"Harmonizing procedural rights indirectly: The Framework Decision on trials in absentia"

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1. Introduction

When comparing the administration of Criminal Justice in the United States and the European Union you will immediately realize a significant difference: The United States have an elaborated federal system of Criminal Justice, the European Union has not. In Europe, it is still the single Member State being in charge of criminal prosecution and sentencing and, by this, providing security for its citizens. The predominant role of the Member States in the area of freedom, security and justice (Article 67 of the Treaty on the Functioning of the European Union – TFEU) is illustrated by the fact that even the European Public Prosecutor – once he is established - will have to lodge an indictment at the national court of a Member State.[1] Thus, talking about European Criminal Justice we do not refer to a European Criminal Court, nor to a European Code on criminal procedure, but on a rapidly expanding set of rules on cooperation in criminal matters. Correspondingly, the Union's action in the framework of police and judicial cooperation in criminal matters has focused on initiatives in the area of mutual legal assistance in order to overcome traditional impediments to transnational criminal law enforcement.

In a European Union whose citizens can move freely from one Member State to another (Article 21 TFEU) the transnational enforcement of criminal law is essential. This is why the smooth functioning of cooperation in criminal matters has become a key element of the area of freedom, security and justice. Meeting this challenge, the European has replaced the traditional regime of mutual legal assistance by new cooperation instruments. So, the European Arrest Warrant[2] took the place of various multilateral treaties in the framework of the Council of

[1] See Article 86 sect. 1 of the Treaty on the Functioning of the European Union (TFEU).

[2] See the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Official Journal L 190 of 18 July 2002, p. 1).

Europe and the European Union and bilateral agreements between the Member States.

These new instruments have been based on the principle of mutual recognition, i.e. the idea that a judicial decision that has been delivered in one Member State can be recognized and executed by the authorities of another Member State. Since the Member States of the European Union share common values and principles (rule of law, democracy, respect for human rights) the Member States shall be permitted to trust in the legality of the judgment of another Member State's court.

This sounds rather simple-hearted and obviously neglects the fact that we are still facing a lot of differences in the national criminal justice systems and – as a consequence – different standards as well. Correspondingly, the principle of mutual recognition is riddled with a lot of reservations.

In German court practice, the provision on convictions in absentia has emerged to one of the most important exceptions.[3] The different standards applying to trials in absentia in the Member States are illustrated by the Krombach case.[4]

Krombach was a German national living in South Germany. His second wife had a daughter from a previous marriage with a French national. During the summer of 1982 the daughter was on school holidays at Krombach's home. One morning, she was found dead in her bedroom. The police started an investigation, but found no evidence of assault. As a consequence, the public prosecutor's office decided to take no further action in the case. After his appeal against this decision had been dismissed the father of the deceased girl lodged a criminal complaint with the investigating judge in Paris. In 1991, Krombach was charged with the crime of assault resulting in involuntary death. He was summoned for trial, but did not appear in court. He was found guilty and sentenced to fifteen years' imprisonment in absentia without his defence counsel being heard. Germany – and later on Austria as well – refused to extradite Krombach to the French authorities. In 2001,

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[3] See e.g. Higher Regional Court (Oberlandesgericht) Karlsruhe, Decision of 13 July 2007 – 1 AK 48/06, (2008) Neue Zeitschrift für Strafrecht – Rechtsprechungsreport 112; Higher Regional Court Stuttgart, Decision of 9 January 2008, 3 Ausl 134/07, (2008) Neue Zeitschrift für Strafrecht – Rechtsprechungsreport 175; Higher Regional Court Köln, Decision of 12 August 2010 – 6 AuslA 28/102; Higher Regional Court Karlsruhe, Decision of 4 January 2011 – 1 AK 51/10.

