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TRUST ISSUES

The Arrest Warrant System from a Nordic Perspective

TEAM FINLAND

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1. Introduction

In 2002 the Framework Decision on the European Arrest Warrant (FD EAW) was adopted to speed up European extradition procedures and enhance judicial cooperation. The FD EAW replaced several existing instruments concerning extradition between the Member States of the EU including the 1957 Council of Europe Convention on extradition with its two protocols of 1975 and 1978 and several bilateral conventions. The key feature of the FD EAW is that it is based on the principle of mutual recognition of judicial decisions, which breaks with the traditional principle of territorial jurisdiction. In case of the EAW, the state which receives the arrest warrant must within its jurisdiction recognise and give effect to the regulations of the issuing state. This means that territory and jurisdiction are no longer identical. In contrast to traditional requests for judicial assistance, the judicial authorities in the Member States shall in principle automatically accept judicial decisions of other EU States.[1] The merits of the request are considered valid based on presumed trust and there are only limited grounds for refusal.

After the adoption of the FD EAW, the Nordic Ministers of Justice, at a meeting in Svalbard on 25 June 2002, decided that the Nordic extradition acts needed to be revised in order to take into account the changed legal environment brought by the FD EAW. This revision was possible because Article 31(2) FD EAW allows Member States to continue applying existing extradition arrangements subject to the conditions set out in said Article and also to conclude new multilateral agreements or arrangements in so far as such agreements or arrangements allow the prescriptions of the Framework Decision to be extended or enlarged and help to simplify or facilitate further the procedures for surrender of persons who are the subject of EAWs, in particular by fixing time limits shorter for the proceedings, by extending the list of offences exempt from a double criminality requirement laid down in Article 2(2), by further limiting the grounds for refusal set out in Articles 3 and 4, or by lowering the threshold provided for in Article 2(1) or (2).

A multilateral convention was concluded between the Nordic Countries in 2005. The Convention, referred to as the "Nordic Arrest Warrant" (NAW), has now been implemented by Finland, Denmark, Norway, Iceland and Sweden. Contrary to the previous intra-Nordic extradition system created during the 1950s, the Nordic Arrest Warrant is based on an obligation to surrender. As the surrender system is based on the principle of mutual recognition, a NAW is not a request in the traditional sense that can be granted or refused by the recipient State. According to the NAW Convention, arrest warrants

[1] André Klip, European Criminal Law 3rd edition. Intersentia, pp. 380-395. Klip argues that there has been a swift from a "request model" to an "order model".

"shall" be executed and Articles 4 and 5 of the Convention use the words "non-execution" of a NAW rather than "refusal to grant". The NAW Convention, like the FD EAW, makes surrender obligatory unless one of the grounds for refusal laid down in the Convention is applicable.

Thus, the NAW Convention resembles the FD EAW by laying down a duty to surrender based on the principle of mutual recognition in Article 1(3) of the Convention. However, it modifies and removes a number of restrictions to surrender included in the FD EAW. Compared to the FD EAW, the NAW Convention goes further by completely abolishing the general requirement of double criminality, reducing the threshold of penalties for surrender and simplifying the rules of speciality and accessory surrender. Actually, the modifications quite closely correspond to the categories explicitly suggested for new extradition arrangements in Article 31(2) FD EAW. In this regard the NAW Convention seems to reflect a higher level of mutual trust between the Nordic Countries than the FD EAW does between the Member States of the EU. The extent to which the NAW Convention really can or should serve as a model for improving the FD EAW can be debated.[2] This paper examines the modifications made by the NAW Convention and if these could serve as an inspiration for further developing the FD EAW along similar lines.[3]

2. The Two Concepts of Mutual Trust

Before moving on to the particular differences between the FD EAW and NAW Convention, a few words should be said about the concept of mutual trust behind these two arrangements. The principle of mutual recognition is premised upon a sufficient degree of trust and confidence between Member States *vis-a vis* their criminal justice systems. Member States should not only have confidence in the rules of another legal system itself, but also trust that these rules will be properly applied. In European Council policy documents, it is said that trust is based, in particular, on Member States´ shared commitments to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law. [4]

However, the assumption of genuine mutual trust has been questioned. There have been expressions of concern particularly in light of EU enlargement, which has brought many new criminal justice

[2] Gjermund Mathisen, Nordic Cooperation and the European Arrest Warrant: Intra-Nordic Extradition, the Nordic Arrest Warrant and Beyond, Nordic Journal of International Law 79 (2010), pp. 1–33, esp. at pp. 24–32.
[3] While we are aware of a number of topical issues concerning the EAW such as fundamental and human rights as grounds for refusal, they are left out of this presentation simply because they are shared equally by both instruments and are therefore in our view not as essential for this comparative approach.
[4] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters OJ C 12, 15.1.2001, p. 10. See also Opinion 2/13, EU:C:2014:2454, para 168.

systems into the EU. It could be argued that it is naïve and inadequate to pursue a cooperation agenda that is based purely on and assumed high level of trust and confidence between judicial authorities in these national systems. The main reason for this potential lack of trust is a concern that fundamental rights and procedural rights for suspects in the criminal justice systems are not consistently and adequately protected throughout the Union, as evidenced by judgements against Member States by the European Court of Human Rights.[5]

