

Ariel Falkiewicz*

The Double Criminality Requirement in the Area of Freedom, Security and Justice – Reflections in Light of the European Court of Justice Judgment of 11 January 2017, C-289/15, *Criminal Proceedings against Jozef Grundza*

Considerable limitations of the double criminality requirement in the third pillar instruments were mainly linked with the constitutional principles nullum crimen, nulla poena sine lege. For this reason, researchers did not pay sufficient attention to the question of proper interpretation of the double criminality requirement in the Area of Freedom, Security and Justice. In the recently released judgment of the Grundza case (C-289/15), the European Court of Justice has answered question with reference to Framework Decision 2008/909/JHA. In this paper, an attempt is undertaken to examine the double criminality requirement in a broader context, namely EU cooperation in criminal matters.

I. Introduction

The double criminality requirement has its roots in the first mechanism of international cooperation in criminal matters, i.e. in extradition, where it is often called a customary rule of international law.¹ Apart from this, it is a basic condition in cases of mutual legal assistance *sensu stricto*, transfer of proceedings, as well as in recognition and enforcement of foreign judgements.² In general terms, the essence of the double criminality requirement is that the criminalization of the act provides the basis for a legal assistance request, both in the requesting and the requested state. According to this requirement, a legal detention or penalty imposed on a person could only be enforced in the requested state for those acts which constituted a criminal offence in light of its

* Ph.D, Barrister of Warsaw Bar Association. This research paper was supported by European Commission research project: Best practices for EUROpean COORDination on investigative measures and evidence gathering, EUROCOORD, JUST-2015-JCOO-AG, 723198.

1 I. Shearer, Extradition in International Law, Manchester 1971, p. 138. (However, Shearer in no way justifies this position. As for the unrighteousness of this view he speaks, in the firstly of, the extradition law in Scandinavian countries, adopted at the turn of the 1950s and 60s).

2 L. Gardocki, Double Criminality in Extradition Law, Israel Law Review (ILR) 1993, vol. 27, issue 1-2, p. 288.

own laws.³ Although, EU cooperation in criminal matters, based on framework decisions and directives, is essentially different than cooperation based on multilateral conventions I believe that for interpretation of classical institutions (*inter alia* double criminality, speciality rules) can not disregard historical issues.

The Framework Decision 2002/584/JHA⁴, adopted in 2002, introduced a considerable limitation on the validity of the requirement under discussion, through enumeration of crime categories for which the verification of the double criminality would be left out.⁵ In the later instruments, adopted within the third pillar, and then within the Area of Freedom, Security and Justice, legal provisions analogous to those resulting from art. 2 (2) of FD 2002/584/JHA were adopted in almost all cases.⁶ Similarly, thus, the double criminality requirement in the particular instruments poses, as a rule, only an optional ground for refusal of cooperation.⁷

The above-mentioned restriction, of the double criminality requirement within the AFSJ, attracted the attention of representatives of the doctrine⁸, constitutional courts

3 In the author's opinion, there is a difference between the double criminality requirement in procedural law (international cooperation in criminal matters) and the double criminality requirement in substantive criminal law where often it is a basic jurisdiction requirement. Double criminality, as a condition in procedural law, relates to criminality under *lex fori* where the double criminality in substantive criminal law relates to criminality under *lex loci*. In other words, in the field of cooperation (procedural law) the court must verify whether the act is criminalized in the state where the act was not committed (territory of the issued/executing state). In the field of jurisdiction, it refers to a situation where the act was committed outside the territory of the state where the perpetrator is being prosecuted. See *inter alia*: Ch. van den Wyngaert, Double Criminality as a Requirement to Jurisdiction, in: N. Jareborg (ed.), Double Criminality: Studies in International Criminal Law, Uppsala 1989, p. 50; P. Asp, A. von Hirsch, D. Frände, Double Criminality and Transnational Investigative Measures in EU Criminal Proceedings: Some Issues of Principle, Zeitschrift für Internationale Strafrechtsdogmatik 2006, no. 11, p. 512.

4 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ 2002 L 190, p.1.

5 Art. 2 (2) of the FD 2002/584/JHA.

6 Art. 3 (2) of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of freezing property or evidence orders; art. 5 (1) of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; art. 7 (1) of the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; art. 10 (1) Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; art. 11 (1g) of the directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters.

7 Art. 2 (4) of the FD 2002/584/JHA.

8 See *inter alia*: M. Plachta, European Arrest Warrant: Revolution in Extradition?, European Journal of Crime, Criminal Law and Criminal Justice 2003, no. 11, pp. 185-186; A. Sinn, L. Wörner, The European Arrest Warrant and Its Implementation In Germany – Its Constitu-

of particular EU member states⁹ as well as the European Court of Justice¹⁰ (hereinafter: ECJ). This was connected with the suggested relations between the double criminality requirement and the principles *nullum crimen, nulla poena sine lege*.¹¹ The scope of this paper does not allow a broader presentation of these positions, which in this context are unnecessary. What matters, is that the direction of the doctrinal debates diverted attention from another vital theoretical question – namely, the way in which the double criminality requirement is interpreted. In the recently passed sentence in the *Grundza* case, the ECJ – in response to a request of the District Court in Presov, Slovakia – proposed one of a few possible interpretations of the double criminality requirement, laid down in art. 7 (3) of FD 2008/909 JHA. This paper aims not only to present the reasons for the interpretation adopted by the ECJ but also, or perhaps most importantly, to deliberate whether this interpretation can be extended over the other instruments of the EU cooperation in criminal matters.

