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Domesticating the European Arrest Warrant: European Criminal Law between Fragmentation and Acculturation

Abstract: Careful comparative observations of the domestic processes of transposition of the European Arrest Warrant Framework Decision (EAW) suggest that the successful implementation of this piece of legislation throughout the European Union conceals entrenched differences and remarkable divergences in the way Member States actually incorporate the EAW within their legal systems. Yet this diversity in the law of surrender does not refute the idea of a rapprochement of domestic jurisdictions through European legal harmonization. Indeed the development of judicial cooperation tools such as the EAW is fostering a remarkable cultural convergence which is impacting national legal systems in a much deeper way than one might think given the persistent plurality of national procedures of surrender between Member States.

Introduction

In the wake of the attacks of September 11th, the impetus given to the securitization of the European Union (EU) agenda offered an opportunity to flesh out the project of a common policy in criminal matters.[1] Following swift negotiation with the European Commission and the European Parliament,[2] the Council of the European Union – consisting of a representative of each Member State - adopted the Framework Decision on the European Arrest Warrant and the surrender procedures between Member States on 13 June 2002.[3] Aiming at "abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities",[4] the Framework Decision on the European Arrest Warrant was conceived as "the first concrete measure in the field of criminal law implementing the principle of mutual recognition".[5] It is designed to facilitate the arrest and the transfer "of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" from a Member State to another.

[1] On the EU's reaction to the terrorist attacks of 11 September 2011, see J. Wouter 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", *Common Market Law Review*, 41 (2004), 909-35.
[2] On the birth of the European Arrest Warrant, see M. Plachta and W. van Ballegooij, "The Framework Decision on the European Arrest Warrant and Surrender Procedures Between Member States of the European Union", in R. Blekxtoon and W. van Ballegooij (eds.), *Handbook on the European Arrest Warrant* (The Hague: TMC Asser Press, 2005), esp. pp. 32-36.
[3] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States, OJ L 190, 18.7.2002. There is a vast amount of literature on the European Arrest Warrant. For a detailed presentation of this instrument, see among others N. Keijzer and E. van Sliedregt (eds.), *The European Arrest Warrant in Practice* (The Hague: TMC Asser Press, 2009), and in French, S. Bot, *Le mandat d'arrêt européen* (Bruxelles: Larcier, 2009).
[4] Council Framework Decision 2002/584/JHA, 5th recital of the preamble.
[5] *Ibid.*, 6th recital of the preamble.

Beyond terminological changes[6] the Framework Decision establishes a "system of free movement of judicial decisions" which differs from the previous extradition procedure in many ways. The major breakthrough of the scheme is the complete judicialization of the surrender process from the issuing of the warrant to its execution.[7] Under this instrument the role of executive authorities is limited to "practical and administrative assistance"[8] and the procedure is entirely placed in the hands of the Member States' judiciaries, who become the only bodies competent to issue and execute a European Arrest Warrant. The Framework Decision shortens the lengthy extradition process by setting a 90 day time limit for the execution of the warrant[9] and it renders the substantive requirements for transfer less onerous. The double criminality principle – according to which extraditable infractions must be punishable in both the requesting and the requested states - is not required for 32 enumerated offences.[10] The political offence exception is also abolished and so too the nationality exception according to which states do not extradite their own nationals. However, the Framework Decision does set out many grounds for non-execution of the European Arrest Warrant - some mandatory and some optional - including amnesty in the executing state, *ne bis in idem*, age of criminal responsibility, and *locus delicti* exceptions.[11]

The legislation establishing the European Arrest Warrant (EAW) did not become directly applicable upon its adoption by the Council of the European Union.[12] It could only acquire legal effect through implementation in each of the EU Member States. The latter were bound to take the necessary measures to comply with the new instrument by the end of 2003, which they all did (though not always on time). Eventually all Member States transposed the Framework Decision into their own domestic legislation and the European Arrest Warrant gradually replaced extradition throughout the European Union.[13] By 2011 the Commission could boast of the operational success of this new "efficient mechanism to ensure that open borders are not exploited by those seeking to evade justice"[14] by pointing to a series of indicators showing consistent increases in the number of warrants issued and executed in the preceding years and a remarkable decrease in the average time of surrender compared to the pre-EAW era.

Breaking with the long history of extradition,[15] in which the idiosyncrasies of domestic criminal law, complex international treaties and overtly political considerations had intertwined for centuries, the legal transplant of a single instrument designed by the European Union to streamline and depoliticize surrender between the 28 Member States reveals the

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[6] Instead of "extradition", "extradition request", "requesting states" and "requested state", the Framework Decision uses the words "surrender", "arrest warrants", "state of issue" and "state of execution", thus contributing a terminological evolution stressing automaticity in the process of removing a person from one state to another.

[7] O. Lagodny, "'Extradition' without a Granting Procedure: The Concept of 'Surrender'", in Blekxtoon and van Ballegooij (eds.), *Handbook on the European Arrest Warrant*, pp. 39-45.

[8] 9th recital and Art. 7 of the Council Framework Decision 2002/584/JHA.

[9] Council Framework Decision 2002/584/JHA, Art. 17 and 23.

[10] *Ibid.*, Art. 2(2).

[11] *Ibid.*, Art. 3 and 4.

[12] On the legal effects of Framework Decisions, see A. Hinajeros, "On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?", *European Law Journal*, 14-5 (2008), 620-634.

[13] For a series of case studies on the implementation of the Framework Decision in Belgium, France, Germany, Italy, Spain and the UK, see M.-E. Cartier (ed.), *Le mandat d'arrêt européen* (Bruxelles: Bruylant, 2005). On Belgium, Cyprus, Finland, France, Germany, Hungary, Italy, Poland, Spain, see also E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2006), and E. Guild and L. Marin (eds.), *Still not Resolved? Constitutional Issues of the European Arrest Warrant* (Nijmegen: Wolf Legal Publishers, 2009).

[14] European Commission, *On the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States*, COM(2011)175 final, p. 3.

