of the abovementioned instrument, these rights have the same meaning and scope as those guaranteed by the ECHR.

Surprisingly, no such correspondent exists in the body of the FD on the EAW. However, the right to a fair trial has not been altogether forgotten. The very first reference to this fundamental right is found in the second thesis of recital 12 of the Preamble, stating that the FD does not prevent a Member State from applying its constitutional rules relating to due process. As it will be further demonstrated in the paper, the principle has been embodied through the existence of circumscribed guarantees scattered all over the text of the FD.

a) Right to be informed

Art. 11 of the FD, entitled “Rights of a requested person”, provides that when a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the EAW and of its contents, and also of the possibility of consenting to surrender to the issuing judicial authority. This guarantee corresponds to Art. 5 (2) ECHR, which stipulates that everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of

³⁹ N.Keijzer, E.V. Sliedregt, *The EAW in practice*, The Hague: TMC Asser Press, 2009; decisions quoted by A. Lazowsky, S.Nash, pag. 46.

⁴⁰ In Romania, the EAW Framework Decision was implemented by Law No. 302 of 28 June 2004, amended by Law No. 224/2006 and Law No. 222/2008. In the Evaluation report on the fourth round of mutual evaluations “The practical application of the EAW and corresponding surrender procedures between Member States”-Report on Romania from 20 May 2009, it is mentioned that “the grounds for refusal listed in the implementing law are in line with the FD. None of the grounds for non-execution envisaged as optional in the FD are taken as mandatory in the Romanian implementing law”.

⁴¹ Brasov Court of Appeal, Decision No. 30/F/N/24 March 2008, www.jurindex.ro, 02 August 2010.

⁴² The High Court of Cassation and Justice, Decision No. 581/18 February 2008, www.jurindex.ro, 02 August 2010.

⁴³ M. Fletcher, R.Löf, B. Gilmore, *EU Criminal Law and Justice*, Edward Elgar Publishing Limited, UK, 2008, p. 118.

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any charge against him. Art. 6 (3)(a) ECHR also stipulates that everyone charged with a criminal offence has the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.

b) Right to legal assistance

The second paragraph of Art. 11 establish that a requested person who is arrested for the purpose of the execution of an EAW shall have a right to be assisted by a legal counsel in accordance with the national law of the executing Member State. According to the Commission, the right to legal assistance is probably the key issue in procedural rights for requested persons. All requested persons are in a better position if they have a lawyer, and it is true that a person who is represented by a lawyer is in a far better position as regards enforcement of all his other rights, partly because he is better informed of those rights and partly because a lawyer will assist him in ensuring that having his rights be respected⁴⁴.

This guarantee goes in line with Art. 47 of the CFREU which provides that everyone shall have the possibility of being advised defended and represented. In addition, paragraph 3 of this provision demands that legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. In accordance with Art. 52(3) of the abovementioned instrument, these rights have the same meaning and scope as those guaranteed by the ECHR.

The right to legal assistance is covered by Art. 6 (3) (b) and (c) of the ECHR, which stipulates the right of every suspect to have the necessary time and facilities at his disposal to prepare his defence properly. The suspect has the right to choose to defend himself, to be assisted by a lawyer of his own choosing, or to have a lawyer assigned to him in case he does not have the means to pay for a lawyer himself. The right to legal assistance arises immediately upon arrest, although a reasonable time is allowed for the lawyer to arrive⁴⁵. Notwithstanding the fact that the requested person is entitled to defend himself, obligatory legal assistance can be prescribed under certain circumstances. In this respect, it must be highlighted that Art. 3 of the Proposal for a Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the EU⁴⁶ established the obligation to provide legal assistance when the suspect is the subject of a EAW.

