

Mutual Recognition in Criminal Matters: The Danish Experience

Jørn Vestergaard¹ & Silvia Adamo²

1	Introduction	432
2	The 1960 Nordic Act and the 1967 Common Act on Extradition	433
2.1	Legislation Preceding Transposition of the EAW-FD	433
2.2	The 2003 Transposition Act	434
2.3	Judicial Authority and Available Judicial Remedies	437
2.4	Extradition of own Nationals	438
2.5	Political Offence Exception	438
2.6	Double Criminality and Territoriality Clause	439
2.7	Bars to Extradition	441
2.8	Human Rights	441
2.9	Torture and Other Inhuman or Degrading Punishment or Treatment.....	442
2.10	Humanitarian Considerations	442
2.11	Overall Account of the EAW-FD Transposition into Danish Law	442
3	The Act on Execution of Decisions in Criminal Matters in the EU ...	442
3.1	Offences not Covered by Article 2(2) EAW-FD	444
4	Practitioners' Assessment of Negotiation Outcomes	444
4.1	General Evaluation of the Mutual Recognition Instruments	445
4.2	Assessment of Current Developments	446
4.3	Involvement of Practitioners in Negotiations	446
4.4	Practical Problems Concerning Cooperation Matters	447
4.5	Outlook for Future Cooperation Requirements	448

1 Professor of Criminal Law, Faculty of Law, University of Copenhagen, <http://jura.ku.dk/jv>.

2 Research Fellow, Faculty of Law, University of Copenhagen.

5	Transposition of Mutual Recognition Instruments	448
5.1	Constitutional Setting and Parliamentary Tradition	450
5.2	The Transposition of Mutual Recognition Instruments	450
5.3	Problems Encountered Concerning Transposition	451
5.4	Practitioners' Involvement During the Transposition Process	451
5.5	Reciprocity and Territoriality Issues	452
5.6	Procedures for Executing a Decision Issued in Another Member State	452
5.7	Issues Regarding Fundamental Rights	453
6	Practical Application of Judicial Cooperation Instruments	453
6.1	Introductory Remarks	453
6.2	Practical Difficulties in the Application of Mutual Recognition Principle	454
6.3	Knowledge of Legal Instruments Regarding Mutual Recognition	455
6.4	Cases and Feed-back	456
6.5	Outlooks for Improvement – a Database on Definitions of Offences?	457
7	Conclusions	458
	Appendices	460

1 Introduction

The study reported in the following is in part based on information provided by a comprehensive sample of legal practitioners possessing extensive experience within the field of international criminal law cooperation.³ Before turning to an account of the experts' evaluation regarding the implementation of mutual recognition instruments, an overview of the relevant legislation will be presented.

Denmark joined the EEC in 1973. In the wake of a rejection by public referendum of accession to the Maastricht Treaty in 1992, a so-called »national compromise« was struck between a majority of political parties. As a

3 *The future of mutual recognition in criminal matters in the European Union*, Gisèle Vernimmen-Van Tiggelen, Laura Surano and Anne Weyembergh (eds.), Brussels, Editions de l'Université de Bruxelles, 2009. All 13 respondents are prominent legal experts who are currently or have recently been involved in the negotiation, transposition or application of the framework decisions at focus in the study. In Denmark, the administration of international criminal matters is concentrated in Government agencies well represented by the public servants among the respondents. The complete report of the study has been published on the European Commission (DG JLS) website, *see* the following link at point 4) Background documents: "ec.europa.eu/justice_home/doc_centre/criminal/recognition/doc_criminal_recognition_en.htm".

consequence, the Maastricht Treaty was supplemented by the Edinburgh Agreement between Denmark and the then 11 other Member States, providing Denmark with a number of opt-outs from participation in EU policies in the areas of union citizenship, monetary policy, the defence dimension, and Justice and Home Affairs. Subsequently, an additional referendum was conducted in 1993, this time concluding in an approval. Thus, Denmark participates fully in the intergovernmental cooperation on Justice and Home Affairs under the Third Pillar, for instance in the fight against terrorism, but is in general not a party to supranational cooperation under the First Pillar. Denmark also participates in the Common Foreign and Security Policy except for decisions and actions with defence implications.

Danish legislation on mutual recognition in criminal matters is subsumed into two major acts:

- *The 1967 Extradition Act*, as amended in 2003 and subsequently.⁴
- *The 2004 Act on Execution of Decisions in Criminal Matters in the European Union*.⁵

2 The 1960 Nordic Act and the 1967 Common Act on Extradition

2.1 Legislation Preceding Transposition of the EAW-FD

Prior to the transposition of the Council Framework Decision on the European Arrest Warrant (hereinafter: the EAW-FD), Danish extradition law encompassed two separate acts.⁶ The first legislation on extradition matters to be enacted in Denmark was the 1960 *Act on Extradition of offenders to other Nordic countries* (the Nordic Extradition Act). By 1967, a common *Act on Extradition of offenders* (the common Extradition Act) was at long last passed, thus implementing the European 1957 Convention on Extradition while upholding the above mentioned Nordic Extradition Act.

Compared to the provisions in the 1967 common Act, the legislation regulating extradition relations between the Nordic countries is characterized by less restrictive conditions for extradition and more simplified procedures. This is a reflection of the mutual confidence and trust between these neighbouring countries as a result of a relatively high degree of similarity in terms of cultural

4 1967 common Extradition Act 249 of 9 June 1967 [*Lov om udlevering af lovovertrædere*]. The current consolidation of the Extradition Act is Consolidation Act [*lovbekendtgørelse*] 833 of 25 August 2005.

5 Act 1434 of 22 December 2004.

6 See also Vestergaard, J. in A. Górski & P. Hofmanski (eds.), *The European Arrest Warrant and its Implementation in the Member States of the European Union*. Wydawnictwo C.H.Beck, 2008, pp. 47-53 and 189-232. For a more elaborate account of the state of legislation in Denmark with regard to extradition, see Vestergaard, J. (article in Danish): »Den europæiske arrestordre. Udlevering til strafforfølgning mv.« *Tidsskrift for Kriminalret* 9/2004, pp. 555-567.

and legal traditions. From a Danish perspective, relations between the Nordic countries, as well as the broader activities of the Council of Europe, have been important preludes to the recent efforts in judicial cooperation under the Third Pillar on the extradition of suspects, defendants and convicts.

Both of the two mentioned acts were amended for the implementation of the EAW-FD.

2.2 *The 2003 Transposition Act*

The process of transposing the EAW-FD into Danish law was completed by the end of May 2003, Denmark being one of the first Member States to complete implementation. This early implementation by means of legislative action undoubtedly had the effect of rendering the EAW the mutual recognition instrument that is most commonly known and practised by Danish authorities to date.⁷

The passing of the Government's bill signified Parliament's consent to the Government's participation, on Denmark's behalf, in the adoption of the EAW-FD.⁸ Before political agreement is concluded in the Council, the Danish Government will in general ensure that a sufficient negotiation mandate has been obtained from the legislature, *i.e.* the Parliament of Denmark, *Folketinget*.⁹ If domestic legislation needs amendment, a bill will often be introduced at an early stage.

The amended chapters in the 1967 common Extradition Act specifically concern relations with other EU Members States. The new rules concerning extradition from Denmark to another EU Member State on an EAW are contained in Chapter 2(a) (conditions for extradition) and Chapter 3(a) (procedures for dealing with such cases) of the Extradition Act.

The amended provisions of the common Extradition Act, enforced on 1 January 2004, apply to requests for extradition submitted after that date.¹⁰

The Ministry of Justice stipulated that the new concepts used in the EAW-FD do not differ substantively from the content of traditional terminology, so the

7 The EAW-FD was implemented by means of Act 433 of 10 June 2003 amending the 1967 Act on Extradition of Offenders and the 1960 Act on the Extradition of offenders to Finland, Iceland, Norway and Sweden (Transposition of the EU-Framework Decision on the European Arrest Warrant, etc.) [*Gennemførelse af EU-rammeafgørelse om den europæiske arrestordre mv.*]. The amended provisions came into force by 1 January 2004 and apply to arrest warrants presented after that date.

8 In principle, Denmark follows a *dualist* doctrine of international law. Thus, under Danish law, international legal obligations are not binding in domestic law unless they have been specifically incorporated by way of legislation.

9 Except with the approval of parliament, *Folketinget*, the Danish Government may not enter into any obligation of major importance, *e.g.* a treaty requiring domestic implementation by law, cf. § 19 (1) of the Danish Constitution.

10 Cf. § 3 of the 2003 amendment Act. The Permanent Representative of Denmark informed the Secretary General of the Council of the European Union of the transposition by letter received 7 November 2003. Cover note to the General Secretariat, Brussels 16 January, 5348/04, COPEN 13, EJM 5, EUROJUST 5.

previously used terms were retained in implementing the Framework Decision in Denmark. The EAW-FD uses the term »surrender« instead of »extradition«. As both terms involve the actual handing over of a wanted person to the requesting country, the term extradition is applied in the amended provisions of the Extradition Act too.