II. Factual Circumstances

On 3 October 2014, the Czech Republic District Court in Cheba (*Okresní soud v Chebu*) imposed a cumulative custodial sentence of 15 months on Mr Grundza, a Slovak national, for burglary and obstruction of the implementation of a decision of a public body, namely a breach of a temporary ban on driving imposed on him by a decision of the Municipality of Přerov (*Magistrát města Přerov*) on 12 February 2014. The judgment of 3 October 2014 was sent to the Slovakian District Court in Presov (*Krajský súd v Prešove*), for recognition of the judgment and enforcement of the sentence in Slovakia. Article 4 (1) of Law No 549/2011, which corresponds to Article 7 (3) of FD 2008/909/JHA, provides that a decision may be recognised and enforced in the Slovak Republic if the act in respect of which the decision was issued constitutes an offence under Slovak law. The referring court states in this regard that Article 348 (1) (d) of the Slovak Criminal Code, which concerns the offence of thwarting the imple-

tionality, *Laws and Current Developments, Zeitschrift für Internationale Strafrechtsdogmatik* 2007, no.5, p.216; *M. Fichera*, The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?, *European Law Journal* 2009, vol. 15, no. 1, pp. 79-81.

- 9 Problems with the double criminality requirement in light of *nullum crimen* principle were subject of considerations by the constitutional courts in the Czech Republic (judgement of Constitutional Court of 3 May 2006, sign. Pl. Us. 66/04) and Hungary (decision of Court of Cassation of 08 March 2008, sign. 733/A/2007).
- 10 European Court of Justice (ECJ) 3.5.2007, case C-303/05 (*Advocaten voor de Wereld VZW v. Leden van de Ministerraad*) [2007] ECR I-3633. See *inter alia*: *F. Geyer*, European Arrest Warrant. Court of Justice of the European Communities. Judgment of 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, *European Constitutional Law Review* 2008, vol. 4, issue 01, pp. 149-161; *E. Herlin-Kernell*, In the Wake of Pupino, *Advocaten voor de Wereld and dell'Orto*, *German Law Journal* 2008, no. 12, pp. 1153-1156.
- 11 Another key question beyond the substantive scope of this paper, was a departure, in FD 2002/584/JHA, from one of the classic principles of the extradition law: the rule of not extraditing a state's own nationals to foreign states.

mentation of an official decision, refers only to decisions of the judicial authorities or of another ‘Slovak’ body which are enforceable within the ‘Slovak’ territory. Considering these circumstances, the Slovakian court decided to refer the following question to the ECJ, for a preliminary ruling: *On a proper interpretation of Articles 7(3) and 9(1)(d) of Framework Decision 2008/909/JHA, is the condition of double criminality to be considered satisfied only where the act to which the decision to be recognised refers constitutes an offence in concreto, i.e. on the basis of a concrete assessment of the facts (whatever its constituent elements or however it is described) also in the law of the executing State, or is that condition sufficiently satisfied where the act generally constitutes (in abstracto) an offence also in the legal order of the executing State?*

III. Interpreting the Double Criminality Requirement

In relevant literature, it is common to assume that there are two ways to interpret the double criminality requirement: *in abstracto* or *in concreto*. It is difficult to disagree with Advocate General Bobek, who observed, in an opinion on the *Grundza* case, that various authors seem to define those types of interpretation differently.¹²

To confirm the double criminality *in abstracto*, Mohamed Charif Bassiouni deems it sufficient to find out if the act constituting the basis of the legal assistance request is considered as a crime in both the requesting and the requested state.¹³ The other approach (*in concreto*) relies, according to the same author, on the label of the offence and a strict interpretation of its legal elements.¹⁴

According to Michal Plachta, the double criminality requirement *in abstracto* is fulfilled in a situation, in which essential constituent elements of the offence are comparable under the law of both states.¹⁵ An interpretation of *in concreto*, in this author’s opinion, entails an additional objective–subjective verification, connected with the institutions that exclude criminal responsibility in the requested state, e.g. right of self-defence or insanity.

A definition similar to Plachta’s was proposed by L. Gardocki.¹⁶ In his summary on definition problems, he points out, that double criminality *in abstracto*, calls for verification of the question as to whether the behaviour and the acts referred to in the judgment of the issuing state would amount to a criminal offence if committed on the territory of the executing state.¹⁷ Double criminality *in concreto* seems to require more verification, including the satisfaction of other conditions of criminal liability as defined

12 § 23 of the Opinion of Advocate General Bobek delivered on 28 July 2016 (hereinafter referred to as the Opinion).

13 *M.Ch. Bassiouni*, Extradition and world public order, Leiden 1974, p. 322.

14 *Bassiouni*, (fn 13), p. 322.

15 *M. Plachta*, The Role of Double Criminality Requirement in International Cooperation in Penal Matters, in: N. Jareborg (ed.), *Double Criminality: Studies in International Criminal Law*, Uppsala 1989, p. 109.

16 *Gardocki*, ILR 1993, p. 289–290.

17 § 24 of the Opinion.

by the laws of the executing state, such as age or the mental state of the accused person or consideration of further factual circumstances in which the act was committed.¹⁸ In procedures concerning recognition and enforcement of foreign judgments (mainly: transfer of prisoners), the interpretation of *in concreto* also includes an obligation to verify if it would be possible to sentence the person concerned for the same act by a court in the executing state.¹⁹

It seems that the differences between individual authors – in regard to what lies behind the respective types of interpretation of the double criminality requirement – do not pose an obstacle for determining which of the interpretation types should be applied on the grounds of the 2008/909/JHA which by the way, was also observed by the Advocate General.²⁰

Nevertheless, the question is worth considering, if the way to interpret the double criminality requirement in other instruments of cooperation is (or should be) identical with the one adopted in this matter. However, before I try to resolve this problem it is necessary to present and briefly discuss the decision of ECJ in the *Grundza* case.

