Initial Views of the Court of Justice on the European Arrest Warrant: Towards a Uniform Pan-European Interpretation?

Gaetano De Amicis*

Abstract

The author examines the initial views developed by the Court of Justice (ECJ) in its case-law with respect to the implementation issues raised by the new surrender procedure based on the European arrest warrant, and focuses on the attempt to unify its most significant aspects in the framework of the new competences conferred on the Court by the Lisbon Treaty.

I. The new competences of the Court of Justice under the Treaty

Despite the constraints posed to the Court of Justice's powers to give preliminary rulings on matters belonging to the 'third pillar' by the scheme set out in Article 35 (1) EU Treaty, on several occasions the Union judicature has ruled on important provisions of Framework Decision 2002/584/JHA concerning the new surrender procedure based on the European arrest warrant, thus contributing to define an interpretation of its preconditions, objectives and scope.

The role of the ECJ in preliminary reference proceedings, as it is well-known, is to interpret EU law or to rule on its validity and not to apply that law to the factual situation underlying the main proceedings, which is the task of national courts. Hence, it is not for the Court either to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law.

With the Lisbon Treaty, the Court's competence was extended to the whole sector of judicial and police cooperation, in particular to infringement proceedings involving Member States, while the preliminary ruling procedure is no longer subject to the declarations on the acceptance and to the conditions laid down in Article 35 of Title VI of the EU Treaty.

With the exception of the review of the validity and proportionality of police operations and measures aimed at the maintenance of law and order and the safeguarding of internal security (Article 276 TFEU), all acts can now be challenged without any of the restrictions originally laid down in Article 35(6); the choice of the preliminary reference scheme in cooperation matters is no longer subject to an ad hoc discretionary statement by Member States, while Article 267 TFEU introduces a novel concept altogether, i. e. the new urgent procedure for preliminary rulings (regulated by Article 104 b of the ECJ's Rules of Procedure) if the case pending before a national court concerns a person in custody[1].

* Consigliere della Corte di Cassazione

[1] In this respect, s*ee A. Klip*, European criminal law, Intersentia, Oxford, 2009, p. 119 et seq.*; A. Weyembergh – V. Ricci*, Les interactions dans le secteur de la coopération judiciaire: le mandat d'arret européen, in: G. Giudicelli–Delage et S. Manacorda (eds.), Cour de Justice et Justice pénale en Europe, Société de Législation Comparée, Paris,

However, under Article 10(1) to (3) of Protocol 36 on transitional provisions of the Lisbon Treaty, the powers of the Court of Justice with respect to acts adopted before the entry into force of the Treaty in the field of police and judicial cooperation in criminal matters remain unchanged for a maximum period of five years from the entry into force of the Treaty of Lisbon (1st December 2009). During this period, these acts can only be the subject of a reference for preliminary rulings from judicial authorities of Member States that have accepted the Court's jurisdiction, as each decides whether to empower all its judicial authorities, or last instance authorities only, to make a reference to the Court".

II. Legitimacy under EU Law of the European Arrest Warrant

As in the "*Pupino*" case[2], with the judgment of 3 May 2007 the Court of Justice dispelled all doubts on the questions referred to it by the *Arbitragehof* of the Kingdom of Belgium by drawing on the general principles directly derived from Community law – such as loyal cooperation and effectiveness of Community law – and by transferring their implications to the "adjacent" intergovernmental basis of the acts adopted under 'third pillar' procedures[3].

By substantially accepting the Advocate General's Opinion, the Court made significant reference not only to the general principles of Community law pursuant to Article 6 EU Treaty, but also to Articles 49, 20 and 21 of the Charter of Fundamental Rights proclaimed in Nice on 7 December 2000, thus acknowledging its positive value as providing 'orientation' within the Court's reasoning.

As for the inappropriateness claimed by making use of a framework decision under Article 34(2) EU Treaty, the EU judicature held that the approximation of Member States' laws and regulations is likely to occur as a result of choosing this type of secondary law for areas other than those explicitly set out in Article 31(1)(e) EU Treaty (i.e. the setting of minimum rules on the constituent elements of

2009, p. 203 et seq.; *V. Mitsilegas, EU Criminal Law,* Hart Publishing, Oxford and Portland, 2009, p. 18 et seq. and p. 40; *G. Tesauro*, Diritto comunitario, Corte di Giustizia e diritto penale, in: G. Grasso/R. Sicurella (eds.), Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale, Milano, 2008, p. 665 et seq.; *G. Strozzi – R. Mastroianni*, Diritto dell'Unione europea, Torino, 2011, p. 377 et seq.; *L. Daniele*, Diritto dell'Unione europea, Milano, 2010, p. 329 et seq.; *D. Rinoldi*, Lo spazio di libertà, sicurezza e giustizia, in: U. Draetta/N. Parisi (eds.), Elementi di diritto dell'Unione europea, p. s., Milano, 2010, p. 93.

