



The Nature of Mutual Recognition in European Law

Re-examining the Notion from an Individual Rights Perspective
With a View to Its Further Development in the Criminal Justice
Area

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Rights Perspective With a View to Its Further
Development in the Criminal Justice Area

DISSERTATION

to obtain the degree of Doctor
at the Maastricht University,
on the authority of the Rector Magnificus,
Prof. dr. L.L.G. Soete
in accordance with the decision of the Board of Deans,
to be defended in public
on Thursday 9 July 2015, at 14.00 hours

by

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A commercial edition of this PhD-thesis will be published by Intersentia in the Ius
Commune Europaeum Series



ACKNOWLEDGMENTS

The publication of this book signifies an important step in a process of professional and personal discovery. When I embarked on this process of discovering the nature of mutual recognition in EU Law, there seemed to be something contradictory in portraying what should be a process of integration as a process of submission, particularly if such submission would be at the expense of the rights of individuals.

That intuitive observation, however, needed to be translated into a proper analysis of the notion and its relationship with individual rights. A number of teachers have helped me develop the legal, analytical and practical skills needed to meet this challenge. I would like to particularly thank Tom Eijsbouts, Annette Schrauwen, Joe Dunne, Baroness Sarah Ludford, Leen Nys and Jan Albrecht. Furthermore, I am deeply grateful to my PhD supervisors; Taru Spronken and André Klip for helping me develop my analysis at a very practical and human level. In doing so they handed me the key to the successful completion of this book.

I would like to thank the members of my assessment committee, Gerard Mols, Hildegard Schneider, René Barents, Elspeth Guild and Valsamis Mitsilegas.

I would also like to thank Katalin Ligeti and Vincent Glerum for being part of my supervisory committee.

Furthermore, I would like to thank Michael Faure and Jan Smits for including this book in the *Ius Commune* series, Carol Ní Ghiollarnáth for the language revision, Marjo Mullers for the typesetting and Kris Moeremans for the publication of the book. I would also like to thank Licette Poll for her assistance in dealing with all the administrative requirements leading up to the degree ceremony.

Finally, I would like to thank my paranymphs, family, friends and partner. Without their love and support this book would have not been possible. I would like to dedicate this book to my three little nephews Mathijs, Thomas and Jasper. They have the capacity to see the world in a way I have worked hard to re-capture. I hope my journey will instil the faith in them that they can become whatever they want, as long as they stay true to who they are.

PREFACE

This book examines the nature of mutual recognition in European law. The concept of mutual recognition appears in a number of policy areas in the internal market and the Area of Freedom, Security and Justice. There is even a growing convergence in academic literature that mutual recognition should be deemed a principle of European law, with a number of ascribed consequences for the substantive norms and procedural requirements Member States and their authorities are allowed to impose on a product, person or judicial decision originating from another Member State, before it is allowed market access or is to be executed. As is, however, apparent from societal and policy debates (including those by the Commission, Council and European Parliament), the case law of national courts, the Court of Justice and the European Court of Human Rights, and the academic debate, there are clear tensions, notably between free movement and individual rights derived from primary and secondary EU law.

The tensions between free movement and individual rights necessitate a re-examination of the nature of mutual recognition in European law from an individual rights perspective in accordance with the research questions identified in section 1.3. This entails looking at mutual recognition in the context of the aims and (other) principles and norms laid down in primary and secondary EU law, both in the internal market and the Area of Freedom, Security and Justice, with a focus on the impact of mutual recognition on individual rights.

The front cover of this book intends to depict mutual recognition as a wave or as the 'concise Oxford dictionary' describes it:

- '1. Ridge of water between two depressions or long bodies of water curling into an arched form and breaking on the shore; or
2. Disturbance of the particles of a fluid medium e.g. water, air, ether into a ridge and through oscillation by which motion is propagated and heat, light, sound, electricity, etc. without corresponding advance or without any advance of the particles in the same direction; single curve in the course of such motion.'

Let us imagine that this wave is part of a sea, for example the Adriatic between Italy and Croatia where the waves are going back and forth or the Channel between France and the UK where the waves break ashore on the white cliffs of Dover.

Mutual recognition engages the Member States in a process of recognising and giving effect to each other's decisions concerning the marketing of products, allowing access to a profession, pre-trial decisions and judgments in criminal matters, thereby supporting the free movement of products, persons and judicial decisions. They are, so to speak, 'riding the wave' of mutual recognition between Member States.

Waves have the capacity to transport an incredible amount of energy, but they are also part of and rely on a bigger body of water and external factors like the sun, moon, wind, and underwater seismic activity. There is also a parallel here. The specific aims, principles and level of harmonisation in the legal area concerned determine the capacity of mutual recognition to contribute to free movement. To use the area of professional qualifications as an example: the better regulated the professional standards are at the EU level, as well as the recognition procedure and grounds that may be used to refuse access to the profession or impose conditions, the more likely is it that the mutual recognition procedure will result in the professional being able to exercise his/her profession in the host Member State. But, even in a fully harmonised situation, there might be grounds to deny access to the profession reflecting the tensions within the internal market between economic and public interests, such as health and consumer protection.

Brussels, 13 April 2015

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INTRODUCTION

Mutual recognition is widely associated with the paragraph of the Court of Justice judgment in *Cassis de Dijon* in which it held that Member States should in principle allow the importation of products that have been lawfully produced and marketed in another Member State.¹ Mutual recognition has since been developed into a 'cornerstone' for single market policy as well as for policy to develop judicial cooperation in criminal matters.² It is also referred to as a 'principle' in various Treaty provisions, notably on mutual recognition of professional qualifications and judicial cooperation in criminal matters.³ It is furthermore referred to as a principle in the Court of Justice case law on the free movement of goods, professional qualifications and on the application of the *ne bis in idem* principle.⁴

Mutual recognition has hence become commonplace in many areas of European law and policy, ranging from the free movement of goods and the recognition of professional qualifications to judicial cooperation in criminal matters. In these domains mutual recognition engages the Member States in a process of recognising and giving effect to factual and legal situations established in other Member States concerning the marketing of products, allowing access to a profession and pre-trial decisions and judgments in criminal matters.

¹ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, para. 14 (second part): 'There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by national rules.'

² Free movement of goods - Guide to the application of Treaty provisions governing free movement of goods (Arts. 28-30 EC), 2nd Edition, SEC (2009) 673, footnote 74: Presidency Conclusions - Tampere European Council, 15-16/10-1999, Bull. 10/1999, point 33.

³ Art. 53 TFEU (on professional qualifications); Art. 82(1) TFEU (judicial cooperation in criminal matters).

⁴ Case C-110/05, *Commission v Italy* [2009] ECR 519; Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden Württemberg* [1991] ECR 2357; Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345.

Debate on the implications of mutual recognition

The exact implications of mutual recognition across the areas of European law and policy, however, remain uncertain. At the same time, as integration deepens and encroaches more and more on sensitive areas such as criminal law and procedure, an increasing number of questions have been raised regarding the implications of this process of recognising and giving effect to factual and legal situations established in other Member States. This is particularly the case for individual rights derived from primary and secondary EU law, including fundamental rights obligations derived from the Charter of Fundamental Rights of the European Union, those guaranteed by the European Convention for the Protection of Human Rights, and those resulting from the constitutional traditions common to the Member States and European citizenship.

The application of mutual recognition has stirred a lively societal and policy debate. In addition, questions related to the consequences of its application in various areas of European law have received increased attention by courts. This has also led to a rich academic discussion on this subject, which has taken on a new dimension in the context of the EU's institutional framework after the entry into force of the Treaty of Lisbon in December 2009.⁵

Societal debate

Societal debates usually arise after incidents are reported in the media. As regards the internal market, the incidents have usually been based on questions such as whether it is 'safe' for one Member State to accept goods, for instance, toys, onto their market from other Member States or to allow professionals to practise on their territory without demanding compliance with domestic regulatory standards. A case in point here has been the disparities in the training of doctors across the EU and the consequences for ensuring a similar level of standards for foreign and domestic health staff. Moreover several incidents involving doctors from other Member States committing medical errors with sometimes fatal consequences have heightened the attention paid to this issue in the EU. Without adequate mechanisms in place to see that justice is done in these cases, the idea of mutual recognition and free movement of intra-EU migrants rapidly loses popular support.

This may be illustrated by the case of a German doctor who (accidentally) killed a patient in the UK by giving him an overdose of painkillers. He was consequently banned from practicing medicine in the UK. In Germany he was still allowed to practise, however. Surrender to the UK to face manslaughter charges was refused as Ubani had already been given a nine-month suspended prison sentence in Germany.

⁵ O.J. (C 83) 1 of 30.03.2010.

The Free Movement of Doctors

'Doctor Daniel Ubani unlawfully killed overdose patient', *The Guardian*, 4 February 2010

'A coroner today demanded a review of EU agreements over the recognition of doctors when he ruled that the death of a 70-year-old patient who was administered a tenfold overdose by an "incompetent" German GP was unlawful killing.

William Morris called the death of David Gray "gross negligence and manslaughter" and issued 11 recommendations to the Department of Health for the improvement of out-of-hours GP services.

As well as the review of how EU agreements work in the UK, he said the government must issue guidance to all NHS trusts over checking doctors' English, their experience of the NHS and how they had acquired GP status.'

(...)

'Police and prosecutors from the UK looking to bring a possible manslaughter charge against Ubani were shocked last April when, by letter, the German authorities convicted Ubani of causing Gray's death by negligence, gave him a nine-month suspended prison sentence and ordered him to pay €5,000 (£4,400) costs.

Ubani, a German national, is suspended from working in Britain but is still allowed to practise in Witten, his home town, where he specialises in cosmetic surgery and anti-ageing medicine.'⁶

In the criminal justice area, to a certain extent, the debate is even more heated given the (potential) impact of recognising prosecutorial decisions and judgments on the fundamental rights of suspects. Here it is not the consumer or patient being confronted with foreign products or professionals, but a suspect or sentenced person that is being put into the hands of the criminal justice system of another Member State. In a debate which has been fuelled by a combination of chauvinism and genuine care for fundamental rights protection, differences in the quality of justice and prison conditions have been raised in arguments that procedural and substantive standards need to be enhanced and enforced before the judicial decisions taken in other Member States are to be recognised and given effect, without subjecting them to domestic standards first.

⁶ See <<http://www.theguardian.com/society/2010/feb/04/doctor-daniel-ubani-unlawfully-killed-patient>>; <<http://www.theguardian.com/society/2011/jul/12/daniel-ubani-free-to-practise>>; <<http://www.theguardian.com/law/2014/feb/20/authorities-accused-cover-death-patient-killed-german-mp>> (last consulted on 3 May 2015).

The Free Movement of Judicial Decisions

In September 2007 there was uproar in the Dutch media regarding the imminent surrender of Mr. Hörchner, a Dutch national to Poland to be prosecuted there for trafficking in drugs. The case was mired with suggestions of foul play by the Polish and Dutch public prosecutors, looking for a convenient forum in which to prosecute Mr. Hörchner. Dutch public prosecutors had earlier been unsuccessful in prosecuting Hörchner for similar offences. A newspaper article compared the surrender of Hörchner with the situation in the Netherlands during the Second World War when the Supreme Court interpreted Dutch law in such a way that it would outlaw persons providing refuge to Jewish people. The article's suggestion seems to be that Dutch law, now allowing for a simpler surrender of Dutch nationals based on 'mutual recognition', is no longer just. Also the minister was put under what may be described as at least a moral obligation to check whether there was a reasonable suspicion against the person and investigate whether the Polish arrest warrant was issued in bad faith.⁷

Policy debate

These debates have also been taken up at an EU policy level, in which 'mutual recognition' is often approached as a 'governance strategy'⁸ for European integration, implying regulatory control by the home state after which free movement is ensured (as opposed to opting for the harmonisation of substantive norms and procedural requirements or regulatory control by the host state). In the context of the internal market one might therefore define 'home state control' as meaning that products or services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home state controls.⁹

Mutual recognition has been advocated by its proponents as an essential component of European law and integration, facilitating the free movement of goods, people and judicial decisions within an (economic) area without internal borders.¹⁰ The European Commission in particular has sought to formulate mutual recognition as a rule (in which it seems to be equating it to free movement), with exceptions based on countervailing interests that must be justified by the Member States. For instance, in its Guide to the application of Treaty provisions governing the free movement of goods (Arts. 28-30 EC), 2nd Edition, the Commission stated:

The mutual recognition principle in the non-harmonised area consists of a rule and an exception:

⁷ See <<http://www.katholieknieuwsblad.nl/actueel24/kn2437g.htm>>. The follow up of this case is available at: <<http://www.fairtrials.net/cases/robert-horchner/>> (last consulted on 3 May 2015).

⁸ Craig & De Búrca 2011, p. 595: 'It is generally acknowledged that mutual recognition entails a governance structure, and embodies a choice as how to achieve market integration.'

⁹ See Barnard 2004, p. 508: 'the principle of mutual recognition means that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home state controls.'

¹⁰ E.g. Matera 2005, *infra* p. 13; Nilsson 2001.

- The general rule that, notwithstanding the existence of a national technical rule in the Member State of destination, products lawfully produced or marketed in another Member State enjoy a basic right to free movement, guaranteed by the EC treaty; and
- The exception that products lawfully produced or marketed in another Member State do not enjoy this right if the Member State of destination can prove that it is essential to impose its own technical rule on the products concerned based on the reasons outlined in Article 30 or on the mandatory requirements developed in the Court's jurisprudence and subject to compliance with the principle of proportionality.¹¹

Similarly, in its 2000 Communication on mutual recognition of final decisions in criminal matters as regards the judicial cooperation in criminal matters, the European Commission put forward mutual recognition as a rule:

Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extra-national implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.¹²

Assuming the Commission was referring to its interpretation of mutual recognition in the Internal Market, this time the rule was formulated without exceptions, although the Commission did state that it would have to be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the process but that the safeguards would even be improved through the process.¹³

Opponents and sceptics have claimed that these policies have (potentially) negative consequences for public interests (such as safety, health, the environment, and consumer protection) and fundamental rights and the national regulation aimed at protecting these rights and interests.¹⁴ From the perspective of the Member State, the concern is that its (higher) standards of protection would have to give way to lower standards that the product, person or decision has complied with already, leading to a 'race to the bottom' in terms of the level of regulation. From the perspective of the individual, the concern is that (s)he could be subjected to a lower degree of protection due to the free movement of the products, persons or decisions concerned. Recent legislation implementing mutual recognition also shows a tendency of demands for more safeguards and 'brakes in the system' either by Member

¹¹ SEC (2009) 673.

¹² Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 2.

¹³ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 16.

¹⁴ E.g. *Allegre & Leaf* 2003; *Von Heydebrand und der Lasa* 1991, p. 601 ('consumer interest and commercial power').

States, the European Parliament or both.¹⁵ At the same time, there are calls for further harmonisation, basing free movement on common minimum standards ranging from consumer protection to rights of suspects and accused persons in criminal proceedings.¹⁶

Application by courts

The consequences of mutual recognition have also received increased attention from national courts, the Court of Justice of the European Union and the European Court of Human Rights.

A number of national (constitutional) courts have fiercely resisted the idea of mutual recognition in the criminal justice area, and both national courts and the European Court of Justice are grappling with the question of how to marry mutual recognition, free movement, European citizenship, public interests, fundamental rights, and the security interests of the State and the Union as a whole.

Particular tensions between free movement, as furthered by mutual recognition, and individual rights are visible in the case law of the Court of Justice and the European Court of Human Rights.¹⁷ On the one hand, we have seen Court of Justice judgments declaring mutual recognition a ‘principle’ and stating that its application does not depend on prior harmonisation in the internal market and the Area of Freedom, Security and Justice.¹⁸ On the other hand, both Courts have pointed out that compliance with minimum standards cannot be presumed, in particular when there are alleged violations of basic fundamental rights. This may be illustrated by the fact that the Court of Justice – following a similar ECtHR ruling¹⁹ – held that the

¹⁵ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, O.J. (L 255) 22 of 30.09.2005 (as amended). Further discussed in Chapter 2, section 4.2; Directive on the European Investigation Order (awaiting publication in the Official Journal) further discussed in Chapter 3, section 5.2.2.

¹⁶ See in particular the ‘Road map’ for strengthening procedural rights of suspected or accused persons in criminal proceedings’, Council document 14552/1/09 of 21.10.2009.

¹⁷ A number of cases concerning the fundamental rights compatibility application of mutual recognition to judicial decisions in criminal matters have been lodged at the ECtHR. See ECtHR Application No. 14929/08, *Pianese v Italy and the Netherlands*, declared inadmissible on 27 September 2011; ECtHR Application No. 56588/07, *Stapleton v Ireland*; more extensively see on the relationship with ECtHR case law Thunberg Schunke 2013, Chapter 4, Glerum 2013, in particular p. 165-173. See also CJEU Opinion 2/13, *on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, not yet published.

¹⁸ Case C-110/05, *Commission v Italy* [2009] ECR 519; Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345.

¹⁹ *MSS v Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011, paras. 233, 234, 263, 264, 366-368: the European Court of Human Rights declared the return of an asylum seeker from Belgium to Greece in accordance with the EU’s Dublin II Regulation (Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) to be incompatible with Art. 3 ECHR due to inhumane detention conditions in the latter Member State. Before returning an asylum seeker to the Member State of first entry the authorities of the expelling Member State have to

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obligation to return asylum seekers to the Member State of first entry may not be based on the 'conclusive presumption' that fundamental rights will be observed (mutual trust), particularly in view of the Member States' obligation under Article 4 of the EU's Charter of Fundamental Rights (EU Charter) to prevent inhuman or degrading treatment.²⁰

Although the Court of Justice has not (yet) taken this step,²¹ following parallels drawn by the EU's Fundamental Rights Agency between mutual recognition based on mutual trust in the observance of fundamental rights in the area of asylum and mutual recognition of judicial decisions in criminal matters,²² European co-legislators have since decided to introduce an explicit ground for non-execution based on fundamental rights in the Directive on the European Investigation Order²³ and the European Parliament, in a 'legislative own initiative report',²⁴ has called for a similar ground to be introduced in the Framework Decision on the European Arrest Warrant and other measures implementing mutual recognition in the area of judicial cooperation in criminal matters more generally.²⁵

satisfy themselves that the conditions in the receiving Member State in practice comply with ECHR standards.

²⁰ *Joined Cases NS v Secretary of State for the Home Department, Case C-411/10 and M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform, C-493/10* [2011] ECR 13905, para. 106: 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision'; Opinions by AG Trstenjak, 22 September 2011. For a commentary on the AG's opinion see Peers 2011b.

²¹ Case C-396/11, *Radu*, not yet published.

²² Opinion of the European Union Agency for Fundamental Rights of 14 February 2011 on the draft Directive regarding the European Investigation Order, available at: <<http://fra.europa.eu/en/opinion/2011/fra-opinion-draft-directive-regarding-european-investigation-order-ei-o>>, p. 11, footnote 61: '(...) It ought to be underlined that a failure to ensure proper respect for fundamental rights in the execution of an EIO will engage the responsibility of the executing state under instruments such as the ECHR' (last consulted on 3 May 2015). ECtHR, *MSS v Belgium and Greece*, No. 30696/09, 21 January 2011. The ECtHR has so far, however, refused to extend its case law in this direction, see ECtHR of 04.05.2010, Application No. 56588/07, *Stapleton v Ireland*.

²³ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014, further discussed in Chapter 3, section 5.2.2.

²⁴ Art. 225 TFEU: 'The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.'

²⁵ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014) 0174.

The need to re-examine mutual recognition from an individual rights perspective

In sum:

- there is a societal debate in which mutual recognition is connected to free movement and often the inadequate standards with which the products, professionals and criminal justice standards of other Member States are associated;
- there is a policy debate between those that would like to integrate the European Union taking as a basis the norms established in the home state (home state control, which is often referred to as 'mutual recognition') and those that insist on harmonisation of standards and procedures as a condition for free movement;
- finally, the courts are struggling with the question of how to implement the need to recognise and give effect to factual and legal situations established in other Member States while at the same time safeguarding individual rights.

These debates reveal a need to further clarify mutual recognition in European law from an individual rights perspective. After a short introduction to the legal context of mutual recognition in European integration (section 1) and the state of the academic debate on the legal obligations mutual recognition imposes (section 2), in section 3 below, this introductory chapter sets the scene for the book by formulating a number of specific questions and outlining the methodology applied.

1. The Legal Context of Mutual Recognition in European Integration

When assessing the legal context of mutual recognition in European integration two aspects need to be distinguished. First, it needs to be understood that mutual recognition operates within a 'supranational' legal order. Second, it is important to realise that within this legal order mutual recognition operates within two legal areas, the Internal Market and the Area of Freedom, Security and Justice, which each have their own specific aims.

Within a state, mutual recognition is self-evident. A person may practise his or her profession as soon as (s)he obtains the relevant diploma, and an arrest warrant issued in one city leads to the arrest of a suspect or fugitive in another city, no questions asked. Mutual recognition is a well-known notion in international law. The *Encyclopaedia of Public International Law*²⁶ states that 'recognition' means the acceptance of a foreign act of State without reviewing its underlying application of the foreign law and thus the recognition of the legal position already created by this act. Recognition is often 'reciprocal' or 'mutual', since most States that facilitate the

²⁶ *Encyclopedia of Public International Law* (Max Planck Institute for comparative public law and international law under the direction of R. Bernhard), North Holland, Amsterdam, New York, Oxford, 1984, part 10.

acceptance of claims by other States will sooner or later find themselves in a situation where they need the other State to facilitate the acceptance of their claims.²⁷

The European Union is both an international and a supranational organisation,²⁸ thus allowing for comparisons with international organisations²⁹ and (federal) states.³⁰ Seeking recognition in this context transcends inter-state relations by affecting the relationship between the individual and the Member States, as well as that of Member States among themselves. In the case of the European Union, recognition does not flow from the sovereign will of the individual Member States but from the joint objective to develop a European (Economic) Area without internal borders,³¹ for the achievement of which States have pooled their national sovereignty.

Within the European Union, the principle of reciprocity, which entails that recognition depends upon compliance with the standards agreed upon among States, is strictly speaking not a condition for recognising foreign acts, since the obligation to recognise foreign acts flows directly from primary and secondary European law. Member States, including their judicial authorities,³² cannot refuse to apply the common standards foreseen in European legislation by pointing out their infringement by other Member States. They are called to trust that European law is applied effectively by the other Member States.³³ Alleged violations of EU standards are to be addressed through the mechanisms foreseen by the Treaty.

This means that if a Member State, such as the Netherlands, does not implement a directive, such as the Professional Qualifications Directive,³⁴ correctly, thereby effectively blocking Spanish nurses from having access to the Dutch labour

²⁷ *Ibidem*, p. 348.

²⁸ Klabbers 2002, p. 27; Case 26/62, *Van Gend en Loos* and Case 6/64 *Costa v ENEL* [1964] ECR 585. In accordance with Declaration No. 17 to the Lisbon Treaty, supremacy also covers measures taken in the area of police and judicial cooperation: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law', O.J. (C 115) 1 of 09.05.2008.

²⁹ Weiler 2005.

³⁰ Egan 2008; Ouwerkerk 2011 who drew a comparison with the federations of Switzerland and the United States.

³¹ Art. 3(2) TEU; 26 TFEU.

³² Case C-244/01, *Köbler* [2003] ECR 10239; Lebeck 2007, p. 517; '(...) what traditionally has been said to distinguish obligations of the states under EC law as opposed to public international law in general is that loyal action is expected by all branches of government, unlike international obligations where the legislature and the executive but generally not the courts have been compelled to make law conform to those international requirements.'

³³ Case C-5/94, *Hedley Lomas* [1996] ECR 2553, paras. 19 and 20; Opinion of AG Ruiz-Jarabo Colomer in Case C-303/05, *Advocaten voor de Wereld*, [2007] ECR 3663, para. 42.

³⁴ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, O.J. (L 255) 22 of 30.09.2005; Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation, O.J. (L 354) 132 of 28.12.2013).

market, it is not up to the Spanish authorities to take retaliatory action by blocking the access of Dutch nurses to the Spanish labour market. Instead they should ask the European Commission to bring infringement proceedings against the Netherlands or bring such procedures themselves. In the criminal justice area this is a bit more complicated. First, since the European Commission is only allowed to bring infringement proceedings regarding the incorrect implementation of EU legislation, for instance, the Framework Decision on the European Arrest Warrant,³⁵ since the end of the transitional period agreed at the time of the adoption of the Lisbon Treaty (1 December 2014).³⁶ Second, the trust at stake in the criminal justice area is not merely in relation to the effective implementation of EU law but also the practical observance of fundamental rights.

Within the supranational context of the European Union, mutual recognition promotes free movement across the internal borders of the European Union, an aim that was made explicit in the European Community (EC) Treaty with the introduction of Article 7(a) on the 'internal market' by the Single European Act. The internal market is now mentioned in Article 3 of the Treaty on European Union (TEU) and 26 of the Treaty on the Functioning of the European Union (TFEU). In accordance with Article 26 TFEU, the internal market is 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.

In line with Article 3(2) TEU, the Area of Freedom, Security and Justice is also an 'area without internal frontiers' in which the free movement of persons is ensured.³⁷ Articles 67(3) and 82(1) TFEU specify that mutual recognition aims at ensuring 'a high level of security' by facilitating judicial cooperation in criminal matters 'based on the principle of mutual recognition'.³⁸ At the same time, the Union views fundamental rights as enshrined in the European Convention on Human Rights (ECHR) and as resulting from the constitutional traditions common to the Member States as principles of Union law.³⁹ With the entry into force of the Treaty of Lisbon, the Union has now also recognised the EU Charter as having the same legal value as the Treaties and is in the process of acceding to the ECHR.⁴⁰ One of the rights mentioned in the EU Charter, the right not to be tried or punished

³⁵ FD EAW and the surrender procedures between the Member States, 2002 O.J. (L 109) 1.

³⁶ Protocol (No. 36) on transitional provisions, O.J. (C 83) 322 of 30.03.2010; Peers 2011a, p. 61-64.

³⁷ Art. 3(2) TEU: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

³⁸ Art. 67(3) TFEU: 'The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.' Art. 82(1) TFEU: 'Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in para. 2 and in Art. 83'.

³⁹ Art. 6(3) TEU.

⁴⁰ Art. 6(1) TEU; O.J. (C 83) 289 of 30.03.2010; Art. 6(2) TEU.

twice in criminal proceedings for the same criminal offence (Art. 50) also requires mutual recognition for the individual not to be subjected to new criminal proceedings once (s)he crosses the EU's internal borders.

There are two main commonalities between the internal market and the Area of Freedom, Security and Justice. First, in both the internal market and the Area of Freedom, Security and Justice, mutual recognition functions in the context of an 'area without internal frontiers'. Second, in both areas, mutual recognition supports 'free movement'. In the Area of Freedom, Security and Justice it also supports the 'free movement of persons' and the application of fundamental rights in the sense of final decisions in criminal matters taken in another Member State having a barring effect to further prosecution in accordance with the *ne bis in idem* principle. However, it mainly supports a 'high level of security' by facilitating the free movement of judicial decisions.⁴¹

Mutual recognition therefore serves many interests within the single legal areas of the internal market and the Area of Freedom, Security and Justice. It is even possible that one of those interests conflicts with another, for example the right not to be punished twice in criminal proceedings (*ne bis in idem*) and the obligation to execute a prosecutorial decision taken by the judicial authority of another Member State (as laid down in the Framework Decision on the European Arrest Warrant), adding to the complexity of the debates concerning the legal implications of mutual recognition, including those at a scholarly level as discussed below.

2. Academic Debate on Mutual Recognition: a (Limited) Focus on the Obligations It Imposes on Member States

Being such a key notion across European law, mutual recognition has been and is still currently being debated extensively in academic literature. A selected discussion of academic debates concerning mutual recognition in the Internal Market and the Area of Freedom, Security and Justice will be presented below to illustrate that the debate has so far mainly focused on the implications mutual recognition has for the substantive and procedural norms of the Member States. This discussion will be followed by some conclusions as regards the clarifications these debates offer for the legal implications of mutual recognition in European law. These conclusions will pave the way to the outstanding research questions that still need to be addressed regarding the implications mutual recognition has from an individual rights perspective, which this book seeks to examine by looking at the nature and role of mutual recognition in the process of reconciling free movement and individual rights.

⁴¹ Mitsilegas 2006, p. 1281: 'While the logic behind recognition in the internal market and criminal law may be similar (there should be no obstacles to movement in a borderless EU) - which, in criminal matters leads to calls for compensatory measures (criminals should not benefit from the abolition of borders in the EU) - there is a different rationale between facilitating the exercise of a right to free movement of an individual and facilitating a decision that may ultimately limit this and other rights.'

2.1. *Mutual Recognition and the Internal Market*

In the internal market, mutual recognition supports the free movement of goods and persons. A number of different positions have been taken with respect to the implications mutual recognition has on the substantive and procedural norms imposed by Member States in the internal market. To separate the legal from the policy debate these positions will be outlined below, focussing on the arguments used as regarding the origins of mutual recognition and its relationship with the aims, principles and norms of European law laid down in the Treaties and secondary legislation.

Some academics argue that mutual recognition does not create any obligations beyond those that could have been achieved by applying the proportionality principle as laid down in Article 5 TEU.⁴² The proportionality principle imposes a suitability and a necessity test on national measures affecting free movement.⁴³ According to this reading 'mutual recognition' could be achieved by applying the proportionality principle, since 'insisting on a specific standard even if a different standard is functionally equivalent in achieving the desired result, is to have adopted a measure which is not the least restrictive possible'.⁴⁴

Mutual recognition could also be seen as an implementation of the non-discrimination principle laid down in Article 18 TFEU. In accordance with the non-discrimination principle, Member States have to treat products and persons originating in another Member State in the same way as they treat products and persons originating in that Member State. By imposing an 'obstacle based approach' to the free movement of goods, the Court of Justice expanded the prohibition to cover measures beyond quantitative restrictions (e.g. quotas) and measures having equivalent effect imposed at the border. In this way, the Court rooted out protectionism by forcing Member States to justify all measures they impose on products.⁴⁵ At the same time the EC Treaty did not foresee all the new concerns of the 1970s, such as consumer and environmental protection. Furthermore, harmonisation of product standards was stalled due to the unanimity requirement among Member States.⁴⁶ The Court responded to the first problem of addressing the new concerns which became apparent in the 1970s by allowing for an expansion of justifications for state intervention and responded to the second problem of rooting out protectionism by allowing for the 'mutual recognition' of product standards.⁴⁷ However, the implications of mutual recognition are deemed to be limited as, in this reading of mutual recognition, goods that do not meet the technical standards of the importing country may not be marketed there and thus harmonisation of standards remains necessary.⁴⁸

⁴² Weiler 2005.

⁴³ Tridimas 2005, p. 113.

⁴⁴ Weiler 2005, p. 47.

⁴⁵ Weiler 2005, p. 40.

⁴⁶ Weiler 2005, p. 44.

⁴⁷ Weiler 2005, p. 45.

⁴⁸ Weiler 2005, p. 49-50.

Other academics recognise that an independent contribution is made by mutual recognition to the aims of European integration and refer to the developments in the area of the recognition of professional qualifications in relation to the aims of the single internal market. In this respect 'mutual recognition' is distinguished from '(functional) equivalence' since the obligation of mutual recognition does not only entail ensuring equivalence, as further measures need to be taken to facilitate the creation of a single market. An example of such a measure is the obligation to put in place a system of recognition for (professional) qualifications that are not equivalent.⁴⁹ In this reading mutual recognition is not only tied to the non-discrimination⁵⁰ and proportionality principles but also to the solidarity and loyalty principles,⁵¹ in accordance with which Member States have to facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives. Mutual recognition could be seen as the concrete application of those principles in the internal market.⁵²

Some authors have expressed doubts whether in the internal market context mutual recognition is only applicable when there is equivalence among the different national standards and policies. In support of this view, the Court of Justice's case law in which it deemed certain product requirements to be unjustified in the light of an available alternative labelling policy is cited. Even though the product did not comply with equivalent standards, it was allowed market access as long as the differences were clear from the label.⁵³ The reason mentioned for allowing market access even if equivalent standards were not complied with is that 'the Court of Justice must take into account the interests of market integration that the national legislation simply ignored'.⁵⁴

However, this argument has its limits as 'mutual recognition' may entail the recognition of different norms, policies and systems of law, requiring different degrees of trust and pre-existent identity.⁵⁵ In case different policies are pursued mutual recognition would need to be balanced by minimum harmonisation or public interest exceptions.⁵⁶ There is a risk, however, of the Court deciding between quite different political views on the level of harmonisation required, which could challenge the legitimacy of its case law.⁵⁷

There are other authors that insist that 'functional equivalence' of standards is not a condition for 'mutual recognition' at all. Mutual recognition is rather to be based on trust among the Member States and their common heritage and legal orders.⁵⁸ Furthermore, the Member State of destination is required to accept prod-

⁴⁹ Hatzopoulos 1999, p. 66.

⁵⁰ Hatzopoulos 1999, p. 170.

⁵¹ Art. 4(3) TEU, ex Art. 10 EC.

⁵² Hatzopoulos 1999, p. 121.

⁵³ Maduro 2007, p. 820.

⁵⁴ Maduro 2007, p. 820.

⁵⁵ Maduro 2007, p. 822.

⁵⁶ Maduro 2007, p. 822.

⁵⁷ Maduro 2007, p. 74.

⁵⁸ See Matera 2005, p. 11, who considers the adoption of mutual recognition based on mutual trust: 'an exceptional element of cohesion and integration between States which, in spite of
→

ucts that meet a legitimate objective equivalent to that required at a domestic level. The level of protection demanded by the Member State of destination must, in applying the proportionality principle, be reasonable and satisfactory in so far as it complies with the result of scientific research in the sector. Only harmonisation can introduce a common threshold for the protection of the legitimate interests pursued.⁵⁹

The selected academic contributions addressing the legal implications mutual recognition has in the internal market therefore range from a position that considers that it has no added value to the proportionality principle to one in which it is held to imply a general obligation to allow market access based on mutual trust. In between these two positions, there are authors that argue that mutual recognition also obliges Member States to put in place a recognition procedure based on the loyalty principle and others that argue that mutual recognition may be necessary even if the product does not comply with equivalent standards based on the solidarity principle, although a different regulatory approach may require harmonisation first.

2.2. *Mutual Recognition and the Area of Freedom, Security and Justice*

Discussions regarding the implications of mutual recognition on the substantive and procedural norms imposed by Member States and the conditions for its application extend to the Area of Freedom, Security and Justice. However, there is also a difference in the debate on the implications of mutual recognition when compared with that regarding the implications of mutual recognition on the internal market, as the application of mutual recognition as such has been contested. The application of mutual recognition is seen as incompatible with national sovereignty and fundamental rights. Mutual recognition supports the free movement of judicial decisions and the application of the substantive criminal law of the home Member State, which might run counter to decisions other Member States have made in their substantive criminal law and criminal procedure. Furthermore it is feared that basing judicial cooperation in criminal matters on mutual recognition might favour the most repressive legal systems and result in the most invasive prosecutorial measures, which would run counter to the principle that criminal law should only be applied as a last resort and the principle of equality of arms between prosecution and defence.

Several authors have argued in favour of the application of mutual recognition to the Area of Freedom, Security and Justice, and notably to judicial cooperation in criminal matters.⁶⁰ Already in 2001, two years after the policy principle was declared at the Tampere European Council, it was predicted that, although in a

their different traditions and legislations, have common cultural and scientific roots and belong to the same Community which is held together by links stemming from a common body of legislation, common institutions and a supranational jurisdiction, within which rules apply to all states.'

⁵⁹ Matera 2005, p. 17-18.

⁶⁰ E.g. Nilsson 2001; Wouters & Naert 2004; Barents 2006; Janssens 2013.

different field and in a different context, mutual recognition would have a similar significance for criminal law as that which it had already achieved in the internal market.⁶¹ The implication of a 'genuine system of mutual recognition' would be an abolition of all grounds for refusal in judicial cooperation. 'Full faith and credit' would need to be placed in the foreign legal system and in their judges.⁶² 'Real mutual recognition' would still only be possible among Member States very close to one another. In a situation where there are no longer frontiers between Member States for criminals, one would need to think more in terms of a 'European judicial area' than in terms of maintaining the frontiers for efficient law enforcement.⁶³

It has been argued that mutual recognition may be seen as a legal principle (in the Area of Freedom, Security and Justice),⁶⁴ consisting of two aspects: first 'the ought rule', which corresponds to the general idea that mutual recognition promotes free movement within a single legal area, and a 'shall rule', which corresponds to what is referred to in this book as concrete norms deriving from mutual recognition, with implications regarding the level of trust in the legal systems of other Member States (without prior harmonisation), the degree of automaticity and speed by which decisions need to be taken.⁶⁵ More recently, based on comparative research, the 'transplant' of mutual recognition from the internal market to the Area of Freedom, Security and Justice has been held to be both feasible and desirable.⁶⁶

The 'philosophy' of mutual recognition has been explained as being designed to strengthen cooperation between Member States but also to enhance judicial protection of individual rights. The implementation of mutual recognition presupposes that Member States have trust in each other's criminal justice systems and that such trust is grounded in particular on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.⁶⁷ Furthermore, it is argued that mutual recognition implies a real effort towards as much automaticity as possible, as well as the simplification and acceleration of judicial cooperation. Accordingly, most controls should be performed in the issuing State and not in the executing State. Protection of human rights and respect for individual guarantees must, however, be taken into account as well. 'Therefore the challenge is to reconcile both concerns and to find a right balance between them, i.e. avoiding as much as possible double checks and controls, but avoiding at the same time blind confidence and 'deresponsibilisation' of the competent executing authorities.'⁶⁸

Some authors, however, have argued that the development of a 'European judicial area' or Area of Freedom, Security and Justice based on mutual recognition

⁶¹ Nilsson 2001, p. 155.

⁶² Nilsson 2001, p. 158.

⁶³ Nilsson 2001, p. 159.

⁶⁴ Suominen 2011, p. 343.

⁶⁵ Suominen 2011, p. 341: 'One could argue that the recognition of foreign decisions should be as automatic as possible and that balancing different principles against e.g.; the rights of the defendant before recognition could jeopardise this recognition.'

⁶⁶ Janssens 2013, p. 319.

⁶⁷ Weyembergh 2013, p. 970.

⁶⁸ Weyembergh 2013, p. 972.

fails to take into account that the Area of Freedom, Security and Justice requires that a citizen and his legal interests should not only be protected by the criminal justice system but also ‘from the dangers of a criminal justice system operated in a reckless manner’. Basing judicial cooperation on mutual recognition would lead to a ‘hybrid’ prosecution in which the invasive procedures of various legal systems can be confined, thereby leading to a ‘radically punitive criminal justice system’.⁶⁹ To address these concerns, a group of academics proposed an *(Alternative) Programme for European Criminal Justice*,⁷⁰ which would, *inter alia*, reintroduce the dual criminality requirement,⁷¹ implying that Member States should continue to test whether the acts on which the judicial decisions are based would also be criminal acts under their jurisdiction.

Most authors, however, accept the (political) reality of the application of mutual recognition to judicial cooperation in criminal matters. They have nevertheless suggested either upholding ‘limits’ to mutual recognition of judicial decisions in criminal matters, in part based on well-known principles and norms from public law and traditional mutual legal assistance or they have argued that it is necessary to harmonise Member States’ criminal laws and procedures.⁷² These points will be discussed further below.

Certain authors have argued in favour of maintaining the dual criminality requirement. Upholding the dual criminality requirement would be warranted even under a system of mutual recognition, since it is through this test that the ‘executing’ judicial authority could establish the equivalence of the claim upon which mutual recognition rests.⁷³ Others have suggested that the criterion of ‘equivalence’ should apply to the national judicial system and procedure leading to the judgment being recognised and not whether behaviour is an offence in both the issuing and executing State.⁷⁴ In this context it has also been pointed out that many Member States continue to be found to be in breach of their human rights obligations under the European Convention on Human Rights, raising the question to which extent legal acts of those systems may be accepted without further investigation.⁷⁵ This leads into a discussion on the division of labour between the judicial authorities of the home and host Member States in ensuring fundamental rights protection and the checks and balances to ensure the equality of arms between the prosecution and the defence within the EU criminal justice area more generally.⁷⁶

As opposed to the interaction with classic civil rights, including remedies for suspects and sentenced persons,⁷⁷ it seems the academic literature has not yet paid

⁶⁹ Schünemann 2006, p. 351.

⁷⁰ Schünemann 2006.

⁷¹ Art. 11(1). As a fall back option, some sort of *ordre public* clause is to be maintained (see Asp 2006, p. 387).

⁷² I will mostly address the contributions of Schünemann; Peers; Guild; Mitsilegas; Klip and Weyembergh.

⁷³ Peers 2004.

⁷⁴ Mitsilegas 2009, p. 119 at footnote 19; cf. Mitsilegas 2012.

⁷⁵ Guild 2006, p. 10.

⁷⁶ Mitsilegas 2012; Carrera, Guild & Hernanz 2013.

⁷⁷ Verbeke, de Bondt & Vermeulen 2013.

extensive attention to the interaction between the rights derived from European citizenship,⁷⁸ notably rights to residence and free movement, and mutual recognition in judicial decisions in criminal matters. This includes the question to which extent discrimination between nationals and other EU citizens in the context of judicial cooperation is still allowed.

