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# New Challenges for Law Faculties: The View of a Private Law School

*By Karsten Schmidt*

Mister President,
Dear Colleagues,
Distinguished participants,
Ladies and Gentlemen,

Let me first express my gratitude for being invited to present some ideas on this conference. I understand this as a privilege[1].
My contribution to the ELFA Conference in Warsaw will be the view of a private Law School on the general topic „New Challenges for Law Faculties“. To give you an idea, why this view could be of some interest, let me start by providing a broad overview of German law faculties in general, Bucerius Law School in particular, and my personal experience as the dean of this Law School[2].

As you may know, legal education in Germany is governed both by federal law and state law, ruling that nobody is allowed to practice a legal profession without having passed two state exams. The first state exam aims at testing the academic performance of the students. It therefore may be regarded as an equivalent to a master degree after about four years of academic education. The second state exam follows after a two years period of legal training at civil and criminal courts, in the administration and law firms. Therefore, only the first part of legal training in Germany takes place at a law faculty.

1 The preliminary remarks of the Warsaw speech have been cut short for the purpose of publication.

2 The following theses printed in italics were available in the power point presentation and in a printed hand out version in Warsaw.

Bucerius Law School in Hamburg is just one of more than thirty law faculties in Germany but until today, it is the only private one among them. This statistic fact, however, does not justify its existence or explain why and in which respect Bucerius is different. The answer results from the following:
Firstly, this law faculty is private in the strictest sense of the word. It does not touch any public money. It is on the other hand not designed for earning any money. It is a non-profit project financed by tuition fees (24 %), sponsoring (16 %), and a private foundation which is paying for 60 % of the budget every year. This foundation (Zeit Stiftung Gerd und Ebelin Bucerius) is the guarantor for the sustainable performance of Bucerius Law School. The accreditation of our faculty granted by the state authority is based on the promise that this academic institution will continue working in permanence.

Second: The idea behind Bucerius Law School is adding an excellent academic institution to the public law schools. Its distinction is:

- a rigorous selection of students;
- a condensed course schedule,
- the teaching of practical skills in an international context;
- practical experiences through internships in Germany and abroad;
- the teaching of non-legal subjects in its Studium generale,
- an exchange program, which brings all of our students to law schools abroad and provides an international program designed for incoming students from all over the world,
- and an interdisciplinary Master of Law and Business program in cooperation with a private business school.

Perhaps I should add that our academic results directly compete with the results of state faculties in the state exam. And these results prove the high level of our selected students and of legal education at Bucerius. Finally some words about myself. I have been President or dean of Bucerius Law School for more than six years after having served as a professor at three state faculties (Göttingen, Hamburg and Bonn University). Consequently, I do hope that my experience may be useful for contributing to today's discussion. My aim is providing a private law school view on new challenges for law faculties.

## 1. General remarks: tasks and challenges for Law Schools today

*1a) Talking about governance, autonomy and finance of faculties cannot cut off the question of faculties' tasks in general. The present discussion about legal education should not only focus on preparing students for their future profession but must also include legal research.*

This first thesis is meant to point out, that our discussion has to keep the objectives of a law faculty in mind. And this is: preparing students for the legal profession and coming along with research work. The last point is very relevant. Losing touch with research would mean avoiding our responsibility for future tasks of the legal profession. And studying law without dealing with unexpected questions will never prepare students for the period of their professional lives. For this reason legal research is an indispensable element of academic education. Legal education is more than providing practical skills applicable in daily work. It has to include this sort of skills, but it has to be for beyond of this range. Bucerius Law School understands itself as a nerve centre of legal research.

*1b) Modern faculties ought to be sufficiently developed for international cooperation. This task requires more effectiveness of faculties' organisation and financial independence.*

This thesis may appear as a mere truism, a banality which goes without saying. However, in my opinion, the eminent change of legal education in a globalised world is not yet mirrored in the faculties' equipments and fittings. Consequently, it will be more and more difficult for law faculties to meet the demands of legal education.

For this reason Bucerius Law School from the very beginning established a close network of partner universities all over the globe, including both private and public law faculties. Every year these faculties welcome one hundred of our students, while we host about one hundred guests at Bucerius in our fall term, offering them specially designed courses taught in English and acknowledged by their domestic universities, not only in Europe but throughout the world.

*1c) Faculties will have to cope with national and international competition. They must no longer be content with merely acceptable conditions for providing legal education of domestic students. The aim of a faculty should be to attract the brightest students (from its own country and abroad).*

This thesis deals with a very personal observation. During the annual reunion of German deans of law faculties I notice every year that German deans are struggling for better conditions providing a solid education of domestic students in the traditional fields of law. I really do understand this approach. However, the challenge of today and tomorrow is different. Faculties will have to cope with national and international competition. The aim of a faculty should be to attract the brightest students from its own country and abroad.

This was one of the basic ideas when Bucerius Law School was established in 2000. Consequently, our aim from the very beginning was to convince applicants not only for our bachelor program but also for the international exchange and the Master of Law and Business. And we do not let up following this ambition.
These very brief hints were meant to prepare my answers to the basic question of this morning: How can a law faculty meet these challenges? At Bucerius Law School we have recognized three key elements: The Governance structure, the autonomy of the faculty and the financing of the faculty.

## 2. Governance

*2a) Governance of Law Faculties requires professionalism both on the acacdemic and on the business field. The dean as academic head of the faculty should be assisted by an experienced director in charge of the organisation and finance of the faculty. Effective performance of the faculty will depend on the cooperation of the dean and the business director.*

This thesis deals with the professional performance of faculties. In the past, at least in Germany, the governance of law faculties was the task of deans whose gifts and qualifications were of mere academic origin and far from business and leadership. Among my learned friends I met lots of distinguished professors who completed their compulsory period as a dean very reluctantly and permanently longing for its end. Some of them did a really good job, and I do hope I did so, too. The need of the moment is, however, professionalism. American universities have shown how this works. And we found a very special way. Bucerius Law School is run by a limited corporation and its CEO. It works, however, under the responsibility of an experienced scolar, who is appointed as by the faculty. As for myself, I have to cooperate with this very experienced and inspired businessman. This cooperation is a fruitful balance of power between business and academic leadership.

Perhaps you may notice that our private institution is privileged in this respect. As long as we comply with the legal framework and act in accordance with the academic accreditation, the range of our activities is nearly unlimited. A public faculty can hardly act as freely as that. The other side of the medal is that it takes much more administrative efforts to keep the school running on a high academic level in cooperation with business leadership. However, we have shown that it works.

*2b) Faculties will have to put more emphasis on their representation outside their domestic universities. Networking is no longer a privilege of the university presidents but a task of the faculties and their heads, too.*

I imagine that most of my ELFA colleagues agree to these two phrases. So I would like to confine myself by recording the thesis no. 2b, and just add a very short comment. As a private institution, Bucerius Law School had no choice but making itself visible to public and academic life, potential sponsors, and – most importantly – prospective students.

*2c) The tradition of German state faculties was characterized by strong academic chairs and institutes and less influential Deans. It was the individual chairs rather than the faculties which created the academic image of the respective faculty. Sharpening the profile of a modern faculty requires more consolidated activities without touching the independence of academics in their research activities.*

Unlike my last thesis this one deserves some explanation. Everyone knows that academic research and education in Germany had been internationally respected during the 19th century and partly even in the 20th century. Even after World War 2 the international reputation of German law faculties was remarkable. My thesis tries to uncover the secret reason for this phenomenon: The tradition of German state faculties was characterized by strong academic chairs and institutes and less influential deans. It were the individual chairs rather than the faculties which created the academic image of the respective faculty. I am sure that there is still a considerable number of German academics successfully representing this traditional and very personal excellence. And looking at the individual academics it still seems to me crucial that they have to strive for extraordinary performance and enter a faculty promising the best conditions for this result[3]. However: As a model for the institutional shape of a great number of faculties this tradition can no longer be relied on. Sharpening the profile of a modern faculty requires more consolidated activities (without touching the independence of academics in their research activities, mind you!).
To sum up, the reputation of an academic place will be based to a larger extent on the rank of the faculty than on its individual scholars. Although, as an academic of the old school, I am deeply convinced of the importance of outstanding individuals, I have learnt to face this fact that from an institutional perspective, a sharp faculty profile counts at least as much for its sustainable success.

*2d) Strengthening the Dean's role should go hand in hand with enhancing transparency and participation of faculty members and student's representation.*

The consequence of my thesis No. 2c is: strengthening the role of the dean. This will lead to more visibility and a stronger profile of the faculty as an academic unity.

I know: This is an unpleasant perspective for many academics, particularly in Germany. It is, however, unavoidable in my opinion.

3 This clarifying phrase has been added to the wording of the speech after a critical remark of a participant.

And, honestly, a strong but very academic leadership is less awkward than it seems at first glance. In order to promise a fruitful cooperation of faculty members it should go hand in hand with enhancing transparency and participation of faculty members and students' representatives. In Bucerius Law School, e.g., there is much more codetermination of students than I have ever met in any state faculty, even during the leftish period of the 70ies.

## 3. Autonomy

*3a) Autonomy includes academic and financial independence. If autonomy is more than a mere demand the faculty must prove that it deserves this privilege. This requires*

- *strength of the faculty's headship and*
- *a convincing academic performance.*

My thesis Nr. 3a) tries to point out the value of academic autonomy. Autonomy includes academic and financial independence. However, autonomy will not be granted free of charge. If autonomy is more than a mere demand of the faculty members the faculty must prove that it deserves this privilege. This requires

- strength of the faculty's headship and
- a convincing academic performance.

In my opinion there is a dialectical coherence between autonomy and excellence:

- There will be no academic excellence in absence of autonomy.
- Autonomy, however, will only be granted, if the faculty promises convincing academic performance and keeps this promise.

This is a matter of confidence and responsibility. In the particular situation of a private law school, autonomy depends on its background. As long as nobody thinks about earning money by running an academic institution, maintaining autonomy is not really difficult. Organising and running an academic institution on a high ranking level is per se a non-profit affair. In 2008, a private university in Germany tried to do it the other way round. The result was a complete failure. This university closed within one year.

*3b) Strenghtening the head of the faculty without neglecting the independence of academics in their research activities will help to ensure the faculty's autonomy vis à vis the university president and the state.*

This leads me back to the question of governance and leadership in public law faculties: strengthening the head of the faculty without neglecting the research independence of academics will help to ensure the autonomy of public faculties vis à vis the university president and the state. I admit: Bucerius Law School again is privileged in this respect. Where there is no control exercised by supervising authorities, this problem does not exist. Perhaps one might suspect that the foundation as a guarantor of the sustainable performance may tend to interfere in the academic affairs[4]. However, it does not, although it is the sole shareholder of the limited corporation running the law school as a legal body. The reason is: The foundation has promised to the state to maintain the Law School. Consequently, the foundation, being a non-profit institution, too, is interested in the academic appreciation of Bucerius Law School. And the influence of the foundation through shareholdership and supervising board only concerns the limited and its CEO, whereas the academic organisation of the Law School (senate, president, faculty, students body) follows its own discretion and responsibility.

## 4. Finance

4 This remark has been added during the discussion in Warsaw.

*4a) Finance is the counterpart of autonomy and governance. The constitution of universities should provide a maximum amount of faculties' financial independence and responsibility.*

Finance is the counterpart of autonomy and governance. The constitution of universities should provide a maximum amount of faculties' financial independence and responsibility. This is not an idea of my own. It is the result of long and sometimes harmful experience. In the run of the 20th century faculties in Germany lost more and more financial autonomy, for the decision making shifted more and more to the university presidents and the controlling state authorities. Luckily this detrimental tendency has come to an end round about the turn of the centuries. Universities and faculties regained independence and financial responsibility. This is very helpful and promising. Again, this particular problem does not exist in a case of Bucerius Law School, having a financial guarantor who does not interfere in its academic performance.

*4b) The ideal private faculty requires no public money. This state of liberty is the best precondition for competing with state universities. There are, however, a number of successful "private" faculties based on mixed financing including financial support by the state.*

My last thesis deals with the idea of private faculties and with reality. To be honest: Bucerius Law School does not think that state universities will ever be dispensable. There is no arrogance in our view on our academic neighbours. Competition will be helpful, and private law schools seem to be well prepared for competition. And they may serve as models for state universities in some respect. However: The ideal private faculty requires no public money. This state of liberty is the best precondition for competing with state universities. There are a number of successful "private" faculties based on mixed financing including financial support by the state. This fall, a new private law school operating at Wiesbaden close to Frankfurt is going to welcome its first students. Academics in our country and the law faculties in particular are looking forward to sharing this new experience with curiosity. As for myself, I do appreciate this new institution as an invitation for more competition and performance. The only restriction to this appreciation is that the new private law school will be supported by the State of Hessen. As for myself, I prefer the pure models of public faculties and private faculties. I am curious to see, how this Wiesbaden faculty will balance the ideal of private organisation and public co-funding.