[4] See European Court of Human Rights (ECtHR), judgment of 13 February 2001, Application no 29731/96; see also European Court of Justice, judgment of 28 March 2000, Case C-7/98, (2000) ECR 1935.

the European Court of Human Rights stated that the trial in France had been in breach with Article 6 of the European Convention on Hum Rights. In 2009, Krombach was kidnapped and handed over to the French Police; he is now facing a new trial before the French courts.

Admittedly, the decisions of the French, German and European Courts on this case have been delivered before the principle of mutual recognition has been adopted as the new paradigm of cooperation in criminal matters. However, the case clearly reveals that blind trust cannot serve as a basis for the transnational enforcement of criminal law. Reservations such as the ordre-public-clause and a judicial review in the executing Member State are still necessary.

The main question still is how to balance mutual trust and judicial control in the executing (requested) Member State, i.e. the efficiency of transnational cooperation on the one hand and the rights of the accused on the other. Harmonising the rights of the accused can help to find the balance between these two and, thereby, to enhance cooperation between the Member States. This paper will not discuss the initiatives to harmonise the rights of the accused as a whole but focus on trials in absentia and a specific function of harmonisation, i.e. providing a common basis for an effective cooperation between the Member States. To that end, the paper shall address three different aspects:

- the concept of mutual recognition and the role of standard-setting (2.);
- the minimum standard for trials in absentia that can be derived from the case-law of the European Court of Human Rights (3.);
- the standard defined by the Framework Decision on trials in absentia[5] (4.).

2. The principle of mutual recognition

The principle of mutual recognition has emerged from the free movement of goods, persons and services and the establishment of the internal market. According to this principle, goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State even if

[5] Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (Official Journal, L 81 of 27 March 2009, p. 24).

they are produced to technical or quality specifications different from those applied to its own products.[6] In the Tampere summit of October 1999, the European Council transplanted the principle of mutual recognition to the area of police and judicial cooperation in criminal matters.[7] As has been mentioned above, the first measure implementing this principle is the Framework Decision on the European Arrest Warrant.

The new paradigm has been subject to severe criticism. As a matter of principle, mutual recognition might apply to goods and services, but not to arrest and search warrants, i.e. to measures seriously interfering with fundamental rights of the individual.[8] Nevertheless, a closer look at the traditional regime of mutual legal assistance reveals that the idea of mutual recognition is not alien to international cooperation.[9] On the other hand, the ambit of mutual trust is still rather limited, even in the European Union.

International Cooperation in criminal matters requires the states to accept that they will assist another state in criminal proceedings that will be conducted on the basis of foreign law (the law of the requesting state). When extraditing the suspect the requested state acknowledges that the proceedings will follow the *lex fori* that might be quite different from its own law on evidence, the legal status of the parties etc. If a state is not willing to accept this it will not afforded legal assistance to its own proceedings either. So, mutual recognition is deeply rooted in the principle of reciprocity (*do ut des*) and can be considered to be an integral part of international cooperation in criminal matters.

However, mutual recognition in international cooperation is subject to limitations. If the proceedings in the requesting state are in breach with constitutional principles of the requested state the latter will refuse to grant legal assistance. This holds true for criminal law enforcement in particular because the accused faces

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[6] See in this regard European Court of Justice, Case 12/78 (Cassis de Dijon), judgment of 20 February 1979, (1979) ECR 649 (para 14); see also the white paper of the Commission on the completion of the internal market, COM (1985) 310 final (para 61 et seq.).

[7] Conclusions of the Presidency of 15/16 October 1999 (No 37).

[8] See S. Peers, *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, (2004) Common Market Law Review 5 (23 et seq.).

[9] S. Gleß, *Zum Prinzip der gegenseitigen Anerkennung*, 116 (2004) Zeitschrift für die gesamte Strafrechtswissenschaft 353 (357).

serious interferences with his/her fundamental rights. This is what the discussion on the scope of the ordre-public-clause is about: the protection of human rights.

