The protection of the EU's financial interests in a treaty with Switzerland entailed ratification of that treaty by both the Community (as it then was) and its Member States,[253] and the EU's measures on mutual assistance in criminal matters are paralleled by EU legislation which sets out rules for administrative assistance in tax matters.[254] It is striking that while mutual assistance or mutual recognition as regards the criminal law aspects of tax fraud is subject to the ordinary legislative procedure after the entry into force of the Treaty of Lisbon, administrative cooperation as regards taxation is still subject to unanimous voting.[255]

Non-JHA EU legislation also has implications for disqualifications, in particular as regards driving licences: Member States must refuse to issue a licence, or to recognize the validity of a licence, if that licence was restricted, suspended, or withdrawn in another Member State.[256] Also, it might be questioned whether measures concerning disqualifications which do not follow from a criminal conviction pronounced by a court would fall within the scope of the EU's criminal law competence.[257] A Commission proposal regarding cross-border enforcement of sanctions relating to road safety was not agreed by the Council, due to a dispute as to whether it should have a legal base in EC law (as proposed by the Commission) or the third pillar (as it then was).[258]

9.5. Extradition and the European Arrest Warrant

9.5.1. Extradition

A basic element of cooperation between States regarding criminal matters is the concept of extradition, which entails an agreement between States to send a person who is absent from a State pending a criminal trial or following the imposition of a criminal sentence there to that State, in order to serve the sentence or to appear at the criminal trial. The basic international framework for extradition for European States is the 1957 Council of Europe Convention on extradition, which

[253] A parallel treaty with Liechtenstein has also been proposed. See 9.2.5 above.

[254] As regards tax recovery, see Dir 76/308 ([1976] OJ L 73/18), as consolidated following later amendments by Dir 2008/55 ([2008] OJ L 150/28), replaced by Dir 2010/24 ([2010] OJ L 84/1) as from 1 Jan 2012 (Art 28(1)). As regards administrative assistance, see, as regards direct taxation, Dir 77/799 ([1977] OJ L 336/15), as amended by Dirs 2003/93 ([2003] OJ L 264/23) and 2004/56 ([2004] OJ L 157/70), and see the proposed replacement Dir in COM (2009) 29, 2 Feb 2009. As regards VAT, see Reg 218/92 ([1992] OJ L 24/1), replaced by Reg 1798/2003 ([2003] OJ L 264/1)—and see the proposed recast Reg in COM (2009) 427, 18 Aug 2009, agreed by the Council in June 2010 (Council doc 10189/10, 28 May 2010). As regards excise duties, see Reg 2073/2004 ([2004] OJ L 359/1).

[255] See Arts 113, 114(2), and 115 TFEU (former Arts 93, 95(2), and 94 EC), as interpreted in Cases C-338/01 *Commission v Council* [2004] ECR I-4829 and C-533/03 *Commission v Council* [2006] ECR I-1025.

[256] Art 11(4) of Dir 2006/126 ([2006] OJ L 403/18), applicable from 19 Jan 2009 (Art 18).

[257] See further 9.7.3 below.

[258] COM (2008) 151, 19 Mar 2008; see the progress report in Council doc 16634/08, 8 Dec 2008.

all Member States have ratified, although only some Member States have ratified the First (1975) and Second (1978) Protocols to the Convention.[259] In addition, all Member States have ratified the 1977 Council of Europe Convention on the suppression of terrorism, which affects both extradition and mutual assistance;[260] a 2003 Protocol to that Convention is not yet in force.[261]

To implement extradition, the 'requesting' State (the State of the prosecution, which wishes to assert jurisdiction over a fugitive to conduct a criminal prosecution, or to enforce a sentence or detention order) asks the 'requested' State (the 'host' State, which currently has the fugitive) to 'surrender' the fugitive to it, possibly after a provisional arrest to prevent flight. For this purpose, the requested State holds a special extradition proceeding, the details of which are left to national law.

Under the 1957 Council of Europe Convention, extradition must be granted wherever the fugitive has escaped from a custodial sentence of over four months' detention, or is accused of committing a crime which would be an offence resulting in at least one year's detention in both the requesting and requested States (the 'double criminality' rule). However, there are a number of important exceptions to this. A State may limit its extradition obligations to a selected list of crimes, or exclude a selected list from its obligations, and moreover no State has an obligation to extradite a person charged with a 'political offence' or where there would be prejudice, punishment, or prosecution 'on account of the fugitive's race, religion, nationality or political opinion'. Military offences are excluded and fiscal offences may be. Most important of all, States may choose to refuse extradition of their own nationals, and many EU Member States initially chose this option. Among other rules, lapse of time to bring criminal proceedings in the requesting or requested State prevents extradition.

A separate principle for the protection of the fugitive is the 'specialty' rule. This rule prevents the requesting State from bringing other proceedings against the fugitive for offences other than that for which he or she was extradited, except where the requested State gives its consent or the fugitive remains in or returns to the requested State. Furthermore, the fugitive cannot be sent to a *third* State ('re-extradited') by the requesting State without the requested State's consent. Requests under the Convention must be exchanged via embassies, but State parties can agree bilaterally on simpler rules for exchanges. In addition to the various options allowed in the text of the Convention, reservations to '*any* provision or provisions' are allowed.[262]

These extensive opt-outs and reservations led to the two subsequent Protocols and to the Convention on the Suppression of Terrorism, which attempted to restrict their use. The Protocols, inter alia, narrow the 'political offence' and

[259] ETS 24, 86, and 98 respectively. For details of ratification and signatures, see Appendix I.
[260] ETS 90. [261] ETS 190. For details of ratification and signatures, see Appendix I.
[262] Art 26(1) (emphasis added).

fiscal offences exceptions, and the Terrorism Convention lists six 'terrorist' offences which definitely shall not be classified as 'political offences' by signatory States, and allows States to exclude other crimes from the scope of the exception. However, parties may still refuse extradition if they suspect that the requesting State is persecuting the accused, and can enter a reservation if they consider that a particular offence falling within the list of 'terrorist offences' is indeed a political offence.[263] EEC Member States agreed an EPC Convention in 1979 attempting to restrict the use of such reservations between each other, but this Convention never entered into force and ratification attempts were abandoned.[264]

Because many EU Member States had not ratified one of the Protocols to the 1957 Convention and/or had chosen *à la carte* from the provisions of the 1957 Convention and its Protocols, extradition between them was deemed unsatisfactory. Therefore, the Schengen Convention and two EU Conventions of 1995 and 1996 aimed to restrict Member States' use of reservations and exceptions under the Council of Europe measures,[265] although the EU Conventions are not yet in force.[266] Also a 1989 EPC Convention tried to speed up existing mechanisms by allowing authorities to fax extradition requests.[267] The Schengen provisions abolished the fiscal offences exception for VAT, customs duties, and excise duties; provided for requests to be sent to justice ministries; and allowed for speedy extradition with the fugitive's consent. Also, the inclusion of extradition requests in the Schengen Information System (SIS) facilitated the practical application of the extradition rules.[268] The first EU extradition Convention provided for detailed rules governing such speedy consented extradition, and then the second Convention attempted to address a large number of barriers to extradition, in particular: lowering the threshold for extradition to a six months' custodial sentence in the requested State; weakening the double criminality rule as regards organized crime; abolishing the 'political offence' exception, although Member States could make a renewable reservation on this point; abolishing also the 'fiscal offences' exception, although Member States could provide that the exception was only abolished to the extent that the Schengen extradition required; requiring Member States to permit extradition of their nationals to other Member States, although Member States could make a renewable reservation on this point; limiting the Council of Europe restrictions relating to lapse of time, specialty, and re-extradition (to other Member States); and integrating the EPC Convention on faxing requests into the text.

[263] Art 13 of the Convention.

[264] UK government Command Paper, Cm 7823 (1980).

[265] Arts 59–66 (Schengen Convention); [1995] OJ C 78/1 (consented extradition); [1996] OJ C 313/11 (disputed extradition). See also the Schengen Executive Committee Declaration on extradition ([2000] OJ L 239/435).

[266] See Appendix I for ratification details.

[267] For the text, see: <http://www.asser.nl/eurowarrant-webroot/documents/cms_eaw_12_1_Agreement1989.05.26.pdf>.

[268] On the SIS, see 12.6.1.1 below.

Furthermore, there are specific extradition rules in a number of EU criminal law measures, in particular applying an 'extradite or prosecute' principle.[269] Also, the rules on sentencing in several EU measures specifically require that in at least some cases, the penalties should be stringent enough to give rise to possible extradition proceedings.[270]

9.5.2. European Arrest Warrant

Extradition between Member States has now largely been replaced by the Framework Decision establishing the European Arrest Warrant (EAW). The Framework Decision was adopted in June 2002, and Member States were obliged to apply it by 31 December 2003.[271] It has attracted a significant amount of case law from the Court of Justice: a reference on its validity and eight references on its interpretation.[272] First of all, as to the legal form of the Framework Decision, the Court of Justice confirmed that the Council could replace Conventions by means of a Framework Decision.[273]

As for the substance of the Framework Decision, it has replaced the corresponding provisions of the prior EU, EPC, and Council of Europe measures.[274] However Member States retained the option to apply earlier extradition rules as regards acts committed before a certain date.[275] In that case, the prior measures continue to apply in part as regards requests to those Member States

[269] For details, see 11.5 below. [270] See the provisions discussed in 10.6 below.

[271] Art 34(1) ([2002] OJ L 190/1). All references in this section are to this Framework Decision unless otherwise indicated. On the EAW, see N Keijzer and E van Sliedregt, eds, *The European Arrest Warrant in practice* (Asser, 2009); E Guild and L Marin, *Still not resolved? Constitutional issues of the European Arrest Warrant* (Wolf, 2009); R Blextoon, ed, *Handbook on the European Arrest Warrant* (Asser, 2005); S Alegre and M Leaf, *European Arrest Warrant: A solution ahead of its time?* (Justice, 2003); and J Wouters and F Naert, 'Of arrest warrants, terrorist offences and extradition deals: An appraisal of the EU's main criminal law measures against terrorism after "11 September"' (2004) 41 CMLRev 909.

