# SOME REMARKS ON THE LIMITS TO MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CIVIL AND CRIMINAL MATTERS WITHIN THE EUROPEAN UNION

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## 1. Introduction

The question of the limits is central to the debate on mutual recognition. It has been so since the famous *Cassis de Dijon* judgement, which is deemed to be at the roots of the principle of mutual recognition within the Union. The Court of justice held that goods lawfully produced and marketed in one Member State can freely circulate in the rest of the Community, notwithstanding legislative disparities in the State of origin and the State of destination of the goods. The Court set, however, an exception to such rule, by allowing the State of destination to prohibit entry of the goods into its market if the prohibition is justified by mandatory public interest requirements, such as health and consumers protection. Clearly, the question of the limits to the operativity of mutual recognition becomes more sensitive passing from the movement of goods to that of judicial decisions; and even more so when it comes to court decisions having a direct impact on the personal freedom of an individual.

## 2. The Tampere statement on mutual recognition of judicial decisions

Pursuant to the conclusions of the Tampere European Council in October 1999 the principle of mutual recognition "should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union". The wording "should become" appears, though, somewhat inaccurate. It gives the impression that mutual recognition had been entirely unknown in the field of judicial decisions until that moment. But this is not so with respect to civil matters. In fact the principle of mutual recognition has been applied (and one can say, satisfactorily applied) to civil and commercial judgements since the Brussels Convention of 1968. This Convention was recently converted into a regulation, the so-called Brussels I Regulation, based on the new (post-Amsterdam) Title VI of the EC Treaty (Council Regulation, n. 44/2001 of 22 December 2000).

The Tampere statement is, by contrast, fully correct with respect to criminal matters. Though some forms of mutual recognition can be traced in certain instruments of judicial cooperation adopted before 1999, none of them has come into force between all Member States so far (cf., *Programme of measures to implement the principle of mutual recognition of decision in criminal matters*, OJ C 12 EN, 15.1.2001, p.1). Thus, the first concrete measure implementing mutual recognition in the field of criminal law is represented by the Framework Decision on the European arrest warrant finally adopted by the Council on 13 June 2002 (OJ L 190 EN 18.7.2001, p.1).

Now that free circulation of judicial decisions (based on the principle of mutual recognition) is in place within the Union with respect to both civil and criminal matters, there is scope to delineate a comparative picture of how the principle operates in the two fields. This will be done here with special regard to the question of the limits to mutual recognition referred to in the initial paragraph of this paper. To this end we propose to focus on the grounds enabling the courts of one Member State to refuse recognition of a judicial decision issued in another Member State and examine to

what extent such grounds differ according to whether the decision is of a civil or criminal nature. For civil decisions reference will be made to the Brussels I Regulation, for criminal decisions to the Framework Decision on the European arrest warrant.

3. The limits to recognition of civil decisions under the Brussels I Regulation

Brussels I Regulation is the basic instrument ensuring the free circulation of civil decisions within the Union. It has kept the same structure of the 1968 Brussels Convention, whereby the provisions on recognition and enforcement are preceded by a set of common rules on the jurisdiction/competence of the courts. The Brussels I Regulation is currently supplemented by two other instruments covering areas expressly excluded from its scope, namely the so-called Brussels II Regulation concerning matrimonial proceedings (Council Regulation n. 1347/2000 of 29 May 2000, OJ L160, 30.6.2000, p.19) and the Regulation on insolvency proceedings (Council Regulation n. 1346/2000 of even date, *ibidem*) (for a review of judicial cooperation in civil matters within the Union see GIACALONE, *Il punto sui lavori in tema di cooperazione giudiziaria civile nell'Unione Europea*, to be published shortly).

Under the Brussels I Regulation, recognition of judgements is automatic unless contested. This means that any interested party may invoke any of the legal effects (except enforceability) of a judgement given in other Member States without the need to start any special procedure. A procedure is required for enforcement purposes, but it is a simple and rapid one. In fact, the declaration of enforceability can be obtained by the claimant on completion of purely formal checks and can be contested by the defendant only by filing an *ad hoc* appeal. So the burden of promoting an adversarial procedure is reversed onto the defendant.

