

Chapter 16

**THE HANDING OVER OF PROPERTY ACCORDING TO ARTICLE 29
OF THE EUROPEAN ARREST WARRANT FRAMEWORK DECISION:
LEGAL SCOPE, IMPLEMENTATION AND ALTERNATIVE REGIMES
FOR HANDING OVER PROPERTY IN THE EU MEMBER STATES**

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1. INTRODUCTION

According to Article 29-(1) EAW-FD¹

'[a]t the request of the issuing judicial authority or on its own initiative, the executing judicial authority shall, in accordance with its national law, seize and hand over property which:

- (a) may be required as evidence, or
- (b) has been acquired by the requested person as a result of the offence.'

The handing over of property is a factual act, which is substantiated by the legal rules dealing with it. In traditional concepts, a seller would have to hand over objects in order to assign new property or a proprietor would have to do so for the establishment of pledging goods etc. The legal rule, which is of interest for this contribution, is Article 29 EAW-FD – how does it concretise the factual act, i.e., what are the legal implications of this provision?

Article 29 EAW-FD – and especially its application *in praxi* – is closely linked to crucial basic principles in the context of transnational criminal procedures. There are several reasons in favour of taking into account some limitations to the concept of the EAW Framework Decision and especially its Article 29.

- As to the roots of Article 29 EAW-FD, the Commission explains in its Explanatory Report on the proposal of the EAW Framework Decision² in a four-line statement that the provision on the 'handing over of property' had been taken over directly from the European Convention on Extradition³ with the aim of preserving the existing legal order in this matter. The new rule must be inter-

¹ Council Framework Decision on the European arrest warrant and the surrender procedures between Member States of 2002, OJL 190 of 18.07.2002, 1.

² Of 2001, COM(2001) 522, with regard to Art. 42 Draft EAW-FD.

³ Council of Europe Convention on Extradition of 1957, CETS no. 024, <<http://conventions.coe.int/treaty/en/treaties/html/024.htm>> (checked 6 June 2008).

preted in the light of the specific provisions of the EU Convention on Mutual Assistance in Criminal Matters, particularly its Article 8.⁴

However, if one looks more closely, doubts arise as to whether the handing over of property according to Article 29 EAW-FD may be referred to merely as a ‘natural’ development of a EU tradition: Firstly, there is a certain danger that the national laws implementing Article 29 EAW-FD in the Member States – without guidance – will not provide an optimal framework regarding an efficient and ‘fair’ regime for handing over property in a coherent development of EU law.⁵ Secondly, there are several initiatives for the cross-border surrender of property; Article 8 EU-MLAC 2000 is merely one provision governing the handing over of property in cases of mutual legal assistance in the European Union – and maybe not the crucial one.

- As to the aim behind the provision, the suspicion that Article 29 EAW-FD might have been constructed as a device in order to clean up a transnational procedural ‘Tower of Babel’ and get the procedure to concentrate on one State is far from far-fetched. One can at least have serious doubts whether Article 29 EAW-FD reflects only the sublime *ratio* ‘crime does not pay’.⁶
- As is widely known, the adoption of the EAW brings about a limitation to the principle of dual criminality.⁷ Therefore, if one discusses the scope of Article 29 EAW-FD, one automatically broaches the current scope of the principle of dual criminality. This contribution is not the frame to judge the limitation of this principle due to the EAW Framework Decision. However, it can be said, briefly, that a partial abolishment must go together with a convergence of general ideas concerning the scope of criminal law⁸ in the Member States of the Union which is responsible for the limitation. This need is particularly pressing with regard to new members of the European Union. It is fairly uncertain if there is even a vague sort of consensus. As long as this is the case, the principle of dual criminality must not be restricted further than necessary.

⁴ EU Convention on Mutual Assistance in Criminal Matters of 2000 (EU-MLAC 2000), Brussels, 25 September 2001 COM(2001) 522 final/2, 2001/0215 (CNS); *OJ C* 197 of 12.07.2000; for explanations on Art. 8 EU-MLAC 2000, Commentary by Sabine Gless in W. Schomburg/O. Lagodny/S. Gless/T. Hackner (eds.), *Internationale Rechtshilfe in Strafsachen (International Cooperation in Criminal Matters)*, 4th edn., Munich, C.H. Beck 2006, part III B, p. 1007/1008.

⁵ Nevertheless, the national legislation must prove the Member States’ loyalty to EU legislation and compliance with the principle of solidarity among them – in order to be in conformity with the well known ‘Pupino’ doctrine of the European Court of Justice (ECJ), ECJ C-105/03, Criminal proceedings against Maria Pupino (2005) ECR I-5285; see in a slightly different context also *infra* section 5 and John A.E. Vervaele, ‘European criminal law and general principles of Union law’, in J.A.E. Vervaele (ed.), *European Evidence Warrant*, Antwerp-Oxford, Intersentia 2005, p. 131-155 (p. 152 et seq.).

⁶ With regard to confiscation; see Maurice Harari, ‘Remise internationale d’objets et valeurs: réflexions à l’occasion de la modification de l’EIMP’, in *Procédure pénale, droit pénal international, entraide pénale – Etudes en l’honneur de Dominique Poncet*, Chêne-Bourg, Georg éditeur (1997), p. 167-201 (181); *Schweizerisches Bundesgericht* (Swiss Federal Court) Vol. 115 Ib 517 (p. 538) [<http://www.bger.ch>], checked 6 June 2008].