[15] On the history of extradition, see I. A. Shearer, *Extradition in International* Law (Manchester University Press, 1971), pp. 5-21. See also J. Puente Egido, *L'Extradition en droit international. Problèmes choisis*, Recueil des cours de l'Académie de droit international de la Haye, Vol. 231 (Leiden: Martinus Nijhoff, 1991), pp. 27-34.

extent of the ongoing Europeanization of law. It signals the expanding power of the Union, now dealing with a subject which used to be the preserve of national states, and it reveals the depth of EU law penetration into domestic jurisdictions, as the Framework Decision regulates in detail the scope and limits of the duty to surrender which now falls on the judiciaries of the Member States to implement the demand of their European counterparts. This unprecedented transfer of prerogative from national political authority to foreign judiciaries endowed with regulatory power is a remarkable phenomenon. At first sight, it makes the case for the 'convergence thesis' according to which the current movement towards globalization and Europeanisation drives an historic cultural rapprochement between European legal systems.[16] Influenced by a range of legal, political and more general cultural factors, increasingly legal systems seem to resemble each other in their procedural styles and also in their distribution of formal constitutional functions. In support of this thesis, the EAW Framework Decision goes beyond mere technical approximation of national rules, as witnessed for example in banking law or environmental law. Not only does the new scheme affect the symbol of state sovereignty that is the power to arrest, detain and transfer persons. It also has an effect on the power structure of the Member States by depoliticizing the surrender process whereas the technique of extradition had long displayed the signs of a tight coupling with domestic political arrangements. In this respect it could be argued that the achievement of the EAW not only reflects successful legal assimilation but is also the tangible sign of a nascent EU legal culture superseding national traditions.

However convincing the 'convergence thesis' may be in the light of the apparent success of the EAW, it is important though to recognise that legal harmonisation, in the sense of a formal process of integration between legal systems,[17] offers only a narrow window on legal culture. This term, which is often used to describe the set of "values, ideas and attitudes that a society has with respect to its law",[18] reminds us that there is more to law than formal rules. In this perspective, formal approximation of legislation does not necessarily imply legal acculturation. The transposition of the Framework Decision does not mean that from now on Member States share a common understanding of surrender within the *Area of Freedom, Security and Justice* (AFSJ). Indeed some have questioned the somehow naïve vision of convergence through the transfer of regulations and institutions. According to them, beneath superficial harmonization, the deep structure of domestic legal mentalities and legal epistemologies remains unique and cannot be bridged.[19] On the contrary, attempts at legal

[16] On the 'convergence thesis', see B.S. Markesinis (ed.), *The Gradual Convergence* (Oxford: Clarendon Press, 1994). Comp. V.G. Curran, "Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union", *Columbia Journal of European Law*, 7 (2001), 63-126. See also U. Mattei and L.G. Pes, "Civil Law and Common Law: Toward Convergence?", in K.E. Whittington, R.D. Kelemen, and G.A. Caldeira (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2010), esp. pp. 267-271. The 'convergence thesis' has been discussed from a variety of perspectives, either disciplinary (e.g. from a law and economics approach: B. Crettez, R. Deloche, "On the Unification of Legal Rules in the European Union", *European Journal of Law and Economics*, 21-3 (2006), 203-214), national (e.g. from a French perspective: G. Canivet, "La convergence des systèmes juridiques du point de vue du droit privé français", *Revue internationale de droit comparé*, 55-1 (2003), 7-22), and thematic (e.g. from a criminal law perspective, the contributions gathered in *Crime, Procedure and Evidence in a Comparative and International Context: Essays in Honour of Professor Mirjan Damaska*, edited by J. Jackson, M. Langer and P. Tillers (Oxford / Portland: Hart, 2008)).

[17] On the notion of legal harmonization in the field of European criminal law, see the introduction "Objectifs et methods" by M. Delmas-Marty in the collection she edited: *Les chemins de l'harmonisation pénale* (Paris: Société de législation comparée, 2008), p. 19 *et seq.* See also A. Weyembergh, "The Functions of Approximation of Penal Legislation within the European Union", *Maastricht Journal of European and Comparative Law*, 12-2 (2005), 149-172.

[18] R. Michaels, "Legal Culture", in J. Basedow, K.J. Hoppt, R. Zimmermann (eds.), *The Max Planck Encyclopedia of European Private Law*, 2 vols. (Oxford University Press, 2012), vol. II, p. 1059.

[19] See esp. Pierre Legrand's works, and esp. its oft quoted article "European Legal Systems Are Not Converging", *International and Comparative Law Quaterly*, 45-1 (1996), 52-81. To replace this provocative statement in its epistemological context, see from the same author *Le droit comparé* (Paris: Presses Universitaires de France, 1999), and his article "The Same and the Different", in P. Legrand and R. Munday (eds.), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press, 2011), pp. 240-311.

unification may paradoxically lead to further divergences as the adoption of uniform legal forms requires a reinterpretation of practice in the light of domestic legal culture, thus triggering evolutionary dynamics closely tied to national legal systems.[20]

This is not the place to take sides in a debate fuelled to a large extent by competing epistemological assumptions as to the nature of law (legal historians seem more prone to see successful legal transplants than comparatists attached to the irreducible diversity of legal traditions).[21] Indeed the question cannot be determined on theoretical grounds. What seems instead to be required at this point are empirical case studies which adduce evidence supporting or refuting the thesis at hand, and possibly refining the terms of the debate. In this respect the EU governing project can provide useful data to further the discussion. The EAW offers a good test case to challenge the 'convergence thesis' especially as the incorporation of the EAW Framework Decision in the legal systems has been scrutinized by various EU bodies. The stakes (both political and technical) are high and the new surrender scheme offers a perfect case study to assess the progress and the success of the AFSJ. No wonder then that special attention was devoted to the evaluation of its implementation. What does this evaluation of the EAW provided by the European institutions tell us about the 'convergence thesis'? It shows that the new surrender scheme can be seen as bringing greater efficiency throughout the AFSJ with respect to the transfer of suspects and convicts. Surely the fast assimilation of an automatic surrender scheme common to all Member States is evidence of a successful legal approximation but is it evidence of a coming together? In this chapter, it will be argued that the grey literature of the official bodies and the case-law of the Union offer no definite answer (Part 1). Careful comparative observations of the domestic processes of transposition of the Framework Decision suggest that the successful implementation of this piece of legislation throughout the Union conceals entrenched differences and remarkable divergences in the way Member States actually incorporate the EAW within their legal systems (Part 2). Yet this diversity in the law of surrender does not refute the idea of a rapprochement of domestic jurisdictions through European legal harmonization. Indeed the development of judicial cooperation tools such as the EAW is fostering a remarkable cultural convergence which is impacting national legal systems in a much deeper way than one might think given the persistent plurality of national procedures of surrender between Member States (Part 3).