The grounds for the refusal of recognition and enforcement are exhaustively set forth in Article 34 paragraphs 1 to 4 and Article 35 paragraph 1 of the Brussels I Regulation. The list of Article 34 includes: the manifest contrast of the judgement with the public policy of the State in which recognition or enforcement are sought (paragraph 1); in case of default proceedings, failure of timely serving the defendant with the document instituting the proceedings (paragraph 2); the fact that the judgement is irreconcilable with a prior judgement given in a dispute between the same parties and involving the same cause of action (paragraphs 3 and 4). Pursuant to Article 35 paragraph 1 recognition and enforcement are also to be denied if the judgement was rendered in breach of the rules on jurisdiction laid down by the Regulation with respect to certain matters (such as insurance, consumer contracts, immovable properties, the status of companies or other legal persons, intellectual property).

It would not be appropriate to elaborate in this paper on each of the grounds referred to above. It is worth, though, drawing the attention on two points. Firstly, not only the Brussels I Regulation provides a comprehensive set of rules on the competence of the courts; it also considers certain of those rules of such importance that failure to comply with them makes the judgement ineligible for recognition and enforcement in the rest of the Union. Secondly, the ground ranking first in the list of Article 34 deals with public policy. This latter point deserves some more comments.

Public policy (*ordre public*) is a traditional limit to the recognition and enforcement of foreign judgements. It is designed to block judgements which would otherwise be in conflict with

fundamental principles and rules of domestic law. The conflict must be of a particular gravity, as stressed by Article 34 which makes the refusal of recognition and enforcement conditional upon the judgement being "manifestly" in contrast with public policy (a word added to the old text of the 1968 Brussels Convention). Pursuant to established case law public policy encompasses both the substantive and the procedural aspect (for references to the relevant case law see CARBONE, *Lo spazio giudiziario europeo*, Torino, 2000, p.22 ff.). Domestic courts are not only required to make sure that the contents of the judgement are not incompatible with basic rules of internal substantive law (*substantive public policy*). They can also be asked to review the proceedings originating the judgement and verify if such proceedings complied with fundamental principles of domestic procedural law, such as those regarding due process, the right of defence, the independence and impartiality of the judge (*procedural public policy*). If this proves not to be the case, recognition and enforcement must be refused, regardless of the contents of the judgement.

It is certainly so that a public policy problem should rarely occur within the Union. But, however remote and exceptional this case may be, the limit in question provides each Member State with a general and comprehensive safeguard against infringements to fundamental principles of domestic law. Clearly, since Union law is an integral part of the domestic law of Member States, the public policy limit applies to the former as well as to the latter.

4.The limits to recognition of criminal decisions under the Framework Decision on the European arrest warrant

Let us turn now to the Framework Decision on the European Arrest Warrant. This new instrument aims at setting aside within the Union the traditional extradition procedure. The purpose is the same, i.e. the search, arrest, detention and enforced transfer of a person from one Member State to another. But the procedure is radically simplified, in line with the concept of a single judicial space and the requirements of a frontier free area. The political State-to-State phase marking the formal extradition procedure is abolished and replaced by a direct relation between judicial authorities.

The new mechanism is based on the principle of mutual recognition of judicial decisions. This is explicitly spelled out in Article 1 paragraph 2 of the Framework Decision, whereby the courts of a Member State are obliged to execute any European arrest warrant as defined in paragraph 1 of the same Article. The definition contained therein is very general in scope. It covers any arrest order issued by a judicial authority of a Member State, be it a judge or a public prosecutor, at the pre-trial stage or for the execution of an enforceable (though not necessarily final) sentence. Moreover, the new procedure applies to any offences punishable by the law of the issuing Member State by imprisonment for twelve months or more.