IV. The Judgment of the ECJ of 11 January 2017

According to the opinion of the Advocate General, the ECJ stated that it was irrelevant whether the analysis of the condition of double criminality was based on an assessment *in concreto* or *in abstracto*.²¹ Firstly, article 7 of FD 2008/909/JHA makes no mention of those two types of interpretation. Secondly, there is no precise meaning of those notions in the context of double criminality. The ECJ noted, that it was crucial for the answer to make a functional interpretation of article 7 (1) and (3) of Framework Decision 2008/909/JHA. The first paragraph of this article is a well known reflection of art. 2 (2) of FD 2002/584/JHA (mentioned earlier), which contains a list of 32 types of crimes excluded from verification of double criminality. Article 7 (3) states, *for offences other than those covered by paragraph 1, the executing State may make the recognition of the judgment and enforcement of the sentence subject to the condition that it relates to acts which also constitute an offence under the law of the executing State, whatever its constituent elements or however it is described*. It must be emphasized that in the latter provision, the scope of the assessment of double criminality, in that it requires a competent authority of the executing state to verify whether the acts in question ‘also constitute an offence’ under the national law of that state, ‘whatever its constituent elements or however it is described’. As noted both by the Advocate General and the ECJ, offences do not need to be identical in the two member states

18 § 25 of the Opinion.

19 This approach is often called a qualified double criminality; see: G. Vermeulen, W. De Bondt, C. Ryckman (eds.), *Rethinking international cooperation in criminal matters in the EU. Moving beyond actors, bringing logic back*, footed in reality, Antwerpen | Apeldoorn | Portland 2012, p. 108.

20 § 28 of the Opinion.

21 § 25 of the Judgment.

concerned. The condition of double criminality is an exception to the general rule of recognition of judgments and enforcement of sentences and must be interpreted strictly, to limit cases of non-recognition and non-enforcement.

As a consequence of the above reasoning, the ECJ stated, that double criminality in the *Grundza* case was fulfilled, because elements underlying the offence, as reflected in the judgment handed down by the competent authority of the issuing State, would also, per se, be subject to a criminal sanction in the territory of the executing State if they were present in that State.

V. Evaluation of the Decision

The ECJ's sentence does not raise any relevant objections. The European Court of Justice correctly interpreted the ground for refusal typified in art. 7 (3) of FD 2008/909/JHA, refraining from the doctrinal argument about how to interpret the double criminality requirement. In essence, the problem concerning the *Grundza* case was based upon the question of analogous transformation of factual circumstances (German: *die sinngemäße Umstellung des Sachverhalts*), and not on the question depicted in section III above. Problems with international (and of course, European and EU) cooperation in criminal matters are often connected with crimes which are qualified as strictly national (e.g. insult of the head of a requesting state or an attack against a public official of a requesting state). There are many obvious problems in cases where elements of crimes have only national connotations. The *Grundza* case is one of the examples.

In Poland, art. 244 of the Polish Criminal Code sanctions a crime which is analogous to paragraph 348 (1d) of the Slovakian Criminal Code, and penalizes the act where the offender does not respect a court verdict. However, it is not clear whether this provision includes foreign judgments. A linguistic analysis may lead to the conclusion that, e.g. the breach of a temporary ban on driving ordered by a Slovakian court is not a violation of article 244 of the Polish Criminal Code. The above reasoning is also justified by title of chapter 30 (where art. 244 is located) which is namely "Crimes against the administration of justice". There is also a common consensus in Polish doctrine of criminal law²² that crimes located in this particular chapter protect national legal goods only.²³

22 See *inter alia*: W. Wróbel, A. Wojtaszczyk, Z. Zontek, in: L. Gardocki (ed.), *System prawa karnego. Tom 8. Przestępstwa przeciwko państwu i dobrom zbiorowym* (The System of Criminal Law. Vol. 8. Crimes against the State and Collective Goods), Warsaw 2013, pp. 611-612; B. Kunicka-Michalska, in: A. Wąsek (ed.), „Kodeks karny. Część szczególna. Komentarz. Tom II” (Criminal Code. Special Part. Commentary. Vol. II), Warsaw 2004, pp. 104-105; L. Tyszkiewicz, in: M. Filar (ed.), „Kodeks karny. Komentarz” (Criminal Code. Commentary), Warszawa 2014, p. 1321; M. Szweczyk, in: A. Zoll (ed.), „Kodeks karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117-277 k.k.” (Criminal Code. Special Part. Commentary. Vol. II. Commentary to art. 117-277 CC), Warsaw 2008, pp. 1024-1025.

23 Except for the regulation that directly points at an „international” character of a legal good. For example, art. 247a of the Polish Criminal Code penalises behaviour consisting of making false statements in front of The International Criminal Court.

It should be remembered that the previous instrument, which was binding in the cooperation between EU member states, namely the Convention on the Transfer of Sentenced Persons²⁴ provides a similar reason for refusal of article 3 (1e). According to this provision "A sentenced person may be transferred under this Convention only on the following conditions (...) if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its territory (...)". As observed by Plachta,²⁵ there is a certain contradiction between the wording of this provision and the content of the Explanatory Report.²⁶ The former leads to an interpretation *in abstracto*, whereas the latter seems to suggest an interpretation *in concreto*.²⁷ Nevertheless, in the context of the *Grundza* case, what is of importance, is that the above-mentioned art.3 (1) (e) doubtlessly requires an analogous transformation of facts. In the double criminality test, we must assume that the act which led to sentencing the person in question was performed in the administering state. In my opinion, such an analogous transformation of facts is essential, regardless of the way in which double criminality is interpreted.²⁸ If we agree that FD 2008/909/JHA is a "step forward" in a recognition and enforcement of judgments in the AFSJ, then an interpretation of double criminality more strict than that of Council of Europe instrument cannot be used.²⁹

The interpretation of double criminality proposed by the ECJ is a consequence of the mutual recognition principle, which became the leading principle of judicial cooperation in criminal matters in the European Union after the Tampere European Council, and especially after the Lisbon Treaty entered into force.³⁰ Although, as Klip pointed out, the concept of the mutual recognition principle has not been defined³¹; there-

24 Convention signed March 21, 1983, ETS no. 12.

25 M.Plachta, Transfer of Prisoners under International Instruments and Domestic Legislation. A Comparative Study, Freiburg im Breisgau 1993, p. 315.