[2] ECJ, 16. 5. 2005, Case C-105/03, (*Pupino*) [2005] ECR 5285. On this topic, see comments by *V. Manes*, L'incidenza delle decisioni quadro sull'interpretazione in materia penale: profili di diritto sostanziale, in Cass. pen., 2006, p. 1150 et seq., and by *E. Aprile*, I rapporti tra diritto processuale penale e diritto dell'Unione europea, dopo la sentenza della Corte di Giustizia sul "caso Pupino" in materia di incidente probatorio, (ibid.), 2006, 1165 et seq.; *A. Fabbricatore*, Caso Pupino: sul riconoscimento dell'efficacia diretta delle decisioni quadro, in Dir. pen. e proc., 2006, p. 640 et seq.; *G. Armone*, La Corte di Giustizia e il terzo pilastro dell'Unione europea: quale futuro, in Foro it., 2006, IV, c. 587.

[3] ECJ (Grand Chamber), 3. 05. 2007, Case C-303/05, (*Advocaten voor de Wereld*) [2007] ECR 3633, in Foro it., 2007, IV, c. 438, with cuncurring note by *G. Iuzzolino*, La decisione quadro come fonte di produzione del diritto dell'Unione europea nel settore della cooperazione giudiziaria penale. Il mutuo riconoscimento e i principi di legalità, uguaglianza e non discriminazione; in *Cass. pen.,* 2007, p. 3078, with dissenting note by *S. Manacorda*, La deroga alla doppia punibilità nel mandato di arresto europeo e il principio di legalità, p. 4346 et seq., as well as, (ibid.), 2008, 383 et seq., with concurring note by *G. De Amicis – O. Villoni*, Mandato d'arresto europeo e legalità penale nell'interpretazione della Corte di Giustizia.

offences and on sanctions to be inflicted for organised crime, terrorism and drug trafficking offences) and hence it can also concern procedural issues relating to the European arrest warrant. The types of instruments that the Community institutions may use to attain the general objectives indicated in Articles 2(1) (4) and 29(1) EU Treaty are not explicitly set out in Article 3(1)(a) and (b) EU Treaty, while, in turn, the provision of Article 34 does not in any way rank the possible types of acts that may be used for this purpose (Conventions, Decisions and Framework Decisions).

On the important question of whether the European arrest warrant complies with the principles of legality and equality, the Court of Justice ruled that Article 2 (2) of the Framework Decision, in so far as it dispenses with the traditional double criminality requirement for the thirty-two offences listed therein, does not infringe the principle of legality of offences and penalties, as the definition of those offences and of the penalties applicable still falls within the jurisdiction of the issuing Member State. Indeed, the latter must respect fundamental rights and legal principles as enshrined in Article 6 EU Treaty, which undoubtedly includes the principle of legality of criminal offences and penalties (explicitly mentioned, in particular, in Article 7 ECHR and recently reasserted in Article 49 of the Nice Charter of Fundamental Rights).

In particular, the ECJ excluded that the EAW Framework Decision is intended to substantially harmonize the constituent elements of the offences and relevant penalties applicable to them; it is even advisable, not just in terms of strict rationality of legislation, to attain the goal of substantial uniformity of contents and penalties applicable to the criminal offences of Community 'interest' (at least of those listed in the long catalogue of Article 2(2)), no provisions of Title VI EU Treaty make the implementation of instruments of mutual recognition of judicial decisions subject to the previous definition of harmonizing activities for national criminal legislations.

Within this new regulatory framework, the traditional requirements of reciprocity and double criminality are "transformed" but they do not disappear; indeed, they are "assumed" in the case of certain criminal conducts – i. e. those that may directly or potentially affect goods/interests deemed to merit special protection in the European territory – which, for the very reason that they are classified and severely sanctioned in most Member States (as well as massively harmonized), do not need to be reviewed in terms of double criminality, as this was deemed superfluous by the European legislator.

On the other hand, the instrumentality of the arrest and surrender procedures for the exercise of jurisdiction and the effective activation of the State's punitive power of the issuing judicial authority still exists in the new cooperation system designed by the Framework Decision.

Hence, by keeping separate cooperation and harmonization, albeit these are closely interconnected, no issues arise as to the lack of mandatory character or exactness of the criminal offences, both because the goal of substantive harmonization is outside the scope of this institution and because the "execution" of apprehension and its "sufficient review" by the judicial authorities of the requested State

are naturally performed in criminal proceedings, which must be kept conceptually and legally separate from the review of its substantive criminal law preconditions that are defined by the legal system of the requesting State to which cooperation is afforded[4].

Moreover, the ECJ holds that the identification of the offences listed in Article 2 (2) does not entail any violation of the principles of equality and non-discrimination, as these conducts, due to their character and to the entity of the penalty inflicted, can perfectly justify the introduction of a mechanism of mandatory surrender based on the suppression of the double criminality requirement.