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# The European Arrest Warrant in Law and in Practice: Special Reference to the Spanish Experience

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## 1. Introduction

This is an edited summary of a conference-talk given at the Annual Conference of ELFA (European Law Faculties Association) at 25th February in Warsaw. The talk (and this article) "The European arrest warrant in law and in practice. Special reference to the Spanish experience" took place in panel session IV under the title of *International Arrest Warrant*[5].

It has been a great opportunity to set out some of the results of a European Research Project in which I was involved the last two years (September 2008-december 2010). The title of this project is *The EAW in Law and in Practice: a comparative study for the consolidation of the European law-enforcement area*[6] (JLS/2007/JPEN/245 and ABAC 30-CE-0178645/00-20). Two perspectives and also two methodologies: theory and practice; on the one hand, legal diagnosis and, on the other hand, quantitative and qualitative data, as what seems very easy in law may be less so in practice.

All in all, the EU has been taking decisive steps towards a common area of justice. The main results of this project are presented in a report which is published in the Permanente Portugal Justice Observatory which was the leader team of the project sited in the Centro de Estudos Sociais (CES) of Coimbra University (Portugal).

The European Arrest Warrant (hereinafter EAW) is a judicial instrument issued by a Member State which requires another Member State to detain and surrender a requested person. The EAW could be issued for two different purposes: either to conduct a criminal prosecution, or to execute a custodial sentence or detention order [Article 1 Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the member States, of 13 June 2002, (2002/584/JAI) hereinafter FD].

The traditional mechanisms of judicial cooperation had to resort to a new method based on mutual trust and observing relations among the judicial systems of the Member States. This is where the principle of mutual recognition comes in as the cornerstone of judicial cooperation.

The purpose of this research project was to offer a broader knowledge of the EAW which allows the theoretical and practical problems of the first effective instrument of European judicial cooperation to be detailed. From that perspective, it is essential to obtain the suitable indicators in order to compare its experience at European level, in particular in: Portugal, The Netherlands, Italy and Spain.

No one doubts that the EAW has played a relevant role as the first legal instrument to further European judicial cooperation. It is almost a platitude to remark that the EAW has been significant in the full success of judicial cooperation. However, it is fair to say that from a practical point of view flaws and irregularities have emerged in the

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5 I am grateful to Dr. Manuel Bermejo and I really want to say also a sort of thanks to the Warsaw Law Faculty for his warm and generous hospitality. I would like also to express thanks to Prof. Anne Klebes –Pélissier the chairman of this panel, to my colleagues at this session and in general to the assistance to this panel.

6 The Directorate-General for Justice, Freedom and Security of the European Commission gave a grant in June 2008 for a research project from the Centro de Estudos Sociais (CES) of Coimbra University (Portugal) on the European Arrest Warrant. The aforementioned Portuguese research centre led the project, and had the collaboration of the Utrecht School of Law (Netherlands), L'Istituto Ricerca sui Sistemi Giudiziari (Italy) and, from Spain, the Asociación de Jueces para la Democracia and Carlos III University.

theoretical model of the EAW FD, and the resulting national EAW laws. The EAW has existed for nearly seven years, so this is a good time to take stock of its practical application according to different criteria. For example: (1) legality; (2) effectiveness; and (3) respect for fundamental rights.

This project has been too extensive (comparative grid of legislation, case law, interviews, empirical data, survey, etc) so the main results and achievements have been collected in a final report[7]. For this reason, it is not my intention to turn next pages into a monographic deployment of the project report. Therefore, I will briefly describe some of the results, that I consider the main ones; outlining, in particular, some of the barriers that the EAW raises in Spain, from both the issue and the execution perspectives.

## 2. EAW Legislation

The deadline for the final transposition of the Framework Decision on the EAW in the Member States was the 31st December 2003 (see, article 34). Previously, on 14 February 2002 Spain, France, Belgium, Portugal, Germany and Luxemburg stated their intention to revise their national law during the first quarter of 2003 in order to implement the EAW as soon as possible.

In this chronological context Spain was the first EU Member State to transpose the EAW FD on the 14th March 2003 and, moreover, the only one to meet the deadline agreed upon unofficially by the aforementioned group of six Member States. By the time of the FD's deadline (article 25), that is to say, on 1 January 2004, only eight countries had adopted the necessary legal measures. The rest of the Member States joined them gradually, meaning that the process of effective transposition of the FD was held up beyond the official deadline initially envisaged by the Commission.

Those of us who are familiar with the transposition to the national legislations of the European legislation are aware that these delays, far from being an exception, are the general rule. However, and without prejudice to the specific circumstances, the transposition pledges should have been respected as far as dates were concerned, at least roughly. It is obvious that the EAW would not be fully operative until the other Member States had adapted their own national laws.

Getting into the Spanish Law analysis of the EAW, we must start by highlighting that the transposition into Spanish Law required two laws to be approved. The first and more important one, considering its content, is Law 3/2003 of 14 March with a very simple title “on the European Arrest Warrant” (to which we refer as EAW Spanish Law). Second, there is Law 2/2003 of 14 March, of an organic nature, that complements the previous one. Spain, unlike other Member States, did not have to revise its Constitution in order to transpose the EAW FD. However, Spain had to change on the same date (14th March 2003) Articles 65.4 and 88 of the Spanish Law on the Judicial System (hereinafter, LOPJ) so that the law setting each judicial body's jurisdiction (LOPJ) in Spain encompassed the new powers of the Criminal Division of the National Court and the Central Preliminary Investigation in the execution of the EAW procedure.

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7 We highly recommend as a practical reference for all researchers interested in the EAW the detailed report on the EAW across EU, VVAA, *The European Arrest Warrant in Law and in Practice: a comparative study for the consolidation of the European law-enforcement area,* Coimbra, 2010, available in English at http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf

Finally, and before continuing examining the principal features of the EAW, we have to remark that the Spanish transposition law is essentially characterised by following the EAW FD practically to the letter must be highlighted; so much so … that sometimes instead of a transposition it seems like a translation and, moreover, it is not always correct and mature. We must not ignore this first critical feature, because we might have to come back to it later when we study the legal problems raised by the EAW in Spain. In this context we could even consider if perhaps this haste with which Spain transposed the FD can explain some of the most far-reaching problems posed for some time by the EAW in Spain. It is important to briefly describe the relevant characteristics of the Spanish system according to the EAW Spanish Law.

### 2.1. Judicial competent authorities

The EAW FD left the Member States free to establish their 'competent authorities' on one condition; according to article 6 EAW FD, they must be *judicial* authorities[8]. This simple fact –jurisdictionary authorities- is the first and distinctive feature of an EAW compared to extradition since the EAW abandons political-governmental procedures, including the intervention of different Ministries. Surprisingly, however, the concept of judicial authority is not always the same around the EU. It includes obviously Courts, but in some countries it may also include Public Prosecutors, Police Forces, etc. In the case of EAW, FICHERA[9] observes that *some of Member States have interpreted this clause rather broadly* (e.g. Denmark, Germany, Cyprus). The upshot is, however, that governments will no longer have the role they traditionally played in extradition matters.

In Spain the 'issuing judicial authorities' could be any criminal judge or court who is hearing the case in which this type of warrant is in order. On the other hand the 'executing judicial authorities' who has to decide the execution of the EAW are the Central Preliminary Investigation Court and the Criminal Division of the National Court. The Central Preliminary Investigation Court executes the EAW only if the requested person consents to his (or her surrender). Otherwise, if the requested person does not give their consent to their surrender to the issuing State and/or the Public Prosecutor sees any grounds for refusing or setting conditions on surrender, the judicial authority competent to execute the EAW would be the Criminal Division of the National Court.

In brief, concerning competent authorities, the Spanish legislator decided on two different solutions for the issue of the EAW and the execution (or decision) of the EAW. As for the execution or decision of the EAW, the Spanish legislator leaned towards a centralised system in the Criminal Division of the National Court, but we could regard it as a double-headed system (Central Preliminary Investigation Courts, Criminal Division of the National Court)[10]. Whereas for issuing the EAW, Spanish Law sets a diffuse and decentralised system, which considers that, any judge or court hearing a criminal proceeding in which an EAW is appropriate may issue it.

Much of the Spanish doctrine and some experts see centralisation in the National Criminal Court as an advantage for judicial security and the unification of the EAW criteria, because it avoids having differing decisions in similar cases. Hence the

8 LÓPEZ ORTEGA, 'La orden de detención europea: Legalidad y jurisdiccionalidad de entrega', in: *Jueces para la Democracia*, No. 45, 2002, pp. 28-33.

9 FICHERA, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?', in: *European Law Journal*, Vol. 15, No.1, January, 2009, p. 88.

10 So for the execution, the Spanish legislator has kept to the same model of passive extradition, giving power to the National Criminal Court, but, to different judicial bodies in the National Court depending on the proceedings phase.

Magistrates of the National Criminal Court are fully specialized in this topic. For this reason, the executing countries which do not have a centralized judicial authority work within the parameters of an extradition case because they will only decide on a few, isolated EAWs; they do not have as much experience as those countries with a centralised presiding body which hears cases involving EAWs. Therefore, this centralisation avoids problems caused by the lack of experience of some judicial bodies, the lack of harmonised criteria, etc.

Another plus is that communication between judicial authorities is easier when it is all centralised. Although Spain has several Central Preliminary Investigation Courts and different sections in the Criminal Division of the National Court, there is more unity within that judicial body both in executing proceedings and issuing proceedings. This is because if there is an issue they will most likely call a jurisdictional plenary session in an effort to harmonise the criteria at that level, and also in the realm of communication among authorities, which complicates matters because the execution process is not centralised.

Disagreeing with the abovementioned criteria, other sectors consider that the concentrated system is inconsistent. This critical stance has backed transferring the material and territorial competence of the execution to the Court of Preliminary Investigations of the last known address of the requested person. In relation to this voices have been raised in favour of specialisation by Autonomous Communities of some Court of Preliminary Investigation with regard to this matter. Another problem with this centralisation is that Spain is sometimes the transporting of suspects in 72 hours to Madrid in bad weather conditions or from the Islands (Canary or Balearic) might be a problem. Consequently, in their view the judge in the province where the suspect is arrested should be able to decide on the EAW.

But Spain is not the only country that decides to centralise the execution of an EAW in a single judicial body; other EU Member States have also chosen this system. In particular, and considering only those countries, which have taken part in this research project, in the Netherlands[11] the execution of EAWs is the province of the Amsterdam District Court. From the execution of an EAW point of view, we can say that Italy[12] and Portugal[13] have a mixed system, that is to say, half way between the concentrated and diffuse ones. In both countries the decision on the execution of an EAW is not to the responsibility of a single judicial body but is shared by a very limited number of judicial bodies. So, in Italy[14] execution judicial authorities are the appeal courts (known as *Corte di appello*) in the region where the requested person has his address (fixed or temporary). Of a subsidiary character, in cases when this “forum” or territorial circumstance is unknown, the decision is taken by the *Corte di appello* of Rome. In

11 LANGBROEK/KURTOVIC, ‘The EAW in the Netherlands’, in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 245-347. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

12 VELICONA/FABRI, ‘The European arrest warrant in Italy,’ in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 119-243. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

13 GOMES/FERNANDES/BORGES REIS, ‘The European arrest warrant in Portugal’, in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 349-471. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

14 Art. 5. Italian Law No. 69 of 22 April 2005.

Portugal[15], the EAW's execution is again to the responsibility of the appeal courts, known there as *Tribunal de Relação*. In both cases, there are a limited number of jurisdictional bodies: Italy has 29 *Cortes de Appello* and Portugal has only 5 *Tribunais de Relação*.

In our opinion, the numerical factor is a relevant component that must be taken into account when considering decentralising reforms. The risks of conferring this power on a large number of judicial bodies must not be underestimated. For example, according to the latest data[16] from the Spanish General Council of the Judiciary, Spain has 453 Courts of Preliminary Investigation in Spain, to which another 1065 mixed courts must be added (called Juzgados de 1ª Instancia e Instrucción) with jurisdiction in both civil and criminal matters. Consequently, we do not share the thesis of absolute decentralisation of EAW execution because that would mean that some Member States might have more than 1500 execution judicial authorities. A more reasonable alternative, as suggested by MORENO CATENA and CONDE-PUMPIDO TOURÓN[17], would be restricted decentralisation in favour of a specific number of judicial bodies. It would be a compromise solution between a single judicial body and thousands of execution judicial authorities.

