Active personality and non-extradition of nationals in international criminal law at the dawn of the twenty-first century : adapting key functions of nationality to the requirements of International Criminal Justice

Deen-Racsmány, Z.

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The European Arrest Warrant and the Surrender of Nationals Revisited: The Lessons of Constitutional Challenges

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1 INTRODUCTION

In an article co-authored by this writer, published in this Journal, it was concluded in connection with the treatment of the non-extradition of nationals and dual criminality under the European Arrest Warrant[1] that

> the relevant provisions of the instrument as well as its faulty domestic implementing statutes may in fact increase rather than reduce controversies related to requests for the surrender of nationals in Europe.[2]

We have, however, not predicted the wave of (successful) constitutional challenges to the domestic provisions implementing the obligation to surrender nationals for prosecution to other EU members based on European arrest warrants. Central to this omission was the lack of concern with the significance of the establishment under the **[119]** EAW of a highly simplified regime of transfer, 'surrender', different from traditional extradition.

The present contribution addresses these oversights in the light of recent developments. It starts by reviewing the EAW's surrender regime, emphasizing the intention of the drafters to render the widespread, centuries old excuse for refusing the extradition of nationals invalid in this context. It then presents the arguments central to the four decisions rendered to date in domestic courts (in Poland, Germany, Greece and Cyprus) on the compatibility of surrendering nationals under a European arrest warrant with constitutional bans on the extradition of nationals. Reviewing relevant constitutional provisions of other member states and considering the nature of EU Council framework decisions, the author concludes with predictions concerning the extent and consequences of the problem for cooperation in criminal matters in the EU. Finally, she discusses chances that similar problems may arise in a related context, namely under the recently adopted Nordic Arrest Warrant that mirrors the EAW regime in substance and terminology.[3]

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[1] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (2002/584/JHA), *Official Journal of the European Communities* L 190, 18.7.2002, p.1 [hereinafter EAW or Framework Decision].

[2] Zs. Deen-Racsmány and Judge R. Blekxtoon, 'The Decline of the Nationality Exception in European Extradition? The Impact of the Regulation of (Non-)Surrender of Nationals and Dual Criminality under the European Arrest Warrant', 13 *European Journal of Crime, Criminal Law and Criminal Justice* (2005) p. 317.

[3] Konvention om överlämnande mellan de nordiska staterna på grund av brott (Nordisk arresteringsorder) [Convention on Surrender for Crime between the Nordic States (Nordic Arrest Warrant), hereinafter NAW] adopted on 15 December 2005, copy (in Swedish and Danish) on file with the author.

2 SURRENDER OF NATIONALS UNDER THE EUROPEAN ARREST WARRANT

As a part of the package of measures envisaged by the Tampere European Council towards an improved regime of mutual recognition of judicial decisions within the EU,[4] the Council of the European Union adopted the Framework Decision on the European Arrest Warrant in 2002. The aim of this legislative exercise was to simplify **[120]** the extradition of individuals accused or convicted of certain types of criminal acts within the EU.

With this goal in mind, the drafters emphasized at several places in the preambular paragraphs of the FD the intention to establish a regime different from traditional extradition. They recalled the conclusion of the Tampere Council that

> *the formal extradition procedure should be abolished among the Member States* in respect of persons who are fleeing from justice after having been finally sentenced and extradition procedures should be speeded up in respect of persons suspected of having committed an offence.[5]

They further noted that

> [t]he objective set for the Union to become an area of freedom, security and justice leads to *abolishing extradition* between Member States and *replacing it by a system of surrender* between judicial authorities. […][6]

In addition, instead of following classical extradition terminology, the drafters introduced new terms to emphasize the novel nature of cooperation foreseen under the EAW. Pertinently, the Framework Decision deals with 'surrender' or 'execution' (of the warrant) instead of 'extradition'.[7] The central role attributed to this distinction is, however, somewhat surprising considering that many multilateral extradition agreements, including the European Convention on Extradition (ECE), use the very term 'surrender' to define the obligation to extradite.[8]

It may be noted that the Rome Statute of the International Criminal Court also relies on a semantic distinction between 'extradition' and 'surrender' to help states parties accommodate the obligation to transfer suspected criminals to the ICC in spite of constitutional prohibitions on the extradition of nationals. (Art. 102, UN Doc. A/Conf.183/9* (July 17, 1998), available at http://www.un.org/law/icc/statute/romefra.htm.) However, the Rome Statute attributes a substantially different meaning to 'surrender' (*i.e.* transfer to the ICC as opposed to interstate extradition) than the EAW definition. This fact and the vertical nature of the ICC state cooperation regime (as opposed to traditional – horizontal – interstate cooperation, including the EAW) render a detailed study of the implications of the decisions here under consideration for the ICC cooperation regime impossible within the confines of this study.

[4] Tampere European Council (15-16 October 1999), Presidency Conclusions, Chapter VI, available at http://www.europarl.eu.int/summits/tam_en.htm. See, too, text accompanying note 5, *infra*, for a practically literal citation of paragraph 35 of this document.

[5] EAW, *loc. cit.*, preambular para. 1. Emphasis added.

[6] *Ibid.*, preambular para. 5. Emphases added.

[7] Yet, the EAW implementing acts of some member states (*e.g.* Denmark, Finland, Germany (annulled), Malta, and the UK) refer to 'extradition' even in this context. The implementing acts of all member states are available at http://www.eurowarrant.net.

[8] The ECE (E.T.S. No. 24, Art.1) provides that

> [t]he Contracting Parties undertake to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

See, too, Economic Community of West African States Convention on Extradition, Art. 2 (available at http://www.iss.co.za/AF/RegOrg/UnitytoUnion/pdfs/ecowas/4ConExtradition.pdf); Inter-American Convention on Extradition, Art. 1 (available at http://www.oas.org/juridico/english/treaties/b-47(1)html); Extradition Agreement adopted by the Council of the League of Arab States, Arts. I-II, 159 *British Foreign and State Papers* 606.

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The difference from extradition is, however, underlined by semantic innovations: the EAW mentions 'warrant' instead of 'request', 'executing state' where extradition treaties refer to the 'requested state', and speaks of 'issuing state' instead of 'requesting state'. Moreover, instead of referring to 'the authorities of the requested state', it requires the appointment of an 'executing judicial authority'.[9]

More substantially, the FD establishes a simplified granting procedure (direct transmission of arrest warrants between competent judicial authorities, rather than through diplomatic channels or Ministries of Justice, with merely a minimal role retained by central authorities).[10] In addition, it introduces a new type of deadline, unknown to traditional extradition, one within which a final decision on execution should be taken.[11]

On the substantive side, the EAW does away with certain classical extradition principles such as the political offence exception, and, to a large extent, the non-extradition of nationals and dual criminality.[12]

It may, however, be argued that not the formal-semantic innovations but the concept of 'European (Union) citizenship' made the circumcision of traditional grounds of refusal such as the non-extradition of nationals acceptable. This perception finds support in a draft preambular paragraph which has not made it into the final text:

> Since the European arrest warrant is based on the idea of citizenship of the Union […], the exception provided for a country's nationals, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or **[122]** she has committed an offence within the territory of the European Union, irrespective of his or her nationality.[13]

Conversely, Impalà has reasoned convincingly that the concept of EU citizenship is insufficient to justify the significant demolition of the freedom of states[14] in this regard:

> In the first place, as is said in Article 17 TEC, 'citizenship of the Union shall complement and not replace national citizenship'. Furthermore, if this notion is not even sufficient to guarantee

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Moreover, many pre-EAW bilateral extradition treaties and the extradition law of some EU member states use the term 'surrender' interchangeably with 'extradition' or with another specific meaning different from the one attributed to it under the EAW. (The UK Extradition Act of 1989 (available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/legis/num_act/ea1989149/s38.html&query=extradition+surrender&method=all), for instance, appears to use 'surrender' interchangeably with 'extradition', as well as to cover the actual delivering up of the person.)

[9] On the role of and problems with these and other semantic innovations in the FD see N. Keijzer, 'The European Arrest Warrant Framework Decision between Past and Future', in E. Guild, ed., *Constitutional Challenges to the European Arrest Warrant* (Nijmegen 2006) (forthcoming) pp. 25-26 [hereinafter Keijzer, 'EAW'].

[10] See Preambular para. 9, Arts. 3, 4, 7, 9 and 15 EAW; O. Lagodny, ''Extradition' Without a Granting Procedure: The Concept of 'Surrender'', in R. Blekxtoon and W. van Ballegooij, eds., *Handbook on the European Arrest Warrant* (The Hague 2005) p. 39; Liane Ang, 'Procedural Rules' in *ibid*. at p. 47.

[11] Art. 17 EAW. *Cf,* Ang, *loc. cit.,* pp. 60-61 on the limited significance of this deadline in practice.

[12] See Arts. 2(2)-2(4), 3, 4 and 5 EAW. *Cf.,* Deen-Racsmány and Blekxtoon, *loc. cit*., (on non-extradition of nationals and dual criminality), and N. Keijzer, 'The Double Criminality Requirement' in Blekxtoon and van Ballegooij, *loc. cit*., p. 137 [hereinafter Keijzer, 'Double Criminality'].

[13] Premabular para. 12 of the Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States, Explanatory Memorandum (Sept. 2001), available at http://www.ecre.org/eu_developments/terrorism/Commission%20proposal%20for%20framework%20decision%20on%20arrest%20warrant%20and%20surrender%20procedures.doc.

[14] Customary international law does not impose a duty on states to extradite *any* persons, including their own nationals, apprehended on their territory. Conversely, it also does not *oblige* states to *refuse* extradition of their nationals but it admittedly leaves them a substantial measure of *freedom* to do so. (See. *e.g.*, R.Y. Jennings and A. Watts, eds., *Oppenheim's International Law* (9th ed., London 1996) p. 950*;* I. A. Shearer, *Extradition in International Law* (Manchester 1971) pp. 94-132; M. Ch. Bassiouni, *International Extradition: United States Law and Practice* (4th ed., Dobbs Ferry, N.Y. 2002) pp. 682-689.)

