DUAL CRIMINALITY IN EXTRADITION FOR ECONOMIC OFFENCES: A CONDUCT-EQUIVALENCE ACCOUNT OF "DOUBLE PUNISHABILITY", FISCAL EXCEPTIONALISM, AND THE CONSTITUTIONALIZATION OF SURRENDER

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ABSTRACT

Dual criminality-the requirement that the conduct grounding an extradition request be criminal in both the requesting and requested States-operates as a legality safeguard and a cooperation technology. Yet in the extradition of persons sought for economic offences, dual criminality becomes a doctrinal stress test. Economic offences are often „regulatory crimes" whose constituent elements encode domestic policy choices in taxation, financial markets, corporate governance, and jurisdictional reach. A rigid, element-matching understanding of dual criminality risks producing „safe havens" through technical mismatches and historical lags in criminalization; an over-elastic understanding risks transforming extradition into a conduit for exporting extraterritorial regulatory ambitions.

This article pursues a single overarching goal: to reconstruct dual criminality in economic-crime extradition as a coherent legal standard that is faithful to treaty text, judicial practice, and human-rights constraints while remaining operationally workable across diverse legal systems. It advances three theses. First, the best reading of contemporary European and universal extradition instruments supports a conduct-equivalence approach: dual criminality does not require identity of offence labels or perfect congruence of elements, but rather that the essential wrongfulness of the alleged conduct is captured by a criminal prohibition in both systems. Second, the historical „fiscal offence" exceptionalism embedded in the 1957 European Convention on Extradition has been normatively narrowed by the Second Additional Protocol, which deliberately pushes States away from refusing extradition merely because tax systems differ, and toward a „same nature" correspondence test. Third, extradition is now constitutionalized by human-rights law: even where dual criminality is satisfied, surrender is unlawful where it exposes the person to a real risk of ill-treatment or a flagrant denial of justice, as reflected in the European Court of Human Rights' foundational case law.

Methodologically, the analysis proceeds through treaty interpretation (European Convention on Extradition, its explanatory materials and protocols; UNTOC; UNODC model instruments), comparative jurisprudence in common-law and civil-law systems, and doctrinal engagement with legality, sovereignty, and jurisdiction. It concludes by proposing an „integrated" dual-criminality framework for economic offences: a conduct-equivalence test that is explicitly jurisdiction-sensitive and transparently coupled with independent human-rights risk assessment.

The Doctrinal Significance of Dual Criminality in Extradition for Economic Offences

Dual criminality is simultaneously modest and profound. It is modest because it does not aspire to harmonize substantive criminal law; it asks only whether the requested State can recognize, within its own penal order, the wrongfulness of what the requesting State alleges. It is profound because it expresses a basic legality intuition: a State should not cooperate in coercively transferring a person to face punishment for conduct that its own legal order treats as lawful. This intuition sits at the intersection of two sovereignties: the requesting State's sovereign claim to punish wrongdoing affecting it, and the requested State's sovereign insistence that cooperation must not offend its normative commitments. The classical Council of Europe formulation makes this explicit by tying extradition to „offences punishable under the laws of the requesting Party and of the requested Party" and to a seriousness threshold, thereby using dual criminality as both moral anchor and practical filter[1]. The universal cooperation model under the UN Convention against Transnational Organized Crime preserves the same anchor but encourages States to treat dual criminality as satisfied where the *conduct* is criminal in both systems, resisting a purely formal comparison of offence typologies[2].

The difficulty begins when one recognizes that economic offences are not „natural kinds". The content of „fraud", „market abuse", „tax crime", „cartel conduct" or „money laundering" depends on legislative design: the architecture of disclosure duties, the definition of „public official" the taxonomy of predicate offences, the boundary between administrative penalty and criminal sanction, and-crucially-the jurisdictional reach of domestic criminal law. It is therefore unsurprising that comparative scholarship repeatedly returns to a basic warning: if dual criminality is treated as an element-by-element identity requirement, extradition will fail in precisely the category of offences most associated with transnational mobility, asset flight, and

[1] European Convention on Extradition art. 2, Dec. 13, 1957, E.T.S. No. 24.
[2] United Nations Convention against Transnational Organized Crime art. 16, Nov. 15, 2000, 2225 U.N.T.S. 209.

the strategic exploitation of legal heterogeneity3. At the same time, scholarship is equally clear that abolishing dual criminality entirely in classical extradition would be normatively destabilizing, because it would sever the link between cooperation and the requested State's legality commitments, turning surrender into a quasi-administrative act of international police solidarity4.