Even if it is widely acknowledged that legal assistance has to be effective and the State is under the obligation to ensure that the lawyer has the information necessary to conduct a proper defence⁴⁷ and that if legal assistance is ineffective, the State is obliged to provide the requested person with another lawyer⁴⁸ the ECtHR has clearly held that the lawyer's conduct is essentially an affair between the lawyer and his client. This is an important recognition by the ECtHR of the independence of the lawyer. However, the requested person should not be burdened with the risk of ineffective legal assistance. Therefore the ECtHR has held that "A state cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal purposes; (...) under Art. 6 (3)(c) the contracting States are required to intervene only if a failure by counsel to provide effective representation is manifest or sufficiently brought to their attention"⁴⁹. The requested person does not have to prove that he has been prejudiced due to lack of effective legal assistance⁵⁰, nor is it necessary that damages have arisen⁵¹.

In this respect, the Romanian High Court established in one of its decisions that this right was violated in the procedure regarding the execution of an EAW, as the lower court dismissed the claim of the requested person's lawyer regarding the postponement of the hearing and appointed an ex officio lawyer.

⁴⁴ Commission's Green Paper "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the EU", Brussels, 19 February 2003, COM (2003) 75 final; Proposal for a "Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union", Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS).

⁴⁵ ECtHR 8 February 1996, *John Murray* (Reports 1996-I).

⁴⁶ Proposal for a "Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union", Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS).

⁴⁷ ECtHR 9 April 1984, *Goddie* (A 76); ECtHR 4 March 2003, *Öcalan*, (no. 63486/00).

⁴⁸ ECtHR 13 May 1980, *Artico* (A 37).

⁴⁹ ECtHR 24 November 1993, *Imbrioscia* (A 275), par. 41.

⁵⁰ ECtHR 13 May 1980, *Artico* (A 37).

⁵¹ ECtHR 19 February 1991, *Alimena* (A 195-D).

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The High Court took the view that the lower court violated the requested person's right of defence, as the appointed lawyer did not have at disposal the necessary time and facilities to thoroughly study the case, being thus unable to provide an effective legal assistance to the client⁵².

As regards free legal aid, in accordance with the case law of the ECtHR, provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy⁵³. Therefore, legal aid is not unconditional. The ECtHR indicates three factors which should be taken into account⁵⁴: the seriousness of the offence and the severity of the potential sentence, the complexity of the case and the social and personal situation of the defendant. Member States are free to operate the system that appears to them to be the most effective as long as free legal advice remains available where the interests of justice demand it⁵⁵.

Apart from the general principle established in Art. 11, the FD also provides some applications. Thus, in the case the requested person consents to surrender or renounces the speciality rule, the second paragraph of Art. 13 demands that each Member State shall adopt the measures necessary to ensure that consent and, where appropriate, renunciation, are established in such a way as to show that the person concerned has expressed them voluntarily and in full awareness of the consequences. To that end, the requested person shall have the right to legal counsel. Similarly, Art. 27 par. 3(f) states that renunciation (to the speciality rule) shall be drawn up in such a way as to make clear that the person has given it voluntarily and in full awareness of the consequences and, to that end, the person shall have the right to legal counsel.

c) Right to interpretation and translation

This guarantee also stems from the second paragraph of Art. 11 which provides that a requested person who is arrested for the purpose of the execution of an EAW shall have a right to be assisted by an interpreter in accordance with the national law of the executing Member State. It is highly important among fair trial rights, especially in those situations where the requested person is not a national of the executing Member State.

The CFREU does not specifically refer to this guarantee. However, it can be circumscribed to the right of defence prescribed by Art. 48. In addition, Art. 6 (3) (e) of the ECHR provides that every suspect is entitled to have the free assistance of an interpreter if he cannot understand or speak the language used in court. The right to free interpretation extends to all parts of the criminal proceedings, which means that Member States have to provide an interpreter as soon as possible after it has come to light that the suspect is in need of an interpreter⁵⁶. This seems to be decided on an ad hoc basis by the official the suspect comes into contact with (police officers, lawyers, court staff, etc.). The ultimate duty to ensure fairness of the proceedings rests with the trial judge, since he is the ultimate guardian of the fairness of the proceedings⁵⁷.

The recently adopted Directive on the rights to interpretation and to translation in the criminal proceedings, states in Art. 2 (5) that in proceedings for the execution of an EAW, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand or speak the language of the proceedings, with interpretation⁵⁸.