> the freedom of establishment of 'inactive [*i.e.* not (self-)employed] persons', *a fortiori* it cannot justify extradition.[15]

Whatever considerations and justifications the drafters may have had in mind, the EAW clearly does away to a large extent with the right of member states under customary international law to refuse extradition of their nationals. Article 4 on 'Grounds for optional non-execution of the European arrest warrant' provides merely for a conditional exception related to nationality. It states, *inter alia*, that

> [t]he executing judicial authority may refuse to execute the European arrest warrant […]
>
> 6. if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law. [16]

[123] Where they are unable or unwilling to (undertake) enforcement of the sentence domestically, member states are thus not entitled to refuse extradition of their nationals and residents.[17]

In addition, the provision on 'Guarantees to be given by the issuing Member State in particular cases' indirectly establishes a categorical obligation to extradite nationals for prosecution:

> [t]he execution of the European arrest warrant by the executing judicial authority may, by the law of the executing Member State, be subject to the following conditions: […]
>
> 3. where a person who is the subject of a European arrest warrant 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 Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State. [18]

The guarantee of return which may be required in accordance with this provision appears at first sight sufficient to sooth concerns about the constitutional compatibility of the obligation in certain member states, even if one discards the difference between 'surrender' and 'extradition'. On closer examination, and leaving this distinction out of the equation, such guarantees are plainly incapable of rendering a strictly formulated constitutional ban on the extradition of nationals compatible with this provision or with its literal implementation into domestic law. Moreover, few legal system of the world[19] provide for an exception to the

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[15] F. Impalà, 'The European Arrest Warrant in the Italian legal system: Between mutual recognition and mutual fear within the European area of Freedom, Security and Justice', 1 *Utrecht Law Review* (2005) p. 67. Footnote omitted.

[16] *Ibid.*, Art. 4.

[17] *Cf.* Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (revised version) Brussels, 24.1.2006 COM(2006)8 final, available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=720&id=178, at 5 on related problems.

[18] *Ibid.*, Art. 5. *Cf.* Deen-Racsmány and Blekxtoon, *loc. cit.*, and Keijzer, 'EAW', *loc cit*., pp. 41-46 on potential problems related to the application of these rules.

[19] In Europe, the Netherlands appears to be the sole – although imperfect – example. Its Constitution merely provides that extradition (even of nationals) is permissible in accordance with treaties and as regulated by the Parliament. In turn, Art. 4(1) of the Dutch Extradition Act (reproduced, as last amended in 1995, in A.H.J. Swart and A. Klip, eds., *International Criminal Law in the Netherlands* (Freiburg im Breisgau 1997) p. 268) establishes that '[n]ationals of the Netherlands shall not be extradited' but adds directly that

> [t]he first paragraph shall not apply if extradition of a Dutch national is requested for the purpose of prosecuting him and in Our Minister's opinion there is an adequate guarantee that, if he is sentenced to a custodial sentence other than a suspended sentence in the requesting state for offences for which his extradition may be permitted, he will be allowed to serve this sentence in the Netherlands. (*Ibid.*, Art. 4(2).)

constitutional prohibition on the extradition of **[124]** nationals where such guarantees of return are given. In addition, a series of German judgments dating from the 1930s and onwards confirms that the provision of the German constitution applicable at the time which prohibited the extradition of nationals prevented any form of transfer that would have enabled foreign courts to establish jurisdiction over a German national.[20] Central to these decisions is the assumption that '[e]xtradition enables the requesting State to exercise for the first time jurisdiction over the person extradited. Extradition gives to the requesting State the assistance which it needs in order to exercise its jurisdiction'.[21] In this sense, Articles 4(6) and 5(3) of the EAW indirectly establish an obligation to 'extradite', which would be clearly prohibited under the criteria formulated in these judgements.

Admittedly, much has changed in the attitude of states to international cooperation in criminal matters in the past decades. Nevertheless, the above statement still appears valid. Moreover, while they were rendered within the confines of the German constitutional system, it may be assumed that the principles expressed in these decisions are sufficiently generalizable to justify broader applicability. It thus appears reasonable to assume that the definition used by the German courts provides a correct reflection of what is covered by the provision included in many constitutions all over the world, prohibiting the extradition of nationals.

The purpose of such prohibitions is thus clearly at odds with the EAW provision obliging EU member states to surrender the accused for the purposes of prosecu- **[125]** tion, granting merely the subsidiary right to require guarantees of return, or for the execution of a sentence if local enforcement is impossible. It is therefore surprising that only three EU members (Germany, Portugal and Slovenia) have amended their constitution to accommodate this obligation. Moreover, only Austria has negotiated itself a transitional period awaiting amendment of the (constitutional) rule prohibiting the extradition of nationals.[22]

In the light of these facts, it is no surprise that constitutional challenges to the surrender of nationals under the EAW began shortly after its entry into force. The review of the constitutionality of the provision implementing Article 5(3) has been completed in Poland, Germany, Greece and Cyprus. Admittedly, in each case, the judgment was greatly influenced by the peculiarities of the domestic constitutional-legal order in which the challenge had been brought. Yet, thanks to the diversity of the constitutional systems of these four states, it nonetheless appears possible to identify some problems of a more general applicability related to the attempt to circumvent traditional obstacles to extradition by bring into life a new institution for the transfer of accused or convicted individuals. To this end, the next section

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[20] In 1931, the German Supreme Court for Criminal Matters concluded that '[n]ot every delivery as such of a person to a foreign Government constituted an extradition. Only such deliveries constituted extradition as were made to enable criminal proceedings to be taken against the accused in the foreign country.' (*In re* Utschig, reproduced in *Annual Digest* 1931-32, p. 296.) Accordingly, re-extradition after a provisional or temporary extradition did not fall under the prohibition then contained in Article 112 of the German Constitution.

In turn, the German Federal Supreme Court stated in a dicta in 1954 that '[e]xtradition […] presupposes that the extraditing State possesses unlimited power over the person to be extradited but is prepared to surrender that power. *This applies equally to temporary extradition* which may be regarded as constituting a special case of extradition.' (Emphasis added.) It moreover clarified that '[t]he rule that a State's own nationals shall not be extradited is based on the idea that the home State should not lend its assistance so as *to enable another State to exercise jurisdiction over its nationals when that other State is unable to do so in the exercise of its unaided power.*' (*Extradition of German National Case*, German Federal Supreme Court, 1954, reproduced in *International Law Reports* (1954) pp. 232-233.) *Cf. Extradition (Germany) Case*, German Federal Constitutional Court (1959), reproduced in 28 *International Law Reports* p. 319 and *German –Swiss Extradition Case (2),* German Federal Supreme Court (1968) reproduced in 60 *International Law Reports* p. 314 on the distinction between extradition, temporary extradition and handing back following temporary extradition.

[21] *Extradition of German National Case*, *loc. cit.*, p. 233.

[22] See Art. 33 EAW .

presents a summary of these decisions and sets out some of the legal issues which were crucial to them.

3 CONSTITUTIONAL CHALLENGES

3.1 Poland

The first challenge regarding the constitutional compatibility of surrendering a national under a European arrest warrant was decided upon in April 2005 by the Polish Constitutional Tribunal (PCT).[23] The Tribunal was asked by the Gdańsk Circuit Court to give a preliminary ruling as to whether the surrender of a Polish national for the **[126]** purposes of prosecution abroad in accordance with Article 607t§1 of the Polish Code of Criminal Procedure (PCCP)[24] was compatible with the prohibition on the extradition of nationals under Article 55(1) of the Polish Constitution. The latter provides in unambiguous terms that '[t]he extradition of a Polish citizen shall be prohibited.'[25]

The *travaux préparatoires* of the implementing act, cited in the decision, provide evidence of a great deal of disagreement. Some considered the clear distinction between 'extradition' and 'surrender' sufficient to render the constitutional prohibition inapplicable, hence permit the direct implementation of Articles 4(6) and 5(3) EAW. Others advocated for an amendment of Article 55(1). In the end, it was decided to implement the EAW through amending the PCCP, but not the Constitution. However, the distinct nature of the two institutions was emphasized. The amended Article 602 PCCP defines 'extradition' as the handing over of a person for prosecution or to serve a custodial sentence upon application by a foreign state, but it categorically exempts, *inter alia*, the EAW regime from its scope.

The PCCP neither prohibits nor expressly permits the surrender of Polish nationals under an European arrest warrant. However, a closer reading of Articles 607(p)-(t) and 604 PCCP leads to the conclusion that the general prohibition on the extradition of nationals expressed in Article 604 was not meant to apply in the context of the EAW.

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[23] File reference No P 1/05, judgment of 27 April 2005. An unofficial English translation of the decision is available at the website of the PCT at http://www.trybunal.gov.pl/eng.

It should, however, be noted that this was not the first case decided in domestic courts regarding the surrender of a national under an European arrest warrant. The first such decision was handed by the Portuguese Supreme Court of Justice in January 2005. This case, however, did not raise the constitutional incompatibility of the relevant provisions of the law implementing the EAW (*i.e.* Art. 12(1)(g) of Law No. 65/2003; *cf. ibid.* Art. 13(c) implementing Art. 5(3) of the FD). It was rather contended that the recently amended ban on the extradition of nationals, which now permits derogation to comply with international obligations but requires reciprocity, did not permit surrender of a Portuguese national to Spain for enforcement of a Spanish sentence for lack of reciprocity. (Art. 12(2)(f) of the Spanish implementing act permits the refusal of surrender of a national for execution of a sentence.) The Court dismissed the appeal in little over four pages, citing Art. 33(5) of the constitution which permits derogation from the general constitutional regulation of the extradition of nationals specifically in the context of the EU. See note 92, *infra* and accompanying text for the relevant constitutional provisions.

[24] This Article states that

> § 1. Where the European Warrant has been issued to prosecute a Polish national or a person enjoying asylum in the Republic of Poland, surrender may only take place under the condition that that person would be returned to Poland after the final and valid conclusion of the proceedings in the State that issued the European Warrant.