[272] On validity, see Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633. On interpretation, see Cases: C-66/08 *Koslowski* [2008] ECR I-6041; C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307; C-388/08 PPU *Leymann and Pustovarov* [2008] ECR I-8993; C-123/08 *Wolzenburg* [2009] ECR I-9621; C-261/09 *Mantello*, pending (opinion of 7 Sep 2010); C-306/09 *I.B.*, pending (opinion of 6 July 2010); C-105/10 PPU *Gataev*, withdrawn; and C-264/10 *Kita*, pending.

[273] *Advocaten voor de Wereld*, ibid. See 2.2.2.2 above. This reasoning is presumably valid *mutatis mutandis* to a number of other mutual recognition measures which replace or repeal the corresponding provisions of Conventions: see 9.6 and 9.7 below.

[274] Art 31(1). Member States are free to retain or adopt treaties which further simplify the application of the Framework Decision (Art 31(2)). The Court of Justice has confirmed that this latter provision does not mean that Member States can keep applying the Council or Europe, EU, or EPC measures: judgment in *Santesteban Goicoechea* (n 271 above). This interpretation presumably applies *mutatis mutandis* to other mutual recognition measures with equivalent provisions.

[275] France, Italy, and Austria have applied this option (see declarations in [2002] OJ L 190/19). Also, Austria could refuse to extradite its own nationals until the end of 2008 unless dual criminality applied (Art 33(1)).

which have limited the temporal application of the Framework Decision.[276] The Council of Europe extradition Convention (and the Council of Europe's terrorism Convention, when the 2003 Protocol to that Convention enters into force) permits States to replace the application of these Conventions between themselves if they agree a uniform law of extradition.[277] So the (EU) Council adopted conclusions urging Member States to declare officially the non-applicability of the Council of Europe measures between themselves.[278] More fundamentally, the Court of Justice has ruled that the purpose of the Framework Decision is to replace the traditional extradition system with a system of surrender on the basis of an EAW.[279]

The basic rule is that EAWs must be executed 'on the basis of the principle of mutual recognition and in accordance with the provisions of [the] Framework Decision'.[280] An EAW can be issued whether a person is wanted for trial or whether a person has already been convicted and escaped application of a custodial sentence or detention order.[281] It may be issued for any act punishable in the issuing State (the Member State issuing the arrest warrant) by a period of at least twelve months or, where a sentence has already been passed, for at least four months.[282] This threshold will in principle be waived in the specific circumstances of the application of the Framework Decision on the recognition of pre-trial supervision orders, although Member States have the option of refusing to waive that threshold.[283] It should also be noted that the mere possibility of issuing an EAW in order to enforce a sentence against a person resident in another Member State does not extinguish the application of the 'enforcement condition' which applies to the Schengen double jeopardy rules.[284]

The central provision of the Framework Decision abolishes the principle of double criminality, where the warrant has been issued for one of the standard list of thirty-two offences 'as defined by the law of the issuing Member State', where such an offence could be subject to a sentence of at least three years.[285] In fact, the list contains more than thirty-two offences, since some points cover more than one offence. For acts not on the list, surrender of the person 'may' be subject to the condition of double criminality in the executing State (the State enforcing

[276] Art 32. The Court of Justice has confirmed that in that case, Member States are still free to ratify the EU's extradition Conventions in order to simplify extradition somewhat as regards such persons: judgment in *Santesteban Goicoechea* (n 271 above).

[277] Art 28(3) of the former Convention; Art 9 of the latter Convention (as amended by the Protocol).

[278] Council doc 12413/03, 11 Sep 2003, adopted by the JHA Council, 3 Oct 2003.

[279] Judgments in: *Advocaten voor de Wereld,* para 28; *Koslowski*, para 31; *Leymann*, para 42; and *Wolzenburg*, para 56 (all n 271 above).

[280] Art 1(2).

[281] Art 1(1) and clause 5 of the preamble.

[282] Art 2(1).

[283] Art 21 of that Framework Decision ([2009] OJ L 294/20), applicable from 1 Dec 2012 (Art 27(1)). On the substance, see 9.6.3 below.

[284] Case C-288/05 *Kretzinger* [2007] ECR I-6441. On the substance, see 11.8 below.

[285] Art 2(2).

the arrest warrant),[286] with the consequence that there will still be an obligation to establish whether the act in question would be a crime in both States.

The validity of this partial abolition of dual criminality was challenged though the national courts, on the grounds that it breached the principle of the legality of criminal proceedings and the principles of equality and non-discrimination.[287] However, according to the Court of Justice, while these principles formed part of the general principles of EU law, and were moreover reaffirmed in the EU Charter of Fundamental Rights,[288] the principle of legality was not infringed because it was for the issuing Member State to comply with it when it defined the offences which it sought to punish or prosecute by means of executing an EAW.[289] As for the principles of equality and non-discrimination, the Court held that abolishing the dual criminality rule only as regards thirty-two specific offences was not a breach of those principles, since 'the Council was able to form the view, on the basis of the principle of mutual recognition and in the light of the high degree of trust and solidarity between the Member States, that, whether by reason of their inherent nature or by reason of the punishment incurred of a maximum of at least three years, the categories of offences in question feature among those the seriousness of which in terms of adversely affecting public order and public safety justifies dispensing with the verification of double criminality', and so any distinction between persons convicted or accused of those crimes and persons convicted or accused of other crimes was justified, even if those two groups of persons were comparable.[290] Also, the lack of precision in the definition of the offences was not problematic on this ground either, since the Framework Decision did not have the purpose of harmonizing substantive criminal law and the Treaty (as it then was) did not make application of the Framework Decision conditional on such harmonization.[291] This reasoning is presumably valid *mutatis mutandis* to the abolition of the dual criminality principle in a number of other mutual recognition measures.[292]

There are three categories of grounds for which the execution of an EAW could be refused or delayed. The Court of Justice has ruled that these are the *only* grounds which could justify non-execution of an EAW.[293] Firstly, there are three

[286] Art 2(4). [287] *Advocaten voor de Wereld* (n 271 above). See further 9.3.5 above.

[288] Paras 45–47 of the judgment, ibid. [289] Paras 48–54 of the judgment, ibid.

[290] Paras 57–58 of the judgment, ibid.

[291] Para 59 of the judgment, ibid. The Court referred to its case law on the double jeopardy rule, on which see 11.8 below. Arguably the subsequent wording of the Treaty (Art 82 TFEU) entrenches the mutual recognition principle even more strongly (see 9.2.3 above).

[292] See 9.6 and 9.7 below. However, note that the Framework Decision on mutual recognition of financial penalties abolishes dual criminality for a longer list of crimes (9.7.1.1 below), and the proposed Directive establishing the European Investigation Order would abolish dual criminality entirely (9.6.1.3 below). The *Advocaten voor de Wereld* judgment cannot automatically be applied by analogy to those measures.

[293] See the judgments in: *Koslowski*, para 43; *Leymann*, para 51; and *Wolzenburg*, para 57 (all n 271 above).

grounds for *mandatory* non-execution of the warrant: an amnesty in the executing State, if that State had jurisdiction to prosecute the offence under its national law; where the double jeopardy rule applies; and where the fugitive is below the age of criminal responsibility in the executing State.[294] Secondly, there are seven grounds for *optional* non-execution:[295] residual application of the double criminality rule; a pending prosecution in the executing Member State for the same acts (*lis pendens*);[296] a decision not to prosecute, or a final sentence, in the executing State, which prevents further proceedings; time-barring of the action in the executing Member State, if it has jurisdiction; a prior judgment for the same acts in a third State, if that judgment has been enforced; the executing Member State's agreement to enforce the sentence itself, against one of its nationals or residents or a person staying there, where the EAW was issued for the purpose of enforcing a sentence; or where the executing Member State either regards the acts as taking place within its territory or would not exercise extraterritorial jurisdiction over acts which took place outside the issuing State's territory.

The Court of Justice has clarified that the exception concerning time-barring only applies where there was no final judgment; a final judgment dismissing a prosecution due to time-barring falls instead within the scope of the mandatory double jeopardy exception.[297] Furthermore, the exception relating to possible execution of a sentence against nationals, residents, or persons staying in the executing State has attracted a number of references to the Court of Justice.[298] It will also interact with the later Framework Decision on the recognition of custodial sentences, once the latter measure is implemented by Member States.[299] First of all, in its *Kozlowski* judgment, the Court of Justice interpreted the part of the exception relating to persons 'staying in' the executing State,[300] ruling that it could not apply to all persons temporarily located in the executing State,

[294] Art 3. Note that this is the only mutual recognition measure which provides for mandatory grounds for non-execution. On the interpretation of the double jeopardy exception, see Case C-261/09 *Mantello*, pending (opinion of 7 Sep 2010). As with most other EU mutual recognition measures, the question arises as to the relationship between this specific exception and the general rules on double jeopardy set out in Arts 54–58 of the Schengen Convention ([2000] OJ L 239). On this issue, see 11.8 below. The *Mantello* opinion argues that at least the interpretation of the 'same facts' in Art 3(2)of the Framework Decision must be identical to the interpretation of the Schengen rules.

[295] Art 4.

[296] On this point, it should be noted that the traditional 'extradite or prosecute' rule found in many Framework Decisions on substantive criminal law (see 11.5 below) is now irrelevant where an EAW is issued, since the EAW Framework Decision does not permit a refusal on the grounds that the executing State is *planning* to prosecute the person concerned. On the coordination of prosecutions in *lis pendens* cases, see 11.6 below.

[297] Case C-467/04 *Gasparini* [2006] ECR I-9199, para 31.

[298] Art 4(6). See also the discussion of Art 5(3) below.