⁷ Art. 2-(2) EAW-FD; see the chapter by Elies van Sliedregt in this book.

⁸ E.g., in the context of crime definitions.

- Furthermore, an extensive application could collide at some point with other contractual obligations⁹ of the Member States and, in general, their commitment to procedural and human rights.

All in all, the vital question here is whether there is a corrective in order to avoid too large a scope for the handing over of property, especially with regard to confiscation of funds.

At the very moment, these problems may seem rather theoretical, because there appears to be no relevant case law or controversial practice implementing Article 29 EAW-FD. According to hearsay and anecdotal evidence, there are currently no problems, because cases of property surrender are clear-cut for an Article 29 EAW-FD procedure; the competent national agencies find an amicable solution or a formal request for separate mutual legal assistance is presented. But in the future, many questions related to the handing over of property according to Article 29 EAW-FD may arise. Hypothetical cases, especially with regard to the scope of dual criminality, are self-evident:

The EU Member State X recognises a crime called ‘Sabotage’ which covers expressions of opinion which are, on the other hand, legally protected in Y, also a EU Member State. For this crime, the legislation of X states a blanket confiscation of the delinquent’s funds. A, a journalist, is guilty of ‘Sabotage’ according to the law of X. Since he lives in Y, X issues an EAW. What are the consequences with regard to A’s property in Y?

The following sections will initially give an overview of the legal scope of Article 29 EAW-FD in order to find out if there are limits incorporated in the provision. Then, the implementation of the EU rule by the Member States will be laid out, grouping the various approaches into different models. Furthermore, some of the alternative ways to hand over objects within the framework of mutual recognition will be broached. The closing résumé looks ahead pondering the problematic perspectives of handing over objects along with a person sought for an alleged crime.

Occasionally, the contribution will hint at the parallel problems in Swiss national law, an exceedingly worthwhile focus, since Switzerland – despite its non-membership of the European Union – is one of the most crucial hot spots for banking and financing in general in Europe. In addition, firstly, Swiss and European legal orders are linked together in a complex way and, secondly, experiences in one legal order can serve as a welcome inspiration in the other.

2. CONTENT AND LEGAL SCOPE OF ARTICLE 29 EAW-FD

Article 29 EAW-FD is only one aspect of the prominent transfer regime based on mutual recognition as provided by the EAW Framework Decision. The provision,

⁹ See *infra* section 3.3.3.

however, mirrors all the problems embedded in that regime, e.g., as pointed out already, the consequences resulting from the abolition of dual criminality.

2.1 Two instruments in one box

Article 29 EAW-FD offers – in the tradition of other provisions on extradition – two instruments in one box: ‘Handing over of property’ as a superordinate concept (German terminology: *Sachauslieferung*) refers both to property

- which may be required as evidence in the issuing State (German terminology: *Beweisrechtshilfe*), and to property
- which has been acquired by the requested person as a result of the offence.

The second specification has its particular significance in the context of confiscation measures (German terminology *Einziehung*) in the issuing State.

In recent years, legislators have made various distinctions between the extradition of persons (including some ‘cleaning up’ annex procedures) on the one hand, and confiscation matters seizing the proceeds of crimes. Thus, in new legal frameworks for international co-operation in criminal matters other than extradition the two instruments are dealt with separately.¹⁰ The reason for separate regulations or provisions governing mutual assistance in evidence matters, on the one hand, and the extradition of property (including preparations for confiscation), on the other, are mainly the disparate objectives of the two regimes: while the first is part of co-operation in prosecuting a certain crime, the second is an appendix to an extradition and often a (final) decision in allocating property. Nevertheless, in the past, despite this dissimilitude, the approach of combining these two instruments in one provision – as does Article 29 EAW-FD – was fairly common.

2.2 Starting point

Pursuant to Article 29-(1) EAW-FD, the issuing judicial authority can present a request with regard to the seizure and handing over of the property mentioned. However, such a request is not compulsory for the requested State to act on the basis of Article 29-(1) EAW-FD.¹¹

2.3 Independence of ‘property extradition’

Article 29-(2) EAW-FD allows the handing over of property independently from the handing over of the person: property, which may be needed as evidence or has been acquired by the requested person as a result of the offence, shall be handed over even if the EAW cannot be carried out due to the death or escape of the requested person.

¹⁰ See *infra* section 4.

¹¹ ‘Or on its own initiative’.

However, it is rather dubious whether this approach constitutes the best solution in all cases. If the person sought, for example, escapes to another country, it may be wise to retain his or her property in the State of (original) domicile. The first test of this rule *in praxi* can be awaited with interest.

2.4 Property to be handed over

Article 29 EAW-FD only states that property which may be required as evidence or has been acquired by the requested person as a result of the offence has to be handed over. However, in practice different questions may arise:

- Does the requesting State bear any responsibility to show that it actually needs the property for evidential reasons?
- What qualifies as an acquisition of property by the requested person? E.g.: (When) Is money in a banking account acquired as a result of the offence?
- Even if 'property' is typically defined in a fairly broad way as 'something owned; any tangible or intangible possession that is owned by someone',¹² it appears unclear what exactly should be handed over with a person. On the other hand: Who defines what *should* be handed over? Are legal criteria relevant or even common sense with regard to the interests of the particular States *in casu*? For example, what if a person carries a savings bank book for a joint account or drives a car which would be his or her own except for an outstanding installment?