Transferring the principle of mutual recognition to the area of cooperation in criminal matters, the Council shifted the balance towards effective criminal law enforcement. Invoking the idea of mutual trust between the Member States, the Council abolished traditional obstacles to extradition when adopting the Framework Decision on the European Arrest Warrant. Nevertheless, the impact of the principle of mutual recognition is rather limited since the Framework Decision still contains the majority of traditional reservations. Thus, mutual recognition does not mean automatic execution, but leaves room for judicial review by the courts of the requested Member State.

A closer look at the European Arrest Warrant reveals that the new regime does not change the traditional extradition very much. In essence, the changes are limited to three aspects:

Firstly, the double criminality requirement has been abolished for 32 categories of crime.[10] These crimes are supposed to reflect a common understanding of what kind of behaviour should be considered a criminal offence. Since these categories are not yet fully harmonised this assumption can be doubted. In that regard, the Framework Decision is based upon mutual trust. The national criminal law of the Member States is supposed not to be in breach with fundamental principles and human rights in particular.

Secondly, the Framework Decision has lifted the ban on extradition of own nationals[11] that is deeply rooted in the constitution of various Member States. Nevertheless, this principle appears to be in conflict with the prohibition of discrimination on grounds of nationality (Art. 18 TFEU). Thus, the Framework Decision is mainly based upon the consideration that the nationality of the suspect should not protect him from being prosecuted in the Member State in whose territory the crime has been committed. The principle of mutual recognition cannot be considered to be the ratio of the duty to extradite own nationals; however, mutual trust in the criminal justice systems is an essential precondition for a waiver of the constitutionally guaranteed ban on extradition of own nationals.

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[10] Article 2 sect. 2 of the Framework Decision (supra note 2).

[11] Cf. Article 4 No 6 and Article 5 No 3 of the Framework Decision (supra note 2).

Thirdly, the Framework Decision does not provide for any exceptions relating to political, fiscal and military offences.[12] In this regard, the reasoning is similar to the considerations on the double criminality requirement.

Apart from these aspects, the traditional obstacles to extradition still apply to the new regime. The Framework Decision contains a list of 13 obligatory and optional grounds for non-execution of a European Arrest Warrant.[13] In this list, the Framework Decision has compiled a catalogue of the obstacles to extradition originating from international treaties and national extradition law of the Member States. Most of those obstacles are intended to protect the rights of the accused. In the end, this catalogue has become quite extensive. Partially going beyond the ambit of national extradition law, the implementation of the Framework Decision triggered the introduction of new obstacles to extradition.

In Germany, this has happened with regard to life imprisonment. Although German extradition law does not prohibit the extradition of a suspect who faces life imprisonment, the German legislator has implemented the corresponding exception in the Framework Decision.[14] According to the new provision, the convicted person shall be entitled to apply for a judicial review of the penalty at the latest after 20 years.[15]

However, this reservation only applies to the execution of a European Arrest Warrant, i.e. to requests for extradition issued by another Member State. As a consequence, a suspect facing life imprisonment may be extradited to a Non-Member State (e.g. the United States) without a guarantee for a review procedure being necessary.[16] This result seems at odds with the very idea of mutual recognition and mutual trust because it reflects that Germany has less confidence in a Member State than in any third state. The situation can be regarded as a paradox: The more the European Union and its Member States care for the

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[12] Cf. recital (12) and Article 4 No 1 of the Framework Decision (supra note 2).

[13] Article 3, 4 and 5 of the Framework Decision; see also Art. 1 sect. 3 for the European ordre public (replacing the national ordre-public-clauses of the Member States).

[14] Art 5 No 2 of the Framework Decision (supra note 2).

[15] Section 83 No 2 of the Act on Mutual Legal Assistance; see also the explanatory memorandum to the draft of the German Act, Bundestags-Drucksache No 15/1718, p. 21; see also Higher Regional Court Köln, Decision of 27 April 2009 – 6 AuslA 25/08.