## 2.2 Scope of the EAW

An EAW is pertinent to criminals punishable by the law of the issuing Member State with a maximum deprivation of freedom of at least 12 months if they are still under prosecution, or with a prison sentence of at least 4 months if they have already been sentenced. In other words, if an EAW is issued for prosecution purposes, the requested person must be a suspect under investigation for crimes punishable with a *custodial sentence* (prison sentence) of 12 months or more. On the other hand, if an EAW is issued to execute a sentence, the requested person must have been convicted to a *custodial sentence* of 4 months or more. Obviously, qualification of the facts and valid penalty procedures are those established by the State issuing the request.

So the scope of a EAW is essentially sustained by two elements. The first is the 'type of criminal offence' or 'offence' that is underpins the EAW; second, and closely linked to it, the 'penalty' entailed by the offence or that has been effectively handed down. The "offence" distinguishes the EAW according to whether it is included or not in the list of article 2.2 FD, henceforth the *EAW catalogue*. The second factor, 'the period of the detention order' or 'the penalty' (or custodial sentence) distinguishes the abovementioned cases[18] according to certain minimum limits. Anyway, the facts qualification (in theory) and the valid penalty are those established by the State issuing the request. On this basis, the EAW system may be split into two groups: a) EAW requests referring to offences included in the EAW catalogue, which must also be punishable with a custodial sentence of three or more years; b) EAW requests for a offence not listed in the EAW catalogue, in which case the 'limit of penalty' varies depending on the aim of the EAW. If the EAW has been issued to launch or continue proceedings against the requested person, the offence should be punishable with a

15 Art. 15. Portuguese Law No. 65/2003 of 22 August 2003.

16 *La Justicia dato a dato 2009*, Madrid, CGPJ, p. 10.

17 MORENO CATENA/CONDE-PUMPIDO TOURÓN, in: Round Table Conference 'La Orden de Detención Europea', Toledo, 2003, in: www.uclm/espaciojudicialeuropeo.es www.uclm/espaciojudicialeuropeo.es. CONDE-PUMPIDO TOURÓN, pp. 39-48. MORENO CATENA, pp. 11-38. MORENO CATENA, VÍCTOR, 'La orden europea de detención en España', in: *Revista del poder judicial* , No.78, 2005, pp. 11-38

18 Offence.

custodial sentence of 12 months or more. If the EAW has been issued for execution of sentence, the conviction must be of at least four months.

In terms of execution, this pair of elements determines whether the principle of double incrimination is at stake[19]. The EAW FD abolishes double criminality checks that routinely take place for extradition, for the first group (a). It follows that the executing state cannot refuse surrender, even of its own nationals, on the grounds that it does not recognise the offence as a crime under its jurisdiction. In fact, this is an example of the principle of mutual recognition at work. For offences outside the EAW catalogue, the FD leaves the double-criminality check to the discretion of the Member States.

This schema may seem straightforward, but it is not so easy in practice. There may appear some the controversial points in certain cases. First of all, the EAW FD leaves a legal gap for those offences falling within the scope of the list but under the three-year threshold. Obviously, in this case double criminality remains by omission.

On the other hand, the EAW catalogue[20] has been criticised for the lack of logical order with which the offences are listed, arguing that they should have been grouped together following logical criteria[21], for example, the legal interest being protected and/or the seriousness of the crime.

Considering specific offences included in the list, other problems may arise. Surprisingly or not, not all the categories listed are considered crimes throughout the EU. Some national criminal law systems do (or did[22]) not envisage one or two crimes within the catalogue. Therefore, these countries would never be able to issue an EAW for these behaviours, but in the opposite case they would be obliged to surrender a requested person for these crimes. For example, illicit trade in human organs and tissues was not a crime in Spain until recently. This gap was corrected in the last reform of the Spanish Criminal Code, but it will only become effective when the reform enters into force on 23rd December 2010[23] (see new Article 176 bis Spanish Criminal Code). The crime of swindling is also unknown in English and Scottish Criminal Law.

In other Member States, these issues have resulted in some Member States excluding some offences from the list on the grounds that they are not punishable under their own criminal codes. This is the case for abortion and euthanasia in Belgium, or the

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[19] On the content and significance of the double incrimination principle see CEZÓN GONZÁLEZ, *Derecho Extradicional,* Dykinson, 2003, pp. 88-90. As well as MANZANARES SAMANIEGO*, El Convenio Europeo de Extradición*, Bosch (1986). pp. 48-55 in connection with Article 2 of said convention signed on 13 December 1957. CUERDA RIEZU, 'Los principios de legalidad, doble incriminación e igualdad en la orden europea de detención y entrega'*,* in: CUERDA RIEZU/JIMÉNEZ DE PARGA (eds.), *Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales*, Tecnos (2009), pp. 541-566. GÓMEZ-JARA DÍEZ, 'Orden de Detención Europea y Constitución Europea: reflexiones sobre su fundamento en el principio de reconocimiento mutuo', in *Diario La Ley*, 2004, No. 6069, pp. 1-6. GONZÁLEZ-CUÉLLAR SERRANO, 'La «euroorden»: hacia una Europa de los carceleros', in: *Diario La Ley,* 2006, No. 6619, pp. 1-6.

20 In any case, the EU Council can change the EAW catalogue after consultation with the EU Parliament (Article 2 EAW FD).

[21] Concerning this, ARANGÜENA FANEGO, 'La orden europea de detención y entrega. Análisis de las Leyes 2 y 3 de 14 de Marzo de 2003, de transposición al ordenamiento jurídico español de la Decisión Marco sobre la 'euroorden'', in: *Revista de Derecho Penal*, 2003, No. 10, p. 28.

22 Because there has been legal improvements since 2003.

[23] Organic Law 5/2010, of 22 June, modifying Organic Law, 10/1995, of 23 November, of the Criminal Code does not, however, enter into force until 23 December 2010.

generic exclusion by Austria, until 31 December 2008, if the act for which the EAW has been issued is not punishable under Austrian Law. However, the Court of Justice[24] notes that the only valid definition is that given by the issuing judicial authority according to its domestic law. In Italy, there is not a verbatim translation of the EAW FD's catalogue, the EAW offence catalogue are adapted into Italian legal categories (see, article 8.1 Italian EAW Law); which means that sometimes it is correspondence straightforward with the EAW FD, but other times it is not because the Italian Law is more detailed[25].

From another point of view, the FD list terminology is sometimes too abstract[26], for example, corruption[27], computer-related crime[28], swindling, terrorism, racketeering[29], etc. As suggested by a group of doctrine experts[30], it would be (and would have been) useful for each member state to publish a record/catalogue of all those acts that their national laws would include under the offences listed (EAW catalogue).

In other cases the difficulty arises because the maximum penalty under national law for some listed offences is always lower than three years. For example, in Spain the illegal trafficking of an endangered plant species has a maximum penalty of two years imprisonment (Article 332 Spanish Criminal Code). Therefore, although the offence is listed, in Spain it would be automatically excluded because of the penalty duration, and, in the end, an EAW of this type of offence would depend on the requirements of offences not included on the list.

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24 See, Advocaten voor de Wereld VZW v. Leden van de Ministerraad, Decision of 3.5.2007, Case C-303/05.

25 GOMES/FERNANDES/BORGES REIS, 'The European Arrest Warrant: comparative analysis', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 44 See more, in VELICONA/FABRI, 'The European arrest warrant in Italy' in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 132, 133. Both In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

26 Vide ORMAZABAL SÁNCHEZ, 'La Orden europea de detención y entrega y la extradición de nacionales propios a la luz de la jurisprudencia constitucional alemana. [Especial consideración de la Sentencia del Tribunal Constitucional alemán de 18 de julio de 2005 (2 BvR 2236/2004)]', in: *Diario La Ley*, 2006, No. 6394, p. 2. DE HOYOS SANCHO, 'Eficacia transnacional del *non bis in idem* y denegación de la Euroorden', in: Diario La Ley, 2005, No. 6330, p. 11. Article 2.2 of the EAW FD has been also criticised for its vagueness, see PÉRIGNON/DAUCÉ, The European Arrest Warrant a growing success story, in: ERA Forum, 2007, No. 8, p. 207. MACKAREL, 'The European Arrest Warrant – the Early Years: Implementing and Using the Warrant', in: *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, Vol. 15, No. 1, p. 44. Same critique, FICHERA, The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?, in: 15, *European Law Journal*, 2009, Vol. 15, No. 1, pp. 79-80.

27 JIMÉNEZ VILLAREJO, 'Reflexiones sobre el concepto de corrupción a propósito de la orden de detención europea', in: *Actualidad Jurídica Aranzadi*, 2002, No. 560, p. 1-5.

28 Some authors remark on the need for clarification based on the diverging international praxis and domestic laws on what constitutes this crime, the activities included in "cyber crime", etc., see in particular, POCAR, 'New challenges for international rules against cyber-crime', in: *European Journal on Criminal Policy and Research*, 2004, No. 10, p. 32, more pp. 34-37.

29 PLACHTA, 'European Arrest Warrant: Revolution in Extradition?', in: *European Journal of Crime, Criminal Law and Criminal Justice*, 2003, Vol. 11, No. 2, p. 190.

30 Vid. FONSECA MORILLO, 'La orden de detención y entrega europea', in: *Revista Española de Derecho Comunitario Europeo*, 2003, No. 14, p. 89.

All in all, the majority (if not all) the thirty-two offences on the EAW list are punishable in all Member States[31]. In my opinion, this highlights further that the new EAW system is innovative in its exclusion of government authority involvement rather than for doing away with the principle of double incrimination checks[32]. If the principle of controlling double incrimination is successfully implemented for the majority of listed offences because they are punished by both countries (issuing and executing), what advance or improvement would the removal of the double incrimination principle provide? This is what the Advocate General explained in his allegation to the case VOOR DE WERELD. In RUIZ JARABO's view, *the acts listed are classed as offences in all the Member States*, so *it is not the double criminality requirement, which is set aside but rather* only *the requirement of its verification*[33]*.*

## 2.3 Grounds for refusal and other guarantees

Notwithstanding these scope-limits ('offence' and 'penalties') for the issuing countries, the executing judicial authority still enjoys some leeway to refuse an EAW request on mandatory grounds of non-execution or non-mandatory grounds of non-execution.

The EAW FD establishes the grounds for non-execution of an EAW and distinguishes mandatory from non-mandatory elements (article 3). An EAW must *be refused* by the executing judicial authority if the sentence has been already served elsewhere, if the offences are covered by amnesty under the jurisdiction of the executing state, or if the requested person's age exempts him/her from criminal liability. In other words, an executing judicial authority may refuse to execute the EAW in the event of *non bis in idem*[34]*,* age (requested person is a minor), and pardon.

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[31] DE MIGUEL ZARAGOZA, 'Algunas consideraciones sobre la Decisión Marco relativa a la orden de detención europea y a los procedimientos de entrega en la perspectiva de extradición', in: *Actualidad Penal*, 2003, No.4 pp. 139-236.

[32] Vid. JIMENO BULNES, 'La orden europea de detención y entrega: aspectos procesales', in: *Diario La Ley*, 2004, No. 5979, p. 4; JIMENO BULNES, 'After September 11th: the Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples', in: *European Law Journal*, 2004, Vol. 10, No.2**,** pp. 235-253. MACKAREL, 'The European Arrest Warrant – the Early Years: Implementing and Using the Warrant', in: *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, Vol. 15, No. 1, p. 40.

33 They are offences where the verification of double criminality is regarded as superfluous because the acts concerned are punished throughout the Member States. Paragraph 90. See also footnote No. 86. Advocate General's opinion. Advocaten voor de Wereld VZW v. Leden van de Ministerraad, Decision of 3.5.2007, Case C-303/05.

34 See, LÓPEZ BARJA DE QUIROGA, El principio *non bis in idem*, Dykinson, 2004, págs. 14-17. DE HOYOS SANCHO, 'Eficacia transnacional del *non bis in idem* y denegación de la Euroorden', in: *Diario La Ley*, 2005, No. 6330, pp. 1-22. CEDEÑO HERNAN, 'La orden de detención y entrega europea. Especial consideración del non bis in idem como motivo de denegación', in: GASCÓN INCHAUSTÍ et al. (eds.), *El Derecho Procesal en la Unión Europea*, 2006, pp. 75-106. IRURZUN MONTORO, 'El espacio judicial europeo en una encrucijada?', in: *Diario La Ley,* 2006, No. 6532, pp. 1-12. VERVAELE, 'The transnational *ne bis in idem* principle in the EU: mutual recognition and equivalent protection of human rights', in: *Utrecht Law Review*, 2005, No. 1, pp. 100-118. BAILIN, 'Double jeopardy', in: LEAF (ed.), *Cross border crime, Justice Publication*, 2006, pp. 103-120. WASMAIER/THWAITES, 'The development of *non bis in idem* into a transnational fundamental right in EU law: comments on recent developments', in: *European Law Review*, 2006, Vol. 31, pp. 65-78. VAN DER WILT, 'The European Arrest Warrant and the principle *ne bis in idem'*, in: BLECKXTOON, R./ VAN BALLEGOOIJ, W. (eds.), *Handbook on the European Arrest Warrant,* The Hague, 2005, pp. 99-117; ECJ jurisprudence about the non bis in idem: Criminal Proceedings v. Miraglia, Decision of the 10.3.2003, Case C-469/03. Criminal Proceedings v. Van Esbroeck, Decision of 9.3.2006*,* Case C-436/04. Criminal Proceedings v. Gasparini and others*,* Decision of 28.9.2006, Case C-467/04. Van Straaten, v. Netherland and Italy, Decision of 28.9.2006, Case C-105/05.