Unlike the criminal law cooperation in the EU and in instruments like the FD EAW, the NAW Convention is the result of a regional extradition system based on similar criminal law and a mutual trust that has developed over a long period of time.[6] Compared to the FD EAW and the development of criminal law cooperation in the EU, the NAW Convention rests on a long tradition of cooperation and cultural and legal similarities in the Nordic states. This has led to a concrete, as opposed to a presumed, mutual trust between the Nordic States. The mutual trust behind the FD EAW therefore has a significantly different background and basis since the FD EAW was developed over a much shorter period of time and because the starting point of the whole EU criminal cooperation is different from that of the Nordic cooperation. Traditionally, mutual recognition and cooperation between the Nordic states have always been (and still are) based on a genuine will to cooperate, which is an essential element of this cooperation. In contrast to this, mutual recognition in EU criminal law entails that there is an obligation to recognise decisions of other Member States.[7]

3. Conditions for Surrender

3.1 Double criminality

3.1.1 What is it and why is it important?

Double (or dual) criminality has traditionally been considered a central feature of not only extradition law but also a variety of other forms of international cooperation in criminal matters.[8] In the context of extradition law the principle essentially means that extradition will not be granted unless the act

[5] B. Schünemann, Alternative Project for a European criminal law and procedure, Criminal Law Forum 18(2), pp. 227–251.
[6] See Mathisen (n. 2).
[7] Annika Suominen, The principle of Mutual Recognition in Cooperation in Criminal Matters – A Study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States, Intersentia 2012, p. 65.
[8] Michal Plachta, The role of Double Criminality in International Cooperation in Penal Matters, in N. Jareborg (ed.) *Double Criminality. Studies in International Criminal Law*, Iustus Förlag 1989, p. 111 et seq.

for which extradition is sought is a criminal offence under the laws of both the requesting and requested state.

Various justifications have been offered for upholding the requirement of double criminality. The justifications may vary somewhat depending on the legal context, but in the area of legal assistance the requirement has been justified *inter alia* with references to the principle of legality. In this sense it has been argued that the principle of legality requires that a state where a certain act is not punishable refrains from all measures that would assist in the prosecution of a person for this act. Double criminality has also been seen as a way to avoid potential conflicts with the requested state's basic values in the sense that a state should not use its coercive powers for the purpose of promoting aims which are in conflict with those basic values.[9] References have also been made to principles of state sovereignty and reciprocity.[10] The persuasiveness of the different justifications has been subject to some academic discussion, and some of them might be more relevant in the context of extradition than others, but further examination of this discussion will have to be left outside the scope of this presentation.

Double criminality is specifically listed in Article 31(2) FD EAW as one of the areas where Member States may make further simplifications to their extradition arrangements. While reference is only made to extending the list of offences in Article 2(2) FD EAW, this does naturally not preclude Member States from concluding arrangements that entail an even further departure from the requirement of double criminality. The following chapter starts with a brief review of how the FD EAW has already aimed to relax the requirement of double criminality traditionally associated with extradition. This is followed by a comparison to the corresponding provision in the NAW Convention, by which the Nordic Countries have opted to even further remove barriers to extradition that have traditionally been imposed by the rule of double criminality.

3.1.2 Double criminality in the EAW

The FD EAW operates with what could be described as a multilayer system of double criminality, with a different set of conditions depending on the classification of the criminal act in question. The

[9] Petter Asp – Andrew von Hirsch – Dan Frände, Double Criminality and Transnational Investigative Measures in EU Criminal Proceedings: Some Issues of Principle, in Zeitschrift für Internationale Straffrechtsdogmatik, 11/2006, p. 512 et. seq.
[10] Elies van Sliedregt, The Dual Criminality Requirement, in N. Keijzer and E. van Sliedregt (ed.) *The European Arrest Warrant in Practice*, T.M.C. Asser Press 2009, p. 52 et seq.

central provisions in regarding double criminality in the Framework Decision are found in Articles 2(2) and 2(4).

According to Article 2(2) the 32 categories of offences listed in this paragraph, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant.

The above provision does, despite its apparently wide applicability, in essence operate as an exception to the provision in Article 2(4), according to which for offences other than those covered by paragraph 2, surrender may be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described (double criminality). This rule is also explicitly included in Article 4(1) as an optional ground for refusal, although with some further clarification regarding tax crimes.

While the Framework Decision allows for Member States to require double criminality in cases that are not considered so called ‘list offences’, the above articles do not, however, allow further requirements that the criminal act in question would be punishable by a certain minimal maximum penalty in the executing state, or for that matter even that the act would even be punishable by a prison sentence and not for example a fine. It is in other words sufficient that the act would be considered an offence in the executing State and fulfils the criteria set out in Article 2(1) under the law of the issuing State.

To give some perspective before comparison to the NAW system below, it is interesting to note that the original proposal by the Commission[11] took a substantially different approach to the principle of double criminality. According to the proposal a consequence of the application of the principle of mutual recognition was that the double criminality condition must be abolished as well as the rule of speciality. However, where the execution of a EAW for certain conduct would run counter to the fundamental principles of the legal system of a Member State, it would have had a possibility to opt out for those offences. This would have been done by giving each Member State the possibility of establishing a 'negative' list of offences for which the execution of the EAW would be excluded.[12]

[11] COM(2001) 522 final/2 of 25 September 2001.
[12] Ibid. recital 14.