So far, extradition from Denmark to one of the other *Nordic countries* remains covered by the provisions under the amended 1960 Act on extradition of offenders to Finland, Iceland, Norway and Sweden. However, the provisions regarding extradition on the basis of an EAW are applicable in relation to Finland and Sweden insofar as those rules are more far-reaching.¹¹ The latter rule may have a particular impact in cases involving extradition of Danish nationals or extradition for political offences as the provisions in the 1960 Nordic Extradition Act might in such instances have a narrower scope in certain respects.

In order to harmonize specific Nordic extradition law with the EAW format and still preserve the particular features of the Nordic legislation, an international agreement on a Nordic Arrest Warrant was entered in 2005. Consequently, it has been decided to abolish the Act on Extradition of offenders to other Nordic countries and to amend the common Extradition Act accordingly. In November 2006, the Minister of Justice proposed a bill on a Nordic Arrest Warrant aimed at obtaining Parliament's consent to ratification of a convention signed by the Nordic countries. Legislation was accordingly passed in early 2007.¹² The purpose is to harmonize specific Nordic extradition law with the EAW format and still preserve the particular features of the Nordic legislation by covering all extradition issues in a comprehensive Act and annihilating the 1960 Nordic Extradition Act as an independent piece of legislation. The 2005 convention widens extradition conditions and further simplifies procedures and is in that respect even more far-reaching than the EAW. Consequently, it has been decided to abolish the Act on Extradition of offenders to other Nordic countries and to amend the common Extradition Act accordingly. So far, these changes have not been enforced, as parallel legislation has not yet been fully implemented in all Nordic countries.

The impending amendments of the 1967 Extradition Act specifically concern relations with other Nordic countries. So far, the new rules concerning extradition from Denmark to another Nordic country on a Nordic Arrest Warrant have not yet been enacted. Eventually, they will be contained in a new Chapter 2(b) (conditions for extradition) and a new Chapter 3(b) (procedures for dealing with such cases) of the Extradition Act.

The amended provisions regarding extradition for prosecution or enforcement of a sentence in another EU Member State imply a number of significant alterations

11 Cf. the 1960 Nordic Extradition Act § 1(2)(2).

12 Act 394 of 30 April 2007 on the implementation of convention on surrender for criminal offences between the Nordic countries (Nordic Arrest Warrant etc.) [*Gennemførelse af konvention om overgivelse for strafbare forhold mellem de nordiske lande (nordisk arrestordre mv.)*].

of the previously applicable modality of extradition under Danish law. Attention has mainly been focussed on the following points:

- Extradition may no longer be refused on the grounds that there is insufficient evidence to support the charge or conviction for an act for which extradition is sought.
- Issue of an EAW will in itself provide the basis on which to secure a person's extradition for prosecution or service of sentence, and it is no longer possible to demand that an underlying arrest or custody warrant be supplied.
- Danish nationals will basically be extraditable in the same way as foreign nationals, although a condition regarding re-transferral for serving the sentence in Denmark may be stipulated, cf. Article 5(3) EAW-FD.
- Extradition may no longer be refused on the grounds that the offences involved are of a political nature.
- Double criminality is no longer required for a number of offences, specified on the »positive list«, cf. Article 2(2) EAW-FD.
- A number of new grounds for refusal have been introduced, some of which are mandatory (*i.e.* extradition has to be refused), while others are optional (*i.e.* extradition may be refused, following concrete assessment in the individual case).
- A European arrest warrant has to be dealt with within shorter time limits than in the past and the Act includes deadlines for processing time, for a decision on extradition and for a possible judicial review.

On 23 February 2005 the Commission issued its report on the Member States' implementation of the EAW-FD.¹³ In the report – and in the Commission staff working document annexed to it – the Commission concluded that Denmark had not implemented some of the provisions of the Framework Decision and had not fully implemented others. In Denmark's comments to the Commission report and the staff working document it is stated that in Denmark's view the EAW-FD has been fully transposed into Danish law, and that Denmark therefore cannot understand the Commission's criticism.¹⁴

Extradition to non-Member States associated with the Schengen *acquis* have recently been made subject to certain provisions with reference to the EU 1995 and 1996 conventions on Extradition.¹⁵

13 COM(2005)63 final and COM(2008)8. Cf. SEC(2005)267 and SEC(2006)079.

14 Regarding Member States' comments to the Report from the Commission on the EAW, *see* further 11528/05, COPEN 118, EJM 40, EUROJUST 44.

15 *See* § 4 of amendment Act 394, 2007, cf. Government Order (*bekendtgørelse*) 489 of 29 May 2007. Cf. the 1995 Convention on Simplified Extradition Procedure between Member States of the European Union. Cf. the 1996 Convention Relating to Extradition between Member States of the European Union.

2.3 Judicial Authority and Available Judicial Remedies

Under the 1967 common Extradition Act, the role of issuing as well as executing judicial authority has been assigned to the Ministry of Justice. This arrangement might appear rather odd to someone from a country where such tasks have traditionally been a matter for the courts, or to someone who takes the wording of the Framework Decision very literally.

Clearly, this model does not completely remove the authority from the administration and the potential influence of the Government. Still, it is presumably a scheme that will work to the benefit of the individual, as it not only ensures a certain degree of uniformity and accountability, but ultimately furthers legality and independency too. The individual in question has full access to court review and even to subsequent appellate review of an initial court decision.

A possible flaw of this system, if any, would eventually be an inherent tendency towards reluctance to extradite rather than the opposite. All other things being equal, this means that the individual's rights are relatively well protected by checks and balances.

In the Commission report on the EAW it is stated that it is difficult to view the designation of the Ministry of Justice as being in the spirit of the Framework Decision. Furthermore, the Commission states that the designation of an organ of the state as a judicial body in this context impacts on fundamental principles upon which mutual recognition and mutual trust are based.

Denmark has commented that it disagrees altogether with the Commission's views concerning Denmark's designation of the Ministry of Justice as the competent judicial authority. The reasons for this are as follows: Article 6(1) EAW-FD and Article 6(2) EAW-FD state that the issuing judicial authority and the executing judicial authority shall be the judicial authority of the Member State which is competent respectively to issue or execute an EAW by virtue of the law of that State. Thus, under the Framework Decision it is for the individual Member State to decide who will issue and execute European Arrest Warrants, and this in no way conflicts with the wording of the EAW-FD, assuming of course that the relevant ministry is a judicial authority under national law, which happens to be the case in Denmark.

Under Danish law, the concept of »judicial authorities« traditionally includes the courts and the prosecution authorities. According to the Danish law on the administration of justice, the prosecution authorities comprise the Ministry of Justice, the Attorney General (*Rigsadvokaten*), the regional public prosecutors (*statsadvokaterne*), and the Commissioners of Police (*politidirektørerne*) and their chief prosecutors. Furthermore, it follows directly from the Danish Penal Code that charges for crimes against national security may be brought only by the order of the Ministry of Justice.

Denmark maintains the position that there is no question of Denmark wishing to create some special arrangement for European Arrest Warrants by designating the Ministry of Justice as the judicial authority for the issue and execution of such warrants. Furthermore, under Danish law the Ministry of Justice has the central competence as regards extradition, and even before the adoption of the EAW-FD, the Ministry dealt with cases involving the extradition of offenders to other EU Member States. Also, a decision taken by the Ministry

of Justice to extradite a person could always unconditionally be brought before the Danish courts and tested by two instances. Among the reasons for this was the fact that this would result in the same allocation of authority and procedure for handling extradition requests on the basis of an EAW as applied for extradition requests on the basis of *e.g.* the European 1957 Convention on the Extradition of Offenders. Denmark also wanted to ensure uniform practice in the handling of European arrest warrants, and it was found this would best be achieved by giving authority to the Ministry of Justice.

2.4 Extradition of own Nationals

Extradition of Danish nationals has not generally been possible under Danish law. However, this restriction is not prescribed by the Constitution. The 1960 Nordic Extradition Act permits extradition of Danish citizens in more serious cases as well as when the person has previously lived in the requesting country for at least two years. In 2002, the 1967 common Extradition Act was amended so that it became possible for the first time to extradite a Danish national to a state outside the Nordic countries. The amendment was part of a so-called antiterrorism bill presented soon after September 11th, 2001.¹⁶ The double criminality requirement was still generally maintained. At the time when the bill was presented and enacted, the negotiations on the draft EAW-FD had by and large been completed and, consequently, more far-reaching amendments were anticipated. The in-between initiative, however, might have facilitated the more far-reaching changes soon to come.

In accordance with the Framework Decision, extradition from Denmark to another Member State can no longer be refused for the reason that the person is a Danish national. However, Denmark has chosen to take advantage of the optional Article 5(3) EAW that makes the surrender of nationals subject to the condition that the person will be returned to the executing state to serve any custodial sentence or detention order passed in the issuing state. Furthermore, the execution of an arrest warrant in conviction cases may be refused if the judicial authority decides that the sentence should be executed in Denmark.

2.5 Political Offence Exception

Traditionally, extradition for political offences has not been permitted by Danish law. However, the 1960 Nordic Extradition Act limited this restriction solely to Danish nationals. The EU 1996 Convention requires that offences covered by the European 1977 Convention on Terrorism be removed from the remit of the political offence exception¹⁷. Consequently, the 1960 common Extradition Act was amended in 1997. As a result of the antiterrorism package enacted in 2002,

16 This revision of the common Extradition Act implemented the EU Extradition Convention of 1996 and allowed Denmark to withdraw a previous reservation regarding the extradition of its own nationals.