Such questions are subject to controversial discussions related to frozen assets.¹³ German law, for example, did not explicitly define 'property' in the context of an extradition procedure framework so that in the late 1990s courts established case law including banking accounts in this term.¹⁴

The EAW Framework Decision is silent on this aspect. It should, however, have addressed the question, at least in the Commission's Explanatory Report on the Proposal of the EAW Framework Decision.¹⁵

2.5 Temporary and permanent exceptions – rights acquired in the property

Provided the property is liable to seizure or confiscation in the territory of the executing Member State, the latter may, if the property is needed in a criminal proceeding, temporarily retain it or hand it over to the issuing Member State only on condition that it is returned afterwards (Article 29-(3) EAW-FD).

¹² Thesaurus based on WordNet 3.0.

¹³ See for further information: Mark Pieth (ed.), *Recovering Stolen Assets*, Bern, Peter Lang 2008.

¹⁴ See *Oberlandesgericht Frankfurt*, Decision of 30 July 1997 – 2 Ausl. II 10/96.

¹⁵ See *supra* n. 2.

According to Article 29-(4) EAW-FD, the surrender of property is, furthermore, barred in order to safeguard any rights, which the executing Member State or third parties may have acquired in the property. Where such rights exist, the issuing Member State shall return the property without charge to the executing Member State as soon as the criminal proceedings have been terminated.

It is interesting to note that Article 29 EAW-FD does not comment on other limitations like, e.g., the principle of proportionality. How would one have to decide with regard to objects or assets of minimal value? Is there a possibility to take into account the idea of *minima non curat praetor*? At the moment, there seems to be no answer to this question.

2.6 Rights of the surrendered person?

Article 29 EAW-FD does not comment on the rights of the surrendered person explicitly, although various questions with regard to this area might arise. In general, little attention has been paid to procedural safeguards for suspects in the EU framework.¹⁶

2.7 Decision in cases of conflict

In comparison to other legal regimes concerning the handing over of property, Article 29 EAW-FD provides only little legal guidance for cases in which claims for property are made in different countries.

In contrast, even the Freezing Property Framework Decision¹⁷ addresses the problem of double jurisdiction or of a possible infringement of the *ne bis in idem* principle when it comes to non-recognition or non-execution of a decision.

Article 29-(3, 4) EAW-FD with its allocating regime may give preference to the jurisdiction which retains the property or takes the first (final) decision; there is no adequate mechanism for allocating the property to the jurisdiction with the best claim. This is, however, a general problem of EU co-operation.¹⁸

2.8 Another point of view: the situation in Switzerland

2.8.1 General remarks

Swiss Courts and scholars basically agree on the interpretation of Article 59-(1) of the Swiss *Bundesgesetz über internationale Rechtshilfe in Strafsachen*¹⁹ which states

¹⁶ See Chrisje Brants, 'Procedural safeguards in the European Union: Too little, too late?', in J.A.E. Vervaele, *supra* n. 5, p. 103 et seq.; *infra* section 3.3.3.

¹⁷ Council Framework Decision of 2003 on the execution in the European Union of orders freezing property or evidence (Freezing Property FD), OJ L 196 of 02.08.2003, 45.

¹⁸ See Green Paper on Conflicts of Jurisdiction and the Principle of *ne bis in idem* in Criminal Proceedings of 2005, COM(2005) 696 final.

¹⁹ *Bundesgesetz über internationale Rechtshilfe in Strafsachen* (Federal Act on International Mutual Assistance in Criminal Matters, IRSG) of 1981, no. 351.1 [<http://www.admin.ch/ch/d/sr/sr.html>], checked 6 June 2008].

that objects and assets found with the requested person²⁰ are handed over for certain reasons: the provision is considered not only to refer to the direct possessions²¹ of the requested person, but also to everything in his or her domicile, office or hotel room. With regard to objects and assets deposited – either in a bank or with a third person – there is a special rule: they fall within the scope of Article 59 IRSG, provided the requested person disposes of them either *de jure* or *de facto*.²² As an orientation guide, one also has to take into account Article 59-(3) IRSG containing a list of objects or assets which are considered to have been obtained by the criminal act.

Hence, unlike Article 29 EAW-FD, the scope of Article 59 IRSG is in some measure limited with regard to the objects and assets which can be subject to a handing over.²³ Furthermore, the Swiss provision is generally more descriptive due to the enumeration in Article 59-(3) IRSG.

2.8.2 Additional requirements for the handing over

In a leading case, the highest court of Switzerland, the *Bundesgericht* (Federal Court), required a link between the objects or funds handed over and the crime *in casu*.²⁴ The federal court is stricter with regard to items required for confiscation than with regard to items required as evidence. Whereas for the latter, it is sufficient that they could constitute adequate exhibits pursuant to a preliminary examination, the handing over for confiscation is only possible if it is sufficiently demonstrated that the objects or funds have been attained directly or indirectly by the prosecuted crime or that such a provenance is highly probable.

2.8.3 Similarities

- Both the EAW Framework Decision and the *Bundesgesetz über internationale Rechtshilfe in Strafsachen* recognise the dichotomy of objects of ‘evidence’ and funds being a ‘result of the offence’ in the same provision.