[299] See Art 25 of that Framework Decision ([2008] OJ L 327/27), applicable from 5 Dec 2011 (Art 29(1)). On the substance, see 9.7.1.2 below. On the relationship between the EAW and the rules on the transfer of sentenced persons in the meantime, see the pending *Kita* case (n 271 above)

[300] See n 271 above, paras 36–54.

but equally could apply to a person staying there for a period of time who had established certain connections there. Moreover, the definitions of 'resident' and 'staying in' had an EU-wide autonomous meaning not dependent on the laws of the Member States. In order to apply any of the three categories of exception, Member States 'must assess whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being executed on the territory of the executing Member State', a condition which does not in fact appear in the Framework Decision. It followed that this exception 'has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires', and therefore that:

> ...the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.

In order to examine whether those 'certain connections' exist:

> ...it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.

Applying these principles, the Court stated that interruptions of stay and non-compliance with immigration law (ie the immigration law aspects of the person's status) could not lead automatically to the conclusion that the person concerned was not 'staying in' the Member State, but could be 'of relevance' when deciding that issue. On the other hand, the commission of crimes in that State or the detention in that State following a conviction (ie the criminal law aspects of the person's status) were not relevant at all for deciding whether that person was 'staying' there—although they could be relevant for applying the second phase of the assessment, ie deciding whether there was a 'legitimate interest' in not executing the EAW in the particular case. The Court did not offer any indication of how to interpret the concept of the 'actual state of residence' (ie the criteria to interpret the 'resident' requirement).[301] Nor did the Court address the question as to whether the person's *future* immigration status (ie whether the person had been, or could or would be, validly expelled as distinct from surrendered) was relevant to the application of the reintegration requirement.[302]

[301] For further suggestions as to the interpretation of these concepts, see the *Wolzenburg* opinion, paras 53–70.

[302] As the opinion in *Koslowski* convincingly argues (paras 159–172), reintegration into the executing State's society is not feasible if the person will be expelled, but also any expulsion must comply with EU free movement or immigration law. See also the *Wolzenburg* opinion, paras 84–86.

Subsequently, in the *Wolzenburg* judgment, the Court ruled that Member States retain a discretion to permit only *some* categories of nationals, residents, or persons staying on the territory to benefit from the possibility of refusing to execute a warrant,[303] on the grounds that allowing a choice for Member States to limit the scope of the exception would further the underlying objectives of the Framework Decision by bringing more people within its scope. However, this discretion was constrained by the principle of equal treatment of EU citizens who were nationals of other Member States, which meant that Member States at the very least had to treat EU citizens who had permanent residence status in that State the same as that State treated its own citizens.[304] EU citizens who had not yet obtained that status could be treated differently (ie not benefiting from the exception) because they were not in a similar position to nationals of the host State, as regards reintegration in the society of that State after serving their sentence, since they were not highly integrated into that State in the first place. The Court did not address the question of whether EU free movement or immigration law might be a potential barrier as such to execution of an arrest warrant, ie because the offence that the person is charged with or convicted of is not serious enough substantively to justify removal from the territory.[305]

Furthermore, the Court did not address the question of which third-country nationals, if any, could benefit from the same principle,[306] or the position of dual citizens.[307] Presumably the Court's ruling, by analogy, means that Member States are free to set other conditions restricting the scope of this ground for refusal of execution of an EAW, or the other optional grounds for refusal of execution in this Framework Decision or other mutual recognition measures, subject to the equality principle and also human rights obligations (on which, see the discussion further below).[308] On this point, it should be emphasized

[303] See n 271 above.

[304] On the broader interaction between the mutual recognition principle and EU free movement law, see 9.4 above. On the substance of the concept of permanent residence in EU free movement law, see 6.4.1 above. The Court also made a link with an optional provision of the Framework Decision on recognition of custodial penalties, which applies the same five-year rule: see 9.7.1.2 below.

[305] See 9.4 above. There is a specific provision on this point in Art 7(2) of the asylum procedures Dir (Dir 2005/85, [2005] OJ L 326/13), which was the subject of the withdrawn *Gataev* case. See now Art 8(2) of the proposed recast asylum procedures Dir (COM (2009) 551, 21 Oct 2009).

[306] Logically the Court's approach in *Wolzenburg* should apply by analogy to EU citizens' third-country national family members who have obtained permanent residence status pursuant to EU free movement law (6.4.1 above), as well as those who obtain status identical or comparable to such permanent residence pursuant to the EEA or the EU–Turkey association agreement (see 6.4.3 above). On the general question of equal treatment of third-country nationals, see 3.4.3 above. On the immigration law links, see the opinion in *Koslowski* (n 271 above).

[307] On the position of dual citizens, see 9.4 above.

[308] *Contra* the Advocate General's opinions in *Kozlowski* (para 74) and *Wolzenburg* (paras 60–63), the objective of reintegration into society is *not* the only basis for a limitation of the exception in Art 4(6), in light of the optional restrictions which the Court accepted on the scope of the Art 4(6) exception in the *Wolzenburg* judgment. So the Dutch rules limiting the Art 4(6) exception

that the equality principle applies to the entirety of this (and other) Framework Decisions, not just to the specific clauses that mention nationals and residents of the executing State.[309]

Finally on this provision, the pending *IB* case asks how to distinguish it from the separate but similar provision on possible guarantees where the EAW has been issued for the purpose of prosecution, where the trial was held *in absentia*.[310]

Next, there are three cases in which the executing judicial authority can (at its discretion) ask for certain guarantees in accordance with the executing Member State's law. Firstly, where the sentence has been passed *in absentia*, if the person concerned had not been summoned in person or otherwise informed of the details of the hearing, the executing State may request the guarantee that he or she must have 'an opportunity to apply for a retrial' and be present at the judgment.[311] This provision was amended in 2009, by means of a Framework Decision that also inserted revised (uniform) rules relating to the *in absentia* exception in four other mutual recognition measures.[312] The new rule provides that an executing State may refuse to execute an EAW unless one of four conditions applies, as specified further: the person concerned was sufficiently aware of the trial; the person concerned was defended by a lawyer which he or she had instructed; the person concerned has waived his or her right to a retrial; or the person concerned has a right to a full retrial. These new rules reflect the case law of the European Court of Human Rights more accurately.[313]

Secondly, where a life sentence could be imposed for the crime, the issuing State may be requested to guarantee that the sentence must be reviewable after twenty years at the latest.[314] Thirdly, a judicial authority may insist, where an EAW is issued for the purpose of prosecution, that a national or resident of the executing State must be returned after the trial to serve their sentence in that State.[315] This provision will also interact in future with the Framework Decision on recognition of custodial sentences,[316] and furthermore it should obviously be interpreted consistently as far as possible with the nearly identical provision

for non-Dutch citizens to cases where the person concerned could have been prosecuted in the Netherlands for the relevant offence and where the person concerned would not lose his or her residence right (see paras 80–86, *Wolzenburg* opinion) are only objectionable to the extent that they infringe EU free movement or immigration law.

[309] See paras 42–47 of the *Wolzenburg* judgment (n 271 above). [310] Ibid.

[311] Art 5(1). *In absentia* trials are an issue in the pending *IB* case (ibid). Note also that *in absentia* judgments trigger the application of the Schengen double jeopardy rules: see Case C-297/07 *Bourquain* [2008] ECR I-9425, and further 11.8 below.

[312] [2009] OJ L 81/24, rescinding Art 5(1) and inserting a new Art 4a. This Framework Decision must be applied from 6 Mar 2011, except as regards Italy, which will apply it from 1 Jan 2014 (Art 8(1) and (2), 2009 Framework Decision, and declaration in [2009] OJ L 97/14). The other measures amended by the 2009 Framework Decision are the Framework Decisions on recognition of financial penalties, confiscation, custodial sentences, and probation and parole (see 9.7.1, 9.7.4, and 9.7.5 below). Note that except as regards Italy, the 2009 Framework Decision will apply even before the dates to apply the latter two Framework Decisions. [313] See 9.3.1 and 9.3.5 above.

[314] Art 5(2). [315] Art 5(3). [316] See n 298 above.

permitting refusal to execute an EAW, where the EAW was issued for the purpose of enforcing a sentence, if the executing Member State will take over the sentence. An entirely identical interpretation of the two provisions is not possible, however, since only one of the two provisions can apply to persons 'staying in' the territory.[317] As noted already, the pending *IB* case concerns the difference between the two provisions when a trial was held *in absentia*.

As for other traditional restrictions on extradition obligations, Member States can no longer refuse to extradite their own nationals,[318] although there are some vestigial remnants of this principle.[319] There is no reference to a possible refusal to execute the warrant or guarantees on grounds of immunity, privilege, or pardon, although the Framework Decision provides that where a privilege or immunity exists, the time period to execute the warrant does not start until that privilege or immunity is waived.[320] Nor is there an exception for fiscal offences, military offences, or political offences as found in the Council of Europe's extradition Convention, although there is a provision in the preamble to the Framework Decision (discussed below) referring to the prohibition on execution of measures intended to persecute people on certain grounds, which corresponds to a part of the traditional 'political offence' exception. There are still possible restrictions relating to grounds of specialty (ie the principle that a person cannot be prosecuted for an 'offence other' than that named in the EAW), subsequent surrender to other Member States, and re-extradition to a non-EU State, but Member States have the option to waive the first two of these protections.[321]

The Court of Justice has clarified aspects of the specialty rule, following a reference from a national court.[322] According to the Framework Decision, the rule does not apply, leaving aside cases where Member States have waived it,

[317] Art 4(6), discussed above. The requirement of identical interpretation is bolstered by the reference to both provisions in the Framework Decision on custodial penalties (see ibid). The Court of Justice has also noted that the two provisions have the same objective (*Wolzenburg* judgment, para 62, n 271 above). See also the opinion in *Kosłowski* (para 73), ibid.

[318] See the clearly correct interpretation on this point in the opinions in *Kozlowski*, paras 40–112 and *Wolzenburg*, paras 121–144 (both ibid), in particular as regards the German rule that nationals cannot be subject to an EAW without their consent. Of course, the German rule is understandable in light of the constitutional problems implementing the Framework Decision there as regards extradition of nationals (see further below). In any event, the point has limited relevance given the Court's interpretation of Art 4(6) (see next footnote).