The Commission had in this adopted what could be seen as a rather radical point of view when it concluded that each Member State not only would recognize the entire criminal law of the other Member States, but also agree to assist them in enforcing it, subject of course to the exceptions provided by the proposed negative lists.[13] As can be seen by the FD EAW that eventually entered into force, this rather progressive view was not shared by the Member States, which eventually led to the current watered down version that is the positive list in Article 2(2).

Even though the final version of the double criminality rules in the EAW Framework Decision was not as radical as the Commission proposal, the positive list nevertheless met some resistance as is evident for example by the landmark case *Advocaten voor de Wereld*[14]. One of the questions considered in this case was the relationship and potential conflict between the arguably vague wording of the positive list in Article 2(2) FD EAW and the principle of legality, which as noted above has been considered by some to be one of the central justifications for the double criminality rule. Without describing the case in detail it can in short be noted that the CJEU saw no conflict and found that while Article 2(2) FD EAW dispenses with verification of double criminality for the *categories of offences* mentioned therein, the definition of those offences and of the penalties applicable continue to be matters determined by the law of the issuing Member State, which must respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU, and, consequently, the principle of the legality of criminal offences and penalties.[15] The fact that the CJEU did not, apart from briefly mentioning it, directly handle the issue with the rather vague wording of some categories has been met with some criticism.[16]

The CJEU has also been confronted with the question how to interpret double criminality when it comes to non-list offences. The question arose in the more recent *Grundza*[17] case, where the CJEU found that a flexible approach should be taken when confronted with the question whether the requirement of double criminality is met and consequently that grounds for refusal in this regard should be interpreted strictly in order to limit cases of non-recognition and non-enforcement.[18] The CJEU concluded that the condition of double criminality must be considered to be met where the

[13] Ibid. p. 16.
[14] Case C-303/05 *Advocaten voor de Wereld*, judgement of the Court of justice delivered on 3.5.2007.
[15] *Advocaten voor de Wereld*, para. 53.
[16] Van Sliedregt (n. 9), p. 60.
[17] Case C-289/15 *Grundza*, judgement of the Court of justice delivered on 11.1.2017.
[18] *Grundza*, paras. 36 and 46

factual elements underlying the offence would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State.[19]

The above cases suggest that the CJEU has been ready to promote a rather flexible approach that avoids interpreting the double criminality requirement in the FD EAW too widely and therefore limits the cases where execution of EAWs is refused because of double criminality concerns. This approach has not, however, in all cases been shared by several Member States and various additional limitation of arguably questionable nature have been implemented in national legislation.[20]

Considering the highly established status of the double criminality principle in international extradition law and the substantial ramifications of further relaxing it, it is understandable that even the limited steps taken by the FD EAW in this direction have been viewed as a controversial and it has been argued that EAW has already gone too far in abolishing double criminality well beyond crimes that have been harmonized as a consequence of EU measures or international treaties.[21]

These observations conclude this brief review of the double criminality requirement in the FD EAW and we now move on to take a look at how the question has been approached by the Nordic Countries in the NAW Convention.

3.1.3 Double criminality in the NAW

If one was to answer the question what would be one of the most significant steps of simplification concerning surrender of persons that could be taken by Member States under Article 31(2) FD EAW, a reasonably well justified answer could be the removal or further limitation of the double criminality requirement. This is not only due to the numerous issues that the multilayered double criminality approach of the FD EAW described above has given rise to, but also the fact that the double criminality requirement is such a fundamental feature of traditional extradition law.

After having briefly described above the double criminality requirement included in the FD EAW, it is evident that the approach to the issue is fundamentally different in the NAW Convention. On this point the NAW Convention is substantially more ‘surrender friendly’ and serves as a case in point of measures that simplify or facilitate further the procedures of surrender under the FD EAW.

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[19] *Grundza*, para 54.
[20] Van Sliedregt (n. 9), p. 60 et seq.
[21] Steve Peers, EU Justice and Home Affairs Law, Oxford University Press, 2011, p. 752 et seq.

According to Article 2(3) of the NAW Convention, arrest warrants based on criminal acts provided for in the national legislation of the issuing state shall be executed pursuant to the articles of the Convention without any examination of double criminality whatsoever.

While the abolition of double criminality is worded in a quite absolute manner in the above Article, it has not lost all significance in the NAW Convention. Namely Article 5(2) of the NAW Convention provides that the executing judicial authority may refuse to execute the Nordic arrest warrant if the act on the basis of which the Nordic arrest warrant has been issued is regarded by the law of the executing State as having been committed in whole or in part in the territory of the executing State or in a place treated as such and this act does not constitute an offence under the law of the executing State. This Article is also further discussed below in the context of what significance the principle of territoriality has been afforded by the two instruments.

One example that illustrates how far the Nordic Countries have been ready to take the abolition of double criminality as a manifestation of mutual trust is the fact that Sweden originally considered even not applying this limited form of double criminality as a ground for refusal. It was, however, eventually included also in the Swedish legislation in part due to the fact that the other Nordic Countries had already chosen to include it.[22]

While it might be considered quite a big step to abolish double criminality as a requirement for surrender or extradition practically entirely, it has been presumed to have somewhat limited practical significance between the Nordic Countries due to the high level of similarity between the legal systems of the respective countries. The readiness to do so is nevertheless an indication of the high level of mutual trust between the countries.[23] It can be noted, however, that the legal systems of the Nordic Countries are despite all similarities not entirely identical, and it cannot be ruled out that they will diverge in some respects in the future. This means that the Nordic Countries have accepted that they might in some cases be forced to execute a NAW for acts that are not considered criminal acts under the laws of the executing state. While these cases will no doubt be rare, they cannot be considered entirely theoretical.