III. The concepts of "residence" and "staying" for the purpose of refusing surrender

Under a different viewpoint, the uniform interpretation of the provisions of the Framework Decision that the Court is called upon to perform when the legal text does not contain any explicit reference to the legislation of the Member States in order to determine its exact meaning and its concrete scope may be of great interest.

As such, the concepts of 'staying' and of 'residence', for instance, – both of which determine the scope of the grounds for optional refusal under Article 4(6) of the Framework Decision – have been the subject of "uniform definition" by the ECJ, that has ruled that they are "autonomous notions" of European Union law.

Indeed, in its judgment dated 18th July, 2008, the ECJ stated within a reference for a preliminary ruling submitted under Article 35 EU Treaty by the *Oberlandesgericht Stuttgart* in a case on the execution of a European arrest warrant issued on 18th April, 2007, against a Polish national by the competent judicial authority of the Republic of Poland, that Article 4(6) of the Framework Decision on the European arrest warrant must be interpreted as meaning that:

(a) a requested person is 'resident' in the executing Member State when he has established his actual place of residence there while he is 'staying' there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence;

(b) in order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' under the aforementioned Article 4(6), it is for the executing authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State[5].

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[4] This point was made by *L. Picotti*, Il mandato d'arresto europeo tra principio di legalità e doppia incriminazione, in: M. Bargis/E. Selvaggi (eds.), Mandato d'arresto europeo. Dall'estradizione alle procedure di consegna, Torino, 2005, p. 45 et seq.

[5] ECJ (Grand Chamber), 17. 07. 2008, Case C-66/08 (*Kozłowski*), [2008] ECR 6041, in Cass. pen., 2008, p. 4399 et seq., with remarks by *E. Selvaggi*, Aporie nel m. a. e.: quale la base giuridica per il trasferimento dell'esecuzione della pena nel caso del cittadino? In general, on the issues concerning the inconsistencies of the provisions of domestic

It follows that in their national law transposing Article 4(6), the Member States "*are not entitled to give those terms a broader meaning than that which derives"* from the uniform interpretation model thus developed by the Court of Justice.

IV. The conditions for surrendering a citizen of a EU Member State for the purposes of execution

With its judgment of 6th October, 2009[6], the Grand Chamber of the Court of Justice ruled on a problematic issue of great importance and offered a "uniform" interpretation of Article 4(6) of the EAW Framework Decision with regards to the "compatibility" with EU law of a national legislation that laid down a different regime for the surrender of national citizens and of citizens of other Member States of the European Union in terms of objections that could be made to the enforcement of a EAW.

The subject of the question referred to the ECJ by a Dutch court was essentially focused on the interpretation of the "legitimacy under Community law" of the legislation of the State of execution, in so far as it provided for the refusal to surrender nationals and equated them with the status of foreigners (EU or third country nationals) holding a permit of stay of unlimited duration (under Article 6, paragraph 5 of the law of 29 April 2004, no. 195). The national court had raised doubts as to the compliance of this provision with Community law, in particular in the case of a national of another EU Member State.

In fact, at the stage of adopting the Framework Decision, several Member States transposed the optional refusal clauses pursuant to its Articles 4(6) and 5, thus establishing different regimes according to whether the requested person is a resident or a national (as did Italy, for instance, in the case of EAWs for execution purposes), or imposing additional requirements for residents that were not considered in the Framework Decision. This was indeed the case of the Netherlands, whose legislation was submitted by the Court of Amsterdam to the ECJ after receiving a EAW issued by the German judicial authority against a German national resident in the Netherlands for the execution of a custodial sentence that had become final.

By substantially accepting the reasoning underpinning the Advocate General's Opinion, the Court answered the question referred by stating the following principles:

(1) A national of one Member State who is lawfully resident in another Member State is entitled to rely on the first paragraph of Article 12 EC Treaty against national

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legislation on the grounds for refusing the surrender of a national in the case of a warrant for execution or prosecution purposes, see remarks by *M. Pisani*, "Reinserimento" del condannato e cooperazione giudiziaria internazionale, in Riv. it. dir. proc. pen., 2008, p. 528 et seq.

[6] ECJ, 6. 10. 2009, Case C-123/08 (*Wolzenburg)* [2009] ECR 9621, in Cass. pen., 2010, p. 1185, with a note by *E. Calvanese – G. De Amicis*, Mandato d'arresto europeo e consegna "esecutiva" del cittadino nell'interpretazione della Corte di Giustizia: verso la declaratoria di incostituzionalità dell'art. 18, lett. r), della l. n. 69/2005?, ibid., p. 1191 et seq.

legislation, such as the Dutch law on the surrender of persons of 29 April 2004, which lays down the conditions on which the competent judicial authority can refuse to execute a European arrest warrant issued with a view to the enforcement of a custodial sentence;

(2) Article 4(6) of Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States must be interpreted as meaning that, in the case of a citizen of the Union, the Member State of execution cannot, in addition to a condition as to the duration of residence in that State, make application of the ground for optional non-execution of a European arrest warrant laid down under that provision subject to supplementary administrative requirements, such as possession of a residence permit of indefinite duration;

(3) The first paragraph of Article 12 EC Treaty is to be interpreted as not precluding the legislation of a Member State of execution under which the competent judicial authority of that State is to refuse to execute a European arrest warrant issued against one of its nationals with a view to the enforcement of a custodial sentence, when such a refusal is, in the case of a national of another Member State having a right of residence on the basis of Article 18(1) EC Treaty, subject to the condition that that person should have lawfully resided for a continuous period of five years in that Member State of execution.