[16] The chance of being pardoned is considered to be sufficient, see German Constitutional Court, judgment of 6 July 2005 – 2 BvR 2259/04, 113 official Court Reports 154 (163 et seq.).

protection of human rights the more they will insist on these rights to be respected by other Member States in cooperation in criminal matters.

The distinction between Member States and Non-Member States is due to the fact that Member States have accepted certain standards as a common basis for cooperation in criminal matters (such as the European Convention on Human Rights and the Union's Charter of Fundamental Rights). As a consequence, a Member State insisting on compliance with these standards cannot be regarded as hampering the smooth functioning of cooperation in criminal matters. By contrast, it contributes to an indirect enforcement of this common standard.

A similar reasoning applies to optional grounds for refusal such as life imprisonment. Although a uniform standard is not yet defined by European Union Law, the Framework Decision takes up the concerns raised by life imprisonment and thereby favours a human rights oriented approach to the new extradition regime. By adopting optional grounds for refusal the Union is setting human rights standards by soft harmonisation. Member States are not obliged to amend their legislation on life imprisonment, but if they refuse to do so they will risk that a European Arrest Warrant will not be executed by another Member State insisting on the standard adopted in the Framework Decision. This approach can be defined as indirect harmonisation.

To sum up, mutual recognition does not call for "blind trust", but has to based upon a common standard. The closer the cooperation is the stricter standards can be applied without hampering the transnational enforcement of criminal law. This reasoning applies not only to obligatory (minimum) standards, but to optional standards (soft harmonisation) as well.

3. Trials in absentia and Art. 6 ECHR

As regards trials in absentia, the European Convention on Human Rights (ECHR) establishes a minimum standard all Member States have to comply with. The European Court of Human Rights had several occasions to discuss under what conditions a trial in absentia can be considered to be compatible with the right to a fair trial (Art. 6 ECHR).

According to the case-law of the Court, the right to a fair hearing by a tribunal (Art. 6 (1) ECHR) comprises the right to take part in the hearing. This right can be derived from the defence rights in Art. 6 (3) ECHR, such as the right to defend

himself in person and to examine witnesses because the accused cannot exercise these rights without being present.[17] As a consequence, the accused must be notified of the hearing in order to exercise his right to take part in the trial. If the accused has been notified it is up to him to appear at the hearing or to waive the exercise of this right. However, such a waiver must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance.[18]

The waiver must not only be voluntary, but must also constitute a knowing and informed relinquishment of the right concerned.[19] In concrete terms, it is not sufficient that defendant has vague and informal knowledge of criminal proceedings that have been instituted against him; a waiver rather requires an official and precise notification of the charge and the trial.[20] Before an accused can be said to have tacitly waived his right to take part in the trial it must be shown that he could reasonably have foreseen what the consequences of his absence would be.[21]

Particular difficulties arise if the accused makes himself unavailable to be informed of and to participate in the proceedings in order to escape trial. If the accused has been notified of the charges and, thus, should reasonably have foreseen the consequences a conviction in absentia will not violate the right to a fair trial.[22] According to the Court, seeking to escape trial the accused forfeits his right to participate in the hearing.[23] Although the Court does not consider this

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[17] European Court of Human Rights, judgment of 12 February 1985, Application No 9024/80 (Colozza v. Italy), para 27.

[18] European Court of Human Rights, judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 31.

[19] European Court of Human Rights, judgment of 22 December 2009, Application No 5962/03 (Makarenko v. Russia), para 135.

[20] European Court of Human Rights, judgment of 12 October 1992, Application No 14104/88 (T v. Italy), para 28.

[21] European Court of Human Rights, judgment of 1 March 2006, Application No 56581/00 (Sejdovic v. Italy), para 87.

[22] European Court of Human Rights, judgment of 28 February 2008, Application No 68020/01 (Demebukov v. Bulgaria), para 45-46 and 57.

[23] See European Court of Human Rights, judgment of 12 December 2001, Application No 20491/92 (Medenica v. Switzerland), para 55; judgment of 1 March 2006, Application No 56581/00 (Sejdovic v. Italy), para 82-83.

conduct as an implicit waiver the reasoning (foreseeability of the consequences) is quite similar.

