SUMMARY

The European Arrest Warrant (‘EAW’) has replaced extradition in relations between the Member States of the European Union. In my doctoral thesis I examine the extent to which the grounds for refusing to execute an EAW correspond with or differ from the grounds for refusing extradition. I use the criterion of amazement or astonishment to assess the significance of any correspondence or difference.

The principle of mutual recognition lies at the root of the EAW: a judicial authority of one Member State must in principle execute a decision of a judicial authority of another Member State without examining its merits and without any formalities, even if the executing judicial authority could not have reached a similar decision under its own Member State law. Differences between the laws of the issuing and the executing Member States are, therefore, irrelevant to the application of the principle of mutual recognition. This principle is founded on the assumption of a high level of confidence in the soundness of Member States’ legal systems and in the belief that these systems will be applied in conformity with human rights. At first sight, the principle of mutual recognition does not seem to allow any grounds for refusing to execute an EAW. On closer inspection, however, we can discern three limits to the principle of mutual recognition: 1) the obligation to respect human rights; 2) the principle of *ne bis in idem*, and 3) the lack of harmonization in the rules on jurisdiction and the absence of a conclusive mechanism for resolving conflicts of jurisdiction. The first two limits result from primary Union law and, to some extent, are of a constitutional nature. Any arrangement based on the principle of mutual recognition must observe these two limits. The third limit, however, is of a different nature. It is not compulsory, but instead gives expression to Member States’ desire to retain control over offences falling under the jurisdiction of both the issuing and executing Member States. Any correspondence or difference between the EAW and extradition will certainly amaze or astonish if it cannot be reconciled with the principle of mutual recognition and does not follow directly from the limits to that principle.

In examining the correspondences and differences, I make a distinction between the European level (i.e. the Framework Decision and the European conventions on extradition) and the Dutch level (i.e. the Surrender Act [*Overleveringswet*] and the Extradition Act [*Uitleveringswet*]). A comparison of the grounds for refusal based exclusively at a European level would paint an incomplete picture of the correspondences and differences. Rather than having direct effect, the Framework Decision relies for its effect on national implementation legislation. In implementing the Framework Decision, Member States may choose not to implement optional grounds for refusal and optional guarantees and, even if they decide to implement optional grounds or guarantees, may restrict the reach of those grounds or guarantees, while still observing EU law. The European conventions on extradition also contain optional grounds for refusal and allow contracting Parties to make reservations in respect of any of the provisions. Whether the requested Party’s authorities must or may refuse extradition based on an optional ground for refusal or a reservation depends on the national laws of that Party.

At a European level, a number of traditional exceptions to extradition are absent from the Framework Decision. These include the principle of double criminality (at least partially) and the exceptions regarding tax, military and political offences. This difference between the EAW and extradition is not, however, amazing as these exceptions are incompatible with the principle of mutual recognition and do not concern the limits to that principle.
The Framework decision contains one ground for refusal which does not have a counterpart in extradition law (i.e. the optional ground for refusal as regards a final decision in a Member State in respect of the requested person and the same acts, which prevents further proceedings). In the light of the principle of mutual recognition this ground for refusal is astonishing, if only because this ground for refusal does not seem to have a reasonable purpose.

The correspondences between the EAW and extradition are more important than the differences. When interpreted in conformity with human rights, the Framework Decision contains many arrangements also appearing in extradition law. These include the human rights exception, the principle of double criminality (as regards offences other than the listed offences), the principle of double jeopardy (\textit{ne bis in idem}), exceptions relating to the jurisdiction of the executing Member State over the offence on which the EAW is based and the principle of speciality.

Some of these correspondences are astonishing if considered in the light of the principle of mutual recognition. The right to demand that a non-listed offence constitutes an offence under the laws of the executing Member State, for instance, is not compatible with the principle of mutual recognition as the limits to the latter do not justify this as an optional ground for refusal. Another example is the provision on verdicts \textit{in absentia}. Although this ground for refusal derives from case law of the European Court for Human Rights on the right to a fair trial (Art. 6 ECHR), it is based on the \textit{national} dimension of this case law. The \textit{transnational} dimension, by contrast, which relates to cases involving one state helping another state to execute a verdict \textit{in absentia}, does not require a ground for refusal such as that contained in the Framework Decision. As regards verdicts \textit{in absentia}, therefore, the Framework Decision offers more protection to the requested person than is required by primary EU law. This is remarkable, given the high level of confidence between Member States that underpins the Framework Decision.

Most of the correspondences relate directly to one or more of the limits to the principle of mutual recognition. These grounds for refusal, therefore, are not astonishing. Although the limits to the principle of mutual recognition do not directly justify the existence of certain provisions (the principle of speciality, for example, and the temporary suspension of execution of an EAW for serious humanitarian reasons, insofar as the human rights exception does not already bar execution of the EAW), the existence of these provisions is not in itself astonishing. In the case of the provisions on speciality, the grounds for refusal and the principle of speciality are two sides of the same coin. Similarly, the existence of the provisions on the temporary suspension of execution of an EAW does not astonish because the principle of mutual recognition is not an end in itself, but instead a means to develop and maintain freedom, security and justice.