A *Manifesto on European Criminal Procedure Law* by scholars from ten Member States⁷⁹ presented in 2013 included six demands,⁸⁰ starting with a call for limitations of mutual recognition where the criminal proceedings would risk violating legitimate interests either of the individual or the Member State.⁸¹ The extent to which mutual recognition is to be limited is to be determined by means of a proportionality test, taking into account both individual and national interests.⁸²

In the explanatory notes, the Manifesto clarified the concept of legitimate interests by stating that ‘the realisation of the state interest of uncovering the truth through a criminal proceeding is limited by the rule of law and the status of the suspect as subject of the proceedings.’⁸³ The Manifesto regrets that infringements of fundamental rights are not generally acknowledged by the Court of Justice as

⁷⁸ Art. 45 EU Charter; Art. 20, 21 TFEU; Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. (L 158) 77; Case C-184/99, *Grzelczyk* [2001] ECR 6193; Case C-413/99, *Baumbast and R* [2002] ECR 7091; Case C-34/09, *Zambrano* [2011] ECR 1177; Guild 2004, Chapter 2 in particular; Marin 2014; Craig & De Búrca 2011, Chapter 23.

⁷⁹ European Criminal Policy Initiative 2013. Its members are: Asp, Bitzilekis, Bogdan, Elholm, Foffani, Frande, Fuchs, Helenius, Kaiafa-Gbandi, Leblois-Happe, Nieto-Martin, Satzger, Suominen, Symeonidou-Kastanidou, Zerbes and Zimmermann.

⁸⁰ The six demands are: (i) limitation of mutual recognition; (ii) Balance of European criminal proceedings, meaning that the public interest in criminal prosecution, the Member State’s interest in preserving national identity, and the affected citizens’ interests are all balanced on the principle of proportionality; (iii) Respect for the principle of legality and judicial principles in European criminal proceedings, demanding a clear set of rules governing which Member States may exercise criminal jurisdiction over an offence and thereby prevent conflicts of jurisdiction; (iv) Preservation of coherence at a vertical (with the legal order of the Union) and horizontal (in respect of Member States’ systems of criminal justice) level; (v) Observance of the principle of subsidiarity meaning that EU action should only be taken if it cannot be reached as effectively by measures taken at national level and due to its nature and scope can be better achieved at Union level; and (vi) Compensation of deficits in the European criminal proceedings calling for pan European minimum defence rights compensating for the disadvantages of suspects in cross border criminal proceedings.

⁸¹ In accordance with Arts. 6 TEU, discussed in section 1, and 4(2) TEU: ‘2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

⁸² European Criminal Policy Initiative 2013, under ‘I. Fundamental demands to the Union legislator’.

⁸³ European Criminal Policy Initiative 2013, under ‘II. Explanatory notes to the demand of the European Criminal Policy Initiative.’

limiting the principle of mutual recognition.⁸⁴ As regards national interests, the Manifesto notes the absence of a general *ordre public* reservation,⁸⁵ which it states makes little sense as ‘in the area of free movement of goods—from which the concept of mutual recognition stems—such a reservation is provided for in art. 36 TFEU’.⁸⁶ It furthermore condemns the absence of such a ground for refusal in the area of criminal justice altogether given its particularly strong connection to basic rights and fundamental value judgments underpinning the legal order.⁸⁷ As regards the application of the proportionality principle, the Manifesto points to the distinction being made between measures of lesser and greater intrusiveness in the Directive on the European Investigation Order,⁸⁸ with additional grounds for refusal in respect of the latter, as well as its inclusion of a mandatory proportionality assessment by the issuing judicial authority. It calls for the insertion of such a proportionality assessment in the Framework Decision on the European Arrest Warrant⁸⁹ as well.⁹⁰

A number of authors also point to the need for the harmonisation of criminal law and procedures. It is pointed out that mutual recognition harmonises procedural safeguards at the lowest common denominator, putting the ‘Freedom’ aspect of the Area of Freedom, Security and Justice at risk and that ‘the suppression of the dual criminality requirement tends to favour the most repressive system of criminal justice, because a judicial decision needs to be executed even if the acts would not be criminal under the system of the executing State’. As regards criminal procedure, the effect of mutual recognition harmonising procedural safeguards at the lowest common denominator cannot be compensated by the free choice of the actors involved, as is the case in the internal market (a consumer can opt not to buy a certain product). As regards substantive criminal law, there is less room for a flexible application of mutual recognition. It is easier to impose more stringent environmental standards on a product than to apply a different criminal policy to a certain act. Harmonisation of procedural safeguards as well as substantive criminal

⁸⁴ European Criminal Policy Initiative 2013, under ‘II. Explanatory notes to the demand of the European Criminal Policy Initiative’.

⁸⁵ On the interpretation of this notion which, for instance, appears in Art. 2(b) of the 1959 European Convention on Mutual Legal Assistance: ‘2. Assistance may be refused: (...) (b) if the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of its country’; Weyembergh 2013, p. 956: ‘The notion of *ordre public* could cover a control of respect of human rights and consequently could imply in the requested State a control of respect of human rights and consequently could imply in the requested State a control of the basic decision adopted in the requesting State.’

⁸⁶ European Criminal Policy Initiative 2013, under ‘II. Explanatory notes to the demand of the European Criminal Policy Initiative’.

⁸⁷ European Criminal Policy Initiative 2013, under ‘II. Explanatory notes to the demand of the European Criminal Policy Initiative’.

⁸⁸ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

⁸⁹ 2002 O.J. (L 190) 1.

⁹⁰ European Criminal Policy Initiative 2013, under ‘II. Explanatory notes to the demand of the European Criminal Policy Initiative’.

law is therefore necessary to support the abolition of dual criminality and to enhance trust among judicial authorities⁹¹ and uphold fundamental rights.

Current mutual recognition measures largely operate on a first come first served basis, mitigated by an optional ground for non-execution based on territoriality exceptions and a degree of coordination by Eurojust.⁹² This system does not take into account all relevant interests in the allocation of jurisdiction, notably those of the suspect or accused person whose position may be seriously affected depending on the jurisdiction in which (s)he will be tried. It is pointed out that a claim for basing judicial cooperation in criminal matters on mutual recognition would be stronger if it coincided with EU measures on the allocation of jurisdiction.⁹³

Finally, it should be noted that there has also been a degree of cross-over from 'Community lawyers' to the Area of Freedom, Security and Justice, either supporting or criticising the application of mutual recognition in this area or, in the latter case, rather criticising the way in which mutual recognition has been applied by the Court in the absence of equivalence. In particular from this perspective, the requirement of dual criminality and judicial cooperation based on 'host state control' is squarely rejected since borders would be kept intact and dual regulation would remain possible, which is deemed incompatible with the Area of Freedom, Security and Justice which is without internal borders.⁹⁴ The differences in the practical observance of fundamental rights are not deemed an obstacle, as any regulation of European legislation of mutual recognition and the application of that legislation by the Member States involved is subject to ensuring full respect for fundamental rights.⁹⁵ On the other hand, the question has been raised how far mutual recognition should go, in criticizing the Court for defending the application of mutual recognition in the Area of Freedom, Security and Justice, without equivalent standards.⁹⁶ The Court is accused of venturing into the realm of political decision making (judicial activism), which it should only engage in exceptionally if the legislator has failed to implement a fundamental right and/or action is clearly needed to further European integration.⁹⁷

The debate regarding mutual recognition in the Area of Freedom, Security and Justice is therefore still very much aimed at either defending its application, rejecting it or seeking to impose conditions, limits and flanking (harmonisation) meas-

⁹¹ Weyembergh 2004, p. 151.

⁹² Art. 85 TFEU; Proposal for a regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust), COM (2013) 535.

⁹³ Klip 2012, p. 382.

⁹⁴ Barents 2006, p. 363 (in Dutch): 'Daarmee is overigens niet gezegd dat op basis van het bestemmingslandbeginsel geen strafrechtelijke samenwerking tussen de lidstaten zou kunnen plaatsvinden (...) Waar het om gaat, is dat deze methode ongeschikt is om gestalte te geven aan het concept van de ruimte zonder binnengrenzen, zoals dit is vastgelegd in de Europese verdragen. Tussen dit concept en het vereiste van dubbele strafbaarheid bestaat een inherente contradictie.'

⁹⁵ Barents 2006, p. 365.

⁹⁶ Hatzopoulos 2008, p. 44-65 particularly criticising the Court's decision in Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633 as 'a striking application of the principle of mutual recognition, strengthened in this occasion by "trust" and "solidarity"'.
⁹⁷ For more on this concept see Dawson, De Witte & Muir 2013.

ures. In line with these positions there are two extremes in which mutual recognition is either deemed appropriate and ideally should apply fully, as a consequence of the Union being a European judicial area, or mutual recognition is (firmly) rejected since its application is seen as offering inadequate protection to individuals and failing to respect individual rights and national sovereignty. Between these extremes there are also positions stating that mutual recognition can only apply in a limited manner taking into account the equivalence of the claim upon which mutual recognition rests or the national judicial system in which it originates. A number of authors also point to the (additional) need for the harmonisation of criminal law, including criminal jurisdiction rules.

2.3. *Limits of the Current Academic Debate on Mutual Recognition*

At the moment, the European Union is seeking to defend its legitimacy both in the economic area as well as in the criminal justice area in the face of mounting political and judicial opposition. In this context more clarity and legal certainty as regards the impact of mutual recognition on individual rights is urgently required. The current academic literature, however, reveals that there is an on-going debate regarding the nature of mutual recognition. Should it be seen as an integration method (home State control) or as a general principle of European law from which concrete rules derive even in the absence of harmonisation?⁹⁸

Furthermore it may be concluded that the current academic debate on mutual recognition in European law is seeking to determine the implications that mutual recognition has for the substantive and procedural norms of the Member States, with attempts being made to formulate conditions for – or limits – to its application, to alleviate its perceived impact on Member States as well as individuals.

However, an approach which seeks to formulate general conditions for mutual recognition and limits to its application is not entirely satisfactory given that the implications of mutual recognition may be different depending on the timeframe under investigation. Differences in the appreciation of the implications of the mutual recognition principle for the substantive and procedural norms of the Member States are evident, for instance, depending on whether one assesses mutual recognition based on the 1970s case law of the Court of Justice on the free movement of goods or whether one takes into account the subsequent developments in this legal field, notably through the refinement of the aims of the common, internal market, the case law of the Court of Justice in which the free movement of goods and other interest are balanced, and the harmonisation of product standards as well as the recognition procedure.

A comparative view taking on board mutual recognition in areas other than the free movement of goods, such as the mutual recognition of professional qualifications and judicial decisions in criminal matters, already presents a different picture than if the focus is only on the mutual recognition of product requirements, since the subject seeking recognition (of its qualifications) is a person, not a good,

⁹⁸ See *infra* section 3.2; Tridimas 2006, p. 3.

and, most of the time, different interests are at stake in terms of health, safety and fundamental rights of the individual. The link with the free movement of persons is particularly important from a comparative perspective, taking into account that most of the controversy regarding the application of mutual recognition in the Area of Freedom, Security and Justice concerns the free movement of judicial decisions and consequently the (forced) free movement of individuals.

However, there are limits to a comparative approach to the application of mutual recognition in the internal market and the Area of Freedom, Security and Justice, as the latter, even though it forms part of EU law, builds on a particular system of national and transnational norms and cooperation in the areas of criminal law and fundamental rights, as pointed out by several authors and evidenced by the tensions in the case law.

Therefore a re-examination of the nature of mutual recognition through a comparative examination of the implications of mutual recognition in European law, with an emphasis on fields in which the free movement of persons are directly affected must be combined with further reflections on the role mutual recognition plays in the process of reconciling free movement and individual rights, taking into account their differences as well as their similarities.

3. What is the Nature of Mutual Recognition from an Individual Rights Perspective? Questions and Research Methodology

In order to gain better insight into the legal implications of the notion of mutual recognition in the European legal system, that is the consequences of mutual recognition as defined in European law for those who are subject to it (notably Member States, their citizens and residents), it is necessary to re-examine the nature of mutual recognition from an individual rights perspective. This is of particular importance with a view to the further development of mutual recognition in the criminal justice area, given the direct impact of law enforcement measures on individual rights.

Taking an individual rights perspective entails looking at the impact of mutual recognition on individual rights derived from primary and secondary EU law. This encompasses the rights to free movement and residence to which European citizens are entitled. It also covers individual rights recognised in international and European cooperation in criminal matters, such as the right to social rehabilitation of sentenced persons, as well as classic civil rights, such as the right to liberty and a fair trial, which are rights guaranteed by the European Convention for the Protection of Human Rights and resulting from the constitutional traditions common to the Member States. The Charter of Fundamental Rights of the European Union brings the classic fundamental rights and citizenship rights together in one single document, which is binding on the Member States when they are implementing EU law.

This book aims at analysing the notion of mutual recognition from this perspective by answering the following questions:

- What does the development of mutual recognition in the internal market and the Area of Freedom, Security and Justice reveal about its nature in European law?

- What are the similarities and differences between mutual recognition as developed in the internal market and in the Area of Freedom, Security and Justice? And, in particular, what role does mutual recognition play in the process of reconciling free movement and individual rights in both areas, taking into account their differences as well as their similarities?

These questions will be assessed by looking at mutual recognition in the context of the aims of the internal market and the Area of Freedom, Security and Justice (as elaborated in section 3.1 below) and (other) principles of European law (further discussed in section 3.2), and norms laid down in primary and secondary EU law (illustrated in section 3.3) by following its development in four specific fields covered by those two areas.

Chapter 2 will explore the nature of mutual recognition in the internal market, starting with an overview of the aims of the internal market and their relationship with mutual recognition, followed by two case studies devoted to the mutual recognition of product requirements and professional qualifications, in which the relationship between mutual recognition and the aims, principles and norms of the internal market will be further explored. The first case study will be devoted to the mutual recognition of product requirements, since the *Cassis de Dijon*⁹⁹ decision is widely perceived to be the birthplace of mutual recognition in the case law of the Court of Justice. Another reason for selecting product requirements is that *Cassis de Dijon* was used by the European Commission as an example of mutual recognition that ‘worked well in the internal market’ and hence deserved repetition in the Area of Freedom, Security and Justice.¹⁰⁰ The second case study selected concerns the mutual recognition of professional qualifications, which was originally envisaged to take place based on measures adopted under Article 47 EC (currently Art. 53 TFEU) but which in the end was enabled by a combination of Court of Justice case law and secondary legislation. The mutual recognition of professional qualifications importantly relates to the free movement of persons, thereby making it relevant to the aim of this book of taking an individual rights perspective and building a bridge to the subject matter covered by the Area of Freedom, Security and Justice.

Chapter 3, after a historical introduction, and taking as its basis the conclusions of Chapter 2, will explore the nature of mutual recognition in the Area of Freedom, Security and Justice. It will do so first separately as regards the aims and will then proceed to two cases studies regarding the European Arrest Warrant and flanking measures and the *ne bis in idem* principle. The mutual recognition of arrest warrants, as enabled by the Framework Decision on the European Arrest Warrant¹⁰¹ was selected since it has long been seen as the flagship mutual recognition measure in the Area of Freedom, Security and Justice. However, more than a decade on it has been joined by a number of flanking mutual recognition measures like the European

⁹⁹ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

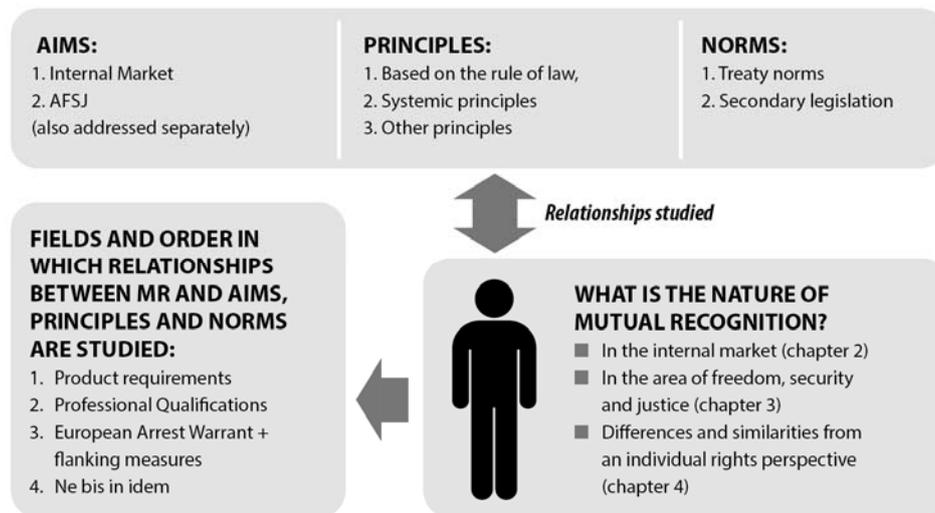
¹⁰⁰ COM (2000) 495, p. 2.

¹⁰¹ 2002 O.J. (L 190) 1.

Investigation Order¹⁰² and measures strengthening the Rights of suspects and accused persons further contextualising and shaping the impact of mutual recognition of judicial decisions in criminal matters on individual rights. The final case study will be devoted to the mutual recognition of final decisions in criminal matters as a bar to further prosecution, which is covered by the expression *ne bis in idem*. The reason for selecting this case study is that here not only the recognition of a judicial decision is relevant but also the application of a fundamental right of particular importance for the exercise of free movement rights. The individual should not be faced with a second prosecution as a consequence of exercising his/her free movement rights. Furthermore, the Court of Justice's *Gözütok* and *Brügge* decision,¹⁰³ which concerned the application of *ne bis in idem* principle, has been dubbed the *Cassis de Dijon* of the Area of Freedom, Security and Justice.¹⁰⁴

Chapter 4 will provide a synthesis of the findings of the previous two chapters and further explore the similarities and differences between mutual recognition as developed in the two areas, including the question as to what role mutual recognition plays in the process of reconciling free movement and individual rights in both areas, taking into account their differences as well as their similarities. This research methodology is depicted below.

Figure: Depiction of research methodology



This study re-examines the nature of mutual recognition in European law and in particular seeks to identify the role mutual recognition plays in the process of reconciling free movement and individual rights, with a particular view to the further

¹⁰² Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

¹⁰³ Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345.

¹⁰⁴ Thwaites 2003, p. 260.

development of mutual recognition in the criminal justice area. The ambition of this study is not to provide a comprehensive overview of the fields of European law in which mutual recognition has been applied. However, where appropriate, it builds on and seeks to incorporate other attempts at more narrowly defining mutual recognition in European law by comparing the internal market and the Area of Freedom, Security and Justice, focussing on its application and implementation in the internal market or the Area of Freedom, Security and Justice, comparing it with third States, or looking at it within the context of the Union's fundamental rights obligations.¹⁰⁵ This study also builds on academic contributions drawing a comparison with mutual recognition in other fields that it does not explicitly cover, such as asylum and migration or judicial cooperation in civil matters.¹⁰⁶

3.1. *Sources on which the Study will be Based*

The research will be based on an assessment of relevant primary sources such as official documents adopted by the European Commission, European Parliament and the Council, secondary legislation, Court of Justice and selected national case law as well as the opinions of various commentators and scholars. The analysis will also benefit from the practical experience I gained through working for the European Parliament's Internal Market and Consumer protection Committee (IMCO) and as an advisor on matters dealt with by its Civil Liberties, Justice and Home Affairs Committee (LIBE) from 2007 until 2015 and the frequent exchanges with other EU officials and practitioners that have played a key role in developing the EU's agenda in these areas. Whereas in the internal market area the European Parliament has long enjoyed the right of 'co-decision', it has only recently been granted this power in the area of police and judicial cooperation. I had the pleasure of being involved in the drafting of an own initiative report on the future of the Single Market¹⁰⁷ and participating in the negotiations on a number of the Directives on procedural rights of suspects (on the Right to Information in criminal proceedings¹⁰⁸ and Access to a Lawyer in criminal proceedings)¹⁰⁹ as well as negotiations on the Directive on the European Investigation Order¹¹⁰ and the Legislative own initiative report on the

¹⁰⁵ In particular Hatzopoulos 1999; Padoa Schioppa 2005; Maduro 2007; Suominen 2011; Ouwerkerk 2011; Glerum 2013; Janssens 2013; Thunberg Schunke 2013; for a comparison with judicial cooperation in civil matters see Mitsilegas 2012.

¹⁰⁶ For a comparison with judicial cooperation in civil matters see Mitsilegas 2012. For a comparison with asylum and migration law see Battjes *et al.* 2011.

¹⁰⁷ European Parliament resolution of 20 May 2010 on delivering a single market to consumers and citizens, text adopted P7_TA-PROV(2010)0186.

¹⁰⁸ Directive 2012/13/EU on the right to information in criminal proceedings, O.J. (L 142) 1 of 01.06.2012.

¹⁰⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. (L 294) 1 of 06.11.2013.

¹¹⁰ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

Framework Decision on the European Arrest Warrant.¹¹¹ These experiences have offered me a unique insider's perspective on the shaping and reshaping of measures implementing mutual recognition as well as flanking measures in these areas.¹¹²

3.2. Working Definitions

To facilitate the research, a 'working definition' of mutual recognition will be applied, which does not pre-empt the question of its nature nor applies the definitions offered by the Commission as those will also be the subject of further scrutiny. Based on his study of mutual recognition in the internal market, Hatzopoulos suggested the following definition of mutual recognition:

'Mutual recognition is aimed at ensuring that, in the context of the four freedoms recognised by the EC Treaty, Member States recognise and give effect to factual and legal situations established in the territories of other Member States.'¹¹³

The Member States¹¹⁴ and the Court of Justice¹¹⁵ have since expanded mutual recognition to cover judicial cooperation in criminal matters among the Member States in the context of the maintenance and development of the Union as an Area of Freedom, Security and Justice. Taking into account the definition proposed by Hatzopoulos and the consequent legal and political developments examined more closely throughout this book, the following conceptual understanding of mutual recognition is used as a basis for addressing the questions at issue:

Mutual recognition is aimed at ensuring that, *in the context of the European Union [as an (economic) area without internal borders]*, Member States recognise and give effect to factual and legal situations established in the territories of other Member States.

This definition of 'recognising and giving effect' implies a process which might entail a number of steps depending on *what* is recognised. The terms 'factual and legal decisions' already indicate that sometimes the recognition of a fact (i.e. compliance with a certain standard) is at issue, whereas at other times it is the recognition of a decision (taking the shape of a diploma or a judgment for instance). What 'giving effect' means also depends on the context. In the area of the free movement of goods, for instance, giving effect implies allowing market access, whereas in accordance with the Framework Decision on the European Arrest Warrant giving

¹¹¹ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014)0174.

¹¹² For an account see Van Ballegooij 2015.

¹¹³ Hatzopoulos 1999, p. 74 (translated from French).

¹¹⁴ Presidency Conclusions – Tampere European Council, 15-16/10-1999, Bull. 10/1999. For an account see Elsen 2007.

¹¹⁵ Starting with Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345; Annotated by Vervaele 2005b and Thwaites 2003.

effect requires that a person must be arrested and surrendered for prosecution or the execution of a sentence.

Although the definition provided does not mention it explicitly, an (economic) area without internal borders assumes the free movement of factual and legal situations established in the other Member States. 'Free movement' may also refer to the aim of achieving a factual situation in which (within the European Union) goods circulate freely, a person may practise his or her profession as soon as (s)he obtains the relevant diploma, and an arrest warrant issued in one city leads to the arrest of a suspect or fugitive in another city, no questions asked (resembling a domestic situation).¹¹⁶ The term has been translated to the Area of Freedom, Security and Justice as the 'free movement of judicial decisions'.¹¹⁷ In this case this implies that *what/who moves* is the suspects or sentenced persons, whose movement is not free of course.

Mutual recognition will also be distinguished from 'functional equivalence' or 'equivalence', which are often referred to as a 'condition' of being equal or equivalent in value, worth, function, etcetera. In other words, recognition is made subject to the product or person having complied with equivalent requirements. The next question is *who* or what determines what is equivalent.

In this context it is important to distinguish mutual recognition from the integration method of 'home State control'. This term means in the internal market, for instance, that products lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls. Applying the same reasoning to the mutual recognition of professional qualifications implies that an individual who has complied with the professional training requirements of his/her home State, and hence is allowed to practise his/her profession, should be allowed to do so in the other Member States. In the Area of Freedom, Security and Justice/judicial cooperation this translates as meaning that judicial decisions of one Member State can and should be automatically recognised and executed by other Member States, because they have already satisfied home State controls. Home State control therefore is relevant in the context of *how* free movement is achieved. Alternatives to home State control are host State control, in which free movement is subject to compliance with the rules of the host State and harmonisation, in which free movement is subject to compliance with norms laid down in EU legislation.

We must understand, however, that in all areas under investigation authorities may impose 'exceptions' to free movement or impose conditions before free movement may take place or may apply a justification ground for the non-execution of a decision. Those exceptions and conditions also illustrate the underlying tensions between free movement and other interests, including those based on the protection

¹¹⁶ 'Free movement' can refer to one of the principles of European law, which are an elaboration of the aim to achieve a single market in the areas of goods, persons, services and capital, discussed in section 3.3 below; Arts. 14 (now 26), 39 (now 45), 43 (now 49), 49 (now 56), 59 (now 66 all TFEU) EC.

¹¹⁷ FD EAW, recital 10; Opinion of AG Cruz delivered on 6 July 2019 in Case C-306/09, *I.B.*, para. 43; Court of Justice Case C-306/09, *I.B.*, para. 50.

of individual rights. A comparison table will be drawn up to illustrate the norms stemming from the application of mutual recognition and their effect in the fields of European law covered by this research, indicating what is recognised, whether there is a recognition procedure and what are its effects, and which conditions for and exceptions to free movement remain.¹¹⁸

3.3. *Relationship with Aims*

As a first step to examining the nature of mutual recognition in European law, its relationship with the aims of the Internal Market and the Area of Freedom, Security and Justice is explored.¹¹⁹ Both these areas are products of more than half a century of European integration. Against this backdrop, they are both still relatively young, the internal market having been introduced by the Single European Act in the mid-1980s and the Area of Freedom, Security and Justice by the Treaty of Amsterdam at the end of the 1990s.

As mentioned, the aim of the internal market is to create an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.¹²⁰ An important element of the creation of the internal market is the free movement of persons. This economic concept has gradually widened to take on a more general meaning connected with the idea of European Union citizenship.¹²¹

The issue of free movement of persons and EU citizenship is where the two areas most clearly overlap and where the individual rights perspective taken in this research is most apparent. Free movement cannot be fully achieved without lifting internal border controls. This was also the rationale underlying the Schengen Convention and the Schengen Convention Implementation Agreement, which were originally agreed outside the Community's legal framework.¹²² Eventually Member States agreed on the Treaty goal to maintain and develop the Union as an 'Area of Freedom, Security and Justice' in which both the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration, and the prevention and combating of crime.¹²³ It has even been claimed that, in the absence of a definition laid down in the Treaty, the Area of Freedom, Security and Justice has been interpreted and developed by the Council and Commission in a manner which subjects 'Freedom' and 'Justice' to the 'Security' of the Union and its Member States.¹²⁴

¹¹⁸ The comparison table may be found in the annex to this book.

¹¹⁹ Cf. *supra* section 1.

¹²⁰ Art. 26 TFEU.

¹²¹ Art. 45 EU Charter; 21 TFEU; Case C-184/99, *Grzelczyk* [2001] ECR 6193, para. 31; Case C-413/99 *Baumbast and R* [2002] ECR 7091, para. 82; Case C-34/09, *Zambrano* [2011] 1177; Guild 2004, Chapter 2 in particular; Craig & De Búrca 2011, Chapter 23.

¹²² O.J. (L 239) 22.09.2000, recitals.

¹²³ Art. 3(2) TEU.

¹²⁴ Bigo 2006, p. 35.

3.4. Relationship with (Other) General Principles

General principles constitute a key source of the EU's legal system. The academic discussion on general principles has been wide and extensive. There is little agreement on their actual scope and typology. Tridimas¹²⁵ has provided one of the most authoritative and clear definitions of a general principle of law and division of general principles in the context of European law. He defines a general principle of law as: 'a general proposition of law of some importance from which concrete rules derive.'¹²⁶

Some other indicators of a general principle of law proposed by him are that:

- it is recognised as such by the relevant constituency (the courts, political actors, citizens);
- it transcends specific areas of law; and
- it concerns a core value of an area of law or the legal system as a whole.'¹²⁷

As regards European law, a number of general principles have been written down in the Treaties, whereas others have mainly been developed in the case law of the Court of Justice, based on its mandate in accordance with Article 19 TEU to 'ensure that in the interpretation and application of the Treaties the law is observed'.¹²⁸

As touched upon in section 1, the Court of Justice has explicitly declared mutual recognition a 'general principle' in its case law on free movement of goods and implicitly did the same as regards the interpretation of the *ne bis in idem* principle.¹²⁹ Furthermore, as discussed in section 2, several academic authors have explored the relationship between mutual recognition and a number of general principles.

A second step towards clarifying the nature of mutual recognition is therefore:

- (i) a determination of whether mutual recognition fulfils the conditions for being treated as a principle of European law (in accordance with the criteria mentioned by Tridimas); and
- (ii) an elaboration of the relationship between mutual recognition and the (other) general principles of European law, during the process of its development in the selected fields covered by the internal market and the Area of Freedom, Security and Justice.

To provide some structure to the debate, the principles mentioned will be categorised. Tridimas distinguishes:

¹²⁵ Tridimas 2006.

¹²⁶ Tridimas 2006, p. 3.

¹²⁷ Tridimas 2006, p. 3.

¹²⁸ Ex Art. 220 EC; Case 294/83 *Parti Ecologiste Les Verts v European Parliament* [1986] ECR 1339.

¹²⁹ Case C-110/05, *Commission v Italy* [2009] ECR 519; Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345.

- (i) principles that derive from the rule of law,
- (ii) systemic principles that underline the constitutional structure of the Community [Union] and define its legal edifice; and
- (iii) other types of general principles based on Treaty and statutory interpretation.¹³⁰

In the section below the general principles most closely tied to the enforcement of individual rights within the European legal order are presented in accordance with this division,¹³¹ taking into account their interaction with mutual recognition and the similarities and differences between the two EU Areas concerned.

3.4.1. Principles that Derive from the Rule of Law

In accordance with Article 2 TEU the Union is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’ Principles that derive from the rule of law¹³² have as their common aspect that they refer primarily to the relationship between the individual and public authorities. They have been derived by the Court primarily from the laws of the Member States and used to supplement and refine the Treaties.¹³³ To a certain extent, the rule of law may be seen as a legal principle in its own right, although there are various definitions of the concept in the domestic, European and international legal order that often subsume a number of fundamental rights mentioned separately below.¹³⁴

¹³⁰ Tridimas 2006, p. 4.

¹³¹ Alternatively see Schermers & Waelbroeck 2001, who propose a division of general principles of European Law into: (i) compelling or constitutional legal principles. These principles cover those stemming from the common European legal heritage and represent a form of natural law, such as the protection of fundamental rights; (ii) regulatory principles common to the laws of the Member States. These are to be distinguished from the first category by the fact that they do not contain an element of justice, fairness, or equity; (iii) general principles of law native to the EU legal order. This category covers legal constructions generally employed by the EU legislature and legal reasoning repeatedly followed by the Court. This category is to be distinguished from the first category because compelling legal principles will not develop separately from either the written texts or the compelling principles so that only rules of a more regulatory nature are relevant in this respect.

¹³² Meaning that ‘all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts’. See the Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19.03.2014, p. 4.

¹³³ Tridimas 2006, p. 4.

¹³⁴ Attempts have, for instance, been made by the Council of Europe’s Venice Commission to define the elements of the concept further: ‘Legality, including a transparent, accountable and democratic process for enacting law; Legal certainty; Prohibition of arbitrariness; Access to justice before independent and impartial courts, including judicial review of administrative acts; Respect for human rights; and non-discrimination and equality before the law’, see Report on the rule of law, CDL-AD (2011), Strasbourg 4 April, 2011, para. 41; The European Commission identifies ‘legality, which implies a transparent, accountable, democratic and →

Therefore, the rule of law will not be treated as a separate category for the purpose of this study.

It may be noted, however, that after the various rule of law crises the European Union has witnessed, attempts are being made to put in place a ‘rule of law mechanism’ in case of systemic threats to the rule of law in a particular EU Member State.¹³⁵ This rule of law mechanism is to precede and complement the procedure of Article 7 TEU in case of a serious breach of the values referred to in Article 2, which may lead to the suspension of voting rights in Council of the Member State found in breach.¹³⁶

It has been rightly observed by the Commission that ‘the confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into “an area of freedom, security and justice without internal frontiers”.’¹³⁷ Judicial cooperation in criminal matters, where individual fundamental rights are directly at stake, cannot function when there are

pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.’ See the Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19.03.2014, p. 4.

¹³⁵ Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19.03.2014.

¹³⁶ Art. 7 TEU: ‘1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply; 2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations; 3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State; 4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed; 5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.’

¹³⁷ Communication from the Commission to the European Parliament and the Council, A new EU framework to strengthen the rule of law, COM (2014) 158 of 19.03.2014, p. 2.

serious concerns regarding the independence of judicial authorities.¹³⁸ This is explicitly recognised by the Union's judicial cooperation instruments.¹³⁹

Fundamental rights

Respect for fundamental rights, which falls into the category of principles that derive from the rule of law, has been a concern from early on in the case law of the Court of Justice, as the impact of European integration on fundamental rights as protected under domestic¹⁴⁰ and international law¹⁴¹ became apparent. The Court of Justice had to show that it could integrate fundamental rights protection into its case law, also in view of the intertwined conflict of the supremacy of European Union law over Member State law.¹⁴²

In this section the following sources of fundamental rights will be discussed, as well as their interaction with mutual recognition:

- the ECHR and constitutional traditions common to the Member States;
- the EU Charter; and
- the potential impact of accession to the ECHR.

ECHR and constitutional traditions common to the Member States

Since the entry into force of the Maastricht Treaty, there has been an express reference in the Treaty indicating that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.¹⁴³ As regards the ECHR it is even argued that the rights of the Convention are general principles of EU law, as such, and not just a source of inspiration for those principles.¹⁴⁴ This results in and

¹³⁸ For a comparison see the CJEU decision of 08.04.2014 in Case C-288/12, *Commission v Hungary*, not yet published, on the prematurely bringing to an end of the term of the national data protection authority in violation of the requirement of independence laid down in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995 O.J. (L 281) 31).

¹³⁹ For instance, in recital 10 to the FD EAW, 2002 O.J. (L 190) 1.

¹⁴⁰ In *Internationale Handelsgesellschaft* the Court held that the protection of fundamental rights, 'whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objective of the Community', see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 4.

¹⁴¹ In *Nold* the Court also recognised that international treaties for the protection of human rights on which the EU Member States have collaborated or to which they are signatories can supply guidelines that should be followed within the framework of Community law. See Case 4/73, *Nold* [1974] ECR 491, para. 13; For a more extensive introduction to the Court of Justice's case law on fundamental rights see Senden 2011, Chapter 3 (context of legal argumentation in fundamental rights cases for the court of justice of the European Union).

¹⁴² Case 6/64, *Costa v ENEL* [1964] ECR 585; Van Populier, Van de Heyning & Van Nuffel 2011, p. 3-4.

¹⁴³ Art. 6(3) TEU.

¹⁴⁴ De Witte 2011, p. 22-24.

necessitates a fundamental rights dialogue between the Court of Justice, national courts and the ECtHR,¹⁴⁵ including on the implications of mutual recognition as highlighted in the introduction.¹⁴⁶

EU Charter

In 2000 the European Union took a further step in fundamental rights protection by adopting its own Charter of Fundamental Rights (EU Charter).¹⁴⁷ This EU Charter has become legally binding since its incorporation by the Treaty of Lisbon.¹⁴⁸ It consists of seven titles:

- (i) Dignity;
- (ii) Freedoms;
- (iii) Equality;
- (iv) Solidarity;
- (v) Citizen's Rights;
- (vi) Justice; and
- (vii) General provisions.

The 'classic civil rights', such as Article 4 on the prohibition of torture and inhuman or degrading treatment or punishment, Article 6 on the right to liberty and security, Article 47 on the right to an effective remedy and to a fair trial, Article 48 on the presumption of innocence and right of defence, Article 49 on the principles of legality and proportionality of criminal offences and penalties resembling rights contained in the ECHR are found in the dignity, freedoms and justice chapters respectively.¹⁴⁹ As touched upon in section 2, the 'right not to be tried or punished twice in criminal proceedings for the same offence' (*ne bis in idem*), in addition to being a principle of European Community law¹⁵⁰ and laid down in Articles 54-58 of the Schengen Convention Implementation Agreement, also features as a fundamen-

¹⁴⁵ Senden 2011, p. 28 (on the relationship with national courts): 'The Member States, mostly the national constitutional courts, keep the CJEU alert to provide a sufficient level of protection. In turn, the CJEU can bring about change in the fundamental rights protection at national level.' Claes 2006, Chapter 23; Besselink *et al.* 2014.

¹⁴⁶ Cf. Mitsilegas 2006, p. 1282: 'Mutual recognition challenges traditional concepts of territoriality and sovereignty. Viewing the European Union as a single 'area' where national enforcement tools circulate freely, even if no EU-wide standards are created, may lead to a renegotiation of fundamental constitutional principles both at national and EU level.' Case C-399/11, *Melloni*, not yet published.

¹⁴⁷ For a commentary see Peers *et al.* 2014.

¹⁴⁸ O.J. (C 115) 01 of 09.05.2008.

¹⁴⁹ See Art. 52(3) EU Charter: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

¹⁵⁰ Case C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375; Opinion of AG Sharpston of 15.06.2006 in Case C-467/04, *Gasparini* [2006] ECR 9327.

tal right in Article 50 of the EU Charter.¹⁵¹ This right requires recognition in the legal orders of the other Member States for it to be effective.

The equality chapter incorporates the rights to equality before the law (Art. 20) and the prohibition of discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation as well as nationality (Art. 21). Non-discrimination also appears in Article 18 TFEU in accordance with which Member States have to treat products and persons originating in other Member States in the same way as they treat their own. The Member States lose their competence to discriminate in the absence of objective justifications for the benefit of the integration of the Union. Nevertheless, under non-discrimination, the (judicial) product or person will still have to comply with two sets of regulations (those of the home State and those of the host State). For this reason, the non-discrimination principle has been deemed inadequate for the achievement of the internal market. Therefore, there is an additional need for mutual recognition.¹⁵² In the area of criminal law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.¹⁵³

The EU Charter also contains the citizen's rights, such as that to freedom of movement and residence contained in Article 45, which is in line with the division made by *Tridimas* and will be developed further in section 3.4.3 (other types of general principles). Principles, such as environmental protection, are contained in Article 37 belonging to the solidarity title. The difference between rights and principles is that the latter do not give rise to direct claims for positive action by the Union's institutions or Member State authorities.¹⁵⁴

Article 52(1) EU Charter requires that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.¹⁵⁵

Just like non-discrimination, proportionality has a broader meaning based on Article 5 TEU (ex Art. 5 EC), which on the one hand is used as an instrument of

¹⁵¹ O.J. (C 83) of 30.03.2010.

¹⁵² Hatzopoulos 1999, p. 170.

¹⁵³ See Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633, para. 56; see *infra* Chapter 3, section 5.2.

¹⁵⁴ Art. 52(5): The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality. Explanations relating to the Charter of Fundamental Rights, O.J. (C 303) 17 of 14.12.2007.

¹⁵⁵ For its application by the Court of Justice, see, for instance, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, not yet published.

market integration and on the other hand is applied to protect individual rights.¹⁵⁶ From Article 5 TEU proportionality can be used as a ground for review of national measures derogating from the rules on free movement. Proportionality is an important condition for successfully invoking a justification ground.¹⁵⁷ The proportionality principle imposes suitability and a necessity test on national measures affecting free movement. The latter criterion is interpreted as meaning whether no 'less restrictive alternatives' are available.¹⁵⁸ The proportionality principle also allows the Court of Justice to exercise a balancing of the objectives pursued by EU measures and their adverse effect on individual freedoms.¹⁵⁹

Scope of application; relationship with ECHR and Member State provisions

The scope of application of the EU Charter is determined by its general provisions contained in Title VII. Member States have to respect the rights and observe the principles contained in the EU's Charter of Fundamental Rights when implementing Union law in accordance with Article 51 EU Charter.¹⁶⁰ In this context it is to be noted that, in accordance with the case law of the Court of Justice, 'implementing Union law' is not limited to pure transposition of EU law.¹⁶¹ It also applies to national legislation which is called upon as an exception to a free movement provision.¹⁶² Conversely, the Charter does not apply when there are breaches of fundamental rights with no connection to Union law. In those cases it is up to the national courts to ensure compliance with the fundamental rights obligations concerned.¹⁶³

Article 52(3)¹⁶⁴ and 53 EU Charter¹⁶⁵ clarify that the rights and principles of the EU Charter are to be seen as offering a minimum standard of protection. Member

¹⁵⁶ Jans 2000, p. 243.

¹⁵⁷ De Vries 2006, p. 16.

¹⁵⁸ Tridimas 2005, p. 113.

¹⁵⁹ Tridimas 2006, p. 139; Case C-331/88, *Fedesa* [1990] ECR I-4023.

¹⁶⁰ Art. 6(1) TEU: '1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.' EU Charter, Art. 51 (Field of application): '1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties; 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.', O.J. (C 83) of 30.03.2010.

¹⁶¹ Case C-617/10, *Fransson*, not yet published, paras. 27 and 28.

¹⁶² Case C-390/12, *Pfleger*, not yet published, para. 36; Peers 2014a.

¹⁶³ Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573, p. 10.