[319] Arts 4(6) and 5(3), discussed above. Since the *Wolzenburg* judgment (ibid) accepted the blanket application of Art 4(6) (and probably Art 5(3), by analogy) to nationals of the executing State, Member States with qualms about surrendering their own nationals have an obvious (and legitimate) option available to address their concerns. See also the specific derogation (now expired) for Austria and the temporal limitations which some Member States apply (n 274 above).

[320] Art 20, which also refers to a request for a waiver, but does not state what happens if the waiver is not granted. On this issue, see H Fox, *The Law of State Immunity* (OUP, 2002), 503–516.

[321] Arts 27 and 28. An identical specialty provision appears in the Framework Decision on custodial penalties, except there is no possibility for Member States to waive its application (Art 18 of that measure, n 298 above; see 9.7.1.2 below). It would be logical to interpret these provisions the same way.

[322] *Leymann and Pustovarov*, n 271 above.

where: the person concerned has stayed in or returned to the State which wishes to bring the extra charges; the offence is not punishable by a custodial penalty or detention order; the criminal proceedings do not give rise to detention; the person concerned could be subject to a *restriction* on his or her liberty, as compared to a *deprivation* of it;[323] the person concerned has consented to surrender or to waiver of the specialty principle; or the executing State's authorities have consented to waiver of the principle.[324] The Court ruled that in order to determine what was an 'offence other' than that for which the person was surrendered:[325]

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

A modification of the description of the offence as regards the type of narcotics which were allegedly imported, without changing the legal description of the offence, does not amount to a charge for an 'offence other' than that for which the person concerned was surrendered, given that the offence concerned still fell within the same heading in the list of offences for which dual criminality is abolished.[326] Finally, the exception relating to cases where the criminal proceedings do not give rise to restrictions on liberty meant that such proceedings could go ahead, but that any pre-trial or post-trial detention which resulted could only be applied with the consent of the person concerned or the executing State's authorities pursuant to the rules in the Framework Decision. In the meantime, however, the person's liberty could still be restricted if that was lawful on the basis of the charges set out in the EAW.[327] It should be noted that the provisions in the Framework Decision on subsequent surrender to another Member State are to a large degree identical to the specialty provisions, and so should presumably be interpreted the same way as far as possible.[328]

[323] See the clarification of this point in ibid, para 70.

[324] Art 27(2) and (3). The last exception is subject to limits set out in Art 27(4): inter alia, consent must be refused where the mandatory exceptions in Art 3 apply, and otherwise may only be refused where Art 4 applies; the guarantees in Art 5 also apply.

[325] Para 57, *Leymann* judgment, n 271 above.

[326] Paras 60–63, ibid.

[327] Paras 72–76, ibid.

[328] Art 28(1)–(3). However, note the absolute requirement of the executing State's consent before the person concerned can be extradited to a non-EU State (Art 28(4)).

The Framework Decision contains provisions on human rights which have largely been repeated in subsequent Framework Decisions.[329] In particular, the preamble specifies that:

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

The main text of the Framework Decision then specifies that '[t]his Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.[330] There are also provisions in the preamble, unique to this Framework Decision, concerning possible suspension of the Framework Decision if a Member State is suspended from EU membership due to human rights breaches, and protection against extradition, etc in cases of, for example torture, or the death penalty.[331] Finally, Member States are required to establish remedies for fugitives as regards a right to information about the EAW, the right to counsel and an interpreter, and the right to a hearing.[332] It should be noted that the subsequent Directive on suspects' rights to interpretation and translation and the proposed Directive on suspects' right to information expressly apply to EAW proceedings.[333]

The Commission presented an initial assessment of the national implementation of the Framework Decision in 2005,[334] and subsequently updated this analysis in 2006 to take account of the late Italian implementation (Italy being the last Member State to implement the Framework Decision) in April 2005.[335] According to the statistics available to the Commission, 2,603 warrants were issued, 653 persons were arrested, and 104 persons were surrendered up until September 2004; it estimated that the time to execute a warrant had fallen from

[329] However, see the different wording of the Framework Decisions on the evidence warrant, mutual recognition of financial penalties, and recognition of confiscation orders (9.6.1.2, 9.7.1.1, and 9.7.4 below), as well as the proposed Directive establishing the European Investigation Order (9.6.1.3 below). On human rights and mutual recognition in general, see 9.3.5 above. [330] Art 1(3).

[331] Paras 10 and 13 of the preamble. On human rights protection against extradition, see 9.3.1 above. [332] Arts 11 and 14.

[333] See 9.8.2 below. [334] COM (2005) 63, 23 Feb 2005.

[335] COM (2006) 8, 24 Jan 2006.

nine months to forty-three days (thirteen days where the warrant was not contested). In the Commission's view, however, a number of Member States were not in full compliance with the Framework Decision, in particular by wrongly restricting its temporal scope; limiting the partial abolition of double criminality; granting decision-making powers to executive (rather than judicial) bodies; allowing their authorities to demand additional guarantees before surrender; providing for additional grounds for refusal (including an over-broad application of human rights grounds and the imposition of conditions concerning the surrender of nationals); insisting on additional procedural requirements for transmission of arrest warrants; failing to apply time limits; and setting out the procedural rights of the individual too vaguely.

This critical report on the EU's flagship mutual recognition measure resulted in an unprecedented debate in the JHA Council, which focused on the issues of the human rights ground for refusal, political grounds for refusal, the use of executive bodies instead of judicial bodies, and the limits on the temporal scope of the Framework Decision.[336] The Council did not adopt any formal conclusions on these issues, but it asked the Commission to produce a further report by June 2006 and decided to conduct a practical evaluation of the application of the EAW.[337] Member States subsequently submitted detailed responses in writing objecting to the Commission's analysis.[338]

A second Commission report in 2007 concluded that there were still problems applying the Framework Decision in some Member States, inter alia as regards transitional application of the EAW, surrender of own nationals, sentencing thresholds, double criminality checks, and incorrect or impermissible grounds for non-execution, including a large number relating to human rights.[339] Several Member States had amended national laws to bring them further into conformity with the Framework Decision. As for the Commission's previous report, half of the Member States' objections related to information which they should already have sent to the Commission, a quarter were valid corrections, and the Commission did not agree with the other quarter of the objections. In practice, according to the report, in 2005, 6,900 warrants were issued in twenty-three Member States providing statistics, resulting in 1,770 arrests and 1,532 surrenders, with half consenting to surrenders and a fifth being nationals of the executing State, guarantees of return having been agreed in half of those cases. The time to execute the warrants was still forty-three days (eleven days in the case of consent), although in 5% of cases the relevant deadlines were not met. The Commission

[336] See Council doc 8842/1/05, 19 May 2005.

[337] JHA Council press release, 2–3 June 2005. The questionnaire for the evaluation, which began in 2006, can be found in Council doc 14272/05, 11 Nov 2005.

[338] Council doc 11528/05, 5 Sep 2005.

[339] COM (2007) 407 and SEC (2007) 979, 11 July 2007. See the responses of two Member States (Council docs 14308/07 and add 1, 12 and 13 Nov 2007).

concluded that the Framework Decision was a 'success', and the remaining problems with its application were 'peripheral'.

The latest fairly complete statistics concerning the EAW, dating from 2008, show that in that year over 14,000 EAWs were issued by the Member States supplying statistics.[340] Over 4,500 persons were arrested, and nearly 2,900 were surrendered. Clearly the EAW is increasingly used in practice.

As for the Council's evaluation, it culminated in a series of draft recommendations, mostly concerning practical aspects of the application of the EAW but also touching on the sensitive issues of the grounds for non-recognition, including human rights grounds, and the possible abolition of the specialty rule.[341] Some recommendations were addressed to Member States, while another batch were addressed to the Council's working groups; the latter were then followed up by Council conclusions, which were adopted in June 2010.[342] The Stockholm programme invited the Commission to consider the evaluation and possibly to make proposals to 'increase efficiency and legal protection for individuals in the process of surrender'.[343] It should also be noted that Eurojust, the EU prosecutors' agency, also has a role as regards EAWs.[344]

The implementation of the EAW has been equally controversial at national level in a number of Member States,[345] and three national constitutional courts struck down the national application of the Framework Decision, at least in principle. First of all, in spring 2005, the Polish constitutional court ruled that the national law implementing the EAW Framework Decision was unconstitutional as it permitted the extradition of Polish citizens, although that court delayed the application of its judgment for eighteen months so that the constitution could be modified; the constitutional amendment duly took effect in November 2006. Next, in July 2005, the German Constitutional court ruled that the national implementing law was invalid, as regards German citizens; the Spanish and Hungarian courts responded by disapplying the EAW as regards German warrants issued for German citizens, but the national law was amended by August 2006. Finally, in November 2005, the Cypriot constitutional court ruled that the EAW conflicted with the Cypriot constitution as regards the surrender of Cypriot nationals; so the constitution was amended as from July 2006. However, the Czech constitutional court in particular upheld the Framework Decision.

How should the EAW be assessed? The initial case law of the Court of Justice is focusing on the efficient application of the EAW, overriding the sound argument that at least some EU citizens with less than five years' residence in a Member State may be sufficiently integrated there to benefit from the same protection as a

[340] Council doc 9734/4/09, 7 Dec 2009.
[341] Council doc 8302/4/09, 28 May 2009.
[342] Council doc 8436/2/10, 28 May 2010.
[343] [2010] OJ C 115, point 3.1.1.
[344] See 11.9 below.
[345] See the summary with further references in the 2007 Commission report (n 338 above), and the analysis in Guild and Marin, n 270 above.