European evaluation of Member States' compliance

Evaluation Framework

The European Union did not wait for the requirement of « objective and impartial evaluation » of the AFSJ to be engraved into the primary law of the EU[22] to scrutinize the correct transposition of the EAW Council Framework Decision. The symbolic importance of this first measure of mutual recognition at a time of securitization of European politics[23] explains the early attention devoted to the proper implementation of the new surrender

[20] G. Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences', *Modern Law Review*, 61-1 (1998), 11-32. See also M. Langer, "From Legal Transplants to Legal Translations: the Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure", *Harvard International Law Journal*, 45-1 (2004), 1-64.

[21] Comp. P. Legrand, "The Impossibility of 'Legal Transplants'", *Maastricht Journal of European and Comparative Law*, 4-2 (1997), 111-124, and A. Watson, "Legal Transplants and European Private Law", *Electronic Journal of Comparative Law*, 4-4 (2000) URL: http://www.ejcl.org/ejcl/44/44-2.html (Retrieved: 09/08/2015). And for a discussion on the "competing approaches to the study of legal transfers", see D. Nelken, "Towards a Sociology of Legal Adaptation", in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* (Oxford/Portland: Hart, 2001), esp. pp. 7-20.

[22] Art. 70 of the Treaty on the European Union, in force since 1 December 2009.

[23] On the securitization of European politics in the first decade of the 20th century, see E. Guild, S. Carrera and T. Balzacq, "The Changing Dynamics of Security in an Enlarged European Union", in D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (eds.), *Europe's 21st Century Challenge: Delivering Liberty* (Farnham / Burlington: Ashgate, 2010), 31-48.

scheme in the European national jurisdictions. As with all "third pillar" instruments, Member States were shielded until 1 December 2014[24] from any infringement proceedings brought by the Commission before the European Court of Justice for failures to incorporate the Framework Decision in their law.[25] But the ECJ, mother of all enforcement bodies of the European Union, is not the only "compliance-promoting tool" designed to tackle the "compliance-deficit" of EU law.[26]

With the European Union trying to reduce the recourse to infringement procedures and to improve monitoring through a range of measures such as "correlation tables, conformity checking, scoreboards and barometers, guidelines, implementation plans, networks and committees, inspection, package meetings, fitness checks, legal reviews, and reporting",[27] a vast array of techniques are available to assess the compliance of Member States. Drawing on this toolbox, two distinct non-judicial evaluations of the EAW were launched successively.[28] The first procedure was instigated by the Commission under art. 34 par. 3 of the EAW Framework Decision[29] and led to three successive reports in 2005,[30] 2007[31] and 2011.[32] The second procedure was based on the Joint Action of 5 December 1997 "establishing a mechanism for evaluating the application and implementation at national level of international undertakings in the fight against organized crime".[33] It took place under the aegis of the Council of the European Union and involved all Member States in a process of "mutual evaluations" which resulted in one national report per country followed by a final recap document.

Evaluation Strategies

The evaluations of Member States carried out by the Commission and the Council were based on distinct standards. Thus the criteria of assessment adopted by the Commission – effectiveness and rapidity of the judicial instrument[34] – were more precise than those adopted by the Council which emphasized more vaguely[35] the need to determine "the extent

[24] Protocol n° 36 of the Lisbon Treaty (12008M/PRO/36) provides "as a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty" that the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable until five years after the date of entry into force of the Treaty of Lisbon. As a result Member States were shielded from any infringement proceedings until the end of 2014.

[25] Even thus curtailed, the role of the ECJ has been crucial with respect to the Framework Decision: several preliminary rulings have been issued at the request of national courts in doubt about the interpretation and validity of the Framework Decision and the transposing legislation.

[26] On the variety of "compliance-promoting tools", see, M. Cremona (ed.), *Compliance and the Enforcement of EU Law* (Oxford University Press, 2012), esp. the book's introduction and the chapter on "The Governance of Compliance" by E. Chiti.

[27] M. Ballesteros, R. Mehdi, M. Eliantonio and D. Petrovic, *Tools for ensuring implementation and application of EU law and evaluation of their effectiveness*, European Parliament's Committee on Legal Affairs Study, Doc. PE 493.014 (Luxembourg: Publications Office, 2013), p. 18.

[28] A.G. Zarza, "Evaluation of Member States in the Third Pillar of the European Union: The Specific Case of the European Arrest Warrant", in A. Weyembergh and S. de Biolley (eds.), *Comment évaluer le droit pénal européen?* (Editions de l'Université de Bruxelles, 2006), pp. 99-113.

[29] According to this provision "the Commission shall (...) submit a report to the European Parliament and to the Council on the operation of this Framework Decision accompanied, where necessary, by legislative proposals".

[30] COM(2005) 63 final, followed by a revised version COM(2006) 8 final.

[31] COM(2007) 407 final.

[32] COM(2011) 175 final.

[33] Joint Action 97/827/JAI, OJ L344, 15/12/1997.

[34] In addition to the general criteria used to evaluate the implementation of Framework Decisions and Directives (i.e. "practical effectiveness, clarity and legal certainty, full application and compliance with the time limit for transposal"), see COM(2005) 63, p. 2.

[35] One weakness of the mutual evaluation system seems to be that "no particular parameter have been identified which would serve as a marking system (…) to assess whether a Member State is compliant, partially compliant or not compliant", H.G. Nilson, "Eight Years of Experiences of Mutual Evaluation within the EU", in Weyembergh and de Biolley (eds.), *Comment évaluer le droit pénal européen?*, p. 123.

of the practical successes"[36] of the surrender scheme. As far as method is concerned, the Commission mainly based its first two reports on statistical and legal data communicated by Member States while the peer-evaluation operated by the Council relied instead on a sophisticated mix of questionnaire, on-the-spot visits by experts of other Member States, and follow up reports. Yet the autonomy and the specificity of each evaluative process should not be over-emphasized. Not only do the assessment of the Commission and the mutual evaluation organized by the Council refer to each other,[37] but all of these institutions promote a common objective, namely to measure the proper implementation and the effective application of the new surrender scheme throughout the *Area of Freedom, Security and Justice*.