In addition, the EAW FD envisages seven cases in which the executing judicial authority *may refuse*[35] to execute the EAW (article 4): (1) offences[36] subject to double criminality check that are not a crime in the executing state (although mismatch of tax regimes between countries is not a valid ground for refusal in the case of tax crimes); (2) acts already under prosecution in the executing state; (3) acts the executing state has decided not to prosecute or that have already been sentenced elsewhere; (4) acts within the jurisdiction of the executing state whose punishment is statute-barred; (5) acts already prosecuted, sentenced or served in another state, other than the issuing state (*ne bis in idem*); (6) in the case of a warrant for sentence execution, decision of the executing state to execute the sentence itself instead of surrendering the requested person for him to serve it abroad; (7) acts committed, in whole or part, in the executing state, or outside the issuing state.

Members States are free to decide whether to consider these circumstances optional grounds or, on the contrary, as mandatory. For instance, although most Members States generally enforce double criminality checks for crimes outside the EAW catalogue, there are some exceptions like Spain[37] where it remains optional. Under Spanish EAW Law, even the decision of whether to surrender a requested person for crimes outside[38] the EAW catalogue that are not offences under Spanish law is left to the discretion of the executing judicial body [see, article 12.2 a) EAW Spanish Act]. The Italian law[39] turns the EAW FD around by making double criminality the rule upfront – Italy shall enforce the EAW only in cases where the act is also considered to be an offence under Italian law. In practice other laws, such as the Portuguese, also retain double criminality checks to the maximum extent allowed. These transpositions could be seen as a signal of mistrust towards the European legislator.

Furthermore, nothing has prevented some national transpositions from extending the grounds for non-execution of an EAW. Obviously from a mutual recognition principle point of view[40] this is highly debatable, especially when there exist mandatory grounds for non-execution. Perhaps, the most paradigmatic case is the Italian system[41] where all optional grounds have been turned into mandatory elements, with even some

35 The problem from my personal point of view is: what does an *optional or non-mandatory cause of denial* actually signify for the executing judicial body? Is the judicial body obliged *sua sponte* to control each of these, i.e., to know if in each case they may be applied or not? In other words, must be the executing judicial body be aware of the existence of an optional ground whether or not it intends to apply it? Are the executing judicial bodies obliged to verify their possible existence even if the judge does not intend to refuse the EAW or the requested person (or his o her lawyer) do not mention it? And of course: will this question have the same answer in every EU Member State when they play as a executing country?

36 Offences non listed in the EAW Catalogue.

37 Art. 4.6 Spanish Law No. 3/2003 of 14 March 2003.

38 Art. 9.2. Spanish Law No. 3/2003 of 14 March 2003.

39 Art. 7.1 Italian Law.

40 ALEGRE/LEAF, Mutual recognition in European judicial co-operation: a step too far too soon? Case Study—the European Arrest Warrant, commentary to article 7 ECHR «Double Criminality and Retrospective Application», in: *European Law Journal*, 2004, No. 10, pp. 208–209.

41 Art. 18. Italian Law no. 69 of 22 April 2005. *Gomes/Fernandes/Borges Reis,* The European Arrest Warrant: comparative analysis', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 43. See more, in *Velicona/Fabri,* VELICONA/FABRI, 'The European arrest warrant in Italy' in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law-enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 135-138. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

additional new mandatory grounds added. As a whole, the Italian law has twenty mandatory grounds for refusal, three mandatory and seven optional grounds more than provided for by the EAW FD. These include: consent of the person whose right has been infringed; whether under Italian law, the offence could be considered as committed in order to exercise a right, fulfil a duty, or was determined by chance or *force majeure*; if there are no limits to preventive detention in the issuing state; if the object of the EAW is a political offence; if there is reason to believe the underlying sentence does not respect the minimum rights of the requested person; if the requested person is pregnant or the mother of children under the age of three; if the coercive measure underlying the warrant lacks justification; if the sentence underlying the warrant is contrary to the fundamental principles of the Italian legal system.

The Dutch law[42] turns most optional grounds for refusing an EAW into mandatory elements, with three exceptions: (1) for acts under prosecution in the Netherlands, the Minister of Justice can decide, on advice of the public prosecutor's office, to suspend the Dutch prosecution and enable surrender abroad; (2) on acts the Netherlands has decided not to prosecute, either because its criminal law is inapplicable or a trial abroad is preferred; (3) on acts committed in the Netherlands or outside the issuing state, refusal of surrender can be waived on a reasoned request by the public prosecutor.

The legal and practical power of executing judicial authority in each Member State is not always very clear. It is evident from the above paragraphs that the unequal application of the EAW throughout Member States is a major issue[43]. The belief that the EAW will function harmoniously is therefore not enough to ensure its implementation. In our opinion these problems, sometimes more serious than others, uncover another major point of concern: the guarantees for surrender. In short, judicial insecurity generated by the double incrimination configuration, like a surrender denial contingent on offences not included in the list, or new mandatory grounds for refusal could seriously endanger the principles of equality, legality and the fundamental rights of interdiction of defencelessness and due process.

Quite different is that the executing state may demand three different kinds of *guarantees to execute the EAW.* According to article 5 EAW FD these guarantees are*:* a) a *retrial* if the requested person was sentenced *in absentia*; b) a *review* in the case of a lifetime sentence; c) the possibility to serve the sentence at home for nationals or residents[44] of the executing state; in the event of an EAW issued for prosecution this means that surrender may be subject to the condition of returning to the executing country to serve the eventual custodial sentence or detention order if the requested persons so desires[45].

In practice at the end, these guarantees may function as further grounds for non-execution if they are not ensured by the issuing country. However, it is up to the

42 Articles 8. 9 and 13 of Dutch Surrender Act of 29 April 2004.

43 As *Guild*.

44 In the case of Spain, the EAW Spanish Act only envisages this guarantee for Spanish nationals, but not residents or persons staying in the territory [see, article 4.6 EAW FD, and article 12.2 f) of the Spanish EAW Act].

45 The last guarantee seems reminiscent of the traditional right not to be extradited from one's home country and be able to serve the sentence at home. However, there is a slight difference in the EAW FD depending on the purpose of the EAW. In the event of an EAW for prosecution, the executing state *can demand* this guarantee. However, if the EAW is to execute a sentence, the executing judicial authority *has the option to refuse the surrender if it decides to execute the sentence itself*.

national transpositions to make specific mention of such guarantees and, obviously, whether they are mandatory or optional.

For example, Portuguese EAW Law has converted two of these optional guarantees into mandatory ones[46]: the retrial for decisions rendered *in absentia,* and the review of lifetime sentences. Similarly, the Netherlands[47] where mandatory guarantees are retrial for sentences *in absentia* and the opportunity to serve sentence at home. The Dutch law is in particular one of the most protective of its nationals, only allowing surrender for prosecution with the guarantee that the requested person may return to serve any eventual sentence in the Netherlands. Dutch nationals may never be surrendered to serve a sentence abroad since in such cases the Netherlands will always execute the sentence itself. Indeed the EU Council has rightly considered this attitude a discriminatory practice against non-Dutch citizens and contrary to the spirit of the EAW FD[48]. Despite its restrictive legislation, the Italian EAW Law considers all these guarantees as optional.

Finally, Spain only envisages as mandatory the guarantee[49] of review of lifetime sentences and as optional the guarantee of return-back after surrender if it is a prosecution request[50].

Indeed the guarantee of a retrial in the event of sentence rendered *in absentia* has received much attention for its surprising absence in the Spanish EAW Act. Initially this was interpreted as an obligation on Spanish judicial authorities to surrender the requested person even if the custodial sentence had been rendered in the issuing country *in absentia*. The confusion was resolved subsequently by the Spanish Constitutional Court pointing out that under Spanish constitutional doctrine, review of a judgement rendered *in absentia* is mandatory for every surrender decision whatever the procedure, be it for extradition or an EAW request. On this point, the Constitutional Court stated that although Spanish National Court does not require any preconditions to be provided by the issuing authority before approving an extradition or EAW, the order granting surrender must include the guarantee that the issuing state accepts the requested person's right of appeal. In this way the issuing state takes full responsibility for compliance with the guarantee although it is not envisaged strictly in the Spanish

46 Art. 17 Portuguese Law 65/2003 of 22 August 2003. *Gomes/Fernandes/Borges Reis,* 'The European Arrest Warrant: comparative analysis', in: The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area, Permanent Observatory of Portuguese Justice (November/2010), pp. 58. See more, in *Gomes/Fernandes/Borges Reis,* The European arrest warrant in Portugal', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 359-361.

47 Art. 6. Dutch Surrender Act of 29 April 2004.

48 Council of the EU, 2009, p. 46.

49 Art. 11. Spanish Law No. 3/2003 of 14 March 2003. If the offence for which the EAW has been issued is punishable by custodial life sentence, or a life-time detention order, the Spanish Judicial authority shall subject the surrender to the condition that the issuing member state has provisions in its legal system for a review of the penalty or measure imposed, or the application of measures of clemency which the person is entitled to apply for under the law or practice of the issuing State, aiming at a non-execution of such penalty or measure (Article 11.1 EAW Spanish Law). When looking at the study sample of received EAWs, the data reported one case among 234 EAW executions for which this guarantee was demanded.

50 *Oubiña Barbolla, Sabela/González Vega, Ignacio,* 'The European arrest warrant in Spain', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 473-596. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

EAW Law. The Legal Basis 7 of Judgement 177/2006 of 27th June states that although the EAW FD and the EAW Spanish Law 3/2003 do not establish this requirement as a *sine qua non* condition for surrender, this does not mean the executing judicial authorities may ignore it since it is an essential part of the fundamental right to trial with full guarantees recognised by Article 24.2 of the Spanish Constitution, and therefore must be respected implicitly or explicitly by any Spanish law. The EAW FD does not make it mandatory for Member States to establish such conditions for surrender, but forwards the matter to the national legal systems. In fact, although the EAW Spanish law does not envisage any specific rules in this respect, the right to trial with full guarantees is enshrined in the Spanish legal system.

Curiously, before the constitutional appeal and the explanation of the Constitutional Court, the inacceptable interpretation of the Criminal Division of the National Court, was supported by some authors, like CASTILLEJO MANZANARES51; in her opinion the exclusion of this guarantee "matched the expressions and bilateral commitments previously assumed by Spain with the Italian Republic, that concluded with the signing of the Treaty of 28 November 2000".

### 2.3 EAW procedure

The EAW FD sketches the essential lines of the EAW procedure[52]; within this frame, EU Member States are free to detail the EAW procedure according to their legislations. The EAW strictly comprises two steps: the issuing procedure and the executing procedure; surprisingly, most of the EAW FD deals only with the execution procedure. For obvious reasons neither this nor the specific system of each Member State can be examined in depth here. Focus shall rather be given to the following sequential phases: 1) EAW transmission; 2) Arrest of the requested person; 3) Hearing; 4) Surrender Decision; and finally, 5) The effective transfer of the requested person.

In general, according to the EAW FD, the EAW executing procedure is dealt with as a matter of urgency and within preclusive time-limits (Articles 17 and 23), the requested person is entitled to a hearing (Articles 14 and 19), to be assisted by a lawyer and an interpreter [Article 11(2)], to the rights available to arrested persons and, where appropriate, to provisional release in accordance with the executing state's law.

The procedure starts when a Member State issues an EAW. The *transmission of the EAW* may be (article 9 EAW FD), either directly to an executing judicial authority (with possible mediation of the national's central authority or the European Judicial Network) where the requested person is known or believed to be located; and/or generically by introducing an alert on the Schengen Information System (SIS), in which case any enforcement agency of the Member States may carry out the arrest directly if the requested person resides or is found in its territory. In practice, most EAWs are issued and received through this last channel. This seems logical since most EAWs are issued by judicial authorities that do not know the requested person's whereabouts.

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[51] CASTILLEJO MANZANAREZ, 'El procedimiento español para la emisión y ejecución de una orden europea de detención y entrega', in: *Actualidad Jurídica Aranzadi*, 2003, No. 587, pp. 1-5.