At a European level, the EAW still shows a high degree of correspondence with extradition as regards the grounds for refusal and the required guarantees, even though the EAW is based on the principle of mutual recognition. This degree of correspondence does not necessarily represent a permanent state of affairs in the case of all the grounds for refusal and the guarantees. We should distinguish between grounds for refusal that are founded on the obligation to respect human rights or on the principle of \textit{ne bis in idem} on the one hand and, on the other hand, grounds for refusal that are justified by a lack of harmonization in the rules on jurisdiction and the absence of a conclusive mechanism for resolving conflicts of jurisdiction. The first two limits are imposed by primary Union law, whereas the third limit is not compulsory, but instead derives from Member States’ desire to protect their sovereignty. Primary Union law does not, therefore, prevent the abolition of those grounds of refusal that
relate to the third limit on the principle of mutual recognition. Moreover, primary Union law does not *a fortiori* prevent abolition of those grounds for refusal and the guarantees that are astonishing in the light of the principle of mutual recognition.

At a national, Dutch level the degree of correspondence between the EAW and extradition law is even higher as the Dutch legislator consciously modelled the legislation implementing the Framework Decision on Dutch extradition law, having assumed – incorrectly – that the Framework Decision allowed for such implementation. The national implementing laws may differ from or correspond with extradition law only insofar as required or allowed by the Framework Decision.

The following four examples illustrate this point. In cases of EAWs issued in execution of a custodial sentence, the Dutch legislator has unlawfully added the requirement that the offence must attract a maximum custodial sentence or detention order of at least 12 months under the issuing Member State’s law. Surrender for non-listed offences meanwhile has been made conditional on qualified double criminality, whereas the Framework Decision allows only the condition of double criminality. In contravention of the Framework Decision, refusal to surrender a Dutch national for the purpose of executing a custodial sentence is not automatically followed by execution of that sentence in the Netherlands. In addition, and contrary to the Framework Decision, the Netherlands will not surrender a Dutch national for offences, listed or otherwise, that are not punishable under Dutch law.

These unlawful differences result in unlawful correspondences with Dutch extradition law. National courts are obliged to do away with these unlawful differences and correspondences by interpreting national law “as far as possible” in conformity with the Framework Decision. Although the District Court of Amsterdam has indeed interpreted the Surrender Act in conformity with this Decision with respect to some minor differences, on a more important point, however, it has held that a conforming interpretation of the Surrender Act would amount to an interpretation contra legem, for which the duty of conforming interpretation cannot serve as a basis. As regards the majority of those unlawful differences and correspondences, the District Court of Amsterdam has yet to recognize that the Dutch legislator has incorrectly implemented the Framework Decision, let alone attempt any conforming interpretation. Although the European Commission has repeatedly told the Netherlands that, in many respects, the Surrender Act does not represent a correct implementation of the Framework Decision, the Dutch Minister for Justice has not seen fit to introduce a bill to correct this. Once, however, the transitional period set in the Treaty of Lisbon ends – in other words, on 1 December 2014 – the Commission will be entitled to initiate infringement proceedings to seek to force the Netherlands to amend its legislation.

Given the differences between the EAW and extradition law as regards the grounds for refusal, surrendering a requested person cannot reasonably be seen as the same as extraditing a requested person. Similarly, in view of the correspondences between the EAW and extradition law, it also cannot be claimed that the EAW is essentially different from extradition. The more correct conclusion would seem to be that the EAW is extradition in transition.

This state of affairs is not necessarily permanent. The principle of mutual recognition can be developed further. The European Union could choose to abolish those grounds for refusal and guarantees that are not compatible with the principle of mutual recognition and whose existence is not justified by any of the limits to that principle. It could also abolish those grounds for refusal that relate to lack of harmonization in the rules on jurisdiction and the absence of a conclusive mechanism for resolving conflicts of jurisdiction, once it has harmonized the rules on jurisdiction or adopted such a mechanism. As mentioned above, primary Union
law does not require such grounds for refusal. If these two categories of grounds for refusal were to be abolished, the Framework Decision would have less resemblance to extradition law. The Netherlands meanwhile needs to implement the Framework Decision correctly as correct implementation of this Decision, or conforming interpretation of national law, could and should do away with the unlawful differences between the Framework Decision and national law, as well as the resultant unlawful correspondences between national law and extradition law. If the Netherlands does not comply with its European obligations, the Commission will be able to seek to enforce those obligations from 1 December 2014 onwards. The Dutch legislator could also choose to rescind the legislation implementing optional grounds for refusal and the optional guarantees. The Surrender Act would show less resemblance with Dutch extradition law if the Dutch legislator were to implement the Framework Decision correctly and rescind the implementation of optional provisions.

Being able to extend the principle of mutual recognition, however, is largely dependent on two conditions: the need to ensure proportionality, and the ability to strengthen confidence between Member States.