The assessment carried out by the EU bodies provides a wealth of information on the use of EAW by Member States. Yet reservations have been expressed in relation to the statistical data collected.[38] The Commission itself acknowledges in its 2011 reports the existence of "considerable shortcomings in the statistical data available for analysis" and highlighted the absence of a "common statistical tool" and the "different interpretations to be found in the answers to the Council's questionnaire".[39] Moreover the restriction of the evaluation to the application of the EAW meant that it did not include the domestic structures into which it was incorporated.[40] The assessment carried out by the Council or the Commission was above all a check on the conformity of national law with the Framework Decision. The evaluation was centred on the implementation of the legal instrument rather than its impact on the jurisdictions of the Member States. And even when the assessment was practice oriented - the Council's mutual evaluation was intended to scrutinize "the practical processes operated and encountered by Member States"[41] - the extent of the fit between EU rules and Member States' law was not a subject of primary concern.[42] What was critical was to assess the effectiveness of the surrender scheme, to highlight the situations in which the respective national implementing authorities failed to fully satisfy their transposition duty and to promote compliance with the Framework Decision.

Evaluation Results

Relying on their respective assessment, the Commission and the Council hailed the success of the EAW. Both institutions concluded that the new surrender scheme was operating efficiently. The basis for this conclusion was "the increasing volume of requests, the percentage of them that result in effective surrender and the fact that the surrender deadlines are generally met",[43] an "operational success" which "contrasts very favourably with the pre-

[36] Council of the European Union, *Orientation debate on a proposed Mutual Evaluation exercise concerning, in particular, the practical application of the provisions of the Framework Decision on the European Arrest Warrant and corresponding surrender procedures between Member States*, Council doc. 9602/05, 3/06/2005.
[37] In this respect it is telling that the last report from the Commission on the implementation of the EAW draws heavily on the mutual evaluations carried out by the Council which in turn refers to the evaluations carried out by the Commission.
[38] S. Carrera, E. Guild, N. Hernanz, *Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System*, CEPS Papers in Liberty and Security in Europe, n°76 (Brussels: Centre for European Policy Studies, 2013), esp. annex 1, pp. 29-33. According to the authors, the indicators produced display important defects and methodological deficiencies and result in incomplete, inaccurate and inconsistent data which led the Council of the European Union to propose a revision of the evaluation process in 2012.
[39] European Commission, COM(2011)175 final, p. 10.
[40] P. Kortenhorst, "Evaluating the Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States", in Guild and Marin (eds.), *Still not Resolved?*, p. 100.
[41] Council of the EU, *Final report on the fourth round of mutual evaluations - The practical application of the European Arrest Warrant and corresponding surrender procedures between Member States*, Council doc. 8302/4/09 REV4, 28/05/2009, p. 4.
[42] On the narrow purpose of evaluation of European criminal law, see de Biolley and Weyembergh's conclusion in their edited collection, *Comment évaluer le droit pénal européen?*, esp. pp. 223-224.
[43] Council of the EU, 8302/4/09 REV4, p. 6.

EAW position".[44] This positive judgement was also backed by the analysis of formal compliance. Other positive indicators came from the monitoring of domestic legislative changes to adapt to general or individual recommendations provided by evaluating bodies with respect to administrative or legal issues (e.g. language flexibility in everyday practice, proportionality test in the issuing of EAW…).

In spite of the sophisticated apparatus designed to measure the application of the EAW throughout the EU, very little is known about the impact of the Framework Decision on the deeply entrenched legal structure of Member States. The approximation of the rules of surrender between European Member States is a legal reality attested by the EAW evaluation. Statistical and legalistic key indicators do provide information about the efficiency of the new surrender scheme and the increasing degree of conformity of national legal systems with the Framework Decision. Individual reports on the implementation of the Framework Decision in Member States shed light on possible obstacles to the issuing and executing of EAW and offer recommendation to resolve them. But without any thick description of the transposition process in the Member States, these sectoral evaluations can hardly cut short the academic debate about the forms of legal convergence between European jurisdictions. The success of the EAW may well be the sign of a coming together of European Member States, but it could also conceal the fragmentation of European legislation which was the result of its visible domestication by Member States.

Domestic Fragmentation of European Legislation

Diversity of Constitutional Challenges

Many hints of a fragmentation of the EAW scheme were actually visible from its inception.[45] Compared to the quick adoption of the Framework Decision, its national transposition did not always go smoothly.[46] The last country to introduce the EAW into its legal system, Italy provides a good example of how domestic context influenced the pace of the reform as political ambiguity towards the new instrument met academic and practitioner criticism.[47] Far from being an exception, the Italian scenario is only one among many others which saw national legal elites express reservation towards the paradigm of mutual recognition and some of its consequence, especially extraditing nationals or partial elimination of the double criminality requirement.[48] In some countries the incorporation did not seem to pose any problem but in others doubts about the validity of the scheme prompted *ex ante* constitutional reform (France).[49] Where the constitutionality of implementing statutes was contested in front of the supreme courts,[50] judges sometimes rejected the objecting arguments (Belgium, Czech Republic). But in several cases implementing statutes were

[44] European Commission, COM(2011)175 final, p. 3.

[45] For a general perspective on the fragmentation of the AFSJ, see the various contributions gathered in *Revue trimestrielle de droit européen*, 47-4 (2012), 827-854.

[46] For a pan-European perspective, see R. Calvano (ed.), *Legalità costituzionale e mandato d'arresto europeo* (Naples: Jovene, 2007); Guild (ed.), *Constitutional Challenges to the European Arrest Warrant*; Guild and Marin (eds.), *Still not Resolved?* See also J. Sivers, "Too Different to Trust? First Experience with the Application of the European Arrest Warrant", in E. Guild, F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Aldershot / Burlington: Ashgate, 2008).

[47] L. Marin, "The European Arrest Warrant in the Italian Republic", *European Constitutional Law Review*, 4-2 (2008), 251–273.

[48] The case of Germany is emblematic: see F. Gayer, "A Second Chance for the EAW in Germany: The 'System of Surrender' After the Constitutional Court's Judgment of July 2005", in Guild and Marin (eds.), *Still not Resolved?*, pp. 195-208, with good bibliographic references.

[49] R. Errera, "The Implementation of the EAW in France. Constitutional Issues and Scope of Judicial Review", in Guild and Marin (eds.), *Still not Resolved?*, esp. pp. 167-169.

[50] For a comprehensive list of these constitutional challenges, see P. Zeman, "The European Arrest Warrant: Practical Problems and Constitutional Challenges", in Guild and Marin (eds.), *Still not Resolved?*, pp. 107-111.

deemed contrary to the Constitution leading either to their annulment and the adoption of new legislation (Germany) or to the amendment of national constitutions (Poland, Cyprus).

