EU Criminal Law for Defence Counsel: focus on the European Arrest Warrant

1. This Paper starts from the premise that there is an urgent need for the Rights of an accused person in Cross-Border cases to be strengthened in a number of important respects. Many of the few safeguards that remained under the "old" Extradition era have been removed and overtaken by the rush for speedy delivery of accused persons between Countries, regardless of their Rights under the evolving regime of the European Arrest Warrant ("EAW").

2. Defence Counsel and their clients in the EU face an uphill struggle to fairly and satisfactorily put a strong case against surrender, and the following obstacles in EAW cases are some of the reasons why:

(i) under the "old" system the principle of "dual criminality" protected defendants from unfair prosecution or punishment in the State to which they had been extradited for acts which are not criminal in their home Country. Under the new system defendants have lost this protection.
On the 3rd May 2007 the European Court of Justice Ruled that "the Removal of verification of double criminality complies with the principle of legality and with the principle of equality and non-discrimination". The Court rejected the submission that the Framework Decision was seeking to harmonise criminal law in Europe. The Court ruled that the choice of the 32 categories of offences was not a "watering-down" of the clarity which had hitherto been necessary.

The Defence had maintained that the removal of verification of double criminality was even more questionable since no evidence had to be produced to clarify the matter, AND that in every EAW there was no detailed definition of the facts in respect of which surrender may be Requested. [For details of the Case see Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad].

As a result defendants in Cross-Border cases are vulnerable to unfair prosecution and punishment in another State for acts which are not criminal in their home country.

(ii) under the Principle of "Specialty" there is a condition included in most Extradition Treaties whereby the person being extradited can only be tried for the offences specified in the Extradition Request, and no other Offences. In this way the Executing (Requested) State is able to impose a limit on the Issuing (Requesting) State to prosecute only those Offences openly declared in the Extradition Request;

(iii) another problem relates to the well-established "ne bis in idem" principle, or the prohibition of "double jeopardy", that no-one should be prosecuted or tried twice for the same acts or the same criminal behaviour. The aim has been to provide Member States with common legal rules in relation to "ne bis in idem" to ensure uniformity in both the interpretation of these rules and their practical implementation. The problem is acute where a defendant is convicted in one country of substantially the same conduct for which he faces trial in another country.

It is true that the "ne bis in idem" principle has been established in Article 50 of the Charter of Fundamental Rights of the European Union. The reality is however that defendants are excluded from Meetings where Member States decide where a defendant will be tried i.e. which "Forum" or State will hold the trial. This is a very big question for defendants who will have no real say in the decision about where their Case is going to be tried, no choice, and no participation.

If it was an Englishman who was in this position it would be absolutely intolerable to have Spain or Greece deciding that he should be deprived of a British Jury Trial without any say in the decision. In addition, he would not get such a fair trial outside the UK, and he would face huge difficulties of expense and logistics getting his witnesses to the far distant trial.
There would also remain the risk he would be sent from country(1) where he had been tried, to country (2) and tried a second time there for essentially the same offence.

(iv) as we have seen above a defendant has no real status, or "power" to prevent injustice in the present EAW climate;

(v) in addition, despite the EU rhetoric, a defendant has now lost many of the protections he had under the old system, with no <u>new set of Rights and Rules</u> to balance this loss;

(vi) in fact, so bad is the situation, it is now essential in a Cross-Border Case for a Defendant to have both a lawyer in the Issuing State AND the Requested (Executing) State. Early access to a lawyer is vital in both States (dual representation). The EU has completely failed to address or to provide across Europe any, or any adequate, system of Legal Aid to cope with this new fast-track EAW system that hugely benefits Prosecutors and States, and which seriously undermines the Defence.

(vii) Notwithstanding the frequency with which EU Decisions or Directives call upon the need to respect Fundamental Rights and fundamental legal principles, there is no evidence that the Member States are listening, or putting it into practice. For example, Article 1(3) of the Framework Decision on the European Arrest Warrant states that "this Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union".

Yet when it comes to actually defending or standing up to support those "fundamental rights and principles" remedy or robust support comes there none! Instead of "equality of arms", or "a level playing field" for the Defence, there are the continuing hollow pronouncements, empty gestures, and an inconspicuous response.

You cannot look to the European Court of Justice for help either. We noticed how the European Court of Justice dealt with the "dual criminality" principle in paragraph 2(i) above. It has been crushed and marginalised.

Two further Cases from the CJEU have demonstrated the restricted line this important Court is continuing to take on Defence Rights, and it does not bode well for Justice in the future. In Radu [Case C-396/11 29th January 2013] the CJEU was asked to deal with the question whether evidence of past or future violations of fundamental rights in the Issuing Member State in relation to pending proceedings against the requested individual and particularly in relation to the issuance of an EAW are possible grounds to refuse the execution of the EAW. The Court said NO.

In another Case, Melloni [Case C-399/11 26th February 2013], the CJEU refused to allow Spain to reject an Italian EAW on Spanish Constitutional Law principles on the basis that on the defendant's return to Italy he would have been prevented from having a retrial of his case in a full hearing where he could exercise his Defence Rights. The CJEU again adopted a narrow approach that (a) it was not a ground expressly provided for in the Framework Decision; and (b) such an approach would be incompatible with the superiority of EU law over national law.

It is worthy of Note that the House of Lords in the UK has made totally different pronouncements on this issue, one in 2012 and the other in 2013.

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In the House of Lords Report of the 26th April 2012 on the European Union's Policy on Criminal Procedure it expressed the view that "current EU legislation, subject as it is to the Charter of Fundamental rights, does permit the court of a Member State to refuse mutual recognition on human rights grounds in justified cases".

A further expression of dissent by the House of Lords after the case of Radu is to be found in their 13th Report of Session 2012-2013 HL Paper 159 para 172 on EU police and criminal justice measures. In it the House of Lords stated that "it would be a mistake to interpret the Judgement in Radu as preventing the option to decline an EAW request on human rights grounds on the basis of Section 21 of the Extradition Act 2003".

What is this but a clear Statement to the EU from such an exalted Legal Authority that EU Case-Law and all EU Framework Decisions, Directives and other Instruments must contain clauses guaranteeing fundamental rights and proportionality. I have made the point in para 2(v) above that no new set of Rights or Rules has come into existence to give clear guidance to Courts and Lawyers in Cross-Border cases.

In simple terms Courts in the EU must be able to refuse to implement or execute any EU measure where there are substantial grounds to believe that the measure would result in a breach or breaches of a fundamental right of the person concerned.

(viii) What is "mutual recognition" and does it matter?
In 1999 the European Council decided that the principle of mutual recognition should become the "cornerstone for judicial cooperation in criminal matters". The first Instrument to implement this principle was the Framework Decision on the EAW.

Proportionality