26 Explanatory Report on the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, Addendum I to CDPC(82)7, 19.

27 *The condition (double criminality requirement – A.F.) is fulfilled if the act which gave rise to the judgment in the sentencing State would have been punishable if committed in the administering State and if the person who performed the act could, under the law of the administering State, have had a sanction imposed on him.*

28 I disagree with M. Plachta that this meaning of the double criminality requirement is an extensive interpretation (M. Plachta, «fn 15», pp. 123-124). This type of interpretation is essential where there is a legal basis for it (e.g. § 3 (1) of the German Federal Law on International Judicial Assistance in Criminal Matters where it is used in all types of cooperation).

29 § 40 of the Opinion.

30 See *inter alia*: L. Klimek, Mutual Recognition of Judicial Decisions in European Criminal Law, Springer 2017, pp. 8-14; Ch. Janssens, The Principle of Mutual Recognition in EU Law, Oxford 2013, pp. 151-153; Z. Barwina, „Zasada wzajemnego uznawania w sprawach karnych” (The Principle of Mutual Recognition in Criminal Matters), Warszawa 2012, p. 138.

31 A.Klip, European Criminal Law. An Integrative Approach, Cambridge-Antwerp-Portland 2016, p. 362.

fore undoubtedly the double criminality requirement should be considered as its serious limitation.³²

As was conclusively stated by the ECJ, the extensive interpretation of a ground for refusal is unacceptable in light of this constitutional principle.³³ The optimising and balancing function of the mutual recognition principle³⁴ cannot be omitted in the process of interpretation the double criminality requirement.

There is also one important aspect which was not noticed by the ECJ. In extradition (surrender) proceedings, the double criminality requirement is very often considered as a reflection of *nullum crimen, nulla poena sine lege* principles.³⁵ However doubtful it appears,³⁶ if we assume that it is meant as a type of guarantee for a person, it must be remembered that usually, in the procedure of recognition and enforcement of foreign judgments, the double criminality requirement will pose an obstacle for a person who wants to serve the sentence in his or her own country³⁷. Although I have my doubts as to whether Framework Decision 2008/909/JHA was made for EU citizens, as was declared,³⁸ as it seems obvious that the interpretation of the double criminality requirement should not create an obstacle for the prisoner.

The above question relates to the main purpose of this paper. In relevant literature, the authors point to the fact that the double criminality requirement is not homoge-

32 H.G. Nilsson, Mutual Trust and Mutual Recognition of our Differences. A Personal View, in: G. De Kerchove, A. Weyembergh (eds.), *La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne*, Brussels 2002, p. 158.

33 § 46 of the Judgment.

34 A. Suominen, Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts, *European Criminal Law Review* 2014, vol. 4, issue 3, pp. 213–214.

35 Gardocki, ILR 1993, p. 294; P.O. Träskman, *Should We Take the Condition of Double Criminality Seriously?* (in: N. Jareborg (ed.), *Double Criminality: Studies in International Criminal Law*, Uppsala 1989, p. 154; S.Z. Feller, The Significance of the Requirement of Double Criminality in the Law of Extradition, *Israel Law Review* 1975, no. 51, p. 80.

36 See *inter alia*: Ch. Van den Wyngaert, Restrictive Function of International Human Rights, in: A. Eser, O. Lagodny (eds.), *Principles and Procedures for a new Transnational Criminal Law*, Freiburg 1992, pp. 492–493; B. Swart, Human Rights and the Abolition of Traditional Principles, in: A. Eser, O. Lagodny (eds.), *Principles and Procedures for a new Transnational Criminal Law*, Freiburg 1992, p. 520.

37 M. Plachta, (fn 25), pp. 311–314; Gardocki, ILR 1993, p. 288.

38 It is my belief that regardless of the purposes declared in the preamble, such as social rehabilitation of the sentenced person, the main purpose of Framework Decision 2008/909/JHA is reduction of the population of foreign nationals in prisons in Western Europe, mainly in the UK. See: M. Plachta, *Przekazywanie skazanych w Unii Europejskiej: model sui generis czy twórcze rozwinięcie tradycyjnego systemu?*, *Studia Europejskie* 2007, no. 4, p. 75–76. See also: the debate in the House of Commons of 6 June 2016 „Removal of Foreign National Offenders and EU Prisoners”, where the Secretary of State for the Home Department, Theresa May stated that „(...) *The Ministry of Justice has been working to remove EU prisoners under the EU prisoner transfer framework decision, which is a compulsory means of prisoner transfer that allows us to send foreign criminals back to their home country to serve their sentence.*(...)”. <https://hansard.parliament.uk/Commons/2016-06-06/debates/1606066000003/RemovalOfForeignNationalOffendersAndEUPrisoners> (access: 28 October 2017).

neous in the field of international cooperation in criminal matters³⁹. In the field of extradition/surrender procedure, the validation of the double criminality requirement is usually beneficial to the suspect. As mentioned above, it is different for the procedure of recognition and enforcement of foreign judgments. Finally, in the field of evidence, it is not clear whether it is beneficial to the suspect or not as it cannot be known in advance if the evidence to be collected abroad proves to be exculpatory or incriminating. However, this differentiation does not undermine the legitimacy of the question as to whether the way the double criminality is interpreted, should be identical in other instruments of cooperation, based upon the principle of mutual recognition, binding in the Area of Freedom, Security and Justice

VI. *The Double Criminality Requirement in Other Instruments of Cooperation in the AFSJ*

A great number of instruments have entered into force since 2002. My considerations are limited to those which are (or will be) most frequently used in the AFSJ. I will focus on the EAW, European Investigation Order⁴⁰ (hereinafter: EIO) and mutual recognition of financial penalties.⁴¹

I believe that the essence of Framework Decision 2008/947/JHA and the provision of the double criminality in art. 10 (1) is similar to Framework Decision 2008/909/JHA, so the conclusions made in the *Grundza* case should be the same. Therefore, no further explanation regarding this should be needed.