On the other hand, the right to free translation of documents is not explicitly mentioned in Art. 6 ECHR. It is, however, established in ECtHR case law and incorporated in the proposed Directive. The ECtHR held that only those documents, which the defendant "needs to understand in order to have a fair

⁵² The High Court of Cassation and Justice, Decision no. 945/14 March 2008, www.scj.ro, 12 August 2010.

⁵³ ECHR Judgment of 9.10.1979, *Airey* (A 32), par.11.

⁵⁴ ECtHR 24 May 1991, *Quaranta* (A 205), par. 35.

⁵⁵ Proposal for a "Council Framework Decision on certain Procedural rights in Criminal Proceedings throughout the European Union", Brussels, 28 April 2004, COM (2004) 328 final, 2004/0113 (CNS), section 60-61.

⁵⁶ ECtHR 28 November 1978, *Luedicke, Belkacem and Koç* (A 29).

⁵⁷ ECtHR 24 September 2002, *Cuscani* (no. 32771/96).

⁵⁸ EU Parliament and Council, "Directive on the rights to interpretation and to translation in the criminal proceedings", Brussels, 31 May 2010, 1420/2010. The Directive has been adopted by the EU Parliament on the 16th June 2010 and is expected to be confirmed by the EU Council in September 2010.

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trial”, need to be translated⁵⁹. The rules on how much material is translated vary according to the Member State and also in accordance with the nature of the case. Pursuant to the proposed Directive, essential documents that require translation include decisions depriving a person of his liberty, the charge/indictment and any judgment. Moreover, Art. 3(5) provides that in proceedings for the execution of an EAW, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the EAW is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document. In addition, the competent authorities shall decide in any given case whether any other document is essential, but the onus remains on the defence lawyer to ask for translations of any documents he considers necessary over and above what is provided by the authorities.

It should be noted that Member States are required to cover the costs of the interpretation and translation and that they are expected to ensure a sufficient quality of the interpretation and translation in order to safeguard the fairness of the proceedings.

d) Hearing of the requested person

Pursuant to Art. 14 of the FD, where the arrested person does not consent to his or her surrender as referred to in Art. 13, he or she shall be entitled to be heard by the executing judicial authority, in accordance with the law of the executing Member State. Where the EAW has been issued for the purpose of conducting a criminal prosecution and the executing judicial authority must either agree that the requested person should be heard according to Art. 19 or agree to the temporary transfer of the requested person. In this respect, the abovementioned article states that the requested person shall be heard by a judicial authority, assisted by another person designated in accordance with the law of the Member State of the requesting court. The requested person shall be heard in accordance with the law of the executing Member State and with the conditions determined by mutual agreement between the issuing and executing judicial authorities. The competent executing judicial authority may assign another judicial authority of its Member State to take part in the hearing of the requested person in order to ensure the proper application of this Article and of the conditions laid down.

According to Art. 18 par. 3, in the case of temporary transfer, the person must be able to return to the executing Member State to attend hearings concerning him or her as part of the surrender procedure.

e) Reasonable time spans

Art. 17 par. 1 of the FD states that an EAW shall be dealt with and executed as a matter of urgency. Thus, the procedure must be rapid and effective. The overriding concern for celerity within the context of the EAW led to confining the procedure to imperative deadlines. Following the arrest of the person the judicial authority of the executing State has 60 days to legislate on surrender with a possible extension of 30 additional days for serious grounds and a reduced period of 10 days in the case of the consent of the person to his/her surrender. Although the possibility of not meeting these deadlines persists, the average time taken for execution has decreased from nine months to 43 days, which represents undoubtedly the guarantee of a better respect of the right to a fair trial⁶⁰.

Nonetheless, pursuant to par. 4 of Art. 23, the surrender may exceptionally be temporarily postponed for serious humanitarian reasons, for example if there are substantial grounds for believing that it would manifestly endanger the requested person's life or health. The execution of the EAW in this situation shall take place as soon as these grounds have ceased to exist.

f) Right to an effective remedy

This fundamental right is enshrined in the first paragraph of Art. 47 of the CFREU, which provides that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal and corresponds to Art. 6 and 13 of the ECHR. However, in Community

⁵⁹ ECtHR 19 December 1989, *Kamasinski* (A 168); see also ECtHR 14 January 2003, *Lagerblom* (no. 26891/95).