In spite of these setbacks the transposition of the Framework Decision was eventually achieved in all Member States. But the apparent pan European consensus on the validity of the new surrender scheme is based on a variety of constitutional understandings which reveals the existence of seemingly irreconcilable perspectives between Member States.[51] Thus confronted with a constitutional provision prohibiting the transfer of nationals to foreign countries, the Czech supreme court gave the green light to the EAW on the basis that traditional extradition and European surrender are substantially different[52] while Polish judges required an appropriate amendment to the Constitution because the two categories were not regarded as fundamentally distinct.[53] Beyond this example, European constitutional courts' rulings on the implementation of the Framework Decision dealt with the relationship between EU law and Member States constitutional legal systems in very different ways, showing growing differences between their readings of the respective constitutional clauses on the interconnections between legal systems.[54]

Variety of Implementing Acts

Political and constitutional differences between national contexts played a key role in the diversity of national laws putting into practice the EAW Framework Decision. The very nature of this type of legal instrument leaves considerable leeway to Member States as it is "binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods".[55] But a close analysis of national legislation shows that the room for manoeuvre left to the States did not just result in a multiplicity of methods of implementation. Regulatory creep and gold-plating could be observed as some countries exceeded the terms of the Framework Decision ('over-implementation') while substantive requirements were sometimes lost in translation. Prompt in hailing the transposition by all the Member States, the Commission also noticed these shortcomings and it reported incorrect implementation of the surrender scheme in several jurisdictions.[56]

The way Member States incorporated the grounds for refusal to surrender provided by the Framework Decision[57] offers a good example of how over-implementation led to a fragmentation of the EAW scheme. While some countries made some or all of the optional grounds for refusal mandatory in their national legislation, others also added additional bars to extradition relating to national security, to political offences or to human rights.[58] Here the glass half-full perspective which sees proper transposition of a unified surrender scheme

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[51] O. Pollicino, "European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems", *German Law Journal*, 9-10 (2008), 1313-1355. See also J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"', *Common Market Law Review*, 44 (2007), 9-40.

[52] Czech Constitutional Court, Judgment of 3 May 2006, Pl. ÚS 66/04, English translation available online, URL: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=512&cHash=94f2039f92b13843f3a3b93c6fcb237e (Retrieved: 09/08/2015).

[53] Polish Constitutional Tribunal, Judgment of 27 April 2005, P 1/2005, English translation available online, URL: http://trybunal.gov.pl/fileadmin/content/omowienia/P_1_05_full_GB.pdf (Retrieved: 09/08/2015).

[54] Pollicino, "European Arrest Warrant and Constitutional principles of the Member States", 1353.

[55] Art 34(2) of the Treaty on European Union, in force at the time of the adoption of the Council Framework Decision 2002/584/JHA. Since then the Treaty on European Union has been substantially amended by the Treaty of Nice and the Treaty of Lisbon.

[56] In its last report the Commission still pointed out "shortcomings in the way some Member States implement the Council Framework Decision", COM(2011)175 final, p. 3.

[57] On bars to surrender in the EAW scheme, see S. Alegre, "The European Arrest Warrant and the Grounds for Non-Execution", in G. Giudicelli-Delage, S. Manacorda and J. Tricot (eds.), *L'intégration pénale indirecte. Interactions entre droit pénal et coopération judiciaire au sein de l'Union européenne* (Paris: Société de législation comparée, 2005), 127-153.

[58] For a general overview, see *Commission Staff Working Document* SEC(2011) 430 final, esp. pp. 3-8.

throughout Europe gives way to the glass half-empty view of a multiplicity of national legislations, some giving judges discretion as to whether or not to execute a warrant that other jurisdictions consider either compulsory or inadmissible. The "disturbing"[59] observation of a marked variability in the implementation of bars to surrender applies to other features of the EAW. Referring to the Council's evaluation, the final Commission report highlights several cases where the respective national implementing law fails to fully transpose the Framework Decision[60] with regards e.g. to time-limits to issue or execute a warrant, the condition of reciprocity in EAW procedures, the list of offences not covered by the double criminality test, the seriousness of the offence liable to surrender…

Plurality of National Frameworks

Making clear the variability of the implementing Acts of Member States and their failure to comply with EU legislation does not provide a complete picture of the degree of fragmentation of the new surrender scheme. The multilingual nature of EU law also plays its part in reinforcing diversity and creating possible discrepancies between national texts and domestic practices. The EAW Framework Decision has been published in the twenty-four official languages of the EU, each text being authentic.[61] In the twenty-eight Member States, legislators have transposed one of these versions into their own legal system according to epistemic conventions peculiar to their respective jurisdiction. Following on from this, the judges of Member States, in implementing the EAW scheme on a case by case basis, have interpreted this national legislation in the light of their own national understanding of the law.[62] Such an interpretive *mise en abyme*, from translation to application via transposition in each jurisdiction, gives rise to conceptual confusion and possible divergences between them. Even if textual concordance of multilingual legislation can be created through meta-jurilinguistic mechanisms,[63] the multiplicity of legal cultures brought together under the AFSJ adds to the difficulty in transplanting the EAW uniformly in all Member States.

The focus on formal transposition of the Framework Decision plays down the fact that the rules transposed find themselves "indigenized on account of the host culture's inherent integrative capacity".[64] This domesticating process is influenced by the national interpreters' epistemological assumptions and their legal practices which are culturally conditioned. In this respect the EAW offers a good illustration of the way legal rules and techniques – conceived in their textual dimension - change as they cross boundaries. In Italy for example the entrenched political conception of civil liberties protection (*garantismo*) justified a version of the EAW "much more restrictive than traditional extradition was"[65] but the judges consistently adopted an interpretation of the requirements of national legislation which

[59] COM(2006)8 final, p. 5.
[60] COM(2011) 175 final, p. 5, and accompanying *Staff Working Document* SEC(2011) 430 final, esp. pp. 3-8.
[61] With regard to European secondary legislation, the European Court of Justice established that "all the language versions must, in principle, be recognised as having the same weight", Case C-296/95, *Commissioners of Customs and Excise, ex-parte EMU Tabac SARL, The Man in Black Ltd, John Cunningham*, 2 April 1998, par. 36. For a thorough examination of the EU linguistic regime, see J.-C. Barbato, Fascicule 2390 : "Régime linguistique de l'Union européenne", *JurisClasseur Europe Traité*, 2011.
[62] On the variability of the national rules of statutory interpretation, see S. Vogenauer, "Statutory Interpretation", in J.M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, 2nd ed. (Cheltenham / Northampton: Edward Elgar, 2012), pp. 826-838.
[63] For evidence supporting this thesis, see K.K. Sin, "Out of the Fly-Bottle: Conceptual Confusions in Multilingual Legislation", *International Journal for the Semiotics of Law - Revue internationale de sémiotique juridique*, 26-4 (2013), 927-951.
[64] Legrand, "The Impossibility of 'Legal Transplants'", 118.
[65] M. Fichera, *The Implementation of the European Arrest Warrant in the European Union: Law, Policy and Practice* (Antwerp / Cambridge: Intersentia, 2011), p. 146.