The principle of mutual recognition acquires here special importance from another point of view. The Framework Decision does not lay down common rules on the competence of the issuing courts, or minimum standards for the procedure to be followed by them or provisions harmonizing the constituent elements of the criminal acts to which the arrest order may refer. All these areas continue to be left to the free determination of each Member State. Hence mutual recognition applies, beyond the judicial decisions concerned, to the substantive and procedural criminal law on which such decisions are based.

In view of the broad scope of mutual recognition in this field, the question of the limits becomes particularly sensitive. The grounds for refusing to execute a European arrest warrant are listed in

Articles 3 and 4 of the Framework Decision. The list is apparently exhaustive so that non-execution could only be based on grounds expressly set forth in these provisions. There is, however, a distinction between the grounds of Article 3 and those of Article 4. The formers call for the mandatory non-execution of the arrest order, while the latters leave to the judge to decide whether to apply them or not (optional non-execution).

The list of Article 3 includes: amnesty of the relevant offence in the executing State (paragraph 1); if the requested person has been already sentenced for the same facts in a Member State and the sentence has been served or is being served or may no longer be executed (paragraph 2); because of the age, the requested person may not be held criminally responsible in the executing State (paragraph 3). Passing to Article 4, the grounds for optional non-execution contemplated therein can be summarized as follows: the so-called "double criminality" requirement, from which however the major offences listed in Article 2 are expressly exempted (paragraph 1); the *non bis in idem* principle, in case the requested person has been already prosecuted or acquitted for the same offence in the executing State or in a third State (paragraphs 2, 3 and 5); the expiry of the period of limitation fixed in the executing State for the prosecution or punishment of the relevant offence (paragraph 4); the requested person is a national or resident of the executing State and this State undertakes to execute the sentence or detention order in accordance with its domestic law (paragraph 6); the relevant offence has been committed outside the territory of the issuing State (so-called extraterritorial jurisdiction) (paragraph 7).

5. A comparative analysis

From a quick survey of the grounds for non-execution of the European arrest warrant, one point immediately emerges. It is the absence of anything similar to the limit of public policy provided for in the Brussels I Regulation. If the grounds listed in Articles 3 and 4 of the Framework Decision were to be considered exhaustive, as generally believed, the said absence would appear somewhat surprising. As already indicated, the limit of public policy performs an important function in civil matters. It permits the rejection of judgements rendered in other Member States, whenever they are found to be incompatible with fundamental substantive or procedural principles of domestic law. Now, it is difficult to see why a similar limit should not apply in the field of criminal law. However important a civil decision may be, involving the payment of damages or the seizure of assets, public policy considerations are even more mandatory and overriding with respect to criminal decisions calling for the arrest of a person and his subsequent surrender to another Member State. Thus, one would expect that safeguards in this field be more (not less) than in civil matters.

In this frame, and assuming always that the grounds for non-execution of the European arrest warrant illustrated above are exhaustive, there would seem to be some merit in certain criticism against the new extradition mechanism. As is well known, the Framework Decision has been the subject of a lively debate. The critics complain about the hasty adoption of this instrument in the aftermath of the 11 September 2001 tragedy; the enlargement of its scope to almost all criminal offences, while initially it was only meant to combat terrorism, organised crime and drug trafficking; the absence of rules providing for a minimum standard of procedural safeguards to be complied with by the judicial authority issuing the arrest order; the possibility that such order be issued by the prosecution service, that in certain countries is subject to the political direction of the government and, therefore, may not be considered as an independent and impartial authority. This just to mention some of the more controversial points (amongst the critics of the Framework Decision see *The European arrest warrant: threats or promise*, a paper presented by Mr. Justice Adrian Hardiman,

Judge of the Supreme Court of Ireland at the Conference of Presidents of the Supreme Courts and Attorneys General of Member States of the European Union held in Dublin, 29th to 31st May, 2002).