Member States' nationals.[346] The Court's assumption in the *Wolzenburg* case that widening the application of the EAW as much as possible will necessarily assist to achieve its aims, along with the addition of a further requirement in order to apply some exceptions to the Framework Decision in the *Kosłowski* case, is, with respect, misguided, as it overlooks the contrary objectives of free movement rules and fails to recognize that the enforcement of a sentence in the executing State in such cases still accomplishes the objectives of deterrence and punishment while increasing the chance of rehabilitation. The recommendation from the Council evaluation on the EAW to abolish the application of the specialty rule is profoundly unprincipled, since its abolition would allow unscrupulous prosecutors to circumvent all of the safeguards in the Framework Decision (for instance, by issuing an EAW and then proceeding with the 'real' prosecution for minor offences which fall below the punishment threshold in the Framework Decision or for offences which fall within the scope of the grounds for non-execution of an EAW). This would hardly improve the legitimacy of the EAW and could reduce the efficient application of the system by wasting executing States' time and resources chasing and processing fugitives whose alleged crime was quite trivial. This is already a problem to some extent, with some Member States issuing arrest warrants for crimes such as the 'theft of a piglet'.[347]

The most fundamental issue for the legitimacy of the EAW, other than the still-contested issue of the surrender of nationals, is the question of whether the EAW system is compatible with human rights, an issue which applies equally to all other mutual recognition measures.[348] Certainly it is problematic that the Commission keeps criticizing Member States' attempts to protect the human rights of suspects who are the subject of EAWs: the 2007 report, for instance, objected to the Danish law which provides for refusal of surrender on grounds of 'torture, degrading treatment, violation of due process as well as if the surrender appears to be unreasonable on humanitarian grounds', as well as a British law which requires *in absentia* trials to meet basic ECHR criteria.

The answer to this fundamental question depends in part on whether Member States' judicial authorities have an obligation, or at least the power, to refuse execution of other Member States' warrants on human rights grounds (in addition to the specific double jeopardy and *in absentia* provisions of the Framework Decision). The judgment in *Advocaten voor de Wereld* referred to a requirement to protect human rights within the context of the Framework Decision, but then ruled that the onus is on the issuing State to ensure the application of human rights as regards the dual criminality principle. However, this case did not address the issue of whether the executing State can examine the issuing Member State's request in order to consider non-execution on human rights grounds.

[346] See the opinion in *Wolzenburg* on this point.

[347] cf the inconclusive discussions on the proportionality of issuing EAWs (see the evaluation recommendations and conclusions (nn 340 and 341 above)).

[348] See generally 9.3.5 above.

While the main text of the Framework Decision is ambiguous as to whether human rights can constitute grounds for non-execution of a warrant, the express wording of the preamble is not: '[n]othing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person' as regards discriminatory prosecution, and the Framework Decision 'does not prevent a Member State from applying its constitutional rules relating to due process' and other specified matters. While it would obviously have been preferable, from the point of view of legal certainty, to set out these provisions as express exclusions from the principle of mutual recognition in the main text of the legislation, it can be presumed that this was considered unnecessary because it was assumed that Member States' international human rights commitments and national constitutions, along with the primary law of the EU (Article 6 TEU) took precedence over the Framework Decision. Furthermore, for the same reasons, it must be accepted that any *further* human rights obligations stemming from international commitments or national constitutions, even if not referred to explicitly in the preamble, can also be invoked as grounds of non-execution. And given the nature of human rights obligations, non-execution on human rights grounds must be regarded as mandatory, not discretionary. The vague express reference to human rights obligations in the main text of the Framework Decision should be understood as confirming this interpretation.

Although the Court of Justice case law on the grounds for non-execution has consistently concluded that the grounds for non-recognition in the Framework Decision are exhaustive,[349] this does not answer the objection that human rights grounds for non-execution stem from the primary law of the EU (now including the EU Charter of Fundamental Rights), not secondary legislation. A series of opinions of Advocates General have concluded explicitly that Member States can refuse to recognize EAWs on human rights grounds.[350] As for the argument that Member States must have mutual trust in each others' systems, as noted above, the inability to reject mutual recognition on human rights grounds, on the assumption that the problem will be fixed months later in the issuing State or years later in the European Court of Human Rights, would mean that human rights protection in this field would be theoretical and illusory, not real and effective.[351]

There is therefore no basis for the Commission's continued arguments that Member States' legislation transposing the Framework Decision has exceeded the limits of their discretion on this point; and there is still less ground for the interpretation of the Framework Decision advocated by Eurojust or the European Parliament.[352]

[349] See n 271 above.

[350] See the opinions in *Wolzenburg*, *Koslowski*, and *Santesteban Goicoechea*, as well as the questions in the pending *IB* case and the withdrawn *Gataev* case (n 271 above).

[351] See 9.3.5 above. See also the balance between the mutual trust principles and human rights protection in the *Wolzenburg* and *Koslowski* opinions (ibid).

[352] See Annex II to the 2004 annual report of Eurojust and the EP recommendation to the Council of 15 Mar 2006 (P6_TA-PROV(2006)0083). See also the Commission assessments of the implementation of other Framework Decisions (9.6.2, 9.7.1.1, and 9.7.4 below).

As for specific human rights issues, the mandatory non-execution of a warrant on double jeopardy grounds is welcome, but the merely *optional* non-execution for cases of final judgments and (in some cases) termination of prosecution is objectionable, in light of the Court of Justice's interpretation of the double jeopardy rules.[353] The *in absentia* exception (which appears in most other mutual recognition measures) is not only optional, rather than mandatory, but also fails to take account of the *Poitrimol* line of jurisprudence of the European Court of Human Rights.[354] As noted above,[355] although the 2009 Framework Decision on this issue brings standards into line with ECHR case law,[356] this ground for refusal is still only optional and the long delay before the application of the 2009 measure in Italy is regrettable. It would obviously have been far better to have provided for proper protection in the first place.

Of course, if the interpretation of the relationship between this measure and human rights protection argued above is correct, then any such human rights problems can be solved by applying the national or international human rights obligations which take priority over the Framework Decision. But to ensure legal certainty on these important issues, it would of course have been better to set out this interpretation explicitly in the text of this Framework Decision, and equally in other EU mutual recognition measures.

Finally, is the basic principle of mutual recognition acceptable? And if so, is the EU's approach to mutual recognition, as embodied in particular in the Framework Decision establishing the EAW, correct? Due to the broader implications of this debate, the answer is considered fully in the conclusions to this chapter.

9.6. Pre-trial measures

Further measures in addition to (or instead of) extradition proceedings are often necessary before a trial with cross-border aspects takes place. It is obviously necessary to trace any relevant evidence or witnesses and ensure that the evidence can be used, or that the witnesses will testify, at the trial if possible. Sometimes it is necessary to issue freezing orders to ensure that property is available for evidence or for subsequent confiscation. Finally, an important issue for individuals is the length of any detention awaiting trial, which risks being longer where there are cross-border elements to a case. These three issues will be examined in turn.

9.6.1. Movement of evidence

In order to facilitate the movement of evidence in criminal cases,[357] the EU initially adopted specific and general measures on mutual judicial assistance, building on

[353] See 11.8 below. [354] See further 9.3.5 above. [355] Ibid.
[356] On that case law, see 9.3.1 above.
[357] On the movement of evidence in civil cases, see 8.5.4 above.

the existing international (Council of Europe) framework. Subsequently the EU has moved towards adopting mutual recognition measures in this area, starting with the Framework Decision on the European Evidence Warrant. Further steps are planned in this field, which are linked to plans for legislation harmonizing national evidence law, for the purpose of ensuring mutual admissibility of evidence.[358] The Commission plans to propose legislation on both issues in 2011,[359] and issued a Green Paper on both issues in 2009 to prepare these measures.[360] In the meantime, however, a group of Member States tabled an initiative in spring 2010 for a Directive establishing a 'European Investigation Order', which will would repeal or replace most (but not all) existing mutual recognition measures in this area.[361]

9.6.1.1. Mutual assistance in criminal matters

The core texts on cross-border mutual assistance between judicial authorities in criminal law cases are the 1959 Council of Europe Convention ('the 1959 Convention') on mutual assistance, which all Member States have ratified, and the first Protocol to that Convention (1978), which all but one of the Member States has ratified.[362] A Second Protocol to the Convention, which parallels the EU Convention of 2000 (see below) in several respects, was agreed in 2001, but only a minority of EU Member States have ratified it.[363]

The 1959 Convention applies to all offences except military offences, and there is no sentencing threshold or double criminality requirement for its use, as there is for extradition treaties, except for search and seizure measures.[364] A judge in the 'home State' of the prosecution, wanting to obtain evidence or other relevant material which another Member State is 'hosting', must send formal requests (called 'letters rogatory'), usually via his or her national ministry, to the relevant ministry of the host Member State, which forwards the request to a national judge. A judge in the prosecuting State can also request the attendance of a witness who is residing in another State, but any summons the prosecuting judge sends to such a witness unless the witness sets foot in the prosecuting Member State and then disobeys a second summons to appear. If a prosecuting judge would like to contact a potential witness in custody in another Member State, the would-be witness can refuse. There is an exception for political offences and fiscal offences; assistance may also be refused if a requested State considers that executing a request is 'likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country'.[365] In practice, reservations are also applied

[358] See further 9.8.1 below.

[359] See Commission 2010 work programme (COM (2010) 135, 31 Mar 2010, Annex II) and the Action Plan on implementing the Stockholm programme (COM (2010) 171, 20 Apr 2010).

[360] COM (2009) 624, 11 Nov 2009. [361] On this proposal, see 9.6.1.3 below.

[362] ETS 30 and ETS 99. For ratification details, see Appendix I.

[363] ETS 182; for ratification details, see Appendix I. [364] Art 5 of the Convention.

[365] Art 2 of the Convention.

regarding double jeopardy.[366] The First Protocol to the Convention inter alia removes the exception for fiscal offences, although a State can still retain the exemption in part.