52 Part of this fragment is based on section 'procedures' of 'National transpositions and their variations', of GOMES/FERNANDES/BORGES REIS, 'The European Arrest Warrant: comparative analysis', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 50-55. See also their conclusions. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

The rare cases of direct transmission are generally for one reason, i.e. so as not to renounce the speciality rule. These are EAW requests for persons who have previously been claimed in an EAW for other facts. The decision on the previous EAW may be pending or even may have been executed, but the issuing judicial authority already knows where the requested person is to be found.

When the executing judicial authority receives the EAW through one of these channels, it verifies its legitimacy according to the above-mentioned requirements, such as the nature of the offences, the length of penalty, principle of double criminality, grounds for refusal, guarantees, etc.

At this stage, the executing judicial authority may consider the EAW invalid and refuse its execution. The EAW may also be incomplete. In this case the executing judicial authority must ask the issuing authority for further clarifications. Only when these problems have been resolved can the EAW request move on to next stages: *arrest and hearing*.

On an initial reading of the EAW FD, the arrest or detention and consecutive hearing of the requested person may appear somehow intermingled due to their proximity in time. In any event, when the requested person is arrested, he or she has the right to be informed of the warrant, its contents, the possibility of consenting to surrender, and assistance by a legal counsel and an interpreter in compliance with local law (article 11 EAW FD).

These stages encompass two major decisions of the EAW procedure: a) the *consent decision*[53], where the requested person chooses whether to consent to his surrender; b) the *provisional imprisonment decision*, where the executing authority chooses whether to keep the requested person incarcerated, or release him/her provisionally until the final surrender decision. The executing judicial authority must take this decision according to its national laws and consequently take the necessary measures to prevent absconding (FD article 12).

- ⇒ If the requested person acquiesces voluntarily, fully aware of what his/her choice to surrender entails, the executing procedure is shorter and simpler. The surrender decision should be taken within a period of 10 days after consent has been given (articles 13 and 17 EAW FD).

- ⇒ When the requested person does not consent to his/her surrender, any surrender decision may be taken only after a hearing and within a period of 60 days after the arrest of the requested person.

However, according to Article 17 EAW FD, in both cases (consent and contested cases) the time limits for the surrender decision may be extended by a further 30 days if the grounds are considered reasonable.

The timeframes and content of the *hearing stage* are surprisingly under-specified[54] by the EAW FD. For example, according to article 14 EAW FD, it is clear that if the

53 DE PRADA SOLAESA, 'Consentimiento a la entrega. Renuncia al principio de especialidad', in: ARROYO ZAPATERO/NIETO MARTÍN (eds.), *La orden de detención y entrega europea*, Editorial Universidad Castilla-La Mancha, 2006, pp. 355-362.

54 GOMES/FERNANDES/BORGES REIS, 'The European Arrest Warrant: comparative analysis', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement*

requested person does not consent to surrender, he/she is entitled to a hearing. However, nothing is said in the EAW FD about the consequences if the requested person consents to surrender. As a result, many national EAW laws envisage a hearing in both cases. The EAW FD also establishes that a representative of the issuing country may be present at the hearing (article 19), but some national transpositions do not recognise this ruling (see for example the Spanish one).

The content of this hearing differs in each case. For example, in the case of an EAW issued for prosecution purposes, the requested person must either be heard or temporarily transferred to the executing state under conditions agreed by both states, with the right to return to the issuing state being guaranteed before the surrender decision (article 18 EAW FD). In conclusion, the executing judicial authority follows its national EAW law. While details of each EAW system cannot be given here, it may be affirmed that as a rule, the hearing will also consider previously mentioned elements such as information of the warrant, provisional imprisonment or detention decision, consent decision, etc.

Anyway, after the hearing the executing judicial authority has to take a *decision about the execution of the EAW*: approve, refuse based on mandatory or non mandatory grounds for reject the EAW execution, postpone, make conditional, etc[55]. If the person concerned has consented to surrender to the issuing State, the final decision on the EAW should be taken no later than ten days after the hearing. When the requested person has not agreed to their surrender and in other cases, the executing judicial authority may decide within sixty days of the arrest. However, in both cases (consented and contested cases) the time limits may be extended by a further 30 days if the grounds are considered reasonable.

After the decision to surrender, it comes the *transfer*. The requested person is surrendered as soon as possible on a date agreed between the authorities concerned. In any event, the effective surrender should be no later than 10 days after the decision on the EAW execution (Articles 23.2 EAW FD).

The issuing judicial authority designates the police authority that will come to the executing country to pick up the requested person. Obviously, the issuing authority has to inform the executing authorities of the place and date for the surrender. Any delay must be reported with justification to Eurojust (article 17 EAW FD). The EAW FD envisages the possibility of a new surrender date being agreed by the two judicial authorities if the previous one frustrates (article 23), within a further time limit of ten days of the date first set. The surrender can also be postponed for serious humanitarian reasons.

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*area*, Permanent Observatory of Portuguese Justice (November/2010), p. 37. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

55 Likewise, the EAW FD recognizes other circumstances that may also condition the surrender decision process. For example, in the event of multiple surrender requests for one person (art. 16), the executing judicial authority must choose one on the basis of their gravity, the date of the requests, and also their purpose. On the other hand, the countdown on the time limits referred to in Article 17 does not start until any privileges or immunity enjoyed by the requested person are waived (article 20 EAW FD). If the requested person has been extradited from a third state, the executing judicial authority must first ask this third state for authorisation to surrender him. By the same token, the deadlines set are not taken into account until such authorisation is received and the previous speciality rules relinquished (article 21).

### a) Spanish EAW Procedure

Obviously, the EAW procedure follows in Spain the main guidelines of the EAW FD, however the execution of the EAW has some particularities in each EU Member States. Therefore, in the next paragraphs we will focus our attention on the Spanish ones.

In practice, like in other Member States the majority of the EAWs get to Spain through SIRENE. This seems logical if we consider the reasons for issuing an EAW: the issuing judicial authority normally does not know where the person requested in the EAW is; so the direct transmission (and reception) is an exception. The dossiers consulted in the research project and the opinions of consulted experts confirm that most of the EAWs received in Spain[56] have been sent via SIRENE. The rare cases of direct transmission are generally due to one reason, which is that nobody renounces the speciality rule. These are EAW requests for persons who have previously been claimed in an EAW for other facts; the decision on the previous EAW may be pending or even have been executed already.

Once the requested person has been located or found in Spain, the police will proceed with his or her arrest with the corresponding reading of rights, among which the cause of the arrest is prominent (Article 520 Spanish Criminal Procedure Law, Article 13.1 Spanish EAW Law). The arrested person may be brought before the Central Preliminary Investigation Court, directly or through the Preliminary Investigation Court within the jurisdiction where the person has been arrested, within no more than 72 hours of the arrest (Article 13.2 Spanish EAW Law).

When the arrested person has been brought before the judicial authority, it will inform them of the existence of the EAW, its content, the possibility of irrevocably consenting[57] to surrender to the issuing State and the rest of their rights (Article13.3 EAW Spanish Law). The hearing must be conducted according to the Criminal Procedure Law regarding the hearing of the arrested person; which means directed by the Central Preliminary Investigation Judge, with the attendance of the Public Prosecutor, legal counsel for the arrested person and, where necessary, an interpreter. The main judge of this Central Preliminary Investigations Court will ask the arrested person if they consent irrevocably to their surrender and if they renounce entitlement to the speciality rule[58] (Article 14 Spanish EAW Law). The judge shall make sure that the consent to surrender and renunciation of entitlement to the speciality rule have been given freely and with full understanding of the consequences, in particular of its irrevocable nature. Whether the requested person has given consent to the surrender or not, the judge will also hear the Public Prosecutor's Office on the origin of the surrender, the existence of impediments or the need to impose conditions on the surrender, etc.

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[56] The same dynamic is also applied in the reverse situation. The general rule is that the Spanish judicial bodies send requests via SIRENE.

57 About the requested person's consent, see DE PRADA SOLAESA, 'Consentimiento a la entrega. Renuncia al principio de especialidad', in: ARROYO ZAPATERO et al. NIETO MARTÍN (eds.), *La orden de detención y entrega europea*, Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 355-362. In particular, for the right to know the content of the order as a fundamental right, BERNARD, 'El derecho fundamental a ser informado acerca del contenido de la orden de detención y entrega europea', (ARROYO ZAPATERO et al. NIETO MARTÍN (eds.), *La orden de detención y entrega europea*, Cuenca, Editorial Universidad Castilla-La Mancha, 2006, pp. 319-325.

58 According to data collection In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf., see Appendix II, none of the requested persons that we have consulted in the sample renounced the speciality rule.

In this hearing, any of the parties[59] (requested person or Public Prosecutor's Office) may propose the use of any necessary source of evidence regarding the concurrence of causes for refusal or conditioning of the surrender. As a general rule, the evidence will be assessed in the same act but, if necessary, the judge will fix a time limit for its assessment, taking into account the need to respect the maximum time limits provided by law.

In the course of this hearing, the Judge of the Central Preliminary Investigations Court will also decide on the personal situation[60] of the requested person. In view of the pleas in law of the requested person and the Public Prosecutor's Office on this subject, the Judge of the Central Preliminary Investigations Court shall decree the precautionary measures he considers necessary to ensure the requested person is fully available and the EAW is executed: provisional imprisonment, provisional release or any other measure provided for that purpose in the Criminal Procedure Law. The judge or the Criminal Division of the National Court may modify the precautionary measure initially agreed during the procedure (Article 17 Spanish EAW Law). Furthermore, the decision (judicial order) of the Central Preliminary Investigations Court on the personal situation of the requested person may be appealed to the Criminal Division of the National Court.

If the person concerned has consented to surrender to the issuing State and the Public Prosecutor sees no grounds for refusing or setting conditions for surrender, the Judge of the Central Preliminary Investigating Court may issue a writ for surrender to the issuing State. This writ shall be issued no later than ten days after the hearing and no appeal is possible (Articles 18.1 and 19 Spanish EAW Law).

Where the requested person has not agreed to their surrender and/or the Public Prosecutor's Office notices a refusing cause or that conditions have been set for the surrender, the Central Preliminary Investigation Court shall refer the proceedings to the Criminal Division of the National Court so that it may decide within sixty days of the arrest (Article 18.2 Spanish EAW Law).

Relating to this fact, the Spanish Public Prosecutor's Office protocol states, among other recommendations, that the Central Preliminary Investigation Court includes a written note when forwarding the file to the Criminal Division of the National Court stating how many days are left before the sixty days provided in Article 19 EAW Spanish Law expire. Usually the file arrives without that information, so the corresponding Criminal Division of the National Court must infer it from the arrest date in order to know how long it has to decide without exceeding the ordinary limit established in the law. During some of the interviews of the project, several Judges of

59 As we have noticed before the Spanish prosecutor Could not appeal the refusal of the surrender decision in the name of the issuing judicial authority, See the interesant reflection about the possible role of the prosecutor in the appeal of the national executing proceedings of criminal judicial cooperation instruments, MORÁN MARTÍNEZ, 'La decisión Marco de 22 de Julio de 2003 relativa a la ejecución en la UE de las resoluciones de embargo preventivo de bienes y aseguramiento de pruebas', in: *La prueba en el Espacio Europeo de Libertad, Seguridad y Justicia Penal*, CEJ/Thomson Aranzadi, 2006, pp. 72-73.

60 ANDREU MERELLES, 'Las medidas cautelares personales en la ejecución de una orden europea de detención y entrega: visión del juez central de instrucción', in: *Manuales de formación continuada*, No. 42, 2007, pp. 281-292. ARANGÜENA FANEGO, 'Las medidas cautelares en la legislación de la orden europea de detención y entrega: especial consideración de la prisión provisional y sus alternativas y de la intervención de objetos y efectos del delito', in: (ARROYO ZAPATERO et al. NIETO MARTÍN (eds.), *La orden de detención y entrega europea*, Universidad Castilla La Mancha, 2006, pp. 383-430.

the Criminal Division of the National Court complained that the Central Preliminary Investigation Courts used up or even exceeded the time they had to bring the file before the Criminal Division of the National Court.

In addition to this, it is worth discussing, even superficially, an exceptional situation that has been admitted when the requested person has been arrested and he or she has to be brought before the judicial authorities because there are some cases in practice, which might be not covered by the EAW Spanish Law. The personal situation decision of the requested person, which is at this stage within the competence of the Judge of the Central Preliminary Investigations Court, could exceptionally be heard as an ordinary legal hearing before the Judge of the Preliminary Investigation Court from where the requested person has been arrested or where they are. Under the intervention protocol of the EAW signed by the Crown Prosecution Service in Spain the General Council of the Judiciary expressly allows this exceptional pre-recorded appearance before the Central Preliminary Investigation Courts. These Courts may use the ordinary hearing to regularise the personal situation of the requested person in the Preliminary Investigation Court near to where the person has been arrested. The judge will send the proceedings urgently (via fax, etc.) to the Central Preliminary Investigation Court. They may even take place via videoconferencing from the place of the arrest or the closest place with videoconference facilities.