¹⁶⁴ Art. 52(3) EU Charter: '3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said

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States may go beyond this minimum standard based on other human rights documents, notably the ECHR and national constitutions. *Lenaerts* has suggested *inter alia* based on the Court's judgment in *Omega Spielhallen*, concerning the prohibition of laser games in Germany given their alleged violation of human dignity (Art. 1 EU Charter) as the game involved simulated killing,¹⁶⁶ that, in accordance with Article 53, a certain difference in measures chosen to protect fundamental rights may be accepted.¹⁶⁷

However, more recently, in *Melloni*, which concerned the question whether the right to apply for a retrial in case of an *in absentia* conviction foreseen in Article 24 of the Spanish Constitution could still be relied upon in surrender procedures, in view of its exclusion by Article 4(a) of the Framework Decision on the European Arrest Warrant¹⁶⁸ as inserted by the Framework Decision on *in absentia*,¹⁶⁹ the Court of Justice held that such a higher level of protection provided for by a national constitution may only be demanded to the extent the primacy, unity and effectiveness of EU law are not thereby compromised.¹⁷⁰ This judgment has, however, met resis-

Convention. This provision shall not prevent Union law providing more extensive protection.'

¹⁶⁵ Art. 53 EU Charter: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

¹⁶⁶ Case C-36/02, *Omega Spielhallen* [2004] ECR 9609, paras. 37 and 38.

¹⁶⁷ *Lenaerts* 2012, p. 398: 'It is not indispensable for the restrictive measures issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental rights or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another Member State. This means that, in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the Member States the question of determining the level of protection of fundamental rights they consider consistent with their national constitution.'

¹⁶⁸ Council Framework Decision on the European Arrest Warrant and the surrender procedures between Member States, O.J. (L 190) of 18.07.2002, p. 1.

¹⁶⁹ O.J. (L 81) 24 of 27.03.2009.

¹⁷⁰ Case C-399/11, *Melloni*, paras. 59 and 60. 59: 'It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, para. 21, and Opinion 1/09 [2011] ECR I-1137, para. 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, *inter alia*, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, para. 61); It is true that Art. 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.' Cf. Opinion 2/13, *on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, not yet published, para. 189.

tance from certain national courts, which refer to the need to respect their national *ordre public*.¹⁷¹

There is therefore an on-going discussion between the Court of Justice and national (constitutional) courts regarding mutual recognition, the responsibilities for fundamental rights protection and the respect for national identity in the Area of Freedom, Security and Justice.¹⁷² The demand of the *Manifesto for European Criminal Procedure* law for 'limitations of mutual recognition where the criminal proceedings would risk violating legitimate interests either of the individual or the Member State'¹⁷³ have to be understood in this context.

Potential impact of EU accession to the ECHR

In accordance with the Treaty of Lisbon, the European Union is now also in the process of acceding to the ECHR.¹⁷⁴ This could avoid possible conflicts in interpretation between the Strasbourg and Luxembourg Courts which would upset the current status quo, in accordance with which the ECtHR deems fundamental rights protection in the EU 'equivalent' to that under the ECHR.¹⁷⁵

Evidence of such inconsistencies may be found, particularly due to the European Court of Justice's hesitant approach at times to taking up obvious fundamental rights concerns. De Witte, *inter alia*, cites Case C-301/06, *Ireland v Parliament and Council*¹⁷⁶ on the Data Retention Directive¹⁷⁷ in which the Court focused on the

¹⁷¹ Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. A 442/13 (119/13); Vogel 2013; *Bundesverfassungsgericht* of 30.06.2009 - 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 and 182/09 (*Treaty of Lisbon*).

¹⁷² The seeds for this struggle were already sown in the original drafting of this provision as discussed by Claes 2006, p. 692-696.

¹⁷³ In accordance with Art. 6 TEU, discussed in section 1, and Art. 4(2) TEU: '2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

¹⁷⁴ Art. 6(2) TEU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.' Protocol (No. 8) on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, O.J. (C 83) 201 of 30.03.2010; Draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at: <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_document_s_en.asp> (last consulted on 5 May 2015).

¹⁷⁵ ECtHR of 30.06.2005, Application No. 45036/98, *Bosphorus Hava Yollari Turizm v Ireland*, para. 165: 'The Court finds that the protection of fundamental rights by Community law can be considered to be, and to have been at the relevant time, "equivalent" (...) to that of the Convention.' Van Populier, Van de Heyning & Van Nuffel 2011, p. 6-7.

¹⁷⁶ [2009] ECR I-593.

¹⁷⁷ Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, O.J. (L 105) 54 of 13.04.2006.

question of the appropriate legal basis, as an example. It took five more years before the Court ruled that the Data Retention Directive was invalid in Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others*¹⁷⁸ given its incompatibility with Articles 7 and 8 of the EU Charter.¹⁷⁹ In the area of judicial cooperation in criminal matters, the Court's judgment in the *Advocaten voor de Wereld* case has also been criticised for not examining the real issue at stake,¹⁸⁰ being the proportionality of the unequal treatment resulting from the abolition of the dual criminality requirement concerning a number of 'serious crimes' listed in the Framework Decision on the European Arrest Warrant.¹⁸¹ A more recent example is Case C-396/11, *Radu*, in which the Court of Justice did not take up the invitation of AG Sharpston to interpret Article 1(3) of the Framework Decision on the European Arrest Warrant in a manner that it would allow the executing judicial authority to refuse surrender in case it would be shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process, with reference to Articles 6, 47 and 48 of the EU Charter.¹⁸²

It remains to be seen, however, whether accession to the ECtHR would indeed address all these inconsistencies,¹⁸³ as the particular system of enhanced judicial cooperation developed between the Member States of the European Union does not fit neatly with the allocation of responsibility to one Member State, but it points more towards a collective responsibility, including for safeguarding the right to a fair trial. It has been pointed out that this may also necessitate the EU legal order to 'give further reaching protection to the particular Convention inspired right at stake'.¹⁸⁴

¹⁷⁸ Not yet published.

¹⁷⁹ See De Witte 2011, p. 26; Guild & Carrera 2014.

¹⁸⁰ De Visser 2014, p. 42: 'The *Advocaten voor de Wereld* judgment was widely seen as avoiding the real issue at stake, akin to the disappointing judicial treatment of another controversial piece of Union legislation the Data Retention Directive, where the CJEU confined itself to examine only whether the measure was based on the correct legal basis.' Raulus 2011, p. 240: 'In the *Advocaten voor de Wereld* case, the ECJ simply denied that there could be any problems under the EAW system. It is not argued here that the EAW should have simply been declared void by the ECJ. By adopting a softer, a more flexible approach and indicating that the Court is aware that in practice, in some cases, there may arise a conflict with fundamental rights protection. There would be a way for the ECJ to indicate that it is willing to perform rigorous judicial review of EU law.'

¹⁸¹ Geyer 2008, p. 160-161; this case will be further discussed in Chapter 3, section 5.1.

¹⁸² This case will be further discussed in Chapter 3, section 5.3.

¹⁸³ Opinion of AG Sharpston in Case C-396/11, *Radu* [2013] ECR 39; Thunberg Schunke 2013, talking about the ECHR judgment in *Stapleton v Ireland* (ECHR of 04.05.2010, Application No. 56588/07) states that it must not be concluded that, within the mutual recognition model, State responsibility for an executing State regarding a violation of Art. 6 in an issuing State is excluded altogether.

¹⁸⁴ De Witte 2011, p. 34: 'References to the case law of the Strasbourg court should, in principle, remain as abundant as before, because of the horizontal clause in the Charter mandating reliance on the ECHR (and its interpretation) when using Convention based rights of the Charter. The Court of justice has dutifully complied with this rule of interpretation already several times since the entry into force of the Lisbon Treaty. There is a potential trap, though, →

The Court of Justice has on the contrary highlighted adherence to the principle of ‘mutual trust’ between Member States as one of the main conditions for EU accession to the ECHR in its opinion on a draft accession agreement.¹⁸⁵ In its opinion the Court expressed the concern that accession to the ECHR would lead to a situation in which Member States would have to check fundamental rights observance by other Member States, whereas in accordance with the principle of mutual trust a Member State may only check whether another Member State has observed fundamental rights guaranteed recognised by EU law in ‘exceptional circumstances’.¹⁸⁶ In doing so accession would ‘upset the underlying balance of the EU and undermine the autonomy of EU law’.¹⁸⁷

Based on this opinion the drafters of the accession agreement will need to rethink how to accommodate the concerns of the Court of Justice without undermining the effective application of the ECHR.¹⁸⁸ At the same time this opinion underlines the need for the Court of Justice to clarify which exceptional circumstances would lead to a rebuttal of the presumption of trust in fundamental rights observance in the context of judicial cooperation in criminal matters.

3.4.2. Systemic Principles

Systemic principles refer to the relationship between the EU and Member States and include the supremacy and loyalty principles. They may also refer to the EU legal position of the individual, such as the principle of direct effect, or to the relations among the institutions of the Union, such as the principle of institutional balance.¹⁸⁹

in the cross-reference within the Charter to Strasbourg case law, namely that the EU Courts (and the national courts applying EU law) may stick too closely to the minimum standard developed in Strasbourg, without asking themselves whether the EU legal order should give further reaching protection to the particular Convention inspired right at stake.’

¹⁸⁵ Opinion 2/13, on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, not yet published.

¹⁸⁶ *Ibidem*, para. 191; ‘It should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (see, to that effect, judgments in *N.S. and Others*, C-411/10 and C-493/10, ECLI:EU:C:2011:865, paras. 78-80, and *Melloni*, ECLI:EU:C:2013:107, paras. 37 and 63).’

¹⁸⁷ *Ibidem*, para. 194: ‘In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.’

¹⁸⁸ For possible next steps see Odermatt 2015.

¹⁸⁹ See also De Witte 2000, who focuses on what he calls ‘institutional principles’, which would correspond with this category of Tridimas, as they serve to regulate the relations between →

Loyalty principle

The loyalty principle or the principle of sincere cooperation¹⁹⁰ obliges Member States (including their administrative and judicial authorities)¹⁹¹ to facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives. This also implies the need to deal with infringements against Union law in an equivalent manner to infringements of national law.¹⁹² Under the related duty of sincere cooperation, the Union and the Member States have to assist each other in carrying out tasks that flow from the Treaties.¹⁹³

If necessary, Member States need to act themselves to achieve the objectives of the Treaties.¹⁹⁴

The principles of supremacy and direct effect

The principle of supremacy implies that the European Union legal order prevails in case of a conflict with (subsequent) laws of the Member States.¹⁹⁵ In accordance with Declaration No. 17 of the Treaty of Lisbon, supremacy also covers measures taken in the area of police and judicial cooperation.¹⁹⁶ Nevertheless, and as already pointed out in relation to the principle of fundamental rights, there is an on-going discussion between the Court of Justice and national (constitutional) courts about supremacy and the responsibility for fundamental rights protection in the domain of criminal law.¹⁹⁷ The claim for supremacy of European Law in the Area of Freedom,

institutions, which, given the nature of the EU, can take place both – at the horizontal level – between EU institutions and – at the vertical level – between EU institutions and the Member States. In the light of this, he distinguishes between horizontal institutional principles (such as institutional balance) and vertical institutional principles (such as the principle of sincere cooperation and subsidiarity).

¹⁹⁰ Art. 4(3) TEU, ex Art. 10 EC.

¹⁹¹ Case C-224/01, *Kobler* [2003] ECR 10239.

¹⁹² Case 68/88, *Commission v Greece* [1989] ECR 2965.

¹⁹³ Case 2/88, *Zwartveld* [1990] ECR 4405; Gormley 2000, p. 116: 'They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty. This means national authorities and community authorities have to cooperate with each other. Member States have to provide mutual assistance to one and other.'

¹⁹⁴ Gormley 2000, p. 114.

¹⁹⁵ Case 6/64, *Costa v ENEL*, [1964] ECR 585.

¹⁹⁶ O.J. (C 115) 1 of 09.05.2008: 'The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.'

¹⁹⁷ Case C-399/11, *Melloni*, paras. 59 and 60: '59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, para. 21, and Opinion 1/09 [2011] ECR I-1137, para. 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, *inter alia*, Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para. 3, and Case C-409/06, *Winner Wetten* [2010] ECR I-8015, para. 61). It is true that Art. 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection

Security and Justice is undermined by remnants of intergovernmentalism allowing (certain) Member States to decide whether to ‘opt in’,¹⁹⁸ stay out¹⁹⁹ or to engage in enhanced cooperation.²⁰⁰

The remnants of intergovernmentalism are also visible as regards the application of the principle of direct effect. Based on this principle, under certain conditions European law, including secondary EU legislation, can be enforced directly by courts in the Member States.²⁰¹ In their combined application, the principles of direct effect and supremacy may, for instance, enable an individual to rely directly upon Treaty provisions or provisions laid down in directives to override provisions of domestic law. However, ‘framework decisions’, the type of secondary EU legislation used as regards police and judicial cooperation, prior to the entry into force of the Treaty of Lisbon, explicitly excluded the possibility of direct effect.²⁰²

This situation remained unaffected by the end of the ‘transitional period’ which froze the pre-Lisbon competences of the Court and Commission in relation to these measures until December 2014.²⁰³ Only if a framework decision (such as that on the European Arrest Warrant) is amended (and hence turns into a directive, or a new directive is adopted, such as has been the case regarding Access to a Lawyer) will the principle of direct effect apply. Therefore the principle of ‘indirect effect’ remains very important in this area. This principle requires national courts to interpret national law in line with directives²⁰⁴ and framework decisions.²⁰⁵

3.4.3. Other Types of General Principles

The third category of principles identified by *Tridimas* is somewhat open-ended in scope. What is clear is that principles of substantive Union law, such as those underlying free movement plus specific Union policies, are meant to be covered.

provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.’ Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. A 442/13 (119/13); Vogel 2013; Bundesverfassungsgericht of 30.06.2009 – 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 & 182/09 (*Treaty of Lisbon*).

¹⁹⁸ Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. (C 83) 299 of 30.03.2010.

¹⁹⁹ Protocol (No. 22) on the position of Denmark, O.J. (C 83) 299 of 30.03.2010.

²⁰⁰ For example, Art. 82(3) TFEU; Peers 2011a, p. 93.

²⁰¹ Case 26/62, *Van Gend en Loos* [1963] ECR 1; *Reyners v Belgium* [1974] ECR 631 (direct effect Art. 49 TFUE (ex Art. 43 EC) on the freedom of establishment); Case 41/74, *Van Duyn* [1974] ECR 1337 (direct effect directives); De Witte 2010; more generally on direct effect see Craig & De Búrca 2011, Chapter 7.

²⁰² Art. 34(2)(a) EU (Nice).

²⁰³ Council of the European Union document 8878/13 of 25 April 2013, p. 3: ‘Pursuant to Article 9 of Protocol 36, the legal effects of such acts will in any event “be preserved until those acts are repealed, annulled or amended” in accordance with the post-Lisbon Treaties. This means that the legal effects of pre-Lisbon “common positions”, “framework decision” and “decisions” as defined in Article 34 of the former TEU will continue to apply until they are amended or replaced (or, indeed, repealed or annulled).’

²⁰⁴ Case 14/83, *Von Colson* [1984] ECR 1891.

²⁰⁵ Case C-105/03, *Pupino* [2005] ECR 5285.

The provisions on free movement are an elaboration of the aim to achieve a single market in the areas of goods (covering the mutual recognition of product requirements), persons, services (including the mutual recognition of professional qualifications) and capital.²⁰⁶

Free movement as an EU citizenship right

In another attempt to bring the European integration process closer to the citizen, the Maastricht Treaty²⁰⁷ introduced provisions stressing the rights to free movement and residence contained in the Treaty as rights belonging to European citizens. This coincided with the introduction of an express reference to fundamental rights in the Treaty,²⁰⁸ as well as provisions related to cooperation in the area of justice and home affairs 'for the purposes of achieving the objectives of the Union, in particular the free movement of persons.'²⁰⁹

European Union citizenship brings all the fundamental market freedoms together and even adds to them, given that the right of free movement and residence under Article 20 TFEU and 45 of the EU Charter are not directly tied to economic activity.²¹⁰ However, there is also a limitation of the personal scope to those holding the nationality of a Member State:²¹¹

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
 - (a) the right to move and reside freely within the territory of the Member States;
 - (...)
 These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

Over the years through the case law of the Court of Justice a development took place in which the court has stressed the rights of free movement and residence²¹² and national measures limiting that free movement and residence have faced

²⁰⁶ Arts. 14 (now 26), 39 (now 45), 43 (now 49), 49 (now 56), 59 (now 66 all TFEU) EC.

²⁰⁷ O.J. (C 191) of 29.07.1992.

²⁰⁸ Art. 6(3) TEU.

²⁰⁹ Art. B, K: Art. K.1: 'For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest. (...) 7. judicial cooperation in criminal matters.'

²¹⁰ Case C-184/99, *Grzelczyk* [2001] 6193, para. 31; *Baumbast and R* [2002] ECR 7091, para. 82 Case C-34/09, *Zambrano* [2011] 1177; Klip 2012, p. 472.

²¹¹ For an analysis see Guild 2012.

²¹² Case C-184/99, *Grzelczyk* [2001] ECR 6193, para. 31; Case C-413/99, *Baumbast and R* [2002] ECR 7091, para. 82.

increasing scrutiny as regards their impact on the 'genuine enjoyment of the substance of these rights'.²¹³

The cases related to EU citizens were mostly confined to access to residence rights²¹⁴ or benefits.²¹⁵ The potential importance of EU citizenship as a vehicle for rights in the context of the application of mutual recognition in the Area of Freedom, Security and Justice still needs to be explored further. The question may be raised whether the EU citizen gains rights through the enhanced model of judicial cooperation based on mutual recognition, or loses them.²¹⁶ A related question is how the 'high level of security' aimed for in the Area of Freedom, Security and Justice in accordance with Article 67(3) TFEU, by means of judicial cooperation based on mutual recognition (Art. 82(2) TFEU), affects the genuine enjoyment of the substance of the citizenship rights of free movement and residence.

These questions are of particular importance given that judicial cooperation is presented as a 'compensatory measure' for the free movement of EU citizens (within the Schengen Area at least). A striking example of that approach is the European Commissions' justification for the 'free movement of judicial decisions' in its proposal for a *Framework Decision on the European Arrest Warrant*, resulting in the forced movement of suspects and sentenced persons due to the execution of a European arrest warrant:

Since the European arrest warrant is based on the idea of citizenship of the Union [...], the exception provided for a country's national, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union.²¹⁷

The protection against discrimination secured by the status of EU citizenship in relation to nationals of the host Member State only applies when there is intra-EU mobility or when the person exercises free movement. Paradoxically, this citizenship right has now been used to justify a restriction of other individual rights, some linked to EU citizenship, whereas others are not.

²¹³ Case C-34/09, *Zambrano* [2011] ECR I177, para. 42; Guild 2004, Chapter 2 in particular; Craig & De Búrca 2011, Chapter 23.

²¹⁴ *Baumbast and R* [2002] ECR 7091; Case C-34/09, *Zambrano* [2011].

²¹⁵ Case C-184/99, *Grzelczyk* [2001] ECR 6193.

²¹⁶ Klip 2012, p. 471: 'The recognition of rights for European Union nationals outside the economic sphere will require the formulation of additional or new general principles of Union law. This may lead to principles that are much more oriented towards fundamental rights than to the economic well-being of the European Union. Such principles may relate, for instance, to the relationship between the principle of proportionality and the principle of mutual recognition in surrender proceedings or to the meaning of the rights of the defence in the context of mutual recognition.'

²¹⁷ Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant, see Chapter 3, section 5.

This logic, to the extent that it has been accepted in EU legislation, and by national courts,²¹⁸ may leave doubt as to the applicability of EU citizenship rights in the Area of Freedom, Security and Justice, particularly those articulated in Directive 2004/38/EC, which defines conditions governing the exercise of the right of free movement and residence as well as the right of permanent residence in the territory of the Member States by Union citizens and their family members.²¹⁹

It also needs to be recalled that the EU citizenship right to free movement and residence is now enshrined in Article 45 of the EU Charter and can be linked with other Charter rights such as that to liberty and security (Art. 6 EU Charter, reflecting Art. 5 ECHR). EU citizens are therefore 'entitled to rights which emanate from multiple sources and which are enforced through a variety of mechanisms'.²²⁰

3.5. *Relationship of Mutual Recognition with Treaty Norms and Secondary Legislation*

A third step towards ascertaining the nature of mutual recognition will be taken by elaborating upon its relationship with treaty norms and secondary legislation. Even if the Court of Justice has determined that mutual recognition applies irrespective of the level of harmonisation achieved, there is still an underlying tension between the level of equivalence of the norms and systems of the Member States, as has also been pointed out by a number of academic contributions discussed in section 2.

Mutual recognition concerns the acceptance of factual and legal situations. As such, it supports the free movement of (judicial) products and persons from other Member States. Yet, primary EU law (the Treaties, Court of Justice case law) and secondary EU legislation may also produce other norms that either facilitate or limit free movement. In the application of these norms, the host Member State can impose measures on (judicial) products and persons from other Member States. When taking the internal market as an example, such measures may be substantive (e.g. product requirements) or procedural (e.g. testing requirements) in nature. In the Area of Freedom, Security and Justice, fundamental rights, *inter alia*, as laid down in the EU Charter, may have substantive (prohibition of torture ex Article 4 EU Charter) and procedural (right to an effective remedy ex Art. 47 EU Charter) implications.

The following subsections elaborate on the relationship between mutual recognition and harmonisation in two situations:

- (i) the first situation is that in which substantive and procedural conditions for free movement have not been harmonised, a situation purely ruled by primary EU law.

²¹⁸ For example not completely as regards German citizens by the *Bundesverfassungsgericht* in the decision of 18.07.2005 – 2 BvR 2236/04 (*European Arrest Warrant*); Geyer 2006, p. 103.

²¹⁹ Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. (L 158), 30.04.2004, p. 77–123.

²²⁰ Guild 2012, p. 14.

- (ii) the second concerns those situations in which mutual recognition occurs in the context of a harmonised area. These two situations will be illustrated further below.

Mutual recognition outside the context of harmonisation (based directly on primary EU Law)

If (full) harmonisation of conditions for free movement has not occurred, mutual recognition occurs in a context within which a Member State wishing to impose its measures on a (judicial) product or person from another Member State has the opportunity to rely on various public interest exceptions to free movement that have been laid down in the Treaty. With regard to product requirements, for example, the host state might claim the product is dangerous to public health (a Treaty exception to the free movement of goods in accordance with Art. 36 TFEU). In this case it is for the host State to substantiate its claims.²²¹ As will be discussed further in Chapter 2, the Court has recognised additional public interest justifications under the 'rule of reason', which originates from in *Dassonville* and *Cassis de Dijon* case law.

Mutual recognition in the context of harmonisation

When studying mutual recognition in a specific field, it should be noted that substantive and procedural requirements may also be the subject of harmonisation.²²² In such cases, mutual recognition depends on compliance with the minimum standards laid down in the harmonising measure concerned. Some examples that will be explored in this book include the Professional Qualifications Directive, the Framework Decision on the European Arrest Warrant, and the Framework Decision on the Transfer of Sentenced Persons,²²³ which is aimed at the rehabilitation of the sentenced person, which has its origin in international human rights law²²⁴ and European cooperation in criminal matters.²²⁵

²²¹ An example of this might be Case C 24/00, *Commission v France* [2004] ECR 1277 concerning the energy drink 'Red Bull'. France effectively banned the sale of the drink until 2008, when French authorities had to admit they could not provide 'scientific proof of danger to consumers'. Red Bull storms into France', *International Herald Tribune*, 9 June 2008.

²²² For an account of its relationship with (minimum) harmonisation see Hofhuis 2006, p. 19-21.

²²³ Council Framework Decision 2008/909/JHA, O.J. (L 327) 27 of 05.12.2008.

²²⁴ United Nations International Covenant on Civil and Political Rights, 16.12.1966, Art. 10(3):3. 'The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.'

²²⁵ Council of Europe Convention on the Transfer of Sentenced Persons, E.T.S. No. 112, of 21.03.1983.

INTERNAL MARKET

1. Introduction

In line with the methodology outlined in Chapter 1, this chapter will assess the nature of mutual recognition in the context of the internal market. In doing so, it will look at the relationship between mutual recognition and the aims and policies of the internal market. It will furthermore entail a number of case studies regarding the development of mutual recognition in two fields covered by the internal market: product requirements and professional qualifications.

The assessment will take into account the fact that the Court of Justice, the Commission, the Council, and the European Parliament have been active players in developing the notion of mutual recognition in these fields. As the conceptual academic debate has mostly focussed on the development of the mutual recognition of product requirements, notably after the landmark decision in *Cassis de Dijon*,¹ it will be revisited in the context of this case study. Furthermore, both case studies will cover the relationship between mutual recognition and the general principles of EU law and the harmonisation of substantive and procedural requirements imposed on goods and professionals from other Member States.

The next sections will first discuss the aims and policies of the Union as an internal market and their relationship with mutual recognition (section 2), followed by the case studies regarding mutual recognition of product requirements (section 3) and professional qualifications (section 4), and conclusions regarding the nature of mutual recognition in the internal market (section 5).

2. Aims and Policies of the Union as an Internal Market

The establishment of the internal market is one of the main objectives of the European Union. It has its origins in the objective to create a common market, which has been part of the Treaty from the 1957 Rome Treaty until the entry into force of the Treaty of Lisbon.

¹ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

The Rome Treaty (hereafter EEC) focused on economic integration after more ambitious attempts for European political integration failed, notably due to the rejection of a European Defense Community by French Parliament in 1954.² The aim of this economic integration, however, remained 'an ever closer union among the European peoples' reminiscent of the declaration of French foreign minister Robert Schuman of 9 May 1950, in which a pooling of coal and steel production was seen as a way to materially prevent war between France and Germany and a first step towards European federation.³

In accordance with Article 2 EEC, economic integration would be achieved by means of the gradual establishment of a 'common market'⁴ and the approximation of the economic policies of the Member States:

The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of member states, to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it.

From the perspective of economic integration, the objective of establishing a common market goes further than a free trade area since it requires not only the lifting of customs duties and quotas between the States participating in it but also the establishment of a common customs tariff towards third countries and provisions concerning the free movement of production factors (labour, goods, capital, establishment and services).⁵

The economic integration foreseen by the EEC did not entail a choice for a liberal market economy. Policies aimed at achieving the common market cover both market liberalisation and possibilities for government intervention.⁶ This is visible as regards the specific provisions on free movement, which all contain both a prohibition on national rules impeding free movement (of, for example, goods and persons) and exceptions based on public health, security etc.⁷

The EEC provided for a common customs area by 1970. This target was, however, already achieved in 1968. Combating 'measures having equivalent effect to

² Craig & De Búrca 2011, p. 5.

³ Which was the basis for the European Coal and Steel Community of 1951; Craig & De Búrca 2011, p. 2 (citing Juliet Lodge): 'Functionalism starts from the premise that by promoting functional cooperation among states it may be possible to deter them from settling disputes over competition for scarce resources aggressively. The logic behind the approach is to prevent war not negatively – by keeping states apart – but positively by engaging them in cooperative ventures.'

⁴ Report of the Heads of delegation on the common market and Euratom (*Spaak report*), 21 April 1956: 'L'objet d'un marché commun européen doit être de créer une vaste zone de politique économique commune, constituant une puissante unité de production, et permettant une expansion continue, une stabilité accrue, un relèvement accéléré du niveau de vie, et le développement de relations harmonieuses entre les États qu'il réunit.'

⁵ Barnard 2004, p. 9.

⁶ Schrauwen 1997, p. 288; Craig & De Búrca 2011, p. 582.

⁷ Craig 2002, p. 4.

quantitative restrictions on imports', however, proved more difficult to achieve. This was due to difficulties in achieving the approximation of product standards imposed by the Member States and inability of the principle of non-discrimination to outlaw measures effectively that, even though they were equally applicable to domestic and foreign products, still posed *de facto* obstacles to free movement.

Court of Justice case law furthering free movement within the common market

In this context, in the 1970s and early 1980s, the Court of Justice played a key role in 'furthering the single market enterprise'⁸ by developing its case law on the notion of the common market and the interpretation of the treaty provisions on free movement notably in the decisions of *Schul*,⁹ *Cassis de Dijon*¹⁰ and *Reyners*.¹¹

Mr. Schul imported second hand pleasure and sports boats from France into the Netherlands on behalf of a client. The Dutch customs authorities levied 18% VAT, which he objected to leading to court proceedings. The Regional Court of Appeal of Den Bosch decided to raise a number of preliminary questions regarding the compatibility of the levy with Community law, *inter alia*, with Article 95 EEC prohibiting not only the direct but also the indirect imposition of internal taxation on products from other Member States in excess of that on similar domestic products.

In its reply the Court of Justice held Article 95 prohibited Member States from imposing VAT on the importation of products from another Member State by a private person, where no such tax was levied on the supply of similar products, to the extent to which the residual part of the VAT paid in the Member State of exportation and still contained in the value of the product when imported was not taken into account.¹²

In supporting this point, the Court provided an interpretation of the 'common market' which clarified that barriers to trade needed to be removed in order to 'merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market', stressing the importance of this objective not only for business but also for individuals:

33. The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intracommunity trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. It is important that not only commerce as such but also private persons who happen to be conducting an economic transaction across national borders should be able to enjoy the benefits of that market.¹³

In *Cassis de Dijon*, the Court was faced with a German law which was indistinctly applicable to both German and other EU economic operators prohibiting the

⁸ Craig 2002, p. 6; Craig & De Búrca 2011, p. 10.

⁹ Case 15/81, *Schul* [1982] ECR 1409.

¹⁰ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

¹¹ Case 2/74, *Reyners v Belgium* [1974] ECR 631.

¹² Case 15/81, *Schul* [1982] ECR 1409, para. 32.

¹³ Case 15/81, *Schul* [1982] ECR 1409, para. 33.

marketing of alcoholic beverages under the term 'liquor' when they contained an alcohol percentage of less than 25%. Rewe, however, wanted to import a 'liquor', Cassis, which only contained 15-20%. This led to the raising of preliminary questions to the Court of Justice regarding the compatibility of the German law with the free movement of goods. In its judgment, the Court stressed the need for 'mutual recognition' of product requirements:

There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by national rules.¹⁴

Furthermore in *Reyners*¹⁵ the Court accorded direct effect to the Treaty provision on the freedom of establishment even though no directive had been adopted to implement this freedom. In this way it offered recourse to a Dutch national who had been refused entry to the Belgian Bar in spite of the fact that he has obtained his law degree in Belgium. The *Cassis de Dijon* and *Reyners* decisions will be further discussed in sections 3, on the mutual recognition of product requirements and 4, on the mutual recognition of professional qualifications, below.

White paper on completing the Internal Market

In the early 1980s the Commission and Council, supported by the European Parliament, regained momentum.¹⁶ The *Cassis de Dijon* decision was seized upon by the Commission to devise a 'new approach' to harmonisation of product standards, based on 'minimum harmonisation', meaning that the Community should only seek to harmonise standards to the extent necessary to ensure free movement.¹⁷

Upon the request of the European Council¹⁸ ideas for the completion of the 'internal market' by the end of 1992¹⁹ based on 'mutual recognition' combined with 'minimum harmonisation' were elaborated upon in the Commission's White Paper on Completing the Internal Market of June 1985.²⁰ According to the Commission, the general principle had to be approved that 'if a product is lawfully manufactured and marketed in one Member State, there is no reason why it should not be sold freely throughout the Community'.²¹ Furthermore the Commission recognised 'the

¹⁴ Case 120/78, para. 14 (second part).

¹⁵ Case 2/74, *Reyners v Belgium* [1974] ECR 631; In general on direct effect see Craig & De Búrca 2011, Chapter 7.

¹⁶ See more in depth Gormley 2006, p. 18-19.

¹⁷ O.J. (C 256) 2 of 03.10.1980.

¹⁸ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 7.

¹⁹ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985.

²⁰ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 1.

²¹ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 58; Cf. 63-68, 77-79, 93. Weiler

→

essential equivalence of Member States' legislative objectives in the protection of health and safety, and of the environment'.²² The Commission repeated that a clear distinction needed to be drawn in future internal market initiatives between what was essential to harmonise and what could be left to the mutual recognition of national regulations and standards. Furthermore legislative harmonisation would have to be restricted to laying down essential health and safety requirements.²³

Single European Act

This White Paper was followed by negotiations on institutional reforms regarding decision making, particularly replacing the unanimity requirement for common market legislation by qualified majority.²⁴ The resulting Single European Act of 17 February 1986 (hereafter SEA) also introduced the notion of an 'internal market' alongside the concept of a 'common market'.

According to Schrauwen, the best way to approach the internal market concept is to use the French term of *espace*. This term is derived from the Latin term *spatium*, which refers to both space and time, something which the English language fails to capture.²⁵ Accordingly, in Article 18 EC, the internal market was defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the treaty'. This internal market was to be established by 31 December 1992.

In the negotiations leading up to the SEA, the Commission had wanted a definition closer to the definition used by the Court in *Schul*, stressing that the internal market is an area within which goods, persons, services, and capital could move under the same conditions as within a Member State.²⁶ Member States were, however, not willing to accept the free movement of people beyond economically active persons qualifying under the various material provisions of the Treaty. Hence, the definition spoke about 'an area without internal frontiers' in which free movement is ensured, but this would have to be 'in accordance with the provisions of the treaty'.

Member States were also not willing to accept any legal consequences in relation to the expiry of the 1992 deadline for the establishment of the internal market. It was notably the Commission's suggestion that if national rules on free movement

2005, p. 50 comments that in spite of the pragmatic approach the statements of the Commission still reflect the sense of urgency and frustration that was also apparent in the 1980 Communication on the *Cassis de Dijon* decision.

²² Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 65.

²³ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 65.

²⁴ Completing the Internal Market. White paper from the Commission to the European Council (Milan 28-29 June 1985), COM (85) 310 final, 14 June 1985, para. 61.

²⁵ Schrauwen 1997, p. 140.

²⁶ Schrauwen 1997, p. 120: 'Le Marché intérieur de la Communauté est progressivement établi au cours d'une période expirant le 31 décembre 1992. Il comporte un espace sans frontières dans lequel les personnes, les marchandises, les services et les capitaux circulent dans les mêmes conditions que dans un Etat membre.'

were not removed by the deadline of 1992 they would automatically be recognised as equivalent.²⁷

The introduction of the notion of an ‘internal market’ alongside the ‘common market’ may be seen as a more overt choice for a liberal market, since its definition stresses free movement.²⁸ On the other hand, it has been pointed out that this ‘liberal market’ concept was balanced by new provisions on flanking policies.²⁹

From Maastricht to Lisbon

Further steps in the process of economic integration were taken by the 1992 Maastricht Treaty. After the Member States rejected the ‘free movement of persons within the internal market under the same conditions as within a Member State’, at the time of the Maastricht Treaty,³⁰ the implications of the free movement of persons were considered to have two dimensions:

- (i) First the Maastricht Treaty added provisions on justice and home affairs, although it placed this provisions outside the Community framework (Art. B Treaty on European Union), eventually to be covered by the concept of an ‘Area of Freedom, Security; and Justice’ (which will be the subject of Chapter 3) by the 1997 Treaty of Amsterdam;³¹ and
- (ii) Second, provisions on European citizenship were added stressing the importance of free movement as a right for European citizens, thereby bringing the Treaty provisions more in line with the spirit of the Court’s decision in *Schul*.³²

Since Member States rejected the idea of automatic recognition of each other’s standards during the negotiations for the SEA, the Commission’s policy documents after 1992 focused on administrative measures needed to ensure the proper implementation of internal market legislation.³³ They also paid increasing attention to the

²⁷ Schrauwen 1997, p. 133; Craig & De Búrca 2011, p. 588.

²⁸ Schrauwen 1997, p. 154: ‘Toutefois, si la définition du marché intérieur dans l’article 7A n’exclut pas totalement les possibilités d’interventionnisme, la thèse que le fondement dualiste du marché commun diffère du fondement du marché intérieur ne me semble pas audacieuse’; this view is supported by the fact that there was a strong business interest behind the Commission’s proposals (see Gormley 2006, p. 18).

²⁹ Craig 2002, p. 19; Craig & De Búrca 2011: ‘The debate between those different sides of the political spectrum, between a neo-liberal conception of the EU and the ‘European social model’, remain as lively today as ever.’

³⁰ O.J. (C 191) of 29.07.1992.

³¹ O.J. (C 340) of 10.10.1997.

³² O.J. (C 191) of 29.07.1992, Arts. 8, 8(a)-(e); Arts. 9 TEU and 21 TFEU; Case C-184/99, *Grzelczyk* [2001] ECR 6193, para. 31; Case C-413/99 *Baumbast and R* [2002] ECR 7091, para. 82; Case C-34/09, *Zambrano* [2011] ECR 1177; Guild 2004, Chapter 2 in particular; Craig & De Búrca 2011, Chapter 23.

³³ Making the most of the Internal Market, COM (93) 632; Gormley 2006 writes at p. 24: ‘The shift in focus to legislation rather than infringement proceedings is, in part, a natural result of the White Paper initiative, but it also represented a succumbing to political pressure on the Commission to be less rigorous in its approach.’

need to deliver the benefits of the internal market to citizens,³⁴ in line with the ambition to gain popular support and legitimacy for the economic integration project. This is linked to the so-called ‘social dimension of the internal market’. According to Craig, the internal market was conceptualised in more holistic terms to include not only economic integration but also consumer safety, social rights, labour policy, and the environment.³⁵

During the last decade, to the dismay of some,³⁶ this ‘reconceptualisation’ of the internal market has continued, as evidenced by the changes introduced in the Lisbon Treaty and the priorities of the ‘EU2020’ strategy³⁷ discussed below.

Treaty of Lisbon: common market replaced by internal market

Upon the entry into force of the Treaty of Lisbon on 1 December 2009, Article 2 EC on the common market was repealed and replaced in substance by Article 3 (3) TEU³⁸ on the internal market, which now not only has to *comprise* an ‘area without internal borders within which free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’³⁹ but also has to, *inter alia*, *work for* sustainable development, a highly competitive social market economy, the environment, social justice and equality:

1. The Union’s aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.
3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment, It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe’s cultural heritage is safeguarded and enhanced.

³⁴ SEC (1997) 1.

³⁵ Craig 2002, p. 38.

³⁶ Pelkmans 2007; Craig & De Búrca 2011, p. 605.

³⁷ COM (2010) 2020 of 03.03.2010; Council conclusions of 17.06.2010, Document EUCO 13/10.

³⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Tables of equivalence, O.J. (C 83) 361 of 30.03.2010.

³⁹ Art. 26(2) TFEU.

The definition of the 'internal market' as such has not been changed significantly, although its position has been moved down to the part of the TFEU dealing with 'union policies and internal actions', in which a new title is created entitled 'internal market'. Article 26(2) TFEU reads:

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

The first paragraph of Article 26 TFEU furthermore reminds us of the fact that the internal market is a project or 'ongoing task':⁴⁰

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

EU 2020 strategy and Monti report; the market as an instrument not an aim in itself

The EU2020 strategy is the long term strategy of the EU to reach 'smart, sustainable and inclusive' growth. It replaces the Lisbon Strategy, which expired in 2010. The strategy contains a number of 'flagship initiatives' ranging from the 'digital agenda' to a 'platform against poverty'.⁴¹ The internal market is notably absent from the EU2020 strategy.⁴²

In a separate initiative, the then Commission president Barroso decided to ask ex Commissioner (and now ex Italian prime minister) Mario Monti to draw up a report with concrete recommendations on how to revitalise the single market integration process. His report entitled 'A new strategy for the Single Market, at the service of Europe's economy and society' was published on 9 May 2010.⁴³

Parliament's Internal Market and Consumer protection committee (IMCO) decided to launch its own initiative report on 'Delivering a Single Market for Consumers and Citizens', which was adopted in plenary on 20 May 2010.⁴⁴ If one compares the Monti report with the Parliament's resolution on Delivering a Single Market to Consumers and Citizens, it becomes clear that there is broad agreement between the Commission and European Parliament on the re-conceptualisation of the internal market in line with the Treaty of Lisbon.

As mentioned, the 'common market', as envisaged in the EEC Treaty, contained provisions on market liberalisation, while allowing for government intervention to defend a certain public interest. Parliament's resolution confirms this approach in taking the view that the major challenge facing the Union is to

⁴⁰ Craig & De Búrca 2011, p. 588.

⁴¹ See <http://ec.europa.eu/europe2020/index_en.htm> (last consulted on 10 May 2015).

⁴² Even though the European Parliament in its resolution on EU2020 stressed that the Internal Market should be a key area for the EU2020 strategy, P7_TA-PROV(2010)0053, para. 24.

⁴³ <http://ec.europa.eu/internal_market/smn/smn58/docs/monti_en.pdf> (last consulted on 10 May 2015). The fact that the publication of this report coincided with the 60th anniversary of the Schuman declaration was not a coincidence.

⁴⁴ P7_TA-PROV(2010)0186.

Find a balance between an open economy, capable of stimulating economic growth and job creation and providing an integrated response to the major challenges of the future and an economic system which is equally up to the task of delivering consumer protection and the social and environmental safeguards that citizens need.⁴⁵

Parliament's resolution also takes the view that the 'old perception' of the Single Market should be supplemented in order to make it more inclusive.⁴⁶ Similarly, Monti's report stresses that 'a market is an instrument, not an end in itself'.⁴⁷ The aim is for the Union to be a highly competitive social market economy in accordance with Article 3 TEU.⁴⁸

Assessment

The development of the 'common market' and 'internal market' concepts from the EEC until the Treaty of Lisbon and beyond, in their interaction with the interventions by the Court of Justice, the Commission, the Council and the European Parliament, reveals a fascinating picture of the stages of European integration and the role market integration played in this process.