As for EU measures, the Schengen Convention contains rules on judicial assistance, which: require Member States to abolish the fiscal offence exception for excise duties, VAT, and customs duties (if they have not yet ratified the First Protocol to the Council of Europe Convention); widen the scope of proceedings for which assistance could be requested; allow direct contact between legal authorities without ministry intervention; and provide for posting procedural documents directly to persons in other Member States.[367]

Subsequently, to supplement the Council of Europe measures in order to facilitate the movement of evidence between Member States,[368] the EU adopted a Convention on mutual assistance in 2000 and a Protocol to the EU Convention in 2001; the Convention and Protocol are in force in a large majority of Member States.[369] The most important criminal law provisions of the Convention specify that:

(a) the Schengen provisions on posting documents and contacting other judges directly have become the normal rule;[370]
(b) the State where the evidence is located must normally comply with the formalities and procedures which the home State requests;[371]
(c) the home State may request that a State with custody over a person transfer that person (possibly without his or her consent) to be a witness in the trial in the home State;[372] and
(d) the home State may request a hearing by videoconference with a witness, an expert, or the suspect in the territory of the host State; a summons to such a conference will be mandatory for a witness or expert. Member States may opt out of the provision for video hearings with the suspect.[373]

The 2001 Protocol is primarily concerned with financial crime. It provides in turn for assistance relating to requests for information on bank accounts, requests for information on bank transactions, and requests for monitoring of

[366] See the facts of the *Miraglia* case (C-469/03 [2005] ECR I-2009).

[367] Arts 48–53, Schengen Convention ([2000] OJ L 239).

[368] On the practice before the Convention, see the report in [2001] OJ C 216/14.

[369] [2000] OJ C 197/1 and [2001] OJ C 326/1. For ratification details, see Appendix I. On the Convention and Protocol generally, see E Denza, 'The 2000 Convention on Mutual Assistance in Criminal Matters' (2003) 40 CMLRev 1047; and D McClean, *International Cooperation in Civil and Criminal Matters* (2nd edn, OUP, 2002), 224–237. On the policing issues arising from the Convention, see 12.9 below.

[370] Arts 5 and 6.

[371] Art 4.

[372] Art 9. Consent is required by Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Latvia, Poland, and the UK.

[373] Art 10; Denmark, France, the Netherlands, Poland, and the UK have opted out of the provision. See also Art 11, on the hearing of witnesses and experts by telephone. On the human rights rules applicable in such cases, see *Viola v Italy*, judgment of 5 Oct 2006.

bank accounts,[374] although the first two types of assistance can be subjected to the conditions applicable to search and seizure,[375] and the first type can be limited to specific offences.[376] More generally, the Protocol contains provisions on: the obligation of requested authorities to inform the requesting authorities about their investigations; the forwarding of additional requests for mutual assistance; the waiver of banking secrecy in relation to mutual assistance; the abolition of the fiscal offence exception (copying the wording of the First Protocol to the Council of Europe Convention); abolishing the political offence exception (although Member States may limit this abolition to specific offences); and providing for dispute settlement in the Council or Eurojust in case requests are blocked on grounds of dual criminality or the remaining reservations under the mutual assistance Convention.[377]

These measures allow the prosecuting State to assert its authority de facto over persons and evidence in another Member State, albeit indirectly through the acts of the requested Member State's authorities. They also simplify the 'border controls' previously slowing down the processing of requests between Member States. However, the position of the defendant under these rules is problematic, as there is no reference to the right to cross-examine witnesses, and there are only limited minimum standards applicable to cross-border hearings (although the Council has the power to adopt a measure on this subject, which it has not yet used).[378] In fact, for suspects (as well as witnesses), there is no express right to counsel.

The EU has also adopted a number of measures on mutual assistance as regards specific crimes, in particular as regards drug trafficking,[379] and in conjunction with a number of Joint Actions harmonizing substantive criminal law.[380] More generally, a Joint Action on good practice on mutual assistance requires Member States to deposit statements with the Council Secretariat setting out in detail their intentions to respond to mutual assistance requests from other Member States swiftly and effectively,[381] and the SIS functions as a practical tool for listing persons who or objects which are connected with criminal proceedings.[382]

9.6.1.2. European Evidence Warrant

In order to apply the principle of mutual recognition to aspects of the movement of evidence between Member States, in 2008 the Council adopted a Framework

[374] Arts 1–3 of the Protocol; see also Art 4 (confidentiality of such requests).

[375] Arts 1(5) and 2(4). [376] Art 1(3); but the Council can extend the scope (Art 1(6)).

[377] Arts 5–10. Denmark, France, and Latvia have invoked a permitted reservation to limit the abolition of the political offence exception. [378] Art 10(9) of the Convention.

[379] Executive Committee Decision SCH/Com-ex (93)14 ([2000] OJ L 239/427).

[380] For details of these measures, see the first edition of this book, at 172–173. As regards identification and tracing of criminal proceeds, see also Art 4 of the Framework Decision on money laundering ([2001] OJ L 182/1). [381] [1998] OJ L 191/1.

[382] See 12.6.1.1 below.

Decision establishing a European Evidence Warrant (EEW), which Member States must apply by 19 January 2011.[383] The Framework Decision will not apply to all movement of evidence; rather it is the first stage in a two-stage procedure replacing mutual assistance measures with mutual recognition measures.[384] So it will not apply to evidence which could only be obtained by: the holding of hearings, or similar measures; bodily examination or obtaining bodily material; gathering real-time information, for example by intercepting telecommunications or monitoring bank accounts; analysis of existing documents, objects, or data; or the furnishing of communications data by telecommunications companies.[385] The EEW can only be issued if the evidence sought is necessary and proportionate and if such evidence could be obtained according to the national law of the issuing State in similar cases; but it will be up to the issuing State alone to judge these issues.[386] Detailed procedural safeguards proposed by the Commission, such as protections relating to privacy and self-incrimination, were dropped.[387]

Dual criminality will be abolished for searches and seizures for evidence falling within the scope of the Framework Decision, for the standard list of thirty-two crimes.[388] The grounds for non-recognition (all optional) include a defective EEW, double jeopardy, immunity or privilege, territoriality, and national security.[389] As for remedies, they must be available in the executing State, at least as regards the exercise of coercive measures, although the substance of the EEW could only be challenged in the issuing State. The issuing State must grant remedies equivalent to those applicable to purely domestic proceedings, and both States have obligations as regards time limits and the facilitation of proceedings.[390] Next, the Framework Decision contains the standard human rights clauses, with the additional proviso that 'any obligations incumbent on judicial authorities in this respect shall remain unaffected'.[391] Finally, the EEW will not entirely replace traditional mutual assistance measures, but will co-exist with them for a transitional period until the second stage of the EEW is in place and mutual assistance measures are fully replaced.[392]

From a human rights perspective, it is unfortunate that the exceptions to execution of foreign decisions will be optional only, and that the Commission's

[383] Art 23(1) of the Framework Decision ([2008] OJ L 350/72). All further references in this section are to this Framework Decision, unless otherwise noted.

[384] On the second stage, see the proposal for a European Investigation Order (discussed below).

[385] Art 4(2). [386] Art 7.

[387] Art 12 of the Commission's proposal (COM (2003) 688, 14 Nov 2003).

[388] Art 14. There is a special rule for Germany, allowing it to maintain dual criminality for a further six crimes: see Art 23(4) and the German declaration published in [2008] OJ L 350/92. For the definition of 'search and seizure', see Art 2(e). [389] Art 13.

[390] Art 18.

[391] Art 1(3); similar wording appears in the Framework Decision on the execution of confiscation orders (see 9.7.4 below). [392] Art 21 and recital 25 in the preamble.

proposed safeguards have been dropped. The safeguards proposals reflected the jurisprudence of the European Court of Human Rights.[393]

9.6.1.3. European Investigation Order

As noted above, in order to implement the objective of creating a comprehensive system governing all exchanges of criminal evidence between Member States, a group of Member States proposed a Directive to establish a European Investigation Order (EIO) in spring 2010.[394] This Directive, if adopted in the form originally proposed, would repeal the Framework Decision on the European Evidence Warrant, substitute (as regards freezing of evidence) for the Framework Decision on freezing orders,[395] and replace the 'corresponding' EU and Council of Europe Conventions and Protocols on mutual assistance (including the Schengen Convention provisions), as regards relations between participating Member States.[396] It is based on Article 82(1)(a) TFEU.[397]

The proposed Directive follows the structure of the Framework Decision establishing the EEW with certain amendments, and with the inclusion of some of the specific rules on mutual assistance set out in the 2000 EU mutual assistance Convention and its Protocol. It would apply to all 'investigative measures' (this concept is not defined) with the exception of joint investigation teams and certain measures relating to telecommunications interception.[398] It is not certain whether the proposal would apply to some issues dealt with in other EU measures, such as the criminal records legislation or the issue of covert investigations.[399] Otherwise the EIO would apply to most of the issues excluded from the EEW, ie hearings, bodily examinations, analysing data, and similar actions, along with obtaining banking data.

The proposal would amount to a 'bonfire' of the key traditional grounds for refusals of mutual assistance requests or the EEW, most notably as regards double jeopardy, dual criminality, and territoriality. This would be the first EU measure to abolish fully the possibility of refusal on any of these grounds, never mind all three together. The abolition of the double jeopardy exception takes no account of other EU rules on this issue and status of this principle in the EU Charter of Fundamental Rights,[400] while the combined abolition of the dual criminality and territoriality exceptions means that a person could be subject to home, business, and body searchers for committing an act that was not criminal under the national

[393] See 9.3.4 above.

[394] [2010] OJ C 165/22. All references in this subsection are to this initiative, unless otherwise noted.

[395] On this measure, see 9.6.2 below.

[396] Art 29; there is no indication of which provisions are considered to 'correspond'. On the position of non-participating Member States and associated non-EU States, see generally 9.2.5 above.

[397] On the competence issues, see 9.2.4 above.

[398] Art 3.

[399] Recital 9 in the preamble to the initiative states that it does not apply to cross-border police surveillance, which is regulated by Art 40 of the Schengen Convention (see 12.9.2 below).