The rules contained in the Framework Decision and the national implementation laws presuppose a review as to their conformity with the Community principles of equality and non-discrimination: according to the ECJ, compliance with this fundamental principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

Hence, the principle of non-discrimination has general relevance and must be also applied to the legislation through which Member States transpose the instruments of judicial and police cooperation into their respective domestic systems according to the so-called "intergovernmental" method by completing the "third pillar" decision-making procedures: they cannot, in the context of the implementation of a Framework Decision, infringe Community law, in particular the provisions of the EC Treaty relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States (paragraph 45).

This assertion, besides its novel approach as it extends the prohibition of discrimination to the provision of Title VI UE Treaty, reaffirms through a different way a settled interpretation of the ECJ that, as early as 1974, defined this principle as applying "to all legal relationships" which can be located within the territory of the Community by reason either of the place where they are entered into or of the place where they take effect[7]. However, the Court ruled with even greater precision in a subsequent judgment of 24th November, 1998, that although criminal legislation and the rules of criminal procedures are matters for which the Member States

[7] ECJ, 12. 12. 1974, Case 36/74, *(Walrave v. Union cycliste internazionale)*, [1974] ECR 1405 et seq.

are responsible, they may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law[8].

On the basis of the above arguments, the Court points out (in paragraph 69) that in order to be justified in the light of Community law, the difference in treatment provided for by the Dutch legislation must also be *proportionate to the legitimate objective pursued by the national law*. Hence, it may not go beyond what is necessary in order to attain that objective[9].

Once these standards of review are adopted it is evident for the Court that the single condition based on nationality for its own nationals, on the one hand, and the condition of residence of a continuous period of five years for nationals of other EU Member States, on the other, may be regarded as being such so as to ensure that the requested person is sufficiently integrated in the Member State of execution (paragraph 68).

This different treatment appears to be wholly permissible as it lacks any discriminatory connotation if account is taken of the requirement that a reliable, personal and social connection with the requested State of execution must exist in order to conclude that the person concerned is likely to integrate better into the community after serving his sentence.

This would not be the case for a Community citizen who is neither a national of the Member State of execution nor has resided for a certain continuous period in that State, which makes it possible, according to the Court, to infer a greater connection with his Member State of origin than with the society of the Member State of execution.

The Court's conclusion is therefore grounded in the Community legal framework as is interpreted by the Court itself with reference to the conditions required for the residence of other Union citizens, meaning that a requirement for residence for a continuous period of five years does not appear to be disproportionate or unreasonable with regard to the objective of the social reintegration of a requested person who is a national of another Member State[10] (paragraphs 71-73). On the contrary, the requested Member State of execution may not lay down and impose supplementary administrative requirements by making the application of the benefit of the refusal to surrender subject to the possession of a residence permit of indefinite duration, as this would be irreparably contrary to Articles 16 and 19 of Directive 2004/38 (paragraphs 52-53).

V. The specialty principle

An important delimitation of the scope of the traditional specialty rule (according to which a person may not be prosecuted, sentenced or otherwise deprived of

[8] ECJ, 24. 11. 1998, Case C-274/96, (*Horst Otto Bickel and Ulrich Franz*), [1998] ECR 7637 et seq.
[9] ECJ, 18. 11. 2008, Case C-158/07, (*Forster*), [2008] ECR 8507, paragraph 53.
[10] ECJ, 12. 05. 1998, Case C-85/96, (*Martínez Sala*) [1998] ECR 2691, paragraph 53.

liberty for an offence committed prior to his or her surrender other than that for which he or she was surrendered)[11] is laid down in a ECJ ruling of 1st December, 2008, which dwells on the specific implications of this fundamental safeguard – which, as is well known, protects not only the sovereignty of the requested State but also, albeit indirectly, the rights of the requested person – within the new surrender scheme governed by the European arrest warrant[12].

According to the Court, in particular, in order to determine whether what is at issue is an "offence other" than that for which the person was surrendered pursuant to Article 27(2) of the EAW Framework Decision, it is necessary to ascertain whether the *constituent elements of the offence*, according to the legal description given by the issuing State, are those for which the person was surrendered and whether there is a *sufficient correspondence* between the information given in the arrest warrant and that contained in the later procedural document[13].