17 Denmark had made a reservation to the 1977 Convention and thus maintained the right to refuse extradition for any kind of political offence. Furthermore, Denmark made reservations to Ch. 1 of the Additional Protocol 1975 to the European Convention on Extradition and so maintained the right to refuse extradition for offences covered by the Convention on Genocide and the Geneva Conventions.

two further modifications were added in the form of references to the UN conventions on suppression of terrorist bombing and financing of terrorism, respectively. In 2006, additional reference was made to the UN convention on the combat of nuclear terrorism.

According to the EAW-FD, the political offence exception is no longer relevant. Thus, it is left out of the new provisions of the common Extradition Act¹⁸. However, execution of an arrest warrant shall continue to be refused if there is »a serious risk that the person will be persecuted for political reasons«.¹⁹

2.6 Double Criminality and Territoriality Clause

In Denmark, extradition without a double criminality requirement was partially authorized by the provisions of the 1960 Nordic Extradition Act²⁰. The general requirement under the 1967 common Extradition Act was that the conduct for which extradition was requested had to be punishable under Danish law by a maximum sentence of at least 4 years imprisonment. In accordance with the EAW-FD, the double criminality requirement has now been abolished for the listed 32 offences.²¹ The terminology of the common Extradition Act nonetheless indicates that there may be grounds for refusal in a specific case, for instance on grounds of human rights concerns, even where double criminality is not required. A maximum period of at least 3 years imprisonment under the law of the issuing state is now required.

For any offence not listed in the Framework Decision, double criminality remains a requirement under the 1967 common Extradition Act²². However, in accordance with the European 1957 Convention on Extradition, the maximum punishment may now be as low as 1 year's imprisonment under the law of the issuing state, a threshold Danish negotiators were reluctant to accept. There is no longer a punishment threshold in domestic law.

In several responses to the Danish Government's consultation on the draft EAW-FD and the Extradition Bill, concern was expressed about the abolition of double criminality, not only from the Bar Association but also from police and prosecutors. In practice, the Framework Decision list does seem to present a real problem. So far, at least, no case has occurred to substantiate such worries. It is difficult to imagine that a European Arrest Warrant will be issued in ordinary criminal cases concerning minor offences. And naturally, the executing authority

18 Similarly, military offences are no longer considered a valid bar to extradition.

19 See 1967 common Extradition Act § 10(h)(1).

20 Under the Nordic Extradition Act, there is a requirement of double criminality and of a maximum punishment of at least 4 years imprisonment in the case of Danish citizens who have not for the previous two years been resident in the requesting state. In cases regarding political offences, there is also a requirement of double criminality.

21 In English the text is »shall ... give rise to surrender« ... »without verification of the double criminality of the act«. In French it reads »donnent lieu à remise« ... »sans contrôle de la double incrimination du fait«. In the Danish Extradition Act the wording is that extradition »may be completed on the basis of an European Arrest Warrant, even though a similar act is not punishable under Danish law« (author's translation), *see* § 10(a)(1).

22 The requirement of double criminality implies that the act was considered a criminal offence under Danish law at the time of committing the act as well as at the time of trial.

will be obliged to ensure that an act is not mislabelled in an attempt to run a smoother extradition business. Political propaganda within the usual boundaries accepted in democratic societies cannot be crudely termed as terrorism, sabotage or racism and xenophobia in order to secure extradition. Minor acts of shoplifting cannot arbitrarily be listed as organized theft.

The EAW-FD contains a territoriality clause allowing extradition to be refused, even for offences that fall within the Article 2(2) list, where the arrest warrant relates to offences that have been committed in the whole or in part of the territory of the executing state. Under the amended 1967 Extradition Act, this optional clause has been adopted as mandatory where the act is not a criminal offence under Danish law.²³ In cases of this sort it will not make any difference whether or not the act is covered by the Framework Decision list since the person cannot be extradited in either case.

For offences other than those covered by Article 2(2) EAW-FD, surrender may be subject to the condition that the acts for which the EAW has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or however it is described, cf. Article 2(4) EAW-FD. Thus, an executing judicial authority may refuse to recognise a judicial decision issued in another Member State if, in one of the cases referred to in Article 2(4) EAW-FD, the act on which the EAW is based does not constitute an offence under the law of the executing Member State, cf. Article 4(1) EAW-FD. Denmark has made use of the option granted in the EAW-FD to set up indispensable requirements regarding double criminality for certain categories of cases. The traditional requirement regarding double criminality has only been removed for conduct listed in Article 2(2) EAW-FD. An EAW must, therefore, be refused for all conduct falling outside the »positive list« where such conduct does not constitute an offence under Danish law.²⁴

An EAW regarding *prosecution* in another EU Member State may only be executed for acts not covered by Article 2(2) EAW-FD,²⁵ if the offence is punishable by imprisonment for at least 1 year under the law of the issuing State, and the act is considered an offence under Danish law.²⁶ An EAW regarding *enforcement of a sentence* in another EU Member State may be executed for acts not covered by Article 2(2) EAW-FD, where a sentence has been passed or a detention order has been made, if the sanction is a sentence of at least four months, and the act is considered an offence under Danish law.²⁷ No particular

23 See 1967 common Extradition Act § 10(f).

24 In the *travaux préparatoires* of the amendment Act it was stated that the requirement regarding double criminality shall be administered in a flexible manner in accordance with Article 2(4) FD, so that the requirement is found to be fulfilled if an act described in an EAW in whole or in part correspond to an offence under Danish law. Regardless of legal classification, it shall be sufficient that the accusation, the indictment or the judgement concerns an act which would have been considered an offence if committed in Denmark.

25 Article 2(2) EAW-FD has been transposed into § 10(a)(1) of the amended 1967 common Extradition Act.

26 Cf. § 10(a)(2) of the Extradition Act.

27 Cf. § 10(a)(3) of the Extradition Act.

requirements have been established concerning the level of punishment under Danish law in addition to the precondition regarding double criminality. Extradition for prosecution or enforcement of a sentence may be executed for multiple offences even though the conditions stipulated above only are met for one of the relevant offences.²⁸

2.7 Bars to Extradition

The history of the EAW-FD as well as that of the amended 1967 Extradition Act demonstrates that the Department of Justice fought vigorously to protect the traditional principles of Danish extradition law, while simultaneously acknowledging the need to develop good practice regarding mutual recognition. During the political negotiations, Denmark therefore argued against the initial proposal to abolish double criminality generally, preferring a »positive list« of specific offences. Similarly, Denmark supported the widest possible use of the reservation regarding constitutional and human rights. In the amended Extradition Act, all optional clauses in the Framework Decision have been incorporated as mandatory bars to extradition. The same is true of the optional provisions on guarantees to be given by the issuing state.²⁹

2.8 Human Rights

In accordance with the EAW-FD, extradition must be refused if the conduct for which the arrest warrant is issued is regarded by the Danish judicial authority as a lawful exercise of rights and freedoms of association, assembly or speech protected by the Danish constitution or the ECHR.³⁰ By means of this »cat flap« clause, the executing authority is vested with sufficient discretionary power to avoid unreasonable classifications by the issuing authority within the Framework Decision list, for instance under the heads of organized crime, terrorism, racist and xenophobic offences. Naturally, the vague character of some of the terms included on the list may give rise to concern, and an executing authority cannot always be relied upon to activate the brake in politically sensitive cases. However, the existence of the human rights clause will minimise the risk of an arrest warrant being abused by an issuing authority or accepted by an executing authority for reasons of convenience or to maintain good international or inter-agency relations.

Under the Danish Extradition Act, therefore, the executing authority may refuse to execute an arrest warrant by reference to fundamental rights and freedoms if a case merely regards passive participation in a criminal organisation, since an offence with such a general scope does not exist in Denmark. Similarly, it is well known that the concept of terrorism is vague. Under Danish law, the definition in the Framework Decision on terrorism was adopted when enacting the earlier mentioned antiterror package in 2002 which gave rise to fierce discussions regarding the lack of precision in the amended provisions. It might be of some consolation for those of us who are still

28 Cf. § 10(a)(4) of the Extradition Act.

29 See 1967 common Extradition Act § 10(b) ff.

30 See EAW-FD article 1(3) and preamble para. 12.

concerned on this issue, that the Council declaration regarding respect for fundamental rights has explicitly been mentioned in the Danish *travaux préparatoires*.

2.9 *Torture and Other Inhuman or Degrading Punishment or Treatment*

As a supplement to the draft amendment to the Extradition Act, a provision was added that explicitly states that extradition shall be refused if there is a risk that the individual will be subjected to torture or to other inhuman or degrading treatment or punishment in the issuing state³¹. This initiative sent an encouraging, if redundant, message since the provision does not add anything to Article 3 ECHR³².

2.10 *Humanitarian Considerations*

Humanitarian reasons as a bar to extradition have been reduced to a less prominent position in the Extradition Act. Previously, the Extradition Act included non-compliance with humanitarian considerations as a general bar to extradition. Henceforth, even serious humanitarian reasons may only temporarily postpone extradition.³³ However, since there is no fixed time limit for the postponement, it should not be difficult to strike a reasonable balance in individual cases, for instance by deferring extradition for an indeterminate period of time if necessary. It will therefore be possible to conduct mental examinations where appropriate. If a requested individual is seriously mentally ill, extradition would be barred by virtue of humanitarian considerations.