[400] See 11.8 below.

law of the place where it was committed. This is fundamentally objectionable from the point of view of human rights principles or national sovereignty.[401]

Furthermore, the EIO Directive would also remove a number of sundry other restrictions or safeguards which currently apply to the EEW or mutual assistance measures: the requirements that the issue of EEWs must be proportionate, and could only be issued if such as documents, could also be obtained in the issuing State under its law (if they had been present there) would be dropped; the data protection clause in the EEW Framework Decision would be dropped;[402] the flexibility of the executing Member State not to carry out coercive measures, and the possibility of applying a validation procedure where the order was not issued by a judge, (ie was issued by a police officer) would be dropped;[403] the rules relating to remedies would be significantly weakened;[404] the possibility of videoconferences with suspects would no longer be subject to an express protection for human rights, and the requested Member State would no longer have a blanket power to refuse these requests;[405] many restrictions relating to controlled deliveries (ie 'sting' operations by police or customs officers) would be dropped;[406] and certain restrictions concerning bank information would be dropped.[407]

These changes would be counterbalanced only by the addition of a single sentence to the brief reference to the human rights safeguards in the EEW Framework Decision, referring to constitutional protection for freedom of expression.[408] For the reasons set out elsewhere in this chapter,[409] these vague provisions do not provide sufficient protection, at least in the absence of clarification from the Court of Justice.

9.6.1.4. Criminal records

One aspect of mutual assistance that has received special attention from the EU in recent years is the exchange of information concerning criminal records. This is due to a concerted attempt to increase the effectiveness of the rules concerning the exchange of this information. It should also be kept in mind that this issue is linked to other EU legislation on taking account of prior convictions, the issue

[401] See the comments in 11.6 below.

[402] Art 10 of the EEW Framework Decision. It is possible that Art 23 of the 2000 EU Convention on this subject (n 369 above), or the EU's 2008 Framework Decision on personal data protection (see 12.6.4 below), would apply instead, but the proposed Directive does not mention this.

[403] See Arts 11 and 12, EEW Framework Decision.

[404] Compare Art 13 of the EIO proposal to Art 18 of the EEW Framework Decision; the rule that evidence transfers could be suspended pending appeal (Art 11(5), EEW Framework Decision) would also be dropped.

[405] Compare Art 21(10) of the EIO proposal to Art 10(9), 2000 Convention.

[406] Compare Art 26 of the EIO proposal to Art 12, 2000 Convention.

[407] Compare Arts 23–25 of the EIO proposal to Arts 1(5), 2(4), and 3(3), 2001 Protocol to the EU Convention.

[408] Art 1(3).

[409] See 9.3.5 and 9.5.2 above.

of disqualifications following a criminal conviction, and to the double jeopardy principle, and can also affect a person's position in other respects as set out in national law (the increased possibility of pre-trial detention and different rules on trial procedure and enforcement of a sentence).[410]

The Council of Europe's mutual assistance Convention provides that a requested State shall send extracts from its judicial records to a requesting State, to the same extent as it complies with requests from its own authorities. Otherwise, the request shall be complied with in accordance with the requested State's law.[411] This Convention also provides that all its Contracting Parties will inform the other Contracting Parties at least once a year of all criminal convictions and subsequent measures concerning the latter's nationals which are entered into the judicial record.[412] The First Protocol to the Convention supplements the latter point by providing that further information on these convictions must be provided on request.[413]

In order to speed up the transfer of information from criminal records, the EU Council adopted, as an interim measure, a Decision in 2005 which sets out a standard form and detailed rules regarding sending requests for information on convictions and requires immediate transmission of information regarding convictions of nationals of other Member States.[414] Member States had to withdraw any reservations to the Council of Europe Convention on the first issue, but could retain them on the latter issue.

As both the mutual recognition programme and the Hague programme called for broader measures to enhance the exchange of information on criminal convictions, the Commission had released in the meantime a White Paper on the issue in early 2005.[415] This White Paper pinpointed difficulties in rapidly identifying Member States where individuals have already been convicted, obtaining information quickly and by a simple procedure, and in understanding the information provided. To address these issues, the Commission suggested a two-stage process. In the first stage, a European index of offenders would be established, in order to make it easier to identify which Member States a person had been convicted in. In a second stage, a standard format would be used to exchange detailed information about the convictions.

In response to the White Paper, the JHA Council agreed in April 2005 that information on EU citizens would instead be exchanged bilaterally between Member States, with an index of offenders used only as regards non-EU

[410] See respectively 9.7.2, 9.7.3, and 11.8 below. EU free movement law also contains provisions on the exchange of police records (see 7.4.1 above).

[411] Art 13 of the Convention. Five Member States have reservations on this clause.

[412] Art 22 of the Convention. Eight Member States have reservations on this clause.

[413] Art 4 of the First Protocol. The UK and Ireland have reservations on this clause.

[414] [2005] OJ L 322/33. The Decision applied from 21 May 2006 (Art 7).

[415] COM (2005) 10, 25 Jan 2005.

nationals.[416] The Commission subsequently proposed a Framework Decision concerning the exchange of information on EU citizens' criminal records, which the Council adopted in 2009, alongside an implementing Decision.[417] Member States are obliged to apply these measures by 7 and 27 April 2012;[418] on the latter date, the prior EU Decision is repealed and the Framework Decision will replace some of the relevant Council of Europe measures in relations between Member States.[419]

This Framework Decision repeats the obligation in the 2005 Decision for each Member State to send to each other Member State information on the criminal convictions of nationals of those other States as soon as possible, extending this to cases where the person concerned is a dual national of the convicting Member State.[420] This information must be stored in the system established by the Framework Decision for possible further transmission,[421] and the Framework Decision elaborates upon the process of sending and replying to requests for information on criminal convictions.[422] There are specific rules on personal data protection.[423] The criminal record information is to be exchanged using a standard format,[424] which was established by the Council in the parallel Decision establishing a European Criminal Records Information System (ECRIS).

ECRIS is not an EU-wide database; nor does it give any Member States' authorities access to the criminal records database of other Member States.[425] Instead, the 2009 Decision establishes the standard format for the supply of criminal records information which might be exchanged pursuant to the Framework Decision, by means of common codes indicating generally the type of offence and type of penalty imposed on the person concerned.[426]

A subsequent proposal from the Commission suggests further rules on criminal records, including a derogation from the 2009 Framework Decision, concerning specific sexual offences against children.[427] Regarding the criminal records of third-country nationals, the Commission has so far issued a discussion paper on the feasibility of establishing an index of their convictions.[428]

[416] See JHA Council press release, 14 Apr 2005. [417] [2009] OJ L 93/23 and 33.

[418] Art 13 of the Framework Decision and Art 8 of the 2009 Decision.

[419] Art 12 of the Framework Decision. More precisely, Art 22 of the Council of Europe mutual assistance Convention and Art 4 of the First Protocol to the Convention are replaced, while Art 13 of that Convention remains in force, with a continued waiver of Member States' reservations.

[420] Art 4, Framework Decision; compare to Art 2 of the 2005 Decision. Art 4(4) of the Framework Decision incorporates Art 4 of the First Protocol to the Council of Europe Convention.

[421] Art 5, Framework Decision.

[422] Arts 6–8, Framework Decision; compare to Art 3 of the 2005 Decision.

[423] Art 9, Framework Decision; compare to Art 4 of the 2005 Decision.

[424] Art 11, Framework Decision.

[425] Art 3 of the 2009 Decision. On such forms of information exchange, see 12.6 below.

[426] Art 4 of the Decision.

[427] COM (2010) 94, 29 Mar 2010, Art 10. On the issue of disqualifications, see 9.7.3 below.

[428] COM (2006) 359, 4 July 2006.

As for the future, the Stockholm programme calls for: Member States to implement ECRIS as soon as possible; the Commission to assess whether networking criminal records will prevent offences from being committed, and whether ECRIS can be extended to include supervision measures; and the Commission to propose legislation to establish a register of the criminal convictions of third-country nationals in Member States' courts.[429] The action plan on implementation of the programme provides for a legislative proposal on the latter point and proposals for measures implementing ECRIS in 2011, and an evaluation of ECRIS and its possible extension in 2014.[430]

9.6.2. Freezing orders

The enforcement of foreign freezing orders is governed first of all by the 1990 Council of Europe Convention on the proceeds of crime, ratified by all Member States, which requires States to enforce orders freezing the proceeds of crime issued by other signatory States.[431] However, the obligation is subject to many possible grounds for refusal.[432]

Initially, EU measures in this area were confined to an obligation to give freezing requests from other Member States equal priority with domestic requests.[433] But subsequently freezing orders were the subject of the EU's second Framework Decision concerning mutual recognition in criminal matters.[434] The Framework Decision applies to orders issued by 'judicial authorities' (as defined by the issuing State) in the framework of criminal proceedings,[435] not only to freeze criminal assets (the subject of the 1990 Council of Europe Convention), for the purpose of their subsequent confiscation,[436] but also orders concerning the freezing of evidence, for the purpose of subsequent transfer to the issuing State pursuant to mutual assistance rules.[437]

Member States must recognize and execute the freezing order of another Member State, subject only to the most limited list of grounds for non-recognition appearing in any EU measure to date.[438] In particular, dual criminality is abolished for the standard list of thirty-two crimes.[439] However, where a freezing order relates to subsequent confiscation (as distinct from securing evidence),

[429] [2010] OJ C 115, point 4.2.3. See also the plans for a police records index (12.6.3 below).

[430] COM (2010) 171, 20 Apr 2010.

[431] Arts 11 and 12 of the Convention (ETS 141). See now Arts 21 and 22 of the replacement 2005 Council of Europe Convention on the same issue (CETS 198), which has been ratified by only a minority of Member States (see Appendix I for ratification details).

[432] Art 18 of the 1990 Convention and Art 28 of the 2005 Convention, both ibid.

[433] Art 4 of the 2001 Framework Decision on money laundering ([2001] OJ L 182/1); Art 3 of the 1998 Joint Action on this subject was identical ([1998] OJ L 333/1). See further 9.7.4 below.

[434] [2003] OJ L 196/45. Member States had to comply by 2 Aug 2005 (Art 14(1)).