The removal of the double criminality requirement in the NAW Convention has not encountered resistance in the implementing measures of national legislatures in the same way as the FD EAW, which is of course natural since it is based on a mutually agreed upon international treaty between

[22] Prop. 2010/11:158 Överlämnande från Sverige enligt en nordisk arresteringsorder (Swedish Government Proposal), pp. 73–74.
[23] Ibid, p. 65. Similarly also in the Norwegian Government Proposal, Ot.prp. nr. 39 (2007-2008), p. 12.

the countries in question. What is perhaps more significant to note is that this in principle very large deviation, in respect of the double criminality requirement, from traditional international extradition law and the FD EAW has not received much criticism in Scandinavian legal literature either, even though some writers have described it as somewhat radical.[24] On a theoretical level the impact of this development has also been seen as even more pronounced due to e.g. the lower penalty thresholds and rules concerning accessory extradition, which essentially means that even quite petty offences under the laws of the issuing State may give rise to extradition without being criminal under the laws of the executing State.[25]

3.2 Territoriality, extraterritoriality and jurisdiction

The *locus delicti* exceptions contained in article 4(7)(a) and (b) FD EAW are important because to a certain extent they replace the double criminality requirement. Article 4(7)(a) FD EAW contains the (optional) territorial exception. This means that, if the alleged conduct has in whole or in part taken place on the territory of the executing State, the judicial authority of that state may refuse the surrender of that person. The rationale behind territoriality is that it is a matter for the state on whose territory an offence has been committed to decide which consequences that offence should entail.[26] In the original proposal by the Commission the territorial exception had been completely removed. During the negotiations within the Council the exception was, however, retained. This was due to the need to compensate for the partial abolition of the double criminality rule in Article 2(2) FD EAW. States may feel the need to protect persons under their jurisdiction from other Member States, especially where the conduct concerned is lawful under their national law.

The territoriality exception in the FD EAW does not require that the alleged conduct is not punishable in the state where it has been performed as it applies also to cases where the alleged offence is punishable in both states. In such cases, situations are conceivable where the authorities of the executing state find reasons for not exercising jurisdiction, because justice will be better served in the states which has issued the EAW. This explains the optional character of the exception.[27] It has been argued that the territoriality exception serves not so much the interest of executing Member State in

[24] Dan Frände, Finland och den nordiska arresteringsordern, in *Festskrift till Gorm Toftegaard Nielsen*, Christian Ejlers' Forlag, 2007, p. 129 et seq.
[25] Mathisen (n. 2), p. 19.
[26] Nico Keijzer, Locus Delicti Exceptions, in N. Keijzer and E. van Sliedregt (ed.*) The European Arrest Warrant in Practice*, T.M.C. Asser Press 2009, p. 90.
[27] Nico Keijzer, The EAW Framework Decision: Some Highlights in E. Guild & L. Marin (eds.) *Still not resolved? Constitutional Issues of the European Arrest Warrant*, Nijmegen Wolf Legal Publishers 2009, p. 37.

local crimes being prosecuted in their own courts, but rather primarily in their interest in certain conduct that is lawful under their law not to be prosecuted at all.[28]

According to Article 5(2) of the NAW Convention the executing judicial authority may refuse to execute a Nordic arrest warrant if the arrest warrant relates to acts that under the law of the executing state are regarded as having been partly or wholly committed in the territory of the executing state or a place treated as such and the act does not constitute an offence under the law of the executing state. This article resembles Article 4(7)(a) FD EAW. There is, however, a significant further condition that has to be met in order to refuse surrender, i.e. that the act also must fail to meet a double criminality requirement in the executing state. This requirement of double criminality therefore substantially circumscribes and restricts the function of the territoriality principle as a ground for refusal in the NAW Convention. As noted above, the NAW Convention has entirely removed double criminality as a general requirement for extradition, but now also the double criminality requirement is actually retained only in a manner that further restricts the application of territoriality as a ground for refusal. In most cases the executing state would undoubtedly prosecute these cases that concern acts in their territory, which would in itself act as a ground for refusal, but in principle this a significant point.

All the Nordic Countries that are EU Member States (Finland, Sweden and Denmark) have implemented the territoriality exception contained in article 4(7)(a) FD EAW as a mandatory ground for refusal. Furthermore, these states have restricted the mandatory exception to cases where the act or corresponding act does not constitute an offence under the law of the executing state. This means that if the conduct is deemed to have occurred in the executing state's territory, double criminality is required for extradition (like in the case with the NAW). This matches as above is suggested to the purpose of the territoriality exception (included in both instruments) for protecting domestic non-prosecution instead of from protecting the domestic prosecution. The restriction also plays an important role when it comes to the mandatory implementation of article 4(7)(a) FD EAW. Those Member States that have implemented article 4(7)(a) as mandatory exception may have created difficult situations, because this may force them to refuse to execute EAWs in situations where trial in the issuing Member State would be preferable. By limiting the exception with the double criminality rule the Nordic States may have circumscribed these problems.