The responses to the above criticism are mostly centered on the "mutual trust" argument. The supporters of the new procedure emphasise that same is based on a high level of confidence between States sharing common legal traditions, in particular the respect for the principle of the rule of law. Moreover, all Member States must observe the European Convention for the Protection of Human Rights, which provides for the right of liberty and fair trial (Articles 5 and 6 of the Convention). This argument, however, is not flawless. One thing is confidence, even a high level of confidence; another the unlimited and unconditional execution of any arrest warrant issued in other Member States. The demand for a certain degree of safeguards does not appear unreasonable. The rules of the European Convention on Human Rights are not sufficient. Experience shows that violations of Articles 5 and 6 of the Convention by Member States (or States in the process to join the Union) are far from being rare; and the Strasbourg Court may deal with complaints by the victims of any such violations only after the exhaustion of all domestic remedies. So the Strasbourg Court cannot provide timely protection.

6. Explicit and implied grounds for non-execution of a European arrest warrant

It is not correct, however, to assume that the grounds for non-execution of the European arrest warrant are only the ones set out in Articles 3 and 4 of the Framework Decision. Those are the grounds explicitly labelled as such. But there are additional grounds that can be implicitly drawn from other provisions of the text. Reference is to be made in this regard to Article 1 paragraph 3, as well as to Recital 12 of the Framework Decision.

Article 1 (3) states that the 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". This language is somewhat strange. Article 6 of the EU Treaty refers to the principles of freedom, democracy and the rule of law, as well as to the fundamental rights as they result from the European Convention on Human Rights and the constitutional traditions of the Member States. It goes without saying that any acts of legislation adopted by Union's institutions must conform with said principles. But it is for the Court of justice, not for the European legislature, to assess and certify that this is the case. Thus, if Article 1 (3) is to serve a useful purpose, one has to go beyond a litteral construction of the text. In fact, what such provision actually requires is that the whole of the Framework Decision be interpreted and applied so as to always conform to the principles of art. 6 of the UE Treaty. More particularly, under Article 1 (3) a European arrest warrant should be rejected by domestic courts if its execution would entail an infringement of such fundamental principles.

The meaning of Article 1 (3) is confirmed and clarified by Recital 12 of the Framework Decision. Recital 12 contains three propositions. The first is of lesser interest for our purposes since it mirrors the wording of Article 1 (3), perhaps in a more peremptory manner and adding a reference to Chapter VI of the Charter of Fundamental Rights of the European Union. Let me just remind that Chapter VI of the Nice Charter deals with the rights related to justice. The second and third propositions are directly relevant to our point. Pursuant to the second proposition surrender of a requested person may be refused when there are objective reasons to believe that the arrest warrant of that person has been issued on the grounds of his sex, race, religion, ethnic origin, nationality,

language, political opinions or sexual orientation, or even that that person's position may be prejudiced for any of these reasons. The language used is particularly strong: "Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person…". The language of the third proposition of Recital 12 is by no means less effective. It says that a Member State is not prevented from applying its constitutional rules relating to due process and certain other matters (freedom of association, freedom of the press and other media).

The conclusions that one draws from the foregoing are of immediate evidence. Firstly, the list laid down in Articles 3 and 4 is in no way to be considered exhaustive. The grounds for non-execution of the European arrest warrant provided therein are complemented by those resulting from a combined reading of Article 1 (3) and Recital 12 of the Framework Decision. Secondly, these additional grounds are of paramount importance, in that they are meant to ensure the respect of fundamental principles of European and domestic constitutional law. As a matter of fact, they introduce into the system of the European arrest warrant a limit not dissimilar to that of public policy under the Brussels I Regulation. One may define it in terms of "constitutional public policy". Thirdly, the alleged failure by the Framework Decision to provide adequate safeguards in areas such as non discrimination, due process, right to liberty and defence, stems from an incorrect assumption. In fact, contrary to what is opined by certain critics, the Framework Decision does not prevent in any way Member States from applying domestic and European constitutional principles relating to those areas.