⁶⁰ Commission's reports of 23rd February 2005 and 24th January 2006 based on article 34 of the framework decision by the Council of 13th June 2002 relative to the EAW and surrender procedures between Member States, COM (2005) 63 final and COM (2006) 8 final

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law the protection is more extensive since it guarantees the right to an effective remedy before a court. The ECJ enshrined the principle in its case-law long before the existence of the FD on EAW through judgments such as *Johnston*⁶¹, *Heylens*⁶² and *Borelli*⁶³.

The FD on EAW complies with this right through Art. 5 which states that the executing State can subordinate the execution of the warrant to the acquisition by the issuing State of guarantees, the final aim of which are to protect the person. This faculty includes cases of decisions *in absentia* and of infractions punished by a life sentence. Thus, according to the first paragraph of the aforementioned article, where the EAW has been issued for the purposes of executing a sentence or a detention order imposed by a decision rendered in absentia and if the person concerned has not been summoned in person or otherwise informed of the date and place of the hearing which led to the decision rendered in absentia, surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the EAW that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment⁶⁴.

Furthermore, if the offence on the basis of which the EAW has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.

g) Rights granted by Council Framework Decision 2009/299/JHA

As a premise, recital 1 of the Preamble refers explicitly to the right of an accused person to appear in person at the trial, which is included in the right to a fair trial provided for in Art. 6 of the ECHR, as interpreted by the ECtHR. In order to exercise this right, the person concerned needs to be aware of the scheduled trial. Under this FD, the person's awareness of the trial should be ensured by each Member State in accordance with its national law, it being understood that this must comply with the requirements of the Convention.

The provisions of this amending FD set conditions under which the recognition and execution of a decision rendered following a trial at which the person concerned did not appear in person should not be refused. These are alternative conditions; when one of the conditions is satisfied, the issuing authority, by completing the corresponding section of the EAW, gives the assurance that the requirements have been or will be met, which should be sufficient for the purpose of the execution of the decision on the basis of the principle of mutual recognition.

The right to a retrial or an appeal is reinforced by the FD. Thus, recitals 11 and 12 of the Preamble provide that such a retrial, or appeal, is aimed at guaranteeing the rights of the defence and is characterised by the following elements: the person concerned has the right to be present, the merits of the case, including fresh evidence are re-examined, and the proceedings can lead to the original decision being reversed. The right to a retrial or appeal should be guaranteed when the decision has already been served as well as, in the case of the EAW, when it had not yet been served, but will be served without delay after the surrender. Moreover, the retrial or appeal shall begin within due time after the surrender.

The FD also addresses the right of the requested person to be informed. Pursuant to Art. 13, if an EAW is issued for the purpose of executing a custodial sentence or detention order and the person concerned has not previously received any official information about the existence of the criminal proceedings against him or her, nor has been served with the judgment, this person should, following a request in the executing Member State, receive a copy of the judgment for information purposes only. The issuing and executing

⁶¹ ECJ, C-222/84, *Johnston*.

⁶² ECJ, C-222/86, *Heylens*.

⁶³ ECJ, C-97/91, *Borelli*.

⁶⁴ Art. 5 par. 1 of the FD on EAW is still in force, as the Framework Decision 2009/299/JHA which repeals it, has not yet entered into force.

judicial authorities should, where appropriate, consult each other on the need and existing possibilities to provide the person concerned with a translation of the judgment, or of essential parts thereof, in a language that the person understands.

Finally, it should be noted that the FD demands that the detention of that person awaiting such retrial or appeal shall, until these proceedings are finalised, be reviewed in accordance with the law of the issuing Member State, either on a regular basis or upon request of the person concerned. Such a review shall in particular include the possibility of suspension or interruption of the detention.