2.11 *Overall Account of the EAW-FD Transposition into Danish Law*

Quite understandably, the introduction of the EAW gave rise to profound concerns regarding the abolition of traditional principles and requirements under the law of extradition. The hectic political activities in the wake of September 11th gave good reason for worries in relation to civil rights. However, from a principled perspective the result of the legislative efforts became fairly balanced. As far as Danish extradition legislation is concerned, all available handles were pulled to ensure that an arrest order will not be executed unless it is reasonably fair and just. Legally, there is sufficient basis for defending the individual's relevant interests, and competent agencies and actors have been assigned the relevant tasks in safeguarding fundamental freedoms and rights properly.

3 The Act on Execution of Decisions in Criminal Matters in the EU

The Act of Execution of Decisions in Criminal Matters in the European Union³⁴ transposed in one single piece of legislation the Framework Decision

31 See 1967 common Extradition Act § 10(h)(2).

32 The ECHR was specifically incorporated into Danish law in 1992.

33 See 1967 common Extradition Act § 10(i).

34 Act 1434 of 22 December 2004 [*Lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union*].

2003/577/JHA on the *freezing of assets and evidence*; the Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties*; and the Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to *confiscation orders*.

The Act entered into force on 1 January 2005, and the provisions in the Act apply to requests for execution submitted after that date.³⁵

The Act was amended in 2008 in order to pre-implement the proposal COM(2003)688 for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (hereinafter: the EEW-FD) and the initiative JAI(2005)2 with a view to adopting a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union.³⁶

So far, the amended provisions of the Act have not been enforced, as the pre-implemented framework decisions were not enacted until by the end of 2008.³⁷

A decision based on one of the mutual recognition instruments may be executed by the relevant authorities in Denmark without any requirement of double criminality if the offence is included in the particular »positive list« applicable to the specific type of decision and it carries a sentence of minimum 3 years of imprisonment.³⁸

In accordance with EAW-FD Article 4(7)(a), execution of an EAW is barred for cases regarding acts committed in part or in whole on Danish territory if double criminality is lacking.³⁹

For offences other than those covered by Article 7(1) of the Enforcement Order FD, the executing State may make the recognition and enforcement of a European enforcement order subject to the condition that the order relates to acts which constitute an offence under the law of the executing State, whatever the constituent elements or however it is described, see draft Article 7(3). Denmark has stipulated that the option granted in the FD may be used to establish a rule to the effect that execution of a decision regarding imprisonment may be refused if an offence not covered by the »positive list« set up under Danish law or not carrying a sentence of at least 3 years in the issuing state is not a criminal offence under Danish law.⁴⁰ Thus, an optional ground for refusal has been established in cases regarding offences outside of the »positive

35 Cf. Act 1434, 2004 § 62.

36 Act 347 of 14 May 2008 [*Lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om Det Centrale Dna-profil-register*].

37 Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

38 See 1967 common Extradition Act § 10(a) as amended by Act 433, 2004. Cf. Act 1434, 2004 § 6, § 13(e), § 19, § 29(c), § 32 as amended by Act 347, 2008.

39 Cf. § 10(f)(1) of the Extradition Act.

40 Act 347, 2007 § 29(c)(2).

list« in domestic law, which do not have a corresponding offence under Danish law.

The possibility to enforce a double criminality requirement is intended to be optional and subject to limitations due to other considerations. In the *travaux préparatoires* of the amendment Act it was stated that the possibility to take over the serving of such a sentence in Denmark should not be excluded, even if the offence is not criminalized in Danish law, in those cases where 1) the individual in question so wishes and 2) considerations about his/her resocialization point in the same direction.⁴¹ So even if a double criminality requirement is not met, refusal is optional with a view to the particular features of the case and the general aim of resocialization.⁴² This can be seen as a further limitation of the requirement of double criminality which contributes to the advancing diminution of its importance.

The persons interviewed for the present study agreed that it is important to have an exemption from the basic principle regarding a double criminality requirement, even if the use of such an optional ground for refusal is considered as a somewhat remote contingency.

4 Practitioners' Assessment of Negotiation Outcomes

4.1 *General Evaluation of the Mutual Recognition Instruments*

The overall assessment by professionals involved in the negotiations on instruments regarding mutual recognition is generally positive. The assessment identifies the background for the development of the principle of mutual recognition in criminal matters as on the one hand the introduction of an area of freedom that formally and practically erased internal borders within the European Union, and on the other hand the high trust among Member States in the functioning of each others' legal system, that is the cornerstone upon which the principle of mutual recognition is constructed. In this sense, the progression of mutual recognition in criminal matters is seen as a natural consequence of the general political developments in these areas.

The process initiated by the Tampere conclusions has defined the political goals and cleared the way for the introduction of legal instruments that are suitable to ease the promotion of the principle of mutual recognition. The most viable mode of progression, *i.e.* the most realistic way to concretize the political goals, is to align the various legal systems in Europe, and not necessarily to harmonise European penal systems completely. This standpoint was endorsed by other persons interviewed who were positive about not only the evolution of the principle of mutual recognition but also a more general rapprochement of legislation on criminal matters. Criminal law is especially arduous to harmonise completely since it represents a core aspect of the sovereignty of the national State. Alignment and approximation [Danish: *tilpasning* and *tilnærmelse*] are therefore preferred as good alternatives for the furthering of increased

41 Parliamentary Bill 2007-08 L 79, p. 49, part 3.2.1.

42 Parliamentary Bill 2007-08 L 79, p. 72, commentaries ad § 29(c).

cooperation, which fits in well with a traditional Scandinavian pragmatic standpoint regarding policy matters.

The EAW is considered the most far-reaching and significant innovation in the European context, especially in light of the speedy adoption of the initial proposition for approval.

4.2 Assessment of Current Developments

The introduction of the instruments of mutual recognition is viewed as an important symbolic step towards a certain degree of harmonisation of criminal law in Europe. Nevertheless, the situation before the principle of mutual recognition was established was also founded on trust and cooperation in the European context. The framework decisions have entailed an alignment and approximation of the national penal systems. They are founded on confidence among Member States that penal codes and procedures all across the Union have the same level of efficiency and respect for the rule of law. For this, the new instruments adopted are viewed by Danish civil servants and practitioners not as a total harmonisation but rather as a consolidation of the basic features of the different penal traditions in the various Member States. They represent the acknowledgement of the fact that as a starting point, efficient extradition/surrender to another European State must be facilitated by instruments based on the principle of mutual recognition, in that the national rules on procedure and evidence are recognized as being comparatively satisfactory.

It has been noted by the persons interviewed that the efficiency of the cooperation has increased after the adoption of EAW-FD and other framework decisions. More specifically, the simplified proceedings are perceived as a notable advantage. The basic problem with the former system of legal assistance was the slowness of the process, which gave rise to a series of problems as regards the rule of law and the respect of due process for the parts involved in the proceedings.

Thus, the major improvement deriving from application of the principle of mutual recognition is the immediate recognition of requests of surrender, etc. This represents the crucial difference between the present legal instruments and the former systems with regard to extradition. Previously, the requirement of double criminality could potentially give rise to great encumbrance in the actual cooperation.

The concrete step forward in matters concerning legal cooperation is constituted by the level of efficiency and practical impact that the new instruments have carried with them. The fact that the Member States could reach agreement on a »positive list« indicating in which cases an action is both allowed and required entails that there is no longer occasion for lengthy considerations on whether to send a request to another Member State or not. It has moreover been suggested that the partial abolition of the traditional requirement regarding double criminality might be interpreted as a political indication of an increased mutual trust on criminal matters.

It is expected that the Framework Decision on Freezing Orders and the European Evidence Warrant will work in the same direction by facilitating

improved cooperation and providing the formal conditions for a faster and smoother handling of cases.

4.3 *Involvement of Practitioners in Negotiations*

In Denmark the negotiations of new legal instruments are headed by the International Office under the Ministry of Justice. The International Office is the national central authority responsible for such negotiations, as its field of work is the international legal and police cooperation, mutual assistance cases, surrender cases, national and international drug-related questions, Schengen, Europol and European cooperation within the Third Pillar area.

Civil servants from the Ministry of Justice participate in negotiations, representing the position of the Danish Government. Practitioners from various other agencies are usually involved in the preparations, in that contributions are gathered from relevant professionals. Law enforcement officials and the prosecution issue information and opinions. This implies that the practitioners representing agencies that will be administering the particular legal instruments are in fact involved in their negotiation. This procedure enhances the targeted adoption of efficient legal instruments since they have been immediately handled by the actors later to become responsible for their practical implementation.

4.4 *Practical Problems Concerning Cooperation Matters*

Factors that tend to weaken or impair efficient cooperation in criminal matters are predominantly of a *practical* nature. Impediments or obstacles such as language differences and difficulties in communication might weaken the enhancement of cooperation.

In this respect, the persons interviewed could not recognize any particular problem with the current legal formulation of the instruments of mutual recognition. For instance, the theoretical possibility of hampering the traditional dual criminality clause by complying with the »positive lists« does not represent a practical problem as most offences on the lists are actually criminalized in all Member States.