In the early period, European integration was clearly steered by the desire to prevent future wars, notably between France and Germany. The common market perhaps was a consolation prize after more bold attempts at political integration had failed. Nevertheless it could be seen as a first step towards that political integration.

After market integration stagnated in the 1970s and early 1980s the Court stepped in to clarify what establishing a common market entailed, including the efforts the Member States needed to undertake in terms of mutual recognition.

The Commission and Council then started to negotiate on what the Court had said and reached new compromises on what they wanted to achieve with the common market, resulting in a separate provision on the internal market and mutual recognition, the latter of which will be discussed further in the sections on the mutual recognition of product requirements and professional qualifications.

In noting that the internal market project clearly entails political choices, as opposed to being a technocratic exercise which is not required to be accountable to European citizens, over the last decades the pendulum seems to have swung back a little again as the internal market and common market concepts were merged again and the internal market not only needs to achieve a state of affairs (an area without internal borders within which free movement is ensured) but also has a number of substantive aims (the highly competitive social market economy etc.).⁴⁹

⁴⁵ P7_TA-PROV(2010)0186, para. 24.

⁴⁶ P7_TA-PROV(2010)0186, para. 13.

⁴⁷ Monti report, p. 12.

⁴⁸ Reflected in paragraphs 13 and 24 of P7_TA-PROV(2010)0186, p. 26 Monti report.

⁴⁹ For an alternative view based on the case law of the Court of Justice see Spaventa 2009, p. 925: 'The aims of the internal market have evolved with the times, not least thanks to the progress achieved through negative and positive integration. Thus if, in a first stage, the main task was to dismantle discriminatory barriers, and genuine barriers to free movement, there is no reason why the interpretation of the Treaty free movement provisions should not

In other words, the internal market is the national markets merged into one. At the same time the internal market is a way of achieving something,⁵⁰ the highly competitive social market economy as indicated in Article 3 TEU and, although more in the background now, lasting peace between the Member States (and their nationals) participating in the European Union.

2.1. *Relationship with Mutual Recognition*

In accordance with the definition found in Chapter 1, Mutual recognition aims at ensuring that, in the context of the European Union as an internal market/(economic) area without internal borders, Member States recognise and give effect to factual and legal situations(established in the territories) of other Member States. As such, it was an essential element in the Commission's White Paper on Completing the Internal Market.

As already touched upon, during the negotiations for the SEA the Commission tried to push the idea of mutual recognition even further by proposing that if national rules on free movement were not removed by the deadline of 1992 they would automatically be recognised as equivalent. This proposal was unacceptable for the Member States.⁵¹ Member States did agree, however, to the insertion of an article which required the Commission to draw up an inventory of national measures which might be eligible for harmonisation under Article 100a EC (now 114 TFEU).⁵² Based on this inventory the Commission could propose to the Council to decide that certain provisions in force in a Member State had to be recognised as equivalent to those applied by another Member State.

Based on the information received, the Commission, however, decided not to propose specific measures for the recognition of equivalence at the Community level. In its 1993 Communication on the 'Management of the Mutual Recognition of National Rules',⁵³ the Commission reasoned that it would be better instead to rely on the case law established by the Court of Justice and to 'ensure compliance with the principle of the acceptance of goods coming from other Member States, by

encompass the need to ensure that the internal market is a "dynamic and competitive" economy. Unnecessary regulation reduces competitiveness both because it is expensive and because it stifles innovation. The broadening of the scope of the Treaty, then, could be seen as a contribution not so much to deregulation but rather to better regulation, through a process of continuous self-reflection, and of continuous dialogue between regulators, traders and the Court.'

⁵⁰ Craig & De Búrca 2011, p. 607 citing De Witte: 'However these [referring to removing disparities between national provisions that hinder free movement or competition] need not be, and cannot logically be the only purposes of internal market legislation; Such legislation is always *also* about "something else" and that something else, may in fact, be the main reason why the internal market measure was adopted.'

⁵¹ Craig 2002, p. 15.

⁵² Art. 100b EC provided: 'During 1992, the Commission shall, together with each Member State, draw up an inventory of national laws, regulations and administrative provisions which fall under Article 100a and which have not been harmonised pursuant to that Article.'

⁵³ Commission Communication, Management of the Mutual Recognition of National Rules after 1992, COM (1993) 669.

managing transparently, effectively and consistently what must remain exceptions to that principle':

16. (...) the present state of Community law, as enshrined in Article 30 (now 28) of the Treaty and secondary legislation and developed through decisions of the Court of Justice, has already established the principle of the acceptance of goods coming from other Member States. This principle is based in particular on the mutual recognition of national rules and may be departed from only to satisfy mandatory requirements or on the grounds listed in Article 36 (now 30), such as health, safety or the protection of the environment; 17. In view of the forthcoming completion of the White Paper programme and in the light of the conclusions drawn from the inventory provided for in Article 100b, it is therefore essential to ensure compliance with the principle of the acceptance of goods coming from other Member States, by managing transparently, effectively and consistently what must remain exceptions to that principle.⁵⁴

This in fact meant that, at least in general terms, the Commission had to give up on the idea of mutual recognition based on home State control, with the result that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls. Weatherill described the events as follows:

'Trading freedom would be maximized were the other extreme, a rule of home State control, to prevail, that is, were host State competence to interfere with imports wholly excluded under a regime which insists that conformity with home State requirements is a passport to access to the EU wide market. But this has not been adopted as a generally applicable unqualified rule in Europe either. Although the Commission was attracted by automatic mutual recognition of divergent national technical standards as the rule governing the Internal Market after 1992, the Member States were prepared to introduce in the Single European Act only a more cautious regime of recognition by Council decision. And even this was left unused and then deleted by the Treaty of Amsterdam.'⁵⁵

On a sectorial level and as regards product requirements, the Commission's ideas regarding the 'management' of the exceptions to 'mutual recognition' took the form of:

- an obligation for Member States to notify draft technical standards to the Commission in order for it to be able to examine their conformity with Community law before they are approved;⁵⁶
- the insertion of 'mutual recognition clauses' in new national legislation; and
- notifying exceptions to the free movement of goods in accordance with Decision No. 3052/95,⁵⁷ which was recently replaced by a Regulation laying down

⁵⁴ Commission Communication, Management of the Mutual Recognition of National Rules after 1992, COM (1993) 669, para. 16.

⁵⁵ Weatherill 2002, p. 54.

⁵⁶ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, 1998 O.J. (L 204) 37.

procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State.⁵⁸

The Commission's policy in this area will be discussed further in section 3 below.

As regards professional qualifications, administrative cooperation and alternative dispute resolution complement the consolidation of various sectorial and general directives in addition to Court of Justice case law in an overarching Directive on the mutual recognition of professional qualifications (Directive 2005/36/EC).⁵⁹ The Commission's policy in this area will be discussed further in section 4 below.

2.2. Conclusion

In the previous section, the relationship between mutual recognition and the aims of the internal market was studied. As discussed, the Court prepared the ground by defining the 'common market' as a single market and stressing the need for free movement by means of mutual recognition. The Commission then based its policy around this idea both in terms of removing obstacles to free movement and harmonisation.

The Commission's attempt to lay down a provision in the Treaty mandating automatic recognition was rejected by the Member States, which feared a disproportionate impact on their regulatory authority. This led to a shift in the Commission's emphasis on administrative cooperation to manage mutual recognition of product requirements and professional qualifications.

Even with these developments, the internal market concept, as it was introduced by the Single European Act, seemed to legitimise a Commission policy aimed at creating a liberal market and moving away from the historical compromise between a free market and state intervention to protect public interests. The Treaty of Lisbon and the EU2020 strategy, however, confirm that the Union is still built on this original compromise. This has consequences for mutual recognition in the sense that public interest regulation may entail inherent limits to free movement unless a common (minimum) level of protection is agreed upon in EU legislation.

At the same time, mutual recognition takes place within a context in which another player has entered the stage: the European citizen. This citizen is *entitled* to free movement and residence within the European Union providing a personal dimension to the free movement provisions and especially those related to the free movement of persons. At the same time, this citizen's approval is sought for ongoing economic integration through the guarantee that consumer protection, social and environmental safeguards that citizens (also) need to be in place.

⁵⁷ Decision 3052/95/EC of the European Parliament and the Council establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community. 1995 O.J. (L 321) 1.

⁵⁸ See *infra*. COM (2007) 36 of 14.02.2007.

⁵⁹ See *infra*. Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, O.J. (L 255) 22 of 30.09.2005.

3. Mutual Recognition of Product Requirements

In assessing the mutual recognition of product requirements, it needs to be understood that the free movement of goods⁶⁰ between Member States first required the lifting of both financial and physical barriers to trade. The lifting of financial barriers to trade was achieved when a full customs union was established between the Member States in 1968. After this, the focus could shift to cracking down on all quantitative restrictions such as import bans on quotas. By the late 1960s quantitative restrictions like import bans and quotas were virtually non-existent.

Quantitative restrictions and measures having equivalent effect

The Commission's emphasis shifted to combating 'measures having equivalent effect to quantitative restrictions on imports' (hereafter, MEES) in accordance with Article 28 EC (currently Art. 34 TFEU), encompassing measures such as national rules on the shape, content and packaging of goods which may hinder inter-State trade but which cannot be described as quantitative restrictions. The Commission sought to challenge these national measures based on the non-discrimination and proportionality principles.

In accordance with A2 of Directive 70/50/EEC on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuit of the aims of the EEC Treaty,⁶¹ the Commission held that national rules which discriminated against imports were taken to infringe Article 28 EC.

In accordance with Article 3 of Directive 70/50/EEC, MEES also covered 'measures governing the marketing of products which deal, in particular, with shape, size, weight, composition, presentation, identification or putting up and which are equally applicable to domestic and imported products', but only 'where the restrictive effect of such measures on the free movement of goods exceeds the effects intrinsic to trade rules'. This would be the case, in particular, where 'the restrictive effects on the free movement of goods are out of proportion to their purpose' and 'the same objective could be attained by other means which were less of a hindrance to trade'.⁶²

3.1. Case Law Regarding Mutual Recognition and the Rule of Reason

The Court of Justice developed its own definition of a MEES in Case 8/74, *Procureur du Roi v Dassonville*,⁶³ which was further refined in Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*.⁶⁴

⁶⁰ Ex Arts. 23-31 EC.

⁶¹ 1970 O.J. (L 13) 29.

⁶² 1970 O.J. (L 13) 29, Art. 3.

⁶³ Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837.

Dassonville

The facts of the *Dassonville* case were as follows: Belgium required that importers of Scotch whiskey possess a British certificate of authentication. The Dassonville brothers imported Scotch whiskey from France without being in possession of a certificate of origin from the British customs authorities, thereby infringing the Belgian law. Within the context of criminal proceedings instituted against the Dassonville brothers, they defended themselves by stating that the Belgian rule amounted to a MEE prohibited under Article 28 EC.

The Court held that the fundamental criterion to determine whether a measure was a MEE was not whether the measure was discriminatory or disproportionate (as the Commission had proposed in Directive 70/50/EEC), but whether the measure directly or indirectly, actually or potentially, hindered the free movement of goods.⁶⁵

In bringing all trade restrictive measures under the prohibition of Article 28 EC the Court, however, at the same time stipulated that, as long as there were no Community measures in place, Member States would remain competent to uphold measures guaranteeing the authenticity of a product's designation of origin for consumers as long as these measures were reasonable and the means of proof required did not act as a hindrance to trade between the Member States.⁶⁶ This has become known as the 'rule of reason', although the Court never referred to it as such.⁶⁷

Cassis de Dijon

As indicated, the decision of the Court of Justice in *Dassonville* meant that almost all government regulation was *prima facie* caught by the prohibition of Article 28 EC. This caused doubt as to the extent to which Member States remained competent to uphold the rules they drafted in the general interest in accordance with the rule of reason. In *Cassis de Dijon* the Court provided more guidance on the application of the rule of reason.⁶⁸

Cassis de Dijon concerned a German law prohibiting the marketing of alcoholic beverages under the term 'liquor' when they contained an alcohol percentage of less than 25%. The import/export firm Rewe wanted to import 'Cassis de Dijon' from France to be marketed in Germany. 'Cassis' only contained an alcohol concentration of 15-20%. The Commission had already initiated infringement proceedings against the German law in 1974 in a case concerning the importation of French *Anisette*, which also had an alcohol percentage below the required 25%. The Commission had dropped its charges after the German authorities allowed *Anisette* to be marketed on the German market. Rewe expected the German authorities to grant the same treat-

⁶⁴ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

⁶⁵ Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837, para. 5.

⁶⁶ Case 8/74, *Procureur du Roi v Dassonville* [1974] ECR 837, para. 6.

⁶⁷ Timmermans 2005, p. vi; Craig & De Búrca 2011, p. 640.

⁶⁸ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649.

ment to them regarding 'Cassis'. However, in this case the German authorities refused authorisation for the drink to be marketed in Germany. Rewe consequently initiated proceedings claiming the German law, which fixed a minimum alcohol percentage, was to be seen as an MEE infringing Article 28 EC. The German Court suspended the legal procedure and asked the Court of Justice to interpret Article 28 EC in the light of the requirements of the German law.

Rule of reason

The Court distinguished between distinctly applicable (discriminatory) and indistinctly applicable measures. As long as there was no harmonisation, indistinctly applicable measures necessary to achieve certain general interests were deemed acceptable.⁶⁹

In the absence of common rules relating to the production and marketing of alcohol (...) it is for the Member States to regulate all matters relating to the production and marketing of alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

At the same time, the Court rejected the German government's claim that it needed to fix a minimum alcohol percentage to ensure the fairness of commercial transactions. Other, less trade restrictive, measures such as an obligation to indicate the alcohol percentage on the label would suffice.⁷⁰

The rule of reason, as developed since *Cassis de Dijon*, has the following elements:

- the aim of the measure must be so important that it takes precedence over the objective of free movement;
- the measure must be proportional, meaning that it must be both necessary and not more restrictive than needed;

⁶⁹ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] ECR 649, para. 8; Gormley 2005, p. 21: 'The term rule of reason covers the acceptance by the Court of certain matters in the general interest as possible justifications for measures that cannot benefit from the exceptions permitted by the first sentence of article 30 EC.'

⁷⁰ Case 120/78, para. 13: 'As the Commission rightly observed, the fixing of limits to the alcohol content of beverages may lead to the standardization of products placed on the market and of their designations, in the interests of a greater transparency of commercial transactions and offers for sale to the public. However, this line of argument cannot be taken so far as to regard the mandatory fixing of minimum alcohol contents as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information is conveyed to the purchaser by requiring the display of an indication of origin and of the alcohol content on the packaging of products.' Matera claims that the approach chosen by the Court in *Cassis* was anticipated by Art. 3 of Directive 70/50/EC, see Matera 2005, p. 7.

- the measure cannot discriminate according to nationality, meaning it should apply to domestic and foreign products alike;⁷¹ and
- The measure may not duplicate a Community measure.⁷²

Since the *Cassis de Dijon* judgment there has been quite a lot of discussion in academic literature concerning the question whether the rule of reason means the measures at stake are not caught by the Treaty provisions on the free movement of goods or whether the Court created extra possibilities for States to justify market regulation based on interests that are in accordance with the aims of the Treaty. The latter reading seems more persuasive.⁷³ As Gormley states:

'The real concept behind the rule of reason is the recognition that Community law does not yet offer at a legislative level guarantees in respect of certain interests or values (...) Accordingly in the *lacunae* pending the adoption of legislation at the Community level, the Court, in the interest of reasonable and appropriate application of the law, upholds national guarantees that the Community legislator does not yet afford to Community citizens.'⁷⁴

Mutual recognition

Returning to the judgment of the Court in *Cassis de Dijon*, after mentioning the rule of reason, the Court then first stressed the importance of the free movement of goods calling it 'one of the fundamental rules of the Community' and then held that Member States should in principle allow the importation of products that had been lawfully marketed in another Member State.⁷⁵

(...) There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be

⁷¹ Although there is discussion on whether this condition is applied consistently. See Gormley 2005, p. 30. Schrauwen 2005b, p. 8: 'There is a lot of confusion here, but the unwillingness of the Court to let go of the condition of non-discrimination when applying the rule of reason is quite understandable. It is submitted that only the Treaty itself can give exceptions to the prohibitions explicitly given in the Treaty: constitutional prohibitions need constitutional categories of exceptions and not judge made ones.'

⁷² Schrauwen 2005b, p. 6.

⁷³ Gormley 2005, p. 23.

⁷⁴ Gormley 2005, p. 23.

⁷⁵ Case 120/78, para. 14 (first part): 'It is clear from the foregoing that the requirements relating to the minimum alcohol content of alcoholic beverages do not serve a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community. In practice, the principal effect of requirements of this nature is to promote alcoholic beverages having a high alcohol content by excluding from the national market products of other Member States which do not answer that description. It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 28 of the Treaty.'

subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by national rules.⁷⁶

The last part of paragraph 14 of *Cassis* has become widely known as the first expression of 'mutual recognition' as developed and promoted by the Commission as a principle of European law.⁷⁷ The extent to which this has been successful will be discussed in section 3.4, after a description how this decision influenced the Commission's general policy on harmonisation and enforcement in the area of the free movement of goods in section 3.2 and a discussion of the academic criticism regarding the Commission's interpretation of the *Cassis* decision (section 3.3).

3.2. *Impact of the Cassis de Dijon Decision on the Commission's Harmonisation and Enforcement Policy Regarding the Free Movement of Goods*

At the time of the *Cassis de Dijon* ruling, the European Community was experiencing slow progress on the removal of the technical barriers to trade. The reason for this was twofold:

- (i) The need for unanimity in the Council to adopt measures harmonising the Common market. This problem was exacerbated by the fact that during the late 1970s, a time of economic recession, Member States were not keen on opening their market further to foreign products.
- (ii) The high complexity of harmonising European production standards for goods. It proved quite difficult to come up with standard product requirements.⁷⁸

In this context the Commission read the 'mutual recognition' paragraph of the *Cassis de Dijon* decision as an invitation by the Court to elaborate a 'new approach' for the completion of the Single Market. Mr. Davignon, the Commissioner who was then responsible for the Single Market, charged Matera (as cited in Chapter 1, who was a member of Mr. Davignon's staff at the time) with the task of drafting a 'dynamic' interpretative document on *Cassis*.⁷⁹ In this document, the ground work was laid for an interpretative document issued by the Commission on 3 October 1980.⁸⁰

⁷⁶ Case 120/78, para. 14 (second part).

⁷⁷ Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition, O.J. (C 265) 02 of 04.11.2003. On p. 13, under footnote 9, the Commission states: 'This principle [referring to mutual recognition] originates in the 'Cassis de Dijon' judgment of 20 February 1979.' For an overview of the 'post-Cassis jurisprudence' see Craig & De Búrca 2011, p. 649-653.

⁷⁸ Matera 2005, p. 7.

⁷⁹ Matera 2005, p. 12.

⁸⁰ O.J. (C 256) 2 of 03.10.1980.

3.2.1. Legislative Consequences

In its Communication, the Commission drew a number of conclusions regarding the legislative action of the Community and the Member States. The Commission announced a 'new approach' to (substantive) harmonisation combined with an assessment of draft Member State legislation for possible infringement of the *acquis* in the free movement of goods area. It therefore not only paid attention to new Community legislation taking into account the principle of mutual recognition, but it also dealt with the enforcement of this principle.

In accordance with Directive 83/183 (and Directive 98/34),⁸¹ the Member States were already required to notify all draft technical standards to the Commission in order for the Commission to be able to examine their conformity with Community law before they would be approved.

The Commission also attempted to enforce the application of mutual recognition by insisting on the insertion of 'mutual recognition clauses' in new national legislation. In this way, producers and importers from the other Member States would be alerted to their free movement rights.

Another measure taken by the Commission to enforce mutual recognition was Decision 3052/95.⁸² This Decision obliged national authorities to notify the Commission of national measures derogating from the principle of free movement of goods. As mentioned, it was replaced by Regulation 764/2008 which lays down procedures relating to the application of national technical rules to products lawfully marketed in other Member States.⁸³

These points will be further discussed below.

New approach to harmonisation

In its 1980 Communication, the Commission announced that, regarding harmonisation, it would focus on sectors where the impact of technical requirements on the functioning of the common market was most sorely felt. Priority would be given to technical rules that were deemed acceptable under the case law of the European Court of Justice (e.g. justified host state regulation in accordance with public interest exceptions recognised by the Treaty of 'mandatory requirements' following Cassis).

The Council approved the Commission's approach. In its May 1985 'Resolution on a new approach to technical harmonisation and standards',⁸⁴ it adopted four

⁸¹ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, 1998 O.J. (L 204) 37.

⁸² Decision 3052/95/EC of the European Parliament and the Council establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community, 1995 O.J. (L 321) 1.

⁸³ O.J. (L 218) 21 of 13.08.2008.

⁸⁴ Council resolution of 7 May 1985 on a new approach to technical harmonisation and standards, O.J. (C 136) 01 of 04.06.1985.

'fundamental principles' on which this new approach had to be based, which are still valid after a reform in 2008:⁸⁵

- (i) First, legislative harmonisation would be limited to the adopted of 'essential safety requirements' on the basis of Article 100a EC (currently Art. 114 TFEU). Products would have to conform to these essential safety requirements in order to achieve market access throughout the Community.⁸⁶
- (ii) Second, the task of drawing up technical specifications needed for the production and placing on the market of products conforming to the essential safety requirements would be entrusted to specialised standardisation organisations. The principle Community bodies which came to be used in the new approach are the European Committee for Standardization (CEN) and the European Committee for Technical Standardization (CENELEC).⁸⁷
- (iii) Third, the technical specifications would maintain their voluntary status; and
- (iv) Fourth, the national authorities would be obliged to recognise that products manufactured in conformity with the harmonised standard would be presumed to conform to the essential safety requirements established.

The producer would have the choice of not manufacturing in conformity with the standards established by the specialised bodies. In this case, however, it would be up to the producer to prove the conformity of that product with the essential safety requirements.⁸⁸

Example: Toy safety

An example of the new approach is to be found in the area of Toy safety. Directive 88/378/EEC of 3 May 1988 on the approximation of the laws of the Member States concerning the safety of toys,⁸⁹ which was repealed by Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (hereafter, Toy Safety Directive),⁹⁰ was the first directive under the 'new approach'.

In accordance with the Toy Safety Directive, essential (toy) safety requirements are laid down in EU legislation (Art. 10 annex II). Toys produced in line with those standards are presumed to comply with the essential requirements laid down in the Directive. Manufacturers have to affix a so-called 'CE' mark confirming compliance (Arts. 15-17). Member States have to allow toys with CE marks onto their market (Art. 12), although they are simultaneously under a duty to ensure that

⁸⁵ Decision No. 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, O.J. (L 218) 115 of 13.08.2008; Craig & De Búrca 2011, p. 599.

⁸⁶ Decision No. 768/2008/EC, Art. 3.

⁸⁷ See <<http://www.cen.eu>> and <<http://www.cenelec.eu>> (last consulted on 10 May 2015) respectively.

⁸⁸ Council resolution of 7 May 1985 on a new approach to technical harmonisation and standards, O.J. (C 136) 01 of 04.06.1985, p. 2-3.

⁸⁹ O.J. (L 187) of 16.07.1988, p. 1.

⁹⁰ O.J. (L 170) of 30.06.2009.

sample checks are carried out to verify their compliance with the standards annexed to the Directive by conducting market surveillance (Arts. 40-45).

Assessment

The 'new approach' provides flexibility to manufacturers in only having to show conformity with essential safety requirements and allowing for inspection to test for conformity with the standards.⁹¹ At the same time, the approach entails a risk in case Member States do not invest in market surveillance. Furthermore, there is the risk of 'regulatory capture' of the European standardisation bodies by industry (to the detriment of adequate consumer protection).⁹²

Notification of draft technical standards

In accordance with Directive 83/183 (and Directive 98/34),⁹³ the Member States are required to notify all draft technical standards to the Commission in order for it to be able to examine their conformity with Union law before they are approved. During the examination, the proposed national regulation will be assessed as to its conformity with similar provisions in other Member States. Article 8(1) obliges Member States to notify the Commission of any draft 'technical regulations' which are due to be adopted, together with a statement of why they are necessary. In case a national measure has not been notified in accordance with the Directive, it cannot be relied on.⁹⁴ Article 9 contains a standstill clause. Member States must postpone the adoption of the draft technical regulation for three months, pending its consideration by the Commission and other Member States. In case another Member State or the Commission opposes the draft regulation, the standstill period is extended for another three months. Another nine months may be added in case there are plans for harmonisation.

Mutual recognition clauses

The Commission has also attempted to enforce mutual recognition by insisting on the insertion of 'mutual recognition clauses' in new national legislation. The Commission policy obliged the Member State to inform the Commission of the way in which similar production and marketing requirements in other Member States would be recognised. In case the Member State wishes to refrain from inserting a general mutual recognition clause, it must provide reasons for this decision.

The reason the Commission insisted on taking up the mutual recognition clauses was that the Commission believed that, in the absence of a 'mutual recognition clause', national producers would likely be deterred from exporting to another

⁹¹ Craig & De Búrca 2011, p. 599.

⁹² Craig & De Búrca 2011, p. 601.

⁹³ Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, 1998 O.J. (L 204) 37.

⁹⁴ Barnard 2004, p. 120; Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL* [1996] ECR 2201.

Member State.⁹⁵ Another advantage mentioned by the Commission was that national authorities would be reminded of the need to apply Articles 28 to 30 of the EC Treaty (currently Arts. 34 to 36 TFEU) when dealing with a product from another Member State or the European Economic Area.⁹⁶ The insertion of a 'mutual recognition' clause in new legislation setting out technical standards would exempt products from other Member States from the application of the technical regulation in which it is contained, except where it would be necessary to ensure an appropriate level of protection.⁹⁷

The Commission's proposal was taken up by the Council, which, in a Resolution of 28 October 1999, called on the Member States 'to review and simplify the relevant national legislation and its application procedures, for example, by inserting appropriate mutual recognition clauses in relevant legislative proposals and improving national procedures for applying these clauses efficiently.'⁹⁸

In its November 2003 'Interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition',⁹⁹ the Commission went on to propose a standard mutual recognition clause to be inserted in all new national regulation setting out technical standards. It would read as follows:

The requirements of this law do not apply to products lawfully manufactured and/or marketed in another Member State of the European Union or in Turkey, or lawfully manufactured in an EFTA State that is a contracting party to the EEA agreement. If the competent authorities have proof that a specific product lawfully manufactured and/or marketed in another Member State of the European Union or in Turkey, or lawfully manufactured in an EFTA state that is a contracting party to the EEA agreement, does not provide a level of protection equivalent to that sought by this law, they may refuse market access to the product or have it withdrawn from the market, after they:

- have informed the manufacturer or the distributor in writing which elements of the national technical rules prevent the marketing of the product in question, and
- have proved, on the basis of all the relevant scientific elements available to the competent authorities, that there are overriding grounds of general interest for imposing these elements of the technical rule must be imposed on the product concerned and that less restrictive measures could not have been used, and
- have invited the economic operator to express any comments he may have within a period of (at least four weeks or 20 working days), before issuing an individual measure against him restricting the marketing of this product, and

⁹⁵ Commission Communication, Management of the Mutual Recognition of National Rules after 1992, COM (1993) 669, para. 36; Bernard 2002, p. 112: 'The advantage of a mutual recognition clause is that it alerts traders to the possibility of benefiting from free movement through mutual recognition rather than having to apply standards and technical regulations of the host state.'

⁹⁶ Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition, C 265/02 of 04.11.2003.

⁹⁷ Bartels 2005, p. 693.

⁹⁸ Council resolution of 28 October 1999 on mutual recognition, O.J. (141) 5 of 19.05.2000.

⁹⁹ O.J. (C 265) of 04.11.2003.

- have taken due account of his comments in the grounds of the final decision. The competent authority shall notify the economic operator concerned of individual measures restricting the marketing of the product, stating the means of appeal available to him.

Case law regarding mutual recognition clauses

The Commission found support for its policy regarding mutual recognition clauses in the decision of the Court of Justice in the *Foie Gras* case.¹⁰⁰ This case concerned a French decree setting out various mandatory quality and composition requirements before a product could be marketed as *foie gras*. The French authorities notified the Commission of this decree in accordance with Directive 83/189/EEC. The Commission objected to the quality and composition requirements and to the fact that the decree made no provision for a mutual recognition clause for products lawfully marketed in the other Member States.

After the French government refused to change the decree, the Commission brought infringement proceedings. The Court accepted the legitimacy of the objectives of the decree which were consumer information and protection, but it held that the means chosen to achieve those objectives were disproportionate. The Court considered that the affixing of informational labels would be sufficient for consumer protection purposes. In any event, the risk that imported products would not have a certain *foie gras* content did not justify a trade ban.¹⁰¹ The Court then found that France was in breach of its obligations under Article 28 EC for failing to include a mutual recognition clause in the decree.¹⁰²

In later cases the Court, however, seemed to reject an obligation for Member States to include a mutual recognition clause. The following three cases: Case C-24/00, *Commission v France*, Case C-95/01, *Greenham and Abel* and Case C-270/02, *Commission v Italy*,¹⁰³ which were handed down by the Court on 5 February 2005, illustrate the point.

All of these cases dealt with the conditions under which products containing nutrients such as vitamins and minerals can be traded in other Member States.

Case C-24/00 concerned infringement proceedings brought by the Commission against France relating to a French law which made the sale of foodstuffs to which chemical products had been added subject to a prior ministerial order of approval. The French had, *inter alia*, refused the marketing of the well-known drink 'Red Bull'. Case C-95/01 concerned preliminary questions raised by France, where Greenham and Abel were prosecuted for having sold food supplements and meal substitutes not authorised by the same ministerial order. Case C-270/02 concerned

¹⁰⁰ Case C-184/96, *Commission v France (Foie gras)* [1998] ECR 6197. In its second Biennial Report on the Application of Mutual recognition in the Single Market, COM (2002) 419, p. 26, the Commission claimed that the Member States were under an obligation to systematically insert a mutual recognition clause in all their legislation. Matera reached the same conclusion in Matera 1998.

¹⁰¹ Case C-184/96, *Commission v France (Foie gras)* [1998] ECR 6197, paras. 21-27.

¹⁰² Case C-184/96, *Commission v France (Foie gras)* [1998] ECR 6197, para. 28.

¹⁰³ Case C-24/00, *Commission v France* [2004] ECR 1277; Case C-95/01, *Greenham and Abel* [2004] ECR 133, Case C-270/02, *Commission v Italy* [2004] ECR 1559.

infringement proceedings brought by the Commission against Italy relating to an Italian law subjecting the marketing of food products for athletes to prior authorisation by the ministry of health.

In his opinion to Case C-24/00, Advocate General Mischo rejected claims by the Commission (based on the *Foie Gras* decision) that Member States were obliged to introduce mutual recognition clauses in all new technical regulation. In his view, a requirement for the inclusion of a provision for mutual recognition risked creating more problems than it solved because of the interpretation difficulties that could arise. He also held the view that mutual recognition clauses were in any event unnecessary because Articles 28 to 30 EC laid down clear and directly effective rules which are 'sufficient as they stand'.¹⁰⁴ The Court consequently rejected the Commission's claim,¹⁰⁵ effectively ridding the Commission of this policy tool.

Assessment

The *Foie Gras* judgment stressed the insertion of mutual recognition clauses, but it is suggested that this was because 'the Commission's application to the Court was determining that Articles 28 to 30 EC imposed some general obligation to include such a clause in national legislation'.¹⁰⁶

In later cases the Court, however, rejected an obligation for Member States to include a mutual recognition clause in national legislation. The two reasons offered by Advocate General Mischo that this would lead to confusion about the concept and a lack of need since the precedents developed in the case law,¹⁰⁷ revealed the differences in approach between the legislative and judiciary bodies of the Union. The Commission was trying to enhance a (free movement) policy, whereas the Court of Justice was engaged in balancing the interests of market access and State regulation through the application of European law and principles. The confusion the Advocate General referred to and wanted to avoid was with regard to the relationship between mutual recognition and free movement. Mutual recognition does not guarantee free movement as Member States may still invoke exceptions, subject to the control of the Court.

Notifying exceptions to the free movement of goods

In addition to *ex ante* notification of new technical standards and the (failed) policy of mutual recognition clauses, the Commission tried to establish a procedure for

¹⁰⁴ Opinion of AG Mischo in Case C-24/00, *Commission v France*, paras. 47-56.

¹⁰⁵ Case C-24/00, *Commission v France*, para. 17.

¹⁰⁶ *Jarvis* 2004, p. 1404: 'Indeed, to derive such a general obligation from the *Foie Gras* judgment was always optimistic. On a close reading of the grounds of the judgment in *Foie Gras* it is apparent that the Court's reasoning in that case was no different from that in a long and consistent line of case law dealing with national restrictions on the use of generic terms. The only difference in *Foie Gras* was that the operative part of the judgment made reference to the absence of a mutual recognition clause. But that was, it is suggested, because the Commission's application to the Court was determining that Articles 28 to 30 EC imposed some general obligation to include such a clause in national legislation.'

¹⁰⁷ Opinion of AG Mischo in Case C-24/00, *Commission v France*, paras. 47-56.

notifying exceptions to the free movement of goods in accordance with Decision 3052/95.¹⁰⁸ Decision 3052/95 required a short information sheet and copies of national decisions derogating from the free movement of goods to be distributed to other Member States within a time period of 45 days.¹⁰⁹ National measures already notified under Directive 98/34 were exempted from notification under Decision 3052/95.

The necessary information procedure would cover four types of decisions:

- (i) a general ban on a model of a type of product;
- (ii) a refusal to allow a product to be placed on the market;
- (iii) a requirement that the model or type of product concerned be modified before it can be placed on the market in question;
- (iv) a withdrawal of the product from the market.¹¹⁰

The monitoring scheme established by Decision 3052/95 proved largely unsuccessful. National authorities did not provide the Commission with enough information. An important problem with Decision 3052/95 was that it was not clearly described what the consequences were of notification, while it created the option of the Commission to start infringement procedures and this was considered the least favoured option by Member States.¹¹¹

Regulation harmonising the mutual recognition procedure

The Commission consequently gave up its efforts to enhance compliance with Decision 3052/95. In February 2007 it launched a proposal for a Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95.¹¹² After agreement was reached with the European Parliament, Regulation 764/2008 (also known as the 'Mutual Recognition Regulation') was published in the Official Journal in August 2008.¹¹³

¹⁰⁸ Decision 3052/95/EC of the European Parliament and the Council establishing a procedure for the exchange of information on national measures derogating from the principle of the free movement of goods within the Community, O.J. 1995 (L 321) 1.

¹⁰⁹ Decision 3052/95/EC, Art. 4.

¹¹⁰ Decision 3052/95/EC, Art. 1.

¹¹¹ The 2000 report from the Commission on the implementation of Decision 3052/95/EC distinguished four scenarios: (i) notification concerns a temporary measure concerning a specific product - no specific follow-up is required as it usually concerns product defects rather than substantive differences in the laws between states, (ii) the notification highlights substantive differences which cannot be removed by mutual recognition - this may require harmonisation measures at EU level; (iii) the notification is irrelevant in the sense of either not being needed or being the subject of a more specific notification obligation - either no action is required or the notification is referred to the appropriate Commission service; (iv) the notification indicates a breach of Treaty provisions - the Commission must consider whether to launch infringement procedures under Article 226 EC; Report from the Commission on the implementation of Decision 3052/95/EC, COM (2000) 194.

¹¹² COM (2007) 36 of 14.02.2007.

¹¹³ O.J. (L 218) 21 of 13.08.2008.

The Commission saw four main problems in the implementation of the principle of mutual recognition:

- (i) The lack of awareness of enterprises and national authorities about the existence of the mutual recognition principle.
- (ii) The legal uncertainty about the scope of the principle and the burden of proof.
- (iii) The risk for enterprises that their products will not get access to the market of the Member State of destination
- (iv) The absence of regular dialogues between competent authorities in different Member States.¹¹⁴

The Regulation concentrates on the burden of proof by setting out the procedural requirements for denying market access, imposing additional requirements or withdrawing products from the market. In accordance with Article 2 paragraph 1, the Regulation applies to:

Administrative decisions addressed to economic operators, whether taken or intended, on the basis of a technical rule as defined in paragraph 2, in respect of any product, including agricultural and fish products, lawfully marketed in another Member State, where the direct or indirect effect of that decision is any of the following:

- (a) the prohibition of the placing on the market of that product or type of product;
- (b) the modification or additional testing of that product or type of product before it can be placed or kept on the market;
- (c) the withdrawal of that product or type of product from the market.

Article 6(1) sets out the procedure to be followed when the national authority intends to take one of the decisions referred to in Article 2(1). Main elements are an obligation on the national authority to notify the economic operator of its intended decision and at the same time state the grounds on which the decision was based. The national authority has to allow the economic operator at least 20 days to submit its comments.¹¹⁵ The national authority has to take its final decision within 20 days from the expiry of the time limit given to the economic operator to submit its comments. In exceptional circumstances this period may be extended to 40 days. This decision then has to be notified to the economic operator and the Commission.

In case the national authority persists, it will have to motivate why any arguments put forward by the economic operator were rejected. It will also have to point the economic operator to the remedies available under its national provisions.¹¹⁶ When the competent authority fails to notify the economic operator of a decision, as referred to in Article 2(1), within 40 days the product shall be deemed to be lawfully

¹¹⁴ COM (2007) 36 of 14.02.2007.

¹¹⁵ Regulation 764/2008, Art. 6 para. 1.

¹¹⁶ Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, Art. 6 para. 2.

marketed in that Member State insofar as the application of its technical rule, as referred to in paragraph 1, is concerned.¹¹⁷

In accordance with Article 12 of the Regulation, the Commission issued a report on its application in 2012.¹¹⁸ The Commission concluded that the Regulation works by and large in a satisfactory way. It underlines the ‘preventive dialogue’ established between enterprises and administrations aimed at amicably and effectively settling problems of free movement. Between 2009 and 2012, the Commission received 1,564 notifications by Member State authorities of decisions taken in accordance with Article 2(1) of the Regulation. 90% of the notifications related to articles of precious metals, whereas the rest related to a variety of other products: foodstuffs, food additives and medicines, energy drinks and electrical equipment.

As regards the precious metals, the Commission refers to its (failed) attempts to harmonise hallmarking requirements and the Court of Justice’s decision in the *Houtwipper* case, in which it upheld a Dutch requirement of independent third-party hallmarking.¹¹⁹ This case will be further discussed in section 3.4. As regards foodstuffs, food additives and medicines the Commission announced further harmonisation efforts.¹²⁰

Consumer interest and commercial power

Summing up the ‘problems flowing from the Cassis strategy’, Craig and De Búrca, citing *Lasa*, indicate that, first, especially as regards food standards, the Court seems not to have protected the consumer enough, deferring to labelling requirements as alternatives to compliance with the standards of the host State. However, the majority of the consumers do not pay much attention to the information given on the label. Second, ruling on Treaty exceptions and the applicability of mandatory requirements puts the Court of Justice and national Courts in a position of balancing between market integration and the attainment of other societal goals. Third, the protective effect of certain trade rules might be lost in the desire to enhance market integration. The deregulatory effect of the Court’s decisions would need to be remedied through harmonisation. Finally the effects on the division of labour between

¹¹⁷ Regulation laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, Art. 6 para. 4.

¹¹⁸ Communication from the Commission to the European Parliament and the Council, First report on the application of Regulation (EC) No. 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member States and repealing Decision No. 3052/95/EC, COM (2012) 292.

¹¹⁹ Case C-293/93, *Houtwipper* [1994] ECR 4249, para. 22.

¹²⁰ Communication from the Commission to the European Parliament and the Council, First report on the application of Regulation (EC) No. 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member States and repealing Decision No. 3052/95/EC, COM (2012) 292, p. 9.

the EU and Member States in regulating the internal market need to be considered.¹²¹

3.2.2. Interim Conclusion

As the overview of the preceding section shows, the Commission has built almost its entire policy concerning the free movement of goods around one particular decision of the European Court of Justice, namely *Cassis de Dijon*. It, however, found the Council in its way when it attempted to impose mutual recognition across the board and found the Court in its way when it tried to impose an obligation upon Member States to insert ‘mutual recognition clauses’ in new market regulation. In the end, a Regulation was necessary to make sure Member States apply the mutual recognition principle in practice to products from other Member States.

The application of mutual recognition to product requirements continues to raise questions regarding its relationship with the aims and principles of the internal market and the level of additional harmonisation and enforcement needed to fulfil these aims in particular as regards consumer protection in terms of market surveillance and product labelling.

3.3. *Academic Criticism Regarding the Commission’s Interpretation of Cassis*

The Commission’s interpretation of the *Cassis de Dijon* decision has also been the subject of criticism in academic literature. In its 1980 Communication on the *Cassis de Dijon* decision, the Commission stressed that the host Member State had to admit onto its market a product that had been lawfully produced and marketed in another Member State, even if it had been produced according to different technical or quality standards, unless the imposition of the host Member State’s rules was necessary to satisfy ‘mandatory requirements’.¹²²

Some academics, however, submitted that the real value of the *Cassis* decision lay in the elaboration of the ‘rule of reason’, in stressing that the ‘mutual recognition’ paragraph was only an *obiter dictum* in the decision. The critical response to the Commission’s Communication may be illustrated by the statements of Barents:

‘It would have been better if no. 5 and 6 [referring to the first part of the Commission’s communication cited in section 2.4.] had been replaced by a statement of the principle that Member States may apply their national laws (without specification) to imported

¹²¹ Craig & De Búrca 2011, p. 687-688; Von Heydebrand und der Lasa 1991.