An unofficial translation of the provisions of the Polish Code of Criminal Procedure transposing the EAW is available at http://www.eurowarrant.net. The entire code is available in Polish at http://www.legislationline.org/upload/legislations/3f/01/2a9c3d98f63c8bc921ff2248661c.pdf.

[25] The 1997 Polish Constitution is available at http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

In spite of all the care vested into its drafting, the PCT found the contested provision unconstitutional. In its decision, it first considered the legal nature of EU Council framework decisions concluding, *inter alia*, that such instruments do not generate an immediate effect in the domestic law of the member states. However, member states are obliged to implement them.[26] The Tribunal found this obligation supported by Article 9 of the Polish Constitution, according to which '[t]he Republic of Poland shall respect international law binding upon it.'[27] **[127]**

It noted later on, however, that during the *travaux préparatoires* of Article 55 of the 1997 Constitution of Poland,[28] suggestions were made to permit exceptions to the ban on the extradition of nationals if an international treaty in force for Poland obliged it to do so. The PCT emphasized that, out of concern that permitting extradition would constitute a severe limitation of Polish sovereignty, the provision prohibiting the extradition of Polish nationals was in the end 'formulated without allowing for any derogations'.[29]

The Tribunal devoted much attention to the question whether 'surrender' *as opposed to 'extradition'* is permissible under this provision. It concluded that-pre 1997 Polish terminology does not justify a distinction between the constitutional term 'extradition' and 'surrender'. Moreover, it found that, as the Constitution does not mention 'surrender' as a distinct legal category, the linguistic difference intended by the drafters of the EAW could not be accommodated.[30]

Furthermore, the PCT rejected the argument that the amendment of the PCCP (defining the constitutional meaning of 'extradition') would have been sufficient to avoid constitutional incompatibility. It stressed that

> [w]hen interpreting constitutional concepts, definitions formulated in legal acts of a subordinate order cannot have meanings that bind and determine the mode of their interpretation. […], constitutional concepts are autonomous in relation to the legislation in force. This implies that the meaning of particular terms adopted in legislative acts cannot determine the mode of interpretation of constitutional regulations, as in such case the guarantees contained therein would lose any sense whatsoever. To the contrary, it is the constitutional norms that should impose the mode and orientation of interpretation of the provisions of other acts. The point of departure for the interpretation of the Constitution, in turn, consists in the comprehension of the terms used in the text of the given act of law, as historically developed and determined in legal doctrine.[31]

The Tribunal also considered the submission that Article 55(1) of the Constitution should be interpreted in the light of Poland's obligation (as a member of the EU) to apply an interpretation consistent with EU law (*i.e.* the principle of pro-European interpretation). It recognized that the application of this principle to the matter before it (falling under the Third Pillar) could not be ruled out. Such interpretation would permit surrender under the EAW. Yet, the Tribunal held that the limits of this principle identified by the European Court of Justice (ECJ) (namely that the consequences of **[128]** such an interpretation may not lead to the deterioration of the situation of individuals and in particular to the 'introduction or aggravation of penal liability') render such interpretation inappropriate in the present case.[32]

The Tribunal then found that 'the answer to the initial question raised, whether the surrender to an EU member state of a Polish citizen wanted on the basis of the European

[26] Judgment of the PCT, *loc. cit*., pp. 10-11, paras. 2.1.-2.4.
[27] Constitution of Poland, *loc. cit*. Judgment of the PCT, *ibid.*, p. 11, para. 2.4.
[28] This rule elevated the non-extradition of Polish nationals from a simple provision of the PCCP to a constitutional norm. The original PCCP provision did qualify the prohibition with reference to international obligations of Poland.
[29] Judgment of the PCT, *loc. cit*., p. 12, para. 3.1.
[30] *Ibid.*, p. 14, para. 3.2.
[31] *Ibid.*, p. 14, para. 3.3.
[32] *Ibid.*, p. 15, para. 3.4. See, too, note 123, *infra*.

Arrest Warrant is a form of extradition, can only be given as the result of *comparison of these two institutions*'.[33] It accordingly took note of the significant differences between the provisions implementing the EAW and those of the Polish CCP dealing with extradition outside the EU (*i.e.* differences concerning the status of the principle of dual criminality, organization and competences of the executive and the judiciary, simplification and acceleration of procedure in the EAW, the elimination of exceptions related to nationality and political offences) and came to the conclusion that

> the institutions under comparison differ not only in terms of their name, but also of content attached to them by the lawmaker. They consist of such content, however, which was determined by legislative act and which cannot define […] a constitutional institution.[34]

The PCT added, however, that surrender under the EAW could only be accepted as an institution distinct from extradition 'if the *substance* [were] essentially different'.[35] Having identified the core of both legal institutions in the handing over of persons to a foreign state for prosecution or enforcement of the sentence, it concluded that surrender is merely a particular form of extradition as regulated in Article 55(1) of the Constitution.

In addition, the Tribunal denied the validity of the assumption that the reference in the constitutional prohibition to the traditional mode of extradition did not preclude the introduction of a similar new institution, not covered by this prohibition. It added that as surrender under the EAW 'is a more painful institution than that of extradition [both in its material and procedural aspects] […] the same prohibition applies even more to surrender based on the EAW, which is realised for the same purpose (*i.e*. is essentially identical) and is subject to a more painful regime.'[36]

Having thus found that surrender under the EAW constitutes a modality of extradition, the PCT considered it necessary to look at the problem posed to it in connection with other provisions of the Constitution. It examined whether any of those could justify derogation from the prohibition expressed in Article 55(1).

[129] For this purpose, it first looked at Article 31(3). This provision permits limits to be imposed on fundamental rights laid down in the constitution, if those 'are necessary in the democratic state for the assurance of its security or public order, or for the protection of the environment, health and public morality, or of liberties and rights of other persons.' Admittedly, the seriousness of crimes covered by the EAW suggests that those may constitute threats to many of these categories. However, the Tribunal cited with approval the view that 'limitations of constitutional rights cannot infringe upon the *essence* of such rights'.[37]

Turning to this question, the PCT could not accept the view that the essence of the right not to be extradited would not be violated. It noted that

> the essence of the subjective right stemming from the constitutional prohibition of extradition consists in the right of a Polish citizen to be protected by the Republic of Poland and to be granted just and open trial before an independent and impartial court in the democratic state governed by the law.[38]

It held, however, that if the essence of the right were limited to that stated above, the provisions of the Polish Constitution on the general right (regardless of nationality) to a fair trial would render Article 55(1) superfluous. Accordingly, it concluded that Article 55(1)

> expresses the right of the citizen of the Republic of Poland to penal liability to *a Polish court of law*. His surrender on the basis of the EAW to another EU member state [...] would be an infringement of such substance. From this point of view it should be recognised that the

[33] *Ibid.*, p. 15, para. 3.4. Emphasis added.
[34] *Ibid.*, p. 17, para. 3.6.
[35] *Ibid.*, p. 17, para. 3.6. Emphasis added.
[36] *Ibid.*, p. 18, para. 3.6.
[37] *Ibid.*, p. 19, para. 4.1. Emphasis added.
[38] *Ibid.*, p. 19, para. 4.1.

> prohibition of extradition of a Polish citizen […] is of the absolute kind, and the subjective personal right of the citizens stemming from it cannot be subject to any limitations, as their introduction would make it impossible to exercise that right.[39]

Finally, looking at the essence of the concept of EU citizenship, the Tribunal rejected the submission that the Polish EU membership would render surrender of Polish nationals under the EAW consistent with the Constitution due to the fact that the concept of Polish citizenship should thereby have become altered or lost significance in this context. It noted, *inter alia*, that whereas EU citizenship

> is connected with the gaining of certain rights, it cannot result in the diminishment of the guarantee functions of the provisions of the Constitu- **[130]** tion concerning the rights and freedoms of the individual. Moreover, as long as the Constitution attaches a certain set of rights and obligations with the fact of possession of Polish citizenship (regardless of the rights and obligations pertaining to 'anyone', who is subject to the jurisdiction of the Republic of Poland), *such citizenship must constitute an essential criterion for the assessment of the legal status of the individual*.[40]

This analysis led the Polish Constitutional Tribunal to the conclusion that Article 607t(1) PCCP was not compatible with Article 55(1) of the Constitution**.** Having considered the limits of its powers established under the Constitution and the importance of Polish compliance with international obligations binding on it, it found it possible to extend the force of the contested provision for eighteen months following this decision.[41] Recalling the obligation upon Poland under Article 9 of the Constitution to abide by international law binding on it, and taking note of Poland's obligations as a member of the EU (among which the obligation to implement the EAW Framework Decision), the Tribunal 'could not rule out the appropriate amendment of Article 55 Paragraph 1 of the Constitution' as a means appropriate for bringing the implementation of the EAW into line with the Constitution.[42]

3.2 Germany

Less than three months after the Polish decision, the German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter FCC) also ruled against the constitutional compatibility of the provisions permitting the surrender of German citizens under the EAW to other EU member states.[43] The FCC decision declaring the entire German implementing legislation[44] void for its incompatibility with Article 16(2) of the German constitution (*Grundgesetz* (*GG*) or Basic Law), probably came as a surprise to those familiar with the recent legislative history of this constitutional prohibition. This provision was namely amended in 2000, primarily to accommodate Germany's **[131]** obligations under the ICC Statute.[45] However, due to noticeable developments in the EU in the field of judicial cooperation following the Tampere Council, an opening was made for exceptions within Europe as well.

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[39] *Ibid.*, p. 19, para. 4.2. Emphasis added.
[40] *Ibid.*, p. 20-21, para. 4.3. Emphasis added.
[41] *Ibid.*, p. 21-22, para. 5.1.
[42] *Ibid.*, p. 21, para. 5.
[43] BVerfG, 2 BvR 2236/04 vom 18.7.2005, Absatz-Nr. (1 - 201), http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604.html.
[44] *Gesetz zur Umzetsung des Rahmenbeschlusses über den Europäischen Hafbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäische Union* [Law (of 21 July 2004) implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the procedures for surrender between the Member States of the European Union], *Bundesgesetzblatt*, (2004-I), Nr. 38, p. 1748.
[45] See 'Progress Report by Germany And Appendices', Council of Europe, Consult/ICC (2001) 14, p. 2, available at http://www.legal.coe.int/criminal/icc/docs/Consult_ICC(2001)/ConsultICC(2001)14E.pdf.