To this effect, modifications concerning the time or place of the offence are allowed, in so far as they (a) derive from evidence gathered in the course of the proceedings conducted in the issuing State concerning the conduct described in the arrest warrant; (b) do not alter the nature of the offence; *c)* do not lead to grounds for refusal under Articles 3 and 4 of the Framework Decision.

It is clearly for the national court, having the jurisdiction to do so, to carefully "weigh up and compare" the elements described in the indictment and those contained in the European arrest warrant on the basis of these distinguishing criteria. It is assumed that the concept of an 'offence other' than that for which the person was surrendered must be assessed with regard to the different stages of the proceedings and in the light of any procedural document "capable of altering the legal classification of the offence".

It is indeed possible, as the ECJ rightly observes, that in the course of the proceedings, based on new evidence gathered, the constituent elements of the offense may be further specified or even modified, with the consequence that the description of the facts emerging from their initial representation at the time when the European arrest warrant was issued may have changed in the meantime to such an extent that it might jeopardise compliance with the specialty rule.

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[11] On this issue, see in general *M. R. Marchetti*, under Mandato d'arresto europeo, in: Enc. dir., Annali, II, t. 1, Milano, 2008, p. 565 et seq.; *M. Caianiello*, Il principio di specialità, in: M. Bargis/E. Selvaggi (eds.), Il mandato d'arresto europeo. Dall'estradizione alle procedure di consegna, (note 4) p. 215 et seq.; see also *G. De Amicis – G. Iuzzolino*, Guida al mandato d'arresto europeo, Milano, 2008, p. 135 et seq. For the case-law, in particular on the interpretation of the specialty clause as introducing a precondition for prosecution, see Cass., Sez. un., 28. 02. 2001, *Ferrarese*, in C. E. D. Cass., n. 218767, and, more recently, Cass., Sez. un., 29. 11. 2007, *Pazienza*, in Cass. pen., 2008, p. 3178.

[12] ECJ, 1. 12. 2008, Case C-388/08, (*Leymann and Pustovarov*), [2008] ECR 8993, in Cass. pen., 2009, p. 1287, with remarks by *E. Selvaggi, Osservazioni*, 2009, p. 1296 seq., who states that a mere "modification of the description of the offence" which only concerns the kind of narcotics indicated in the EAW is not, in itself, the definition an «offence other» than that for which the person was surrendered (in that case the indictment concerned the import of hashish, while the arrest warrant referred to an import of amphetamins).

[13] In the Italian caselaw, for a similar solution see Cass., Sez. VI, 15 febbraio 1992, *Annunziata*, in Giur. it., 1993, II, c. 130.

What is certain for the Court – and its statement also acts as a general orientation for the interpreter – is that *"to require the consent of the executing Member State for every modification of the description of the offence would go beyond what is implied by the specialty rule and interfere with the objective of speeding up and simplifying judicial cooperation of the kind referred to in the Framework Decision between the Member States"* (paragraph 56).

A further important decision of the ECJ has investigated the scope of the exception to the specialty rule under Article 27(3)(c) of the Framework Decision with regards to cases in which criminal proceedings do not entail the application of a custodial measure.

In these cases, it is clear that the judicial authorities must hear cases where the offence is other than that for which the person was surrendered, since the various exceptions to the specialty rule only apply in such events.

According to the Court, the mentioned exception must be interpreted as meaning that where there is an 'offence other' than that for which the person was surrendered, and thus the consent procedure under Article 27(4) of the Framework Decision must be initiated – and consequently consent must be requested and obtained – if a penalty or a measure involving the deprivation of liberty is to be executed, while the person surrendered can be prosecuted and sentenced for such an offence before this consent has been obtained, provided that no measure restricting liberty is applied during the prosecution or when judgment is given for this offence.

It follows that if, as an outcome of the proceedings, the person surrendered is sentenced to a penalty or a measure involving the deprivation of liberty, the requesting State must obtain consent for that penalty to be enforced.

However, the exception under Article 27(3)(c) does not preclude a measure restricting liberty from being imposed on the person surrendered before consent has been obtained "*where that restriction is lawful on the basis of other charges which appear in the European arrest warrant"*.

Even though extremely concise, with this wording the Court seems to have referred to requests for surrender involving several offences, and hence to cases of multiple custodial measures[14].

VI. Sentence rendered *in absentia* and the European arrest warrant for execution purposes

Articles 4(6) and 5(3) of Framework Decision 2002/584/JHA must be interpreted as meaning that where the executing Member State concerned has implemented Article 5(1) and Article 5(3) of that Framework Decision in its domestic legal system, the execution of a European arrest warrant issued for the purposes of execution of a sentence imposed *in absentia* within the meaning of the aforementioned Article 5(1) may be subject to the condition that the person concerned, who

[14] See, in this respect, *E. Selvaggi*, (n. 12), p. 1298 et seq.

is a national or resident of the executing Member State, should be returned to the executing State in order, as the case may be, to serve the sentence passed against him there, following a new trial organised in his presence in the issuing Member State[15].