The doctrinal question, then, is not whether dual criminality should exist, but what it should *mean*. The modern drift-across treaties, manuals, and much case law-favours what may be called a conduct-equivalence understanding. On this view, the inquiry does not ask whether the requesting State's offence definition has an identical twin in the requested State's code. It asks whether the factual conduct alleged, stripped of merely local legislative idiosyncrasies, would fall under a criminal prohibition of the requested State. UNODC's revised manual on the Model Treaty on Extradition is explicit that double criminality is required but should be applied in a manner tolerant of differences in legal drafting, because otherwise cooperation collapses under technicalities[5]. The same spirit is visible in treaty reform within the Council of Europe: the original fiscal-offence clause of the 1957 Convention openly acknowledged that differences between national fiscal laws were sufficiently deep that States were unwilling to make extradition for such offences mandatory[6]. But by 1978 the Second Additional Protocol replaced that posture with a rule that fiscal offences should be extraditable where the offence corresponds to one „of the same nature" and, critically, that refusal is not justified merely because the requested State does not impose the same type of tax or does not contain a regulation of the same kind[7]. The explanatory materials make clear that the purpose was to align fiscal offences with ordinary offences and avoid systemic obstruction based on domestic regulatory variance[8].

Economic-crime extradition demonstrates why that move is more than technical. Take tax fraud and customs offences. Historically, fiscal exceptionalism was rooted in an older sensibility: that tax enforcement is a quintessentially domestic sovereign act, and that States should be

[3] S.A. Williams, The Double Criminality Rule and Extradition, 15 Mich. J. Int'l L. (1994)
[4] P. Asp, Double Criminality and Transnational Investigative Measures, ZIS 11/2006, at 523–32
[5] U.N. Off. on Drugs & Crime, Revised Manuals on the Model Treaty on Extradition 7–15 (2004).
[6] European Convention on Extradition art. 5; Explanatory Report to the European Convention on Extradition ¶¶ on fiscal offences.
[7] Second Additional Protocol to the European Convention on Extradition art. 2, Mar. 17, 1978, E.T.S. No. 98 (replacing art. 5).
[8] Explanatory Report to the Second Additional Protocol to the European Convention on Extradition ¶¶ 15– (fiscal offences rationale).

wary of turning extradition into a device for the enforcement of foreign revenue claims. Yet the empirical and legal landscape has changed. Sophisticated fiscal fraud now frequently operates through corporate vehicles, cross-border invoicing, carousel structures, and laundering channels; it is often a *predicate* to money laundering and a vector for organized criminal financing. The universal treaty architecture reflects that reality. UNTOC structures extradition as an instrument against serious transnational crime, and its documentation and interpretive practice repeatedly emphasize that where dual criminality exists, it is the criminality of the underlying conduct that matters, not the domestic label[9]. In other words, modern cooperation law treats many fiscal offences not as mere „revenue disputes" but as paradigmatic economic crimes that implicate financial integrity and organized crime structures. A conduct-equivalence reading of dual criminality is therefore not a policy indulgence; it is the doctrinal response to the transnationalization of economic wrongdoing.