avoided frustrating cooperation between judicial authorities.[66] In contrast, most Member States' legislators have designed the EAW as a simplified procedure but national judges sometimes interpret it so strictly that its application slips back to a quasi extradition process.[67] Beyond these expressions of legal particularism, another striking feature of variation between Member States lies in the use of the EAW: figures provided by the Commission show that the number of European warrants issued and executed varies greatly between Member States and is not at all correlated with their population,[68] thus raising suspicion of diverging national attitudes and judicial practice in respect of this instrument.

European acculturation of National Legal Systems

Transnational practices

Even if we admit the theoretical impossibility of uniform application of EU law throughout the Union and in spite of significant divergences in the application of the EAW Framework Decision, one should not jump too hastily to the conclusion that no convergence is taking place. The illusion of a technical rapprochement fuelled by a narrow focus on State compliance is clearly revealed by awareness of the political and linguistic processes maintaining and reinforcing diversity in spite of legal approximation. Yet if we widen the lens even more to take into consideration specific institutional developments and broad cultural trends which have accompanied the implementation of the surrender scheme, it must be noted that other factors are playing in favour of convergence. Specific tools have been established to manage, contain and reduce legal diversity, such as the evaluation procedures set up by the Commission and the Council (see *supra*). The European legislature has also created horizontal networks bringing together judges and officials from all Member States to facilitate judicial cooperation and improve coordination between competent authorities responsible for investigation and prosecution of organized and cross-border crime (see especially the European Judicial Network and Eurojust).[69]

What these various instruments all have in common is the promotion of convergence between criminal justice systems through monitoring techniques which are not legally binding but are nevertheless normative. Thus, the evaluation carried out by the Commission and the Council of the implementation by Member States of the EAW Framework Decision does not have a merely descriptive purpose. It is also prescriptive in that it develops recommendations which build up further expectations: the extent to which national practice conforms to those expectations is then itself subject to future checks either in the form of follow-up reports or domestic judicial interpretation of EU law. In a similar way, the European Judicial Network (EJN) and Eurojust do not have any regulatory power but they promote increased cooperation through peer-learning and experience sharing throughout Europe.[70] To achieve this aim, these transnational networks created by the European institutions rely on the one hand on regular

[66] Marin, "Like after a Strange Fall: Constitutional Micro-fractures and the EAW. Some Lessons from the 'Emerging' European Constitutional Law Suggested by the Italian Case", in E. Guild and L. Marin (eds.), *Still Not Resolved?*, p. 239.
[67] See the French example: P. Lemoine, "La coopération judiciaire entre Etats: L'exemple de l'extradition et du mandat d'arrêt européen à travers la jurisprudence de la Chambre criminelle", *Revue de science criminelle et de droit pénal comparé*, 64-2 (2009), 297-316.
[68] *Commission Staff Working Document* SEC(2011) 430 final, pp. 185-189.
[69] On Eurojust, see in this volume the chapter by A. Megie: "Eurojust in Action: An Institutionalisation of European Legal Culture?"
[70] M. Claes and M. de Visser, "Are You Networked Yet? On Dialogues in European Judicial Networks", *Utrecht Law Review*, 8-2 (2012), 100-114. From the same authors, see also, "Courts United? On European Judicial Networks", in A. Vauchez and B. de Witte (eds.), *Lawyering Europe. European Law as a Transnational Social Field* (Oxford / Portland: Hart, 2013), 75-100. See also J. Thomas, "Networks of the Judiciary and the Development of the Common Judicial Area", *New Journal of European Criminal Law*, 2-1(2011), 5-8.
75-100.

face-to-face meetings between governments' legal agents, and on the other hand, on the use of sophisticated IT facilities. Thus the EJN website provides online apps to assist national judicial authorities to identify their competent counterparts and the legal requirements in the executing Member State,[71] and to help to draft an EAW form.[72] In addition, the EJN online library not only provides practical information concerning the EAW (the full text of the legal instrument, forms, notifications, case law, national legislation, etc....) but also makes guidelines for the adoption of good practices easily accessible (see especially the European handbook on how to issue a European Arrest Warrant, translated in all EU languages).[73] Irrespective of the degree of legal fragmentation of the EAW scheme and whatever the success may be of these compliance-tools in streamlining surrender and nurturing mutual trust between Member States, they foster common practices and transnational interactions between judges throughout the Union.

Judicial Dialogue

In addition to transnational practices in surrender, which contribute to the creation of some kind of EU legal culture (conceived as 'EU law in action' distinct from 'EU law in books'), other legal processes reinforce convergence between the law of Member States. The role of the ECJ is crucial in this respect even though its jurisdiction was restricted with regard to "third pillar" measures until the end of 2014 (see *supra*). Despite the reluctance of some domestic courts to initiate a 'judicial dialogue' with the ECJ,[74] it has had the opportunity to release preliminary rulings on the interpretation (and validity) of the Framework Decision on eleven occasions between 2007 and 2013.[75] These decisions - made at the requests of national judges - lay down how the EAW must be understood and applied in Member State jurisdictions. Through declaratory rulings, which bind all Member States with respect to the meaning of EU law, the Court promotes uniform interpretation of the Framework Decision.[76] The Court does not just clarify the content of its rules and give an autonomous meaning to its concepts (e.g. 'residents' entitled to request the non-execution of a European Arrest Warrant to undergo a custodial sentence in the country of execution).[77] The ECJ also requires national courts to interpret EAW domestic legislation as far as possible 'with a view to ensuring that (the) Framework Decision is fully effective and to achieving an outcome consistent with the objective pursued by it'.[78]

The ECJ preliminary rulings rein in the fragmentation of the surrender scheme by limiting the margin of interpretation of national courts in the application of domestic legislation. But the work on the meaning and the significance of EU legislation carried out by the Court goes further in that it leads to the Europeanization of legal concepts.[79] With the

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[71] See the EAW atlas, URL: http://www.ejn-crimjust.europa.eu/ejn/AtlasChooseCountry.aspx?Type=1 (Retrieved: 09/08/2015).