Even with this fact in mind, examinations of whether the traditional double criminality requirement was actually met used to be rather time-consuming and potentially a barrier for transnational cooperation. In this respect, the creation of »positive lists« has helped a great deal in making this part of the process more effective.

The same rationale was applied in the drafting of the options regarding refusal, *e.g.* of a request for surrender of a suspect for prosecution. The justification for including both obligatory and optional grounds for refusal was the need for a balanced efficiency improvement and a politically acceptable solution. Having discussed and approved provisions on these matters, there is typically little reason to spend time and effort in investigating whether a request should be complied with or rejected. This arrangement created a transparent and simple instrument that encourages its actual use since it demonstrates the ability to be an instrument that is respectful of the Member States' legal traditions and systems and that offers possibilities in borderline cases or controversial instances

to pull the »emergency brake« or to leave by the »cat flap«, e.g. if it is felt urgent to refuse surrender to another Member State.

Surrender of Danish nationals to another Member State has only taken place in a few instances and has not caused much concern among practitioners in the criminal justice system. This possibility is in general recognized as fair, as it is called for by common principles of constitutionality and justice; that criminals should be prosecuted. It is acknowledged that prosecution might subject Danish nationals to proceeding abroad, but such strain should not in itself preclude cooperation. Professionals involved in such cases have not had any serious concerns due to surrendering nationals to another Member State since the guarantees for a fair trial are perceived as sufficient all across the European Union.

4.5 Outlook for Future Cooperation Requirements

It has been brought up by some of the persons interviewed that »The Legal Atlas«, which lists the name and contact numbers, e-mails and addresses of the relevant actors on issues of mutual recognition, is an important tool for mapping the different authorities in the Member States. It is very useful for officials dealing with European mutual recognition instruments to have an updated list with the names of individuals dealing with the same issues in all Member States. The Legal Atlas can be found on the Eurojust website, under the European Judicial Network page. As a mutual assistance tool, it allows practitioners to find the locally competent body that can receive a request for mutual assistance and authorize a particular measure. It also provides an overview of some of the procedures for investigation which can be requested from another Member State, for example whether interception, recording and transcription of telecommunications is admissible, or whether another measure is possible under mutual judicial assistance. As it is, the major challenge is to keep the Legal Atlas updated so that the local authorities can use it as a starting point for requesting legal assistance.

There is also great support among the persons interviewed for Eurojust which, according to the respondents, should be used on a larger scale than it is nowadays.

It is seen as a positive rapprochement between the criminal European legal systems that the development is founded on a principle of mutual recognition and approximation instead of on a comprehensive harmonisation. Consolidation of the various texts in one single instrument is not considered as in itself an improvement for mutual cooperation initiatives. Regulation in detail does not necessarily provide a higher degree of transparency. The more legislation, the more attention will be required from a rule of law perspective. As far as Denmark is concerned, there is presently a high degree of coherency and consistency with regard to the legal instruments in force.

To further enhance mutual cooperation and recognition, it was suggested to base new legislation on a rigorous examination of where the practical problems of cooperation in criminal matter lie, and from there approach the matter by means of legislation in order to maximise the use of resources devoted to this aim.

It was highlighted by the interviewees that certain practical issues are essential for efficient cooperation, such as:

- a solid and trustful contact between practitioners and institutions based in the various Member States (*e.g.* enhancement of the European Judicial Network);
- well functioning communication channels, including the possibility to communicate in a foreign language that is understood by all the parts involved in the cases;
- reasonable knowledge about each others' legal systems and institutions.

5 Transposition of Mutual Recognition Instruments

5.1 *Constitutional Setting and Parliamentary Tradition*

As may be noted from the above parts of this article, European law is sometimes implemented by the Danish Parliament on a pre-emptive basis, *i.e.* bills are introduced and legislation is passed and enacted while negotiations regarding draft instruments are still pending in the Council. This tradition reflects the constitutional framework.

The text of the Danish Constitution is rather brief. The relative vagueness of the statutes allows for a pragmatic and quite smooth development of democratic and legal traditions.⁴³ Basically, legislative powers are attributed to the national parliament, *Folketinget*, which has 179 seats. Typically, the country is run by a minority government based on party coalitions. In effect, opposition parties are sometimes able to exercise considerable influence within specific policy areas.

Important parliamentary activities are rooted in standing committees set up according to Parliament's Standing Order, *i.e.* rules of procedure.⁴⁴ The committees are composed by parliament members representing the various political parties on a proportional basis, typically consisting of 17 delegates and an equal number of substitutes. Any legislative bill is referred to the relevant committee for reading and submission of a committee report. Moreover, the committees actively participate in the checks and controls on government business in general. Within the area of penal and procedural law, the parliamentary Judiciary Committee,⁴⁵ *Retsudvalget*, has been vested the tasks of scrutinising pending legislation, posing written questions to the responsible minister, typically the Minister of Justice, consulting with ministers appearing in person before the Committee, etc. Within the area of Community law, the parliamentary European Affairs Committee, *Europaudvalget*, bears the responsibility for performing the relevant tasks.⁴⁶ A third standing committee,

43 An English translation of the Danish Constitution may be found on the Parliament's website: www.ft.dk.

44 For a brief account of the standing committees, *see* the Parliament's website.

45 The Judiciary Committee, *Retsudvalget*, is sometimes referred to as The Legal Affairs Committee.

46 Originally, the committee was called the Common Market Committee, *Markedsudvalget*, but in 1994 it was renamed.

the Foreign Affairs Committee, *Udenrigsudvalget*, is dealing with matters regarding foreign, security and development policy in general.

In the area of foreign policy, there is to some extent an overlap between the areas of responsibility for the European Affairs Committee, the Foreign Affairs Committee and a committee of a somewhat different kind, the Foreign Policy Committee, *Det Udenrigspolitiske Nævn*.⁴⁷ A practice has been developed in which a parallel debate may take place in the Foreign Policy Committee and in the standing committees.

A particular issue may sometimes be treated by more than one of the committees. In matters regarding the European Union, the Europe Committee plays a key role as the instance checking and debating the vast bulk of relevant initiatives, but as Home and Justice Affairs have come to play a rapidly increasing role in a Union context, the discussions and deliberations in the Judiciary Committee have become still more important too.

From a constitutional law perspective, conducting negotiations on the Community and Union level is an exercise of the Royal prerogative exercised by the Executive.⁴⁸ In practice, however, the Government will always seek to supply the European Affairs Committee and other relevant parliamentary committees with qualified information on pending initiatives at the earliest stage possible. In principle, neglect to obtain a proper parliamentary mandate would not involve any legal responsibility, but might very well imply a political problem for the responsible minister or for the Government as such. Besides issuing the committees relevant documents, the responsible minister will normally appear before the European Affairs Committee prior to Council meetings to brief the parliamentary members orally on the proposed Danish position and the expected negotiation eventualities. Typically, such a session will provide the minister with the necessary mandate for the upcoming negotiations in the Council. The mandate is not formally drawn up and might in some instances be of a more or less vague nature.⁴⁹

5.2 *The Transposition of Mutual Recognition Instruments*

It has been mentioned already that the process of transposing the EAW into Danish law was completed by the end of May 2003, Denmark being one of the first Member States to complete implementation. The amended provisions came

47 Cf. Constitution § 19 (3), which further requires provisions applying to the Committee to be established by law, cf. Act no. 54 of 5 March 1954 on the Foreign Policy Committee.

48 In accordance with § 19 (1) of the Constitution, the King (i.e. the Government) »shall act on behalf of the Realm in international affairs«. Delegation of state powers to international authorities by mutual agreement with other states requires a majority of five-sixths of the members of parliament voting in favour of enacting legislation to the effect or a confirmation by public referendum of a bill adapted without obtaining the necessary qualified parliamentary majority, cf. Constitution § 20. The said provision was introduced in 1953 and allows the current Constitution to provide a legal basis for accession to the European Communities.

49 For further details on the procedures prior to Council negotiations, see the Ministry of Foreign Affairs website, where preparatory stages involving Government committees are described too: www.um.dk.

into force by 1 January 2004 and apply to arrest warrants presented after that date.

The other instruments based on the principle of mutual recognition have been transposed within time limit too:

- Framework Decision 2003/577/JHA on the *freezing of assets and evidence*.
- Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to *financial penalties*.
- Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to *confiscation orders*.

The Danish Parliament, *Folketinget*, gave its consent to the Government's participation in the negotiations of the framework decisions as early as of June 2003.⁵⁰ This allowed preparation of the parliamentary bill for implementation of these instruments at the same time as the negotiations were conducted under the Council, and also led to the fact that the Act now implementing said framework decisions has been in force since 1 January 2005.

Since the procedure for implementation involves a parliamentary consent to negotiate at a very early stage of the drafting of the framework decisions, European legislation is implemented following the letter of the text. Therefore, at the time of the implementation the Danish Parliament respects the provisions laid down, even if they were originally pointing in a direction not favoured in the national context. To give an example, the creation of the »positive list« to revoke the requirement of double criminality was only reluctantly embraced by Danish authorities and politicians. Nevertheless, when the negotiations on this matter reached the point of agreement, there were no significant obstacles for accepting that the principle of mutual recognition requires to a large extent the abandonment of double criminality requirements. Consequently, the process of implementation is not an occasion for the reopening of previously settled issues, even if they were problematic to agree on.