Whereas the role to be attributed to the distinction between 'surrender' and 'extradition' under the EAW was not yet foreseeable, the ICC Statute, including Article 102 containing a similar distinction,[46] was already available. Nonetheless, the German legislator preferred to accommodate relevant new obligations as an *exception* to the non-extradition rule, rather than as a new legal-constitutional institution. Consequently, the provision now reads as follows:

> (2) No German may be extradited to a foreign country. The law can provide otherwise for extradition to a member state of the European Union or to an international court of justice as long as the rule of law is upheld.[47]

The relevant provision of the German implementing statute stipulates, in turn, that

> [t]he extradition of a German citizen for the purposes of prosecution is *only permissible* if it is *guaranteed* that where a sentence or a detention order has been passed in the issuing State, the person, at his request, will be returned to the jurisdiction in which this law applies.[48]

Not surprisingly, the appeal to the FCC did not directly concern the compatibility with the *Grundgesetz* of the extradition of a national to an EU member state as such. Rather, it was claimed that such extradition would violate the rule of law confirmed specifically in Article 16(2) *GG*, including the principle of non-retroactivity, dual criminality (amounting to an application of foreign law) and the lack of judicial review concerning the granting decision.[49]

[132] Accordingly, the FCC had to inquire into the question whether constitutional principles related to the rule of law had been violated. Unlike the Polish Constitutional Tribunal, the FCC did not enter to into a lengthy consideration of the primacy of EU law and related obligations upon Germany as an EU member to implement the EAW.[50] On the other hand, it devoted much attention to the essence of the rule against extradition, stating, *inter alia*, that the right was meant to guarantee that

> citizens cannot be removed against their will *from the legal order known to them* […] Every citizen should be protected – if he remains within the national territory – from uncertainty that he would be condemned in a legal system alien to him, under extraneous conditions, which are little transparent to him.[51]

It considered the right to remain in one's own legal system, in the light of historical events, as having a high constitutional rank, and defended it also with reference to the extensive jurisdiction of German courts over extraterritorial acts of nationals.[52]

It confirmed that the right contained in the first sentence of Article 16(2) *GG* may thus only be restricted in accordance with the second sentence of the same article (*i.e.* provided

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[46] See note 3, *supra.*

[47] Art. 16(2) *GG*, available at http://www.oefre.unibe.ch/law/lit/the_basic_law.pdf. Emphases added. The final proviso reads in German: '*soweit rechtsstaatliche Grundsätze gewahrt sind"*, which is sometimes translated as 'provided that *constitutional principles* are respected'. Before its 2000 amendment, Article 16(2) contained merely a general prohibition on extradition of nationals.

[48] Art. 80(1) of the German *Gesetz zur Umzetsung des Rahmenbeschlusses über den Europäischen Hafbefehl und die Übergabeverfahren zwischen den Mitgliedstaaten der Europäische Union* [Law (of 21 July 2004) implementing the Framework Decision of the Council of the European Union on the European arrest warrant and the procedures for surrender between the Member States of the European Union], *Bundesgesetzblatt,* (2004-I), Nr. 38, p. 1748.

[49] Whereas the EAW surrender regime does away with the traditional role played by Ministries of Justice in the context of granting extradition, the German implementing act left the final decision, following a ruling on admissibility by the courts, up to the Federal Minister of Justice.

[50] It has, however, referred to the obligation flowing from the German membership in the EU to participate in the – intergovernmental – Third Pillar and simplify extradition procedures in relation to other member states in the context of subsidiarity (Art. 23(1) GG). Judgment of the FCC, *loc. cit*., para. 75.

[51] *Ibid.*, para. 65, unofficial translation cited in J. Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony', Jean Monnet Working Paper 10/05, available at http://www.jeanmonnetprogram.org/. Emphasis added.

[52] Judgment of the FCC, *loc. cit.*, paras. 67-68.

that the rule of law is upheld). It then found that the amendment, envisaging certain exceptions to the previously unlimited right of Germans not to be extradited, was permissible as not inconsistent with rights granted under other provisions of the *Grundgesetz*.[53]

The FCC noted, however, that when implementing the EAW into German law, the legislator was obliged to follow the proviso stated in the second sentence of Article 16(2) *GG*. This meant implementing the objective of the FD not only so that the limitation on the constitutionally confirmed individual right against extradition would be proportionate. The legislator also had to ensure that the conditions of the rule of law **[133]** prevailed in the legal system (state or international court) to which a German would be extradited. In addition, the implementation had to respect all other provisions of the *Grundgesetz*. Even more relevantly, the legislator had to utilize the discretion granted to it in the FD to ensure maximal consistency with the *Grundgesetz* to implement it so that the restrictions imposed on the constitutional prohibition on extradition would be proportionate.[54] In this connection, the FCC, like the PCT, noted that framework decisions lack direct effect and require implementation at the national level.[55]

The FCC identified Article 4(7)(a) EAW as granting discretion unutilized by the German legislature.[56] This provision permits member states to deny transfer under a European arrest warrant if the offences in question

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

The Court was namely of the opinion that the legislator was obliged to ensure that the limitation of the individual constitutional right against extradition is considerate by safeguarding legal certainty. To this end, it was to offer particular protection in cases where the request for extradition concerned a case with a 'significant domestic connecting factor' (*Inlandsbezug*). The FCC added that '[w]hoever, as a German, commits a criminal offence in his or her own legal area need, in principle, not fear extradition to another state power'.[57]

Similarly to the PCT, the FCC submitted that, in these cases, extradition would lead to linguistic difficulties, cultural differences and other disadvantages in terms of procedure and possibilities of defense. In addition, it drew attention to the problem of lack of familiarity with the substantive criminal law of a foreign jurisdiction.[58] In contrast, it found a similar level of protection unnecessary in cases without such **[134]** significant domestic element (*Auslandsbezug*). In such cases, German nationality in itself cannot prevent the extradition of the accused.[59]

The FCC concluded that the German legislator failed to exhaust the discretion permitted by the FD to implement it in accordance with the *Grundgesetz*. It found that the only difference between the treatment of Germans and foreigners, namely the condition of return in case of surrender for prosecution in the case of Germans, demonstrates insufficient

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[53] *Ibid.*, para. 70. In this connection, the FCC – like the PCT – addressed the relevance of EU citizenship but emphasized that this concept did not replace national citizenship of the member states. Moreover, it found that the non-extradition of nationals is not incompatible with the principle of non-discrimination based on nationality, as the latter was meant to apply only to fundamental rights. (*Ibid.*, paras. 74-75.)
[54] *Ibid.*, paras. 77-80.
[55] *Ibid.*, para. 81.
[56] *Ibid.*, para. 82.
[57] 'European Arrest Warrant Act void', Bundesverfassungsgericht, Press Release No. 64/2005, 18 July 2005, p. 2 [hereinafter 'EAW Act void'], containing a detailed summary of paras. 83-86 of the judgment.
[58] Judgment of the FCC, *loc. cit.*, para. 85.
[59] *Ibid.*, para. 86.

concern with the requirement of proportionality and the importance of the constitutional prohibition and its background. Among others, more respect should have been paid to the role of *Inlandsbezug* on the grounds permitted in Article 4(7) EAW. Moreover, the optional ground for refusal based on the *ne bis in idem* principle (being prosecuted or having been prosecuted, Article 4(2)-(3) EAW) should have been implemented into the German law on the EAW. It should also have been considered, if decisions of the Office of the Public Prosecutor to refrain from local prosecution must be subjected to judicial review in the context of requests for extradition.[60]

In addition, the FCC stated that the principle of non-retroactivity in general does not apply to changes of criminal procedure, but it is only relevant in the context of substantive criminal law. Yet, it added that the situation is different for cases where Germans who previously enjoyed an absolute protection from extradition were to be extradited following an amendment for acts committed in another EU member if those lack a significant foreign connection and had not been penalized under German law at the time of their commission. Here, the situation would be comparable to a retroactive change of material law.[61]

Subsequently, the FCC turned its attention to the problem of lack of judicial review of the EAW granting decision.[62] This was found inconsistent with Article 19(4) *GG* guaranteeing recourse to court.[63]

For *inter alia* these reasons, the FCC declared the European Arrest Warrant Act void in its entirety, rendering extradition of Germans to other EU members impossible. However, the possibility to extraditing foreigners remains open under the Law on International Judicial Assistance in Criminal Matters, as it stood prior to the entry into force of the European Arrest Warrant Act.[64]

Three of the judges attached dissenting opinions. Judge Broß agreed with the outcome but argued that the FCC should have come to it based on a finding that the **[135]** Act failed to take account of the principle of subsidiarity (*i.e.* primacy of German jurisdiction) laid down in Article 23(1) *GG*. This should even apply in cases with a significant foreign connecting factor. Consequently, surrender should only be permitted where domestic prosecution fails for factual reasons.[65]

Judge Lübbe-Wolff, too, shared the view that the EAW Act did not sufficiently recognize the fundamental rights of Germans provided under the Basic Law. However, in her opinion it would have been sufficient to declare extradition based on the Act inadmissible in a specific category of cases.[66] In turn, Judge Gerhardt submitted that the Act leaves enough freedom for authorities and courts to observe the principle of proportionality while being in accordance with the judgment of the ECJ in the *Pupino* case which had emphasized the importance of the principle of loyal cooperation by member states also in the Third Pillar.[67]

3.3 Greece

The Greek legislator implemented the relevant EAW provisions imposing an obligation upon the designated judicial authority to refuse surrender of Greek nationals for enforcement of a