If the above-mentioned conditions are not met the trial may not be held in the accused's absence. A conviction in absentia, however, does not violate the right to a fair trial if the convicted person can subsequently obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact.[24] Once again, it is up to the accused to decide whether to apply for review or to waive the exercise of this right. In any case, the review proceedings may not be made subject to the condition that the accused can prove that he was not seeking to evade justice or that his absence in the trial was due to force majeure.[25]

In short, trials in absentia are considered to comply with the right to a fair trial if the accused has waived or forfeited the right to be present at the hearing. As regards the waiver, the reasoning of the Court is based on the consideration that the Convention confers individual rights, not obligations.[26] It is the accused who decides whether to exercise these rights or not. The waiver, thus, can be regarded as an integral part of the relevant individual right.

By contrast, the forfeiture of procedural rights might turn out to be a Pandora's box containing a variety of sanctions for the failure of the accused to attend the trial.[27] Accordingly, the Court has emphasised that the national legislator must be able to discourage "unjustified absence". The sanctions must, however, comply with the principle of proportionality. Since the right to be defended by a lawyer is a fundamental element of a fair trial, the suppression of this right would be a disproportionate sanction. In the absence of the accused representation by his

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[24] European Court of Human Rights, judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 31.

[25] European Court of Human Rights, judgment of 12 February 1985, Application No 9024/80 (Colozza v. Italy), para 30.

[26] Concurring Opinion of Judge Bonello, in: European Court of Human Rights, judgment of 21 January 1999, Application No 26103/95 (van Geyseghem v. Belgium).

[27] See for a detailed analysis: K. Gaede, *Fairness als Teilhabe – Das Recht auf konkrete und wirksame Teilhabe durch Verteidigung gemäß Art. 6 EMRK*, Duncker und Humblot Berlin 2007, p. 775 et seq.

defence counsel will be his only chance of having arguments of law and fact in respect of the charge against him.[28]

The Court's concept of forfeiture is based on the premise that the accused is not only entitled, but obliged to appear at the trial. According to the Court, this obligation comes from the need to verify the accuracy of the statements of the accused and to compare them with those of the victim and of the witnesses.[29] But this does not seem to be a convincing argument because the accused has an inalienable right to silence and a mute defendant is as productive as an absent defendant.[30] Thus, the benefit from an obligation of the accused to attend the trial is rather limited. On the other hand, as the analogy to the right to silence reveals, the states are not permitted to make the right to a fair trial subject to the condition that the defendant gives himself up at prison. The guarantees set out in Article 6 ECHR may not be used as a whip to make the accused appear in court.[31]

Maintaining the capital importance of the presence of the accused, the Court argued that the defendant should appear because of his right to a hearing[32], so attending the trial will serve his own interests. This is however a reasoning that is incompatible with any kind of sanction for the failure to appear in court because this would turn a legal right into a binding obligation. What we are facing here is the problem of legal paternalism. As has been mentioned above, the Court has held that a waiver must be attended by minimum safeguards commensurate to its importance. Shall a person that has been accused of murder be able to waive his right to be present at the trial even if he thereby acts against his own interest?

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[28] European Court of Human Rights, judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 35; judgment of 21 January 1999, Application No 26103/95 (van Geyseghem v. Belgium), para 33-34.

[29] European Court of Human Rights, judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 35.

[30] Concurring Opinion of Judge Bonello, in: European Court of Human Rights, judgment of 21 January 1999, Application No 26103/95 (van Geyseghem v. Belgium).

[31] See for the right to legal assistance: European Court of Human Rights, judgment of 21 January 1999, Application No 26103/95 (van Geyseghem v. Belgium), para 34; judgment of 13 February 2001, Application no 29731/96 (Krombach v. France), para 89-90; for the right to appeal: judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 37-38; judgment of 13 February (Krombach, ibid.), para 96 et seq..