¹²² O.J. (C 256) 2 of 03.10.1980: ‘Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State. Technical and commercial rules, even those equally applicable to national and imported products, may create barriers to trade only where those rules are necessary to satisfy mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee. This purpose must be such as to take precedence over the requirements of the free movement of goods, which constitutes one of the fundamental rules of the Community.’

products (lawfully produced and marketed) when there exists a valid reason, which is the true message of the Cassis de Dijon judgment.¹²³

The *Cassis de Dijon* judgment, while constituting a continuation of the Court's policy outlined in the *Dassonville* case, is not so revolutionary as the Commission wishes to believe. It has to be regretted that the Commission has used a dubious interpretation of this judgment as a weapon to revive its crusade against protectionism.¹²⁴

Others submit that the Commission was wrong in interpreting *Cassis* as implying 'mutual recognition' and would prefer the term 'functional equivalence', or simply 'equivalence', since 'Cassis' was only allowed on the German market with a label indicating its (lower) alcoholic content.¹²⁵

The academic criticism may be summed up as stating that, by first mentioning the 'mutual recognition' paragraph to be followed by the 'rule of reason', the Commission painted a distorted picture. A layman reader was led to believe that 'mutual recognition' meant Member States could no longer impose their measures on products lawfully produced and marketed in another Member State (home State control).

It may come as no surprise that the Commission, wishing to promote free movement, would stress such an interpretation of mutual recognition, since this could lead to the establishment of the internal market without first insisting on harmonisation.

On page 3 of its Communication, the Commission even stated: 'The principle of mutual recognition plays an important part in the functioning of the Internal Market. Thanks to it, the free movement of products is possible in the absence of any Community harmonising legislation.'¹²⁶ It is, however, recalled that in its Communication the Commission did mention that the host State would still be able to impose rules that are necessary to satisfy 'mandatory requirements'.¹²⁷

¹²³ Barents 1981, p. 297.

¹²⁴ Barents 1981, p. 299: Cf. Alter & Meunier-Aitsahalia 1994, p. 539: 'This second to last paragraph, in the context of the rest of the decision was provocative. Because the Court had already dismissed the validity of the German law for reasons well established in the Court's previous jurisprudence, the statement was indeed redundant.'

¹²⁵ Weiler 2005, p. 47: 'In fact, the Court may have used the language of mutual recognition but employs the practice of functional parallelism. After all, even in *Cassis* itself, it allowed Germany to insist that a product lawfully marketed in France be labelled differently as a requirement for accessing the German market. Only with a label indicating its (lower) alcoholic content does French *Cassis* become functionally parallel to the German regulation of fairness of commercial transactions'.

¹²⁶ Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition, O.J. (C 265) 02 of 04.11.2003, p. 15.

¹²⁷ O.J. (C 256) 2 of 03.10.1980: 'Any product lawfully produced and marketed in one Member State must, in principle, be admitted to the market of any other Member State. Technical and commercial rules, even those equally applicable to national and imported products, may create barriers to trade only where those rules are necessary to satisfy mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee. This purpose must be such as to take precedence over the requirements

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The Commission's 'dynamic interpretation' seems to have persuaded some academics as well, which lead to a discussion on whether the decision in *Cassis* led to an expansion of home or host State control over market regulation.

When read as a whole, Armstrong views the judgment in *Cassis* as an extension of host State control. In *Cassis*, the German government could not prove the necessity of requiring a minimum alcohol concentration of 25% to ensure fair commercial practices. This was the reason that *Cassis* had to be admitted to the German market (possibly with a label indicating its alcohol percentage):¹²⁸

'Far from mandating a model of home state control, the judgement in *Cassis de Dijon* created further regulatory space for host state controls through its creation of the mandatory requirements exception. To be sure this regulatory space for host state regulators would be rigorously policed by EU and national courts ... analytically, the judicial analysis shifts to the issue of the justification offered by the host state for the application of its rules rather than merely mandating the application of home state rules.

Thus in *Cassis de Dijon*, the result was that the German authorities had provided no good reason for invoking host state controls and *for that reason* goods lawfully placed on the market in another Member State should be permitted market access. But it would be quite wrong to confuse the outcome of an analysis with the analysis itself. In other words, the correct analysis is one based on the enduring regulatory responsibility of host state regulator, 'in the absence of harmonisation' rather than one premised on a pure model of home state control.'

Weatherill, however, reaches the opposite conclusion reasoning that, even though the Court first insisted on Member States' freedom to regulate their markets, they have to justify why they impose their rules on products lawfully placed on the market in another Member State:¹²⁹

'Article 28 EC provides gnominically for a prohibition against 'quantitative restrictions on imports and all measures having equivalent effect', but it has been remarkably recast by the Court into a formula for determining the limited circumstances in which a 'host state' is entitled to apply its rules in a way that will exclude imported goods (...) from its market or make difficult their access to it.

In *Cassis de Dijon* the Court first articulated clearly how and why national regulatory autonomy would be subjected to the requirements of Community law in so far as the exercise of such autonomy damaged product market integration.

It began by insisting on the primacy of host state control in the absence of common Community rules. "It is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their territory." But this initial concession to the host state is deceptive. In accordance with paragraph 8 the host state is (...) permitted to apply its rules only on condition that they carry a sufficient justification in the public interest to prevail over the interest in the integration of markets (...) Moreover in accordance with the principle that inter-State trade

of the free movement of goods, which constitutes one of the fundamental rules of the Community.'

¹²⁸ Armstrong 2002, p. 234.

¹²⁹ Weatherill 2002, p. 43-45.

restrictions are treated as exceptional, the burden is on the regulating State to make that case in support of its rules. The core of the *Cassis* ruling therefore concludes by turning on its head the initial embrace of host state control.'

3.3.1. Conclusion

To a certain extent, the statements of *Armstrong* and *Weatherill* may be reconciled. The 'mutual recognition' paragraph in the *Cassis* judgment is significant since it stresses that the host State has to justify the application of its norms. At the same time, however, the Court expanded the public interests that can be used to justify host State intervention. However, there is no encroachment on the right of the (host) State to regulate its market in absence of (full) harmonisation.

This view of *Cassis* would be in line with a more gradual appreciation of the Court's case law. There was no revolution as *Barents* appropriately put it.¹³⁰ A combined application of the non-discrimination and proportionality principles, as envisaged by the Commission in Directive 70/50, proved insufficient for the achievement of a common market in the area of the free movement of goods.

Therefore it was replaced with an obstacle-based approach by the Court in *Dassonville*, while allowing for the maintenance of reasonable national measures. The mutual recognition paragraph in *Cassis* can be seen as a specification of the obstacle-based approach, combined with an elaboration of the rule of reason.

3.4. General Academic Appraisal of Mutual Recognition

In general, mutual recognition aims at ensuring that, in the context of the European Union as an economic area without internal frontiers, Member States recognise and give effect to factual and legal situations established in the territories of other Member States. As regards the free movement of goods, the starting point for this discussion is the idea that products complying with equivalent standards should be granted market access.

As discussed in Chapter, 1 section 2.1, several academic authors have given their own appraisal of mutual recognition in the internal market. We might sum up their positions as:

- (i) Mutual recognition is not an obligation according to the Court of Justice case law, as the objectives can be achieved by applying the non-discrimination and proportionality principles; only goods complying with equivalent standards may achieve market access. Goods that do not meet the technical standards of the importing country may not be marketed and thus harmonisation of standards remains necessary (*Weiler*).¹³¹

¹³⁰ *Barents* 1981, p. 299.

¹³¹ *Weiler* 2005, p. 49-50.

- (ii) Mutual recognition has procedural implications beyond testing for equivalence, based on solidarity, for instance, the obligation to put in place a system of recognition of qualifications that are not equivalent (Hatzopoulos).¹³²
- (iii) Mutual recognition may be necessary even if there is no equivalence in standards, as ‘the Court of Justice must take into account the interests of market integration that the national legislation simply ignored’.¹³³ The case law of the Court of Justice, in which it determined certain product requirements to be unjustified in the light of an available alternative labelling policy, may serve as an example. A different regulatory approach might, however, require prior harmonisation or public interest exceptions (Maduro).¹³⁴
- (iv) Mutual recognition is a general obligation based on mutual trust among the Member States and their common heritage and legal orders. Equivalence appears in the context of the proportionality test as the level of protection demanded by the Member State of destination. The level of protection must be reasonable and satisfactory in so far as it complies with the result of scientific research in the sector (Matera).¹³⁵

In assessing these four interpretations of mutual recognition, one has to take into account that the Commission’s original interpretation of *Cassis* and mutual recognition has evolved over the last 30 years, as has the case law of the Court of Justice.

In 2009 the Commission produced a Staff working document entitled: ‘Free movement of goods – Guide to the application of Treaty provisions governing free movement of goods (articles 28-30 EC), 2nd Edition’.¹³⁶

In comparison with the 1980 Communication the 2009 Staff working document spells out mutual recognition more clearly as a ‘principle’.¹³⁷ It furthermore clarifies that exceptions to this principle have to be based on a public interest recognised by the Treaty or in the Court’s case law and subject to the proportionality principle, whereas the 1980 document focused on the ‘necessity test’.¹³⁸

Under the heading ‘the mutual recognition principle’ the Commission stated:

¹³² Hatzopoulos 1999, p. 66.

¹³³ Maduro 2007, p. 820.

¹³⁴ Maduro 2007, p. 822.

¹³⁵ Matera 2005, p. 17-18.

¹³⁶ SEC (2009) 673.

¹³⁷ Tridimas 2006, p. 3, as discussed in Chapter 1, section 3.2.

¹³⁸ O.J. (C 256) 2 of 03.10.1980: ‘The principles deduced by the Court imply that a Member State may not in principle prohibit the sale in its territory of a product lawfully produced and marketed in another Member State even if the product is produced according to technical or quality requirements which differ from those imposed on its domestic products. Whether a product ‘suitably and satisfactorily’ fulfils the legitimate objective of a Member State’s own rules (public safety, protection of the consumer or the environment etc.), the importing country cannot justify prohibiting its sale on its territory by claiming that the way it fulfils the objective is different from that imposed on domestic products. In such a case, an absolute prohibition of sale could not be considered ‘necessary’ to satisfy a ‘mandatory requirement’ because it would not be an ‘essential guarantee’ in the sense defined in the Court’s judgement.’

'Under the 'principle of mutual recognition' different national technical rules continue to co-exist within the internal market. The principle means that, notwithstanding technical differences between the various national rules that apply throughout the EU, Member States of destination cannot forbid the sale on their territories of products which are not subject to Community harmonisation and which are lawfully marketed in another Member State, even if they were manufactured according to technical and quality rules different from those that must be met by domestic products.

The only exceptions to this principle are restrictions that are justified on the grounds described in Article 30 EC (protection of public morality or public security, protection of the health and life of humans, animals or plants etc.) or on the basis of overriding requirements of general public importance recognised by the case law of the Court of Justice, and are proportionate to the aim pursued.

Thus, the mutual recognition principle in the non-harmonised area consists of a rule and an exception:

- The general rule that, notwithstanding the existence of a national technical rule in the Member State of destination, products lawfully produced or marketed in another Member State enjoy a basic right to free movement, guaranteed by the EC treaty; and
- The exception that products lawfully produced or marketed in another Member State do not enjoy this right if the Member State of destination can prove that it is essential to impose its own technical rule on the products concerned based on the reasons outlined in Article 30 or in the mandatory requirements developed in the Court's jurisprudence and subject to the compliance with the principle of proportionality.'

Commission v Italy: Mutual recognition is a legal principle

As mentioned in Chapter 1, Tridimas has identified a number of characteristics of a general principle of law:

- it has to be established as general proposition of law, from which concrete rules derive;
- it has to be recognised by the relevant constituency (the courts, political actors, citizens);
- it has to transcend specific areas of law; and
- it concerns a core value of an area of law or the legal system as a whole.¹³⁹

One might say that the Commission is part of 'the relevant constituency' recognising mutual recognition as a general principle of law. Another (more important) part of this constituency is the European Court of Justice. The Commission finds support for its claim that mutual recognition is a general principle of law by citing Case C-110/05, *Commission v Italy*,¹⁴⁰ in which the Court for the first time addressed national measures obstructing the free movement of goods violating the 'principle' of mutual recognition:

¹³⁹ Tridimas 2006, p. 3.

¹⁴⁰ Case C-110/05, *Commission v Italy* [2009] ECR 0519.

The principle originated in the famous *Cassis de Dijon* judgment (...) and was the basis for a new development in the internal market for goods. While at the beginning not expressly mentioned in the case law of the Court of Justice, it is now fully recognised.¹⁴¹

Case C-110/05 concerned infringement proceedings against Italy for introducing legislation that prohibited motorcycles and quadricycles from towing a trailer, a restriction which in effect limited the possibility to sell these trailers in Italy. The Court agreed that the Italian legislation constituted an obstacle to the free movement of goods in accordance with the *Dassonville* formula ('all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade').¹⁴² It then mentioned 'mutual recognition' together with the principles of non-discrimination and market access:

34. It is also apparent from settled case-law that Article 28 EC reflects the obligation to respect the principles of non-discrimination and of mutual recognition of products lawfully manufactured and marketed in other Member States, as well as the principle of ensuring free access of Community products to national markets (see, to that effect, Case 174/82 *Sandoz* [1983] ECR 2445, paragraph 26; Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraphs 6, 14 and 15; and *Keck and Mithouard*, paragraphs 16 and 17).

35. Hence, in the absence of harmonisation of national legislation, obstacles to the free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods constitute measures of equivalent effect to quantitative restrictions even if those rules apply to all products alike (see, to that effect, '*Cassis de Dijon*', paragraphs 6, 14 and 15; Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 8; and Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, paragraph 67).

The Italian government, however, claimed that its legislation prohibiting motorcycles and quadricycles from towing a trailer was justified under the rule of reason, claiming that it was necessary to ensure road safety, which was accepted by the Court as 'an overriding reason relating to the public interest capable of justifying a hindrance to the free movement of goods'.¹⁴³ The Court accepted this argument while also holding that the choice for a total prohibition was not disproportionate.¹⁴⁴

¹⁴¹ SEC (2009) 673, footnote 74.

¹⁴² Case C-110/05, para. 33.

¹⁴³ Case C-110/05, para. 60.

¹⁴⁴ Case C-110/05, para. 66: 'In the present case, the Italian Republic contends, without being contradicted on this point by the Commission, that the circulation of a combination composed of a motorcycle and a trailer is a danger to road safety. While it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions.' (see, by analogy, Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699, para. 58).

The academic comment to this case has focused on the question whether restrictions on use are to be covered by the prohibition of Article 34 TFEU (measures having equivalent effect to quantitative restrictions), leading to an expansion of the market access test or rather should be exempted from this prohibition by analogy to selling arrangements as in *Keck and Mithouard*.¹⁴⁵

The fact that the Court has now followed the Commission in declaring that mutual recognition is a principle of European Law in substance seems to have brought nothing new. The Court mentioned mutual recognition as a principle, but it then went on to apply the rule of reason to the Italian measure resulting in it being deemed acceptable.

The Commission's position on mutual recognition is (not surprisingly) in line with the view proposed by Matera that mutual recognition is to be seen as a general obligation based on mutual trust among the Member States and their common heritage and legal orders.¹⁴⁶ The Commission document also confirms Maduro's view that mutual recognition may be necessary even in cases where there is no equivalence, in which case a label may inform the consumer about the differences in composition of the product for example.¹⁴⁷

The guiding line in the case law of the Court is that, where imported products are similar to domestic ones, adequate labelling, which may be required under national legislation, will be sufficient to provide the consumer with the necessary information on the nature of the product. No justification on the grounds of consumer protection is admissible for unnecessarily restrictive measures.¹⁴⁸

An example of a case concerning labelling requirements is Case 27/80, *Criminal proceedings against Fietje*.¹⁴⁹ This case concerned a Dutch requirement to indicate the denomination 'liqueur' on certain alcoholic products. This required producers from other Member States to change the label on their products. The Court accepted that the Dutch measure was taken to satisfy a mandatory requirement (consumer protection), but it also stated that, where the good bore a label containing information of equivalent value to the consumer, a labelling requirement such as the Dutch one would infringe Article 28 EC.¹⁵⁰ In other words, consumers have a choice not to buy

¹⁴⁵ Cases C-267 and C-268/91, *Criminal proceedings against Keck and Mithouard* [1993] ECR 6097; Spaventa 2009; Oliver 2011; Gormley 2011, p. 91: 'Although the expression "a considerable influence on the behaviour of consumers, which, in its turn affects the access of that product to the market of that Member State" is also found in paragraph 56 of *Commission v Italy*, in paragraph 57 of that judgment the Grand Chamber of the Court made it clear that the measure prevented the existence of a demand in the market for such trailers and therefore hindered their importation. Thus, any impression that the Court will permit *de minimis* restrictions on use is, it is respectfully, submitted ill-founded. That said, there is a distinct impression, as Spaventa put it, that the court is trying to have its *Keck* and eat it'. For a general overview see Craig & De Búrca 2011, p. 663-668.

¹⁴⁶ Matera 2005, p. 17-18.

¹⁴⁷ Maduro 2007, p. 822.

¹⁴⁸ SEC (2009) 673, p. 43.

¹⁴⁹ Case 27/80, *Criminal Proceedings against Anton Adriane Fietje* [1980] ECR 3839.

¹⁵⁰ Case 27/80, *Criminal Proceedings against Anton Adriaan Fietje* [1980] ECR 3839, para. 12: 'However there is no longer any need for such protection if the details given on the original label of

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the products from other Member States based on the information provided on the label.

The *Beer purity*¹⁵¹ case may serve as another example where a label providing information to the consumer was deemed sufficient to allow market access to products that were not substantially equivalent. The German *Biersteuergesetz* reserved the name 'Bier' for products brewed with malted barley, hops, yeast, and water. This requirement impeded market access for foreign beers often brewed with maize and rice. Germany defended the law on the ground of consumer protection: the German customer would be misled if products not brewed with the traditional ingredients would be sold in Germany as 'Bier'. The Court rejected the German government's arguments stating the German citizens might very well get used to and appreciate foreign beers even though they were brewed with different ingredients. Germany could inform the consumer adequately by requiring beer producers to mention the ingredients on the labels.¹⁵²

The question is, however, to what extent the requirement of equivalence may be dropped in case the measures imposed in the host Member States are based on a different regulatory approach,¹⁵³ which Maduro also acknowledges may prove harder without additional harmonisation or more room for public interest exceptions ('managed mutual recognition').¹⁵⁴ Examples of this situation are Case 188/84, *Commission v France (Woodworking machines)*,¹⁵⁵ Case C-293/94, *Houtwipper*, Case C-30/99 *Dynamic Medien v Avides Media* and Case C-36/02, *Omega Spielhallen*.¹⁵⁶

Commission v France concerned an infringement action by the Commission against a number of procedural safety rules adopted by the French authorities for different types of woodworking machines. Machines that were deemed dangerous were submitted to technical examination before they could be marketed in France. Inspection costs had to be paid by the importers. The French legislation was based on the idea that users of the machines should be protected against their own mistakes and that the machines had to be designed so that the user's intervention was limited to a strict minimum. Other Member States, however, based their approval

the imported product have as their content information on the nature of the product and that content includes at least the same information, and is just as capable of being understood by consumers in the importing State, as the description prescribed by the rules of that State. In the context of Article 177 of the EEC Treaty, the making of the findings of fact necessary in order to establish whether there is such equivalence is a matter for the national court.'

¹⁵¹ Case 178/84, *Commission v Germany* [1987] ECR 1227.

¹⁵² Case 178/84, *Commission v Germany* [1987] ECR 1227, para. 35: 'It is admittedly legitimate to seek to enable consumers who attribute specific qualities to beers manufactured from particular raw materials to make their choice in the light of that consideration. However, as the Court has already emphasized (judgment of 9 December 1981 in Case 193/80, *Commission v Italy* 1981 ECR 3019), that possibility may be ensured by means which do not prevent the importation of products which have been lawfully manufactured and marketed in other Member States and, in particular, "by the compulsory affixing of suitable labels giving the nature of the product sold". (...)'

¹⁵³ Gormley 1996.

¹⁵⁴ Maduro 2007, p. 822, as discussed in section 3.4.

¹⁵⁵ Case 188/84, *Commission v France (Woodworking machines)* [1986] ECR 419.

¹⁵⁶ Case C-36/02, *Omega Spielhallen* [2004] ECR 9609.

procedures on the principle that the worker should receive thorough and continued training so that he would be capable of responding correctly in case a machine malfunctioned. According to the Commission, the French rules were excessive regarding non-automated machines. The Court, however, held that Community law did not require the recognition of a different regulatory approach regarding the safety requirements of woodworking machines.¹⁵⁷

*Houtwipper*¹⁵⁸ concerned a lady facing criminal prosecution in the Netherlands for having had in her possession, or traded, gold and silver rings not bearing the hallmark required by Dutch Law, although they did have hallmarks of another Member State. The Dutch Court doubted whether the Dutch requirements were in accordance with the Community's provisions on the free movement of goods. In its decision, the Court of Justice stressed that the market for articles of precious metal was the subject of differing national rules, in particular with regard to the acceptable standards of fineness, the type and number of hallmarks, the maximum tolerance with regard to the amount of precious metals in alloys, and the methods of supervising hallmarks.¹⁵⁹

The Dutch law, requiring an additional hallmark in the Netherlands would make it more difficult for precious metals to be imported.¹⁶⁰ The Court held that a Member State cannot require a fresh hallmark in case the information provided by the original hallmark was equivalent to that prescribed by the Member State of importation and intelligible to consumers of that State.¹⁶¹ The Dutch law, however, also required the hallmark be affixed by a competent and independent legal person.¹⁶²

Even though the Court repeated its earlier judgment in *Biologische producten*, that double controls could not be justified if the results of the control carried out in the Member State of origin satisfied the requirements of the Member State of

¹⁵⁷ Case 188/84, *Commission v France* (woodworking machines) [1986] ECR 419, paras. 16-17: '16. It follows that whilst a Member State is free to require a product which has already received approval in another Member State to undergo a fresh procedure of examination and approval, it is nevertheless under a duty to assist in bringing about a relaxation of the controls existing in intra-Community trade (see judgment of 17 December 1981 in Case 272/80 *Frans-Nederlandse Maatschappij voor Biologische Producten* (1981) ECR 3277). Moreover, it is not entitled to prevent the marketing of a product originating in another Member State which provides a level of protection of the health and life of humans equivalent to that which the national rules are intended to ensure or establish. It is therefore contrary to the principle of proportionality for national rules to require such imported products to comply strictly and exactly with the provisions or technical requirements laid down for products manufactured in the Member State in question when those imported products afford users the same level of protection. 17. However, as Community law now stands Member States are not required to allow into their territory dangerous machines which have not been proved to afford users the same level of protection.'

¹⁵⁸ Case C-293/93 ECR (1994) 4249.

¹⁵⁹ Case C-293/93, para. 12.

¹⁶⁰ Case C-293/93, para. 13.

¹⁶¹ Case C-293/93, para. 15.

¹⁶² Case C-293/93, para. 17.

importation,¹⁶³ it did, however, uphold the Dutch requirement of independent third party hallmarking.¹⁶⁴

The German government had argued that a Member State could not prohibit the marketing in its territory of articles of precious metal hallmarked by the producers themselves in the Member State of exportation. The fact that the German system imposed penalties under public law if hallmark rules were infringed and thereby allowed action under the Law against Unfair Competition by certain associations vested with the power to issue warnings relied on the manufacturer's guarantee and, finally, provided for special training for gold- and silversmiths, apparently did not persuade the Court.¹⁶⁵ The Court seemed more convinced by the arguments of the British government stressing the possible risks for consumers.¹⁶⁶

Case C-30/99, *Commission v Ireland*,¹⁶⁷ followed on from *Houtwipper*. This case concerned, *inter alia*, an Irish trade ban on articles made from precious metals that did not comply with its provisions concerning standards of fineness, unless the hallmarks were replaced to comply with those standards. The Commission argued that the Irish rules constituted measures having equivalent effect to quantitative restrictions. It recognised that the Irish rules were in place to protect consumers, but it also held that 'mutual respect' must be in place for the fair and traditional practices of the other Member States.¹⁶⁸ Furthermore the information provided by the hallmarks in other Member States was equivalent in nature and could be supplemented by attaching labels or placing notices in the display cases.¹⁶⁹ The Irish government, however, contented that Member States would still be allowed to prohibit the marketing of imported goods even where they complied with the fair and traditional practice in another Member State in case the public interest justified it.¹⁷⁰ The Commission, however, submitted that 'the principle known as mutual recognition should apply to indications of fineness'.¹⁷¹

The Court referred to its decision in *Houtwipper* in stating that requiring additional hallmarking of articles made from precious metal would make their import more difficult and costly.¹⁷² It recognised that such a measure could be justified on grounds of consumer protection.¹⁷³ It, however, held that such a measure was not proportionate where the information provided by the hallmark was equivalent and

¹⁶³ Case C-293/93, para. 19.

¹⁶⁴ Case C-293/93, para. 22. The Court continued: 'The choice between prior control by an independent body and a scheme such as that in the Federal Republic of Germany is a matter for the legislative policy of the Member States; the Court will review that choice only where there has been a manifest error of assessment. That has not occurred in this case, as the Advocate General has shown in points 27 and 28 of his Opinion.'

¹⁶⁵ Case C-293/93, para. 20.

¹⁶⁶ Case C-293/93, para. 21.

¹⁶⁷ Case C-30/99, *Commission v Ireland* [2001] ECR 4619.

¹⁶⁸ Case C-30/99, para. 16.

¹⁶⁹ Case C-30/99, para. 17.

¹⁷⁰ Case C-30/99, para. 19.

¹⁷¹ Case C-30/99, para. 22.

¹⁷² Case C-30/99, para. 28.

¹⁷³ Case C-30/99, para. 29.

intelligible to the consumer of the state of importation.¹⁷⁴ The test to be applied was whether the 'description, trade mark or promotional description or statement was liable to mislead the purchaser, the presumed expectations of an average consumer who is reasonably well-informed and reasonably observant and circumspect'.¹⁷⁵ It then held that the information provided by a hallmark struck on an article of precious metal from another Member State which indicates the standard of fineness in part per thousand was equivalent to the Irish system.¹⁷⁶

These cases show the link between mutual recognition and harmonisation. Free movement may not be achieved when the differences in regulatory approach are too great.¹⁷⁷ In these cases, for example, the French authorities were allowed to impose their higher worker safety standards until minimum requirements for woodworking machines were established. Furthermore, pending legislation on marking precious metals, the Court was not going to insist on a certain type of marking and supervision. It is worth noting that this case law played out against the backdrop of a proposed Directive on marking precious metals,¹⁷⁸ which contained an option of self-certification. This directive was never adopted due to an intensive lobby campaign by British MEPs in particular.

Another sensitive area to be discussed in which there are differences in regulatory approaches among Member States concerns child protection, particularly as regards the appropriate age for playing certain video games. Case C-244/06, *Dynamic Medien v Avides Media*,¹⁷⁹ concerned the compatibility of German rules prohibiting the sale by mail order of image storage media which had not been classified for the purpose of protecting children and which do not bear a label from that authority indicating the age from which they may be viewed, with Articles 28 and 30 EC.

Avides had imported Japanese cartoons which had been examined by the British Board of Film Classification, which had classified them as suitable for persons 15 years or older. Dynamic, a competitor, sought to prevent the sale of Avides' products pointing to the requirement to have the media examined in Germany in accordance with the German law on the protection of young persons.

Since the German rule made it more difficult and more expensive to import image storage media from a Member State other than Germany, the Court held it to be a measure having equivalent effect to a quantitative restriction.¹⁸⁰ It was, however, justified under Article 30 EC, public morality/policy, combined with the protection of the rights of the child as laid down in the Convention on the Rights of the Child and the EU Charter.

On the suitability and necessity of the measure, the Court first of all pointed out that the level of discretion left to Member States in determining the sales

¹⁷⁴ Case C-30/99, para. 30.

¹⁷⁵ Case C-30/99, para. 32.

¹⁷⁶ Case C-30/99, para. 33.

¹⁷⁷ Cf. Maduro 2007, p. 822.

¹⁷⁸ COM (93) 322 and COM (94) 267.

¹⁷⁹ Case C-244/06, *Dynamic Medien v Avides Media* [2008] ECR 0505.

¹⁸⁰ Case C-244/06, paras. 34-35.

prohibition pending the examination and classification by the German competent authority was a suitable measure.¹⁸¹ The measure was also not excessive since direct sales to adults were not prohibited.¹⁸²

The *Omega Spielhallen* case¹⁸³ concerned the prohibition of laser games in Germany given their alleged violation of human dignity (Art. 1 EU Charter) as the game involved simulated killing. The Court accepted that respect for fundamental rights is a legitimate interest justifying the restriction of the free movement of goods.¹⁸⁴ In determining whether the prohibition was necessary for the protection of human dignity, the Court held that a certain difference in measures chosen to protect fundamental rights may be accepted.¹⁸⁵

37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler*, the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.

38 On the contrary, as is apparent from well-established case-law subsequent to *Schindler*, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see, to that effect, *Läärä*, paragraph 36; *Zenatti*, paragraph 34; *Case C-6/01 Anomar and Others* [2003] ECR I-0000, paragraph 80).

3.5. Conclusion

Since the *Cassis de Dijon* decision and the interpretation given to it by the European Commission, there has been a lively academic debate concerning the nature of mutual recognition of product requirements. In the Commission's interpretation of mutual recognition, it is to be seen as a general principle of European Law which entails that Member States have to admit a product that has been lawfully produced and marketed in another Member State, even if it has been produced in accordance with different technical or quality standards. Some academics have, however, contested the status of mutual recognition as a general principle of law, claiming that it adds nothing to the application of the non-discrimination and proportionality principles and insisting that market access may only be achieved if equivalent standard

¹⁸¹ Case C-244/06, para. 47.

¹⁸² Case C-244/06, para. 48.

¹⁸³ Case C-36/02, *Omega Spielhallen* [2004] ECR 9609.

¹⁸⁴ Case C-36/02, para. 35: 'Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, *Schmidberger*, paragraph 74).'

¹⁸⁵ See also *Lenaerts* 2012, p. 398.

have been complied with (Weiler). Others recognise a general principle entailing an obligation to allow market access based on mutual trust among the Member States and their common heritage and legal orders (Matera).

Between these two interpretations, there are academics who do recognise mutual recognition as a general principle of law with added value to the application of the non-discrimination and proportionality principles as it may have procedural implications beyond testing for equivalence, based on the solidarity principle. An example of this is the need to put in place a recognition procedure for professional qualifications (Hatzopoulos). Mutual recognition may even be necessary even if there is no equivalence, based on solidarity. An example of this is food and beverage labelling by which the consumer may be informed about the differences in composition of the product. However, a different regulatory approach might require harmonisation and/or more room for public interest exceptions (Maduro).

The legal debate concerning the nature of mutual recognition and the policy debate concerning the best approach to European integration seem to be intertwined somewhat. Matera's insistence that 'functional equivalence' and 'mutual recognition' appear in different contexts, placing equivalence as a subset of the proportionality test may be seen as an attempt to further home State control and free movement by replacing the condition of equivalence with trust. On the other hand, Weiler's insistence on the link between 'equivalence' and free movement may be interpreted as trying to protect the national regulatory authority of the host State (and the public interests protected by it).

The Court's case law, however, does not support an interpretation of mutual recognition which equates it to home State control. The Court opposed the Commission policy of mandating a general obligation to insert mutual recognition clauses in national legislation, which according to Advocate General Mischo would cause confusion about the concept of mutual recognition and was moreover superfluous due to the precedents established in case law.

On the other hand, in *Commission v Italy* (motorcycle trailers) the Court did declare mutual recognition to be a legal principle in the free movement of goods area, thereby supporting the claim that it is a general principle of European law, although, based on an assessment of the free movement of goods case law in isolation, one cannot claim that mutual recognition transcends specific areas of law and concerns a core value of an area of law or the legal system as a whole.¹⁸⁶ At the same time, the Court did accept the Italian claims that the prohibition of motorcycles towing trailers was necessary to protect road safety. Therefore the Court continues to apply the same combination of mutual recognition and the rule of reason that it has been employing since the *Cassis de Dijon* decision.

Even though the case law on labelling requirements shows that there can be recognition in absence of compliance with equivalent standards, a wider assessment of the Court's case law regarding product requirements reveals a residual relationship between mutual recognition and harmonisation. Particularly in more sensitive areas, such as those related to health and safety (*Woodworking machines*), public

¹⁸⁶ Tridimas 2006, p. 3.

policy (*Houtwipper*) and fundamental rights (*Dynamic Medien* and *Omega Spielhallen*), where Member States have different regulatory approaches, the Court will not insist on market access in absence of equivalent standards.

4. Mutual Recognition of Professional Qualifications

In the previous sections of this chapter, the nature of mutual recognition was explored in the context of the aims and principles of the internal market revealing its close relationship both with the aim of merging Europe's national markets into one and the objectives of the internal market, the highly competitive social market economy as laid down in Article 3 TEU.¹⁸⁷

The previous sections also looked at the application of mutual recognition to product requirements by the Court, the Commission, and Council, European Parliament, the response by academics and ultimately the further clarification and confirmation of mutual recognition as a principle by the Court.

This section will turn to the second case study concerning the application of mutual recognition to professional qualifications. As this is a vast and highly specialised area, it is outside the scope of this book to provide a comprehensive overview of the EU secondary legislation and case law governing the mutual recognition of professional qualifications, but rather this section will explore the general picture that arises regarding the nature of mutual recognition based on the main pieces of legislation and the landmark cases in the area.¹⁸⁸

In accordance with the methodology outlined in Chapter 1, this section will explore the nature of mutual recognition by looking at its development in the area of professional qualifications, in particular through:

- (i) its relationship with the aims, provisions and (other) principles of European law, based on the European Court of Justice's foundational case law concerning on the free movement of persons (section 4.1);
- (ii) its application in secondary EU legislation based on the various approaches developed on a sectoral and horizontal level, including the consolidation by the 2005 professional qualifications Directive as amended,¹⁸⁹ where possible referring to the latest legislative developments (section 4.2);
- (iii) looking at the interaction between EU secondary legislation and the (further) development of the case law of the Court of Justice (section 4.3).

This will be followed by conclusions regarding the nature of mutual recognition of professional qualifications (section 4.4). First, the importance of the mutual recognition of professional qualifications for the free movement of persons within the internal market will be shortly introduced below.

¹⁸⁷ See section 2.

¹⁸⁸ For a more extensive overview see Schneider & Claessens 2005; Schneider 1995; Schneider & Claessens 2008; Claessens 2008; Craig & De Búrca 2011.

¹⁸⁹ Directive 2013/55/EU, O.J. (L 345) 132.

Mutual recognition of professional qualifications

Mutual recognition of professional qualifications, including diplomas, certificates and other evidence of formal qualifications has consequences both in terms of the rights of the applicants (the individuals seeking the recognition of their professional qualifications) and the regulatory policy of the Member States. In terms of the rights of the applicant, the mutual recognition of professional qualifications is closely tied to the Treaty provisions on the free movement of persons, which are to be seen as part of the fundamental right to free movement pertaining to EU citizens.¹⁹⁰

In particular, a worker might not be able to perform his profession in another Member State without the recognition of his professional qualifications in that other State. This may be illustrated by the case of Mr. Choquet,¹⁹¹ a French electrician working in Germany who was prosecuted for driving in Germany without having obtained a German driving licence after living there for more than one year. The German court wondered whether the German requirement and consequent criminal prosecution was proportionate and in line with the free movement of workers in light of the fact that the Mr. Choquet was in possession of an equivalent licence and obtaining a German licence, even under a simplified procedure, would lead to language problems and incurring costs.¹⁹²

The Court held that even though the rules regarding the issuance of driving licences, including the determination of the conditions under which a foreign driving licence was to be recognised, remained within the scope of Member State responsibility,¹⁹³ insistence on a driving test clearly duplicating a test taken in another Member State, creating language problems or leading to incurring exorbitant costs, would contravene the free movement of persons.¹⁹⁴ This case triggered the adoption of Community legislation on the mutual recognition of driving licences.¹⁹⁵

Equally, a professional who wishes to establish him/herself in another Member State, in most cases,¹⁹⁶ will have to have his or her professional qualifications recognised in that Member State in order to obtain access to the profession in the host Member State.¹⁹⁷ A service provider is, however, not obliged to have his professional qualifications recognised if he provides his services on a temporary and occasional basis in another Member State.¹⁹⁸

¹⁹⁰ Art. 45 EU Charter; 20 TFEU.

¹⁹¹ Case 16/78, *Criminal proceedings against Michel Choquet* [1978] ECR 2293.

¹⁹² Case 16/78, para. 3.

¹⁹³ Case 16/78, para. 6.

¹⁹⁴ Case 16/78, para. 8.

¹⁹⁵ Council Directive 80/1263/EEC, of 4 December 1980 on the introduction of a Community driving licence, O.J. (L 375) 1, 31.12.1980 (repealed); Council Directive 91/439/EEC of 29 July 1991 on driving licences, O.J. (L 237) 1, 24.08.1991 (as amended); for an overview of recent case law see Mostl 2010, p. 427; Klip 2012, p. 362.

¹⁹⁶ For the special position of lawyers see *infra* section 4.2.

¹⁹⁷ In accordance with Directive 2005/36/EC, O.J. (L 255) 22 of 30.09.2005 see *infra* section 4.2.

¹⁹⁸ Case C-154/89, *Commission v France* [1991] ECR 659, para. 17, ECJ Case C-375/92, *Commission v Spain* [1994] ECR 923, para. 21; Cf. Directive 2005/36/EC, O.J. (L 255) 22 of 30.09.2005, Arts. 5-9.

Member States are allowed to make access to a particular profession legally conditional upon the possession of a specific professional qualification. The reasons for regulating a profession may include the protection of public health (particularly regarding health professionals, including doctors and nurses), consumer protection or, in the case of lawyers, even the functioning of the justice system and the rule of law more generally.¹⁹⁹

In spite of there being an explicit treaty basis for directives allowing for the mutual recognition of diplomas in Article 47 EC, it was the case law of the Court of Justice that was the primary catalyst for the mutual recognition of professional qualifications. This foundational case law will be explored in the following section.

4.1. *Foundational Case Law on the Mutual Recognition of Professional Qualifications*

Similar to the area of the free movement of goods, the Court's case law on the free movement of persons has developed from an approach based on non-discrimination to an approach based on mutual recognition.

In one of the first cases on the matter, Case 2/74, *Reyners v Belgium*,²⁰⁰ the Court outlawed host State regulation limiting access to a profession to those with the nationality of the host Member State. The case concerned a Dutch lawyer who had received his law degree in Belgium. The Belgian Bar, however, refused to admit him since he was not a Belgian national. The Court held that if a national of a Member State was otherwise fully qualified for admission to the legal profession in the host Member State, he could not be refused access to the Bar on the basis of lacking the nationality of that State. Such discrimination would be in direct contravention of Article 43 EC, despite the fact that no directive had been adopted to implement the freedom of establishment based on Article 44 EC or the mutual recognition of professional qualifications of lawyers based on Article 47 EC.²⁰¹

A few years later, in *Thieffry*,²⁰² the Court began to shift its focus from direct to indirect discrimination by outlawing host State regulation limiting access to a profession to those with a host State diploma. This case concerned a Belgian advocate who held a Belgian diploma of doctor of laws which had been recognised by a French university as equivalent to the French licentiate's degree in law. He subsequently obtained a French *avocat's* certificate, having passed the French exam. However, he was refused admission to the Paris Bar because he lacked a French degree. The Court held that the requirement of having a French degree constituted an unjustified restriction on the freedom of establishment.

In spite of the fact that Article 47 EC had not been effectively used to harmonise conditions for the recognition of lawyers' diplomas, Member States were obliged to recognise equivalent diplomas. The Court relied on the loyalty principle

¹⁹⁹ Claessens *et al.* 2013, p. 37; Kraus 2003, p. 248.

²⁰⁰ Case 2/74, *Reyners v Belgium* [1974] ECR 631.

²⁰¹ Case 2/74, *Reyners v Belgium* [1974] ECR 631, paras. 30-32.

²⁰² Case 71/76, *Thieffry* [1977] ECR 765.

to be able to construct this obligation.²⁰³ In the absence of harmonisation, however, it was up to the national authorities to decide whether academic recognition would also constitute evidence of a professional qualification.²⁰⁴

Until the end of the 1980s the Court had been faced with national rules regarding qualifications and diplomas that were either directly or indirectly discriminatory. But even if applied without any discrimination on the basis of nationality, national requirements concerning qualifications can have the effect of hindering nationals of the other Member States in the exercise their free movement rights. This may be the case if the national rules in question take no account of the knowledge and qualifications already acquired by the person concerned in another Member State, which is the essence of the mutual recognition of professional requirements.