1. European Arrest Warrant

As mentioned above, the beginning of the discussion about the double criminality requirement was mainly connected with its serious limitation of FD 2002/584/JHA. This limitation resulted from the fact that little attention was paid to the interpretation of the double criminality requirement which provides an optional ground for refusal. The relevance of this issue is not marginal – 16 EU Member States transposed optional ground for refusal, based on a lack of double criminality, as being mandatory.⁴²

39 *M. Plachta*, (fn 25), p. 311.

40 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, p. 1–36.

41 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, OJ L 76, 22.3.2005, p. 16–30 as amended by the Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.3.2009 (hereinafter FD 2005/214/JHA).

42 Annex to the Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2007) 407 final, p. 11.

Article 2 (4) of FD 2002/584/JHA has almost the same wording as art. 7 (3) of FD 2008/909/JHA. The former applies solely to the surrender and the latter to the recognition and enforcement of a judgment. However, it must be remembered, that a European Arrest Warrant can also be issued for the purposes of execution of a custodial sentence or a detention order. It should be noted, that the provision of art. 4 (6) of FD 2002/584/JHA covers the type of transfer of a prisoner (a national of the state where the EAW was executed). Of course, in such cases the applicability of the double criminality requirement is similar to the situation where the EAW was issued for the purposes of conducting a criminal prosecution. A differentiated interpretation, depending on the purpose of issuing the EAW, should be abandoned, as it is not supported by any provision of FD 2002/584/JHA. Therefore, the interpretation of the double criminality requirement in the procedure of surrender should contain analogous transformation of the described act, as in FD 2008/909/JHA.

The reasoning of the ECJ in the *Grundza* case does not rule out the second element of the correct interpretation, which can be performed, as mentioned above, *in abstracto* or *in concreto*.⁴³ I believe, that only an *in abstracto* interpretation would be in accord with the mutual recognition principle. The *in concreto* interpretation would force the executing state to make a precise analysis of the facts. This might be impossible because of a lack of evidence in the issuing state, whereas interpretation based exclusively on the charge would be a misunderstanding since the surrender procedure is not a regular criminal proceeding. The evaluation of evidence is limited, and generally the responsibility of the authorities of the issuing state.

There is also an *opinio iuris* argument. At the 16th International Congress in Budapest (in 1999), the Internal Association of Penal Law adopted a resolution regarding extradition law, where we can find a postulate of the converting interpretation method. It was noticed that problems with the double criminality requirement arose in connection to crimes such as bribery, perjury, and fiscal offences, which are defined in terms that appear to refer to national officials or institutions⁴⁴. During the 10th Congress in Rome in 1969, the same body adopted a resolution where the following statement can be found: "It could be satisfactory to announce that the incriminated facts underlying the request are punishable in abstracto according to the law of the requested state".⁴⁵

The fact that executing the EAW is usually disadvantageous to the requested person cannot be an argument against this "double elemented"⁴⁶ interpretation. As mentioned above, the opinion about the connection between the double criminality requirement and the *nullum crimen* principle is based on false premises, since the procedure of surrender is not a national criminal proceeding (where the *nullum crimen* principle does

43 In the author's opinion, these types of interpretation relate to analogous transformation of facts which I believe is needed in both cases.

44 See: J.L. de la Cuesta (ed.), Resolutions of the Congresses of the International Association of Penal Law (1926 – 2004), ReAIDP / e-RIAPL, 2007, D-01, p. 153 (available online at <http://www.penal.org/>; electronic access: 4.09.2017).

45 *Ibidem*, p. 62.

46 Including both *in abstracto/in concreto* interpretation and analogous transformation of facts.

definitely apply).⁴⁷ To the contrary, the type of interpretation which excludes analogous transformation of the act is not coherent with the mutual recognition principle.

2. European Investigation Order

Classical mutual legal assistance within the EU⁴⁸ was based mainly on the European Convention on Mutual Assistance in Criminal Matters⁴⁹ (with two additional protocols⁵⁰), CISA⁵¹ and the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union⁵² (with one additional protocol⁵³). The lack of the double criminality requirement generally did not give cause for refusal.⁵⁴ Only in the case of search or property seizure, could the state give a reservation as to the application of the obstacle in shape of the unfulfilled double criminality re-

47 Nevertheless, many authors argue that *nullum crimen* principle requires that national authorities may not use coercive measures for acts that do not constitute offences according to their national system; see: *H. Schultz*, The Principles of The Traditional Law of Extradition (in: *H. Schultz, W. Duk, B. Karle* (eds.), *Legal Aspects of Extradition among European States*, Strasbourg 1970, p. 12-13; see also: footnote 35.