²⁰ Original versions in German and French: *beim Verfolgten gefundene Gegenstände oder Vermögenswerte; les objets et valeurs trouvés en possession de la personne poursuivie*.

²¹ The notion of ‘possession’ in this context does not have to correspond with the similar term in Arts. 919 and 920 Swiss ZGB (*Zivilgesetzbuch*, Civil Code) of 1907, no. 210.0 [<http://www.admin.ch/ch/d/sr/sr.html>], checked 6 June 2008]; an elaboration if the two notions differ – and if so one could question to what extent – but that would be going beyond the scope of this contribution.

²² Maurice Harari, *supra* n. 6, p. 182; Laurent Moreillon (ed.), *Entraide internationale en matière pénale*, 1st edn., Basel-Geneva-Munich, Helbing & Lichtenhahn 2004, p. 307 et seq.

²³ See for the restriction in the Swiss enactment Maurice Harari, *supra* n. 6, p. 181 et seq.; Laurent Moreillon, *supra* n. 22, p. 306 et seq.

²⁴ *Schweizerisches Bundesgericht* (Swiss Federal Court) Vol. 115 Ib 517 (p. 534 et seq.) [<http://www.bger.ch>], checked 6 June 2008]; actually, this judgement refers to another provision of the *Bundesgesetz über internationale Rechtshilfe in Strafsachen* (Art. 74) not in the context of extradition. However, the pertinent considerations are relevant nevertheless, see Laurent Moreillon, *supra* n. 22, p. 306.

- Article 59-(7) IRSG determines, like Article 29-(2) EAW-FD, the independence of the handing over of property from the actual extradition.
- Both instruments contain limitation clauses with regard to the handing over: in Article 59-(2, 4, 5, 6, 8) IRSG and in Article 29-(3, 4) EAW-FD.

3. IMPLEMENTATION OF ARTICLE 29 EAW-FD IN THE LEGAL SYSTEMS OF THE EU MEMBERS

3.1 General remarks

By December 2007,²⁵ the provision was fully transposed in 14 Member States²⁶ and partly transposed in most of the others.²⁷

Four Member States have only partly transposed Article 29-(1) EAW-FD.²⁸ Particularly in France the legislation transposing Article 29-(1) EAW-FD does not explicitly empower the executing judicial authority to seize property on its own initiative.²⁹

Furthermore, also in the context of Article 29-(1) EAW-FD, Estonia has stated that its judicial authority can seize property on its own initiative on the basis of a general legislation which the Commission has not been in a position to examine.³⁰

Six Member States have either not specifically transposed³¹ or only partly³² transposed Article 29-(2) EAW-FD.

In addition, there are 5 Member States which have either not³³ or only partly³⁴ transposed Article 29-(3) EAW-FD on the temporary or conditional handing over of property.

Finally, 4 Member States have not transposed Article 29-(4) EAW-FD with regard to the rights acquired in the property,³⁵ whilst Estonia and Finland have only partly transposed it. In Estonia, the transposing act does not imply that the return of property shall not be affected by any charge.

²⁵ According to Com. Doc. SEC(2007) 979, 36.

²⁶ Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Spain, Ireland, Italy, Lithuania, Hungary and Malta.

²⁷ The Netherlands, Portugal, Romania, Slovenia, the Slovak Republic and the United Kingdom.

²⁸ France, Malta, Poland and Sweden.

²⁹ Art. 695-41 of the Code of Criminal Procedure (CPP), inserted by Law no. 2004-204 of 2004; Art. 17-(1) *OJ* of 10.03.2004; unofficial English translation (emphasis added): 'When the requested person is arrested, then *at the request of the judicial authorities of the issuing member state*, and according to the procedures set out in Art. 56, the first two paragraphs of Art. 56-(1) and Articles 56-(2), 56-(3) and 57, objects may be seized: 1. which may act as exhibits, or 2. which have been acquired by the requested person as a result of the offence'.

³⁰ According to Com. Doc. SEC(2007) 979, 36.

³¹ Denmark, Estonia, Poland, Sweden and the United Kingdom.

³² Finland.

³³ Denmark, Estonia and Sweden.

³⁴ Poland and Finland.

³⁵ Latvia, Malta, Sweden and the United Kingdom.

3.2 Definition of ‘property’ to be handed over

Article 29 EAW-FD neither specifies what may be considered ‘property’ and must therefore be handed over when executing an EAW, nor does it explain whether the handing over procedure has to meet certain standards.³⁶ In practice, these are important questions.

Hence, some Member States have made special arrangements for handing over property when executing an EAW. In doing so, they have implemented the EAW Framework Decision in different ways:

One group of Member States does not provide details about the ‘property’ or the procedure for handing it over, but only refers to the general rules concerning the handing over of property whilst executing an extradition (*allgemeine Regeln der Sachauslieferung*).³⁷ The concept of property as well as the procedure should, therefore, follow the same rules as they do in the general framework of mutual assistance in criminal matters.

3.2.1 Concept of ‘property’

3.2.1.1 General definitions

As indicated before, property is commonly defined in a rather broad sense as ‘something owned; any tangible or intangible possession that is owned by someone’.³⁸ Missing an explicit definition or explanation of the term in the EAW Framework Decision, one has to turn to the general and rather basic definition. This approach is not a new phenomenon in traditional mutual assistance: various instruments dealing with mutual legal assistance do not define ‘property’ either, but leave this task to the case law. The concept of property within the scope of Article 29 EAW-FD may thus be defined over the years by ECJ case law taking its complexity into account.