5.3 Problems Encountered Concerning Transposition

The issues that gave rise to problems during the transposition processes are mainly of legal nature, and neither political nor practical. The fact that a bill is prepared already under the process of negotiation at the European level may delay negotiations, but has the advantage of clearing the field (so to speak) for political misunderstandings at the time of implementation into national legislation.

The problems encountered are therefore mainly of legal character. It was noted by the interviewees that what represents a challenge is the transposition of the principle of mutual recognition so it fits the Danish rules for procedure and sentencing. To give an example, in the case of transfer of convicted persons, the question was raised of how to transfer the length of the conviction: if a certain offence gives for example a maximum of five years prison sentence in Denmark,

⁵⁰ Parliamentary consent given in accordance to the Constitution § 19(1), *see above*.

but the criminal proceedings in another Member State led to a conviction of ten years, the debate was about how long then the convicted person should actually remain in custody. In these particular cases, if they arise in the future, the legislation provides for the Court to consider the matter and if estimated as appropriate to reduce the sentence in accordance with Danish sentencing standards.

It is therefore the clashing of different European legal traditions with regard to procedural and sentencing matters that can give rise to reflections during the process of implementation, as they directly challenge the national definition and content of rules and practices within such areas.

The legal problems encountered revolve solely around the optional grounds for refusal, and the solution indicated is to let the courts consider the concrete issues at stake. Matters related to the »positive lists« and directly addressed by the framework decisions were thus not cause for dispute during transposition into Danish Law.

5.4 Practitioners' Involvement During the Transposition Process

As being the case with preparation and negotiations, practitioners are also involved during the implementation process. The parliamentary Bill is issued for a systematic hearing of relevant organisations and the agencies which will eventually be involved in the administration and enforcement of the final act. Inter alia, the Ministry of Justice addresses the Bar Association (*Advokatrådet*), the Court Presidents, the Court Administration Unit (*Domstolsstyrelsen*), the National Police (*Rigspolitiet*), The Danish Prison and Probation Service (*Kriminalforsorgen*), and the Data Protection Agency.⁵¹ Occasionally, a draft bill is issued for hearing process prior to being revised and presented to Parliament.

5.5 Reciprocity and Territoriality Issues

Danish legislation based on mutual recognition instruments does not require reciprocity. In fact, the EAW-scheme has been applied even in an instance where, at the time of issue of an EAW, the issuing Member State had not transposed the framework decision into its national law, so that the issuing State would not itself be able to deal with an extradition request under the EAW rules.

The 1967 common Extradition Act addresses the issue of territoriality in § 10(f)(2) which relates to the grounds for refusal of the execution of an EAW. Under said provision, a request may be rejected if it concerns an offence committed entirely or for a substantial part on Danish territory. Further, a request may be refused if the offence has been committed outside the issuing States territory and a corresponding act committed outside Danish territory would not be subject to Danish criminal jurisdiction.

51 See materials presented to the Judiciary Committee, Parliamentary Bill 2007-08 L 79 – Annex 1, 27 February 2008. [*Kommenteret oversigt over hørings svar vedrørende udkast til forslag til lov om ændring af lov om fuldbyrdelse af visse strafferetlige afgørelser i Den Europæiske Union, lov om udlevering af lovovertrædere og lov om det Centrale Dna-profilregister*].

The act on the execution of decisions in criminal matters in the European Union, in its latest version after the 2008 amendment, addresses the issue of territoriality in § 13(h)(1) which relates to the grounds for refusal of the execution of an EEW. Under said provision, a request may be rejected if it concerns an offence committed entirely or for a substantial part on Danish territory. Further, a request may be refused if the offence has been committed outside the issuing States territory and a corresponding act committed outside Danish territory would not be subject to Danish criminal jurisdiction.

5.6 *Procedures for Executing a Decision Issued in Another Member State*

Under Danish law, the procedure for executing a decision issued in another Member State can be described as being a mixture of centralized and decentralized procedures. The explanation of this peculiarity lies in the structure of the Danish criminal justice system, in that the Minister of Justice is head of the police as well as the prosecution authorities.⁵²

For Denmark, the competent authority within the meaning of Articles 4 and 5 EAW-FD is the Ministry of Justice and as such the Ministry is the only authority with a competence to receive and execute EAWs.⁵³ The responsibility for initial examination of cases involving extradition on an EAW and the actual issuing of an EAW lies with the Ministry of Justice. Thus, the Ministry decides whether an EAW meets the necessary criteria for certification. The Ministry is the only designated judicial authority responsible for any official correspondence relating to extradition requests and competent to make decisions regarding execution of European Arrest Orders. The designation of the Ministry of Justice as the competent judicial authority means that there has been no need to designate a central authority pursuant to Article 7(2) of the EAW-FD.⁵⁴

The local police commissioner will inform the relevant district prosecutor and the Ministry of Justice of the need to issue an EAW for a wanted person. After being submitted to the relevant district prosecutor, the draft European arrest warrant is to be sent electronically to the Ministry of Justice, via the National Police Commissioner's Office for approval. Once the Ministry of Justice has approved and signed the European arrest warrant as issuing judicial authority, the original warrant is returned to the local police commissioner. A copy is also to be sent to the National Police Commissioner's Office (Communications Centre), for issue of an alert for the wanted person in SIS, the Schengen Information System, and of an internationally wanted person notice via Interpol.

52 See Appendix 1 for a diagram of the basic structure of the Police and the Prosecution Service.

53 See Appendix 2 and 3 for diagrams explaining the procedure in the case of the executing and issuing an EAW, e.g. regarding the role of the Ministry of Justice in the processing of cases that fall within the framework of mutual recognition.

54 Cf. the previously mentioned Addendum to Cover note to the General Secretariat, Brussels 16 January. 5348/04 ADD 1, COPEN 13, EJM 5, EUROJUST 5.

With regard to the comprehensive Act on various matters regulated in European instruments, it is stated that the ordinary municipal courts shall decide on the execution of imprisonment sentences.⁵⁵

Decisions regarding the execution of decisions regarding fines or confiscation are vested with the Minister of Justice.⁵⁶

In the case of execution of certain decisions on *freezing* and *evidence* warrants, the comprehensive Act states that the competency to decide lies with the courts upon request from the prosecutor.⁵⁷ However, where the execution of EEW regards evidence material, which the prosecution authorities have already in its possession before the receiving of the warrant, the decision will be made by the prosecutor. The same holds true in instances where the relevant evidence could be produced without a warrant in a domestic case. In such cases the wanted evidence material will be produced in accordance with the normal requirements of the Procedural Code, and therefore there is no need to initiate court proceedings in order to verify the legitimacy of a transfer of evidence material to another Member State. With regard to instances where the prosecutor finds that the issued decision concerning freezing or evidence should not be executed, the Act states that the final decision lies with the Minister of Justice.

5.7 Issues Regarding Fundamental Rights

According to the respondents, the protection of defendants' rights provided by the ECHR does not represent a problem, as the minimum standards for proceedings established by the Convention are generally complied with in the Danish criminal justice system.

Nonetheless, in the recent act of the execution of decision in criminal matters, an explicit reference to the preamble of the Framework Decision has been made. The Act establishes that a request for an evidence warrant should not be executed if »there is a reason to presume that the warrant was issued with the purpose of prosecuting a person due to the person's gender, race, religion, ethnic origin, nationality, language, political beliefs or sexual orientation«.⁵⁸

6 Practical Application of Judicial Cooperation Instruments

6.1 Introductory Remarks

So far, the EAW is the only European instrument that has been widely utilized in practice, and in the respondents' experience with positive results. There are only few examples of case law or practical application of other instruments on the application of the principle of mutual recognition. This does not mean that these instruments are not applied as they should be, but merely indicates that it is too soon to evaluate their functioning. The Framework Decision on confiscation

55 Act 347, 2008 § 54(2).

56 Act 347, 2008 § 54(1).

57 Act 347, 2008 § 49.

58 Act 347, 2008 § 13(f)(4).

orders was introduced in 2006 and the Framework Decision on financial penalties in 2005, and even though they have been implemented within the time limit in Denmark, the practitioners interviewed could barely report any examples of their application so far (see the next section for one remarkable exception).

6.2 *Practical Difficulties in the Application of Mutual Recognition Principle*

The actual obstacles to efficient cooperation in criminal matters are not caused by differences between the substantive legislative systems of the Member States.

There are only expected to be a few cases where there could be uncertainty as regards the requirement of dual criminality. Theoretically, certain instances of abortion or expression of racism might be punishable in one legal system and not in Denmark, leaving practitioners with the ungrateful task of determining whether for instance an EAW should be executed in order to allow prosecution in another Member State. However, the scenario is regarded as being somewhat hypothetical. The actual cases do not generally pose any difficulty of similarity in definition.

The territoriality clause is not considered a problem for the practical application of the EAW. Even if, with the increasing mobility across borders and the potential for transnational criminality, it is theoretically possible to imagine that the territoriality clause may be used as a ground of refusal, it has been possible in practice to establish a certain connection with the State where the offence was in fact committed.