The problem outlined above came to the fore in *Heylens*,²⁰⁵ which was a case dealing with the recognition of the professional qualifications of a Belgian football trainer in France. The Court reiterated that, in the absence of harmonisation, it was for the Member States to determine what equivalent professional qualifications entailed.²⁰⁶ However, basing itself on the freedom of movement and the loyalty principle, the Court held, as it had done in *Thieffry*, that the absence of harmonisation did not mean that Member States were free to prevent foreign nationals from having access to a certain profession because they did not have the requisite national diploma, in particular when it would be possible for equivalent foreign diploma's to be recognised.²⁰⁷

The recognition procedure was to be set up in a way that national authorities would be able to assure themselves on an objective basis that the foreign diploma certified that its holder had knowledge and qualifications which were 'equivalent' to those certified by the national diploma. The procedure would have to take into account the nature and duration of the studies plus practical training certified by the diploma.²⁰⁸

After this, the Court stressed that 'free access to employment' is to be seen as a 'fundamental right' of each worker of the Community. He would therefore have to be entitled to an 'effective judicial remedy' against a decision by a national authority having the effect of precluding him from exercising that right, since the right to an effective remedy is a general principle of European Community law.²⁰⁹

While the *Heylens* case concerned the free movement of workers, it was soon used as inspiration for an analogous interpretation in a case dealing with the

²⁰³ Case 71/76, *Thieffry* [1977] ECR 765, paras. 16 and 17.

²⁰⁴ Case 71/76, *Thieffry* [1977] ECR 765, para. 24: 'Consequently, it is for the competent national authorities, taking account of the requirements of Community law set out above, to make such assessments of the facts as will enable them to judge whether a recognition granted by a university authority can, in addition to its academic effect, constitute valid evidence of a professional qualification.'

²⁰⁵ Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116.

²⁰⁶ Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116, para. 10.

²⁰⁷ Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116, paras. 11-12.

²⁰⁸ Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116, para. 13.

²⁰⁹ Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116, paras. 14-15.

freedom of establishment in a landmark case *Vlassopoulou*.²¹⁰ This case concerned a Greek lawyer who had worked in Germany advising on Greek and EC law. Vlassopoulou's application to join the local German Bar was rejected on the ground that she had not pursued her university studies in Germany, had not taken the two German state exams, and had not completed the preparatory stage, although she did hold a German doctorate.

The Court held that even though these rules were not discriminatory they could have the effect of hindering nationals of the other Member States in the exercise of their right of establishment guaranteed to them by Article 43, particularly if they took no account of the knowledge and qualifications already acquired in another Member State by the person concerned.

By focusing on the obstacles to free movement created by qualification requirements, the Court was able to elaborate on the principle of mutual recognition, implying that the host State has to compare a migrant's qualifications and abilities with those required by the national system to see whether the applicant has the appropriate skills to join the equivalent profession.²¹¹ In this process Member States are, however, allowed to take into account 'objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity'.²¹² The differences identified between the two legal systems and degrees attesting to the knowledge of those legal systems would have to be compensated by additional study or practical experience.²¹³

Member States also have to ensure an effective judicial remedy against the decision taken by their authorities.²¹⁴

The Court later moved to an obstacle-based approach towards the freedom of establishment in *Kraus* and *Gebhard*.²¹⁵ *Kraus* concerned a German lawyer who had obtained an LLM degree at the University of Edinburgh. Upon his return to Germany, Kraus sent his degree to the German ministry but refused to apply for a compulsory authorisation by the German authorities for the use of his foreign title, claiming that it posed a barrier to the free movement of persons and also constituted discrimination. Kraus brought the case to the administrative court of Stuttgart, which decided to refer preliminary questions to the Court of Justice. This case was special in the sense that Mr. Kraus did not need to have his degree recognised to

²¹⁰ Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- unter Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357; as confirmed by, *inter alia*, Case C-238/98, *Hocsman* [2000] ECR 6623.

²¹¹ Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- unter Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, para. 15; Case 222/86, *UNECTEF v Heylens* [1987] ECR 4116, para. 13.

²¹² Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- unter Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, para. 18.

²¹³ Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- unter Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, paras. 19-21.

²¹⁴ Case C-340/89, *Irene Vlassopoulou v Ministerium für Justiz, Bundes- unter Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357, para. 22.

²¹⁵ Case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [1993] ECR 1663; Case C-55/94, *Gebhard v Consiglio dell'Ordines degli Avvocati e Procuratori di Milano* [1995] ECR 4165.

have access to and to be able to exercise his profession in Germany. In spite of this, the Court, basing itself on the loyalty principle, held that any national measures liable to hinder or make less attractive the exercise of fundamental freedoms could only be justified in case the Member State was able to state objective justifications and the measure was proportionate.²¹⁶ At the same time, the Court recognised that preventing the abuse of academic titles could be a legitimate interest justifying certain restrictions. These restrictions would, however, need to comply with the proportionality principle.²¹⁷

Gebhard equally concerned a German lawyer who was suspended by the Bar of Milan for practicing in Italy on a permanent basis using the title *avvocato*.²¹⁸ Gebhard appealed this decision before the National Bar Council, which asked the Court of Justice whether the Lawyers Service Directive²¹⁹ prohibited lawyers from opening chambers or a branch office in another Member State and which criteria needed to be applied to determine whether activities were of a temporary nature (distinguishing the provision of services from establishment).²²⁰ The Court held that the concept of establishment is a very broad one²²¹ and that Gebhard's situation was covered by this free movement right.²²² It repeated that national measures liable to hinder or make it less attractive to exercise the fundamental freedoms guaranteed by the Treaty must be applied in a non-discriminatory manner; must be justified by imperative requirements in the general interest; must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.²²³

With this case, the Court brought non-discriminatory national restrictions within the remit of the establishment provisions, only to be justified by overriding requirements in the general interest as long as these requirements fulfil the proportionality test.²²⁴

A more recent case in which the obstacle-based approach to the freedom of establishment was applied is *Neri*.²²⁵ Ms. Neri enrolled at Nottingham Trent University (NTU). NTU is a registered and recognised University in the United Kingdom. The provision of the actual courses were delegated to the European School of Economics (ESE), a British private company which has seats in many Member States. In order to avoid the costs associated with staying in the UK, Ms. Neri decided to follow the courses at the ESE in Genoa. After enrolling and paying the fee to the ESE, the Italian authorities informed Ms. Neri that the ESE was not allowed to

²¹⁶ Case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [1993] ECR 1663, paras. 31 and 32.

²¹⁷ Case C-19/92, *Dieter Kraus v Land Baden-Württemberg* [1993] ECR 1663, paras. 32-38.

²¹⁸ Case C-55/94, *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR 4165, para. 9.

²¹⁹ Council Directive 77/259/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services, O.J. (L 78) 17 of 26.03.1977; see *infra* section 4.2.4.

²²⁰ Case C-55/94, *Gebhard* [1995] ECR 4165, para. 18.

²²¹ Case C-55/94, *Gebhard* [1995] ECR 4165, para. 25.

²²² Case C-55/94, *Gebhard* [1995] ECR 4165, para. 28.

²²³ Case C-55/94, *Gebhard* [1995] ECR 4165, para. 37.

²²⁴ Schneider & Claessens 2005, p. 131.

²²⁵ Case C-153/02, *Neri* [2003] ECR 13555.

organise university courses in Italy. According to the Italian authorities, Ms. Neri would, however, not encounter any problems in obtaining the recognition of her diploma if she followed the courses in the United Kingdom. Ms. Neri consequently asked for a refund of her money from ESE. This led to judicial proceedings in which the court of Genoa decided to refer preliminary questions to the Court of Justice. The Court, after reiterating that according to Article 43 all obstacles to the freedom of establishment should be removed, held that the refusal of the Italian government to recognise foreign credentials conferred after a study period in Italy constituted a violation of ESE's freedom of establishment.²²⁶

Italy argued that its practice was objectively justified by the need to ensure high quality education. In its view it would be impossible to exercise quality control in relation to private bodies like ESE by the competent authorities both in the Member State of origin and the host Member State.²²⁷ The Court, in accepting 'high standards of university education' as a legitimate restriction to free movement, in this case considered that the restriction was not proportionate.²²⁸

4.1.1. Interim Conclusion

As the overview of the case law on the mutual recognition of professional qualifications shows, *Reyners* started a development in which the Court declared the article on the freedom of establishment to have direct effect and with it a process in which the host Member State requirements regarding professional qualifications were tested against the free movement provisions, moving from directly discriminatory to indirectly discriminatory measures in *Thieffry* to mutual recognition in *Heylens* and *Vlassopoulou*. The host Member State has to have in place a recognition procedure with possibilities for the applicant to appeal any decision regarding access to the equivalent profession in the host Member State, while allowing the host Member State room to impose compensatory requirements if the professional qualifications are not deemed sufficient. This was followed by the further development of an obstacle-based approach in *Kraus* and *Gebhard*.

Since its interventions were mainly aimed at making sure Member States have procedures in place for individuals wishing to exercise their right of free movement, the Court relied on a combination of systemic principles (supremacy, direct effect, loyalty) and principles deriving from the rule of law (fundamental rights, non-discrimination and proportionality (although the later could be grouped under the first category)).

Much like *Cassis* the Court therefore imposes an obligation upon Member States to recognise equivalent standards, while allowing for reasonable exceptions to free movement, measures to be imposed based certain public interests. The main difference is that mutual recognition of professional qualifications requires a procedure in which the equivalence is determined.

²²⁶ Case C-153/02, *Neri* [2003] ECR 13555, paras. 43 and 44.

²²⁷ Case C-153/02, *Neri* [2003] ECR 13555, para. 45.

²²⁸ Case C-153/02, *Neri* [2003] ECR 13555, paras. 46-51.

The question is to what extent there are similarities between the mutual recognition of product requirements and professional qualifications, when there is no equivalence between the regulatory approaches of the Member States. In the free movement of goods, the consumer may be warned about the contents of a product from another Member State by means of its label. However, cases like *Dynamic Medien* show that there are limits to this approach. This begs the question to what extent the EU legislator has stepped in to harmonise professional qualifications or to allow for exceptions in line with what Maduro describes as a system of ‘managed mutual recognition’.²²⁹

Following on from this, the relationship between the case law on mutual recognition of professional qualifications and the harmonisation of qualifications plus the recognition procedure will be discussed in the section below.

4.2. *Application of Mutual Recognition in Secondary EU Legislation on Professional Qualifications*

In contrast with the mutual recognition of product requirements, the mutual recognition of professional qualifications had a legislative provision devoted to it in the EC Treaty. Article 57 EEC (later 47 EC) called for the adoption of directives on ‘the mutual recognition of diplomas, certificates and other evidence of formal qualifications’. The original idea was for two directives to be passed simultaneously. The first directive would regulate the recognition of diplomas based on Article 47 (1) EC (mutual recognition directive). The second directive would regulate the co-ordination of provisions concerning the taking up and pursuit of activities as self-employed persons based on Article 47(2) EC (co-ordination directive). The two directives adopted based on Article 47 would together ensure the automatic recognition of a diploma. The Treaty of Lisbon merged paragraphs 1 and 2 of Article 47 (current Art. 53 (1) TFEU).²³⁰

In the 1980s this ‘vertical approach’ was supplemented by a ‘new approach’ or ‘horizontal approach’ in accordance with which professional qualifications would not be harmonised, but only the recognition procedure. Both approaches were consolidated in Directive 2005/36/EC on the recognition of professional qualifications, as amended by Directive 2013/55/EU (hereafter Professional Qualifications Directive).²³¹ The legal profession has to be mentioned as a special category as it was

²²⁹ Maduro 2007, p. 822, as discussed in section 3.4.

²³⁰ Art. 53 TFEU: ‘1. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons; 2. In the case of the medical and allied and pharmaceutical professions, the progressive abolition of restrictions shall be dependent upon coordination of the conditions for their exercise in the various Member States.’

²³¹ Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and →

never part of the vertical approach and opportunities have been created for lawyers to provide services and establish themselves in another Member State without having their qualifications recognised. Below these horizontal and sectoral approaches, as consolidated in the Professional Qualifications Directive, will be assessed.

4.2.1. Vertical Approach

The vertical approach implies that, for each profession, training requirements, which are to be complied with in every Member State, are set out. These include quantitative requirements as to the minimum number of hours of courses to be delivered by degree-granting institutions. A professional who has acquired a certain diploma listed in a vertical approach directive obtains full and unconditional access to all professional activities in the host Member State country that a given diploma grants access to in his home Member State. In other words, there is automatic recognition.

The Free movement of Doctors

The recognition of the professional qualifications of doctors wishing to establish themselves in another Member State, already highlighted in Chapter 1, may be used as an example. The profession of doctor was considered to be similar across the Member States. Therefore a minimum level of training could be relied upon as an objective measure. The first 'doctors' directives were Directive 75/362/EEC²³² and Directive 75/363/EEC.²³³ Directive 75/363/EEC contains the minimum training requirements (coordination directive).²³⁴ Directive 75/362/EEC enumerates the official titles of the diplomas for which the training corresponds to the minimum requirements (recognition directive). Complete and automatic recognition applies to all diplomas in this list.²³⁵ Council Directives 75/362/EEC and 75/363/EEC have been consolidated by Directive 93/16/EEC.²³⁶ This Directive has now been repealed and replaced by the Professional Qualifications Directive. Article 21 of the Pro-

Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation, O.J. (L 354) of 28.12.2013, p. 132. A consolidated version of the Directive is available at: <<http://eur-lex.europa.eu/legal-content/en/txt/?uri=CELEX:02005L0036-20140117>> (last consulted on 10 May 2015). Claessens *et al.* 2013.

²³² Council Directive 75/362/EEC of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services, O.J. (L 167) 1 of 30.06.1975.

²³³ Council Directive 75/363/EEC of 16 June 1975 concerning the coordination of provisions laid down by law, regulation or administrative action in respect of activities of doctors, O.J. (L 167)14 of 30.06.1975.

²³⁴ Council Directive 75/363/EEC, Arts. 1 and 2.

²³⁵ Council Directive 75/362/EEC, Arts. 2, 9 and 18.

²³⁶ Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications, O.J. (L 165) of 07.07.1993.

Professional Qualifications Directive sets out the principle of automatic recognition of evidence of formal qualification as doctor as listed in annex V to the Directive. The basic medical training requirements are set out in Article 24, followed by provisions on specialised medical training.

Even though training standards of doctors are harmonised in EU legislation,²³⁷ there is a regular outcry from the media if a foreign doctor commits a medical error or worse.²³⁸ This may be illustrated by the case of a German doctor who accidentally killed a patient in the UK by giving him an overdose of painkillers. The German doctor was consequently banned from practising medicine in the UK. In Germany he was still allowed to practise, however.²³⁹ Another case concerned a Dutch neurologist who was banned from practising medicine in the Netherlands but then continued working in Germany.²⁴⁰

In accordance with Directive 2013/55/EU, an article on an alert mechanism was inserted, which obliges competent authorities of Member States to inform competent authorities of all other Member States about a professional who has been prohibited or restricted, even temporarily, from exercising his profession in their entirety or part, by national authorities or courts. The obligation, *inter alia*, applies to professionals exercising activities related to patient safety or to the education of minors (where the profession is regulated).²⁴¹

The case shows the link between the free movement of health professionals and the need for further harmonisation, mutual recognition of disciplinary rules²⁴² and even judicial decisions in criminal matters (which will be the topic of Chapter 3). It might be seen as remarkable that the recognition of professional qualifications has been enabled since the 1970s, but the recognition of the restriction or prohibition of the exercise of a profession has been addressed only now.²⁴³

On the other hand, the harmonisation of professional requirements for doctors has also led to an increased trust in the profession across the European Union. In

²³⁷ Peeters 2005, p. 390, however, concludes: 'A more profound harmonisation of training requirements and a further coordination of the pursuit of the doctor's profession would be a more stable solution.' In accordance with Directive 2013/55/EU Art. 24(2) basic medical training shall comprise at least five instead of six years. A reference to the European Credit Transfer and Accumulation System has also been introduced: '2. Basic medical training shall comprise a total of at least five years of study, which may in addition be expressed with the equivalent ECTS credits, and shall consist of at least 5 500 hours of theoretical and practical training provided by, or under the supervision of, a university. For professionals who began their studies before 1 January 1972, the course of training referred to in the first subparagraph may comprise six months of full-time practical training at university level under the supervision of the competent authorities.'

²³⁸ <<http://www.guardian.co.uk/society/2011/mar/29/gmc-demands-minimum-standards-eu-doctors>> (last consulted on 10 May 2015).

²³⁹ <<http://www.guardian.co.uk/society/2011/jul/12/daniel-ubani-free-to-practise>> (last consulted on 10 May 2015).

²⁴⁰ <http://www.dutchnews.nl/news/archives/2013/01/dutch_doctor_at_centre_of_negl/> (last consulted on 10 May 2015).

²⁴¹ Directive 2013/55/EU, Art. 56(a), para. 1 in particular.

²⁴² Peeters 2005, p. 380 and 382.

²⁴³ Art. 56(a) does, however, not explain how to address the differences in national disciplinary systems, see Kyrieri 2014, p. 44.

*Kohll*²⁴⁴ and *Decker*,²⁴⁵ the Court concluded for the first time that, since the conditions of taking up and practising the doctors' profession are regulated by the Doctors' Directive, the quality of doctors within the EU is sufficiently guaranteed.

Therefore the argument of public health cannot be called upon to justify a limitation of the free movement of patients. Theoretically, the Court did nothing but logically and correctly apply the ratio of the vertical approach. The scope of the Directive was to allow for free movement by not questioning the equivalence of the diplomas once the minimum training standards are fulfilled. Refusing to reimburse an insured patient treated by a doctor established in another country will be seen the same as an infringement on the free movement principles.²⁴⁶

4.2.2. 'New' or 'Horizontal Approach'

Negotiations on vertical approach directives took a long time and the resulting directives were soon outdated. Therefore, an alternative approach was needed based on a system of recognition of qualifications, without entering into the complexities of each particular profession. At the 1984 Fontainebleau European Council, European heads of State called for the introduction of 'a general system for ensuring the equivalence of university diplomas in order to bring about the effective freedom of establishment within the Community.'²⁴⁷ This came to be known as the 'horizontal' approach to the mutual recognition of professional qualifications.

Advantages of the horizontal approach are that more people are able to apply for recognition as it applies to all professions for which a certain level of education is required. It also avoids difficult negotiations regarding curricula and other professional requirements that must be harmonised before recognition is possible. The gain comes at a price, however. In accordance with the horizontal approach, recognition is not automatic. It only requires the host State authorities to consider the applicant's qualifications and, if the qualifications prove to be lacking in terms of duration and content, the Member State can impose additional requirements.²⁴⁸

The first of the resulting General System Directives (GSDs) was Directive 89/48/EEC.²⁴⁹ Directive 89/48 applied to any Member State national wishing to pursue a regulated profession as an employed or self-employed person in a host Member State, with a degree attesting to at least three years of full time post-secondary education (or equivalent part-time education) at a university or establishment of higher education or another establishment of a similar level in another Member State,²⁵⁰ unless the profession is covered by a specific sectoral directive.²⁵¹ A second

²⁴⁴ Case C-158/95, *Kohll* [1998] ECR 1931.

²⁴⁵ Case C-120/95, *Decker* [1998] ECR 1831.

²⁴⁶ Peeters 2005, p. 381.

²⁴⁷ Fontainebleau European Council 25-26 June 1984, Bulletin EC 6/1984.

²⁴⁸ Barnard 2004, p. 302-303.

²⁴⁹ Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, O.J. (L 19) 16 of 24.01.1989 as amended by Directive 2001/19/EC, O.J. (L 206) 1 of 31.07.2001.

²⁵⁰ Directive 89/48/EEC, Art. 2 para. 1, Art. 3.

GSD, Directive 92/51/EEC, applied to professionals with a lower level of training.²⁵² A third GSD extended the mutual recognition approach to the industrial and professional sectors that were previously covered by earlier vertical directives. This Directive also gave recognition to experience and skills.²⁵³ The functioning of the recognition procedure under the general system will be explained further in the next section on the Professional Qualifications Directive.

4.2.3. Professional Qualifications Directive

By the turn of the century, mutual recognition of professional requirements was enabled via a patchwork of vertical and horizontal directives and case law. By its own admission, the Commission described it as too complicated to understand, difficult to follow, often unclear and sometimes slow in its application and in places out-of-date or unsuited to the particularities of a specific profession. Hence, in 2002 the Commission presented a proposal consolidating the recognition of professional qualifications.²⁵⁴

The resulting Professional Qualifications Directive²⁵⁵ was adopted on 7 September 2005. It replaces 15 directives on the recognition of professional qualifications, including the three GSDs. In accordance with the provisions of the Directive as amended by Directive 2013/55/EU, the automatic recognition process established by the vertical approach directives (Chapter III, Arts. 21-49, including the Doctors Directive as discussed above) and non-automatic recognition process established by the GSDs (Chapter I, II, Arts. 10-20) remain in place.²⁵⁶

General system for recognition

Article 11 of the Directive concerning the general system for recognition foresees five levels of professional qualification varying from successful completion of a training course not forming part of a certificate or diploma, to a post-secondary course of at least four years' duration at a university.²⁵⁷

The point of departure of the general system's recognition procedure laid out in Article 13 is that the competent authority of the host Member State has to allow

²⁵¹ Directive 89/48/EEC, Art. 2, para. 2.

²⁵² Council Directive 92/51/EEC of 18 June 1992 on a Second General System for the Recognition of Professional Education and Training to Supplement Directive 89/48/EEC, O.J. (L 209) 25 of 24.07.1992.

²⁵³ Directive 1999/42/EC of the European Parliament and the Council establishing a mechanism for the recognition of qualifications in respect of professional activities covered by the directives on liberalization and transitional measures and supplementing the general system for recognition of qualifications, O.J. (L 201) 77 of 31.07.1999.

²⁵⁴ Proposal for a Directive of the European Parliament and of the Council on the recognition of professional qualifications, COM (2002) 119.

²⁵⁵ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, O.J. (L 255) 22 of 30.09.2005; for a more extensive overview see Schneider & Claessens 2008, p. 39-41.

²⁵⁶ Directive 2005/36/EC, Arts. 10-20 (general system), Arts. 21-49 (vertical system).

²⁵⁷ Directive 2005/36/EC, Art. 11.

EU nationals access to a certain profession if they possess an attestation of competence or evidence of formal qualifications required to gain access to this profession in another Member State.²⁵⁸ Before access is granted, two conditions have to be fulfilled:

- (i) the attestation of competence or evidence of formal qualifications have to have been issued by a competent authority in the other Member State; and
- (ii) they should attest that the holder has been prepared for the pursuit of the profession in question.²⁵⁹

In accordance with Article 14, the host Member State may, however, impose compensatory measures before access to the profession is granted. In particular, the host Member State may impose an adaptation period of up to three years or an aptitude test if:

- (i) the training the applicant has received covers substantially different matters than those covered by the evidence of formal qualifications required in the host Member State; or
- (ii) the regulated profession in the host Member State comprises one or more regulated professional activities which do not exist in the corresponding profession in the applicant's home Member State, and the training required in the host Member State covers substantially different matters from those covered by the applicant's attestation of competence or evidence of formal qualifications.²⁶⁰

In case the host Member State wishes to impose a compensatory measure it should allow the applicant the choice between an adaptation period and an aptitude test. However, in case the host Member State considers it necessary to impose a certain type of compensatory measure for a certain profession, it will have to inform the other Member States and the Commission in advance and provide sufficient justification. In case the Commission considers the derogation inappropriate or not in accordance with Union law, it shall adopt an implementing act, within three months

²⁵⁸ Directive 2005/36/EC, Art. 13(1).

²⁵⁹ Directive 2005/36/EC, Art. 13 para. 2: 'Access to, and pursuit of, a profession as described in paragraph 1 shall also be granted to applicants who have pursued the profession in question on a full-time basis for one year or for an equivalent overall duration on a part-time basis during the previous 10 years in another Member State which does not regulate that profession, and who possess one or more attestations of competence or evidence of formal qualifications issued by another Member State which does not regulate the profession. Attestations of competence and evidence of formal qualifications shall satisfy the following conditions: (a) they are issued by a competent authority in a Member State, designated in accordance with the laws, regulations or administrative provisions of that Member State; (b) they attest that the holder has been prepared for the pursuit of the profession in question. The one year of professional experience referred to in the first subparagraph may not, however, be required if the evidence of formal qualifications which the applicant possesses certifies regulated education and training.'

²⁶⁰ Directive 2005/36/EC, Art. 14(1).

of receiving all necessary information, to ask the relevant Member State to refrain from taking the envisaged measure. In absence of a response from the Commission within three months the derogation may be applied.²⁶¹ For lawyers, the host Member State may stipulate either an adaptation period or an aptitude test.²⁶²

Article 14 paragraph 4 of the Directive stipulates that ‘substantial differences’ between training in the home and host Member State means ‘matters of which knowledge is essential for pursuing the profession and with regard to which the training received by the migrant shows important differences in terms of content from the training required by the host Member State’.

Article 14 paragraph 5 determines that compensatory measures ‘shall be applied with due regard to the principle of proportionality’. The host Member State should ascertain whether the knowledge acquired by the applicant in the course of his professional experience or through lifelong learning, and formally validated to that end by a relevant body, in a Member State or in a third country is of a nature to cover, in full or in part, the substantial difference defined in paragraph 4.²⁶³

Finally, Article 14 paragraph 6 stipulates that the decision imposing an adaptation period or an aptitude test shall be duly justified. In particular, the applicant shall be provided with the following information:

- (i) the level of the professional qualification required in the host Member State and the level of the professional qualification held by the applicant in accordance with the classification set out in Article 11; and
- (ii) the substantial differences referred to in paragraph 4 and the reasons for which those differences cannot be compensated by knowledge, skills and competences acquired in the course of professional experience or through lifelong learning formally validated to that end by a relevant body.

Effect on the nature of mutual recognition of professional qualifications

The question might be raised whether consolidation of the mutual recognition of professional qualifications in the Professional Qualifications Directive has also changed the nature of the mutual recognition of professional qualifications. In this regard, it might be interesting to cite the European Parliamentary debate on the eve of the adoption of the Directive in 2005.²⁶⁴ First MEP Evelyne Gebhardt (Social Democrat, Germany) commented:

‘I am also very glad that both this House and the Council have managed – and who would have thought this possible? – by means of this legislative document, and with

²⁶¹ Directive 2005/36/EC, Art. 14(2).

²⁶² Directive 2005/36/EC, Art. 14(3).

²⁶³ The concept of lifelong learning was introduced by Directive 2013/55/EU; Case C-340/89, *Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg* [1991] ECR 2357.

²⁶⁴ European Parliament Plenary debate of 10 May 2005 available at: <<http://www.europarl.europa.eu/sides/getdoc.do?pubref=-%2f%2fep%2f%2ftext%2bcre%2b20050510%2bitem-027%2bdoc%2bxnl%2bV0%2f%2fen&language=en>> (last consulted on 10 May 2015).

such overwhelming consensus, to bring to nought the Commission's original approach, which relied on the country-of-origin principle. I have heard a lot of people today expressing approval of the way we did this, with this law making a very clear statement that it was not the country-of-origin principle that would apply, for it is un-European, but that we were working on the basis of mutual recognition and wanted to continue to do so.

If we are to legislate with any consistency – just as the Commission was consistent in twice proposing the country-of-origin principle – it is now time for this House to be consistent and do the same thing with the services directive too. That would be a good job of work, and we should do it.'

MEP Toine Manders (Liberal Democrat, Netherlands) partially in response to Mrs. Gebhardt stated:

'I am pleased that mutual recognition has been mentioned, and in connection with the principle of the country of origin, I think that, if we do not stipulate any criteria, we are talking about the same definition. After all, no conditions are prescribed in this directive, because training is provided in the country of origin. Call it a licence: people with certain qualifications can work in other countries. I consider this worth a debate. It is very important to my mind that the Commission has adopted this and that there is now a duty to justify one's actions. It is essential to obtain a legally sound Europe, but above all in order to obtain a democratically strengthened Europe.'

The academic community, however, did not see a large departure from the pre-existing approach towards mutual recognition. Schneider and Claessens (2008) commented to the Directive as follows:

'Apart from the enlarged scope of the Directive, the simplification of recognition for cross-border service providers and the introduction of a specific language requirement, Directive 2005/36/EC brings no major new elements to the system of diploma recognition. Only the application of the new system will tell whether the objectives of the Commission, i.e. simplification and clarification, will have been achieved.'²⁶⁵

Directive 2005/36/EC contains a number of innovations but even with the further simplifications introduced by Directive 2013/55/EU,²⁶⁶ in essence, it is a shell around two different approaches towards the mutual recognition of professional qualifications.

- (1) prior harmonisation of conditions for the taking-up and pursuit of professional activities with automatic recognition; and
- (2) ex-post comparison of professional qualifications with host state requirements.

Under the first approach, which corresponds to the vertical approach in Chapter III of the Directive, the host State has lost all discretion to apply its own criteria, before

²⁶⁵ Schneider & Claessens 2008, p. 41.

²⁶⁶ Notably the introduction of a European professional card in accordance with Arts. 4(a)-(e) and the possibility to have partial access to a profession in accordance with Art. 4(f); Case C-330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos v Administración del Estado* [2006] ECR 801.

granting access to a certain profession. In other words, recognition is automatic, but there is no home State control since recognition is not based on trust but on the harmonisation of substantive standards.

Under the second approach, which corresponds to the horizontal approach in Chapter I and II of the Directive, even though no harmonisation of substantive requirements is foreseen, a comparison of qualifications is still necessary before the person is allowed to have access to the profession. This is therefore also not home State control.

Bernard²⁶⁷ commented to the original GSDs as follows:

'(...) directives on the so-called 'mutual recognition' of diploma's still follow a functional parallelism logic in so far as they allow the host state to impose compensatory measures, such as aptitude tests or a period of traineeship, when there is a 'substantial' difference between the training acquired in another Member State and that required in the host state (see also case 340/89, *Vlassopoulou*). An individual decision of equivalence is still needed.'²⁶⁸

The conclusion Bernard drew as regards the original GSDs is still valid for the Professional Qualifications Directive. However, introducing guidance through the levels of qualification outlined in Article 11, combined with the recognition system of Article 13, still leaves room for the host State to evaluate the qualifications and seek to impose compensatory measures in accordance with Article 14. In other words, compliance with the recognition criteria does not guarantee access to the profession in the host State. The system allows the host Member State to impose measures to safeguard certain public interests subject to the proportionality principle. This is also important to remember when looking ahead towards the mutual recognition of judicial decisions in criminal matters, which will be the subject of Chapter 3. Recognition is not the same as free movement.

4.2.4. A Special Case: Lawyers

As the vertical approach was not achievable for lawyers, since they are educated in their national legal system and as a consequence know little of the legal systems of the other Member States,²⁶⁹ alternative regimes were developed for the provision of services by lawyers in accordance with Directive 77/259/EEC (Lawyers services

²⁶⁷ Bernard 2002, p. 109.

²⁶⁸ Cf. Armstrong 2002, p. 266: 'The extension of the General Systems approach reflects a desire to encourage active mutual recognition by the host state and, in that sense, reflects on-going changes to the relationship between home and host state regulation. At the same time, the debate over the continued relevance of the sectoral approach, together with more general concerns to simplify the EU legislative framework, highlights that it is not enough simply to toll the bell of mutual recognition as if that ineluctably leads to the conclusion that EU legislation is no longer necessary. Rather, the issue is, as ever, one of the balance and relationship between, on the one hand, EU legislation and, on the other, active and passive mutual recognition.'

²⁶⁹ Claessens *et al.* 2013, p. 43.

directive).²⁷⁰ This was followed by Directive 98/5/EC regulating the establishment of lawyers in other Member States (Lawyers' Establishment Directive).²⁷¹

The Lawyers services directive allows lawyers to provide services in other Member States using the professional title used in the Member State from which they come.²⁷² This includes the representation of clients in accordance with host State requirements, including those pertaining to professional conduct.²⁷³

As an alternative to the recognition of professional qualifications in accordance with the horizontal approach, lawyers can also opt to establish themselves in other Member States without having their professional qualifications recognised. According to a recent study around 3,500 lawyers have made use of this possibility.²⁷⁴

The Lawyers' Establishment Directive allows lawyers to practise in any other Member State on a permanent basis, using his or her home country professional title.²⁷⁵ The foreign lawyer does not have to show his proficiency in the language(s) of the host Member State.²⁷⁶ The activities to be performed under the home title are, however, limited and in case a client or defendant has to be represented in court cases in the host Member State, cooperation will generally have to be sought with a domestic lawyer.²⁷⁷

The Lawyers' Establishment Directive offers three routes for full integration into the legal profession of the host State:

- (i) seeking recognition of professional qualification in accordance with the general system outlined in Directive 2005/36/EC;²⁷⁸
- (ii) providing proof of effective regular pursuit for a period of at least three years of an activity in the law of the host Member State;²⁷⁹ or
- (iii) not being able to meet the three-year requirement but still being able to prove, including during an interview by the host State authorities, the effective

²⁷⁰ Council Directive 77/259/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of the freedom to provide services, O.J. (L 78) 17 of 26.03.1977; Claessens *et al.* 2013, section 2.2.

²⁷¹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, O.J. (L 77) 36 of 14.03.1998 (as amended); Claessens *et al.* 2013, section 2.3. In general on the free movement of lawyers see Claessens 2008.

²⁷² Directive 77/249/EEC, Arts. 2 and 3.

²⁷³ Directive 77/249/EEC, Art. 4, paras. 1 and 2.

²⁷⁴ Claessens *et al.* 2013.

²⁷⁵ Directive 98/5/EC, Arts. 3 and 5.

²⁷⁶ Directive 98/5/EC, Art. 3, as interpreted by Case C-506/04, *Wilson* [2006] ECR 8613.

²⁷⁷ Directive 98/5/EC, Art. 5.

²⁷⁸ Directive 98/5/EC, Art. 10 para. 2.

²⁷⁹ Directive 98/5/EC, Art. 10, para. 1.

regular pursuit of an activity in the law of the host Member State and the capacity to continue this activity.²⁸⁰

The host Member State may refuse the lawyer's full integration in the profession in case this would be against public policy, in a particular because of disciplinary proceedings, complaints or incidents of any kind.²⁸¹

Comment

Looking at the legal profession from the perspective of the application of the mutual recognition to professional qualifications, it is striking how a middle way seems to have been found between the vertical and horizontal approach.

On the one hand, the legal profession is very different between the Member States, given the close relationship with the national laws and languages. On the other hand, full integration in the profession by means of an aptitude test may be seen as prohibitively difficult for the same reason. The Lawyers directives offer a way out for the lawyers to benefit from the free movement provisions, without actually having to integrate into the profession of the host Member State. Once established and practicing under the home title for a while, it will become easier to take such a step.

4.3. Interaction between EU Secondary Legislation and the (Further) Development of the Case Law of the Court of Justice

The functioning of the horizontal approach may be illustrated by the Court of Justice case law regarding the first GSD, Directive 89/48/EC, which applied to the recognition of higher education diplomas awarded on the completion of professional education and training of at least three-year duration. Article 1a contained a derogation from the minimum requirement of three years of education in the home State in case the person seeking recognition studied for a shorter period than three years but the host State treats his education as being equivalent.

This paragraph proved its relevance in Case C-102/02, *Beuttenmüller v Land Baden-Württemberg*.²⁸² This case concerned Ms. Beuttenmüller, an Austrian teacher working in Baden-Württemberg, Germany. She applied for the recognition of her Austrian teaching diploma in order to qualify for a pay raise. The Baden-Württemberg authorities, however, denied her application since her Austrian diploma was not awarded after three years of higher education.

The Baden-Württemberg legislature had passed implementing legislation for Directive 89/48/EEC, which is applicable to diplomas awarded after three years of higher education. The second GSD, Directive 92/51/EEC, applicable to profession-

²⁸⁰ Directive 98/5/EC, Art. 10. Commenting on the third method of integration Claessens *et al.* 2013, p. 51 state: 'It may be clear that this is a codification of the principle laid down by the European Court of Justice in the *Vlassopoulou* case.'

²⁸¹ Directive 98/5, Art. 10, para. 4.

²⁸² Case C-102/02, *Beuttenmüller v Land Baden-Württemberg* [2004] ECR 5405, paras. 38-45.

als with a lower level of training,²⁸³ was not yet implemented in Baden-Württemberg.

The Court held that, since the Austrian authorities deemed the old two year teaching curriculum followed by Ms. Beutenmüller equivalent to the new three year curriculum, it could fall under the system of recognition of Directive 89/48/EEC.²⁸⁴ In other words, there had to be mutual recognition of the decision by the Austrian authorities to grant a diploma after two years and trust that the resulting qualifications were equivalent.

The *Beutenmüller* case proves that the provisions of the various GSDs provide an opportunity for the Court to further develop free movement. It was due to the establishment of a system of levels of professional qualifications that there had to be mutual recognition of the decision by the Austrian authorities to grant a diploma after two years (instead of the three years required in Germany) and trust that the resulting qualifications were equivalent.

Another case did not concern the question of how far mutual recognition should go in terms of trust in the decision of the other Member State, but to what extent qualifications of an applicant that had not qualified for the profession in the home State had to be recognised.

Ms. Morgenbesser (case C-313/01)²⁸⁵ obtained a law degree in her native France, but had not yet qualified as a lawyer. She moved to Italy and wanted to be registered as trainee lawyer there. Her application was refused since she did not have an Italian law degree. Ms. Morgenbesser asked for academic recognition of her French degree, but was informed she needed to take two years of additional courses. Ms. Morgenbesser appealed both decisions and claimed that ‘trainee lawyer’ was a regulated profession under Article 1 of Directive 89/48. Alternatively she claimed based on *Vlassopoulou* that her qualifications would need to be assessed.²⁸⁶

The Court held that a ‘trainee lawyer’ could not be separated from the regulated profession of ‘lawyer’, rejecting any claim that it could be considered a regulated profession in its own right. Hence, Ms. Morgenbesser could not rely on Directive 89/48.²⁸⁷ The Court did, however, find that Treaty’s provisions on establishment (and possibly free movement of workers) were applicable to the situation.²⁸⁸

It then held a refusal of registration as trainee lawyer, based on the sole ground that the applicant did not have a diploma conferred, ratified or recognised by a domestic university, would violate Article 43 EC.²⁸⁹ The competent authority, in accordance with the principles set out in *Vlassopoulou*, would have to examine to what extent the knowledge as certified by the diploma in another Member State and the qualifications or professional qualification or professional experience obtained

²⁸³ Council Directive 92/51/EEC of 18 June 1992 on a Second General System for the Recognition of Professional Education and Training to Supplement Directive 89/48/EEC, O.J. (L 209) 25 of 24.07.1992.

²⁸⁴ Case C-102/02, *Beutenmüller v Land Baden-Württemberg* [2004] ECR 5405.

²⁸⁵ Case C-313/01, *Morgenbesser* [2003] ECR 13467.

²⁸⁶ Case C-313/01, *Morgenbesser* [2003] ECR 13467, para. 37.

²⁸⁷ Case C-313/01, *Morgenbesser* [2003] ECR 13467, paras. 52-56.

²⁸⁸ Case C-313/01, *Morgenbesser* [2003] ECR 13467, paras. 59-61.

²⁸⁹ Case C-313/01, *Morgenbesser* [2003] ECR 13467, para. 62.

there, together with the experience obtained in the Member State in which the candidate seeks enrolment must be regarded as satisfactory.²⁹⁰

The 'revolutionary potential' of the *Morgenbesser* ruling, in terms of extending recognition to those not fully qualified for a profession and academic qualifications, was noted by Schneider and Claessens:

'It must be noted that the Court has taken a very big step with this *Morgenbesser*-decision for the development of diploma recognition in European Community law. Consequently, the *Vlassopoulou* doctrine has to be applied in cases where the migrant is not yet fully qualified, which means that a purely academic qualification is at stake.

The consequence might be that in future, anyone can at any stage in preparation for qualifying for a regulated profession go to another Member State and rely on the mechanism laid down by the *Vlassopoulou* principles and the *Morgenbesser* ruling in order to have prior home Member State qualifications recognised and continue training for a regulated profession in the host Member State.'²⁹¹

Article 55a introduced by Directive 2013/55/EU now provides for the recognition of a professional traineeship carried out in another Member State.²⁹²

At the same time, the judgment shows that the general system of recognition (harmonisation) does not replace the judicial principle of mutual recognition developed by the Court of Justice but 'that they form part of a larger system in which migrants who are not yet fully qualified benefit from the rules developed by the Court'.²⁹³

The December 2010 decision in *Koller*²⁹⁴ further chips away at national room for manoeuvre when there are differences in the duration of professional training required before access to a profession is granted. Mr. Koller had obtained an Austrian law degree and subsequently took additional courses to qualify as a lawyer in Spain. He then applied to take an aptitude test to obtain access to the legal

²⁹⁰ Case C-313/01, *Morgenbesser* [2003] ECR I3467, paras. 63-72.

²⁹¹ Schneider & Claessens 2008, p. 31; Claessens *et al.* 2013, p. 63.

²⁹² Directive 2013/55/EU, Art. 3(j) 'professional traineeship': 'Without prejudice to Article 46(4), a period of professional practice carried out under supervision provided it constitutes a condition for access to a regulated profession, and which can take place either during or after completion of an education leading to a diploma.' Art. 55a: '1. If access to a regulated profession in the home Member State is contingent upon completion of a professional traineeship, the competent authority of the home Member State shall, when considering a request for authorisation to exercise the regulated profession, recognise professional traineeships carried out in another Member State provided the traineeship is in accordance with the published guidelines referred to in paragraph 2, and shall take into account professional traineeships carried out in a third country. However, Member States may, in national legislation, set a reasonable limit on the duration of the part of the professional traineeship which can be carried out abroad. 2. Recognition of the professional traineeship shall not replace any requirements in place to pass an examination in order to gain access to the profession in question. The competent authorities shall publish guidelines on the organisation and recognition of professional traineeships carried out in another Member State or in a third country, in particular on the role of the supervisor of the professional traineeship.'