Article 4(7)(b) FD EAW gives the option to refuse surrender if the offence has been committed outside the territory of the issuing Member State, and the executing Member State would, in a similar case, not have been entitled to prosecute. The provision has the aim of ensuring that the

[28] Keijzer (n. 25), p. 93.

executing state does not have to recognise a more far-reaching exercise of extraterritorial jurisdiction on the part of the issuing state than what the executing state has provided for with respect to its own criminal law. In this regard the FD EAW departs from the principle of mutual recognition. The NAW Convention does not because it omits any such ground for refusal.[29] This means that an extraterritorial offence can be the object of a NAW. This is logical by the uniformly wide extraterritorial jurisdictional claims made by the Nordic States. It has been argued that there may be potential diplomatic tension created where a NAW is issued for an extraterritorial offence allegedly committed by the national of a third state who is present in another Nordic state, as long as he or she is not covered by immunity under international law.[30]

The NAW also does not have an article on jurisdiction and statute-barring that corresponds Article 4(4) FD EAW. This provision in the FD EAW states that the execution of a European arrest warrant may be refused where the criminal prosecution or punishment of the requested person is statute-barred according to the law of the executing Member State and the acts fall within the jurisdiction of that Member State under its own criminal law. Traditionally civil law states of Europe have opposed extradition of their own nationals. These States that do establish jurisdiction over extraterritorial acts of their subjects (i.e. nationals) may refuse handing them over in accordance with Article 4(4) FD EAW. As this possibility relates to cases where, albeit falling under its jurisdiction, the acts cannot be prosecuted in the State of nationality due to their being statute-barred, there is logically no obligation to prosecute domestically. This implies that beyond the limited double criminality rule some safeguards have been built into the FD EAW which could be invoked by the executing Member State authorities to prevent unreasonably broad application of extraterritorial jurisdiction.[31]

As indicated above the NAW Convention does not allow the Nordic countries to rely on prescription under the laws of the executing State in order to refuse extradition. Not providing for such a refusal ground is in line with abolishing the requirement of double criminality. It would be illogical for a State to execute an arrest warrant for acts which it does not treat as criminal offences while refusing to do so where they do constitute offences, but the limitation period is past.[32]

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[29] Mathisen (n. 2), p. 20.
[30] Christoffer Wong, Surrender in Accordance with a European Arrest Warrant in I. Cameron, M. Thunberg Schunke, K. Påle-Bartes, C. Wong and P. Asp, *International Criminal Law from a Swedish Perspective*, Intersentia 2011, p. 237.
[31] Zsuzsanna Deen-Racsmany – Judge Rob Blekxtoon: The Decline of the Nationality Exception in European Extradition? European Journal of Crime, Criminal Law and Criminal Justice, Vol. 13/3, 317–363, 2005, p. 356.
[32] An argument put forward as a reason not including prescription as a ground for refusal in the Commission Proposal on the European Arrest Warrant. See COM(2001) 522 final/2 of 25 September 2001, p. 18.

3.3 Penalty Thresholds and Accessory Extradition

According to Article 2(1) FD EAW a European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

The penalty thresholds act as a proportionality safeguard. For the suspect it ensures that he or she is not subject to unreasonable coercive measures before being tried for a petty offence or serving a short sentence term. It also ensures that the executing state does not have to spend time and resources on dealing with the arrest, detention, hearing and surrender of a suspect wanted for a trial in trivial cases.[33]

The NAW Convention prescribes mutual recognition to a larger extent by lowering the penalty threshold and by introducing accessory extradition to the arrest warrant system. Under Article 2(1) of the NAW Convention, the penalty threshold for extradition to stand trial is only that the act in question is punishable with a custodial sentence or a detention order under the laws of the issuing state. Under the same provision, extradition to serve a sentence is only conditioned on the sentence being one of deprivation of liberty. Therefore, the level of custodial sentence or a detention order is without relevance. Article 2(2) of the NAW Convention provides that surrender can take place for several offences, provided that at least one of them fulfils the conditions set out in Article 2(1).

In practice European Arrest Warrants have in some cases been issued for minor offences, although respecting the thresholds established by the Framework Decision. This shows a need in some situations for judicial authorities to carry out more accurate assessment of the proportionality, that is a comparison of the seriousness of the offence and of the human or financial resources to be deployed, and adequacy of the measure, balancing the usefulness of issuing a European Arrest Warrant and its consequences in the specific case.[34]

The fear that EAWs will be issued for offences which are deemed to be minor or trivial in the executing state have raised proportionality concerns by the European Parliament, governments and

[33] Karin Påle, Villkor för utlämning, Iustus förlag 2003, pp. 168–169.
[34] See Mariana Sotto Maior 'The Principle of Proportionality: alternative measures to the European Arrest Warrant' in N. Keijzer and E. van Sliedregt (ed.) *The European Arrest Warrant in Practice*, T.M.C. Asser Press 2009, pp. 219 and 226.

defendants alike.[35] Proportionality checks have been called for to ensure that pressure on the criminal justice systems of executing Member States, and disproportionate results for the requested individuals, are avoided.[36]