[435] Art 2(a). [436] On this issue, see further 9.7.4 below.

[437] Arts 3(1) and 10. On these rules, see 9.6.1 above. [438] Art 5(1). [439] Art 3(2).

a broader dual criminality condition can be applied, to require that an act constitute an offence *to which a freezing order could apply* in both States.[440] Other grounds (all optional) for non-execution are a defective freezing certificate, an immunity or privilege under the executing State's law, or where it is 'instantly clear' from the certificate that the subsequent rendering of judicial assistance would breach the double jeopardy principle.[441] An executing Member State may also set a time limit for freezing the property.[442]

The Framework Decision includes the same human rights provisions as the Framework Decision establishing the EAW,[443] so these provisions presumably must be interpreted the same way.[444] Also, this Framework Decision provides for remedies to be exercised in either the issuing or executing State. Although the substantive reasons for the freezing can only be challenged in the issuing State, both States are obliged to facilitate access to remedies and the issuing State is obliged to set time limits that guarantee access to an effective legal remedy.[445]

According to a Commission report on the application of this Framework Decision, eight Member States had not yet applied it by October 2008.[446] The Commission report claims inter alia that some Member States made errors as regards abolition of dual criminality, reimbursement, and contact between judicial authorities, and that fourteen Member States provide for forbidden grounds for non-execution (in particular concerning human rights). Overall, the Commission concluded that application of the Framework Decision was 'not satisfactory', due to the limited number of notifications and the 'numerous omissions and limitations' in the laws which had been notified.

This measure is subject to the same objections that apply to other EU mutual recognition measures, *a fortiori* because there are so few grounds for refusing execution (in particular, there are no grounds for refusing execution on grounds of *in absentia* judgments and extraterritoriality), and because they are all optional. Furthermore, the double jeopardy provision is weak, because it is highly unlikely that it will be evident from the certificate connected to the freezing order that the double jeopardy principle is infringed; this will only be evident following further communication between the issuing and executing authorities, and/or subsequent objections by the suspects. If freezing orders apply beyond the time period for a trial to take place within a 'reasonable time', as required by Article 6 ECHR, it is arguable that they should no longer be executed; it is unfortunate that the Framework Decision does not set out this principle expressly. The

[440] Art 3(4).

[441] Art 7. There are also some limited grounds for postponement of execution (Art 8).

[442] Art 6(2). [443] See clause 6 of the preamble and Art 1, second line.

[444] See 9.5.2 above. [445] Art 11.

[446] COM (2008) 885, 22 Dec 2008. According to a later update by the Council Secretariat, four Member States (Italy, Portugal, Greece, and Luxembourg) had not yet implemented this measure and two (the UK and Cyprus) had only partly implemented it by spring 2009 (Council doc 9195/09, 29 Apr 2009). The UK subsequently fully implemented it (Council doc 5254/10, 12 Jan 2010).

Commission's complaints regarding non-recognition on human rights grounds should be rejected for the reasons set out above.[447]

As for the future, this Framework Decision would be replaced, as regards the freezing of evidence, by the proposed European Investigation Order, discussed above.[448] As regards freezing of assets, it would be replaced by plans to propose recast legislation on this topic in 2011.[449]

9.6.3. Recognition of pre-trial supervision orders

There is evidence that foreigners suspected of committing a crime are kept in detention while awaiting trial in cases where nationals suspected of committing the same crime would not be,[450] because of the greater difficulty in ensuring that foreigners will attend the trial and serve any criminal sentence which may be imposed. This difficulty was first of all reduced significantly with the application of the EAW,[451] and it is arguable that discriminatory detention of citizens of other Member States breaches EU free movement law.[452] The issue is now addressed by a Framework Decision adopted in 2009, which Member Sates must implement by 1 December 2012.[453] Unusually, there is no previous international measure addressing the same issues as this Framework Decision. This measure would overlap in some cases with the proposed Directive establishing a European protection order.[454]

The Framework Decision specifies that it does not confer a right to pre-trial release; this issue is left to national law.[455] Implicitly the Framework Decision does not harmonize national law as regards when a person can or must receive bail (for example in light of the seriousness of the particular offences alleged, the prior behaviour or criminal record of the person concerned, and the risk of absconding), or of any conditions that can or must be attached to bail.[456] It includes a standard human rights provision,[457] along with a novel provision specifying that it does not alter national responsibilities as regards 'the protection of victims, the general public and the safeguarding of internal security, in accordance with' Article 33 of the prior TEU (now Article 72 TFEU).[458] The Framework Decision

[447] See 9.5.2 above. [448] See 9.6.1.3 above.

[449] See generally 9.7.4 below, the communication on proceeds of crime (COM (2008) 766, 20 Nov 2008), and the action plan to implement the Stockholm programme (COM (2010) 171, 20 Apr 2010).

[450] See Annex 3 to the annex to the Commission Green Paper on pre-trial supervision orders (SEC (2004) 1046, 17 Aug 2004). [451] See 9.5.2 above.

[452] See 9.4 above and Case C-297/09 *X*, withdrawn.

[453] [2009] OJ L 294/20, Art 27(1). See also the earlier Commission Green Paper on this issue (COM (2004) 562, 17 Aug 2004). All subsequent references in this subsection are to this Framework Decision, unless otherwise noted. [454] See 9.7.6 below.

[455] Art 2(2). [456] See Art 5(3) ECHR.

[457] Art 5. See also points 16 and 17 in the preamble. [458] Art 3.

applies to six specified types of supervision measure;[459] Member States may notify the Council of other types of supervision measure which they are willing to enforce.[460]

Member States are obliged to apply the Framework Decision where the person concerned is lawfully and ordinarily resident in their territory, subject also to that person's consent.[461] They may also, if the person concerned requests, apply the Framework Decision where that person is not lawfully and ordinarily resident, but in that case the application of the Framework Decision depends on the consent of executing state.[462] The principle of dual criminality is abolished for the standard list of thirty-two crimes with a three-year punishment threshold, but Member States may insist, at the time of adoption of the Framework Decision, on applying that principle by way of derogation for 'some or all' of the offences on the list, for 'constitutional reasons'.[463] There are optional grounds for refusal of execution: a defective certificate; absence of consent by the person concerned or the executing State in the circumstances described above; double jeopardy; residual cases of dual criminality; statute-barring (if the alleged offence fell within the jurisdiction of the executing State); immunity (in accordance with the executing State's law); the age of criminal responsibility in the executing State; and where the executing State would have to refuse to execute an EAW that might be issued in the event of a breach of the order.[464] There is no ground for refusal on grounds of territoriality, or the executing State's existing prosecution of or intention to prosecute the person concerned, but arguably this issue is covered by the link to the grounds to refuse to execute an EAW.

There are detailed provisions governing which Member State has competence to take action relating to the supervision order,[465] and providing for coordination between Member States' authorities as regards later developments after the supervision order is issued.[466] There is no provision as such which grants the person concerned a remedy against the decision to approve a supervision order, but then again the Framework Decision grants the person concerned an explicit or implicit right of consent before the supervision order can be transferred in the first place.

[459] Art 8(1).

[460] Art 8(2), which contains a non-exhaustive list of five other types of supervision measure.

[461] Art 9(1). The concept of consent is not further defined.

[462] Art 9(2); see also Art 9(3) and (4).

[463] Art 14. Germany, Poland, Hungary, and Lithuania made declarations to this effect ([2009] OJ L 294/40).

[464] Art 15. It is not clear if the latter point refers only to the mandatory grounds for refusal to execute an EAW, or also to the optional grounds which the Member State concerned applies. For more on the EAW, see 9.5.2 above.

[465] Arts 11, 16, and 18. See also Art 13, on the possible adaptation of the supervision measure in the executing Member State. The Framework Decision does not address the question of what happens if the executing Member State has a more severe regime relating to bail, ie if it would not have released the person concerned pending trial.

[466] Arts 17, 19, and 20.

If an EAW or similar measure is issued as regards the person concerned by the issuing Member State, the executing Member State must surrender that person in accordance with the Framework Decision establishing the EAW. In principle, the executing Member State cannot invoke the custody threshold in the latter Framework Decision (an actual sentence of more than four months, or a potential sentence of more than twelve months), except by way of derogation.[467] The preamble to this Framework Decision makes clear that otherwise the EAW Framework Decision fully applies in the event that an EAW is issued to ensure the return of the person concerned to face trial in the issuing State.

This Framework Decision may make a useful contribution to reducing unjustified pre-trial detention of EU citizens accused of crimes outside their country of nationality. If it proves insufficient to this end, it may be necessary to adopt further measures addressing this issue. On this point, it should be noted that the Commission plans to release a Green Paper on pre-trial detention.[468]

9.7. Post-trial measures

Following the conclusion of a trial, several cross-border issues may arise.[469] The most obvious possibility is the transfer of enforcement of a sentence, whether custodial or non-custodial. The next question is whether a criminal conviction in one Member State may or must be taken into account for the purpose of subsequent criminal proceedings in other Member States (in addition to the separate issue of the double jeopardy effect of the conviction).[470] There may also be a cross-border consequence to a criminal conviction as regards confiscation of criminal assets, or disqualification from carrying out a profession or activity. Finally, there are cross-border aspects to conditional release on probation or parole, as well as orders for the protection of persons.

9.7.1. Enforcement of sentences

An early Council of Europe Convention (from 1970) concerns the enforcement of both custodial and non-custodial sentences, but it has attracted few ratifications from EU Member States; a subsequent Council of Europe Convention on the transfer of sentenced persons was far more successful, attracting unanimous

[467] Art 21, referring to Art 2(1) of the Framework Decision establishing the EAW ([2002] OJ L 190/1).

[468] See 9.8.2 below.

[469] For a detailed analysis of post-trial mutual recognition issues, particularly as regards recognition of custodial sentences, see the Commission's Green Paper on criminal sanctions (COM (2004) 334, 30 Apr 2004), particularly at 23–25, 34–46, and 57–68.

[470] On double jeopardy, see 11.8 below.