48 I do not believe it is appropriate to reverse Mutual Legal Assistance to Mutual Recognition (like did e.g. *A. Mangiaracina*, A New and Controversial Scenario in the Gathering of Evidence at the European Level: The Proposal for a Directive on the European Investigation Order, *Utrecht Law Review* (ULR) 2014, vol. 10, issue 1, p. 115). As rightly noticed by *A. Lach*, mutual recognition is a principle which is a basis for MLA within the EU; see: *A. Lach*, *Europejska pomoc prawna w sprawach karnych* (European Legal Assistance in Criminal Matters), Toruń 2007, p. 54-55. This is why in this paper I use the term „mutual legal assistance” with regard to the European Investigation Order. I believe this is an instrument of MLA, based on the mutual recognition principle.

49 Signed on 20 April 1959, ETS no. 030, the convention was ratified by all EU member states.

50 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS no. 030, signed on 17 March 1978 and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters signed on 8 November 2011, ETS no. 182. The former was ratified by all EU member states, the latter was ratified by 22 EU member states (except Austria, Greece, Hungary, Italy, Luxembourg and Spain).

51 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L 239 of 22.9.2000, p. 19-62.

52 OJ C 197 of 12.7.2000. The convention was ratified by 24 EU member states (except Croatia, Greece, Ireland and Italy). However, it must be noticed that the purpose of this Convention is to supplement the provisions and facilitate the application between the member states of the European Union's already binding instruments (inter alia Council of Europe Convention on MLA).

53 Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union OJ C 326 of 21.11.2001.

54 However, some EU member states gave a reservation to art. 1 and art. 2 of the Convention and say that they grant assistance only when the double criminality requirement is met (Austria, Bulgaria, Hungary, Lithuania).

quirement (art. 5 (1) (a) of the European Convention on Mutual Assistance in Criminal Matters).⁵⁵

Those acts were replaced by the EIO.⁵⁶ The directive also replaces two EU instruments: Framework Decisions 2008/978/JHA⁵⁷ and 2003/577/JHA⁵⁸ (art. 34 (2) of the directive 2014/41/EU).

However, as the legislative process in the Council is not fully public, it is noticeable, that no state gave a reservation or declaration to directive 2014/41/EU, connected with the double criminality requirement, as was the case during the legislative process of Framework Decision EEW. During the negotiations of the latter act, one of the key issues – brought up by Germany – was the lack of a common definition of the crime categories known from Framework Decision 2002/584/JHA. Consequently, Germany made a declaration as to Framework Decision EEW in which The Federal Republic of Germany reserved the right to verify double criminality in the case of offences related to terrorism, computer-related crime, racism, xenophobia, sabotage, racketeering, extortion and swindling.⁵⁹

Through article 11 (2) of the directive, the EIO excludes a possible verification of double criminality in the case of investigative measures enumerated in art. 10 (2). These measures are: (a) obtaining of information or evidence which is already in the possession of the executing authority, and the information or evidence could have been obtained, in accordance with the law of the executing state, within the criminal proceedings or for the purposes of the EIO, (b) obtaining of information contained in databases held by the police or judicial authorities and directly accessible by the executing authority within the criminal proceedings, (c) hearing of a witness, expert, victim, a sus-

55 EU member states which gave a reservation according to art. 5 (1) (a) and (b) of the Convention. These states are: Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, Germany, Ireland, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and United Kingdom).

56 Article 34 (1) of the directive 2014/41/EU. Although the deadline for the implementation of the directive 2014/41/EU was 22 may 2017, at the time of writing this article only 13 EU Member States have implemented the directive: see: https://www.ejn-crimjust.europa.eu/ejn/EJN_Library_StatusOfImpByCat.aspx?CategoryId=120 (access: 19.09.2017).

57 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for the use in proceedings in criminal matters, OJ L 350, 30.12.2008, p. 72–92 (hereinafter: FD EEW). In fact, this act was repealed by EU Regulation 2016/95 repealing certain acts in the field of police cooperation and judicial cooperation in criminal matters, OJ L 26, 2.2.2016, p. 9–12. At the time of repeal, the FD EEW was implemented only by 6 states (Croatia, Denmark, Finland, Netherlands, Slovenia, Spain). According to art. 2 of the regulation 2016/95, any European evidence warrant executed under FD EEW will continue to be governed by that Framework Decision until the relevant criminal proceedings have been concluded with a definitive decision.

58 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196, 2.08.2003, p. 45–55. However, directive 2014/41/EU only replaces this FD in regard to freezing of evidence.

59 Declaration of the Federal Republic of Germany on the Council Framework Decision on the European Evidence warrant for the purpose of obtaining objects, evidence and data for the use in proceedings in criminal matters. This declaration was attached to FD EEW.

pected or accused person or third party on the territory of the executing state, (d) any non-coercive investigative measure as defined under the law of the executing state and (e) the identification of persons who hold a subscription of a specified phone number or IP address.

However, as observed by Belfiore,⁶⁰ the directive is not using the term "non-coercive measures" as a general term for the measures listed above; the aim of the EU legislator was to draw a distinction between non-coercive measures (those expressly listed) and coercive measures (other than those expressly listed). This distinction is important in the context of double criminality since it is only in the case of necessity of using coercive measure (to execute the EIO) that this requirement can apply. This is nothing new in mutual legal assistance, as the double criminality requirement was not a reason for refusal in the classic (Council of Europe) system, with exception to search and seize property as measures which are definitely coercive. Nevertheless, concerns about the lack of a strict definition of "coercive measure" are justified.⁶¹ A possible differentiation of this definition between the EU member states and a growing number of innovative investigation measures is more than expected. The definition of non-coercive measures in the preamble to the directive 2014/41/EU is insufficient and imprecise.⁶²

Also in the source literature, "the double criminality issue" in the EIO was not a central object of considerations.⁶³ This is not an allegation but rather, as I believe, the consequence of the fact, that, in the area of mutual legal assistance, the lack of the double criminality requirement (or its serious limitation) is not as controversial as in the surrender procedure. This reasoning is based on many circumstances.