An important feature of cooperation is what can be called the »informal« side of cooperation between authorities which refers to the interpersonal communication and the practical conditions or framework for joined activities. More specifically, it was pointed out by several interviewees, that when a domestic authority is preparing the drafting of for instance an EAW, it is not uncommon to seek advice by the relevant authorities of the other Member State. The information gathered in that manner could for example revolve around assessing the definition of a particular offence in the penal system of the other Member State. As such, the transnational contact between authorities in charge of law enforcement is characterized by a great degree of informality that should not necessarily have a negative connotation.

The trust among police officers and other civil servants who meet on different occasions at venues for European cooperation should not be underestimated. The efficiency of cooperative activities increases with the opportunity to meet the respective colleagues from other Member States and fosters new cooperation mechanisms. A personal meeting with other colleagues, who work in the equivalent field in another Member State, can further transnational cooperation in criminal matters significantly as it offers the possibility to learn about each other's methods of investigation.

On the part of the defence lawyers, the main considerations refer to the legal position of defendants. In the case of confiscation for example, it was noted that there is a lack of regulation regarding provisional remedies to secure the economic interests of the individuals involved before a final judgement by the court is pronounced. From their point of view, it is regrettable that in the present formulation of the European instruments on mutual recognition, there is no

possibility to protect the private legal interests at stake, the focus being entirely on countering alleged criminal activities.

The defence lawyers also maintain that in order to unite the efforts in the fight against crime, attention should not only be given to the material elements in the national penal systems, but also to the procedural rules. There is still from a defence lawyer's perspective need to protect the defendant against surrender to another Member State as this involves an evident strain as regards imprisonment conditions, language difficulties, displacement from family and known environment, etc.

6.3 Knowledge of Legal Instruments Regarding Mutual Recognition

The EAW is incorporated in a very efficient way and is generally well-known among the relevant practitioners. Introduction courses and presentations have been established to inform the staff about rules and forms, so far mostly with regard to the EAW.

A set of Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW was issued in 2003 by the Ministry of Justice and circulated as binding instructions to the police and prosecution authorities.⁵⁹ Supplementary Guidelines on the handling of requests for the extradition of offenders on the basis of an EAW were issued in 2004 by the Ministry of Justice.⁶⁰

The amended provisions regarding extradition based on an EAW do not require reciprocity. Thus, they are applicable even if, at the time of issue of an EAW, the issuing Member State had not transposed the Framework Decision into its national law, so that the issuing State would not itself have been able to deal with an extradition request under the EAW rules.⁶¹

The defence lawyers interviewed would favour the compiling of a handbook or manual on the various criminal procedure laws in the European Member States.

6.4 Cases and Feed-back

6.4.1 Execution of an EAW

59 5348/04, COPEN 14, EJM 6, EUROJUST 6. *Justitsministeriets vejledning 9498 af 19. december 2003 om behandlingen af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre*. Cf. Addendum to Cover note to the General Secretariat, Brussels 16 January. 5348/04 ADD 1, COPEN 13, EJM 5, EUROJUST 5.

60 *Supplement til vejledning om behandling af anmodninger om udlevering af lovovertrædere på grundlag af en europæisk arrestordre, cirk.skriv. 9678 of 14.12.2004*. The Permanent Representative of Denmark informed the Secretary General of the Council of the European Union by letter received 14 January 2004. The letter included an addendum to the previous notification.

61 Denmark has not made a statement under Article 32 of the Framework Decision relating to the date of the acts to which an extradition request relates. The 2003 amendment Act will apply to acts committed before as well as after it came into force, provided the request has been made after 1 January 2004. The only exceptions are in relation to France, Italy and Austria who have made declarations under Article 32 EAW-FD.

As regards matters of executing an EAW, the legislation adopted has been clearly applied by the courts in the cases submitted up until now.

In 2004 the Supreme Court sustained a decision to surrender a Danish national to Great Britain for prosecution of alleged offences committed before the entering into force of the legislation implementing the EAW-FD.⁶²

In a decision regarding a Danish citizen that was requested to be surrendered to Lithuania, the High Court recognized that the judicial review does not allow for an assessment of the evidence in the case.⁶³ The fact that only two of the five alleged offences were included in the »positive list«, and that three other counts were either not criminal offences under Danish law or maybe statute-barred, did not impede the High Court from sustaining the Ministry of Justice's decision and consequently to execute the arrest warrant, just as the municipal court had concluded.

In a case from 2004, the Courts did not find the fact that Germany had not yet transposed the EAW-FD to hinder the execution of an extradition request from the German authorities.⁶⁴

In a case regarding surrender to Hungary, the Copenhagen Municipal Court sustained the Ministry's decision to extradite, adding that »*the obligatory and optional refusal grounds are exhaustively listed in the legislation [and] the Court cannot and shall not try any base of evidence in the arrest warrant.*«⁶⁵

In a case regarding surrender of a Polish national for execution of an imprisonment sentence in Poland, the High Court found that the person had been adequately subpoenaed regarding the review of his indictment before a Polish appellate court, and that there were therefore no grounds for refusal to extradite.⁶⁶

In these cases and other examined for the purpose of this report, the courts were involved on behalf of defendants contesting decisions to extradite, not on behalf of Government authorities contesting an EAW. Even though the number of cases here presented is very limited, they show how effectively the EU regulation on the EAW has been received in Danish legislation, which can be a positive sign for the future implementation and use of other instruments on mutual recognition.

6.4.2 Issuing of an EAW

62 U 2004.2229 H. U = *Ugeskrift for Retsvæsen*, the standard journal reporting leading court decisions. H = *Højesteret*, The Danish Supreme Court.

63 U 2006.7 V. V = *Vestre Landsret*, the Western High Court. An opinion from the Ministry of Justice explaining the extent of the rules in the Framework Decision and of their range of application was requested by the Prosecuting Authority and included in the case record. Cf. the above mentioned U 2004.2229 H, in which case the matter regarding evidence was explicitly taken into account by the municipal court.

64 *Københavns Byret* (Copenhagen municipal court), SS 1.10512/2004, 17/05/2004.

65 *Københavns Byret* (Copenhagen municipal court), SS 23.18776/2005, 12/09/2005.

66 TFK 2007.732 V. TFK = *Tidsskrift for Kriminalret*, a journal reporting leading court decisions in the penal area.

For years, there has been a great deal of public attention concerning a particular case regarding a killing that took place in Denmark during World War II. A group of Danish citizens collaborating with the German occupation forces abducted an editor of a Danish newspaper and shot him to death in a road side ditch. One of the perpetrators has been living in Germany for many years as a German citizen. An EAW was issued in 2006 aiming at prosecuting him for homicide before a Danish court. However, the Munich High Court refused to execute the EAW. The Danish issuing authorities had not produced sufficient evidence to prove beyond reasonable doubt that the killing was characterized by a particular mean motive (*niedrigen Beweggründe*) or an atrocious mode of acting (*heimtückischen Begehungsweise*). Thus, it was not possible to classify the offence as murder (*Mord*), in which case there would have been no statute-barred prescription. However, in this specific incidence the act of homicide (*Totschlag*) had since long been time prescribed under German law. Consequently, surrender was not an option under the German code on legal assistance (*Gesetz zur Internationalen Rechtshilfe in Strafsachen*, IRG) as recently amended with respect of the EAW-FD.⁶⁷ According to Article 4(4) EAW-FD, prescription is an optional ground for refusal in the sense that the individual Member State may decide the mode of implementation. Under German law, prescription has been made a mandatory ground for refusal.

6.4.3 Execution of Fines

So far, only one case concerning execution of fines has come up, and it is still pending. This is probably due to the fact that the regulation has been adopted only recently.

6.4.4 Reporting

The Ministry of Justice has responsibility for establishing on a regular basis a survey of the cases and the application of the principle of mutual recognition. Until now, the only instrument covered in these summaries is the EAW.

The Criminal Law Office (*Strafferetskontoret*) at the Ministry of Justice is responsible for reporting to the Danish Parliament on the status regarding the administration of mutual recognition instruments.

6.5 Outlooks for Improvement – a Database on Definitions of Offences?

As regards the possibility of compiling a database with legal definitions of offences in the Member States, this is almost univocally seen as a non-necessary step to take in order to enhance further cooperation. The reasons added for this conclusion are several, and resonated in a large majority of the interviews conducted.

- First, it has been noted that the categories of offences in the national legal systems are in many cases identical in all Member States. For instance

⁶⁷ *Oberlandesgericht München*, Beschluss 31.01.2007, OLG Ausl. 179/06. Previously, an EAW issued in Denmark had failed since the initial implementation of the EAW-FD has been declared unconstitutional by the German Constitutional Court, to the effect of which a German citizen could not be extradited as the legislation then in effect didn't allow for this.

homicide, drug trafficking and other serious crimes are by and large penalised in all legal systems and therefore would not constitute a difficulty for cooperation. There is therefore little doubt about the substantive definition of criminal offences.

- Second, in the cases where a particular offence causes problems as far as its definition can be in doubt, this is in practice solved by taking direct contact by the prosecution authorities to colleagues in the other Member States. This informal way of proceeding has the advantage of being both accurate and fast, speeding up the procedure as it may sometimes be needed.
- Third, the preparation of a database is seen as a costly endeavour that may not serve its purpose if the definitions of the offences are not continuously updated.
- Fourth, in the most sensitive cases, as for example if a Member State requests the surrender of an individual for alleged violation of national regulation on abortion, racism or sexual offences, such a delicate matter would surely be controversial and potentially problematic. Nevertheless, instances like that were indicated as clearly exceptional cases that only hypothetically would occur. Therefore, an anticipatory attempt to develop conceptual solutions on these matters is regarded as an exercise with a more hypothetical perspective than as an answer to a real problem. Thus, there is no real problem to be tackled by creating a database.