It seems that similar proportionality concerns haven't been raised while applying the NAW Convention. This is likely resulting from a coherent criminal policy. Although criminal policy to a certain extent is national, the Nordic Countries can be considered to share rather similar thoughts on criminal justice policy.[37] Some of the main values or aims that are characteristic of the legal culture and criminal policy are e.g. the prevention of crime, as well as the requirements, in criminal and penal policy, of legitimacy, a relatively low level of repression and humaneness.[38]

This solidarity is also notable in the memorandum of the Finnish Legal Affairs Committee concerning the implementation of the NAW Convention. The Committee has considered that the Convention enhances, clarifies and modernizes proceedings involving the extradition process between the Nordic Countries. The Convention also shows, that compared to the EU in general, further collaboration is possible between the Nordic Countries due to the similarities between the judicial systems, mutual trust and tradition of cooperation in crime prevention.[39]

While low penalty thresholds can be problematic in a system based on a duty to extradite, accessory extradition on the other hand has been seen a possible inspiration for the European Arrest Warrant system. Extradition is easier to defend as a proportional measure if it is sought and granted not just for one act fulfilling the relevant penalty threshold but at the same time also for other offences as well. The additional offences contribute to making the burdensome process of extradition more reasonable towards the suspect and give added justification for obliging the requested State to spend time and resources.[40]

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[35] Micaela Del Monte, European Added Value Unit: Revising the European Arrest Warrant, European Added Value Assessment accompanying the European Parliament's Legislative own-Initiative Report 2014, pp. 19–20.
[36] Valsamis Mitsilegas, EU Criminal Law After Lisbon – Rights, Trust and the Transformation of Justice in Europe, Hart Publishing, 2016, p. 142.
[37] Sakari Melander, Nordic criminal justice policy – single path or separate ways? in Husa, Nuotio and Pihlajamäki (eds.) *Nordic law – between tradition and dynamism*, 2007, pp. 109–125 (109).
[38] Raimo Lahti, Towards a Rational and Humane Criminal Policy? Trends in Scandinavian Penal Thinking, Journal of Scandinavian Studies in Criminology and Crime Prevention vol. 1/2000, pp. 141–155 (152).
[39] Finnish Legal Affairs Committee, LaVM 8/2007.
[40] Mathisen (n. 2), pp. 27–28.

4. Effects of the Surrender

4.1 The speciality rule and onward transfer

4.1.1 The speciality rule under the FD EAW

The principle of speciality, in general, restricts the power of a prosecuting state which received a person from another state. The general idea is that the requesting state may exercise its criminal jurisdiction only within the limits of the conditions which have been checked and approved by the requested State.[41]

Article 27 FD EAW governs prosecution for further offences and Article 28 subsequent surrender or extradition. Under the FD EAW, the speciality rule and restrictions on onward transfer apply between states, though they can be waived under certain circumstances.

According to Article 27(2) FD EAW a person surrendered may not be prosecuted, sentenced or otherwise deprived of his or her liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered. Exceptions to the rule of speciality are set in paragraphs 1 and 3 of the Article 27. Firstly, the speciality rule does not apply when the person having had an opportunity to leave the territory of the Member State to which he or she has been surrendered has not done so within 45 days of his or her final discharge, or has returned to that territory after leaving it (paragraph 3 (a)). Additionally, the right to speciality can be renounced by the Member State in general (paragraph 1), by the person concerned (paragraph 3(e)-(f) and by the executing judicial authority (paragraph 3(g)). Provisions in Article 27(3)(b)–(d) FD EAW make exceptions from the speciality rule *inter alia* in cases where the suspect risks no more than a pecuniary sanction.

It is noteworthy that originally the proposal by the Commission for the FD EAW sought, for the most part, to abolish the speciality rule, citing mutual trust between Member States. According to the proposed Article 41 a person who has been surrendered pursuant to a European arrest warrant may, in the issuing Member State, be prosecuted, sentenced or detained for an offence other than that for which the European arrest warrant was issued, except where the offence has been entered by the executing member State in a list of conduct for which execution would be refused on the grounds that

[41] Otto Lagodny and Christian Rosbaud, Speciality rule in N. Keijzer and E. van Sliedregt (ed.) *The European Arrest Warrant in Practice*, T.M.C. Asser Press 2009, p. 265.

it would be contrary to fundamental principles of the legal system in that State referred to in Article 27, or with respect to articles 28 or 20 (territoriality and amnesties).[42]

The exact scope of prosecution can be problematic as new charges might be possible for the same acts, or the same charges might be prosecuted but on the basis of acts unspecified in the original request. The CJEU case *Leymann and Pustovarov* addressed *inter alia* the question how the expression "offence … other than that for which he or she was surrendered", used in Article 27(2) FD EAW, should be interpreted.[43]

According to the Court in order to assess, in the light of the consent requirement, whether it is possible to infer from a procedural document an 'offence other' than that referred to in the European arrest warrant, the description of the offence in the European arrest warrant must be compared with that in the later procedural document. The CJEU, however, highlighted that to require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the specialty rule and interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in FD EAW between the Member States.[44]

The Court found that in order to establish whether what is at issue is an 'offence other' than that for which the person was surrendered, it is necessary to ascertain whether the constituent elements of the offence, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a sufficient correspondence between the information given in the arrest warrant and that contained in the later procedural document. Modifications concerning the time or place of the offence are allowed, in so far as they derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant, do not alter the nature of the offence and do not lead to grounds for non-execution under Articles 3 and 4 of the Framework Decision.[45]

The *Leymann and Pustovarov* case seems to indicate that Member States do have some discretion to modify the description of the offence. This approach promotes a swift surrender system based on mutual recognition as it limits the applicability of the rule of speciality.