Indisputably, in the field of evidence, theoretically we cannot anticipate whether the evidence will be aggravating or exculpating for the suspect. We can assume, that many actions, e.g. hearing of witness or property seizure would bring different results. In relations to the argument above, an investigation order would be issued at *in rem* stage

60 R. Belfiore, The European Investigation Order in Criminal Matters: Developments in Evidence-Gathering across the EU, *European Criminal Law Review* 2015, vol. 3, pp. 320-321. See also: Interinstitutional file 2010/0817 (COD), 10749/11, Brussels, 31 May 2011, p. 4 and its critical assessment: S. Ruggieri, Horizontal cooperation, obtaining evidence overseas and the respect for fundamental rights in the EU. From the European Commission's proposals to the proposal for a directive on a European Investigation Order: Towards a single tool of evidence gathering in the EU?, in: S. Ruggieri (ed.), *Transnational Inquiries and the Protection of Fundamental Rights in Criminal Proceedings*, Berlin 2013, p. 294.

61 See e.g.: Ruggieri, (fn 60), p. 294, Mangiaracina, ULR 2014, p. 132.

62 „Non-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law”.

63 See: Mangiaracina, ULR 2014, p. 113 *et seq*; C. Heard, D. Mansell, The European Investigation Order: Changing the Face of Evidence-Gathering in EU Cross-Border Cases, *New Journal of European Criminal Law* 2011, no. 4, pp. 353-367; L. Bachmaier-Winter, European investigation order for obtaining evidence in the criminal proceedings: Study of the proposal for a European directive, *Zeitschrift für Internationale Strafrechtsdogmatik* 2010, no. 9, pp. 580-583; J. Blockstock, The European Investigation Order, *New Journal of European Criminal Law* 2010, vol. 1, issue 4, pp. 481-498; A. Farries, The European Investigation Order: Stepping Forward with Care, *New Journal of European Criminal Law* 2010, vol. 1, issue 4, pp. 425-432.

where it is possible that at least two individuals are potentially in the sphere of interest of the prosecuting authorities of the issuing state. For these reasons, the double criminality requirement is a type of a shield in the procedure of obtaining evidence between EU states. Only efficient obtainment of evidence, with respect for basic rights, can result in probity and justice of transborder procedures and criminal procedures concerning a foreign element.

Of course, the possible danger of a violation of human rights in MLA⁶⁴ is visible when we analyse various types of investigative measures which could possibly be requested by the issuing state, e.g. interception of telecommunications (art. 30 of the directive) or covert investigations (art. 29 of the directive). However, it must be emphasized that the directive provides a general solution in article 11 (1) (g), which includes an optional reason for refusal, namely when the use of the investigative measure indicated in the EIO is restricted under the law of the executing state to a list or category of offences, or to offences punishable by a certain threshold, which does not include the offence covered by the EIO. As an example, we may point to the provisions of the German (art. 100a) and Spanish (art. 579 §2) criminal procedure codes where telephone tapping is only allowed in the case of certain offences, enumerated on a special list.

There are also specific solutions which solve the problem when the double criminality requirement is not met. For example, according to art. 30 (5), the execution of an EIO which indicates that the interception of telecommunications may also be refused if the same investigative measure would not have been authorised in a similar domestic case. Similar restrictions can be found in other provisions that regulate specific coercive measures. It is a kind of addition to the double criminality requirement but it does not pass for a double criminality requirement *sensu stricto* – Kusak adequately describes it as ”double availability of the investigative measure”.⁶⁵

Therefore, possible violations of human rights would be generated in a situation where the authority of the issued state is obliged to execute an EIO regarding the offence which cannot adjudge the use of this type of measure in a similar ”national” case. Besides, it refers to a situation where the EIO is not issued in criminal proceedings *sensu stricto* but in administrative or penal-administrative proceedings where the subject of the proceedings is not a crime but a minor law infringement, and the provisions in the executing state do not allow the application of this type of a measure in analogous penal-administrative or administrative proceedings. There is no direct rela-

64 The question which arises, is whose rights can possibly be violated, and if an individual accused in the issuing state is likely to report a violation of human rights regarding the fact that this hypothetical violation usually concerns a third person? In the context of MLA, we must notice that investigative measures in the executing state will (usually) affect a person who is not accused in the issuing state but e.g. has some connection with the pending case. Another important question is whether the lack of double criminality is relevant from the perspective of this third person.

65 *M.Kusak*, Mutual admissibility of evidence in criminal matters in the EU. A study of telephone tapping and house search, Antwerpen | Apeldoorn | Portland 2016, pp. 68-86.

tion with the double criminality requirement but this extension of the scope of the application of directive 2014/41/EU shows a less strict approach by the EU states to the double criminality requirement in the field of evidence.⁶⁶ Nevertheless, also in these cases, the authorities of the executing state are entitled to trigger a type of mental process and actually use a double criminality/availability test. Thus, it is important to present a proposal of an interpretation.

There is no argument in favour of *in concreto* interpretation. What is more, I assume that in many cases it is impossible to verify double criminality *in concreto* in a situation where the criminal proceedings in the issuing state are still at the *in rem* stage. A differentiated interpretation, depending on the stage of criminal proceedings (interpretation *in abstracto* at *in rem* stage and interpretation *in concreto* at *in personam* stage), seems to be illogical and unjustified in the light of the wording of the directive and – more importantly – in light of the purpose of directive 2014/41/EU.