²⁹³ Schneider & Claessens 2005, p. 165.

²⁹⁴ Case C-118/09, *Koller*, [2010] ECR I3627.

profession in Austria as well. The Austrian authorities refused his application claiming that he was trying to circumvent Austrian rules demanding five years of professional experience.

The Court, however, held that since Mr. Koller held a 'diploma' in accordance with Article 1(a) of Directive 89/48/EC, giving him access to the legal profession in Spain,²⁹⁵ Mr. Koller needed to be granted access to the aptitude test in accordance with Article 3 of this Directive. The fact that he did not fulfil the requirement of five years professional experience could not be a ground to refuse him access to such a test.²⁹⁶ During the last number of years, this development of the Court supporting the recognition of 'foreign' qualifications obtained in the Member States asked to recognise them has continued.²⁹⁷ Member States, however, remain entitled to impose a higher level of professional requirements and insist on compensation measures. European law may also not be abused to circumvent national requirements.²⁹⁸

However, a situation of abuse is not easily accepted as becomes clear from the Court's reasoning in the joined cases of *Torresi* and *Torresi*.²⁹⁹ The cases concerned two Italian nationals, who after obtaining an Italian law degree went to Spain to register as *abogado*. After this they returned to Italy and requested the Bar of Macerata to inscribe them in accordance with Article 3 of the Lawyers' Establishment Directive, allowing them to practice in Italy on a permanent basis, using their 'home country' professional title (= *abogado*). As the Bar took no decision within the prescribed time limit the case was brought in front of the *Consiglio nazionale forense* (CNF), which raised preliminary questions aimed at finding out whether this *via spagnola*³⁰⁰ was to be deemed an abuse of EU law. The Court held that this was not the case as 'the purpose of Directive 98/5 is to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the professional qualification was obtained'³⁰¹ and

in that regard, it must be held that the right of nationals of a Member State to choose, on the one hand, the Member State in which they wish to acquire their professional

²⁹⁵ Case C-118/09, paras. 31-35.

²⁹⁶ Case C-118/09, paras. 40 and 41; Claessens *et al.* 2013, p. 57 comment: 'The Koller case makes clear that the ECJ fully accepts the potential Delaware effects resulting from the discrepancies between legal education systems in different Member States. As indicated above, this may lead to Member States feeling the pressure to reduce these discrepancies and bring the requirements for entrance in the legal profession closer together. This is illustrated by the fact that Spain has now, indeed, introduced a considerable traineeship before law graduates can enter the Spanish legal profession, therewith blocking at least the extreme route Koller used in his case.'

²⁹⁷ Case C-274/05, *Commission v Greece* [2008] ECR 7969; Case C-286/06, *Commission v Spain* [2008] ECR 8025.

²⁹⁸ As becomes clear from Case C-311/06, *Consiglio Nazionale degli Ingegneri* [2009] ECR 415.

²⁹⁹ Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata*, not yet published.

³⁰⁰ See Julian Lonbay, 'So these lawyers walk into a Bar and ... The Court of Justice liberalises cross-border access to the legal profession', available at: <<http://eulawanalysis.blogspot.be/2014/07/so-these-lawyers-walk-into-bar-and.html>> (last consulted on 10 May 2015).

³⁰¹ Joined Cases C-58/13 and C-59/13 *Angelo Alberto Torresi and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata*, not yet published, paras. 47 and 48.

qualifications and, on the other, the Member State in which they intend to practise their profession is inherent in the exercise, in a single market, of the fundamental freedoms guaranteed by the Treaties.

4.4. Conclusion

When addressing the nature of the mutual recognition of professional qualifications, one immediately has to distinguish between the norm developed in the case law of the Court of Justice and the various legislative approaches under the vertical approach, the horizontal approach and in specific sectors such as the legal profession, which has found an alternative route through which limited market access is granted while using the home title. Perhaps this may serve as an example of that 'managed mutual recognition' that Maduro deems necessary when there is no equivalence.

The Court's case law has had a significant impact on the recognition of professional requirements. It did not formulate a rule stating that in principle professionals should be able to exercise their profession in the host Member States. In the absence of the harmonisation, professionals and workers will have to comply with the professional qualifications imposed by the host Member State.

The original approach of the Court towards the mutual recognition of professional requirements was one of non-discrimination. The non-discrimination principle, however, proved insufficient for the accomplishment of the free movement of persons, since it did not oblige the host Member State to take into account the person's qualifications before imposing its measures. Therefore, there was a shift towards mutual recognition. Since the Court's interventions were mainly aimed at making sure Member States have procedures in place for individuals wishing to exercise their right of free movement, the Court relies on the loyalty principle and fundamental rights for effective judicial remedy.

Based on *Vlassopoulou*, a recognition procedure has to be in place within which the host State has to compare a migrant's qualifications and abilities with those required by the national system to see whether the applicant has the 'equivalent' skills to have access to the profession in the host Member State. In this process Member States are allowed to take into account objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. In case equivalence is not sufficiently proven Member States are allowed to take compensatory measures. Member States also have to ensure an effective judicial remedy against the decision taken by their authorities.

With respect to the free movement of goods, 'giving effect to factual and legal situations established in the territories of other Member States' (the working definition for mutual recognition developed in Chapter 1, section 3.2) may often be achieved by allowing the good to have market access, where necessary with a label clearly indicating its composition to the consumer. In the area of the mutual recognition of professional qualifications, giving effect to factual and legal situations established in the territories of other Member States is only possible if a recognition procedure is put in place, with adequate safeguards for the applicant. Alternatively,

the qualifications required for access to a certain profession may be harmonised, leading to automatic recognition (vertical approach).

On the one hand, the Court's case law on mutual recognition is more demanding in the area of professional qualifications in requiring that there be a recognition procedure in place. On the other hand, it is less far reaching since it does not impose a presumption of market access.

The criteria established in case law have been supplemented by legislation. Under the general system, as amended by Directive 2005/36/EU and Directive 2013/55/EU, substantive and procedural conditions for the recognition process are set out, but recognition is not automatic.

Market access can only be achieved after *ex post* comparison by the host State. The procedural harmonisation efforts that have occurred, however, have also furthered mutual recognition on a substantive level. By interpreting EU legislation in a manner which supports free movement, the Court forces Member States to consider the compatibility of their educational systems and professional training requirements, which in its turn brings the prospect of an internal market closer.

5. Mutual Recognition in the Internal Market: Conclusion

This chapter has examined the nature of mutual recognition in the context of the internal market. In line with the methodological framework outlined in Chapter 1 of this book, it started by studying the relationship between mutual recognition and the aims and policies of the internal market. The assessment then continued with two case studies looking at the development of mutual recognition as regards product requirements and professional qualifications. Within these two case studies, the focus was on discovering the relationships between mutual recognition and the aims and principles of European law, while seeking to answer the question whether mutual recognition may also be deemed to be such a principle of European law, as well as the norms laid down in primary and secondary EU law.

There has been a lively academic debate as regards the conditions for and exceptions to mutual recognition in the internal market. As discussed in section 3.4, the scholarly literature has assessed mutual recognition ranging from an interpretation in which it has no significant added value for European integration beyond the non-discrimination and proportionality principles, in the sense that market access may only be achieved if equivalent standards have been complied with (Weiler), until an interpretation under which mutual recognition entails a general obligation to allow market access based on mutual trust (Matera).

Intermediate interpretations have, however, seen an additional value in the sense that mutual recognition may have implications for Member State procedural norms going beyond the obligation to test whether the product or person meets equivalent standards, based on the solidarity principle (Hatzopoulos), to one in accordance with which mutual recognition may entail market access even if the product does not comply with equivalent standards, based on the solidarity principle, although a different regulatory approach might require harmonisation first (Maduro).

Some of these authors seem to have focused on seeking ‘the right’ balance between the perceived competing interests of a substantive or procedural nature. On a more substantive level, they have addressed the relationship between free movement and other general interests, such as the environment or consumer protection. From a procedural point of view, they have sought to address the tensions between the need for European integration and the regulatory autonomy of the Member States to engage in public interest regulation. The resulting scenario is one in which mutual recognition is seen as a harmonisation method which determines a winner in the process.

The analysis conducted in this chapter, however, leads to a different picture within which it becomes increasingly clear that the nature of mutual recognition cannot be properly understood by looking at it as an integration method (home State control). It should be rather seen as a principle of European law.

Mutual recognition is not the same as home State control

As mentioned in Chapter 1, section 3, when one approaches mutual recognition as an integration method, it is seen as equivalent to home State control, implying that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls.³⁰² Applying the same reasoning to the mutual recognition of professional qualifications implies that an individual who has complied with the professional training requirements of his/her home State, and hence is allowed to practise his/her profession there, should be allowed to do so in the other Member States. As illustrated by the Commission’s interpretation of the *Cassis de Dijon* decision and its insistence on the insertion of mutual recognition paragraphs as discussed in sections 3.2 and 3.3, at times Commission officials have been tempted to use home State control and mutual recognition interchangeably in their quest to avoid harmonisation in establishing the internal market.

The historical development of the internal market, however, shows us that there is a difference between mutual recognition and home State control, as evidenced by the interventions of the Court of Justice and the response by the Member States and the Court to the Commission’s policy. The Court prepared the ground for mutual recognition in the internal market in stating in *Schul* that the ‘common market’ entailed that the national markets need to be merged into a single market bringing about conditions as close as possible to those of a genuine internal market³⁰³ and by stressing that the host State had to justify the application of its norms to products lawfully produced and marketed in another Member State in *Cassis de Dijon*.³⁰⁴ This provided an opportunity for European economic integration, which has been stalled due to the complexity of harmonising standards combined

³⁰² See Barnard 2004, p. 508: ‘The principle of mutual recognition means that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls.’

³⁰³ Case 15/81, *Schul* [1982] ECR 1409, para. 33, as discussed in section 2.

³⁰⁴ Case 120/78, para. 14.

with the need for unanimity in Council to adopt measures harmonising the internal market.

The Commission further pursued the idea of what an internal market should imply and then based its policy around mutual recognition both in terms of removing obstacles to free movement and harmonisation. In the Commission's interpretation of mutual recognition based on the *Cassis de Dijon* decision, the host Member State had to admit a product that has been lawfully produced and marketed in another Member State, even if it had been produced according to different technical or quality standards. This was to be the case unless the imposition of the host Member State's rules was necessary to satisfy mandatory requirements (rule of reason). A condition of compliance with equivalent standards could only be imposed in case the host Member State were to bar market access based on a public interest recognised in the Treaty or case law. As regards harmonisation policy, the Commission read the mutual recognition paragraph of the *Cassis* decision as an invitation by the Court to elaborate a 'new approach' for the completion of the Single Market, meaning only those standards that were essential to enable free movement would be harmonised.

However, the Commission's attempts to lay down a provision in the Treaty mandating automatic recognition were blocked by the Member States that feared a disproportionate impact on their regulatory autonomy. Furthermore, as discussed in section 3.3, the Court rejected a general obligation to insert mutual recognition clauses in national legislation, which, according to Advocate General Mischo, would cause confusion about the concept of mutual recognition and moreover was superfluous due to the precedents set in case law.³⁰⁵ This reveals the differences in approach between the legislative and judicial bodies of the Union. The Commission is trying to enhance a policy aimed at establishing an internal market, whereas the Court of Justice is engaged in balancing the interests of market access and State intervention through the application of European law and principles.

The internal market concept, as it was introduced by the Single European Act, seemed to legitimise a Commission policy aimed at creating a liberal market and moving away from the historical compromise between a free market and state intervention. However, as discussed in section 2.2, such an interpretation would militate against the evolution of the internal market since the Single European Act. The Treaty of Lisbon and the EU 2020 strategy confirm that the internal market not only comprises an area without internal borders within which free movement is ensured but also it has to work for a number of public interests, most notably the creation of a highly competitive social market economy. The original compromise between a liberal market and government intervention found in the Rome Treaty's concept of a common market is therefore still valid today. This has consequences for mutual recognition in the sense that public interest may entail inherent limits to free movement unless a common (minimum) level of protection is agreed to in EU legislation. The Court's case law on the free movement of goods and professional qualifications

³⁰⁵ Opinion of AG Mischo in Case C-24/00, *Commission v France*, paras. 47-56.

shows how Member States maintain the possibility to invoke public interests recognised by the Treaty or secondary law to justify exceptions to free movement.

Mutual recognition is a principle

Mutual recognition should rather be seen as a principle of European law, meeting the conditions defined by Tridimas:

- (i) general proposition of law of some importance from which concrete rules derive;³⁰⁶
- (ii) recognised as such by the relevant constituency (the courts, political actors, citizens);
- (iii) transcending a specific areas of law; and
- (iv) concerning a core value of an area of law or the legal system as a whole.³⁰⁷

The general proposition of the law is that effect needs to be given to factual and legal situations established in other Member States. This includes compliance with the product requirements of the home State, diplomas, certificates, and other evidence of formal qualifications. Its origins are to be found in the ambition to create and develop the internal market (spatial and temporal aspect)³⁰⁸ and the obligation to further free movement within this area in the context of the wider ambitions of developing the Union as a highly competitive social market economy (as laid down in Art. 3 TEU).

As mentioned, in line with the Court's definition of a common market in *Schul*, the national markets need to be merged into a single market bringing about conditions as close as possible to those of a genuine internal market. As discussed in section 3.4, from a procedural point of view, this imposes an obligation to 'take into account the interests of market integration that the national legislation simply ignored'.³⁰⁹ From a substantive point of view, free movement needs to be furthered within the common or internal market. Mutual recognition is another tool, beyond non-discrimination, to achieve this aim.

Relationship with norms

In the table below, the norms stemming from the application of mutual recognition and their effect in the internal market are reproduced. In the column on the left, the field and its aim are identified (free movement of goods, free movement of persons). The second column distinguishes between situations in which the Court has elaborated upon mutual recognition directly, based on primary law and fields in which secondary EU legislation was passed. The third column describes the subject of recognition (what is to be recognised). This column also answers the question whether

³⁰⁶ Tridimas 2006, p. 3.

³⁰⁷ Tridimas 2006, p. 3.

³⁰⁸ Case 15/81, *Schul* [1982] ECR 1409, para. 33, as discussed in section 2.

³⁰⁹ *Maduro* 2007, p. 820.

such recognition is direct or whether a procedure has been foreseen. Furthermore, the question is answered with regard to what the effect of recognition is.

Two concrete norms have been derived from the principle of mutual recognition in the free movement of goods area (outside harmonisation in accordance with the *Cassis de Dijon* case law, as consolidated in Regulation 764/2008, and inside harmonisation in accordance with Directive 2009/48 on Toy Safety). Four concrete norms were discovered regarding the free movement of persons (outside harmonisation in accordance with the *Vlassopoulou* case law and inside harmonisation in accordance with the general system of the Professional Qualifications Directive, the vertical approach applying to doctors and the approach found in the Lawyers' Establishment Directive).

In accordance with the Product Requirements Regulation, a Member State authority may not prohibit an economic operator from selling products on its territory which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject. Those products therefore in principle enjoy market access. The Toy Safety Directive also does not foresee a recognition procedure. Member State authorities may not impede the making of toys which comply with this Directive available on the market in their territory (Art. 12 Toy Safety Directive). Compliance is presumed, based on self-certification by economic operators and a declaration of conformity with essential safety requirements, 'CE marking', in accordance with Arts. 10-15, and 17 Toy Safety Directive).

In accordance with the *Vlassopoulou* decision, authorities have to compare migrant's (applicant's) qualifications with national requirements. If those qualifications are equivalent, access to the profession has to be granted. In accordance with Article 13 of the Professional Qualifications Directive, five levels of professional qualifications are established. If the conditions of Article 13 Professional Qualifications Directive are met, access to the profession has to be granted. In the case of doctors, the recognition procedure is only meant to check formal compliance with the harmonised training requirements annexed to the Professional Qualifications Directive. If that compliance is shown, access to the profession has to be granted (Art. 21(2) Professional Qualifications Directive). For Lawyers there is a possibility to practise using the home title, subject to registration in the host State (Arts. 3 and 5 Lawyers' Establishment Directive). In this case, recognition of professional qualifications is avoided altogether. There is also a possibility under the LED to obtain access to the profession using the host State title after regular and effective pursuit of the activity in the law of the host State for three years, supplemented by the *Vlassopoulou* doctrine (Art. 10 Lawyers' Establishment Directive) or through the general system of the Professional Qualifications Directive.

The final column addresses exceptions to or conditions for free movement. In accordance with the Product Requirements Regulation, a Member State authority has to notify the economic operator of a denial of market access or other measure listed in Article 2(1) Product Requirements Regulation and justify this measure by providing technical or scientific evidence supporting the reliance on a public interest exception recognised by the Treaty or in accordance with 'rule of reason'. This

allows the economic operator 20 days to comment. If the Member State authority insists on imposing the measure, the economic operator may appeal the decision in accordance with national law (Art. 6 Product Requirements Regulation). The Toy Safety Directive allows market surveillance authorities to intervene in case non-compliance with essential safety requirements is discovered (Arts. 40-45 Toy Safety Directive).

In accordance with the *Vlassopoulou* judgment, Member State authorities are allowed to impose compensatory measures in case of objective differences in the legal framework and field of activity. The imposition of these measures has to be subject to an effective judicial remedy in accordance with national law. Article 14 of the Professional Qualifications Directive foresees the possibility to impose compensatory measures (adaptation period or aptitude test) if the training covered substantially different matters or specific training is required in the host State which does not exist in the Member State of origin. The decision to impose compensatory measures may be appealed in accordance with Article 51 Professional Qualifications Directive.

In case of doctors, recognition is automatic subject to compliance with harmonised training requirements (Arts. 24-30 Professional Qualifications Directive). However, during the recent revision of the Professional Qualifications Directive, an 'alert mechanism' on prohibitions or restrictions of the pursuit of the professional activity (Art. 56a Professional Qualifications Directive) was put in place seeking to ensure that doctors who have faced such prohibitions or restrictions in one Member State are not allowed to continue their practice in another Member State. A lawyer who seeks to migrate into the profession of the host State can rely on the general system of Articles 13 and 14 of the Professional Qualifications Directive or Article 10 of the Lawyers' Establishment Directive. In this case, access may be denied if regular and effective pursuit of the profession in the law of the host State is not shown, as well wider public policy considerations. This decision is subject to appeal.

In sum, the principle of mutual recognition has core significance (effect must be given to factual and legal situations established in the territories of other Member States). However, as is shown in the table below, mutual recognition as such does not lead to market access, access to the profession and the free movement of persons. This depends on the level of harmonisation achieved and the applicable exceptions based on primary and secondary EU law.

Table: Norms stemming from the application of mutual recognition and their effect in the internal market

Field	Inside/outside harmonisation	Subject of recognition	Recognition Procedure (yes/no) and effect	Exceptions to, conditions for free movement
Free movement of goods	Inside (as regards the application of exceptions to free movement)	Product Requirements (Regulation 764/2008)	<p>- No, A Member State authority may not prohibit an economic operator from selling products on its territory which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject.</p> <p>- Those products enjoy market access</p>	<p>- A Member State authority has to notify the economic operator of a denial of market access or other measure listed in Article 2(1) PRR and justify this measure by providing technical or scientific evidence supporting reliance on a public interest exception recognised by the Treaty or in accordance with the 'rule of reason', allowing him/her 20 days to comment. If the Member State insists, the economic operator may appeal under national law. (Article 6 PRR)</p>
Free movement of goods	Inside	Product requirements for toys (Directive 2009/48/EC)	<p>- No, recognition procedure Member State authorities may not impede toys which comply with this Directive being made available on the market in their territory. (Article 12 TSD)</p> <p>Compliance is presumed, based on self-certification by economic</p>	<p>- Non-compliance with essential safety requirements is discovered by market surveillance authorities (Articles 40-45 TSD)</p>

			operators declaring conformity with essential safety requirements, 'CE marking', in accordance with Articles 10-15, 17 TSD)	
Free movement of persons	Outside	Professional Qualifications (<i>Vlassopoulou</i> doctrine developed by the Court of Justice)	<ul style="list-style-type: none"> - Yes, 'compare migrant's qualifications with national requirements' - If equivalent access to the profession has to be granted 	<p>Possibility to impose compensatory measures in case of:</p> <ul style="list-style-type: none"> - Objective differences legal framework and field of activity - Subject to effective judicial remedy
Free movement of persons	Inside	Professional Qualifications (Professional Qualifications Directive – general system)	<ul style="list-style-type: none"> - Yes, in accordance with Article 13 PQD: 5 levels of professional qualifications + - Attestation of competence or evidence of formal qualifications have to have been issued by a competent authority in the other Member State; and - Second, they should attest that the holder has been prepared for the pursuit of the profession in question 	<p>Possibility to impose compensatory measures (adaptation period or aptitude test) in a case the training covers substantially differences matters</p> <ul style="list-style-type: none"> - Specific training required in host State not existing in the Member State of origin - Decision may be appealed (Articles 14, 51 PQD)
Free movement of persons	Inside	Professional Qualifications Directive-vertical approach-Doctors	Yes: but only meant to check formal compliance with harmonised training requirements in Annex	<ul style="list-style-type: none"> - None, recognition is automatic subject to compliance with harmonised training requirements (Articles 24-30 PQD)

			- If shown access to the profession has to be granted (Article 21(2) PQD)	NB: 'alert mechanism' on prohibitions or restrictions of the pursuit of the professional activity (Article 56a PQD)
Free movement of persons	Inside	Professional Qualifications- (Lawyers' Establishment Directive, 98/5/EC)	- No, with the effect that there is a possibility to practise using the home title, subject to registration in the host State (Articles 3,5 LED); or - Yes, possibility under the Lawyers' Establishment Directive to obtain access to the profession using host State title after regular and effective pursuit of the activity in the law of the host State for 3 years supplemented by <i>Vlassopoulou doctrine</i> (Article 10 LED); or through - Professional Qualifications-general system;	- Regular and effective pursuit not shown + public policy subject to appeal (Article 10 LED) - See above

Furthermore, the fact that the Court developed an approach based on mutual recognition in *Cassis de Dijon* and *Vlassopoulou* confirms that it is an autonomous source of legal obligations for the host Member State, irrespective of specific treaty articles and the degree of harmonisation achieved. Moreover, it transcends a specific area of law since it applies to both the recognition of product requirements and professional qualifications. Finally, policy makers, notably the European Commission and the Court of Justice, in Case C-110/05, *Commission v Italy*, have explicitly referred to

mutual recognition as a principle, confirming its general legal significance and effects.³¹⁰

Mutual recognition operates in the context of other principles

Mutual recognition operates within the same environment as other principles of European law. A number of other Union principles have been applied in the internal market to facilitate free movement. The 'bedrock' of mutual recognition is the non-discrimination principle (Art. 18 TFEU), in accordance with which Member States have to treat products and persons originating in other Member States the same way as they treat their own. This principle also promotes free movement, but is insufficient to achieve an internal market since it still allows the host State to impose its measures without testing whether equivalent requirements were already met by the person or good in the home State.

As discussed in section 3.1, regarding product requirements, mutual recognition pairs up with the principles of solidarity, trust (in the standards of the home Member State) and market access to achieve free movement. As discussed in section 4.1, regarding professional qualifications, the Court's interventions have been more of a procedural nature, reflected in the loyalty principle (Art. 4(3) TFEU), which obliges Member States (including their administrative and judicial authorities)³¹¹ to facilitate the achievement of the Union's tasks and refrain from any measure that could jeopardise the attainment of the Union's objectives, being the main supporter of mutual recognition.

In both fields studied, exceptions to free movement remain possible based on interests recognised by the Treaty, secondary legislation or based on Court of Justice case law. In order to successfully invoke these exceptions, host State requirements should comply with the proportionality principle (Art. 5 TEU), which imposes a suitability and necessity test on national measures affecting free movement.³¹² Mutual recognition and proportionality are not the same in the internal market, since the latter only applies when exceptions to free movement are invoked.

Mutual recognition is not a panacea for the development of the Internal Market

Mutual recognition is not conditional upon compliance with equivalent standards. It applies directly based on the ambition to create and develop the internal market. The *Cassis de Dijon* decision itself may be cited as an example. The case concerned liquor which contained 5-10% less alcohol than the minimum required under the contested German law. Nevertheless, the liquor achieved market access with a label indicating its (lower) alcohol percentage.

The application of mutual recognition on its own is not sufficient for the creation and development of the internal market, which is illustrated by its relationship with harmonisation. The principle of mutual recognition points to and triggers the

³¹⁰ SEC(2009) 673; Case C-110/05, *Commission v Italy* [2009] ECR 519, both discussed in section 3.4.1.

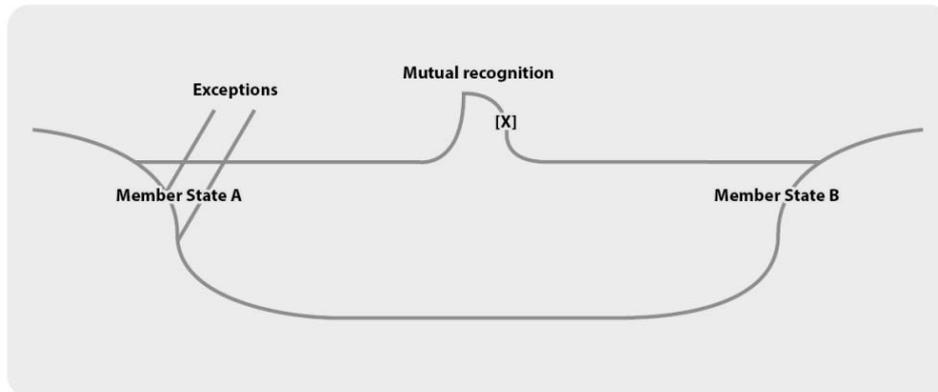
³¹¹ Case C-224/01, *Kobler* [2003] ECR 10239.

³¹² *Tridimas* 2005, p. 113.

need for further harmonisation. And, even when harmonisation is agreed, as in the general system of the Professional Qualifications Directive, the mutual recognition process does not guarantee free movement, as there will always be exceptions confirming the tension between free movement and public interest regulation within an internal market that has both social and economic aims.

In the figure below, mutual recognition is depicted as a wave, corresponding to the front cover of this book. The product or person wishing to benefit from free movement is represented by an [x], riding the wave. The single legal area is represented by the fact that there is a single body of water covering the borders between the two Member States connected by the sea. Mutual recognition and exceptions to free movement based on certain public interests still operate outside the context of harmonisation. One could compare this situation to the mutual recognition of product requirements at the time of *Cassis* or the mutual recognition of professional qualifications in accordance with *Vlassopoulou*. In both fields there has been subsequent harmonisation of the general recognition procedure, in combination with substantive harmonisation or standardisation for specific products or professions, changing the picture and further facilitating free movement.

Figure: the principle of mutual recognition contextualised



THE AREA OF FREEDOM, SECURITY AND JUSTICE

1. Introduction

This chapter assesses the nature of mutual recognition in context of the European Union as an Area of Freedom, Security and Justice. It looks at the relationship between mutual recognition and the aims of the Area of Freedom, Security and Justice and the application of mutual recognition in a number of fields covered by this area. The first case study concerns the Framework Decision on the European Arrest Warrant (hereafter FD EAW), which represents the first European legislative instrument implementing the mutual recognition of judicial decisions in criminal matters. *Ne bis in idem*, entailing the recognition of final decisions in criminal matters in another Member State, will be the second case study under examination.

In carrying out this examination, the differences between mutual recognition as developed in the internal market and the Area of Freedom, Security and Justice will be addressed, as well as the question which role mutual recognition plays in the process of reconciling free movement and fundamental rights.

The question will therefore be asked whether the picture that arose in Chapter 2 of this book, that of a principle requiring that effect needs to be given to factual and legal situations established in other Member States, is confirmed. This question is of particular importance since, as it will be further explained, the European Commission has claimed that mutual recognition 'as applied in the internal market' can indeed be extended to the Area of Freedom, Security and Justice.

Before entering into a discussion on the relationship between mutual recognition and the aims of the Area of Freedom, Security and Justice (section 4), and the case studies on the European Arrest Warrant (section 5) and *ne bis in idem* (section 6) through which the relationship between mutual recognition and the aims, principles and norms of the Area of Freedom, Security and Justice will be studied further, I will first outline the historical development of judicial cooperation in criminal matters in the EU (section 2) and the academic response to the application of mutual recognition to this area (section 3).

Overall conclusions as regards the nature of mutual recognition in the Area of Freedom, Security and Justice will be drawn in section 7.

2. Historical Development of Judicial Cooperation in Criminal Matters in the EU

The 'recognition' of judicial decisions in criminal matters, such as the decision to prosecute a person or issue a warrant for a fugitive convict in particular, has a long history in international criminal justice.¹ Extradition procedures² were traditionally slow and thwarted with conditions and exceptions based on national sovereignty. States Parties were still allowed to refuse cooperation in cases concerning their nationals (nationality exception),³ in case the acts could be perceived as political offences⁴ or in case the acts would not be punishable under their own jurisdiction (dual criminality requirement)⁵ and if the acts (partially) took place on their territory or in a third State and they would not punish them ((extra)-territoriality exception).⁶

Another bar to extradition was developed by the case law of the European Court of Human Rights, barring extradition in case extradition threatened to result in a flagrant breach of the European Convention on Human Rights, without an effective remedy in the requesting State.⁷ In practice these criteria are rarely met, since all Member States are party to the ECHR and are therefore presumed to be able to provide an effective remedy for breaches of Convention rights.⁸ Ultimately, extradition remained a discretionary decision of the government. Attempts to negotiate Council of Europe Conventions making the handover of a person mandatory once certain conditions were met were not successful.⁹ Attempts to constrain the grounds for refusal based on national sovereignty only had limited success.¹⁰

Community Member States decided to agree on a number of instruments between them, first regarding the application of the Council of Europe Conventions,¹¹ followed by their own initiatives. Most visionary among these initiatives

¹ See more in depth Keijzer 2006, p. 18; Plachta & Van Ballegooij 2005.

² A most prominent example is the 1957 European Convention on Extradition (ECE.), E.T.S. No. 24, with its first and second additional protocol (E.T.S. Nos. 86 and 98 respectively).

³ The possibility to refuse the extradition of a national is explicitly recognised by Art. 6(1)(a) of the 1957 Convention.

⁴ ECE, Art. 3.

⁵ The ECE applies a system of qualified dual criminality. Art. 2 ECE requires a minimum maximum penalty of one year both in the requesting and in the requested State.

⁶ ECE, Art. 7.

⁷ European Court of Human Rights, Case No. 1/1989/161/217, *Soering v UK*, 26.06.1989; for a more general overview on human rights protection and the ECHR see Thunberg Schunke 2013, chapter 4.

⁸ This will be discussed further in section 5.3.

⁹ The most prominent example being the 1970 Convention on the International Validity of Criminal Judgments, E.T.S. No. 70. as it was ratified by 11 Member States, see <<http://conventions.coe.int/treaty/commun/quevoulezvous.asp?cl=eng&cm=8&nt=070>> (last consulted on 3 May 2015).

¹⁰ E.g. First Additional Protocol to the European Convention on Extradition, E.T.S. No. 86; Council of Europe Convention on the Suppression of Terrorism, E.T.S. No. 90.

¹¹ E.g. 1979 Dublin 'Agreement concerning the application by the European Community Member States of the Council of Europe Convention on Terrorism'.

was the idea of the French President Valéry Giscard D'Estaing, launched at the Brussels European Council of 5 December 1977, to create a 'European judicial area' among the Community Member States based on the idea of shared sovereignty in, and shared responsibility for, the free movement of persons within the Community's Single Market.¹²

As discussed in Chapter 2, at the time of the Single European Act, not all Member States were ready to take such big steps in European integration. More modest approaches were taken outside the Community framework. A number of Member States agreed on simplifying the extradition procedure in the 1990 Schengen Convention Implementation Agreement.¹³

After the Member States agreed to intergovernmental cooperation in the area in the Maastricht Treaty, similar rules were agreed upon by all Member States in the 1995 Convention on Simplified Extradition Procedure between Member States of the European Union.¹⁴ A 1996 EU Extradition Convention then made significant steps in reducing or eliminating the dual criminality requirement,¹⁵ the political offence exception¹⁶ and the nationality exception.¹⁷ However, reservations had to be accepted again. Neither of the two EU Conventions was ratified by all Member States.

2.1. *The Road towards Mutual Recognition*

Soon after the signing of the Treaty of Amsterdam, which provided the Union with the objective to maintain and develop itself as an 'Area of Freedom, Security and Justice' together with the possibility to adopt binding EU legislation harmonising Member States criminal justice legislation,¹⁸ the UK, backed by the Nordic countries, pushed for greater mutual recognition of court decisions as the way in which judicial cooperation in accordance with the Treaty was to take place.¹⁹ According to the then UK Home Secretary, Jack Straw:

'Inspiration could be taken from the way the internal market was "un-blocked" in the 1980s and, instead of opting for total harmonisation, one might conceive of a situation where each Member State recognizes the validity of decisions of courts from other Member States in criminal matters with a minimum of procedure and formality.'²⁰

¹² De Kerchove & Weyembergh 2000.

¹³ CISA, Arts. 59-66.

¹⁴ O.J. (C 78) 1 of 10.03.1995.

¹⁵ Art. 3 of the 1996 Convention limited dual criminality to six months plus contained a positive list of crimes for which extradition was to be enabled.

¹⁶ Art. 5.

¹⁷ Art. 7.

¹⁸ See *infra* section 4.

¹⁹ Nilsson 2001, p. 155.

²⁰ La Documentation Française, Ministère de la justice, *L'Espace Judiciaire Européen. Actes du Colloque d'Avignon*, Paris 1999, p. 89, as translated by Mitsilegas 2006, p. 1279.

Their initiative was successfully integrated in the conclusions of the June 1998 Cardiff European Council.²¹ Point 45(f) of the December 1998 Vienna Action Plan²² subsequently provided that within two years of entry into force of the Treaty of Amsterdam (which would be May 1, 1999), by May 1, 2001, a process would have to be initiated with a view to facilitating the mutual recognition of decisions and the enforcement of judgments in criminal matters.

In appreciating the reasons behind the move towards mutual recognition, a letter of the United Kingdom delegation to the K.4 Committee,²³ dated 29 March 1999, provides for interesting reading.²⁴ It vents frustration over the slow progress made in expediting and simplifying extradition relations between the Member States.

Paragraph 6(i) mentions:

The 1995 Convention²⁵ will simplify uncontested extraditions. The 1996 Extradition Convention²⁶ will, inter alia, limit (but not abolish) the use of the political offence exception; discourage (but not prohibit) the exemption of Member States' own nationals; and lower the threshold for extraditable offences.

Paragraph 11 then proposes a different approach based on mutual recognition:

The aim would be to develop a regime where each state recognised as valid the decisions of another Member State's judicial authorities with a minimum of formality. Recognition is given even though the decision has been taken under different laws and rules. This contrasts with the method by which judicial co-operation works at present, under which a commission rogatoire must be sent leading to a separate decision by the judicial authority of the requested state, applying the criteria of its domestic laws.

The letter proposes to achieve mutual recognition in two stages:

(a) The EU should initially develop arrangements for certain judicial decisions or judgements to be endorsed by the judicial authority in the requested Member State. There would be a presumption in favour of endorsement, combined with limited

²¹ Cardiff European Council, 15 and 16 June 1998, Presidency Conclusions, SN 150/98, para. 39:39. 'The European Council underlines the importance of effective judicial cooperation in the fight against cross-border crime. It recognises the need to enhance the ability of national legal systems to work closely together and asks the Council to identify the scope for greater mutual recognition of decisions of each other's courts.'

²² O.J. (C 19) 1 of 23.01.1999.

²³ Currently 'Coordinating committee in the area of police and judicial cooperation in the area of criminal matters' (CATS).

²⁴ Council document No. 7090/99, CRIMORG 35 of 29 March 1999.

²⁵ Convention on Simplified Extradition Procedure between Member States of the European Union, adopted on 10 March 1995, 1995 O.J. (C 78) 1.

²⁶ Convention drawn up on the basis of Art. K.3. of the Treaty on European Union, relating to extradition between the Member States of the European Union, adopted on 27 September 1996, 1996 O.J. (C 313) 11.

grounds for refusal. (b) At a later stage, the EU could aim progressively to make certain types of judicial decisions or judgements directly enforceable in all Member States.²⁷

An official statement by the British Home Office Minister Kate Hoey in May 1999 sheds a different light on the British intentions with regard to the mutual recognition of arrest warrants. From this statement, it becomes clear that part of the UK's motivation was to avert harmonisation in accordance with the 'vertical solution of a common set of rules administered centrally by a new European prosecuting agency'.²⁸

The 'vertical solution' refers to the *Corpus Juris for the criminal protection of the financial interests of the EU*.²⁹ The *Corpus Juris* is a result of a study commissioned by the European Parliament in 1995 to look at effective ways to tackle fraud with Community finances in the Member States.³⁰ The authors of the *Corpus Juris* study felt there was a need to harmonise and even unify parts of substantive and procedural criminal law.³¹ A main element of the study implied the establishment of a European Director of Public Prosecution³² who would prosecute crimes against Community finances³³ before national courts, with the help of delegated European Delegated Public Prosecutors. Based on the principle of 'European territoriality',³⁴

²⁷ In paras. 26 and 27 the document specifies: 'Mutual recognition of arrest warrants and convictions could serve, over time, to replace extradition procedures completely. This remains a long term target. It would have profound consequences for all Member States, and would have to rest on the presumption of directly comparable systems of justice and protection for the individual. Fast track extradition, based on judicial backing of arrest warrants, should be developed as an intermediate step. Warrants might for example be made enforceable in the requested state without justice ministry approval, subject only to endorsement by a local court or magistrate and limited grounds for appeal by the subject of the warrant.'

²⁸ Spencer 2004: 'The *Corpus Juris* project was ill received in Britain, where the Eurosceptic press predictably portrayed it as a secret ploy by Brussels to bring about the abolition of the common law, and its replacement with a bogey of its invention called "the Napoleonic system". Although not necessarily sharing these paranoid ideas, the British government was almost as opposed to the notion of a European Public Prosecutor as was the nationalist press. However, it had the realism to accept that trans-border crime in Europe was a genuine problem and to see that if a European Public Prosecutor was politically unacceptable, some other remedy must be found. As a Home Office Minister explained in a statement officially condemning the *Corpus Juris*, the government's counter proposal included "work towards abolition of extradition between Member States so that arrest warrants are directly enforceable"' (citing a statement by Kate Hoey MP, 29 May 1999). Proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, COM (2013) 544 of 17.07.2013.

²⁹ Delmas-Marty 2000, Delmas-Marty & Vervaele 2000.

³⁰ Delmas-Marty & Vervaele 2000, p. v.

³¹ Delmas-Marty & Vervaele 2000, p. 189 *et seq.* (*Corpus Juris* 2000).

³² *Ibidem*, Arts. 18-24; Cf. Proposal for a Council regulation on the establishment of the European Public Prosecutors' Office, COM (2013) 534; European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor's Office, P7_TA-PROV(2014)0234; Ligeti 2013.

³³ *Ibidem*, Arts. 1-8; Cf. Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM (2012) 363.

³⁴ *Ibidem*, Art. 18(1), 24.

warrants for arrests and decisions related to the offences covered by the *Corpus Juris* made by the courts of any of the Member States would have to be recognised throughout the European Union.³⁵

In the preparatory stage, an independent and impartial ‘judge of freedoms’, appointed in each Member State,³⁶ was to decide, upon the request of the European Public Prosecutor, to issue a ‘European arrest warrant’ for the arrest and handover of a person to the territory of the State where his presence is needed.³⁷ After the person was arrested in the other Member State, the judge of freedoms of that other Member State would check that the warrant concerned the arrested person, that the arrested person had been arrested according to a regular procedure and that his rights had been respected.³⁸

Despite the UK’s opposition to the idea of a European Public Prosecutor, a legal basis for its establishment was created by the Treaty of Lisbon and a subsequent Commission proposal is currently being considered by the Member States and the European Parliament.³⁹

2.2. *The Tampere European Council: The Founding of Mutual Recognition as a Policy Principle*

During a special meeting of the European Council on the implementation of the Area of Freedom, Security and Justice held in Tampere, Finland, the European Council then declared mutual recognition to be the ‘cornerstone’ of judicial cooperation in both civil and criminal matters within the European Union.⁴⁰ According to the European Council, the introduction of the concept of mutual recognition of judicial decisions in criminal matters implied that extradition procedures for sentenced persons needed to be replaced by a ‘simple transfer of such persons in accordance with Article 6 TEU’.⁴¹ The conclusion also proposed to consider ‘fast track extradition procedures, without prejudice to the principle of fair trial’⁴² for persons wanted for prosecution in another Member State.

³⁵ *Ibidem*, Art. 24(1)(b); Satzger 2012, p. 116: ‘In this context the principle of mutual recognition is supposed to be applied extensively so that in principle all compulsory measures ordered by any court of a Member State can be executed in any other Member State without further examination.’

³⁶ *Ibidem*, Art. 25bis.

³⁷ *Ibidem*, Art. 25ter; Delmas-Marty & Vervaele 2000, p. 92: ‘The arrest warrant contains the name of the person to be arrested and all other means of identification, as well as a reference to the precise *Corpus Juris* offence justifying the arrest, together with a succinct resume of the facts constituting the offence.’

³⁸ The *Corpus Juris* foresaw a possibility for the decision to be appealed. The arrested person was also to be enabled to ask for bail until transferred, Art. 25ter (2-3).