The question may be posed at this point whether the broadening of the grounds for non-execution of the European arrest warrant is such to prejudice the efficiency of the new mechanism. I don't think that there is any such risk. The need of an efficient tool to fight transnational crime within the Union is out of question. But the "mutual trust" argument referred to above should apply to judicial authorities both ways. Not only when they issue European arrest warrants, but also when they are called to execute them. No doubt that domestic courts will make use of the constitutional ordre public limit only in exceptional cases, to prevent patent (and grave) malfunctionings of the new procedure. This is how the public policy limit has operated in civil matters; there is no reason to fear that the impact will be different with regard to the European arrest warrant.

7. The position of the Italian government vis-à-vis the European arrest warrant

As regards the position of the Italian government towards the European arrest warrant, the facts are as follows. When the Framework Decision was submitted for approval to the Council of Ministers in Brussels of December 6 and 7, 2001, Italy expressed its dissent over the proposed text. For the Italian government the scope of the European arrest warrant should have been limited to few well defined criminal offences. Moreover, the new instrument was deemed to be in contrast with basic principles of the Italian constitution. The opposition of the Italian government blocked the approval of the Framework Decision at that meeting. In fact, the consent of the other 14 Member States was not sufficient, unanimity being required by the Treaty for the adoption of measures of this type. But, as evidenced by a press release of the office of the Italian Prime Minister on December 11, 2001, the opposition of the Italian Government was rapidly withdrawn (indeed, it did not last more than a few days). So, already on December 15, it was possible for the Laeken European Council to acknowledge that the European arrest warrant had received approval by all Member States. The Italian government announced, however, that upon the adoption of the Framework Decision it would have recorded a statement whereby implementation of the Framework Decision in Italy would have required appropriate adaptations of domestic law to take into account mandatory constitutional

requirements and to approximate the Italian judicial system to those of other Member States. The statement has been actually inserted in Annex 2 of the Framework Decision, when the latter was formally issued on June 13, 2002.

These being the relevant facts, two remarks can be made, one of procedure and one of substance. The first remark is linked to the time lapsed between the approval (mid December 2001) and the official adoption (mid June 2002) of the Framework Decision. Apparently, the postponement has been caused by the constitutional requirements of certain Member States (including U.K., Ireland, Sweden, Denmark and Holland). In other terms, the approval given by the governments of these States in December 2001 was not final; rather, it was subject to completion of internal parliamentary procedures. Hence the above mentioned delay of six months. Perhaps Italy could have made use of the same reservation. By so doing, it would have avoided both to remain isolated amongst the Member States (although only for a few days) and to be exposed to the ensuing negative comments on the international press.

The second remark bears on the alleged infringements of the Italian constitution. In this regard the Italian government seems to have relied upon an authoritative opinion rendered by two former presidents of the Italian constitutional court (see CAIANIELLO – VASSALLI, in Cassazione Penale, 2002, p. 462 ff.). In the views of these two eminent jurists the European arrest warrant breaches several provisions of the constitutional charter of Italy in the area of personal freedom, extradition and fair trial (for an opposite view see SELVAGGI – VILLONI, Questioni reali e non sul mandato europeo d'arresto, ibidem, p. 443 ff.). It is my impression, however, that the said opinion is based on an incorrect interpretation of the rules on the European arrest warrant. The Framework Decision is far from disregarding the constitutional requirements of domestic laws. On the contrary, as pointed out in the preceding paragraph, such requirements are covered by a general "without prejudice" clause. Hence, the constitutional public policy limit as a supplementary ground for non-execution of European arrest warrants by domestic courts. But even before the courts, recourse to that general clause can be made by the legislature, when implementing the Framework Decision in the national legal order. Under the EU Treaty framework decisions are basically like directives within the EC. They are binding upon the Member States as to the result to be achieved but leave to them the choice of form and methods. Unlike directives, however, framework decisions are expressly denied any direct effect. It appears, therefore, that it is possible for the Italian Parliament to implement the Framework Decision in such a manner to prevent constitutional infringements whilst preserving the scope and objectives of the European arrest warrant.