In such a case, the surrender of a Rumanian national residing in Belgium had been requested by his State of origin for the purposes of executing a sentence that was imposed *in absentia* but could be challenged under Rumanian law. In its reference to a preliminary ruling and in respect of the case in hand, the Belgian Court raised the question of the applicability of the provision of the Framework Decision that permits the possibility of the surrender being subject to the person concerned returning to the State of execution of the European arrest warrant, so that he may serve his sentence there. As this type of surrender is only provided for in the arrest warrant for prosecution purposes, the point was to decide whether an arrest warrant issued for the purposes of executing a final judgment, which could nonetheless be challenged, could be considered as such.

In his opinion, the Advocate General had maintained that such a warrant could fall within both categories, depending on the timing and on the conduct of the person concerned. In other words, the warrant is for execution purposes if it is issued by judicial authorities but can become in substance (when the requested person has stated that he wishes to be retried) a warrant for the purposes of prosecution and, in this case, the transformation cannot entail the loss of any of the guarantees provided under the Framework Decision for persons who are the subject of an arrest warrant. He had consequently suggested that the Court of Justice should interpret the provision in Article 5(3) as meaning that in the circumstances described in Article 5(1) of the Framework Decision, provision permits an executing Member State to carry out the enforcement of a warrant for the execution of a sentence or detention order subject to the condition that the issuing Member State should guarantee that the person concerned, a national or resident of the executing Member State, will be returned to the executing Member State to serve the sentence or detention order imposed, if any, in the territory of that Member State.

The Court of Justice substantially endorsed the Advocate General's opinion and stated in the grounds of its judgment that the situation of a person who was sentenced *in absentia* and to whom the option of applying for a retrial is still open is comparable to that of a person who is the subject of a European arrest warrant for the purposes of prosecution, with the Court concluding that there is no objective

[15] ECJ, 21. 10. 2010, Case C – 306/09, (*I.B*), in Cass. pen., 2011, p. 392. Article 4(6) introduces an optional ground for refusing surrender *"if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law*", while Article 5(3) provides that the issuing State is required to give a special guarantee, based on which *"where a person who is the subject of a European arrest warrant for the purposes of prosecution is a national or resident of the executing Member State, surrender may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State"*. With reference to the execution of decisions rendered *in absentia*, Article 5(1) lays down that, in certain circumstances, "*surrender may be subject to the condition that the issuing judicial authority gives an assurance deemed adequate to guarantee the person who is the subject of the European arrest warrant that he or she will have an opportunity to apply for a retrial of the case in the issuing Member State and to be present at the judgment"*.

reason precluding a judicial authority competent for execution which has applied Article 5(1) of Framework Decision 2002/584 from also applying the condition contained in Article 5(3) of that Framework Decision.

With a view to offering a real possibility of reintegration into society for a person resident in the executing State[16] who may be retried in the issuing State, the Court maintains that there is nothing to indicate that the EU legislator wished to exclude persons requested on the basis of a sentence imposed *in absentia* from that objective.

VII. The principle of *ne bis in idem* in the execution of a European arrest warrant

Finally, in the *Mantello* case[17] the Court outlined a systematic interpretation of Article 3 (2) of Framework Decision 2002/584/JHA, under which the judicial authorities of the executing Member State can refuse to execute a European arrest warrant if they are informed that the requested person has been "finally judged" by another Member State "in respect of the same acts".

Asked to give a ruling, first on the scope of application of the concept of "same acts", the Court found that, for the purposes of issuing and enforcing a European arrest warrant, the concept of "same acts" in Article 3(2) of the Framework Decision is an autonomous concept of European Union law. However, the concept of "same acts" also appears in Article 54 of the Convention implementing the Schengen Agreement and in that context it was interpreted as only referring to the nature of the acts by applying a criterion of interpretation based on the existence of a set of concrete circumstances which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected[18].

On the basis of the identity of the objectives underlying Article 54 of the Schengen Convention and Article 3(2) of the Framework Decision – i. e. to ensure that no one is prosecuted or tried again for the same acts – the Court considered it possible to apply the same interpretation model that it had developed for this objective with reference to the Convention implementing the Schengen Agreement within the normative context of Framework Decision 2002/584/JHA.

Furthermore, the Court specified that a requested person is considered to have been finally judged in respect of the same acts where, following criminal proceedings, further prosecution is definitively barred or when the person is finally acquitted. The criteria to ascertain whether a judgment is "final" must be found in the legal system of the Member State in which that judgment was delivered.