[60] *Ibid.*, paras. 89-95.
[61] *Ibid.*, para. 98.
[62] See note 49, *supra*.
[63] *Ibid.*, paras. 101 *et seq.*
[64] *Ibid.*, paras. 116 *et seq.*
[65] Dissenting opinion of Judge Broß, reproduced in *ibid.*¸paras. 132-153.
[66] Dissenting opinion of Lübbe-Wolff, reproduced in *ibid.*¸paras. 154-183.
[67] Dissenting opinion of Gerhardt, reproduced in *ibid.*¸paras. 184-201. *Cf.* Section 4.2., *infra*, on this obligation. For the *Pupino* case, see note 122, *infra.*

sentence if '*Greece undertakes to execute the sentence* or detention order in accordance with its criminal law',[68] as well as

> where the person who is the subject of the European arrest warrant for the purpose of a prosecution is a *national of Greece* and is being prosecuted in Greece for the same act. *If the person is not being prosecuted in Greece, the arrest warrant shall be executed subject to an assurance that the person, after being heard, will be returned to Greece* in order to serve the custodial sentence or detention order passed against him or her in the issuing Member State.[69]

In contrast, the Greek Code of Criminal Procedure (GCCP) prohibits the extradition of nationals.[70] In addition, Greece has a tradition of reserving itself the right at**[136]** international fora not to extradite its nationals. At the time of depositing its instrument of ratification to the ECE, it declared that:

> The provisions of Article 6 [non-extradition of nationals] will be applied subject to the application of Article 438 (a) of the Greek Code of Criminal Procedure, which prohibits extradition of nationals of the requested Party.[71]

Similarly, in the context of the Convention relating to Extradition between the Member States of the European Union it declared that 'Greece will not grant extradition of its nationals.'[72]

Yet, the provisions of the CCP and the above international declarations are not supported by a constitutional prohibition. The relevant articles of the Greek constitution merely provide that

> 2. […] [t]he extradition of aliens prosecuted for their action as freedom-fighters shall be prohibited

and

> 4. [i]ndividual administrative measures restrictive of the free movement or residence in the country, and of the free exit and entrance therein of every Greek shall be prohibited. Restrictive measures of such content may be imposed only as additional penalty following a criminal court ruling, in exceptional cases of emergency and only in order to prevent the commitment of criminal acts, as specified by law.[73]

A Greek national whose surrender was requested for prosecution in Spain nonetheless appealed to the *Areios Pagos*, the highest criminal court of Greece, claiming *inter alia* that his surrender to Spain under the EAW would be inconsistent with his *constitutional* rights against extradition. It was further argued against his extradition that 'invoking the Constitution, Greece has explicitly expressed reservations with regard to its right to extradite own nationals under any treaty (multilateral, in the **[137]** context of the Council of Europe, or in the context of the European Union) relating to the institution of extradition'.[74]

The *Areios Pagos* judged, however, that 'there is no contradiction between the […] European arrest warrant and any provision of the [Greek] constitution, and indeed Article 5, paragraphs 2 and 4 thereof.' In addition, it found the argument related to Greek reservations to

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[68] Art. 11(f) of the 'European arrest warrant, amendment to Law 2928/2001 on criminal organisations and other provisions', available at http://www.eurowarrant.net. *Cf. ibid*., Arts. 12(e) and 13(3) implementing Arts. 4(6) and 5(3) EAW in relation to residents.

[69] *Ibid.* Art. 11(h).

[70] Art. 438, see reference to this provision in the Greek declaration to the ECE (text accompanying note 71, *infra*).

[71] Available at http://conventions.coe.int/treaty/Commun/ListeDeclarations.asp?NT=024&CM=&DF=&CL=eng&VL=1.

[72] Available at http://ue.eu.int/cms3_Applications/applications/Accords/details.asp?cmsid=297&id=1996063&lang=EN&doclang=EN. This Convention has not yet entered into force but has already been replaced by the EAW (Art. 31(1)(d) EAW) as far as extradition within the EU is concerned.

[73] Art. 5 of the Hellenic Constitution, available at http://www.cecl.gr/English/hellenicconstitution.htm.

[74] Decision No. decision 591/2005 of the *Areios Pagos*, Council Document No. 11858/05, 09.09.2005, Annex A (available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545&id=78), p. 15, unofficial translation.

multilateral treaties 'void of legal consequences' for the present case. It accordingly declared this ground of appeal unfounded.[75]

3.4 Cyprus

The relevant judgment of the Supreme Court of Cyprus (SCC) of 7 November 2005 is to date the last in line.[76] Confirming a decision of the Limassol District Court not to extradite a Greek Cypriot, the Court concluded that surrender of a national of Cyprus (to the UK) under a European arrest warrant would be unconstitutional.

The contested provision of the EAW implementing act – rendered ineffective by the SCC decision – provides that the executing judicial authority shall refuse execution of an European arrest warrant issued for the purposes of prosecution, *inter alia*,

> (f) where the person who is the subject of the European arrest warrant in view of his *prosecution* is a *national*, unless it is ensured that after being heard, he or she shall be transferred to the Republic of Cyprus, in order to serve a custodial sentence or a detention order which shall be passed against him/her in the issuing State of the warrant.[77]

[138] This rule is in conflict with the Constitution of Cyprus according to which '[n]o citizen shall be banished or excluded from the Republic under any circumstances.'[78] While not explicitly referring to extradition or surrender, a literal reading suggests that those, too, are covered by this general prohibition.[79]

This view was indirectly confirmed by the SCC with reference to one of its previous decisions that found extradition of a Cypriot impermissible under this provision.[80] However, the Court successfully evaded a decision as to whether surrender under the EAW implementing act falls under this prohibition.[81] Albeit referring on this point to the other domestic constitutional challenges cited above, it eventually relied on the fact that the Constitution of Cyprus does not authorize the arrest of a Cypriot national on grounds other

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[75] *Ibid.*, p. 15.

[76] There is, however, a constitutional complaint pending at the time of writing in the Czech Republic, challenging the surrender of nationals under the EAW. There are also indications of similar complaints in Malta. See S. Combeaud, 'Implementation of the European Arrest Warrant and the Constitutional Impact in the Member States', in Guild, *loc. cit.*, p.191; P. Zeman, 'The European Arrest Warrant – Practical Problems and Constitutional Challenges', in *ibid.*, p. 198.

[77] Art. 13(f) of the Law No. 133(I) of 2004 to Provide for the European Arrest Warrant and the Surrender Procedures of Requested Persons Between Member States of the European Union, available at http://www.eurowarrant.net. The Act provides, in addition, that

> where the person who is the subject of the European arrest warrant, *in view of the execution of a custodial sentence or detention order,* is a *national* and the Republic of Cyprus undertakes the obligation to execute the sentence or detention order according to its criminal laws.

(Art. 13(f).) Art. 14(g), in turn, recites this provision using a permissive 'may' and extending its scope to persons staying and/or residing in Cyprus.)

[78] Appendix D, Art. 14 of the Constitution of Cyprus, available at http://www.kypros.org/Constitution/English/appendix_d_part_ii.html.

[79] See 'Cyprus court rejects European arrest warrant extradition' ((7 November 2005), available at http://www.eubusiness.com/Living_in_EU/051107140400.37ly7bal/PloneArticle_view).). Moreover, former Attorney-General Markides has been quoted referring to the need for a constitutional amendment to permit the extradition of nationals. (E. Hazou, 'UK extradition case forces Cyprus to amend Constitution', *Cyprus Mail*, available at http://www.cyprus-mail.com/news/main.php?id=22727&cat_id=1.)

[80] Decision No. 295/2005 of the Supreme Court of Cyprus, Council Document No. 14281/05, 11.11.2005, Annex B, available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=545&id=138.

[81] Decision of the SCC, *loc. cit.*, p. 15.

than those enumerated in Article 11(2) thereof. The relevant paragraphs of this provision stipulate that

> [n]o person shall be deprived of his liberty save in the following cases when and as provided by law: […]
>
> (c) the arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.[82]

Pertinently, arrest for the purposes of extradition is mentioned exclusively with regard to aliens, in Article 11(2)(f), permitting 'the arrest or detention of a person to prevent him effecting an unauthorised entry into the territory of the Republic or of an alien against whom action is being taken with a view to deportation or extradition.'[83] The SCC concluded that none of the grounds enumerated in Article 11(2) 'may be interpreted as allowing the arrest and surrender of Cypriot nationals to another member **[139]** state'. Consequently, it found it impossible to 'interpret national law in conformity with the law of the European Union'.[84]

Whereas it was argued in the submissions before the SCC that EU law supersedes national law, the Court concluded that framework decisions are not directly effective and member states are merely under an obligation to implement those through appropriate procedures existing in the member state.[85] Court judged that this had not been done in Cyprus as the implementing act was inconsistent with Article 11(2) of the Constitution.[86] Consequently, until successful amendment of the relevant provisions, it will not be possible for the designated Cypriot judicial authorities to execute European arrest warrants issued against nationals of Cyprus.

The Court's reasoning implies the position that 'framework decisions may not be considered superior to the Constitution'.[87] Yet, the case forced the Cypriot Government 'to fast-track an amendment to the Constitution'[88] to permit surrender of nationals under a European arrest warrant and thereby to fulfill the obligations of Cyprus towards the EU.[89]

3.5 Central Arguments

The above summary of the decisions pronounced by national constitutional or other high courts in relation to the extradition of nationals under the EAW demonstrates a great deal of dissimilarity in terms of the decisive factors. It is nonetheless possible to distil some arguments which have played a significant role in more than one of them, and/or which can explain the different weight given to particular considerations and the final outcome. In addition, some of the considerations that have only been raised in one particular decision deserve further attention as they are likely to be invoked in other member states.

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[82] Constitution of Cyprus, *loc. cit.*
[83] *Ibid.*
[84] Decision of the SCC, *loc. cit.*
[85] *Ibid.* p. 3 (summary).
[86] *Ibid.*, p. 16.
[87] *Ibid.* p. 3.
[88] Attorney-General Petros Clerides cited in Hazou, *loc. cit. Cf.* E.A. Stefanou and A. Kapardis, 'The First Two Years of Fiddling around with the Implementation of the European Arrest Warrant (EAW) in Cyprus', in Guild, *loc. cit.*, pp. 85-86 on the planned amendment.
[89] *Ibid.*, citing former Attorney-General Alecos Markides on the inapplicability of the planned amendment to the extradition of Cypriots to, *e.g.*, the USA.