An analogous transformation of the described act is also needed when we verify the double criminality requirement. However, directive 2014/41/EU does not have the same provision as Framework Decisions 2002/584/JHA, 2008/909/JHA and 2008/947/JHA. The wording of art. 11 (1) (g) of the directive is different – there is no reference to the constituent elements or description of the act. One should ask, if this could serve as an argument against the analogous transformation. I do not think so, for several reasons. It should be noticed that the wording of art. 11 (1) (g) is not as important as a teleological clarification of this provision. As in other instruments, the double criminality requirement in EIO is an exception to the general rule of the execution of an order issued by another state. From the beginning of mutual legal assistance, the double criminality requirement was treated less strictly than in the field of extradition. If we agree that an analogous transformation is needed in the surrender procedure within the EU, it would be difficult to exclude the necessity of this process in MLA.

3. Mutual Recognition of Financial Penalties

Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties was adopted on 24 February 2005. Its main purpose was to provide a possibility for enforcement by the executing EU state of a fine imposed in the issuing EU state. The instruments which were the predecessors of the FD 2005/2014, adopted by the Council of Europe states,⁶⁷ have never had any practical meaning because of the small number of ratifications.

Framework Decision 2005/214/JHA has been implemented by 26 EU Member States, except Greece and Ireland. Its practical relevance is considerable. Optional

⁶⁶ This extension was in fact introduced by EU Convention 2000 (art. 3), see: *E. Denza*, The 2000 Convention on Mutual Assistance in Criminal Matters, *Common Marker Law Review* 2003, vol. 40, issue 5, p. 1058.

⁶⁷ European Convention on the Punishment of Road Traffic Offences (signed on 30 November 1964, ETS No. 052) and European Convention on the International Validity of Criminal Judgments (signed on 28 May 1970, ETS no. 070).

ground for refusal, based on lack of double criminality, was transposed as mandatory by 9 EU Member States.⁶⁸

Article 1 of FD 2005/214 applies to financial penalties imposed by judicial or administrative authorities of the member states. As in directive 2014/41/EU, the scope of the application is wider than in Framework Decision 2002/584/JHA, and refers also to minor law infringements which are subject of consideration not only by criminal courts but also by some authorities of the issuing state other than a court (i.e. administrative bodies, or the police), if the person had an opportunity to have the case tried by a court having jurisdiction in particular in criminal matters.⁶⁹ Practical application of FD 2005/214/JHA is different than, for example, that of FD 2002/584/JHA, and is connected mainly with road traffic offences⁷⁰ where a fine is a commonly used punishment. It does not mean that provisions of the former act are not similar.

Article 5 (1) of FD 2005/214/JHA is an analogous correspondent to art. 2 (2) of FD 2002/584/JHA with an extension of seven groups of offences.⁷¹ Paragraph 3 of the above-mentioned article mentions the double criminality requirement as only an optional ground for refusal to execute a decision taken by an authority in the issuing state. The wording of art. 5 (3) is nearly the same as the wording of art. 10 (1) of FD 2008/947/JHA, art. 7 (3) of FD 2008/909/JHA and art. 2 (4) of FD 2002/584/JHA. It should be asked whether there is anything that leads us to a different interpretation of this requirement.

Firstly, it must be emphasized, that mutual recognition of financial penalties could be located in a general institution which we can label "mutual recognition of foreign judgements *largo sensu*". The purpose of FD 2005/214/JHA is similar to the purpose of Framework Decisions 2008/909/JHA and 2008/947/JHA which is *inter alia* effective (mutual) recognition and enforcement of decisions made in criminal matters (*largo sensu*) or – more generally speaking – is a step forward towards the "free movement of

68 Report From The Commission based on Article 20 of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Brussels, 22.12.2008. COM(2008) 888 final, p. 5.

69 See e.g. ECJ judgment of 14 November 2013, C-60/12, *Marián Baláž*, where the ECJ stated that „The term ‘court having jurisdiction in particular in criminal matters’, set out in Article 1(a)(iii) of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure (...)”.

70 Recital 4 explicitly states that FD 2005/214/JHA should also cover financial penalties imposed in respect of road traffic offences.

71 These groups are: conduct which infringes road traffic regulations, including breaches smuggling of goods, of regulations pertaining to driving hours and rest periods and regulations on hazardous goods, infringements of intellectual property rights, threats and acts of violence against persons, including violence during sport events, criminal damage, theft and offences established by the issuing state and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty.

sentences” across Europe.⁷² Secondly, the argument that the double criminality requirement is a type of guarantee for a person (who can be legally detained for an act which constituted a criminal offence under the law of the executing state) is not as strong as in the surrender procedure, or even as in the procedure of recognition and enforcement of the judgement, since according to FD 2005/214/JHA there is no possibility to detain such a person. Violations of human rights are possible, but admittedly they only refer to the right to property, not to the right to liberty. Taking these two aspects into account, the interpretation of the double criminality requirement provided by FD 2005/214/JHA cannot be different than the interpretation of similar provisions in FD 2008/909/JHA or FD 2002/584/JHA. Also delocalization (analogous transformation of facts) and the abstract approach are necessary, regardless of the subjective elements of the crime.

VII. *Conclusions*

Despite a partial abolition of the double criminality requirement in the AFSJ, the *Grundza* case has shown that a doctrinal discussion regarding this issue is essential, both for the theoretical and practical aspects. In this article, I have attempted to prove that the interpretation of this requirement should be the same for all types of cooperation. This is not contrary to the opinion, which I hold, that the double criminality requirement is not homogeneous in all the types of cooperation. In the AFSJ, this requirement always poses an obstacle to effective cooperation and remains in opposition to the mutual recognition principle. If one agrees that the double criminality requirement is an exception to the mutual recognition principle, it is necessary to clarify this requirement.

72 *K.Ligeti*, Mutual recognition of financial penalties in the European Union, *Revue Internationale de Droit Penal* 2006, vol. 77, p. 150.