Consequently, a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceed-

[16] This approach was already adopted in judgment of 6. 10. 2009, (*Wolzenburg*), *ibid.*, paragraph 62.
[17] ECJ, 16. 10. 2010, Case C-261/09, in Cass. pen., 2011, p. 1219, with remarks by N. Plastina, ibid., 1219 et seq.
[18] ECJ, 9. 03. 2006, Case C- 436/04, (*Van Esbroeck*), [2006] ECR 2333, in Dir. giust., 2006, n. 16, p. 99 et seq.

ings in respect of the same acts against that person in one of the Member States of the European Union. Where the issuing judicial authority, in response to a request for information made by the executing judicial authority, expressly stated on the basis of its national law that its earlier judgment rendered in its legal system is not a final judgment on the same acts that are the subject of the warrant, the executing judicial authority cannot in principle refuse the execution of the European arrest warrant[19].

Hence, in this case as well, the concept of "same acts" cannot be left to the discretion of the judicial authorities of each Member State on the basis of the rules of their national legislations, but it is an "autonomous" concept of EU law, which, as such, may be the subject of a reference for a preliminary ruling.

On the other hand, this approach seems to be further confirmed by the outcomes of a recent evolution of the ECJ's case-law on the European *ne bis in idem*: even a summary investigation easily reveals that the groundwork is being laid for a fully-fledged fundamental right of European citizens and its legal rationale, contents and objectives are embedded in the fundamental legal principles of Article 6(2) of the EU Treaty. In fact, and also with reference to the specific sector of the third pillar", the Court of Justice has tried to develop an autonomous and uniform concept of "European *res judicata*" by grounding it on the assertion of a safeguard that is increasingly acquiring the character of a fundamental right through its connection to the concept of "European citizenship" and the consequent acknowledgment of the possibility to circulate freely in the common area of freedom, security and justice by ensuring that there is no duplication of prosecutions for the same criminal offences[20].

On the other hand, the European Court of Human Rights which defined the minimum content of the principle of *ne bis in idem* exclusively within the domestic legal system of the Member States has recently adopted the ECJ's line of case-law on the concept of *idem*, where only material acts have to be considered, independently of the protected legal interest[21].

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[19] In the sense that the decision whether a judgment is final is necessarily to be taken in the legislation of the issuing Member State, see ECJ, 11. 02. 2003, Joined Cases C-187/01 and C-385/01 (*Gözutök and Brügge*), [2003] ECR 1345, in Cass. pen., 2003, p. 1688, as well as 22. 12. 2008, Case C- 491/07 (*Turansky*), [2008] ECR 11039, ibid., 2009, p. 3158 et seq.

[20] See, *inter alia*, ECJ, (*Turansky*), as well as the extensive caselaw discussed in the case note by *G. De Amicis*, Il principio del *ne bis in idem* europeo nell'interpretazione della Corte di Giustizia, in Cass. pen., 2009, p. 3162 et seq.; on this issue see, *inter alia*, *S. Cimamonti,* European arrest warrant in practice and *ne bis in idem*, in: N. Keijzer / E. Van Sliedregt (eds.), The European arrest warrant in practice, T. M. C. Asser Press, The Hague, 2009, p. 111 et seq.; *D. Del Vescovo*, Il principio del *ne bis in idem* nella giurisprudenza della Corte di Giustizia europea, in Dir. pen. e proc., 2009, p. 1413 et seq.; *J.A. E. Vervaele,* The Transnational *ne bis in idem* Principle in the EU: Mutual Recognition and Equivalent Protection of Human Rights, Utrecht Law Review, 2005, vol.I, n. 2, p. 100 et seq.; *Klip,* (n.1), p. 231 et seq.; *Mitsilegas* (n. 1), p. 142 et seq.; *C. Amalfitano*, Conflitti di giurisdizione e riconoscimento delle decisioni penali nell'Unione europea, Giuffrè, 2006, p. 52 et seq.; *A. Mangiaracina*, Verso l'affermazione del *ne bis in idem* nello "spazio giudiziario europeo", in Leg. pen., 2007, p. 638 et seq.;*T. Rafaraci*, *Ne bis in idem* e conflitti di giurisdizione in materia penale nello spazio di libertà, sicurezza e giustizia dell'Unione europea, in Riv. dir. proc., 2007, p. 625 et seq.*; M. Wasmeier*, The principle of *ne bis in idem,* in International Review of Penal Law, 2006, p. 123 et seq.

[21] See European Court of Human Rights, Grand Chamber, *Zolotukhin v. Russia*, Application no. 14939/03, Judgment 10 February 2009.

VIII. Conclusive remarks

The lines of case-law examined clearly have an in-depth affect on the rules and scope of the new surrender mechanism[22] and highlight fundamental issues and aspects whose assessment in criminal proceedings highlight the need for a "uniform interpretation" by the judicial authorities of the EU Member States.