In the view of the author, the following arguments are central to the above decisions and are sufficiently general(izable) to assume that they may be (successfully) invoked in other jurisdictions: **[140]**

a) surrender under the EAW is in essence the same legal institution as extradition or it is a subcategory thereof;
b) surrender/extradition of nationals in spite of a constitutional ban cannot be justified with reference to other provisions of the constitution (*e.g.*, *ordre public*);
c) international obligations (here specifically ones flowing from the FD or from EU law in general) do not justify derogation from the constitutionally guaranteed right against extradition;
d) the constitution does not permit arrest of a national on any grounds other than those specified therein;
e) surrender/extradition of nationals would violate the rule of law (*e.g.*, *ne bis in idem*, non-retroactivity, availability of appeal, *etc*.).[90]

In contrast, it appears that,

f) provisions on the non-extradition of nationals contained in extradition acts or codes of criminal procedure, unsupported by a similar prohibition of a constitutional rank, are unlikely to prevent surrender of nationals under the EAW.

4 Implications for Cooperation In Criminal Matters in the EU

4.1 Constitutional Provisions[91] on the Non-extradition of Nationals in Other Member States and the Potential for Successful Constitutional Challenge

Continental Europe, with its predominantly civil law tradition, is commonly seen as the cradle and one of the current strongholds of the non-extradition of nationals. In many of these legal systems, the ban is of a constitutional rank. In the light of this fact, one might have expected a wave of constitutional amendments to accommodate the obligation under the EAW to surrender even nationals. However, probably at least in part due to optimism about the semantic-substantive distinction adopted under the FD, only three member states have amended the relevant provisions of the constitution **[141]** in order to permit cooperation within the EU even in this regard as foreseen under the EAW.

The German amendment has been discussed above. Next to this, the only relevant amendments appear to be those undertaken in Portugal and Slovenia. The current provision of Portuguese Constitution stipulates that

> [t]he extradition of Portuguese citizens from Portuguese territory shall only be permissible where an international agreement has established reciprocal extradition arrangements, or in cases of terrorism or international organised crime, and on condition that the applicant state's legal system enshrines guarantees of a just and fair trial.[92]

A subsequent paragraph of the same article adds that

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[90] In the view of the author, the rule of law is so central to most legal systems that this challenge could be raised even if it is not specifically the provision prohibiting the extradition of nationals but another article of the constitution that imposes this as a general requirement.

[91] Unless otherwise specified, the constitutions cited in this section are available at http://www.oefre.unibe.ch/law/icl/. Years in brackets indicate the year up to which amendments have been incorporated in the online version.

[92] Art. 33(3) of the Constitution of Portugal (1997, available at http://www.parlamento.pt/ingles/cons_leg/crp_ing/).

> [t]he provisions of the previous paragraphs shall not prejudice the application of such rules governing judicial cooperation in the criminal field as may be laid down under the aegis of the European Union.[93]

In turn, the amended Constitution of Slovenia provides that

> [n]o citizen of Slovenia may be *extradited or surrendered unless such obligation to extradite or surrender arises from a treaty* by which, in accordance with the provisions of the first paragraph of Article 3a, Slovenia has transferred the exercise of part of its sovereign rights to an international organisation.[94]

In addition, for reasons, *inter alia*, of incompatibility of the relevant EAW obligations with its constitutional prohibition on the extradition of nationals,[95] Finland used a special procedure known as 'exceptive enactment' (*i.e.* requiring the same majority as would be necessary for amending the Constitution) to adopt its statute implementing **[142]** the FD.[96] In addition, a bill proposing to amend the constitutional prohibition on the extradition of nationals is presently under consideration.[97]

On the other hand, eight of the twenty-five member states (Belgium, Denmark, France, Greece, Ireland, Luxembourg, Spain and the United Kingdom) do not have relevant constitutional prohibitions. In addition, the Maltese constitution permits removal of nationals specifically 'as a result of extradition [although not specifically surrender] proceedings or under any such law as is referred to in section 44(3) (b)' of the constitution.[98] Finally, Article 69(1) of the Hungarian constitution[99] and Article 7(1) of Chapter 2 of the Swedish constitution[100] permit the conclusion that they do not prohibit the extradition or surrender of nationals.[101]

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[93] *Ibid.*, Art. 33(5).

[94] Art. 47 of the Slovenian Constitution (2004). *Cf.* notes 106-113, *infra* and accompanying text on whether the relevant obligations do arise from a *treaty* in this case.

[95] Art. 9(3) of the Finnish Constitution (2000) stipulates that 'Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will.' The *travaux préparatoires* of the 1995 Constitutional Rights Reform indicate that this right is to be interpreted broadly, covering any form of factual transfer from Finland to another country against one's will. (T. Ojanen, 'The European Arrest Warrant in Finland: Taking Fundamental and Human Rights Seriously', in Guild, *loc. cit.*, p. 94.

[96] *Ibid.* pp. 93, 98.

[97] *Ibid.* p. 96.

[98] Art. 43(3) of the Constitution of Malta (1996). The cited Art. 44(3)(b) refers to laws ' for the imposition of restrictions on the freedom of movement of any citizen of Malta who is not a citizen by virtue of section 22(1) or 25(1) of this Constitution'. In turn, Article 44(3) provides in relevant parts that

> [n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -- (a) for the imposition of restrictions that are reasonably required in the interests of defence, public safety, public order, public morality or decency, or public health and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. […]

Cf. notes 7 and 76, *supra* and accompanying text.

[99] This article provides that 'In the Republic of Hungary no one shall be denied of his Hungarian citizenship against his will and no Hungarian citizen may be *expelled* from the territory of the Republic of Hungary.' (Hungarian Constitution (2003), emphasis added.)

[100] This provision stipulates that '[n]o citizen may be *deported or refused entry* to Sweden.' (Swedish Constitution (1989), emphasis added.)

[101] It should be noted that the Swedish Parliament's Committee on the Constitution has stated in its report 1975/76:56, p. 32 that '[t]he protection against deportation should be interpreted as covering, for example, even a case where extradition of a Swedish national for crime to another State gives reason to believe that the extradited person would be deprived of his liberty for such a long period that he probably could never return to Sweden.' (Unofficial translation)This opinion suggests that in other cases, where the deprivation of liberty is not expected to have such an effect, the provision cannot prevent the extradition of nationals.

On the other end of the spectrum are the members, like to Cyprus and Poland, where the right of nationals against extradition or against forcible removal from **[143]** national territory is constitutionally protected: Austria,[102] Czech Republic,[103] Latvia,[104] Slovakia.[105]

Between these extremes are Estonia,[106] Italy,[107] Lithuania,[108] the Netherlands,[109] Portugal,[110] and Slovenia.[111] Like Germany, these members do have a constitutional ban on the extradition (and/or deportation, transfer or surrender) of their nationals but provide that applicable treaties in force may limit this right. A quick first reading of these provisions gives the impression that these states are safe as far as the fulfillment of their obligation under the EAW to surrender nationals is concerned.

However, as pointed out by Impalà, in Italy,

> serious concern has been above all expressed over the choice of legal instrument to establish the EAW, as a Framework Decision is not at all comparable to an international convention. Some considered that the solution here lies in the fact that extradition in the classic sense differs from **[144]** that introduced by the Framework Decision, while others argued that the Framework Decision is rooted in the TEU (Articles 31 and 34), which *is* an international convention. However, it remains possible to contend that if the EAW makes the surrender of a person from one state to another easier, then the level of protection, as a counterbalance, would have to be raised. It should not be possible to evade a constitutional guarantee whereby a legal instrument which is hierarchically superior to the law is required – not one that is qualitatively very different – so as to offer protection to the person to be surrendered.[112]

Whereas there are valid arguments in favor of considering the FD as being in relevant respects sufficiently similar to international treaties or for other reasons being covered by these provisions,[113] it is clear that there is a reasonable chance of recourse to constitutional or other competent courts regarding surrendering nationals under the EAW based on this issue.

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[102] Art. 12(1) of the *Auslieferung und Rechtshilfegesetz* [Extradition and Mutual Assistance Act] (of a constitutional rank, available at http://www.ris.bka.gv.at/bundesrecht/) states that the 'extradition of an Austrian citizen is impermissible'.

[103] Art. 14 of the Charter of Fundamental Rights and Basic Freedoms (1992), of a constitutional status, (available at http://test.concourt.cz/angl_verze/rights.html) provides in the relevant provisions that

> (4) Every citizen is free to enter the territory of the Czech and Slovak [*sic*] Federal Republic. No citizen may be forced to leave his homeland.
>
> (5) An alien may be expelled only in cases specified by the law.

[104] Art. 98 of the Latvian Constitution (1998) states that '[a] citizen of Latvia may not be extradited to a foreign country.'

[105] Art. 23(4) of the Constitution of Slovakia (1992) stipulates, *inter alia*, that '[a] citizen must not be forced to leave his homeland and he must not be deported or extradited.'

[106] Art. 36(2) of the Estonian Constitution (1992) provides that '[n]o Estonian citizen may be extradited to a foreign state, *except in cases prescribed by a foreign treaty*, and in accordance with procedures determined by the applicable treaty and law. Extradition shall be decided by the Government of the Republic. Anyone whose extradition is sought shall be entitled to contest the extradition in an Estonian court.' Emphasis added.

[107] Art. 26(1) of the Italian Constitution (2001) states that '[a] citizen may be extradited *only as expressly provided by international conventions*.' Emphasis added.

[108] Art. 13 of the Constitution of Lithuania (1992) specifies that '[i]t shall be prohibited to extradite a citizen of the Republic of Lithuania to another *state unless an international agreement whereto the Republic of Lithuania is a party establishes otherwise.*' Emphasis added.