II. 4. Right to liberty and security

Art. 6 CFREU provides that everyone has the right to liberty and security of person. This corresponds to the rights guaranteed by Art. 5 of the ECHR, and in accordance with Art. 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR. These standards represent an important guarantee afforded to the suspect against the risk of arbitrary decisions regarding its liberty⁶⁵. Therefore, preventive arrest must remain an exception, whilst freedom should be the rule⁶⁶.

In order to comply with these requirements, the FD on EAW enforces two main guarantees. Thus, Art. 12 establishes that when a person is arrested on the basis of an EAW, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding. Moreover, Art. 26 requires that the issuing Member State deducts all periods of detention arising from the execution of an EAW from the total period of detention to be served in the issuing Member State as a result of a custodial sentence or detention order being passed. To that end, all information concerning the duration of the detention of the requested person on the basis of the EAW shall be transmitted by the executing judicial authority or the central authority to the issuing judicial authority at the time of the surrender.

Regarding the practical implications of this guarantee, it should be mentioned that in 2008, a Romanian Court of Appeal refused to execute an EAW concerning a Romanian citizen issued by the Hungarian judicial authorities as it considered that the requested person's right to liberty and security was violated⁶⁷. The Court took into consideration the circumstances of the case, namely that the requested person had been convicted by the Hungarian Courts to 4 years imprisonment. Previously, he had remained in pre-trial arrest for a period of 3 years and 4 months, after which he was released. The Romanian Court argued that the execution of an EAW must ensure the same level of protection of the requested person's fundamental rights as afforded by the ECHR and based its reasoning on Art. 1 (3) of the FD on EAW. Therefore, considering that, the pre-trial detention had surpassed what was considered to be a reasonable period of time according to ECtHR case-law, the Court refused to execute the EAW⁶⁸. However, the Court of Appeal's decision was reversed by the High Court, which took the view that a Romanian court, as an executing judicial authority, does not have jurisdiction to verify if the pre-trial arrest ordered by the judicial authority of the issuing state was lawful and sustained and, therefore, it cannot state that this measure violates Art. 5 of the ECHR. The national court's jurisdiction in this procedure resumes to verifying the compliance with the formal requirements of the EAW and the incidence of a possible ground for non-execution of those expressly provided by law⁶⁹.

⁶⁵ ECtHR, 19 May 2004, *Gusinskiy* (no. 70276/01).

⁶⁶ ECtHR, 27 June 1968, *Wemhoff* (no 2122/64).

⁶⁷ Braşov Court of Appeal, decision no. 30/F/N, 24 March 2008, www.jurindex.ro, 10 August 2010.

⁶⁸ ECtHR, 07 May 1974, *Neumeister*, (A 017), ECtHR, 2 December 2003, *Imre* (no 53129/99), ECtH, 6 April 2000, *Labita* (no 26772/95)

⁶⁹ The High Court of Cassation and Justice, Decision no. 581/18 February 2008. In the same line are Decision no. 400/24 April 2007, Decision no 2862/28 May 2007 and Decision no. 4045/ 30 August 2007 of the High Court, www.scj.ro, 10 August 2010.

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It must be mentioned that the lower courts embraced the High Court's point of view and no decision refusing the execution of an EAW on grounds that the requested person's fundamental rights granted by the ECHR have been violated by the issuing state was pronounced in 2009⁷⁰.

II.5. The Speciality Principle

Generally speaking, the principle of speciality in the field of the EAW restricts the powers of the issuing judicial authorities which received a person surrendered from the executing state. The prosecuting state may exercise its criminal jurisdiction only within the limits and the conditions of surrender which have been checked and approved by the sending state. The speciality rule is designed to protect the right of the person surrendered not to be prosecuted or to have to serve a sentence which refers to facts committed prior to his surrender, other than those for which his surrender was granted. The background to this rule was the concern that the requesting state would limit its request to acts for which surrender would be granted and to conceal its intent to try the requested person for other facts, for instance facts where double criminality did not prevail. Without the speciality rule, the requesting state will have the possibility, once it has custody of the requested person, to "settle" the case it would otherwise not have been able to do so⁷¹.