However, there is other EU law which does define ‘property’, e.g., the Freezing Property Framework Decision. According to its Article 2-(d) the term property

‘includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents and instruments evidencing title to or interest in such property, which the competent judicial authority in the issuing State considers:

- is the proceeds of an offence referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or
- constitutes the instrumentalities or the objects of such an offence.’

The implementing laws of most Member States do not explain at all which items shall be included under the heading of ‘property’.³⁹

³⁶ See particularly *supra* section 2.4 and 2.6.

³⁷ Luxembourg: Art. 17 Loi du 17 mars 2004 relative au mandat d’arrêt européen; Portugal: Art. 32 Law no. 65/2003 of 2003; see furthermore: Austria, the Czech Republic and Germany.

³⁸ Thesaurus based on WordNet 3.0.

³⁹ See Hungary: Sec. 24 and 25 Act CXXX of 2003.

The Slovak implementing law refers to a ‘thing’,⁴⁰ whereas the implementing law of Slovenia explicitly provides for the seizure of pecuniary benefits.⁴¹

Romania does not give a specification, but refers to ‘[t]he handing over of objects and of other goods’.⁴²

3.2.1.2 The link between property and the requested person: a clarifying approach?

Several Member States try to attain a certain specification by requiring some kind of link between the property and the requested person for the applicability of Article 29 EAW-FD.

- Sweden does not give a special definition, but refers to ‘objects that are found’.⁴³
- The law of Cyprus provides for the handing over of objects ‘which may be used as evidence or which have been *in the possession* of the requested person as a result of the offence’.⁴⁴
- The Dutch law even states: ‘Objects found in the requested person’s possession may be seized at the request of the issuing judicial authority.’⁴⁵
- According to the Belgian law the court in chambers may order the return of objects (handed over to the issuing state) ‘which are not directly associated with the offence charged against the person concerned’.⁴⁶

It can at least remain doubtful whether this approach – in all its alternatives – brings about the clarity the domestic legislators might have aimed for.

3.2.2 Procedural arrangements

Some Member States imply in their laws that property will only be handed over to the EAW-issuing State if the latter explicitly asks for specific objects.⁴⁷

Finland, however, will act even if the EAW-issuing State has not requested such a measure.⁴⁸

⁴⁰ Slovak Republic: Sec. 9(1) Act no. 403/2004 of 2004.

⁴¹ Slovenia: Art. 34(2) ZENPP of 2004.

⁴² Romania: Art. 21-(2) Law no. 302 of 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law no. 224/2006.

⁴³ Furthermore, it states that the provisions of the Swedish Act (2000:562) on International Legal Assistance in Criminal Matters shall be applicable, Sec. 7 Act (2003:1156) regulating surrenders by Sweden according to the EAW system.

⁴⁴ Cyprus: Arts. 9 and 31 Law no. 133 (I) of 2004.

⁴⁵ The Netherlands: Art. 49 Act of 2004 implementing the Framework Decision of the European Union.

⁴⁶ Belgium: Art. 26 § 2 Legislation implementing the European Arrest Warrant of 2003.

⁴⁷ Slovak Republic: Sec. 9(1) Act no. 403/2004 of 2004; Slovenia: Art. 34 (1) ZENPP of 2004.

⁴⁸ Finland: Sec. 66(1) Act on Extradition on the Basis of an Offence between Finland and other Member States of the European Union of 2003 (424/2003).

Furthermore, Finland and Ireland enable a search of a requested person's domicile and the seizure of property in the possession of that person.⁴⁹

3.3 Securing respect for rights acquired in the property

Some Member States lack special rules regarding the rights of the EAW-executing State or third parties. Thus, general provisions for handing over property in connection with an extradition are applicable in this context.⁵⁰

3.3.1 Nature of rights

Most Member States do not establish a special rule, but explicitly state that 'any rights' that the EAW-executing State or third parties may have acquired will be preserved and, therefore, 'property may only be handed over to the EAW-issuing state temporarily'.⁵¹

- Romania explicitly states that the handing over of objects and other goods is subject to the possible rights of *bona fide* third parties and the 'rights of the Romanian State when these objects and goods may enter its property'.⁵²
- Hungarian implementing law refers to 'ownership rights and other rights in such property'.⁵³
- The implementing law of Slovenia explicitly states that, as a rule, property is handed over only temporarily, in order to guarantee the rights of third persons.⁵⁴

3.3.2 Establishment of rights

Another highly challenging problem is the question to what extent the rights acquired, e.g., by third parties, have to be established in order to have an influence on the procedure pursuant to Article 29-(4) EAW-FD.

Several Member States request that the existence of rights of third parties be proven in a formal way.⁵⁵

The implementing legislation does not, in general, require that the property claimed by the EAW-executing State or third persons is liable to seizure or con-

⁴⁹ Finland: Sec. 66(1) Act on Extradition on the Basis of an Offence between Finland and other Member States of the European Union of 2003 (424/2003); Ireland: Sec. 25 EAW Act 2003.

⁵⁰ E.g., Austria; Sweden refers to the provisions of the Swedish Act (2000:562) on International Legal Assistance in Criminal Matters (2003:1156) regulating surrenders by Sweden according to the EAW.