Nevertheless, conduct-equivalence is not a blank cheque. The point of dual criminality is not merely to identify moral wrongfulness, but to ensure cooperation is anchored in the requested State's penal legality. The most persistent doctrinal pressure point is jurisdiction. Many transnational economic offences are prosecuted under expansive jurisdictional theories: effects on domestic markets, use of domestic banking channels, listing on domestic exchanges, nationality of victims, or the presence of conspiratorial agreements connected to the forum. In contrast, the requested State's nearest analogue offence may be territorially narrower. In such cases dual criminality can fail even when the conduct is substantively condemned, because the requested State, applying its own law, would not criminalize the conduct *in the circumstances presented*. Modern UK extradition law illustrates this clearly. The Extradition Act 2003 implements double criminality through a conduct-based test, but differentiates between conduct occurring in the requesting territory and conduct occurring outside it, requiring an appropriate domestic analogue including extraterritorial reach where relevant[10]. The UK Supreme Court's decision in *El-Khouri* (2025) underscores that for economic offences (there, insider dealing), the dual-criminality analysis can turn on whether the UK analogue offence has extraterritorial application in corresponding circumstances, rather than on the ethical nature of the trading conduct itself.[11] The legal point is general: dual criminality is a question not only of „what is prohibited" but also „under what jurisdictional conditions it is prohibited". A

[9] U.N. Off. on Drugs & Crime, Manual on Mutual Legal Assistance and Extradition (2012).
[10] Extradition Act 2003, c. 41, § 137 (U.K.) (double criminality through conduct tests).
[11] El-Khouri v. Gov't of the U.S., [2025] UKSC (press summary) (territorial/extraterritorial structure of § 137).

conduct-equivalence test that ignores jurisdiction risks collapsing dual criminality into a moral-equivalence test, thereby undermining legality and sovereignty.

The celebrated UK case *Norris v. Government of the United States* exposes a second and related dimension: temporal and regulatory lag. In *Norris*, extradition on a cartel price-fixing count was resisted on the basis that the relevant conduct was not, at the material time, a criminal offence in the UK; the House of Lords treated double criminality as requiring a sufficiently clear domestic criminal prohibition and refused to treat administrative competition regulation as an equivalent to criminal cartel prosecution[12]. Scholarly commentary on *Norris* highlights precisely why economic offences are difficult for dual criminality: the boundary between administrative enforcement and criminal sanction is not harmonized, and domestic legal orders do not move in lockstep on whether certain market harms merit imprisonment[13]. Here dual criminality performs a sovereignty-protective function: it prevents extradition for a type of criminalization not adopted by the requested State at the relevant time. But it also reveals a cooperation cost: where offenders exploit mobility, the lag between regulatory condemnation and criminalization can become a shelter.

Common-law jurisprudence outside the UK historically resists strict identity. The US Supreme Court's canonical statement in *Factor v. Laubenheimer* rejects any demand for sameness of statutory terms and focuses on whether the „particular act charged" is criminal in both jurisdictions[14]. This conduct-centred articulation has been repeatedly treated as the doctrinal core of dual criminality in US extradition practice. The same case law tradition reminds us, however, that extradition rights and duties exist only by treaty, and treaty interpretation must not be converted into either a maximalist presumption of cooperation or a maximalist presumption of refusal[15]. That balance resonates with the conduct-equivalence account defended here: it is not a policy preference but a treaty-faithful interpretation, so long as the requested State genuinely identifies a domestic criminal prohibition capturing the essential conduct.

Civil-law doctrine, while often more codified and obstacle-catalogue oriented, converges on the same logic when applied properly. Polish scholarship provides a particularly clear doctrinal

[12] Norris v. Gov't of the U.S., [2008] UKHL 16, [2008] 1 A.C. 920 (double criminality and cartel conduct).
[13] P. Whelan, Resisting the Long Arm of Criminal Antitrust Laws: Norris v. USA, 30 Eur. Competition L. Rev. (2009)
[14] Factor v. Laubenheimer, 290 U.S. 276, 299 (1933) (act-focused understanding of dual criminality).
[15] United States v. Rauscher, 119 U.S. 407 (1886) (treaty-based nature of extradition duties; specialty context).

articulation: dual criminality is increasingly described as a principle of transnational criminal cooperation that must be interpreted in light of the function of extradition, and its application should focus on whether the described conduct constitutes an offence in the requested State, not whether the requesting State's classification maps neatly onto domestic offence typologies[16]. Polish authors also emphasize that the „double punishability" condition must be handled carefully to avoid both formalism and overreach, particularly where transnational cases combine multiple offence types and procedural stages[17]. Similar approaches are visible in broader European academic discussion of „in abstracto" versus „in concreto" assessment and the need to prevent legal heterogeneity from frustrating cooperation[18].