[42] Proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States COM (2001) 522/2 final, 27 September 2001, pp. 16 and 21.
[43] Case C-388/08 PPU *Leymann and Pustovarov*, judgement of the Court of justice delivered on 1.12.2008.
[44] *Leymann and Pustovarov*, paras. 55–56.
[45] *Leymann and Pustovarov*, para. 57.

4.1.2 The speciality rule under the NAW Convention

The NAW Convention limits the speciality rule more than the Article 27 FD EAW. According to Article 23(1) of the NAW Convention, the suspect may be prosecuted and have a sentence against him enforced not only for offences covered by the Nordic arrest warrant under which he was extradited, but also for any other offences including earlier offences.

Exceptions to this main rule include cases where a mandatory ground for refusal would have been applicable under the Article 4 of the NAW Convention (amnesty, ne bis in idem, suspect under the age of criminal responsibility). Where the optional ground for refusal based on territoriality would be applicable, consent by the executing state is needed. According to Article 23(2) of the NAW Convention these two categories of exceptions are subject to set of caveats under which the speciality rule does not apply anyhow. This is the case if the suspect after his initial surrender has had the opportunity, for 45 days, to leave the issuing state, and he has left the country but then returned voluntarily. This is also the case when the suspect before or after his initial surrender from one Nordic Country to another consents to being prosecuted for acts not covered by the Nordic arrest warrant in question.

As indicated above Article 27(1) FD EAW provides an option to renounce the speciality rule also for cases falling within the scope of any mandatory ground for refusal under the Framework Decision. In contrast, the NAW Convention clearly does not provide for such far-reaching option of renunciation which could undermine the imperative character of the mandatory grounds for refusal. This has been considered an additional reason to rethink the said provision in the FD EAW. Provisions in Article 27(3) (b)-(d) FD EAW make exceptions from the speciality rule concerning cases where the suspect risks no more than a pecuniary sanction. This approach could undermine the mandatory grounds for refusal as well as relevant optional grounds for refusal and could be better replaced with a system of accessory extradition as provided for under the Nordic Arrest Warrant. This would allow the requesting State, upon extradition, to prosecute the suspect or execute a sentence against him also for lesser offences and without his consent – but with an adequate safeguard-safeguard as regards the grounds for refusal.[46]

[46] Mathisen (n. 2), p. 30–31

4.1.3 Onward transfer under the FD EAW

According to the Article 28 FD EAW the rule of speciality also applies in cases of subsequent surrender and extradition. Subsequent surrender to a Member State is set out in paragraphs 1-3 and subsequent extradition to a non-EU Member State in paragraph 4. Subsequent surrender requires the consent of the executing Member State (paragraph 1) or the person surrendered (paragraph 2(b) and (c)) or the executing judicial authority (paragraph 3). Exceptions to the speciality rule (paragraphs 2(a)-(c)) are only applicable for subsequent surrender. Consent to subsequent extradition can only be given by the competent authority of the surrendering Member State (paragraph 4).

The CJEU case *West* addressed the question concerning Article 28(2) FD EAW, whether "executing Member State" means the Member State from which a person was originally surrendered to another Member State on the basis of a European arrest warrant, or that second Member State from which the person was surrendered to a third Member State which is now requested to surrender the person onward to a fourth Member State or is consent perhaps required from both Member States.[47] The CJEU ruled that only the State which most recently surrendered the person must consent to onward surrender. The Court reminded that the objective pursued by FD EAW is to facilitate and accelerate judicial cooperation and it thus seeks to contribute to the objective set for the European Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.[48]

According to the CJEU to require the consent only of the first executing Member State would be capable of achieving the objective of simplicity and rapidity pursued by the FD EAW, all the more so because it would be the same Member State which would have to give its consent to a subsequent surrender of the same person, however many successive surrenders took place. Such an interpretation according to which the concept of 'executing Member State' refers only to the Member State which carried out the last surrender of the person concerned reinforces the system of surrender established by the FD EAW for the good of the area of freedom, security and justice, in accordance with the mutual confidence which must exist between the Member States. By limiting the situations in which the executing judicial authorities of the Member States involved in the successive surrenders of the same person may refuse to consent to the execution of a European arrest warrant, such an interpretation only facilitates the surrender of requested persons, in accordance with the principle of

[47] Case C-192/12 PPU *West*, judgement of the Court of justice delivered on 28 June 2012.
[48] *West*, para. 53.

mutual recognition set out in Article 1(2) FD EAW, which constitutes the essential rule introduced by that decision.[49]

4.1.4 Onward transfer under the NAW Convention

Article 24(1) of the NAW Convention provides, without particular restrictions, for re-extradition to other Nordic Countries under another Nordic arrest warrant in situations where the suspect has been surrendered according to a Nordic arrest warrant and hence goes further in facilitating re-extradition between the Nordic Countries than does the FD EAW between the Member States.

Article 24(2) of the NAW Convention allows re-extradition to non-Nordic countries, although only under certain preconditions and subject to national law of the Nordic Country to which the suspect has initially been extradited. The precondition is that the suspect must not have left this country despite having the opportunity to do so for 45 days or the suspect must have left the country but then returned voluntarily. Alternatively, it is required that the suspect himself consents or that the State from which he was initially extradited consents.