[109] Art. 2(3) of the Dutch Constitution (1989) entitled 'Citizenship' provides that '[e]xtradition may take place *only pursuant to a treaty.* Further regulations concerning extradition shall be laid down by Act of Parliament.' Emphasis added.

[110] Art. 33 of the Constitution of Portugal, *loc. cit.*

[111] Art. 47 of the Slovenian Constitution, *loc. cit.*

[112] Impalà, *loc. cit.*, p. 67, notes omitted, emphasis in original.

[113] See, *e.g.*, sources cited in Deen-Racsmány and Blekxtoon, *loc. cit.*, p. 350, note 123. The ECJ is expected to touch upon this issue in a preliminary ruling requested by the Belgian Constitutional Court. This request was made following a complaint by an NGO claiming, *inter alia*, that the matters regulated in the EAW should have

Moreover, the overall picture of a widespread tradition of non-extradition of nationals and reliance on a constitutional prohibition to this effect indicates that there is a great general potential in the EU for constitutional challenges to the surrender of nationals under the EAW. Not only the member states with an absolute prohibition but, as demonstrated by the German complaint, even those that have tried to accommodate their international obligations in this regard, may face such complaints. In addition, as demonstrated by the German and Cypriot decisions, additional unexpected arguments related to constitutional incompatibility (in the form of rule of law considerations, claims that the arrest of a national for surrender to another EU member cannot be justified under the constitution, *etc*.) may lurk around the corner and may surface even in member states convinced to have implemented their obligations in good faith. At the very least, the lack of such challenges would paint a gloomy picture of the qualification of defense attorneys in the remaining EU members.

The fact that so far, over two years into the operation of the EAW regime, no constitutional complaints have been lodged against the surrender of nationals in other member states is not necessarily a reliable indicator that the 'surrender'/'extradition' distinction is considered satisfactory in other jurisdictions. In the two weeks preced- **[145]** ing the decision of the PCT cited above, Polish courts have apparently granted surrender of twelve Polish nationals. Nine of these decisions were executed in the same period.[114] It took a tenth case, that of Maria D. discussed above, to establish the constitutional incompatibility of the relevant provision of the act implementing the EAW. In addition, albeit constitutional recourse has so far only been directed against the provisions implementing Article 5(3)[115] of the EAW, it is perceivable that, once a state is forced to surrender a national for execution of a sentence due to its inability to give guarantees of domestic enforcement, complaints will also be brought against the rules implementing Article 4(6) EAW.[116]

Whereas challenges to the surrender of citizens will not always succeed, the determination of the validity of such complaints can be expected to take several times the period specified under the EAW for the grant of surrender.[117] The simplified and speedy surrender procedure foreseen by the drafters of the EAW may thus become considerably complicated and prolonged.

Successful constitutional complaints will lead to even more undesirable results. The constitution of some members may make it possible to keep even unconstitutional implementing provisions in force awaiting amendment, like it was done in Poland. However, it is likely that the majority, like Germany, would be forced to revert to extradition arrangements applicable prior to the entry into force of the Framework Decision while undertaking amendment.

Pertinently, the shortcomings of the EU regime of judicial cooperation may lead to an increased willingness of domestic courts to interpret the constitution as prohibiting extradition. As pointed out by Guild, constitutional challenges against the extradition of nationals

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been regulated by a convention. (Decision No. 124/2005 of the Belgian Constitutional Court, Council Document No. 11518/05 Add.1, 4.8.2005, available at http://www.consilium.europa.eu/cms3_Applications/applications/PolJu/details.asp?lang=EN&cmsid=720&id=73.)

[114] Information cited in the decision of the PCT, *loc. cit.*, pp. 7-8, Section II.3.

[115] See note 18, *supra*.

[116] See note 16, *supra*.

[117] This problem has been pointed out in A. Doobay, 'Implementation of the European Arrest Warrant Scheme', Conference Paper, Justice Conference on Extradition, Deportation and Rendition held on 31 March 2006 (available at http://www.petersandpeters.co.uk/pdfs/Implementation-of-the-European-Arrest-Warrant-Scheme.pdf) in relation to an unsuccessful Irish constitutional complaint whose determination took a year. See too Stefanou and Kapardis, *loc. cit.*, p. 82 on the failure by the SCC to observe the time limits set by the Cypriot implementing act.

> must be understood against the background of judicial cooperation in the field and the less than exacting manner in which it has been pursued. In light of the development of the field, it is not surprising that some courts in some Member States might be concerned about the protection, at least, of their own nationals. One of the main functions of the national court is to provide legal certainty. The right of the individual to certainty of law so that **[146]** he or she can modify his or her behaviour accordingly has been a common requirement which the European Court of Human Rights has reiterated on more than one occasion when considering Member States' alleged breaches of the rights of individuals. The uncertainty of clear judicial oversight according to common procedural standards and for crimes the definition of which can be commonly understood, all of which are features of the implementation of the EAW, does not inspire confidence. When these problems come against a background of limited respect for the division of powers and responsibilities in the development of the field at the EU level, it is not so surprising that there is some judicial disquiet.[118]

Finally, it should be noted that the extradition acts or codes of criminal procedure of most EU member states without a constitutional ban[119] do prohibit the extradition of nationals. Fortunately, conflict with provisions of the extradition act will cause less problems in the EAW context. As will be discussed in the following section, member states are under an obligation to implement EU Council framework decisions. As most European constitutions confirm international obligations binding upon the state, it is expected, *inter alia* due to the resulting constitutional rank of international obligations, that extradition will be declared permissible in spite of relevant prohibitions contained in other domestic legislation. It is not irrelevant in this context that such legislation is considerably less cumbersome to amend than provisions of a constitution, making it even less worth for member states to be brought to the ECJ over their application or amendment.

4.2 The Nature of Framework Decisions and the Obligation to Implement and Interpret Domestic Law Consistently with EU Law

Framework decisions constitute a particular, unique category of decisions of an international organization, foreseen in the Treaty on the European Union. Title VI on 'Provisions on police and judicial cooperation in criminal matters' provides in Article 34 that

> 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this Title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may:
>
> **[147]** […]
>
> (b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; […][120]

In the case of the European Arrest Warrant, the result to be achieved includes the circumvention of national prohibitions on the extradition of nationals to the extent specified primarily in Articles 4(6) and 5(3) of the FD. This obligation of result has not been drawn into question in the four national decisions handed down so far concerning the constitutional compatibility of the provisions implementing those EAW rules. However, the limits of this duty have been considerably stretched.

In any case, all three decisions where the constitutional challenge was found grounded indicated the need for constitutional amendment. Whereas there is no guarantee that a

[118] E. Guild, 'Introduction' in Guild, *loc cit*., pp. 8-9.
[119] *E.g.* Denmark, Finland, France, Greece, Luxembourg.
[120] Available at http://europa.eu.int/eur-lex/en/treaties/selected/livre1_c.html.

legislative majority in favor of the necessary amendment can be secured, in the light of the wish of member states to profit from European cooperation it is expected that the required amendments will be accomplished.

However, as indicated by the Spanish reaction to the German decision,[121] even temporary inability to execute such requests pending constitutional amendment will hinder cooperation and may even (further) harm mutual trust central to European cooperation in criminal matters.

On the other hand, the recent decision of the ECJ in *Pupino*[122] sheds new light on the need for constitutional amendments. This judgment namely suggests that domestic courts might be under a much stricter obligation than presumed or held in the above domestic decisions to interpret domestic law including the constitution as far as possible in line with Council framework decisions.

Two months prior to this judgment, the Polish decision discussed above addressed the very question whether the principle of consistent interpretation applies even to FDs adopted in the Third Pillar. The PCT, while recognizing that the principle may apply even in this context, found that it was not necessary to solve this matter conclusively,

> **[148]** as the obligation to apply pro-EU interpretation of the national law has its limits – *notabene* these were indicated by the European Court of Justice – namely whenever its consequences would consist of deteriorating the situation for the individual.[123]

However, *Pupino* leads to a different conclusion. The ECJ has namely concluded that

> 42. It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters, […].
>
> 43. In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34(2)(b) EU.[124]

The Court identified the limits of this obligation (next to general principles of law, in particular legal certainty and non-retroactivity) considerably more restrictively than the PCT in the following:

> The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework

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[121] The *Audiencia Nacional* invoked reciprocity, declaring that it would treat German requests under the EAW as requests for extradition, applying the pre-EAW legal framework. See 'Spain says European arrest warrants from Germany null and void', 21 September 2005, available at http://www.eubusiness.com/afp/050921141011.hmda6ws8.

[122] Case C-105/03, Judgement of the ECJ (Grand Chamber) of 16 June 2005. The case concerned a request for preliminary ruling concerning the interpretation of Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings.

[123] Judgment of the PCT, *loc. cit.*, p. 15, para. 3.4. A recent study (Komárek, *loc. cit.*, pp. 10-11.) has criticized this decision, irrespective of *Pupino*, on three grounds, claiming that the Tribunal had dismissed the case too easily. First, it was questioned whether the principle of consistent interpretation, which was developed in the context of states' failure (correctly) to implement framework decisions (resulting in conflicting national rules) could apply to provisions which implement an FD correctly. Secondly, it was claimed that the principle of consistent interpretation has in fact been applied by the ECJ even in cases where it led to the 'worsening of an individual's situation'. The true obstacle to the application of the principle appears rather to have been that that would have imposed criminal liability on individuals. Conversely, as the third counter-argument explains, surrender does not affect criminal liability. *Sed contra* text accompanying note 61, *supra*, on the related German position.

[124] *Pupino*, *loc. cit.*

> decision. In other words, the principle of conforming interpretation cannot serve as the **[149]** basis for an interpretation of national law *contra legem*. *That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision*.[125]

Accordingly, it could be argued that member states are simply under an obligation to do their utmost to interpret constitutional bans on the extradition of nationals as not prohibiting surrender under a European arrest warrant. Yet, admittedly, even *Pupino* does not identify an absolute obligation of result. The formulation 'in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision' stops short of laying down absolute criteria. It is thus expected that it will not deter every domestic court from nevertheless establishing constitutional incompatibility in some cases relevant to the present study. Nor will this ECJ judgment be sufficient to enable cooperation in conflict with certain strictly formulated prohibitions. In those cases, constitutional amendment *will* be required.