At this point one might be tempted to propose that conduct-equivalence solves the problem. It does not. It merely locates dual criminality correctly within the extradition legality architecture. The architecture has, over the last three decades, been constitutionalized by human-rights law, and that development is not optional. In Europe, Strasbourg jurisprudence imposes an independent bar to surrender where extradition would expose the person to a real risk of ill-treatment. *Soering v. United Kingdom* remains the foundational statement that extradition can engage a State's responsibility under Article 3 ECHR where the foreseeable consequences in the receiving State reach the threshold of inhuman or degrading treatment[19]. For economic offences, the relevance is often detention conditions and disproportionate pre-trial incarceration, rather than the death penalty, but the legal structure is the same: the requested State must not surrender where there are substantial grounds for believing the person faces a real risk of Article 3 ill-treatment. The Article 6 dimension-flagrant denial of justice-was crystallized in *Othman (Abu Qatada) v. United Kingdom*, where the Court held extradition impermissible in the presence of a real risk that torture-tainted evidence would be used at trial, constituting a flagrant breach of fair-trial guarantees[20]. The doctrinal importance for economic offences lies in the fact that economic-crime prosecutions can be politicized, may involve unreliable evidentiary practices, and may occur in systems with systemic rule-of-law deficiencies. Extradition law, therefore, is never exhausted by dual criminality; it is a composite

[16] Lidia Brodowski, Zasada podwójnej karalności czynu w kontekście ekstradycji, Studia Prawnicze KUL 1(61) 31–58 (2015)
[17] Michał Płachta, Dwie uwagi na temat praktyki ekstradycyjnej, Palestra 46/3–4, 32–39 (2002)
[18] J. Israel, Legal & Gaps Analysis: Extradition and Transfer of Sentenced Persons (EuroMed Justice) (open PDF).
[19] Soering v. United Kingdom, App. No. 14038/88, Judgment (July 7, 1989). HUDOC+1
[20] Othman (Abu Qatada) v. United Kingdom, App. No. 8139/09, Judgment (Jan. 17, 2012).

of dual criminality plus human-rights legality.

This constitutionalization also manifests in EU law when Member States face third-State requests. The CJEU's jurisprudence in *Petruhhin* introduces an EU-law layer tied to citizenship and non-discrimination, requiring coordination with the Member State of nationality and ensuring that surrender is not granted in a manner inconsistent with EU fundamental rights[21]. The point is not that EU law „replaces" dual criminality; rather, it demonstrates the modern condition of extradition: it is embedded within overlapping legal orders, and dual criminality operates as one legality threshold among several. Policy documents and manuals reflect the same complexity, advising that extradition practice should be harmonized with human-rights safeguards and that cooperation instruments must be interpreted functionally to prevent safe havens without eroding fundamental protections[22].

A compact comparative table helps illustrate the practical consequences of these doctrinal choices in economic offences. It is not offered as a taxonomy of legal systems, but as a map of where disputes predictably arise.

Table 1. Key Structural Issues in Economic-Crime Extradition and Their Impact on Dual Criminality

Structural issue in economic-crime extradition	**Where it bites**	**Why dual criminality becomes contested**	**Typical legal materials**
Regulatory diversity (tax, securities, corporate duties)	Fraud, market abuse, corruption	Element-matching yields false negatives; conduct-equivalence mitigates	UNODC manuals; ECE protocols; domestic extradition statutes
Jurisdictional asymmetry (extraterritorial reach)	Insider dealing, sanctions evasion, cross-border bribery	Requested State's analogue offence may lack extraterritorial scope	UK Extradition Act 2003; *El-Khouri*
Temporal lag in criminalization	Cartels, newer market offences	Conduct condemned but not criminalized at material time	*Norris* and commentary

[21] Case C-182/15, Petruhhin, ECLI:EU:C:2016:630 (Grand Chamber, Sept. 6, 2016) (EU-law layer for third-state extradition).
[22] OECD, Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific (2008) (conduct-based dual criminality recommendation; open PDF).