[32] European Court of Human Rights, judgment of 23 November 1993, Application No 14032/88 (Poitrimol v. France), para 35.

Under what conditions we can allow the defendant to waive the exercise of this right?

According to the case-law of the Court, absence of constraint is at all events one the conditions to be satisfied.[33] It must be doubted whether an accused who faces ten years imprisonment (or more) waives voluntarily his right to be present at the hearing when he seeks to escape trial and imprisonment. In the eyes of the Court, by doing so, the accused forfeits his right to a hearing, but this is a reasoning that is implicitly based on an obligation of the accused to give himself up at prison and that has been found to be incompatible with the very idea of the procedural guarantees in Article 6 ECHR.

In conclusion, the limitations to the right to be present at court as construed by the Court give rise to serious objections. Nevertheless, it has to be kept in mind that the European Convention on Human Rights sets out minimum standards. Correspondingly, state parties still have a margin of discretion when implementing these standards into national law and the European Court of Human Rights must take this into consideration. So, it will be up to the national legislator and the European Union to go beyond these minimum standards in order to strengthen the rights of the accused.

4. The Framework Decision on trials in absentia

Due to its relevance in extradition practice, the Framework Decision on the European Arrest Warrant already provided for legal guarantees relating to trials in absentia.[34] In 2009, this provision has been replaced by the Framework Decision on trials in absentia.[35] Although the Framework Decision expressly refers to Article 6 ECHR[36], it is not designed to harmonise national legislation on trials in absentia, but to redefine the grounds for non-recognition of a European Arrest Warrant and other cooperation instruments.[37] Nevertheless, by doing so, the

[33] European Court of Human Rights, judgment of 27 February 1980, Application No 6903/75 (Deweer v. Belgium), para 49.

[34] Article 5 No 1 of the Framework Decision (supra note 2).

[35] Article 4bis of the amended Framework Decision (supra note 5).

[36] Recital (1) of the Framework Decision (supra note 5).

[37] Recitals (4), (6) and (14) of the Framework Decision (supra note 5).

Framework Decision triggers indirect harmonisation of national law on criminal procedure.

The Framework Decision is closely orientated to the case-law of the European Court of Human Rights, but provides for more detailed rules on the conditions under which a conviction in absentia can be considered to be compatible with the right to a fair trial. In general, the Framework Decision is based on the principle that trials in absentia can solely be recognized on the ground that the accused has unequivocally waived his right to be present at the trial. In order to ensure that his absence can be assumed to be based upon a voluntary and deliberate decision not to exercise his right the Framework Decision requires the accused to be provided with detailed information.[38]

According to the Framework Decision, the accused can be assumed to have waived this right if he has received official information of the scheduled date and place of the trial and he was informed that a decision on his case may be handed down if he does not appear for the trial. It has to be unequivocally established that the accused is aware of the scheduled trial.[39] This will not be the case if the accused has received the information in a language he does not understand.[40]

So, the Framework Decision does not follow the reasoning of the European Court of Human Rights that an accused who seeks to evade justice forfeits his right to participate in the hearing. If a person who absconds and makes himself unavailable to be informed of the trial is convicted in absentia, the conviction will not have to be recognized by another Member State. The Framework Decision thereby acknowledges that the accused may not be deprived of his right to a hearing in order to force him to turn himself in to police. Correspondingly, the considerations emphasize that the waiver must be based on the free will of the accused.[41]

However, the relevant provision does not expressly state that the accused's absence during the trial must not be due to constraint (the fear of being arrested

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[38] Recital (1) of the Framework Decision (supra note 5).

[39] Art. 4bis sect. 1 lit. a of the amended Framework Decision (supra note 5)

[40] European Court of Human Rights, judgment of 19 December 1989, Application No 10964/84 (Brozicek v. Italy), para 40-41 and 45; see also Directive of 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings (Official Journal L 280 of 26 October 2010, p. 1).