It could be maintained that the Framework Decision does ensure proportionality, if only in abstracto, as the issuing judicial authority may issue an EAW only if the offence carries a maximum custodial sentence of at least twelve months or a sentence of at least four months is imposed. However, the maximum custodial sentence and the sentence imposed may not always in concreto be suitable tools for averting disproportionality. Abolishing grounds for refusal and guarantees would mean the executing judicial authority had even less scope to refuse to execute an EAW. The issue of the EAW’s proportionality would then be likely to gain in importance. Establishing a Union-wide proportionality test, to be administered in every case by the issuing judicial authority, is therefore an important condition for further reducing the grounds for refusal and guarantees. In addition to a Union-wide proportionality test, Union-wide criteria should be established so that the issuing of an EAW can be coordinated with the various other forms of judicial cooperation in criminal matters, such as the transfer of criminal proceedings, the transfer of the execution of foreign sentences and mutual assistance. By administering this test and these criteria, the issuing judicial authority would be able to determine, on a case-by-case basis, which instrument of judicial cooperation best served the interests of the area of freedom, security and justice.

The other condition for further developing the principle of mutual recognition is the need to reinforce confidence. Confidence between Member States seems not to be as self-evident as it ought to be. Lack of confidence at the level of the Framework Decision is reflected in the existence of grounds for refusal, the need for guarantees and the principle of speciality. As late as 2009, a ground for refusal was added to the Framework Decision that affords more protection to the individual person than required by the obligation to respect human rights (Art. 4a regarding verdicts in absentia). Another example of lack of confidence can be seen at the level of the Dutch legislator. Not only has the latter implemented all the optional grounds for refusal and, with one exception, all the optional guarantees, even though there was no requirement to do so, but, in implementing these grounds for refusal and guarantees, the legislator has also deviated from the Framework Decision in favour of the requested person and national sovereignty. Initially a lack of confidence at the level of the Dutch courts was shown with respect to the human rights exception, the relevance of humanitarian grounds for the decision on executing the EAW and the formal requirements to be satisfied by an EAW. The Dutch executing judicial authority applied more stringent tests than required by the European Court for Human Rights and the Dutch Supreme Court and than are allowed by the Framework Decision and the Surrender Act. Although the Dutch executing judicial
authority eventually abandoned this line of case law, we should not lose sight of the fact that it has never attempted to do away with some of the unlawful deviations from the Framework Decision by attempting to interpret national law in conformity with the Framework Decision and that it has thereby continued to favour national sovereignty and the individual.

Harmonizing the substantive and procedural criminal laws of the Member States may be the remedy for this lack of confidence. Although the principle of mutual recognition was initially promoted as a less intrusive alternative to harmonizing criminal law, the European Union has recognized harmonization of the criminal laws of the Member States as an important tool for strengthening mutual confidence, and hence for promoting judicial cooperation in criminal matters. If the Member States’ legal systems operate on the same rules, mutual confidence will increase, and the need for grounds for refusal and for guarantees will diminish accordingly. However, as the Member States are particularly attached to their sovereignty in criminal matters, harmonization of criminal laws to a degree that would obviate Members States’ need for grounds for refusal and for guarantees would not seem attainable. Moreover, minimum harmonization of criminal laws might not prevent certain Member States from wishing, possibly for constitutional reasons, to give more protection to the individual.

Limiting the grounds for refusal in the case of the listed offences would seem to represent a more realistic perspective for further developing the principle of mutual recognition. The Framework Decision distinguishes between listed offences, where the executing judicial authority may not verify double criminality, and other offences, where the executing Member State may demand double criminality. Listed offences are offences that seriously disturb public order or seriously endanger public safety. Closely connected to this distinction between the two types of offences is the distinction between those offences that are committed exclusively on the territory of the issuing Member State and those that are not. The principle of mutual recognition and the high level of confidence and solidarity between the Member States compel the executing Member State to execute an EAW for listed offences committed exclusively in the territory of the issuing Member State, even if these offences are not punishable under the laws of the executing Member State. No such obligation exists, however, with regard to listed offences committed wholly or partially in the territory of the executing Member State’s territory.

Consistently applying these two distinctions to the grounds for refusal would restrict the reach of many grounds for refusal to non-listed offences, while also restricting the possibility of refusal for listed offences to those listed offences committed wholly outside the territory of the issuing Member State. The reach of the speciality provisions would also have to be restricted accordingly.

Restricting the reach of grounds for refusal to non-listed offences could substantially increase the number of EAWs executed as the 32 categories of listed offences constitute the most serious forms of criminal behaviour. Restricting the reach of grounds for refusal could therefore make a significant contribution to freedom, security and justice. If the reach of the grounds for refusal were to be restricted, impunity resulting from refusal to execute an EAW would then be possible only with regard to less serious, non-listed offences and listed offences committed wholly or partially in the territory of the executing Member State. Without prior harmonization of Member States’ criminal laws, adapting the grounds for refusal so that most grounds would only apply to non-listed offences would achieve a reasonable balance between the interests of the issuing Member State, the executing Member State and the requested person.