⁵¹ E.g., Cyprus: Art. 31-(4) Law no. 133 (I) of 2004; Portugal: Art. 32-(4) Law no. 65/2003 of 2003.

⁵² Art. 21-(4) Law no. 302 of 2004 on international judicial co-operation in criminal matters as amended and supplemented by Law no. 224/2006.

⁵³ Hungary: Sec. 24(4) Act CXXX of 2003.

⁵⁴ Slovenia: Art. 34(4) ZENPP of 2004.

⁵⁵ Slovak Republic: Sec. 9(4) Act no. 403/2004 of 2004.

fiscation according to its law. Some Member States, however, make this a precondition for a temporary retention or a conditional hand-over of the property.⁵⁶

It goes without saying that in this context both practitioners and scholars will have to cope with difficult problems concerning

- the notion of *bona fides*, and
- the requirements that formal proof of a right pursuant to Article 29-(2) EAW-FD has to fulfil.

The complexity is accentuated by the obvious fact that one does not only have to consider Article 29 EAW-FD, but the maze of domestic implementations in the first place.

3.3.3 *Current focus: rights of the surrendered person*

In a case which was argued before the Dutch Supreme Court,⁵⁷ an EAW had been issued in the Netherlands and sent to Spain, requesting the arrest of a person, X, and the seizure of his objects as meant in Article 29 EAW-FD. The Spanish authorities arrested the person and seized some objects, among them a mobile phone and an amount of cash. The person was surrendered to the Netherlands, but the Spanish authorities failed to hand over the objects. Later, the Dutch prosecutor dropped the case and the person subsequently asked a District Court in the Netherlands to grant order that the seizure should be lifted and the seized objects should be returned to him. The District Court took the position that it could not allow the application, because lifting a seizure by Spanish authorities only a Spanish court would be authorised to do. The individual appealed to the Dutch Supreme Court. The latter reversed the District Court's decision and ruled that if objects have been seized by Spanish authorities in the context of an EAW issued in the Netherlands, the Dutch Courts were competent to hear an objection against the continuation of the seizure. It remains unclear, however, what the force of such a foreign court decision may be in the Member State of issue.

4. OTHER SCHEMES FOR HANDING OVER PROPERTY

Various international co-operation mechanisms provide for the handing over of property – in connection with or without an extradition. In general, the latter schemes differentiate between the hand-over of alleged evidence and the hand-over due to confiscation purposes.⁵⁸

⁵⁶ E.g., Greece: Art. 29-(4) Law no. 3251/2004.

⁵⁷ Dutch *Hoge Raad* (Supreme Court) 3 June 2008, *LJN* BC9015.

⁵⁸ See *supra* section 2.1.

For example, the European Convention on Mutual Assistance in Criminal Matters⁵⁹ provides the basic framework for cross-border co-operation in obtaining evidence.⁶⁰

Within the EU, this Convention of 1959 has been supplemented by the Schengen Implementing Convention 1990⁶¹ (which has not modified the law on handing over property), the EU Convention on Mutual Assistance in Criminal Matters and its Protocol of 2001.⁶²

4.1 Handing over property according to the EU Convention on Mutual Assistance in Criminal Matters

The purpose of the EU Convention on Mutual Assistance in Criminal Matters is to facilitate⁶³ and modernise co-operation between judicial, police and customs authorities by supplementing the provisions and facilitating the application of the European Convention on Mutual Assistance in Criminal Matters.

Article 8 EU-MLAC 2000 provides – as a specific form of mutual assistance – for the restitution of objects obtained by criminal means which are found in another Member State. These are to be placed at the disposal of the requesting State in view of their return to their rightful owners. In certain cases, the requested Member State may refrain from returning the objects if that facilitates the restitution of such articles to the rightful owner. Article 8 EU-MLAC 2000 reads as follows:

‘(1) At the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners.

(2) In applying Articles 3 and 6 of the European Mutual Assistance Convention and Articles 24(2) and 29 of the Benelux Treaty, the requested Member State may waive the return of articles either before or after handing them over to the requesting Member State if the restitution of such articles to the rightful owner may be facilitated thereby. The rights of bona fide third parties shall not be affected.

⁵⁹ Council of Europe Convention on Mutual Assistance in Criminal Matters of 1959 (ECMAC 1959), CETS no. 030, <<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>> (checked 6 June 2008).

⁶⁰ The European Convention on Mutual Assistance in Criminal Matters has been supplemented in order to improve co-operation by its additional protocols of 1978 and 2001, see for the texts of the protocols, e.g., <http://www.assetrecovery.org/kc/node/f89ac79b-a960-11dc-a173-e30edbd7432c/laws_treaties.html> (checked 6 June 2008).

⁶¹ Convention implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders; see in this context the commentary by Wolfgang Schomburg and Sabine Gless, in Wolfgang Schomburg/Otto Lagodny/Sabine Gless/Thomas Hackner, *supra* n. 4, part IV, p. 1383 et seq.

⁶² OJ C 326 of 21.11.2001, 1.

⁶³ E.g., Art. 6-(1) EU-MLAC 2000, which states that requests for mutual assistance and communications take place directly between judicial authorities with territorial competence.

(3) In the event of a waiver before handing over the articles to the requesting Member State, the requested Member State shall exercise no security right or other right of recourse under tax or customs legislation in respect of these articles. A waiver as referred to in paragraph 2 shall be without prejudice to the right of the requested Member State to collect taxes or duties from the rightful owner.’