[72] See the EAW Compendium Wizard, URL: http://www.ejn-crimjust.europa.eu/ejn/EJN_EAWWizard.aspx (Retrieved: 09/08/2015)

[73] URL: http://www.ejn-crimjust.europa.eu/ejn/libdocumentproperties.aspx?Id=13 (Retrieved: 09/08/2015)

[74] A.Weyembergh and V. Ricci, "Les interactions dans le secteur de la cooperation judiciaire : Le mandat d'arrêt européen", in G. Giudicelli-Delage, S. Manacorda and J. Tricot (eds.), *Cour de justice et justice pénale en Europe* (Paris: Société de législation comparée, 2010), pp. 203-244.

[75] H. Patricio, "The European Arrest Warrant in the Case Law of the Court of Justice", *Unio – EU Law Journal*, 0(2014), 62-82, URL: http://www.unio.cedu.direito.uminho.pt/Uploads/UNIO%20ENG/UNIO%200%20-%20Helena%20Patricio_eng.pdf (Retrieved: 09/08/2015).

[76] On the effect of the preliminary rulings, see M. Broberg and N. Fenger, *Preliminary References to the European Court of Justice*, 2nd ed. (Oxford University Press, 2014) esp. 441-469.

[77] Case C-66/08, *Koslowski*, 17 July 2008 ; see also Case C-123/08, *Wolzenburg*, 5 October 2009.

[78] Case C-42/11, *Lopes da Silva*, 5 September 2012.

[79] L. Azoulai, "The Europeanisation of Legal Concepts", in U. Neergaard & R. Nielsen (eds.), *European Legal Method in a Multi-Level Legal Order* (Copenhagen: DJØF Publishing, 2012), pp. 165–182. See also, in this volume, the chapter by V. Mitsilegas: "Managing Legal Diversity in Europe's Area of Criminal Justice: The Role of Autonomous Concepts".

number of preliminary references relating to the EAW expected to grow, especially with the introduction of an urgent procedure to decide preliminary rulings within shorter time frames in disputes relating to persons detained or deprived of their liberty,[80] one can reasonably expect this process of conceptual Europeanization of the EAW to develop in the future.[81] The creation of these pan-European judicial standards by the ECJ is crucial to the development of a distinct EU legal culture in its own right.[82] But in the Union context, where interpreters are dispersed and legal meaning vulnerable to many alterations, the stability and the integrity of the surrender scheme throughout Member State legal systems requires more. The national interlocutors of the Court, Member State officials and national judiciaries, must be committed to the same claims, beliefs and actions. In the case of the EAW, the sharing of normative commitment does not limit itself to multilevel cooperation in legal reasoning. It includes the sharing of political values and ideological beliefs underpinning the enterprise of building an *Area of Freedom, Security and Justice*.

Shared narrative

The establishment and the implementation of the EAW is a good example of the ways a legal instrument can serve the promotion of an ideological purpose throughout the Union's Member States. The new surrender scheme is a flagship of EU criminal policy. It embodies the shifting rationales of the Union in the field of crime control and it fleshes out an integrationist project traceable in the treaties which give the Union new competences in the *Area of Freedom, Security and Justice* (art. 4(2) Treaty on the Functioning of the European Union). This is not the place to disentangle the ideological bundle founding this project.[83] Suffice it to say that it relies on a set of explicit values and implied beliefs expressed in various policy documents which convey an unfolding narrative establishing the European engagement in criminal matters. This new development was first presented according to a functional logic of spillover, in terms of a necessary reaction to the security deficit arising from the abolition of internal borders within an integrated Union.[84] It then gained momentum with the advent of a "citizenship of the Union" which empowered the EU as a guarantor of the security and the freedom of the nationals of the Member States.[85] This critical incremental step in the Union's rationale allowed wider intervention in the field of criminal justice based on mutual trust and the diffusion of market-based mechanisms of integration (e.g. mutual recognition and free circulation of judicial decisions).

Whatever the reality of the security deficit and the degree of mutual trust between Member States, one cannot but observe that these ideas feed a certain vision of the EU and provide the building blocks of a political myth about the Union's past and future.[86] This narrative is given material expression in legal techniques which in turn confirm the contemporary relevance of the European project. Devices such as the EAW are not only

[80] Art. 107-114 of the Rules of Procedure of the Court of Justice (consolidated version of 25 September 2012) establishing an "urgent preliminary ruling procedure" in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union.

[81] See nonetheless Advocate General E. Sharpston, who notes that "in a difficult case, speed may come at the expense of quality", "Transparency and clear language in the European Union: Ambiguous Legislative Texts, Laconic Pronouncements and the Credibility of the Judicial System", *Cambridge Yearbook of European Legal Studies*, 12 (2009-2010), p. 418.

[82] C. Franklin, "The Melting Pot or the Salad Bowl Revisited (Again). The Meeting of Legal Cultures at the European Court of Justice", in J. Øyrehagen Sunde and K. Einar Skodvin (eds.), *Rendezvous of European Legal Cultures* (Bergen: Fagbokforlaget, 2010), 61-75.

[83] For an attempt, see F. Ferraro, *Libertà e Sicurezza nell'Unione europea* (Pisa University Press, 2012).

[84] On the spill-over theory, see M. Fletcher, R. Lööf and B. Gilmore, *EU Criminal Law and Justice*, Cheltenham / Northampton: Edward Elgar, 2008, pp. 22-31.

[85] S.Coutts, "Citizenship of the European Union", in D.A. Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law* (Oxford / Portland: Hart, 2014), pp. 92-109.

[86] On the unavoidable mythical dimension of the European integration project, see V. Della Sala, "Myth and the Postnational Polity", in G. Bouchard (ed.), *National Myths: Constructed Pasts, Contested Presents* (Oxon: Routledge, 2013), 157-172.

justified by the new powers of the EU but they also contribute to the development of its constitutional identity as an actor which promotes the public goods of security and justice in all Member States.[87] Whatever the plurality of the national framework implementing the EAW, all Member States have incorporated in their legal system an instrument the *raison d'être* of which is shaped by a story framed by European institutions. The narrative may undergo various interpretations.[88] It may be too weak to win the assent of all stakeholders, be they politicians, professionals or academics. It is nonetheless taken up by them, if only for them to criticize it, and it is thus circulated even among those who do not embrace it. As such the establishment of the new surrender scheme contributes to the entrenchment of a political myth and its transplant into the legal cultures of all Member States.