A Prosecutor –coordinator- of the South of Spain has been strongly critical of this possibility because it violates the terms of the reform of Articles 65 and 88 of the Organic Law of the Judiciary (hereinafter LOPJ) written in accordance with the EAW Organic Spanish Law 2/2003. The LOPJ establishes that whatever the place of detention may be, the competent judicial body for the execution of an EAW shall be the Central Preliminary Investigation Court or the Criminal Division of the National Court. Unofficially allowing the hearing to take place in the Preliminary Investigation Court of the place where the requested person was arrested, instead of in the Central Preliminary Investigation Court, is a doubtful legal perversion that, furthermore, would (or could) unleash a lot of insecurity in various situations. For instance, if that other extraordinary Preliminary Investigation Court agrees to a precautionary measure against the requested person (e.g., provisional imprisonment) and this person appeals that decision, which would be the competent judicial body to hear that appeal? Article 17 of the EAW Spanish Law confers this power on the Criminal Division of the National Court; but how can the National Court hear a decision agreed in a Preliminary Investigation Court (let us say in Marbella)? On the other hand, the time taken and the procedure's prolongation because of allowing the authority of the Central Preliminary Investigation Court, instead of being almost immediate or lasting only hours, is going to suffer a delay of days or even weeks, etc. In short, this "ordinary" judicial hearing (that should not be so) accepted in the Spanish protocol violates (or may violate) some fundamental rights of the requested person: the right to defence, the right to freedom, the right to a procedure without delays, etc.

In spite of everything, this questionable "judicial hearing" in EAWs was only used in the first stage and, what is more, it was exceptional because it was improved upon little by little. Nowadays, the police inform the corresponding Preliminary Investigation Court through a written note that a person has been arrested in its territorial jurisdiction and that they are going to be taken to the National Court (Central Preliminary Investigation Court).

Strictly, therefore, Spain cannot refuse to surrender its nationals to other member states, unless a Spanish citizen requested by an EAW to serve a custodial sentence

does not consent to do so in the issuing State. However, denying surrender implies not that the requested person does not serve the sentence, but that he will do so in Spain. That is why, as I have already notice, this *sui generis* refusal cannot be considered in itself contrary to the mutual recognition, nor to a shadow of the classical principle that forbids the surrender of nationals. The data collected in our research discovers that only in the 97% of the EAWs received in Spain was it demanded that the person be returned to Spain after hearing.

In the interviews phase, some judges[61] of the Criminal Division of the National Court complained that the Central Preliminary Investigation Courts frequently forgot to ask the requested Spanish persons whether they consented to serve the sentence in the issuing State or whether they wished to be returned to Spain to serve the detention order or the custodial sentence that may be delivered against them by the issuing State. That is why the Criminal Division of the National Court has to return the proceedings to the corresponding Central Preliminary Investigation Court on several occasions, so that this formality is fulfilled. This action by the Criminal Division of the National Court is based on the idea that the executing judicial body that should deal with this part of the proceeding (hearing, questions, etc.) is the Central Preliminary Investigation Court. However, the comings and goings of the proceedings (Central Preliminary Investigation Court-Criminal Division National Court-Central Preliminary Investigation Court) naturally prolong the procedure and there is a risk of not meeting the time limits of sixty days fixed by law.

We agree in broad terms with this approach; logically it should be the Central Preliminary Investigation Court who, under Article 14 of the Spanish EAW Law, asks the Spanish citizen requested by the EAW about this matter. However, there is no obstacle to the Criminal Division of the National Court also obtaining this information if the Central Preliminary Investigation Court has already referred the proceedings to the Criminal Division of the National Court, and therefore the said proceedings are already within its competence. The law does not strictly prevent it [vide Articles[62]. 11.2, 12.2 f) and 14.2 last paragraph]. In fact, whatever the personal situation in which the requested person may be, they will no longer be at the Central Preliminary Investigation Court's disposal, but at that of the Criminal Division of the National Court.

At the end, for this or other reasons, sometimes the Criminal Division of the National Court approves the surrender to the issuing State without respecting this specific guarantee of the procedure of execution of the EAW that involves a Spanish citizen. Therefore several of requested Spanish persons, who have found themselves in this situation, have appealed the surrender decision for legal protection of the Constitutional

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[61] See in particular the section "The perception of the EAW among the actors of the criminal justice". OUBIÑA BARBOLLA/GONZÁLEZ VEGA, 'The European arrest warrant in Spain', in: *The European Arrest Warrant in law and in practice: a comparative study for the consolidation of the European law- enforcement area*, Permanent Observatory of Portuguese Justice (November/2010), pp. 473-596. In: http://opj.ces.uc.pt/pdf/EAW_Final_Report_Nov_2010.pdf.

[62] Last paragraph of Article 14.2 of the EAW Spanish Law states that if the requested person (Spanish in this case) has not given consent, the Judge presiding "shall hear the parties on the concurrence of grounds for refusal of or the setting of conditions for the surrender". On the other hand, Article 11.2 states that "where a person who is the subject of a European warrant for the purposes of prosecution is of Spanish nationality, surrender may be subject to the condition that the person, after being heard, is returned to Spain in order to serve the custodial sentence or detention order passed against him in the issuing State". Also Article 12.2 f) that establishes that "If the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is of Spanish nationality, save when he consents to service in the issuing State. Otherwise, the requested person must serve the sentence in Spain".

Court for violation of the fundamental right to obtain effective judicial protection and be defended. That is what happened in the judgement of the Constitutional Court 177/2006 of 5 June. This dealt with a case that has had consequences because the requested Spanish citizen actually had to appeal the Constitutional Court twice for violation of several fundamental rights. Both times the Constitutional Court declared that in the surrender procedure several fundamental rights had been violated, and, consequently, declared null and void the decisions of the Criminal Division of the National Court that had agreed to the surrender.

One of the most debatable points of the EAW Spanish system is that the decision on the surrender (or not surrender) can not be appealed in the ordinary Jurisdiction. The parties of this procedure (the prosecutor or the requested person) can not appeal the execution decision. In fact this question is strongly criticized by the Spanish doctrine. The order or judicial writ of the Criminal Division of the National Court, which finally decides the execution of an EAW contested, doesn't admit an appeal in the sense of that the case can be taken to a higher court for a new decision. However, there is another chance but it can not be considered strictly as an appeal. The execution decision shall only be appealed in Constitutional jurisdiction through a different procedure called "recurso de amparo" which is an individual constitutional claim based on a violation or infringement of fundamental rights like the due process, the right to defence, etc.

The EAW transpositions of other EU member states always envisage an appeal of the executing procedure. In Spain, there are two clear different opinions about this fact. First are those who believe that it is a barbarity. Even one has revealed us that during a long period of time he thought to present the question of unconstitutionality to the Constitutional Court. Moreover, many interviewees in the project notice a connection between the lack of an appeal system and the use by the requested person of the protection clause at the Spanish Constitutional Court; which obviously it is not a solution because the individual proceeding at the Constitutional Court (called "recurso de amparo") has not this purpose. For them, only a loose interpretation of double instance would lead one to accuse the court of possible unconstitutionality if the suspect is caught and the case presented under article 24 Spanish Constitution, or article 15 of the International Pact of Civil and Political Rights (judicial guardianship effective without a defence lawyer present).

On the other side are those who support that the EAW Spanish Law does not establish an appeal against the decision of the National Criminal Court which refuses or approves the EAW. In their opinion, this is a logical system if one does not see the EAW as a process of resolution because it doesn't resolve anything, but rather only as a French judge asking for a detention and surrender[63]. In other words, the EAW is the request of an issuing judicial authority, therefore it is under their jurisdiction, and since Spain has signed a treaty it must be allowed. They compare the EAW to a warrant between two Spanish judges with a request for detention and surrendering of a person, in which neither there is the right to appeal, because it is like and administrative process of surrender. From this point of view, if it is considered as an administrative procedure of surrender, it cannot be considered a scandal that the EAW has not a

63 Some of them said things like "the decision about the execution of an EAW, is a formal decision because it deals with the surrender of a suspect to an EU judicial authority, who is the one in charge of the case, it is based on the principle of confidence and should not be an interminable decision, but rather a decision made in a brief period of time for very particular motives because the essence of the matter has to be brought before the Tribunal which is issuing the reclaiming".

second instance. The case is first seen by a Central Preliminary Investigation Court and then by a Criminal Chamber of the National Criminal Court which decides if the case meets all of legal requirements. Taking all of that into account, the appeal would go against the speediness and efficiency of the EAW. Furthermore, the extreme pro of this thesis lies in the fact that a normal evolution of the EAW should lead to cases being solved entirely and directly by the Central Investigation Court. For them, only in that case would it make sense to provide for an appeal against the executing decision.

Finally, some authors[64] see incongruence in the EAW FD and national legislation since although the EAW FD fixes short time limits to proceed with surrender, it is surprisingly silent about the consequences of non-fulfilment.

Neither are the consequences of the renounce to the EAW of the issuing judicial authority after the executing judicial authorities arrested the requested person; and even, he or she has been imprisonment during between 10-60 days. The research project has revealed that it sometimes happens; specially due to the lack of economic resources of some issuing countries, which issue an EAW for petty and weird non-listed offences, but even when the executing Court approves the EAW according to a generous interpretation of mutual trust, the issuing country finally renounces to the EAW because he cannot afford the surrender and transportation of the requested individual.

**b) A brief personal reflection**

The EAW's overview from these standpoints could represent an added value (essential, in our opinion) when evaluating the suitability of the variety of solutions that the doctrine proposes to channel the EAW, in the most reasonable and efficient way possible with respect to some of the problems that have arisen form a *Europeist* and rational point of view.

Close judicial cooperation between member states is definitely necessary for an effective European area of freedom, security and justice. But if we want to create a real judicial system without borders or infringement of rights I think it is vital to look back, we must "Look to our Past to plan our Future". In other words, sometimes we need to look to the past to be well prepared for the future. Generally speaking, the background of the EAW can help us plan or design a better European Area of Justice with its instruments. Instruments that have come into force like the Framework decisions which are already approved, but others, too, that are just proposals or simple initiatives like the "European Protection Order": mutual recognition of supervision measures; European Evidence Warrant (EEW); supervision of sentenced persons or persons on conditional release; mutual recognition of custodial sentences and measures involving deprivation of liberty; recognition and execution of confiscation orders; mutual recognition of pre-trial supervision measures; mutual recognition of financial penalties.

64 See, HOYOS SANCHO, 'Il nuovo sistema di estradizione semplifcata nell'Unione Europea. Lineamenti della legge spagnola sul mandato d'arresto europeo', in: *XLV Cassazione Penale,* 2005, pp. 303-315. JIMENO BULNES, 'The Enforcement of the European Arrest Warrant: A Comparison Between Spain and the UK', in: *European Journal of Crime, Criminal Law and Criminal Justice*, 2007, Vol. 15, No.3, p. 303. The authors criticise the fact that no kind of juridical sanction or penalty is contemplated.

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# The Interpretation of contracts concluded on-line under Polish Civil law from the Model Law Perspective

*By Wojciech Kocot*

## I. Introduction

It would come true that in the second decade of the XXI century all Internet-based methods of communication are no longer be regarded as “recent” or “hot” and the early enchantment with all words started with the prefix “e-“ will indispensable belong to the past. Nevertheless the original problems or questions caused by the rise of the global electronic network will bother us relentlessly. One of the real challenges created by the Internet which needs to be settled seems to be the proper method or rather technology of contract interpretations while they are concluded on-line by use of mobile, pervasive and uninterrupted connectivity (within the active-access oriented method, so not to the contracts concluded through electronic mail or similar means of individual communication over distance).

What is the most fascinating thing in online contracting? Unlike traditional, paper-based letters, e-mails or instant messages, we do not exchange online the web-sites. **We interact with them** having no idea at the same time whether or not we interconnect with human beings or just shrewd mechanics, someone real or illusive, actual or out-of-date, true or false information. So we lay aside the interpretative problems of offline transactions which seems to be less challenging and will concentrate on web-based interactions.

I would like to explain at first the position of the Polish civil law reg. the notion of declaration of intent which is the crucial institution of our legal system as far as the interpretation of contracts is concerned, then I would discuss the general rules of interpretation in comparison with the model basic rules of interpretation and at the end I will try to answer the question whether the basic rules of interpretation of contracts concluded online and in so called "real world" still remains the same. I abandon the specific rules of interpretation considering that rules such as: In favorem contractus, Contra proferentem, All terms to be given effect, Reference to contract or statement as a whole, Merger clause, Linguistics discrepancies, Priority of terms negotiated individually, etc. The application of these rules does not vary as far as the online contracting is concerned.