Fiscal exceptionalism legacy	Tax/customs offences	Older treaty design invited refusal; reform pushes „same nature" correspondence	ECE art. 5; Second Additional Protocol; explanatory reports
Human-rights constitutionalization	All offences, including economic	Surrender unlawful if real risk of Art. 3 harm or flagrant Art. 6 denial	*Soering*; *Othman*; Article 6 Guide

Source: Author's own elaboration, 2025.

The forward-looking question is what kind of doctrinal „settlement" is realistic. The most defensible model is an integrated one. It retains dual criminality but clarifies that it is a conduct-equivalence standard: the requested State should ask whether the alleged facts, if situated within its own legal order, would amount to criminal wrongdoing, without demanding identity of offence labels or rigid element correspondence. This model is supported by both universal and European materials and by canonical case law rejecting strict identity[23]. At the same time, the model must be jurisdiction-sensitive: where the requesting State relies on extraterritorial jurisdiction, the requested State should require that an equivalent domestic offence would be applicable under analogous jurisdictional conditions; otherwise, dual criminality is silently transformed into a general moral equivalence test[24]. Finally, the model must treat human rights as an independent, non-derivative constraint. Under Strasbourg doctrine, and under the broader culture of fundamental rights embedded in European cooperation, extradition cannot be granted solely because dual criminality is met; it must be refused where surrender would expose the person to prohibited risks[25].

This integrated model yields concrete implications for the future of economic-crime extradition. It supports treaty drafting and interpretive practice that explicitly reject refusal based on differences in regulatory technique, especially in fiscal matters, while maintaining principled limits grounded in domestic legality and jurisdiction. It also recommends institutional transparency: extradition decisions should articulate dual criminality findings as conduct-equivalence determinations and separately articulate human-rights assessments. This

[23] Robert J. Currie, When (and Where) Is a Crime a Crime? „Double Criminality" (Canadian Institute for the Administration of Justice)
[24] S. Kapferer, The Interface between Extradition and Asylum (UNHCR 2003) (open PDF).
[25] U.K. Home Office, A Review of the United Kingdom's Extradition Arrangements (Baker Review) (2011) (open PDF).

does not merely improve reasoning quality; it reduces the suspicion that extradition is either politically manipulated cooperation or politically motivated obstruction.

Conclusions for the future

First, the post-1957 evolution of European extradition treaty law, combined with UNTOC-based cooperation logic, points toward a mature conception of dual criminality as conduct-equivalence. Treaties and manuals already supply the doctrinal material; what is needed is consistent judicial articulation, especially in complex economic-crime fact patterns where defence arguments often exploit technical mismatches and jurisdictional edge cases[26]. Second, fiscal exceptionalism is no longer normatively persuasive as a default posture in a world of transnational tax fraud and laundering structures. The Second Additional Protocol's „same nature" correspondence rule offers a principled path forward: it respects domestic penal autonomy while refusing to let differences in tax architecture become a blanket obstacle to cooperation[27]. Third, human-rights constitutionalization will continue to shape economic-crime extradition, particularly where economic prosecutions intersect with politicization, detention conditions, or systemic procedural deficiencies. Future legal development should therefore aim not at weakening rights bars, but at integrating them coherently with conduct-equivalence dual criminality-so that cooperation is both effective and legitimately constrained[28].

[26] U.K. House of Commons Library, The Extradition Bill (Research Paper 02/79) (2002) (context on double criminality debates; open PDF).
[27] Beata Piekło, Zasada podwójnej karalności w kontekście przestępczości zorganizowanej w UE, EPPiSM (2024) (open access page and PDF).
[28] Lidia Brodowski, Sources of Extradition Law in the Legal System of the European Union, (Uni. Wrocław repository) (open PDF). Repozytorium Uniwersytetu Wrocławskiego