[41] Recital (1) of the Framework Decision (supra note 5).

and held in custody). Furthermore, the Framework Decision has been criticised for not having made the presence of the accused obligatory in proceedings relating to serious crimes.[42] In any case, if imprisonment for several years is at stake the waiver should be made subject to additional safeguards (legal advice, formal requirement of an express waiver before a judge).[43]

In legal practice, however, these concerns are not expected to become relevant: A person accused of a serious crime will be arrested and, thus, be present at the trial, or he will have managed to escape before being arrested. In that case, the authorities will not be able to inform him of the scheduled trial and, as a consequence, a trial in absentia will not comply with the standard of the Framework Decision.

A waiver of the right to a hearing can not only be derived from the deliberate absence of the accused, but from a mandate to a defence counsellor as well.[44] Accordingly, the accused must be aware of the scheduled trial when giving the mandate to a legal counsellor to defend him at the trial. The waiver must be based upon the free will of the accused and the accused must deliberately have chosen to be represented by a legal counsellor instead of appearing in person at the trial.[45] So, by contrast, a waiver cannot be established in an unequivocal manner if the accused has given the mandate to his counsellor in order to be at least represented at trial, but does not appear in court because he is afraid of being arrested.

If the trial does not meet the conditions set out above the accused should be granted the right to a retrial, or an appeal, in which he has the right to participate and which allows the merits of the case to be re-examined.[46] Despite some ambiguities in the wording, the substantial requirements of the Framework Decision can thus be deemed to be compatible with the minimum standard of the European Convention on Human Rights; to some extent (relating to persons seeking to evade justice) they are even going beyond this standard.

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[42] Response of the Association of Judges (Stellungnahme des Deutschen Richterbundes) of March 2008, http://www.drb.de/cms/index.php?id=465.

[43] See in this regard Article 3 sect. 8 of the Directive on interpretation and translation in criminal proceedings (supra note 40).

[44] Article 4bis sect. 1 lit. b of the Framework Decision (supra note 5).

[45] Recital (10) of the Framework Decision (supra note 5).

[46] The details of this right and its waiver are set out in Article 4bis (1) lit. c and d, (2) and (3) of the Framework Decision (supra note 5).

There are, however, two critical points. Firstly, the Framework Decision defines merely optional grounds for non-execution of a European Arrest Warrant. Since the standard defined in the Framework Decision is mainly based upon the case-law of the European Court of Human Rights it cannot be up to the Member State to decide whether to abide by this standard or not. A violation of the right to be present at the trial ought to be a mandatory, not an optional ground for refusal.[47]

The second point is closely linked with the principle of mutual recognition. According to the Framework Decision (Article 4bis sect. 1), the executing Member State is obliged to surrender the suspect if the European Arrest Warrant "states" that the conditions set out above are met. So, pursuant to the principle of mutual recognition the assurance of the requesting (issuing) Member State should be sufficient.[48]

This mechanism has been subject to severe criticism. It has been argued that it cannot be up to the issuing Member State to assess whether the proceedings conducted by its own authorities are in conformity with the right to a fair hearing in court. The issuing authority just had to fill in the relevant section of the form set out in the Framework Decision and the requested Member State were obliged to surrender the accused person. Ticking the right box would be enough to trigger this obligation.[49]

However, the obligation to execute the European Arrest Warrant requires more than ticking a box. A closer look at the form reveals that the issuing authority has to transmit further information about how the conditions set out in the Framework Decision have been met.[50] This obligation does not make any sense if the executing authority is prohibited from reviewing the assessment of the issuing authority. As far as the execution of convictions is concerned the Framework Decision expressly provides for a consultation mechanism on this issue.[51] So, there is no "blind trust" in the assessment of the issuing Member State, but the

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[47] See also recital (14) of the Framework Decision (supra note 5).

[48] Recital (6) of the Framework Decision (supra note 5).