The right to speciality is stipulated in Art. 27 and 28 of the FD. According to Art. 27 (2), "a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered". Art. 28 refers to the surrender of a person to a Member State, other than the executing Member State, pursuant to an EAW issued for an offence committed prior to his or her surrender and also to the extradition of the surrendered person to a third State.

The exceptions from the rule stipulated by Art. 27(2) are found in paragraphs 1 and 3 of the same article. The right to speciality may be renounced by the Member States in general, by the person concerned (before or after surrender) and by the executing judicial authority. A further category of exceptions from the speciality rule concerns the relevant sanctions⁷² and the specific behaviour of the surrendered person, namely his decision to remain in the prosecuting country. In the situation when the offence in question is not punishable by a custodial sentence or detention order, a requesting Member State may initiate criminal proceedings and sentence the surrendered person because, in this particular case, the person is neither during the proceedings nor as a result thereof effectively restricted is his personal liberty (fines or other sanctions may be imposed).

Since the rule of speciality also applies in cases of subsequent surrender or extradition, Art. 28 provides for the surrender to another Member State than where the original request was issued. The subsequent surrender to another Member State is set out in paragraphs 1-3. The subsequent extradition to a third state (a non-EU Member State) is addressed in Art. 28(4). In general, a subsequent surrender requires the consent of the executing Member State or the person surrendered or the executing judicial authority. Consent to subsequent extradition may only be given by the competent authority of the surrendering Member State, and not by the person concerned. Further, Art. 28 stipulates exceptions to the right to speciality which are only applicable for "subsequent surrender" and not for "subsequent extradition"⁷³.

In a recent case concerning the interpretation of Art. 27 of the FD, the ECJ stated that "in order to establish whether the offence under consideration is an 'offence other' than that for which the person was surrendered within the meaning of Art. 27(2) (...), it must be ascertained whether the constituent elements of the offence, according to the legal description given by the issuing State, are those in respect of which the person was surrendered and whether there is a sufficient correspondence between the information given in

⁷⁰ EU Council - Evaluation Report on the Fourth Round of Mutual Evaluations "The practical application of the European Arrest Warrant and Corresponding Surrender Procedures Between Member States", Report on Romania, 27 April 2009, 8267/1/09 REV 1.

⁷¹ R. Blekxtoon, W. v. Ballegooij, *Handbook on the European arrest warrant*, T.M.C. Asser Press, The Hague, 2005.

⁷² The offence is not punishable by a custodial sentence or detention order, the criminal proceedings do not give rise to the application of a measure restricting personal liberty and the situation when the person could be liable to a penalty or a measure not involving the deprivation of liberty, although the enforcement of the penalty may result in the restriction of personal liberty.

⁷³ N. Keijzer, E.V. Sliedregt, *The European arrest warrant in practice*, The Hague : TMC Asser Press, 2009.

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the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Art. 3 and 4 of the FD (...). The exception in Art. 27(3)(c) must be interpreted as meaning that, where there is an ‘offence other’ than that for which the person was surrendered, consent must be requested, in accordance with Art. 27(4), and obtained if a penalty or a measure involving the deprivation of liberty is to be executed. The person surrendered can be prosecuted and sentenced for such an offence before that consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for that offence. The exception in Art. 27(3)(c) does not, however, preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained, where that restriction is lawful on the basis of other charges which appear in the EAW⁷⁴.

Despite the importance of the speciality rule in the protection of the surrendered person’s rights, there are some concerns regarding the operation of the speciality rule in practice, which may be problematic sometimes. In this respect, in the Council’s report mentioned above concerning the practical application of the EAW it is emphasized the fact that “the speciality rule is a delicate issue as it concerns the position of individuals and procedural safeguards; any change of the system requires thorough reflection and analysis in advance”. The Council encourages Member States to analyse their practice with a view to identifying means of resolving problems associated with the practical application of the speciality rule. The coordination within the Member States should be improved. In doing so, consideration should be given to the possibility of making the notifications envisaged in Art. 27(1) and 28 (1) of the FD⁷⁵.