## II. The act of law, the declaration of intention

**The declaration of intent is the requisite part of each act of law**. The Polish Civil Code (PCC) includes the legal definition of the declaration of intent:

**Article 60**. Barring the exceptions provided for by statutory law, the intention of a person performing an act in law **may be expressed by any behavior of that person which manifests that intention sufficiently**, including the manifestation of this intention in any form of electronic communication (declaration of intent).

The PCC **does not** determine both the legal notion of contract and its indispensable contents. Unlike French or common law tradition and due to the Pandect system, the Polish law specifies the act of law as an elementary notion of the civil law system. Our system is then competent for the majority of Continental, Germanic legal systems representing their joint dilemmas. **The act of law consists of at least one declaration of intent. If there are at least two declarations of intent, the act of law is highly likely to be a contract.**

So the problem of contract interpretation under Polish law is in fact the problem of proper understanding of two declarations of intent put together (compounded) and – as a result – **the common intention of the parties** manifested or communicated (presented and transmitted) expressly or impliedly in the process of interaction with the website.

In the case of the declarations of intent made electronically the special importance ought to be attached to the method or technique used to manifest the intention (e.g. e-mailing, web-site interactions, MMS, SMS, chats, Instant Messaging System, VOiP, etc. The technology, as an US court has said [*Chwee Kin Keong v. Digilandmall.com Pte Ltd (2004) SGHC at 91*], does not change contract law but adds complexity to the traditional analysis. Accordingly, the question is not whether but how the traditional interpretation rules should be applied in the World of Internet.

## II. The subjective and objective test

In the European legal tradition of the XX$^{th}$ century the choice of the relevant method of contract interpretation usually depended on the types of values or ethics which prevailed (were preferable or to which were given the precedent) in the domestic system. So the axiology is the most suitable tool to run the interpretation of all declarations of intention and contracts.

The protection might be generally granted to the real, authentic will (intention, motivation) of the maker of the statement – **the theory of will**, *Wille*, *volonté* or to the confidence, reliance and the justified expectations which are stimulated (encouraged, produced) by such statement – **the theory of reliance**, *Vertrauen*, *confiance*.

Besides the latter theory does not refer to the state of confidence of the addressee of the statement (in such case the subjective test would be appropriate) but appeals instead to the wilder audience (society) and its reasonable expectations towards legally binding behavior of the parties represented by the idea of the reasonable third person.

So in fact we have two separate **tests** which we can employ in contract interpretation: **subjective** (individual) and **objective** (normative) one.

The subjective test is hardly operational in modern contractual practice. The main question refers to the proper **method of recognition of the real (authentic) intention (will)** and how to fix this intention in the case of contract, how to assimilate the separate intentions of each party into the uniform quality. The most troublesome difficulty is the detection by the court of the authentic intent of the maker of the statement at the time of contract conclusion where the other party knew or could not have been unaware what this intention was. The will is a matter of psychology difficult to recognize by the lawyers. During the disputes and court trial, the parties are always in total disagreement. So they attribute meaning to the words used and obligations incurred quite different than they did before. It is more highly unlikely then to explore the common intention of the parties in such circumstances and the meaning attached to by both parties.

E.g. The strictly literal interpretation of the contract which consists on the exact meaning of the words used in the statement is an utmost example of the will theory device (the legal systems which operates with this method prefer the formation of very detailed, self-regulatory contracts trying to consider as many as possible states of facts which could occur under the contractual relationship. The “subjective” test is still applicable even if the attached meaning depart from the common sense of the used wording. The literal interpretation in the pure form does not exist.

The theory of reliance (**the objective test**) helps us to avoid the above problems. Statements are to be interpreted accordingly with the understanding that a reasonable third person in the same shoes of the other party would have had. The standard is thus the hypothetical understanding of the reasonable person of the same kind as the other

party, in the same external circumstances. The reasonable third person represents the ethics of society, she is its emanation. What is acceptable for the society as a whole would be acceptable for such third person. The principles of the good faith and fair dealing seem to be the unavoidable elements of such standard.

The reference to some moral values and the ethics enables to check, whether the party's conduct is in agreement with due diligence and understandable for the other party, who is, from the other hand, obliged to do its best to understand the intent of the conduct.

These both directives are to some extend compatible with the general interpretation rules of the CISG (**art. 8**) the UNIDROIT Principles (**art. 4.2**), the PECL (art. **5.101-5.102**) and DCFR (**8:101-8:102**) the idea of two-step process: subjective and objective test and the combined interpretation – respecting both – the **theory of will**, *Wille*, *volonté* and the **theory of reliance**, *Vertrauen*, *confiance*;

## III. General rules of interpretation (interpretative directives)

The contract interpretation should recognize interests of both parties and take into account the **essence** and the **functions** of contract, which is to be an instrument enabling the parties to shape contractual relationship by their own. It should also protect the self-reliance and, as a result, the safety and certainty of trade. **The court should concentrate on "seriousness" of any declaration of intent as the primary indicator of intent**.

In accordance with Polish civil law, there are two main interpretation's directives (**general rules of interpretation**) which enable us to understand and communicate the true and competent meaning of party's intention to be bound.

- **First** of these directives generally refers to all declarations of intent (with or without an addressee) – art. 65 § 1 of the PCC.

**Article 65**. **§ 1**. A declaration of intent is to be interpreted so as is required by the circumstances in which it was made, the principles of community life (equity), and the established custom.

- **Second** refers exclusively to contracts (art. 65 § 2 of the PCC).

**Article 65. § 2**. In the case of contracts, the congruent intention of the parties and the purpose of the contract, rather than relying on its literal wording, must be established**.**

As a result the **two factors are relevant** in due contract interpretation: common **intent** of both parties which they were familiar with and commonly agreed **purpose** which led both parties to contract formation and execution.

The interpretation of contract to be in agreement with:

- **the sense that has been given mutually by both parties** (the actually agreed intentions) and not with word-for-word (verbatim) quotation
  compare **art. 5:101(1)** of PECL, **art. 4.1** UNIDROIT.
- **The purpose** should be understood as a state of affairs which is going to be achieved in a course of execution of contractual obligations (the detectable standards of achievement). The purpose shall be individualized, relevant to contract concluded by parties in attendant circumstances.
  (*the examples of contract purpose: mainly economic I enter into contract because I want to make or earn money, people hardly involve in trade for gratuitous purposes, the improvement of accommodation conditions, the co-operation on certain market, promotion of common investment, financing of some project: You invest money I give an idea*).

Unlike Vienna Convention or model law, **the PCC does not refer directly to the model** of **reasonability** (a reasonable third person), but it is self-evident that the addressee's meaning of the statement or conduct would prevail only by showing that at the time of contract conclusion **a reasonable person of the same kind and in the same circumstances** would have had an understanding the same or very similar as of the addressee.

Nevertheless the Polish supreme court recommended to follow the **combined method** of interpretation indicated in art. 8 of CISG [*see the resolution of the SN (7) of the 29th of June 1995, III CZP 66/95, OSN 1995, No 12, item 168*].

In the **new draft of the Civil Code** (art. 84-87 of the First Book) the model law – art. 8:101 – 8:102 of the DCFR were followed and more or less copied [they are generally in agreement with art. 4.1 – 4.2 of The UNIDROIT Principles. Unlike PECL, the DCFR is supplemented of the interpretation rules of the judicial acts other than contracts]. The direct reference is made to the model of "reasonable person at the same circumstances".

There is compulsory **two-step process of interpretation** of the common intention of the parties to a contract [art. 65 § 2 PCC; art. 4.1(1) UNIDROIT]. **First** we are obliged to settle the meaning of the statement or conduct inferred from by its maker. What is interesting in the draft of new PCC (art. 86 § 2) the subjective test is to be employed only when the party desired to give its intention the specific meaning and the counterpart ought to be aware of such desire and not necessary of this specific meaning.

If the court fails to determine the meaning of the statement or conduct at the first step or if the parties understood their conduct or statements differently and one party failed to prove (show) that the other knew or was supposed to be aware of the meaning that he attached to [see art. 8(1) of CISG, art. 5:101(2) of PECL and art. 4.2(1) UNIDROIT] it must take the **second step** and interpret in accordance with the meaning that a

reasonable person of the same kind as the other party (addressee) would give to it in the same circumstances [compare CISG [art. 8(2)], PECL [art. 5:101(3)] and UNIDROIT [art. 4.2(2)].

**The both tests are not limited to the interpretation of the contract terms in order to determine the meaning of the contract**. In the process of contract interpretation the objective criteria specified in art. 65 § 1 of PCC ought to be taken into account. The circumstances in which contract was concluded, the principles of equity, public decency, due care and the established customs or usages (see art. 5:102 of PECL, art. 4.3 of UNIDROIT). Layout context (the relevant circumstances) must also be taken into account. It applies to the interpretation of statements and other conduct **during the negotiation stage** (e.g. revocation of offer, late acceptance, modified acceptance, letter of intent) in order to determine whether a contract has been concluded in the first place. It also applies to the interpretation of **statements and other conduct that took place after the conclusion of a contract** (e.g. modification or termination, execution of the right of avoidance, the notification reg. the lack of conformity of the goods sold).

## IV. The subjective and objective test and the online contracting

**The subjective test has been the issue of significant criticism among representatives of the e-law or Internet law doctrine** which is eager to disregard it as useless in the Internet world. It is just heart to please.

The only **exception** is granted in the contracting with consumers. There are certain opinions suggesting that in case of use of general conditions by the entrepreneur towards consumers, the application of the will theory and employ subjective test would restore contractual equilibrium unbalanced by the different economic position of parties. The idea seems to be the point of controversies since the reasonableness test is more appropriate in B2C electronic transactions as much as in traditional ones. Especially in e-commerce it is the consumer who usually takes a position of the active party initiating the transaction running online (so the effect of surprise, confusion or manipulation is certainly weakened or even excluded). The E-consumer is a special specie among very diverse category of non-professionals, usually well-educated and experienced in electronic techniques and tricks. Sometimes such consumer is far better prepared in taking part in e-activities than his professional counterpart. So apart from the fact that it is doubtful overall, if any special protection should be vested in such kind of consumers, the test of reasonable third person is accurate solution for all consumers.

In my view the application of the first step (subjective test) in interpretation of contract concluded online under both Polish, other domestic (particularly of the Germanic tradition) and model laws is very difficult to proceed. The reasons are at least threefold.

1. the complexity and difficulty in the recognition of the common intention of the parties in case of contracts concluded online having regard to the fact that the vast majority of such transactions are carried out by use of general conditions, standard terms or regulations (transaction set) published on websites;

2. the intricacy and sophistication of the establishment of the party's intention and its estimation by the other party (if she knew or could not have been unaware) due to the lack of direct, personal contact (*tête à tête, inter praesentes*) even if the express consent is not required prior to every electronic communication;
3. the vague situation caused by the website operator's instruction of the computer to carry out transactions automatically and reciprocally, mainly in B2B transactions (the electronic agent). And I am not talking about the applications of **uncomplicated software** (like programs which updates the inventory of the items scanned for sale and without human intervention contacts the computers of the supplier placing an order for replacement stock which on the other hand automatically accepts the order and the next morning prints out worksheets and delivery sheets for the supply and transport staff). I mean the **smart software** which, within the interactive communication system, exchange their own standard terms and possessed the ability to learn (the function code broadening) and have capacity to adapt to the current situation by initiating changes or modifications in originally prepared offers or by generating their own ones. Of course, these e-agents are programmed and operated by and with the authority of the parties (like any other piece of equipment under the control of the owner, the owner accepts *in blanco* responsibility), but the assumption of the party's intention in such circumstances due to subjective test seems to be doubtful. We are not aware of the final text of the contract till the very end. In the automatic contracting there is impressive temptation to misuse the smart program to adapt solutions which are in favor of only one side. Then the objective test is the only one which might be adopted.

Taking into account all the above we have to admit that Polish civil law following the evolution of German legal jurisprudence (see the decision of the German Federal Court of Justice - Bundesgerichtshof; publ. BGHZ 91, 324) that after the decades of competing **subjective (will) and objective (customs, contractual practice and social expectations) interpretations of contract**, **the latter seems to be more accurate**. As a result for example the offeror does not necessarily have to act with the intention to bring about a contract if the offeree could reasonably assume under the attendant circumstances that the offeror was making a binding offer. This shift towards an objective theory of the contractual offer is somewhat moderated by the requirement that the offeror has the possibility to recognize his communications as purporting to be a contractual offer,

Today it is largely unchallenged and effective approach to reconciling **the principle of private autonomy with a complex contractual reality in which both parties' communications inevitably unfold through the interpretation and assessment of their reasonable expectations** (see *Prof. P. Zumbansen in: Introduction to German Law, ed. by J. Zekol and M. Reimann, The Hague 2005, 2nd edition, p. 189*).