In the Explanatory Report,⁶⁴ the Member States explain that Article 8 EU-MLAC 2000 introduces new arrangements for restitution in the framework of mutual assistance. The provision permits, but does not oblige (‘may’), a requested Member State to execute the request to restore objects obtained by criminal means, e.g., stolen goods, to their rightful owners. The requested Member State could, for example, refuse such a request where property has been seized for evidential purposes in that Member State.

The provision is not intended to bring about any change of national law on confiscation. Furthermore, it should be noted that Article 8 EU-MLAC 2000 has been framed on the basis that it should apply only in cases in which there is no doubt as to who is the rightful owner of the property. It also operates ‘without prejudice to the rights of *bona fide* third parties’. This ensures that legitimate claims concerning the property will be fully preserved.

Provision was made in Article 6-(2) ECMAC 1959 and in Article 29-(2) of the Benelux Treaty 1962⁶⁵ for waiving the return of property handed over in the execution of letters rogatory. Article 8-(2) EU-MLAC 2000 allows a Member State to exercise such a waiver for the purpose of restoring property to its rightful owner. As in the case of paragraph 1, it is assumed that the ownership of the property should be clear. Paragraph 2 also applies without prejudice to the rights of *bona fide* third parties.

Article 8-(3) supplements Article 8-(2) EU-MLAC 2000 by specifying that if the requested Member State has waived (under the conditions described) the return of objects before they are surrendered, it is prohibited from exercising any security right or other right of recourse under tax or customs legislation enjoyed in respect of a surrendered article. However, the text also states that a waiver declaration pursuant to Article 8-(2) EU-MLAC 2000 shall not prevent the requested Member State from collecting any customs taxes or duties owed by the rightful owner of the property.

4.2 Seizing objects according to the Framework Decision on the European Evidence Warrant (EEW)

In the future, objects may be seized and handed over to the authorities of other Member States under the regime of a Framework Decision on a European Evidence Warrant.⁶⁶

⁶⁴ OJC 379 of 29.12.2000, 7.

⁶⁵ See Chapter II of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 1962, as amended by the Protocol of 1974.

⁶⁶ Framework Decision 2008/978/JHA of 18 December 2008 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters,

This proposal provides the principle of mutual recognition to a European warrant for the purpose of obtaining objects, documents and data for use as evidence in proceedings in criminal matters. The handing over procedure is not connected to the handing over of a person (as it is in Article 29 EAW-FD), it aims at mutual co-operation in criminal matters.

Being an equivalent to the EAW Framework Decision as an instrument for cross-border co-operation, the Framework Decision on a European Evidence Warrant will rely on the principle of mutual recognition and shall lead to a quicker and more effective judicial co-operation in criminal matters. Thus, it will replace the traditional mutual assistance regime in accordance with the conclusions of the Tampere European Council.⁶⁷

Comparing the means to transfer property or rather evidence from one Member State to the other, either within the context of Article 29 EAW-FD or under a future regime of an EEW, it is important to keep in mind that the Draft Framework Decision on a European Evidence Warrant introduces minimum safeguards for such co-operation between the issuing and executing States which shall supplement domestic law.

According to the Draft, an EEW can only be issued by a judge, an investigating magistrate or the prosecutor – thus, authorities which could obtain the objects, documents or data in similar circumstances, if they were located on the territory of their own Member State. This requirement is eventually supposed to prevent the EEW from being used to circumvent national safeguards on obtaining evidence. For example, it would ensure that prohibitions in the issuing State on obtaining evidence subject to legal, medical or journalistic privilege would also apply where its judicial authorities sought such evidence within the territory of another Member State.

In the executing State there is the need to ensure that the fundamental right not to incriminate oneself⁶⁸ is protected, and there is the necessity for additional safeguards with regard to search and seizure to be respected.

Legal remedies, however, are left to the issuing and executing States, where and when evidence is obtained by coercive measures.

4.3 Seizing objects according to the Freezing of Property Framework Decision

Property may be seized – but not handed over – under the Freezing of Property Framework Decision in line with the mutual recognition principle.⁶⁹ The property is frozen with a view to its eventual transfer to the issuing State, or its eventual confiscation.⁷⁰

OJL 350 of 30 December 2008, p. 72 et seq. The text of this chapter was finalised before the adoption of the Framework Decision.

⁶⁷ See, e.g., *OJC* 12 of 15.01.2001, 10.

⁶⁸ The Draft EEW-FD contains in its Art. 12-(1)(b) merely a specific provision protecting natural persons when it comes to producing objects, documents or data.

⁶⁹ Art. 3-(2) Freezing of Property FD.

⁷⁰ Art. 5, *ibid.*

Since the purpose of the Freezing of Property Framework Decision is explicitly limited to provisional measures to prevent the destruction, transformation, moving, transfer or disposal of property or evidence,⁷¹ it will never replace the handing over of objects according to Article 29 EAW-FD, but only prepare for it.

With regard to the concept of the establishment of rights acquired to a property, it is interesting that the Freezing of Property Framework Decision requires the Freezing Order to be accompanied by a request for the transfer of the evidence to the issuing Member State (or a statement that such a request will be forthcoming).⁷² General mutual assistance rules apply to the transfer of the object, except for modifications resulting from the principle of mutual recognition, i.e., the exception of dual criminality.