CONCLUSION

The high degree of interest in the EU towards safeguarding the most important values of society and the guarantees for individuals that take part in social interaction, in the field of law and beyond, was first highlighted by the common intention of Member states to become part to the ECHR, as individual nation and as a separate entity- the EU. Another step was made by the ECJ, in its case-law, by analyzing and debating the problem of human rights prior to the existence of an EU legal document that recognizes them outside the ECHR border. The growing need to ensure security for the citizens at the European level resulted into passing the CFREU a document that not only includes the ECHR rights but also widens the sphere of protection. The tendency to increase protection standards was felt in the field of European cooperation in criminal matters, as well, and this path was highlighted both at the legislative level and in the member states jurisprudence, in a de facto manner. The EAW FD aims to ensure a good balance between efficiency and strict guarantees that the requested person's fundamental rights are respected. In implementing the FD, Member States and national courts have to respect the provisions of the CFREU and the ECHR and to ensure that they are respected

Firstly, passing from previous extradition acts to the current EAW FD enriched as a whole the legal basis for protection, creating a frame of procedural guarantees for the subject of EAW. This leap is recognized by both the EU institutions and the member states. The framework decision’s body comprises itself of numerous guarantees, that even if they are not in direct reference to the ECHR can be easily linked to the rights safeguarded by those provisions: the right to be heard by a judge, the right to a fair trial, the right to legal aid and to an interpreter.

Secondly, the European concern for human rights translated itself in the inclusion of safeguarding human rights principle in the preamble of EAW FD, as a primary requirement for any legal measure in the EAW procedure. Even if this provision does not create, by itself, an additional benefit for the subject of

⁷⁴ ECJ, C-388/08 PPU, *Criminal proceedings against Artur Leymann and Aleksei Pustovarov*.

⁷⁵ Final report on the fourth round of mutual evaluations “The practical application of the EAW and corresponding surrender procedures between Member States” – 18 May 2009.

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EAW and doesn't increase the standard of protection applied, nevertheless, it stands as a proof of European way of thinking and of member states' common legal heritage. It would be desirable that, in the future, the requirement of safeguarding human rights in the EAW proceedings be legislated inside the text of the FD in order to have clear legal force.

Thirdly, the ongoing modification to the EAW FD shows a clear pattern of augmentation in the area of procedural guarantees. The FD 2009/299/JHA is the best example of this process, its main objective being setting the conditions under which a member state can recognize and execute a decision rendered following a trial at which the person concerned did not appear in person, thus assuring the right to a fair trial for the individual involved.

At a jurisprudential level ECJ tried to clarify and unify the provisions of EAW FD in order for member states to reach common ground and to increase the certainty of the procedures. At a national level member states sought to include the ECHR standard in their legal circuit when dealing with the execution of EAW by embracing as a reason for non-execution the breach of individual rights, even if this step goes beyond the boundaries of EAW FD.

Despite all these efforts, criminal law in general remains a legal domain that is resistant to assumptions, generalizations and extending from one case to another the solutions found. By nature criminal law must be clear, predictable and based on solid proofs and EAW proceedings cannot be the exception from the rules. The paradox occurs if we take into consideration that the basis of the EAW proceedings implies a high degree of mutual trust and relies on the assumption that every member state conducts a fair trial and offers all the guarantees for the parties. This assumption, while in a great number of cases turns out to be true, is sometimes contradicted by the constant jurisprudence of ECtHR regarding violations of article 5 or 6 of ECHR. This reality is reflected in the conduct of member states when dealing with the execution of EAW: some of them introduced a distinct reason for non-execution when transposing the FD into national law others analyze the problem of human rights despite the lack of legal basis in the EAW proceedings but almost all of the member states, one way or another, tend to regard the violation of human rights as rising above the blind mutual trust.

Facing this state of affairs, the goal of our paper was to point out that a balance between mutual trust and actively protecting human rights must be embraced and achieved in the EAW procedure. We don't deny that such a stable equilibrium is hard to obtain and preserve but the result of not having it might generate a rupture either in the EAW process, which was designed to be rapid and effective or in the field of protecting human rights, which are the basis of modern law.