Considering this, we dare say that it is highly likely that the theory of will and subjective test is going to be abandoned definitively in both traditional and electronic contracting. The greater prominence will be given to **the doctrine of common intention** to create legal relations (opposite to the doctrine of consideration which is still heartily welcomed in *common law* countries) based on the theory of reliance. The test of reasonableness seems to be universal, the safest, neutral and free from deeper controversies (applicable in traditional and electronic commerce, online and offline contracting, B2B and B2C).

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# For a Progress Towards a European Law of Obligations

*By Jerzy Rajski**

1. The Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses of 1 July 2010[65] opens a new phase of public discussion on the process of Europeanization of certain areas of private law.

The purpose of the Green Paper "is to set out the options on how to strengthen the internal market by making progress in the area of European Contract Law, and launch a public consultation on them. Depending on the evaluation of the results of the consultation, the Commission could propose further action by 2012".[66]

It will be assisted by an Expert Group[67] set up "to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty".[68] The Group will take into consideration "the contributions to the present consultation".[69]

2. The Commission rightly points out that "the completion of the internal market faces a number of barriers, which prevent it from delivering on its full potential.

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65 COM(2010) 348 final

66 Ibidem p.2

67 Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European Contract Law (OJ L 105, 27.4.2010, p.109).

68 Green Paper, p. 4.

69 Ibidem.

Regulatory, linguistic, and other obstacles hinder the smooth functioning of the internal market".[70] However, these obstacles cannot be reduced to divergences between national contract regulations. They embrace at least the whole law of obligations the unitary status of which has been consolidated during centuries in European (continental) legal culture.

The economic and social role of the law of obligations has a great importance for the development of European economic integration. The rules of this part of law regulate in a complex manner the patrimonial relations of a relative nature, i.e., the subjective rights (the correlatives of obligations, rights to performance) effective against individually determined persons (the debtors).

The legal regulation of contracts is located in the law of obligations, and it constitutes its integral part. The provisions concerning contracts are functionally linked with other provisions of the law of obligations, as well as with provisions concerning various categories of juridical acts.

In the systems of law of the States which belong to the Romano-Germanic tradition, the rules concerning contracts have not been separated from the law of obligations like in the Anglo-American Common law tradition, where an autonomous contract law has been developed.

This is why there are some difficulties in locating a separate set of rules on contracts in the systems of Civil law. It requires erecting structures around the provisions on contracts composed of some general rules, and their harmonization with general provisions of the civil law, and the law of obligations in particular.

A statutory separation of the law on contracts would also lead to a certain disintegration of the system of the law on obligations. In consequence thereof, it would become more and more complicated for the law on obligations to perform its main function that is to regulate exchange of goods and services, and to protect the interests of juridical and physical persons against patrimonial harms. A complex and full regulation of this exchange, as well as of the protection of the above interests, is secured by various complementary and interlinked provisions of the law of obligations.

This is why possible policy options embracing the whole law of obligations should be discussed if the purpose of the Green Paper, i.e. to set out options on how to strengthen the internal market by removing legal obstacles to the development of the internal market economic turnover, is to be achieved to a fully satisfactory extent.

3. The codification of the law of obligations has a well established tradition in the legislation of some European countries. The Swiss Code of Obligations of 1911 created the most modern system of this area of private law of that time and has exercised an influence on civil law codifications of the last century in many countries.

This tradition has been reinforced in Poland. When Poland lost independence after it was partitioned by the neighbouring states at the end of the 1700s, the legal systems of

70 Ibidem.

those countries applied in various parts of the Polish territory for over a century (French law applied on the territory of the former Grand Duchy of Warsaw established by Napoleon Bonaparte).

Having regained independence in 1918, the reborn Polish state proceeded swiftly to establish a uniform Polish system of law. This task was given to the Codification Commission composed of the greatest experts in private law – professors and lawyers educated, brought up and having experience in various foreign legal systems.

The Commission decided to first codify the entire law of obligations. The result of its works characterized by the comparative law approach, the Code of Obligations of 1933, created a modern system of law inspired in many respects by the Swiss, French, German and Austrian civil codes. Thus it could be recognized as establishing a uniform law of obligations of a European nature to a large extent.

The idea of Europeanization of the law of obligations has been integrated into the Draft Common Frame of Reference (DCFR).[71] "The DCFR approaches the whole law of obligations as an organic unity", as "the correct dividing line between contract law (in this wide sense) and some other areas of law is in any event difficult to determine precisely".[72]

This is why the process of Europeanization should embrace the whole law of obligations and not contribute to its further fragmentation by separating a set of rules on contracts.

4. It follows from the above remarks that rules of law regulating contracts concluded in all types of legal transactions: consumer, professional and common, should be Europeanized. Progressive decomposition of the law of obligations brought about by a non-systemized development of the European law of consumer contracts should be stopped.

*Acquis communautaire* in the area of consumer contracts regulations requires as soon as possible reformulation and consolidation in a proper legal framework, elimination of inconsistencies and gap-filling.

It is to be stressed that the two Groups[73] which prepared the DCFR concurred in the view "that consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but is built on them and cannot be developed without them."[74]

71 Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Outline Edition, Ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, sellier - european law publishers, Munich 2009.

72 Ibidem, p. 25. See, in more detail, Ch. V. Bar and U. Drobnig (eds.), The Interaction of Contract Law and Tort and Property Law, Munich 2004. This study was conducted on behalf of the European Commission.

73 The Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)

74 DCFR, ibidem, p. 25.

This is why work has to be undertaken with the aim to integrate the consumer contract law in a unitary system of the European law of obligations.

5. A decision on the crucial issue is to be taken: shall the aim of the EU be unification of the European law of obligations (or the rules on contracts only) or, rather, its progressive harmonization.

In each of these cases, a proper EU instrument has to be chosen.

Several options have been identified by the Commission in respect of the legal nature and the scope of application of the future instrument for European Contract Law, ranging "from a non-binding instrument, aiming at improving the consistency and quality of EU legislation, to a binding instrument which would set out an alternative to the existing plurality of national contract law regimes, by providing a single set of contract law rules".[75]

6. The first option does not envisage adopting any Union instrument but provides for a publication of the results of the work of the Expert Group. "If the Expert Group produces a practical and user-friendly text, this could be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions. It could also be used in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. Extensive use of this work could contribute, in the long term, to the voluntary convergence of national contract laws."[76]

It is worth of note that this proposal shows the Commission's recognition of the important influence exerted by the legal science on the development of the law of many European countries and also in supporting the progressive Europeanization of various areas of private law.[77]

The Commission does not envisage to follow in that respect the example and experience of UNIDROIT which not only undertook the initiative for the elaboration of "Principles of International Commercial Contracts" but published them under its aegis.[78]

The Commission stressed that the outcome of the work of the Expert Group will be published on the website of the Commission but "without any endorsement at Union level".[79] Thus, if limited to European Contract Law, it might constitute a successor of the Principles of European Contract Law.

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75 Ibidem, p. 7.

76 Ibidem, p. 7 – 8.

77 See J. Rajski, The role of legal science in the process of progressive Europeanization of private law, in: Essays in Honour of Konstantinos Kerameus, Athens-Brussels 2009, pp. 1107 ff.

78 UNIDROIT Principles of International Commercial Contracts 2004. Published by the Institute for the Unification of Private Law (UNIDROIT), Rome 2004.

79 Green Paper, p. 7.

Accepting this policy option would not mean achieving a significant progress even towards a European Contract Law only.

7. The Commission indicates six possible options for progress towards a European Contract Law:

(a) establishing an official “toolbox” for the legislator,

(b) adopting a Recommendation on European Contract Law,

(c) adopting a Regulation setting up an optional instrument of European Contract Law,

(d) adopting a Directive on European Contract Law,

(e) adopting a Regulation establishing a European Contract Law,

(f) adopting a Regulation establishing a European Civil Code.

8. The proposal of establishing an official “toolbox” for the legislator may contribute to the acceleration of the process of ensuring the coherence and quality of the *acquis communautaire*.

However, it may not bring a significant progress towards a European Contract Law.

9. The next option provides for adoption by the Commission of a Recommendation on European Contract Law, to which an instrument of European Contract law would be attached, encouraging the Member States to incorporate the instrument into their national laws.

The Recommendation could encourage the Member States either to replace national contract regulations with the recommended European instrument, or to incorporate it as an optional regime offering contractual parties an alternative to national law.

Such Recommendation would have no binding effect on the Member States which could freely decide how, to what extent and when to implement the instrument in their national laws.

Therefore, this solution bears the risk of an incoherent and incomplete approach between the Member States which might adopt it in a different way and scope, and at different point of time, or not at all.

This is why it may not be recognized as a proper policy option for progress towards a European Law of Obligations (or Contract Law only).

10. Another proposal of the Commission provides for adopting a Regulation setting up an optional instrument which would constitute an alternative set of rules of law in each Member State giving the contracting parties the possibility of a choice between

two regimes regulating their contracts. This instrument could be applicable in all contracts or in cross-border contracts only.

This is an alternative solution to the concept of the full Europeanization of the law of contracts (unification of law) which would replace the plurality of domestic laws of the Member States in that area. It complies with the postulate of a progressive codification of private law in the European Union.[80]

It allows submitting the European rules concerning contracts (or obligations) to the most important test: that of practical experience. The contracting parties will be empowered to decide which of the competing legal regimes are most proper to regulate their contractual relations because they better meet their needs, as well as those of stability and security of legal transactions.

The advantages as well as disadvantages of the European rules of law might be better tested in confrontation with the law and practice of each of the Member States.

Such co-existence of two legal regimes concerning obligations or contracts may also have a favourable influence on their application and development.

The solution providing for an optional instrument might be better acceptable for the Member States. It would not oblige the Member States to abandon their national laws but would open a wide possibility for their progressive Europeanization inspired, accepted and supported by those whose relationships these rules of law regulate. Therefore, it may be supported.

11. The next option indicated by the Commission provides for adopting a Directive on European Contract Law which could harmonize rules of national contract law on the basis of minimum common standards.[81] Member States would be allowed to retain more protective rules, subject to compliance with the EU Treaty.

The implementation of such directive by the Member States would lead to the achievement of a substantial degree of convergence between their national contract laws; however it would not eliminate all existing legal divergences.

Bringing about harmonization of law on the basis of minimum common standards will leave the diversity of special rules of law concerning contracts (obligations) which are of great importance for shaping the contractual relations of the parties, as they provide for their concrete rights and obligations.

It will also leave intact Member States' autonomy in respect of the legislative way and form of formulation of the principles of law and general rules which are of major importance for the process of interpretation of all rules of law.

80 Cf., e.g., J. Rajski, For a Progressive Codification of European Private Law, in: Liber Amicorum Guido Alpa: Private Law Beyond the National Systems, British Institute of International and Comparative Law, 2007, pp. 825 ff.

81 Green Paper, p. 10.

Thus, I am not in favour of the adoption of this proposal as it could not contribute in a sufficient degree to the elimination of the legal barriers hampering the development of the economic integration processes in the European Union.

12. The next option indicated by the Commission provides for adopting a Regulation establishing a European Contract Law replacing "the diversity of national laws with a uniform European set of rules, including mandatory rules affording a high level of protection for the weaker party".[82]

The scope of application of the Regulation could be limited to trans-border transactions or embrace also domestic ones.

The adoption of this solution would eliminate from the European legal environment the diversity of national laws in the area of contracts, and create a common, European set of rules of law to be uniformly applied and interpreted in all Member States. However, the uniformity of law would be then incomplete because of isolating the provisions on contracts from the whole of the system of the law of obligations.

This is why the Regulation should establish a European Law of Obligations.

13. Finally, the Commission mentions a possibility of adopting a Regulation establishing a European Civil Code which would cover not only contract law, but also other types of obligations (e.g., tort law and benevolent intervention).[83]

As a matter of fact, this proposal does not concern establishing a European Civil Code but a European Code of Obligations.

Such proposal is to be supported in spite of the fact that it might be difficult to get for it sufficient political support from the Member States.

## Conclusions

There is a need to accelerate the process of progressive Europeanization of the law regulating economic relations upon which internal market is built.

The activity of European institutions in that respect should not be limited to rules on contracts separated from the whole system of the law of obligations.

Commission's justification and arguments for an accelerated progress towards a European Contract Law are also convincing in respect of a European Law of Obligations.

82 Ibidem, p. 11.

83 Ibidem, p. 13.

However, they are to be complemented by referring to the necessity of supporting the development of European legal culture based on fundamental common values, without which the European socio-economic architecture would be deprived of solid and lasting foundations. For centuries, the law of obligations has constituted one of the basic foundations of the European legal culture. Its progressive harmonization and unification may be of great importance for the future of European economic integration.

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