In this regard, the main lines of interpretation developed in the ECJ's case-law seem to be aimed not only at identifying a "grid" of concepts and terms (e. g., "staying", "residence", "same acts", etc.[23]) that are "autonomous" under EU law – as they do not explicitly refer to any national law and, as such, do not fall within the margin of discretion in interpreting the law of national judicial authorities – but also at defining a framework of general principles (e. g. an interpretation in conformity with EU law, legality, equality, non-discrimination etc.), whose specific importance, also due to the reference to the Charter of Fundamental Rights (Article 6(1) EU Treaty), may be widely acknowledged and endorsed within the European area of freedom, security and justice.

The task of ensuring that the law is observed in the uniform interpretation of the Treaty, explicitly provided for in Article 19(1) TUE (formerly Article 200 EC Treaty), is therefore fully achieved when exercising the power to give preliminary rulings, in which a national court asks the Court of Justice to rule on the interpretation of EU law. The decisions taken in this context highlight its function as guarantor of the autonomy of the Union's legal system and they are binding not only for the referring court, but also for any other court operating in the territory of the Member States, unless a new ruling is asked for (and subject to the possibility that the case-law may be reversed).

The task of interpreting EU law attributed to the Court of Justice must be considered "exclusive" in this respect alone, as well as with reference to the obligation to request a preliminary ruling by courts and tribunals against whose decisions there is no remedy under national law (pursuant to Article 267(3) TFEU);

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[22] Indeed, it must be pointed out that the Court of Justice also ruled on the EAW on another occasion and defined its relation to extradition proceedings with regards to the *tempus commissi delicti* (ECJ, 12. 08. 2008, Case C-296/08 PPU (*Goicoechea*), [2008] ECR 6307, in Cass. pen., 2009, p. 373 et seq., with note by *N. Plastina*, Corte di Giustizia del Lussemburgo: regime transitorio e applicabilità degli accordi in materia di estradizione nella disciplina sul mandato di arresto europeo, ibid., p. 381 et seq.) and stated, *inter alia*, that Article 31 of the Framework Decision, where it rules on its relation to other legal instruments on extradition, refers only to the situation in which the European arrest warrant system is applicable, which is not the case where a request for extradition relates to acts committed before a date specified by a Member State in a statement made pursuant to Article 32 of the Framework Decision. Therefore, it follows that the replacement under Article 31(1) of the Framework Decision of the conventions explicitly mentioned in that provision does not entail the abolition of those conventions, "*which retain their relevance in cases covered by a statement made by a Member State pursuant to Article 32 of the Framework Decision, and also in other situations in which the European arrest warrant system is not applicable*" (paragraph 58). Moreover, according to the ECJ, the provision in Article 32 must be interpreted as not precluding the application by an executing Member State of the Convention relating to extradition between the Member States of the European Union, drawn up by Council Act of 27 September 1996, even where that convention only became applicable in that Member State after 1 January 2004.

[23] See, for instance, with regards the concept of "victim" – that does not extend to legal persons pursuant to Article 1 (a) and Article 10 of the Council Framework Decision of 15 March 2001 (2001/220/JHA) on the standing of victims in criminal proceedings – ECJ, 21. 10. 2010, Case C–205/09 (*Eredics and Sapi*), paragraph 31 and paragraph 33.

the same task, however, is attributed to "ordinary" courts, i. e. national courts, when they are called upon to apply EU law in the cases brought before them[24].

Under a different but relative point of view, the acknowledgment of the legal value of the Charter of fundamental rights introduces another criterion of legitimacy into the Court's scope and strengthens its position and role *vis-à-vis* the other Community institutions that from now on will be subject to closer scrutiny as to their compliance with fundamental rights, expressed not only in terms of the "literal" interpretation of the Charter but also of the interconnections deriving from it with regards to the other "general principles" that have gradually been developed by the Court over the years from the common constitutional traditions and, particularly, from the European Convention on Human Rights[25].

By way of conclusion, it can be claimed that consideration of the grounds on which the ECJ's recent "regulatory" action is based, together with the acknowledged possibility to submit to the Court's scrutiny all possible gaps or inconsistencies of national legislations with the binding principles set out by the European legislator, is likely to open up new scenarios for the "dialogue" that has been in place between national and European courts for some time now[26].

[24] On these issues and on the different schemes adopted by the Court of Justice in interpreting and applying Community law, see *M. Condinanzi - R. Mastroianni*, Il contenzioso dell'Unione europea, Torino, 2009, p. 16 et seq.

[25] See, in this respect, *G. Repetto*, L'annullamento di atti delle istituzioni comunitarie per violazione di diritti fondamentali nella recente giurisprudenza della Corte di giustizia, in *www.diritticomparati.it*, 23. 05. 2011, p. 3.

[26] On the "circulation" of case-law "knowledge" and on the importance that this culture and this openness towards foreign or supranational jurisprudence may have for national case-law, see remarks by *G. Zagrebelsky*, Corti costituzionali e diritti universali, in Riv. trim. dir. pubbl., 2006, p. 300 et seq.; see also *Weyembergh – Ricci*, (n.1), p. 241 et seq.