5 IMPLICATIONS FOR THE NORDIC ARREST WARRANT

On 15 December 2005, Denmark, Finland, Island, Norway and Sweden concluded the Convention on for Crime Surrender between the Nordic States (The Nordic Arrest Warrant).[126] This treaty, intended to replace the previous regime that has led to the adoption of uniform Nordic extradition laws in relation to each other already in the 1950-60s, takes to a large extent after the EAW. First, it explicitly stipulates that a European arrest warrant issued by one of the three Nordic EU members (Denmark, Finland or Sweden) shall be considered a Nordic arrest warrant.[127] In addition, it adopts EAW terminology, such as 'issuing state', 'executing judicial authority', 'surrender', and follows a greatly simplified procedure.[128] In addition, the provisions related to the surrender of nationals (Articles 5(5) and 6 NAW) literally echo Articles 4(6) and 5(3) of the EAW.

[150] Special provisions permitting – although not mandating – refusal of extradition of nationals in some cases apply only to extradition from and to Iceland.[129] The motive behind this special regime is unknown to the author but it is unlikely to be found in domestic prohibitions of Iceland on the extradition of its nationals. Article 66(2) of the Icelandic Constitution admittedly provides that '[a]n Icelandic citizen cannot be barred from entering Iceland nor expelled therefrom'.[130] However, considering the official interpretation of the similar Swedish constitutional provision[131] it is unlikely that this provision could be successfully invoked in Iceland to prevent extradition or surrender of a national.

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[125] *Ibid.*, para. 47. Emphasis added.
[126] *Loc. cit.*
[127] *Ibid.*, Art. 1(2).
[128] Art. 8 (*ibid.*), for instance, like Art. 9 EAW, provides for the direct transmission of warrants between the judicial authorities. Moreover, Article 2(3) NAW is in fact even more liberal than the corresponding EAW provisions, in that it does away with dual criminality in *all* cases. (*Cf.* Art. 2(2) and 2(4) EAW, *loc. cit.*)
[129] According to Art. 26 NAW, the previous provisions concerning the extradition of nationals to and from Iceland do not apply. Iceland may refuse extradition of its nationals to the other Nordic countries unless the person has resided in the issuing state for at least two years, or if the crime is punishable with at least four years of prison in Iceland. Similarly, the other Nordic states may refuse to extradite their nationals to Iceland under the same conditions.
[130] The Constitution of Iceland is available at http://government.is/constitution/.
[131] Chapter II, Art.7(1) of the Swedish Constitution. See notes 100-101, *supra*, and accompanying text for its interpretation.

The otherwise liberal regime related to the surrender of nationals is at first sight somewhat surprising in the light of past Nordic practices and regulations. The Nordic countries have namely become somewhat infamous for their tradition of reserving themselves the right not to extradite their nationals and even residents.[132] It is, however, less widely known that the Nordic extradition acts of these states (dealing with extradition to other Nordic states), adopted in the 1950-60s and in force to date, do contain exceptions to the ban on the extradition of nationals. They stipulate in this respect, *inter alia*, that a national may not be extradited *unless* at the time of the commission of the crime he has continuously resided for at least two years in the country that requests his extradition, or unless the acts constitute a crime for which local law prescribes at least four years of custodial sentence.[133]

[151] However, subject to such exceptions, the extradition of nationals is prohibited in all five states – although seldom on a constitutional rank – even in relation to other Nordic states. Still, chances of (constitutional) complaints related to the surrender of nationals are insignificant. The sole Nordic constitution that clearly contains a relevant prohibition is that of Finland.[134] However, as indicated above, Finland has a special procedure at its disposal – the so called 'exceptive enactment' – through which the problem of unconstitutionality can be circumvented also in this context. In fact, this procedure has been utilized at the adoption of the current Finnish Nordic extradition act and the statute implementing the EAW.[135] Moreover, constitutional amendment of the ban on the extradition of Finns is underway.[136]

In addition, the EAW requires Denmark, Finland and Sweden to surrender their nationals to each other (and to other EU members) subject only to the conditions specified therein. The relevant provisions have been transposed by all three states into domestic law, hence no specific problems are to be expected here.

As extradition to and from Iceland is subject to a special regime under the NAW which probably correspond with the Icelandic Nordic extradition act, the only remaining question is that of Norway. To the author's knowledge, no international agreement prior to the NAW and/or domestic legislation requires the Nordic EU members to surrender their nationals to Norway, or Norway to surrender its nationals to these states. The use of 'surrender' instead of 'extradition' is improbable to resolve this apparent incompatibility with the legislation presently in force. In fact, the Danish and Finnish acts implementing the EAW use the term 'extradition' [*utlämning*] in the Swedish official version, deemphasizing the novelty and different nature of the similar EAW regime. It is unlikely that the statutes implementing the NAW would apply a different terminology.

In addition, the NAW goes much further in limiting the situations under which extradition of nationals may be refused than is permitted under the prevailing Nordic extradition acts (or under the EAW). It namely establishes the obligation to surrender (even nationals) for any acts that, according to the law of the issuing state, can lead or has led to a

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[132] See, *e.g.*, the reservations by these countries to the ECE (available at http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=024&CM=1&DF=05/09/2005&CL=ENG&VL=1. *Cf.* Zs. Deen-Racsmány, 'Modernizing the Nationality Exception: Is the Non-extradition of Residents a Better Rule?', 75 *Nordic Journal of International Law* (2006), forthcoming.

[133] Art. 2(2) of the Law on Extradition between Finland and the Other Nordic States (in Finnish and Swedish, http://www.finlex.fi/sv/laki/ajantasa/1960/19600270?search%5Btype%5D=pika&search%5Bpika%5D=utl%C3%A4mning); Art. 2 of the Danish Act on Extradition to Finland, Iceland, Norway and Sweden (in Danish, http://www.retsinfo.dk/_GETDOCI_/ACCN/A19600002730-REGL); Art. 2 of the Norwegian Act on Extradition to Denmark, Finland, Iceland and Sweden (in Norwegian, http://www.lovdata.no/all/nl-19610303-001.html); Art. 2 of the Swedish Law on Extradition to Denmark, Finland, Iceland or Norway (*Svensk författingssamling* 1959:254, (in Swedish) http://lagen.nu/1959:254, with modifications up to present).

The author has not been able to obtain a copy of the Icelandic Nordic extradition act.

[134] See note 95, *supra.*

[135] Ojanen, *loc. cit.*, p. 94.

[136] See text accompanying note 97, *supra*.

custodial sentence or detention order.[137] Moreover, the acts/crimes covered or the minimum length of the most severe custodial sentence that can be prescribed for those are not specified.[138] If the relevant provisions of the Nordic extradition acts are not amended – or unless new legislation is adopted to replace them –, these **[152]** features could lead to appeal, although not a constitutional complaint, by nationals against their extradition.

However, it must be remember that Nordic states do attribute a great importance to regional cooperation and are proud to be pioneering in harmonizing their legislation. In fact, the intention of the drafters was exactly to establish a Nordic regime going beyond the liberal EAW model.[139] In accordance with this wish and the provisions of the NAW, [140] all five states are currently working on implementing the Convention. It is hoped that legislatures will speedily and properly transpose the new obligations assumed by their governments under the NAW, including the ones related to the surrender of nationals.

6 CONCLUSION

The non-extradition of nationals is a well-established, widely utilized tradition in transnational cooperation in criminal matters. Attempts in Europe to do away with it have so far been unsuccessful. On the other hand, the attempt under the EAW to circumvent the application of the (constitutional) ban known to many EU member states appears successful, within limits. Whereas challenges against the surrender of nationals have been found grounded on three out of four occasions, the affected member states are now in the process of amending the relevant provisions of the constitution. This outcome can be perceived as a great achievement, signaling a new era without the invocation of the nationality of the accused to prevent surrender within Europe.

On the other hand, constitutional complaints and lengthy constitutional amendment may impose significant obstacles in the way of the cooperation envisaged at and since Tampere, specifically, under the EAW. Due to the deficiencies of the EAW and of the EU mutual trust and recognition regime in general, domestic courts may tend to be conservative in interpreting relevant constitutional provisions. Fortunately, however, the EU is a significant actor with considerable supranational binding powers, and a Court of Justice, which recently even declared the principle of consistent interpretation to apply to EU Council framework decisions adopted in the Third Pillar. These **[153]** features, and the fact that it is so attractive and important to the members to be part of this 'club', are likely to secure the required result in the end.

Doubts raised at first sight about the effectiveness of a similar solution within the Nordic Council appear unjustified. Nordic cooperation has a long tradition and is considered to be of utmost importance by the governments in question. This fact promises good chances of implementing the NAW – in law and in practice. Whereas the extent of liberalism in relation to the extradition of nationals in mutual relations is somewhat surprising in the light

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[137] NAW, *loc. cit.*, Art. 2.

[138] *Sed contra*, Art. 2(1) EAW, specifying such lower threshold as consisting in 'a custodial sentence or a detention order for a maximum period of at least twelve months, or where a sentence has been passed or a detention order has been made, for sentences of at least four months.' See, too, note 128, *supra* on further liberal features.

[139] See 'Nordic extradition convention', Press release of 21 June 2005, available at http://www.norden.org/webb/news/news.asp?id=5201.

[140] All five states have signed the Convention with reservations regarding ratification or approval. (See NAW, *loc. cit.,* Art. 29.) Beyond the fact that parliamentary approval may be a requirement under domestic law, this solution permits necessary amendments to extradition laws and possibly constitutional provisions to be made prior to ratification.

of their existing legislation, the provisions of the Convention apparently reflect the intention of the parties to amend relevant domestic acts – or adopt new ones – in the near future. The effective functioning of the Nordic extradition regime over the past five decades gives good hope that this new convention, modeled on the EAW but going beyond that, will be successfully and effectively implemented.