To sum up, the development of a database containing national definition of offences listed in the instrument is not seen as a necessary or viable option.

7 Conclusions

As mentioned above, the overall assessment of the instruments adopted so far on the matter of mutual recognition is generally positive, especially as far as the EAW is concerned. This assessment is based on the experiences gathered so far on the practical use of the EAW. There is very little doubt among the professionals interviewed that the adopted legal instruments of mutual recognition are indeed facilitating the national authorities in carrying out their tasks in the fight against transnational criminal activities.

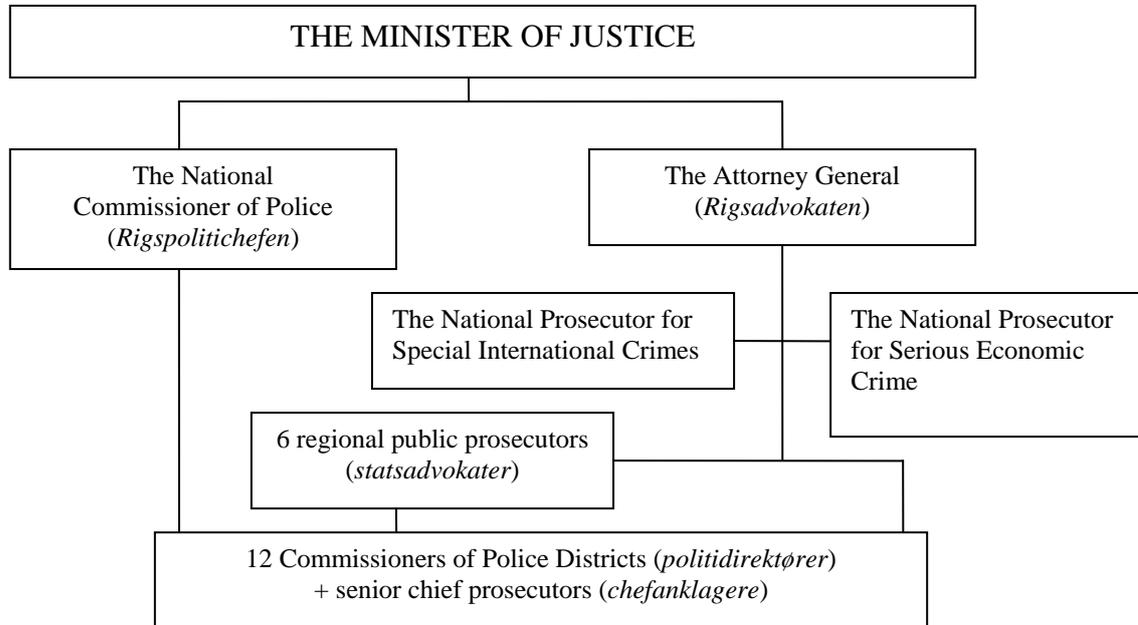
In light of these considerations, the present practical challenge is to gather systematic experience on the legal instruments so far implemented. It has therefore been suggested to defer a broadening of application of the principle of mutual recognition to other areas of cooperation in criminal matters in order to get sufficient feedback on the practical use of already existing instruments. In regard to national authorities, and especially when arguing to national MPs on the introduction of new legal instruments on mutual recognition, it would certainly sustain arguments for introduction of new instruments if the evaluation of existing arrangements could be presented as supporting evidence for the relevance of further initiatives. Thus the way forward indicated during the interviews was to »build on« existing instruments at some point when it is found necessary in light of new demanding counter-criminality efforts, and to base future initiatives and proposals on the assessment of the existing legal basis.

An increased procedural harmonisation may not automatically mean that citizens would gain an improvement of legal certainty as it would not necessarily imply that the procedural rules protecting the fundamental rights of the citizens are working in an appropriate way.

On one hand, the harmonisation of the procedural rules can increase the efficiency and the times of processing the requests, *e.g.* on surrender of suspects and convicts. On the other hand, further development of procedural regulations is not desirable, if more detailed rules would mean that the procedures are made more difficult and demanding. This consideration is also valid as far as the consolidation of the existing instruments of mutual recognition in criminal matters is concerned. However, the fact that several frameworks now coexist, is not seen as troublesome.

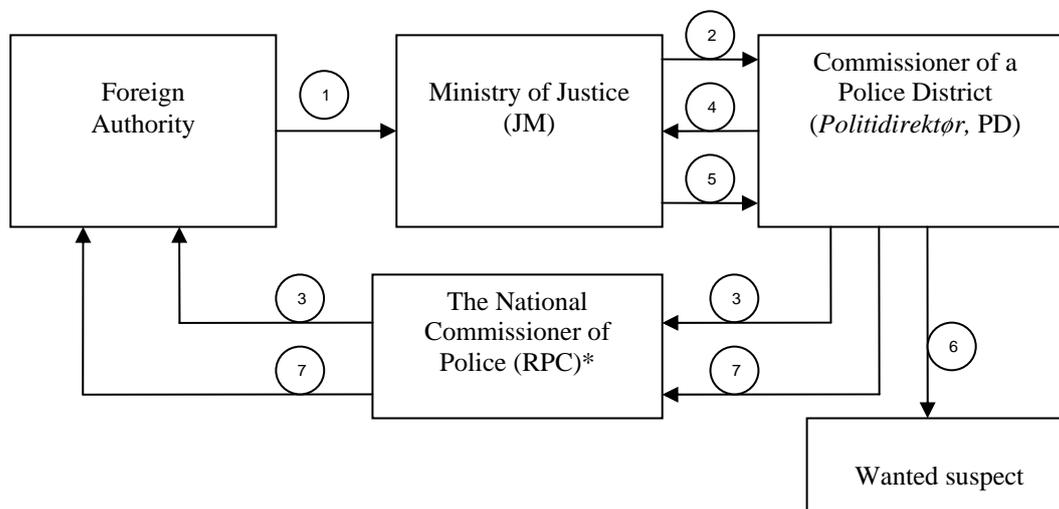
APPENDIX 1

THE BASIC STRUCTURE OF THE POLICE AND THE PROSECUTION AUTHORITY



APPENDIX 2

SURRENDERING ON THE BASIS OF AN EAW
Denmark as executing authority

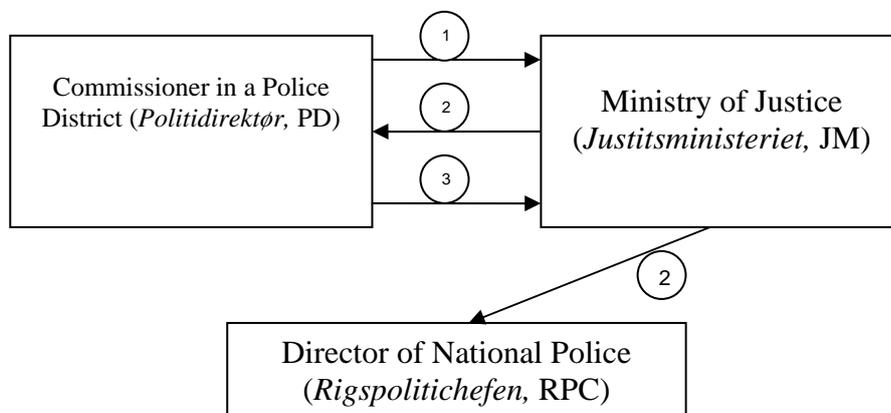


1. JM receives a European Arrest Warrant either directly from the foreign authority or via Schengen and/or Interpol. JM makes a preliminary evaluation of the arrest warrant.
2. The EAW is sent to PD for further inquiry.
3. PD informs through the RPC the foreign authority, if the suspect is arrested and in custody. Copy is sent to the JM.
4. PD sends back a recommendation to the JM, within a deadline of 3 days after, the EAW is available in Danish, Swedish or English.
5. JM decides whether the suspect can be surrendered within a deadline of 10 days after the detention or that the EAW is available in Danish, Swedish or English. The decision is sent to PD.
6. PD notifies the suspect of the JM's decision and of the possibility of trying the decision at the Courts. The deadline for accessing the Courts is 3 days. JM informs of the potential decision of the Courts. A final decision from the Courts has to be reached within 30/60 days.
7. PD decides with the foreign authorities within a deadline of 10 days the practical formalities of the surrender.

* *Rigspolitichefen*, the unit where SIS and Interpol are located.

APPENDIX 3

ISSUING OF AN EAW *Denmark as issuing authority*



1. PD informs JM of the intention of requesting a person surrendered to Denmark. Before the PD prepares a draft to a European Arrest Warrant, the case has to be submitted to the Courts. PD sends a draft of EAW to the JM (judicial authority in Denmark).
2. JM controls that the conditions for the issuing of an EAW are met and authorises the arrest warrant. The original arrest warrant is sent to the PD, with copy to the RPC with the request of that the arrest warrant are inserted in the SIS and/or the Interpol. If necessary the EAW is also sent directly to the European country.
3. PD notifies the JM of when the suspect can be surrendered.