Conclusion

The establishment of the EAW scheme throughout the EU has been hailed as a remarkable accomplishment by the European institutions. The best evidence of this is provided by key indicators which demonstrate that suspects and convicts are now transferred between Member States much more effectively than before. Yet even if we endorse the evaluative framework of EU bodies, one should not take success for granted on the basis of mere quantitative figures. The meaning of success is never straightforward in the case of legal adaptation.[89] And if we take seriously the ECJ statement according to which the purpose of the Framework Decision is to approximate the rules relating to surrender between national authorities,[90] we may question the achievement of this objective on the basis that the efficiency of the new scheme does not preclude wide variation in its national implementation. In other words, surrender between Member States may well be facilitated but it is far from certain that their domestic rules are more similar now than what they used to be. It is however undeniable that the introduction of the EAW follows the flow of developing transnational practices, feeds the continuous dialogue between European and national courts, and contributes to the circulation of shared beliefs as to the means and ends of the construction of a European *Area of Freedom, Security and Justice*.

In the light of these seemingly contradictory trends, it is tempting to dismiss the debate over the 'convergence thesis'. Long lasting differences between Member States' jurisdictions remain as the Framework decision is implemented by a variety of domestic Acts and national practices which reaffirm and renew some national variations in the process of surrender. Yet a remarkable rapprochement can be observed as the transfer of suspects and convicts is streamlined and eased between all European jurisdictions. While we observe homogenization through the circulation of common practices and shared narrative, new national differences emerge and old ones are upheld. In this respect the discussion over the legal convergence taking place in Europe appears flawed by what Gaston Bachelard has described as the "bipolarity of errors" which often characterizes scientific thought. According to this epistemological law, the scientific mind tends to escape from one error by falling into its opposite.[91] Legal thinking is no exception to this movement[92] of which the controversy over

[87] On this theme, see A. Howard Gibbs, *Constitutional Life and Europe's Area of Freedom, Security and Justice*, (Farnham: Ashgate, 2011).

[88] See for example the European Parliament Resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)) endorsing the narrative while pointing out at the failure of European legislation to explicitly include fundamental rights safeguards or a proportionality check.

[89] On the meaning of success in the case of legal adaptation, see Nelken, "Towards a Sociology of Legal Adaptation", esp. pp. 35-50.

[90] Case C-303/05, *Advocaten voor de Wereld VZW v Leden van de Ministerraad*, 3 May 2007, par. 29-30.

[91] G. Bachelard, *La formation de l'esprit scientifique : Contribution à une psychanalyse de la connaissance objective*, 5e éd. (Paris: Vrin, 1965), p. 20.

[92] F. Ost, M. Van de Kerchove, In "Constructing the Complexity of the Law: Towards a Dialectic Theory", in L.J. Wintgens (ed.), *The Law in Philosophical Perspectives* (Dordrecht, Kluwer Academic Publishers, 1999), esp. pp. 148-149. From the

the 'convergence thesis' provides another example. If European legal systems are getting closer while diverging at the same time, the 'convergence thesis' is neither true nor false and it is time for a new analytical framework able to solve this paradox.

In order to better describe the reality of legal integration carried out by judicial cooperation tools such as the EAW, a positive escape route may well be to play the EU legal culture card. In an institutional framework such as the European Union, culture may appear elusive compared to national settings, especially if we use it as a 'term of art' developed by sociologists of law.[93] Geography and history, so important in the Westphalian imagination to shape the contours of national legal cultures, are far less meaningful in the case of the EU. As to the traditional dimensions of the way the term legal culture has been used (practices and ideologies of legal institution, public attitudes and beliefs toward the law, the process of legal mobilisation...)[94] they are more developed in domestic law than in relation to EU law due to its limited scope and its relative novelty. Yet looking at the introduction of the European Arrest Warrant in the landscape of judicial cooperation between Member States, one cannot help but observe a nascent EU legal culture characterized by its sector specific-nature,[95] its market-based legitimacy[96] and the dynamism of its entrepreneurs.[97] This transnational legal culture in the making neither replaces nor unifies national legal cultures but moulds them through a diffusion process which impacts differently on the various Member States. Very little scholarly attention[98] has been devoted to this EU legal culture "simultaneously distinct from and mutually constitutive of the legal cultures of its Member States".[99] Yet in an era of globalization which forces comparativists to redefine the subject of their discipline away from a traditional focus on static comparison of rules emanating from national legal systems to a dynamic analysis of emerging spaces of transnational normativity,[100] EU legal culture may well be a key to better understand the contemporary transformations of the legal in the field of criminal justice.

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same authors, "De la 'bipolarité des erreurs' ou de quelques paradigmes de la science du droit", *Archives de philosophie du droit*, 33 (1988), 177-206.

[93] D. Nelken, "Legal Culture", in Smits (ed.), *Elgar Encyclopedia of Comparative Law*, pp. 480-490.

[94] On these various dimensions, see S.E. Merry, "What is Legal Culture? An Anthropological Perspective", in D. Nelken (ed.), *Using Legal Culture* (London: Wildy, Simmonds & Hill Publishing, 2012), 52-85.

[95] Michaels, "Legal Culture", p. 1062.

[96] A. Afilalo, D. Patterson and K. Purnhagen, *Statecraft, the Market State and the Development of European Legal Culture*, European University Institute Working Papers, 2012/10.

[97] On the various transnational legal entrepreneurs promoting European polity-building, see Vauchez and de Witte (eds.), *Lawyering Europe. European Law as a Transnational Social Field*.

[98] An exception has to be made regarding the constitutional dimension of EU legal culture, scrutinized by the supporters of constitutional pluralism, which has attracted slightly more attention. Even then, the focus is on "elite legal culture" and not on "general legal culture" as rightly notes F. Snyder, "European Constitutionalism in the 21st Century", in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century*, 2 vols. (Oxford/Portland, Hart, 2004), vol. 1, p. 11.

[99] D. Augenstein and J. Hendry, *The 'Fertile Dilemma of Law': Legal Integration and Legal Cultures in the European Union*, Tilburg Institute of Comparative and Transnational Law Working Paper, 2009/06, p. 11.

[100] See *inter alia* D.A. Westbrook, "Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless", *Harvard International Law Journal*, 47-2 (2006), 489-505, and the reply of W. Twining, "Diffusion and Globalization Discourse", 507-515.