4.4 Relationship between different instruments

The relationship between and the interdependence of the different instruments allowing the handing over of property, for evidence or confiscation purposes, appear to be largely unclear.

The national authorities of the EU Member States have to cope with a rapidly growing number of community enactments in this context⁷³ – one might even call the situation a chaos – so that a correct and coherent application of the different instruments *in praxi* is unrealistic. Consequently, instead of creating new legislation, Brussels should concentrate on training people to use the legislation which already exists.

5. CONCLUSION AND PERSPECTIVES

Overall, with regard to the scope of Article 29 EAW-FD one has to underline that the provision is fairly vague, broad in its wording and not descriptive – e.g., unlike its Swiss parallel Article 59 IRSG.⁷⁴ Hence, in order to dare to provide an answer to the question with regard to the limitations of Article 29 EAW-FD discussed at the beginning of this chapter, one might at least say that the provision does not contain them in an obvious way.

However, a careful application of Article 29 EAW-FD is more than recommendable⁷⁵ and would be in compliance with modern legal developments: Recently, the instruments for handing over property have been diversified globally and have gained a life of their own. In nearly all nations, the lawmakers have adhered to the new objective of ‘following the money trail’.⁷⁶ European law and instruments on mu-

⁷¹ Art. 2(c), *ibid.*

⁷² Art. 4-(1), *ibid.*

⁷³ Wolfgang Schomburg/Otto Lagodny/Sabine Gless/Thomas Hackner, *supra* n. 4, Einleitung, p. 2.

⁷⁴ See *supra* section 2.8.

⁷⁵ As pointed out *supra* section 1.

⁷⁶ Mark Pieth, ‘The Harmonisation of Law Against Economic Crime’, 1 *European Journal of Law Reform* (1998/1999) p. 527-545 (532).

tual legal assistance as well as national legislatures implementing EU parameters must take this into account and decide on the legal scope of Article 29 EAW-FD accordingly.

There is clearly a certain danger that Article 29 EAW-FD could be misused for asset recovery while it should be limited to procedures of cleaning the table after extradition.

Thus, it is not far-fetched to see the solution in a restrictive interpretation of the vague terms used in Article 29 EAW-FD. This is definitely a worthwhile approach to consider.

However, from a European point of view, a restrictive approach is highly problematic, because one of the crucial questions still appears to be: which interpretation of national law is possible under the said 'Pupino' doctrine?⁷⁷ As is well known, the European Court of Justice (ECJ) based its reasoning in this landmark judgment⁷⁸ on Article 10 EC Treaty (TEC)⁷⁹ and integrated a first pillar concept of effectiveness (and thereby indirect effect) into the third pillar area by emphasizing the importance of loyalty within the European Union as a whole. Such an approach has been discussed controversially among scholars.⁸⁰ Although the ruling is well observed and has triggered a lively discussion, the rather specific circumstances thereof should function as a reminder of the limited scope of case law. The 'Pupino' doctrine⁸¹ only applies, however, in cases in which national law, which will often be the implementing law concerning a Framework Decision, can and must be interpreted: According to the judgment, the principle of loyal co-operation, enshrined for EC law purposes in Article 10 TEC, requires in particular that the Member States take all appropriate measures, which is an extensive interpretation of the national law in order to ensure the fulfilment of their obligations under EU law. Article 29 EAW-FD obligates the Member States to provide property extradition under the named circumstances. Hence, consequently, the 'Pupino' doctrine⁸² indicates that, e.g., 'property', must be interpreted in a broad sense in order to ensure efficient assistance. Thus, the Slovak implementing law referring to a 'thing'⁸³ will probably have to be interpreted not only including 'bricks and mortar', but also all other pecuniary benefits. The same is true for Article 49 of the Dutch *Overleveringswet*, which allows the seizure only with regard to those objects which are found in the possession of the requested person. Here, an interpretation of the

⁷⁷ See *supra* n. 5.

⁷⁸ *Ibid.*

⁷⁹ Art. 10 TEC states that the Member States shall take all appropriate measures to ensure the fulfillment of the obligation arising out of the Treaty and facilitate the achievement of the tasks of the Community. They shall also abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.

⁸⁰ See, e.g., Ester Herlin-Karnell, 'In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto', 8 *German Law Journal* no. 12 (2007), <<http://www.germanlawjournal.com/article.php?id=881>> (checked 6 June 2008).

⁸¹ See *supra* n. 5.

⁸² *Ibid.*

⁸³ Slovak Republic: Sec. 9(1) Act no. 403/2004 of 2004.

legal scope of the statute including also objects found on the premises of a person extradited will be indicated.

At the other end of the scale, the ‘Pupino’ doctrine⁸⁴ cannot hide the fact that the legal implications of the situation that one State hands over property to another when executing an EAW have to be fixed clearly and in a transparent way – otherwise, the noble combination of freedom, justice and security might be doomed to be a useless vacuum.

This is the dilemma – which cannot be solved, but only detected in this contribution. In the future, the Member States will have to

- reform their implementing laws with the aim of establishing a coherent system for the extradition of property, seizing objects that can be used as evidence and confiscation;
- press on the European level for a clarification and matching of all existing instruments and a reform which better protects individual rights;
- keep an eye on the global development of instruments for handing over property which may affect the implementation of Article 29 EAW-FD.

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⁸⁴ See *supra* n. 5.

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