[49] Openeurope – briefing note: EU strengthens trials in absentia – Framework Decision could lead to miscarriages of justice, http://www.openeurope.org.uk/research/tia.pdf.

[50] See the amended form following Article 4bis of the amended Framework Decision (supra note 5).

[51] See Art. 7 (3) of the (amended) Framework Decision 2005/214/JHA.

executing authority is still competent for review.[52] This holds true in particular for a suspect challenging the information transmitted by the issuing Member State.

Furthermore, it is not only the issuing, but also the executing Member State that is in charge of ensuring respect for the rights of the accused. The Framework Decision clearly states that it shall not have the effect of modifying the obligation to respect fundamental rights, including the right of defence.[53] Generally speaking, the Framework Decision must be interpreted in conformity with the fundamental principles of EU law including the right to a fair hearing.[54] As a consequence, the executing Member State still has to assess whether the proceedings in the issuing Member State comply with the standard of the ECHR. Since the main objective of the Framework Decision is to enhance the procedural rights of persons subject to criminal proceedings[55], the executing state should be competent for review as well with regard to the optional higher standard of the Framework Decision.

In conclusion, despite some ambiguities the Framework Decision on trials in absentia is a step forward because it establishes at least in part a standard going beyond the European Convention. Admittedly, the step is a small one and not very ambitious. Taking into account the main objective of the Framework Decision – to enhance the rights of the accused – the Council did not walk the talk. It is still up to the Member States to ensure respect for the right to be present at the hearing.

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[52] The same applies to the waiver of the double criminality requirement for 32 offences (Art. 2 sect. 2 of the Framework Decision on the European Arrest Warrant): Although the waiver applies to the offences "as they are defined by the law of the issuing Member State" the executing Member State is still competent for review, see

[53] Article 1 sect. 2 of the Framework Decision (supra note 5).

[54] See in this regard: ECJ, European Court of Justice, judgment of 28 March 2000, Case C-7/98 (Krombach), (2000) ECR 1935 (para 37 et seq.); see also the opinion of Advocate General Shaprston of 5 December 2006, in: European Court of Justice, Case C-288/05 (Kretzinger), (2007) ECR I-6442, para 92 et seq.

[55] Article 1 sect. 1 of the Framework Decision (supra note 5).

5. Conclusion

Although the principle of mutual recognition has become a cornerstone of the area of freedom, security and justice the implementation of this principle is a process that has just started. Since the process is still at its very beginning the Member States cannot be expected to rely on "blind trust" nor to "automatically" execute the request of another Member State. The new paradigm rather has to be complemented by standard-setting and review procedures, building trust on the basis of a step-by-step-approach.

The Framework Decision on trials in absentia illustrates that a common standard can be defined by indirect harmonisation showing respect for the Member States' procedural autonomy. In contrast to direct harmonisation the national legislator still can decide whether to adapt the national Code of Criminal Procedure to the European standard or to accept that other Member States will not execute decisions that are incompatible with this standard. Its scope being strictly limited to the framework of cooperation in criminal matters, indirect harmonisation can be regarded as a concession to the principle of subsidiarity (Art. 5 sect. 3 TEU). This might help the Union to overcome Member States' opposition to harmonising national legislation on criminal proceedings. However, indirect harmonisation illustrates as well that the impact of optional standards (soft harmonisation) is limited. Leaving implementation up to the Member States favours different national standards and thereby hampers a smooth functioning of the new cooperation mechanisms.

Taking human rights seriously, European Standards must be considered to be more than a mere concession to some Member States insisting on national peculiarities. The trial in absentia example illustrates that a common standard can be derived from the European Convention on Human Rights and the case-law of the European Court, i.e. a minimum standard that is binding upon the Member States. A European Union having committed to enhancing the rights of the accused is thus expected to take into account the concerns that have been raised by convictions in absentia and to establish a mandatory standard that effectively guarantees the right to be present at the hearing.