A case of re-extradition is dealt with under the Nordic Convention as any other case of extradition. Hence the previously requested State has no role and it is of no significance whether that State could have refused extradition for the act in question. Despite being efficient, the intra-Nordic extradition might not be regarded as a suitable model for reform of the European Arrest Warrant scheme at least until there is less ground for refusal and practice in the EU Member States have become more uniform so that one State would not have denied extradition in a case where another would grant it.[50]

5. Conclusions

We have in this paper explored the approach taken by the FD EAW to questions relating to double criminality, territoriality, the speciality rule and accessory extradition, and how in turn the NAW Convention has chosen to take further steps towards mutual recognition in these areas. Since the previous intra-Nordic extradition system appears to have been an inspiration to the progress made by the EAW, we think it is fair to ask whether sights could again be turned north and to the NAW Convention for a new perspective on what the next steps in the evolution of the EAW could be. This

[49] *West*, paras. 60–62.
[50] Mathisen (n. 2), p. 31–32

view appears to have been shared by the European Parliament in a recommendation[51] to the Council a little over a decade ago in the earlier days of the EAW system, when it was suggested that the effectiveness of the EAW system could be improved along the lines of the NAW. What kind of progress is realistic to expect nowadays though?

If progress is understood to mean further simplifying procedures and removing barriers to surrender, any such progress is inevitably conditional of a simultaneous progress towards a higher level of mutual trust between the Member States of the EU as regards their respective criminal justice systems. Whether this kind of progress is in any way a realistic expectation can fairly be questioned in light of the current political atmosphere in the EU. The concerns regarding the need to obtain an acceptable balance between legal protection and efficiency in the FD EAW indicate that there is a long way to go, before the necessary mutual trust exist among the Member States.

Developments such as the UK leaving the Union and the recent concerns about the independence of the judiciary in Poland are hardly an indication of progress towards a higher degree of mutual trust that could serve as a basis for further improving the EAW system. EAW cases rarely make headlines in newspapers, but a recent decision by the High Court in Ireland[52] managed to do this when surrender to Poland was put on hold due to concerns about the legislative changes and their impact on fair trial rights. This case is now headed for the CJEU and serves as an unfortunate reminder of the obstacles to further improvements to the EAW system.

It is noteworthy that the questions covered by this paper are in many ways linked to double criminality and mutual trust that determines the extent to which this requirement has to be retained. If double criminality is required, as it is to a large extent in the EAW, the rules regarding territoriality and speciality are in some form necessary as a consequence in order to ensure that the requested state does not directly or inadvertently assist in the prosecution of an act that it does not consider criminal. This does not, however, mean that some improvements could not be made without further departing from the double criminality requirement, which is probably an unrealistic scenario for the EAW at the moment.

The modification of classic extradition law rules such as double criminality, territoriality and the speciality rule must not only be seen as an assertion of State sovereignty, but as a fundamental guarantee against potential abuses. For example, the purpose of the territoriality exception can be

[51] European Parliament recommendation to the Council on the evaluation of the European arrest warrant (2005/2175(INI)) OJ C 291E, 30.11.2006, p. 246.
[52] Case *The Minister for Justice and Equality v. Artur Celmer*, High Court of Ireland 12.3.2018.

considered protecting the domestic non-prosecution instead of protecting domestic prosecution. The *locus delicti* exception in Article 5(2) of the NAW Convention may function as a safety valve in cases where surrender could seem particular offensive to *ordre public* in the executing state.

It might not be plausible to waive or even lower the penalty thresholds considering the differences between the criminal justice systems of the Member States, for example concerning penal scales and prosecution policies. The suspects and authorities on the other hand could benefit from introducing a system of accessory extradition similar to the NAW Convention. Accessory extradition would also be in line with the proportionality principle.

The *Leymann and Pustovarov* case indicates that a moderate interpretation of the speciality rule is possible in cases where there might be a good reason to dispense with it as a requirement that could unnecessarily complicate law enforcement. The restricted approach in the *West* case concerning the states from which the consent is required for onward transfer can be seen parallel to the approach already taken in the NAW Convention.

Even if the EU Member States are not ready to make changes to the EAW system that affect surrender to all Member States, we think that the NAW system shows that Member States could consider trying out closer cooperation between for example a smaller number of neighbouring countries, where the perceived differences between the criminal justice systems are not as large. This kind of incremental progress could provide a chance to try out improvements on a smaller scale and getting concrete experience of how they work in practice before perhaps taking the leap towards implementing some of them across the whole Union sometime in the future. It should be noted, however, that a proliferation of various regional arrangements overlapping with the FD EAW could cause a new set of complications. If taken to extremes, this could in principle eventually lead to a patchwork of extradition treaties not much different from the situation before the EAW. This would in turn run contrary to the underlying idea of the FD EAW to introduce a simplified system shared by all Member States. A reasonable balance will therefore have to be maintained between taking cooperation further where possible and simultaneously maintaining a coherent system of surrender or extradition across the EU.

At this point it seems that the greatest value of the NAW Convention is for the Nordic criminal law cooperation itself. By creating the NAW Convention the Nordic Countries wanted to show that the high level of mutual trust present among the Nordic Countries meant that they are capable of going much further than the EU with the mutual recognition.