Multiple solutions can be elaborated in order to solve this problem, and even if none of them is perfect, some may prove more viable than others. We believe that a suitable solution must be acceptable for all member states and must induce a common response and in the same time must ensure the greatest standard of protection achievable in this set of proceedings.

The first solution is based on total and unconditioned trust between member states and it implies neglecting the issue of human rights protection in the EAW proceedings. In this scenario, all member states will consider that there is no possibility of violating human rights by another member state and they will execute the warrant without taking into consideration this problem. The drawbacks of such a decision might be that it contravenes with a reflex that member states have developed, to at least skim any legal issue for problems related to fundamental rights, it neglects the reality that such violation of human rights from the part of member states is still a reality nowadays and it can be perceived as a way of bypassing the whole system of legal guarantees. In the end this solution may rupture any kind of balance between the 2 principles in discussion and may trigger an attitude of neglect towards the guarantees of a fair trial.

Another radical solution shifts to the opposite pole, by reducing the mutual trust to a minimum, and creating a preliminary stage in the EAW proceedings during which the member state that has to execute the warrant examines if all fundamental rights and guarantees have been observed. The first result one might perceive from this change is a transformation of the mutual trust into mutual distrust. There would also be the

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problem of burdening a procedure that was created with the purpose of rapidly conducting transfers between member states, thus leaving it empty of meaning. As a final disadvantage the strive to respect fundamental rights will transform itself into a breach of these rights in terms of the duration of the trial.

The third solution presents itself as a level-headed change of the EAW FD and creates a sense of equality between the general interest of the member states and the individual interest of the person subjected to this procedure. Another advantage of this solution is that at the root of its existence stands the practice of European states and that it evolved as a natural path in the EAW proceedings. The most appropriate way of balancing mutual trust and the protection of fundamental rights is to include among the mandatory or optional grounds for non-execution of the EAW the breach of human rights and procedural guarantees. If a member state can choose not to execute the EAW if there are solid proves or at least sufficient clues that the other state didn't respect the ECHR during the trial, the mutual trust is not eliminated because it is not a discretionary measure and the individual is protected from arbitrary and illegal measures, in other words all the principles in questioned are abided.

We believe that this solution observes the will of member states which already use in practice the violation of human rights as grounds for non-execution of the EAW, it preserves the principles of European cooperation, mainly mutual trust and efficient proceedings and strengthens the role of fundamental rights in this stage of the criminal trial in accordance to the common legal heritage. There are some issues which must be solved before applying the changes but we believe that inquiring all member states is both a mandatory measure to be taken and the best way to find the proper legislative form.

In our opinion choosing to qualify this reason as optional grounds for non-execution of the EAW is the most efficient way to include it into the Framework decision. We reached this conclusion based on the fact that coming up to the conclusion that another state didn't comply with the ECHR standard includes a subjective factor, a personal belief of the magistrate that cannot have a generally technical approach. For this reason the margins of appreciation of member states has to be wider.

Regarding the criteria of evaluation we think that non-execution for this reason has to apply only if there are solid proves of the violation of human rights. Inserting the condition of solid proof will ensure that the efficiency of proceedings is kept in the same borderlines, that mutual trust is not contested except in cases where member states have serious doubts about fundamental rights protection and the EAW procedure will keep its status of rapidity. Recommendations and guidelines can be created in order to assure a common understanding of "solid proof" terminology and good practice database can be designed to help member states unify their case-law in this legal domain.

The baseline of individual rights protection in pursuing greater judicial cooperation in criminal matters has been consistently expressed by EU leaders: "if serious criminal conduct receives an equivalent response and procedural guarantees are comparable throughout the Union, the possibilities of improving coordination of prosecution, whenever greater efficiency can be reconciled with respect for individual rights, must be examined"⁷⁶.

In this line of ideas, a minor change that is requested, first and foremost by the member states through their judiciary, can help improve not only individual protection of the citizen but can also be a growth factor for the field of judicial cooperation in criminal matters. In terms of cost-benefit analysis the efforts at the EU level and at the national levels are of minor amplitude, in many cases consisting in a simple amendment of the law, while the benefits of the European legal system can turn out to be substantial.

⁷⁶ Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998.