³⁹ Art. 86 TFEU; Proposal for a Council regulation on the establishment of the European Public Prosecutors’ Office, COM (2013) 534; European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office, P7_TA-PROV(2014)0234; Ligeti 2013; Asp 2015.

⁴⁰ Presidency Conclusions – Tampere European Council, 15-16/10-1999, Bull. 10/1999, point 33.

⁴¹ *Ibidem*, point 35.

⁴² *Ibidem*.

The European Council asked the Council and the Commission to adopt a programme of measures by December 2000 to implement the principle of mutual recognition. It therefore had no intention to accept the mutual recognition of judicial decisions as a principle of European law in the sense that there would be a general rule concerning the acceptance of acts, decisions and judgments of the authorities of the other Member States.⁴³ Certainly, intentions, like the 1992 deadline for the establishment of the internal market, by which the European Commission originally proposed a deadline for the automatic recognition of national rules on free movement, were lacking.⁴⁴ However, the project of the Area of Freedom, Security and Justice was guided by five-year programmes, the Tampere one being the first one.

Instead, mutual recognition was established as a policy principle to be applied in the area of judicial cooperation through secondary EU legislation, not unlike Article 53(1) TFEU on the mutual recognition of professional qualifications.⁴⁵ The policy programme would have to cover aspects of procedural law on which common minimum standards were considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States.⁴⁶ Ahead of this deadline in 2000, the Commission produced a document specifically dealing with mutual recognition of final decisions in criminal matters.⁴⁷ The European Commission repeated the drawbacks to traditional judicial cooperation (including extradition):

Traditional judicial cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by what one might call the “request” principle: One sovereign state makes a request to another sovereign state, who then determines whether it will or will not comply with this request. Sometimes, the rules on compliance are rather strict, not leaving much of a choice; on other occasions, the requested state is quite free in its decision. In almost all cases, the requesting states must await the reply to its request before it gets what its authorities need in order to pursue a criminal case. This traditional system is not only slow, but

⁴³ Klip 2012, p. 369: ‘Despite its notion as a cornerstone principle, mutual recognition has not obtained an automatic status of general applicability. There must be a decision that falls under one of the specific Framework Decisions, or other acts in which mutual recognition has been stipulated. Despite its status under the Treaties, mutual recognition is not a concept generally applicable to all acts, decisions and judgments of the authorities of the Member States. It must find its basis in one of the legal instruments.’

⁴⁴ *Supra* Chapter 2, section 2; Schrauwen 1997, p. 133; Craig & De Búrca 2011, p. 588.

⁴⁵ Art. 53(1) TFEU (1): ‘In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking up and pursuit of activities as self-employed persons.’

⁴⁶ Presidency Conclusions – Tampere European Council, 15-16/10-1999, Bull. 10/1999, point 37.

⁴⁷ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final.

also cumbersome, and sometimes it is quite uncertain what results a judge or prosecutor who makes a request will get.⁴⁸

The Commission then continued by basing the policy of mutual recognition of judicial decisions in criminal matters on mutual recognition since it had 'worked very well' in the creation of the Single Market:

Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extranational implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.⁴⁹

The Commission's definition did not elaborate on the relationship between mutual recognition of judicial decisions in criminal matters and equivalence, harmonisation and possible exceptions to free movement based on interests recognised by the Treaty and case law of the Court of Justice. This might be seen as remarkable given the fact that judicial cooperation is at times slow, cumbersome and uncertain in its outcome given the need to safeguard individual rights. The definition of mutual recognition chosen by the Commission did not account for these considerations. Individual rights considerations were, however, partially covered in the Commission's further discussion of the impact of mutual recognition on the area of judicial cooperation in criminal matters as regards the recognition procedure, dual criminality, jurisdiction as well as fundamental rights and procedural safeguards.

2.2.1. Recognition Procedure

The Communication did not cover extradition for prosecution as such, although it repeated the Council's ambition of extradition for prosecution being replaced by a simple recognition of the warrant issued by the judicial authorities of the other Member States.⁵⁰ As for final decision in criminal matters, the Commission stated that, ideally, there should be no need at all for a validation procedure. Mutual recognition would work directly and automatically without any additional step. However, the Commission recognised that there was a need for a translation of the decision and a verification that it originated with a competent authority. If the scope of mutual recognition was to be limited, then the 'validation' procedure would have to include a step to ensure that the decision was within that scope. With every additional point to be checked, the validation procedure would become lengthier. Too heavy a validation procedure would have the effect of creating a mutual recog-

⁴⁸ *Ibidem*, p. 2.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*, p. 4.

dition regime that in practice would be very much as the traditional 'request' regime.⁵¹

2.2.2. Dual Criminality

When defining dual criminality, one may distinguish dual criminality *in abstracto* from dual criminality *in concreto*.⁵² For dual criminality *in abstracto*, it suffices that the relevant type of conduct has been made punishable under the laws of both States, regardless of the question as to whether in the concrete circumstances of the case prosecution and/or punishment are possible. Dual criminality *in concreto* goes further. It is not sufficient for the crime to be punishable according to the book. The additional elements that, in the circumstances of the case, amount to a justification or an excuse or even lead to a dismissal of the charge must also be taken into account.⁵³

When applying the dual criminality test, the extradition courts traditionally apply the dual criminality test *in abstracto*. They only inquire as to whether the type of conduct for which extradition is requested would have been a crime under the law of the requesting State. The requirement that the act is, in both of the States involved, punishable by a minimum/maximum penalty is known as the *qualified dual criminality* requirement.

The Commission argued that upholding the dual criminality requirement for mutual recognition would lead to an additional step for each and every validation procedure and would considerably lengthen validation procedures in certain cases, since in certain cases it would have to be re-established what the offender actually did.⁵⁴ The Commission saw a solution in excluding from the scope of mutual recognition some behaviours which are criminalised in certain Member States but not in others. Examples would be related to sensitive areas such as abortion, euthanasia, press offence, and soft drugs offences.⁵⁵

2.2.3. Jurisdiction

Member States have traditionally not limited their jurisdiction to acts committed on their territory (territorial jurisdiction). Many Member States also apply extraterritorial jurisdiction. The most prominent example is jurisdiction based on the active personality principle, which means the Member State establishes jurisdiction in cases where the acts were committed by a national of that State. When Member State A exercises extraterritorial jurisdiction over acts committed in Member State B,

⁵¹ *Ibidem*, p. 17.

⁵² Van den Wyngaert 1989. See as well Flore 2001.

⁵³ Plachta describes two criteria to be fulfilled for double criminality *in concreto*: for an offence which is punishable in one State, a penalty can be imposed in the other State if it was committed in the latter State, and the perpetrator can bear the criminal responsibility and be liable to a sanction under the legislation of the state concerned. Plachta 1989, p. 84.

⁵⁴ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 11.

⁵⁵ *Ibidem*.

this will conflict with Member State B's claim for jurisdiction based on territoriality. Within the European Union, the exercise of extraterritorial jurisdiction has increased during the past decades leading to an increase of individuals being criminally liable before the courts of a foreign State.⁵⁶

The Commission acknowledged that if the requirement of dual criminality were given up and there was no system of jurisdiction that could, for each case identified, determine one Member State to be exclusively competent, Member States would be obliged to recognise decisions and, under certain circumstances, would have to enforce sentences handed down for acts that were not offences under their law.⁵⁷ A possible solution suggested by the Commission was making use of ex Article 31(d) TEU, currently Article 82(1)(b) TFEU. This article enables the adoption of measures on the prevention and settlement of conflicts of jurisdiction between Member States. The Commission, however, predicted lengthy negotiations, which would, however, perhaps lead to a 'once and for all' result.⁵⁸

2.2.4. Fundamental Rights and Procedural Safeguards

In line with the *Tampere Conclusions*, the Commission suggested that mutual recognition could not entirely replace the approximation of law, but that the two went hand-in-hand. It would have to be ensured that the treatment of suspects and the rights of the defence not only would not suffer from the implementation of the process but that the safeguards would even be improved through the process. The Commission suggested that common standards could be considered necessary regarding access to legal advice and representation, interpretation and translation (something which is now formally recognised by Art. 82(2)(b) TFEU).⁵⁹

2.3. *Programme of Measures to Implement the Mutual Recognition Principle*

The Commission's Communication focused on final decisions and therefore did not discuss the impact of mutual recognition when applied to pre-trial decisions. These decisions were, however, covered by the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters.⁶⁰ This Programme talked about mutual recognition being 'applied differently depending on the nature of the decision or the penalty imposed',⁶¹ but in each area, a number of 'parameters' determining the 'effectiveness' of mutual recognition were to be taken into account. The aims to be achieved by mutual recognition would determine how individual

⁵⁶ Deen-Racsmany & Blekxtoon 2005, p. 318; Pearlroth 2003.

⁵⁷ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 11.

⁵⁸ *Ibidem*, p. 19-20.

⁵⁹ *Ibidem*, p. 16.

⁶⁰ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 2001 O.J. (C 12) 10.

⁶¹ *Ibidem*, p. 11.

parameters were to be taken into account, unless an autonomous measure had to be taken for a particular parameter to apply.⁶²

The parameters mentioned in the programme of measures include the four issues raised in the Commission's communication (validation procedure, dual criminality, jurisdiction, and human rights). In contrast with the Commission's Communication, which called for the abolition of the dual criminality requirement, the programme of measures seemed to suggest a choice for mutual recognition and the dual criminality requirement to co-exist, the parameter being 'whether fulfilment of the dual criminality requirement as a condition for recognition is maintained or dropped'.

On jurisdiction, the programme of measures mentioned: 'the definition of minimum common standards necessary to facilitate application of the principle of mutual recognition, for instance, with regard to the competence of courts'. The programme of measures mentioned procedural safeguards as a parameter (the adoption of 'mechanisms for safeguarding the rights of third parties, victims and suspects'). This parameter was, however, not followed up by a specific measure to be taken in the field. The introduction to the programme just mentions that the implementation of mutual recognition presupposes that Member States have trust in each other's criminal justice systems grounded on the shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.

As mentioned, the Commission's Communication was based on the idea of replacing the 'request principle' with mutual recognition, as it had 'worked very well in the creation of the Single Market'. The programme of measures, however, left room for limiting the application of 'mutual recognition' by introducing the following parameter: 'sovereignty or other essential interests of the requested state'.

2.4. Implementation of the Mutual Recognition Principle

Since 2001, as was suggested by the programme of measures, mutual recognition has been 'applied differently depending on the nature of the decision or the penalty imposed'.⁶³ The 9/11 attacks on New York and Washington, however, fundamentally reshaped the policy agenda in the Area of Freedom, Security and Justice. The first clear indication of this was that fast track extradition procedures were renamed 'surrender' and were introduced ahead of schedule to meet the immediate need to more effectively fight terrorism. In the FD EAW,⁶⁴ extradition for prosecution and execution of a sentence were combined in a single instrument.⁶⁵

⁶² *Ibidem*, p. 12.

⁶³ *Ibidem*, p. 11.

⁶⁴ 2002 O.J. (L 190) 1; *infra* section 5.

⁶⁵ For its interaction with Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, see *infra* section 5.1.4 on nationals and residents.

Mutual recognition has also been applied to decisions related to pre-trial supervision (*European Supervision Order*) to freeze property or evidence (*Freezing Order*),⁶⁶ to hand over evidence (*European Evidence Warrant*),⁶⁷ the decision to take into account previous convictions,⁶⁸ confiscation,⁶⁹ and the imposition of criminal sanctions (*Transfer of Prisoners*),⁷⁰ financial penalties,⁷¹ probation, and alternative sanctions.⁷²

Attempts to propose EU legislation on conflicts and jurisdiction and the principle of *ne bis in idem* have been overshadowed by the case law of the Court of Justice, which held that the application of Article 54 of the Schengen Convention Implementation Agreement did not rely on the prior harmonisation of the criminal laws of the Member States.⁷³ A Framework Decision on the Prevention and Settlement of Conflicts Related to the Exercise of Jurisdiction in Criminal Proceedings was adopted,⁷⁴ aimed at preventing parallel prosecutions concerning the same facts and the same person, 'as a first substantial step in preventing breaches of the 'ne bis in idem' principle during criminal proceedings and in avoiding the risk of inadequate exercise of jurisdiction by Member States'. However, this Framework Decision is seen as too weak and, as a number of the other framework decisions cited above, suffers the fate of poor implementation by the Member States.⁷⁵

⁶⁶ Council Framework Decision on the execution in the European Union of orders freezing property or evidence, O.J. (L 196) of 02.08.2003, p. 45.

⁶⁷ Council Framework Decision 2008/978/JHA on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, O.J. (L350) 72 of 30.12.2008.

⁶⁸ Council Framework Decision 2008/675/JHA on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, O.J. (L 220) 32 of 15.08.2008; Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2008/765/JHA of 24 July 2008 on taking into account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM (2014) 312.

⁶⁹ Framework Decision on the application of the principle of mutual recognition to confiscation orders, O.J. (L 328) of 24.11.2006, p. 59.

⁷⁰ Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. (L 327) of 05.12.2008, p. 27; Commission implementation report contained in COM (2014) 057 final.

⁷¹ Framework Decision on the application of the principle of mutual recognition to financial penalties, O.J. (L 76) of 22 March 2005, p. 16.

⁷² Council Framework Decision 2008/947/JHA, O.J. (L 337) of 16.12.2008, p. 102; Commission implementation report contained in COM (2014) 057 final.

⁷³ Commission Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM (2005) 696; Joined Cases C-187/01, *Gozutok* and C-385/01, *Brugge* [2003] ECR I-1345; further discussed *infra*, in section 6.

⁷⁴ Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009.

⁷⁵ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM (2014) 313, p. 11.

A comprehensive review of the state of play regarding the implementation of the mutual recognition measures adopted and implemented was conducted by Vernimmen, Surano and Weyembergh, together with a group of national correspondents in 2009.⁷⁶ The resulting study concluded that at that time it was too early to codify the various mutual recognition instruments, also in the light of the resistance to the FD EAW.

It also urged further steps towards the harmonisation of substantive and procedural criminal law, particularly as regards the rights of the defence, expanding mutual recognition towards the collection of evidence together with legislation on the admissibility of evidence and the resolution of conflicts of jurisdiction and transfer of proceedings, including a review of the Court's case law on *ne bis in idem*.

It also called attention to the need for the proportionate use of the European arrest warrant by issuing judicial authorities and the conflicts that had arisen concerning the application of grounds for non-execution to nationals and residents.⁷⁷

Until 2009, integrating fundamental rights concerns into the mutual recognition measures had limited success both in terms of challenges to the European Court of Justice,⁷⁸ as well as EU legislation on the matter. Since the EU Charter became binding through its incorporation by the Treaty of Lisbon,⁷⁹ fundamental rights consideration have been given a more prominent place in the case law of the Court of Justice, although it did not yet comprehensively address rights and proportionality concerns with the application of mutual recognition.⁸⁰

As regards flanking harmonisation measures, after the failure of the proposal for a Framework Decision on Certain Procedural Rights in Criminal Proceedings,⁸¹ in the second half of 2009, the Swedish presidency launched a 'Road map' for strengthening the procedural rights of suspected or accused persons in criminal proceedings (Council Resolution 2009/295).⁸²

Since then, and as will be developed *infra* in section 5.2, three legislative instruments have been adopted:

- (i) a Directive on the right of interpretation and translation in criminal proceedings;⁸³
- (ii) a Directive on the right to information in criminal proceedings;⁸⁴ and
- (iii) a Directive on access to a lawyer and the right to communicate upon arrest.⁸⁵

⁷⁶ Vernimmen-van Tiggelen, Surano & Weyembergh 2009.

⁷⁷ Vernimmen-van Tiggelen & Surano 2009, p. 549-581.

⁷⁸ Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633; *infra* section 5.1.2.

⁷⁹ Art. 6(1) TEU.

⁸⁰ As will be discussed further *infra* in sections 5 and 6.

⁸¹ COM (2004)328.

⁸² Council Resolution on a Road map for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 925/01, 30 November 2009.

⁸³ Directive 2010/64/EU, O.J. (L 280) 1 of 26.10.2010.

⁸⁴ Directive 2012/13/EU on the right to information in criminal proceedings, O.J. (L 142) 1 of 01.06.2012.

The Commission has also adopted a Green paper on prison conditions,⁸⁶ highlighting the extensive use of pre-trial detention by Member States and its detrimental effect on mutual trust. The European Parliament responded to this Green paper with a resolution adopted in December 2011, in which it called for EU legislation on decisions regarding pre-trial detention and prison conditions more generally.⁸⁷

In November 2013 the European Commission presented a package of proposals for:

- a Directive to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;⁸⁸
- a Directive on special safeguards for children suspected or accused of a crime,⁸⁹ together with a recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings;⁹⁰ and
- a Directive on the right to provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings,⁹¹ together with a recommendation on the right to legal aid for suspects or accused persons in criminal proceedings.⁹²

During the Swedish presidency the Stockholm programme was also adopted, which provided for the EU AFSJ policy agenda between 2009 and 2014.⁹³ As regards mutual recognition, the programme focused on a completion of the application of mutual recognition to all judicial decisions in criminal matters and most notably regarding evidence,⁹⁴ but it also wanted to move further as regards the recognition of disqualifications, moving into administrative law. At the same time, the program-

⁸⁵ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed about the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. (L 294) 1 of 06.11.2013.

⁸⁶ Green Paper on the application of EU criminal justice legislation in the field of detention – Strengthening mutual trust in the European judicial area COM (2011) 327.

⁸⁷ EP resolution of 15 December 2011, P7_TA-PROV(2011)0585, para. 4: ‘Calls on the Commission and EU institutions to come forward with a legislative proposal on the rights of persons deprived of their liberty, including those identified by the EP in its resolutions and recommendations, and to develop and implement minimum standards for prison and detention conditions, as well as uniform standards for compensation for persons unjustly detained or convicted; calls on the Commission and Member States to keep the issue high on their political agenda and to devote appropriate human and financial resources to addressing the situation.’

⁸⁸ COM (2013) 821/2.

⁸⁹ COM (2013) 822/2.

⁹⁰ C (2013) 8178/2.

⁹¹ COM (2013) 824.

⁹² C (2013) 8179/2.

⁹³ The Stockholm programme – an open and secure Europe serving and protecting the citizens, Council document 17024/09 of 02.12.09.

⁹⁴ *Ibidem*, p. 22.

me contained further ambitions to harmonise procedural and substantive criminal law.⁹⁵

Since the adoption of the Stockholm programme in 2009, it has become clear that even if the options for the Member States to propose legislation regarding police and judicial cooperation in criminal matters have been reduced, they are still competing with the Commission as regards the right to initiative.⁹⁶ An illustrative example of that on-going competition is what arguably constitutes the biggest measure concerning mutual recognition since the European Arrest Warrant.

On 15 April 2010, a group of Member States introduced a proposal for a 'European Investigation Order' aimed at obtaining evidence from other Member States (both existing and by means of ordering new investigative measures to be taken by the executing Member State).⁹⁷ Together with the measures adopted under the Road map for strengthening procedural rights, the negotiations leading up to the adoption of a Directive on the European investigation order⁹⁸ will be discussed in detail in *infra* section 5.2 to explore the relationship between mutual recognition as applied in the FD EAW and additional harmonisation measures.

2.5. *The EU Justice Agenda for 2020*

Looking forward to the next five years, in its review of the Stockholm Programme, the European Parliament has claimed a stronger role in developing future benchmarks for the Area of Freedom, Security and Justice.⁹⁹ It has called for the timely and correct implementation of mutual recognition measures and for the strengthening of the procedural rights of suspects, particularly asking the Commission to revisit the case for establishing enforceable standards in relation to pre-trial detention.¹⁰⁰ Building on the results obtained during the negotiations on the European Investigation Order, in a legislative own-initiative report adopted in 2014, the European Parliament also called on the Commission to propose a proportionality check by the issuing judicial authority to be inserted into the FD EAW or the mutual recognition instruments more generally. At the same time Parliament called for the insertion of an explicit ground for non-execution based on fundamental rights.¹⁰¹

⁹⁵ *Ibidem*.

⁹⁶ Art. 76 TFEU; further discussed *infra* in section 4.

⁹⁷ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters based on Art. 81(1) (a) TFEU (2010 O.J. (C 165) 22).

⁹⁸ Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

⁹⁹ European Parliament resolution of 2 April 2014 on the mid-term review of the Stockholm Programme, P7_TA-PROV(2014)0276.

¹⁰⁰ *Ibidem*, paras. 46-47.

¹⁰¹ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014) 0174; see *infra* section 5.3.

The Commission produced a Communication entitled ‘The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union’,¹⁰² which should be read together with Commission initiatives on the independence, quality and efficiency of the judicial systems¹⁰³ and the respect of the rule of law.¹⁰⁴ The rationale behind the Communication was presented by Viviane Reding, the then Justice Commissioner, in a speech delivered at the Centre for European Policy Studies on 20 June 2014.¹⁰⁵ In her speech, Reding tied the Union’s economic and justice agendas in calling for a European *Area* of Justice in which citizens feel secure and confident wherever they are and in which they can freely exercise their right to free movement both in terms of exercising economic as well as civil rights.

In terms of concrete policy actions, the Communication insisted on the transposition and application of EU legislation. It also hinted at a codification of the various directives on criminal procedural rights into one instrument.¹⁰⁶ The Commission, however, did not announce further initiatives in the field of pre-trial detention, nor did it agree with the call of the European Parliament for an amendment of the FD EAW or a horizontal instrument introducing a fundamental rights exception and proportionality check.¹⁰⁷

The European Council conclusions of 27 June 2014¹⁰⁸ contain a ‘strategic agenda for the Union in times of change’, emphasising five fields of action, including a ‘Union of freedom, security and justice’, in which the Council emphasises the need for EU action in justice matters given the increase in free movement of citizens:

Citizens expect their governments to provide justice, protection and fairness with full respect for fundamental rights and the rule of law. This also requires joint European action, based on our fundamental values. Given their cross border dimensions, phenomena like terrorism and organised crime call for stronger EU cooperation. The same is true for justice matters, since citizens increasingly study, work, do business, get married and have children across the Union.¹⁰⁹

¹⁰² COM (2014) 144.

¹⁰³ Communication from the Commission – ‘The EU Justice Scoreboard A tool to promote effective justice and growth’ – COM (2013) 160 and Communication from the Commission – ‘The 2014 EU Justice Scoreboard’ – COM (2014) 155.

¹⁰⁴ Communication from the Commission ‘A new EU Framework to strengthen the Rule of Law’ – COM (2014) 158.

¹⁰⁵ V. Reding, Vice President European Commission, EU Justice Commissioner, *Justice Past, Justice Present and Justice Future, Three Messages to the European Council*, Speech 14/481.

¹⁰⁶ COM (2014) 144, p. 8: ‘EU legislation relating to procedural rights in criminal matters is currently contained in a considerable number of different instruments which have been developed and adopted step by step over the past years. To further strengthen the level-playing field and the consistency of the protection of the rights of suspected persons, the need for codifying criminal procedural rights into one instrument could be examined.’

¹⁰⁷ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV (2014) 0174; see *infra* section 5.3.

¹⁰⁸ Council document EUCO 79/14 of 27 June 2014.

¹⁰⁹ Council document EUCO 79/14 of 27 June 2014, Annex I, p. 19.

The conclusions themselves emphasise the need to promote the ‘consistency and clarity of EU legislation’ to ‘continue efforts to strengthen the rights of accused and suspect persons in criminal proceedings’ and ‘enhance mutual recognition of decisions and judgments’.¹¹⁰ The 18-month programme of the Italian, Latvian and Luxembourg presidencies¹¹¹ clarifies that ‘negotiations on the draft Directives on procedural safeguards for children suspected or accused in criminal proceedings, on presumption of innocence and on legal aid, will be pursued with a view to an early adoption’. The Council will also reflect on the ‘coherence of the instruments adopted in the field of mutual recognition and their consolidation, an assessment on the level of implementation by Member States as well as on possible future initiatives’.¹¹² The presidency document furthermore foresees an examination of the effectiveness of the application of the European arrest warrant, taking into account the findings presented by the Commission and the European Parliament in its report of 2014.¹¹³

2.6. Comment

During the period of 15 years since mutual recognition was declared a policy principle in the implementation of the Area of Freedom, Security and Justice, in the area of judicial cooperation in criminal matters, an impressive list of secondary EU legislation has been adopted covering most pre-trial and final judicial decisions in criminal matters.

However, the *rationale* underlying the application of mutual recognition to judicial decisions in criminal matters remains unclear and a matter of informal disagreement between the three EU institutions and Member States. The same is true for its relationship with the continued existence of a recognition procedure, the dual criminality requirement, jurisdiction rules and territoriality exceptions as well as fundamental rights and procedural safeguards. Furthermore, the framework decisions implementing mutual recognition suffer from poor implementation by the Member States, whereas directives on the rights of suspects and accused persons in criminal proceedings have only recently been adopted.

The European Parliament and Commission seem to argue in favour of the codification of all mutual recognition instruments together with the development of a catalogue of procedural rights, whereas the Council only speaks of correct implementation and consolidation. The Commission and Council are also less explicit in terms of further steps to be taken in harmonising procedural rights of suspects,

¹¹⁰ Council document EUCO 79/14 of 27 June 2014, para. 11; On the need for more consistency, see note of the Meijers Committee CM1502 Inconsistent legal protection in mutual recognition instruments, available at: <<http://www.commissie-meijers.nl/en/comments/367>>, (last consulted on 3 May 2015).

¹¹¹ Council document 11258.

¹¹² Council document 11258, p. 57.

¹¹³ Council document 11258, p. 58; European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014)0174 (further discussed in *infra* section 5.3).

notably as regards decisions regarding pre-trial detention, which is pushed for by the European Parliament.

An interesting development is that the 'strategic agenda' by the Council recognises the development of a European justice agenda, separate from a security/law enforcement agenda based on mutual recognition. Although the Council's justice agenda may be considered to be meagre at the moment and mostly aimed at the civil justice agenda, the development of an independent justice agenda, together with its explicit link to the concept of European citizenship, might indicate a significant development in the thinking of Member States in the area. Their actual commitment towards such a justice agenda will undoubtedly be the subject of intense negotiations and debates during the upcoming period.

3. Academic Debate

As mentioned in Chapter 1, several authors (mostly from the criminal law field) have argued there is only a limited scope, if any, for mutual recognition in criminal law, noting its special nature and the specific interests involved. Some have suggested to uphold procedural and substantive limits to the mutual recognition of judicial decisions in criminal matters in part based on well-known principles and norms from public law and traditional mutual legal assistance and/or argued it is necessary to harmonise Member States' criminal laws and procedures.

We may distinguish four approaches to the application of mutual recognition to criminal law:

- (i) mutual recognition is not appropriate in the area of criminal law;
- (ii) mutual recognition can only apply in a limited manner;
- (iii) mutual recognition needs to be balanced by harmonisation;
- (iv) mutual recognition is appropriate in the area of criminal law and (ideally) should apply fully.

An analysis of these four approaches will allow for a more comprehensive assessment of the nature of mutual recognition of judicial decisions in criminal matters in the context of the maintenance and development of the Union as an Area of Freedom, Security and Justice.

3.1. *Mutual Recognition is not Appropriate in the Area of Criminal Law*

Most of the criticism of the application of mutual recognition is directed towards its application to judicial decisions in criminal matters where it has a direct negative impact on the sovereignty of the host State and the rights of the suspect or convicted person. A convicted person can also benefit from the application of the mutual recognition principle, for instance, where it bars further prosecution under the *ne bis in idem principle* (to be discussed in section 6). The criticism is mainly directed against the European arrest warrant and (to a lesser extent) other mutual legal assistance measures based on mutual recognition.

Part of the criticism is based on practical considerations, stating that currently there is no basis for the mutual recognition of judicial decisions in a European Union in which the provisions of the European Convention on Human Rights are not observed in practice¹¹⁴ and that this should be resolved first by ensuring the harmonisation of procedural safeguards of defendants in criminal procedures and better monitoring and enforcement of fundamental rights and procedural safeguards.¹¹⁵

Others reject the application of mutual recognition in the area of criminal law and justice as a matter of principle. It is argued that mutual recognition fails to take into account that the substantive notion of an 'Area of Freedom, Security and Justice' requires that a citizen and his legal interests should not only be protected by the criminal justice system but also 'from the dangers of a criminal justice system operated in a reckless manner'. Basing judicial cooperation on mutual recognition would lead to a 'hybrid' prosecution in which the invasive procedures of various legal systems can be confined, thereby leading to a 'radically punitive system'.¹¹⁶

An (*Alternative*) *Programme for European Criminal Justice*¹¹⁷ was developed. This *Programme* stipulates that, instead of applying the principle of mutual recognition, European wide prosecutions should be conducted in accordance with the criminal law and procedure of the Member State most relevant to the matter. The *Alternative programme* also contains a 'European arrest warrant'. It is, however, the executing State that orders the arrest and surrender of a person after considering a 'European Transfer Request' issued by the investigating State.¹¹⁸ The dual criminality requirement is maintained.¹¹⁹ Furthermore, the principle of proportionality should be respected in the sense that no other, more lenient measures should be available that would make it unnecessary to take the person into custody.¹²⁰ The defendant has a right to appeal the decision to issue the European arrest warrant in the executing Member State.¹²¹ A decision to refuse a European Transfer Request may be appealed by the criminal justice authority of the investigating State to the European Criminal Court, a new body to be established under the *Alternative programme*.¹²²

¹¹⁴ Allegre & Leaf 2003, p. 14.

¹¹⁵ Allegre & Leaf 2003, p. 14.

¹¹⁶ Schünnemann 2006, p. 351.

¹¹⁷ Schünnemann 2006.

¹¹⁸ Schünnemann 2006, p. 255 *et seq.* Proposal for the regulation of transnational criminal proceedings in the European Union, Arts. 7-9; Asp 2006, p. 385: 'A third basic thought behind the proposal is that the principle of mutual recognition should not - in itself - be a reason to minimize the controls in the requested state, and this conclusion is even more justified in situations where the requested state is better equipped than the investigating state to make a well-founded judgement on the issue in question.'

¹¹⁹ *Ibidem*, Art. 11(1). As a fall back option some sort of *ordre public* clause is to be maintained. See Asp 2006, p. 387.

¹²⁰ *Ibidem*, Art. 9(3).

¹²¹ *Ibidem*, Art. 13.

¹²² *Ibidem*, Art. 13.

3.2. *Mutual Recognition can only Apply in a Limited Manner*

Most authors accept or even support the application of mutual recognition in the area of criminal law, although some call for limits to its application mostly citing the mentioned differences between the internal market and the Area of Freedom, Security and Justice or the special nature of criminal law.¹²³

It has been pointed out that even if the basic idea of removing obstacles to free movement in a borderless EU also applies to criminal law,¹²⁴ criminal law is an area of law and regulation which is qualitatively different from the regulation of trade and markets. Using mutual recognition to achieve 'regulatory competition'¹²⁵ can therefore not be repeated in the criminal law sphere.¹²⁶ Particular emphasis is put on the fact that criminal law regulates the relationship between the individual and the State and guarantees not only State interests but also individual freedoms and rights in limiting State intervention.¹²⁷

Mutual recognition is described as a potential 'journey into the unknown', where national authorities are in principle obliged to recognise standards emanating from the national system of any EU Member State on the basis of mutual trust, with a minimum of formality. It is this potential 'journey into the unknown' which has led to mechanisms of checks in order to avoid total automaticity when it comes to mutual recognition in the internal market. These checks may take the form of leaving a leeway to national authorities to assess whether there is a level of functional equivalence between the systems of the home and host State prior to accepting to recognise the home State's standards, and the possibility for Member States to 'refuse' mutual recognition when evoking mandatory requirements.¹²⁸

Certain authors have argued in favour of maintaining the dual criminality requirement. Upholding the dual criminality requirement would be warranted even under a system of mutual recognition since it is through this test that the executing judicial authority establishes the equivalence of the claim upon which mutual recognition rests.¹²⁹ Others have suggested that the criterion of 'equivalence' should apply to the national judicial system and procedure leading to the judgment to be recognised and not whether behaviour is an offence in both the issuing and executing state.¹³⁰

In this context it has also been pointed out that many Member States continue to be found in breach of their human rights obligations under the European Convention on Human Rights, raising the question to which extent legal acts of those

¹²³ Peers 2004; Mitsilegas 2006; Mitsilegas 2009; Klip 2005; Klip 2009.

¹²⁴ Mitsilegas 2009, p. 118.

¹²⁵ Understood as a process whereby legal rules are selected (and de-selected) through competition between decentralised, rule-making entities (which could be nation States or other units such as regions or localities).

¹²⁶ Mitsilegas 2009, p. 118.

¹²⁷ Mitsilegas 2006, p. 1280.

¹²⁸ Mitsilegas 2009; in the same vein see Klip 2012, p. 392.

¹²⁹ Peers 2004.

¹³⁰ Mitsilegas 2009, p. 119 at footnote 19.

systems may be accepted without further investigation.¹³¹ This discussion leads to a discussion on the division of labour between the judicial authorities of the home and host Member States in ensuring fundamental protection and the checks and balances within the system more generally.¹³² An offshoot of this debate concerns the interaction between the rights derived from European citizenship,¹³³ notably to residence and free movement and mutual recognition in judicial decisions in criminal matters, including the question to what extent discrimination between nationals and other EU citizens is still allowed.¹³⁴

Instead of demanding the reinstatement of the dual criminality requirement, some have argued that traditional exceptions based on territoriality need to be maintained, pointing to a close relationship between the territoriality and dual criminality exceptions, since maintaining the territoriality exceptions prevents the abolition of the dual criminality requirement leading to a violation of the substantive legality principle.¹³⁵

A *Manifesto on European Criminal Procedure Law* by scholars from ten Member States, presented in 2013, includes six demands,¹³⁶ starting with a call for limitations of mutual recognition where the criminal proceedings would risk violating legitimate interests either of the individual or the Member State. The extent to which mutual recognition is to be limited is to be determined by means of a proportionality test, taking into account both individual and national interests.¹³⁷ In the explanatory notes, the Manifesto clarifies that ‘the realisation of the state interest of uncovering the truth through a criminal proceeding is limited by the rule of law and

¹³¹ Guild 2006, p. 10.

¹³² Mitsilegas 2012; Carrera, Guild & Hernanz 2013.

¹³³ Arts. 20 and 21 TFEU; Directive 2004/38/EC of the European Parliament and the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. (L 158), 77; Case C-184/99, *Grzelczyk* [2001] ECR 6193; Case C-413/99, *Baumbast and R* [2002] ECR 7091; Case C-34/09, *Zambrano* [2011] ECR 1177; Guild 2004, Chapter 2 in particular; Craig & de Búrca 2011, Chapter 23.

¹³⁴ Further discussed below in section 5.1.4.

¹³⁵ Flore 2001.

¹³⁶ The six demands are: (i) Limitation of mutual recognition; (ii) Balance of European criminal proceedings, meaning that the public interest in criminal prosecution, the Member State’s interest in preserving national identity, and the affected citizens’ interests are all balanced on the principle of proportionality; (iii) Respect for the principle of legality and judicial principles in European criminal proceedings, demanding a clear set of rules governing which Member States may exercise criminal jurisdiction over an offence and thereby prevent conflicts of jurisdiction; (iv) Preservation of coherence at a vertical (with the legal order of the Union) and horizontal (in respect of Member States’ systems of criminal justice) level; (v) Observance of the principle of subsidiarity, meaning that EU action should only be taken if it cannot be reached as effectively by measures taken at national level and due to its nature and scope can be better achieved at Union level; and (vi) Compensation of deficits in the European criminal proceedings calling for pan European minimum defence rights compensating for the disadvantages of suspects in across border criminal proceeding.

¹³⁷ European Criminal Policy Initiative 2013, under ‘I. Fundamental demands to the Union legislator’.

the status of the suspect as subject of the proceedings'.¹³⁸ It regrets that infringements of fundamental rights are not generally acknowledged by the Court of Justice as limiting the principle of mutual recognition.¹³⁹ As regards national interests, the Manifesto notes the absence of a general *ordre public* reservation, which it states makes little sense as 'in the area of free movement of goods – from which the concept of mutual recognition stems – such a reservation is provided for in Article 36 TFEU'.¹⁴⁰ It furthermore condemns the absence of such a ground for refusal in the area of criminal justice altogether, given its particularly strong connection to basic rights and fundamental value judgments underpinning the legal order.¹⁴¹ As regards the application of the proportionality principle, the Manifesto points to the distinction being made between measures of lesser and greater intrusiveness in the Directive on the European Investigation Order,¹⁴² with additional grounds for refusal in respect of the latter, as well as its inclusion of a mandatory proportionality assessment by the issuing judicial authority. It calls for the insertion of such a proportionality assessment in the FD EAW as well.¹⁴³

3.3. *Mutual Recognition needs to be Balanced by Harmonisation*

A third approach to mutual recognition in criminal law is that of calling for harmonisation to balance its application. It is pointed out that mutual recognition harmonises procedural safeguards based on the lowest common denominator, putting the 'Freedom' aspect of the AFSJ at risk.¹⁴⁴ Furthermore, 'the suppression of the dual criminality requirement tends to favour the most repressive system of criminal justice, because a judicial decision needs to be executed even if the acts would not be criminal under the system of the executing State'.¹⁴⁵

As regards criminal procedure, the effect of mutual recognition harmonising procedural safeguards at the lowest common denominator cannot be compensated by the free choice of the actors involved as is the case in the internal market (where a consumer can opt not to buy a certain product (from another Member States)). In the case of criminal procedure, the suspect or sentenced person moves and is subjected to the criminal justice and prison system of another Member State. Also, as regards substantive criminal law, there is less room for a flexible application of mutual recognition. It is easier to impose more stringent environmental standards to a product than to apply a different criminal policy to a certain act. Harmonisation of procedural safeguards as well as substantive criminal law is therefore needed to

¹³⁸ European Criminal Policy Initiative 2013, under 'II. Explanatory notes to the demand of the European Criminal Policy Initiative'.

¹³⁹ *Ibidem*.

¹⁴⁰ *Ibidem*.

¹⁴¹ *Ibidem*.

¹⁴² Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

¹⁴³ European Criminal Policy Initiative 2013, under 'II. Explanatory notes to the demand of the European Criminal Policy Initiative'.

¹⁴⁴ Weyembergh 2004, p. 151.

¹⁴⁵ Weyembergh 2004, p. 151.

support the abolition of dual criminality, to enhance trust among judicial authorities and uphold fundamental rights.¹⁴⁶

Current mutual recognition measures largely operate on a first come first served basis, mitigated by optional grounds for non-execution based on territoriality and a degree of coordination by Eurojust. This system does not take into account all relevant interests in the allocation of jurisdiction, notably those of the suspect or accused person whose position may be seriously affected depending on the jurisdiction in which it will be tried. It is pointed out that the claim for basing judicial cooperation in criminal matters on mutual recognition would be stronger if it coincided with EU the allocation of jurisdiction.¹⁴⁷

Such a system may also come into conflict with the goal of the Union to provide its citizens with a high level of security. Current policies are seeking to achieve a high level of security by relying on mutual trust instead of common norms. This leads to individuals no longer feeling safe in their relationship with the State(s). Therefore a 'more European approach' is proposed, which would establish criteria under which it would become irrelevant in which Member State a certain offence was dealt with, the prevailing notion being that, when a crime is combated, the interests of everyone involved should be taken into consideration. Under this approach 'a high level of safety' would be offered to citizens of the Union as a whole and would not serve the interests of a particular Member State alone.¹⁴⁸

In this context, one should also factor in the differences between the internal market and the Area of Freedom, Security and Justice. There is not one single product or person seeking market access. At any given point in time, judicial decisions from several Member States may be competing for execution. The choice of which one is to be executed (first) may have serious consequences for the individual concerned. More broadly speaking, there is a need to reconcile the 'high level of safety', which in policy terms has been translated by the 'internal security strategy' and the safeguarding of fundamental rights, as has been acknowledged by the Commission in its latest Communication on the matter.¹⁴⁹ This includes making sure that enhanced law enforcement cooperation is not at the expense of safeguarding individual rights. Preferably these rights should be elevated in the process of enhancing law enforcement cooperation.¹⁵⁰

¹⁴⁶ Weyembergh 2004, p. 156.

¹⁴⁷ Klip 2012, p. 382.

¹⁴⁸ Klip 2009, p. 420; Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009.

¹⁴⁹ Communication from the Commission to the European Parliament and the Council, 'The final implementation report on the implementation of the Internal Security Strategy 2010-2014', COM (2014) 365 of 20.06.2014, section 3.2.2., 'Strengthening the respect of fundamental rights as part of a citizen-centred approach.'

¹⁵⁰ Cf. Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 16.

3.4. *Mutual Recognition is Appropriate and should Apply Fully*

As mentioned various authors have expressed their support for the application of mutual recognition in the Area of Freedom, Security and Justice.¹⁵¹ Already in 2001, two years after mutual recognition was declared a policy principle at the Tampere European Council, it was predicted that, although in a different field and in a different context, mutual recognition would have similar significance for criminal law as it had already achieved in the internal market.¹⁵² The implication of a 'genuine system of mutual recognition' would be the abolition of all grounds for refusal in judicial cooperation. 'Full faith and credit' would need to be placed in the foreign legal system and in their judges.¹⁵³ 'Real mutual recognition' would still only be possible among Member States that are very close to one another. In a situation where there are no longer frontiers between Member States for criminals, one would need to think more in terms of a 'European judicial area' than in terms of maintaining the frontiers for efficient law enforcement.¹⁵⁴

It has been comprehensively argued that mutual recognition may be seen as a legal principle (in the Area of Freedom, Security and Justice),¹⁵⁵ consisting of two aspects. First an 'ought rule', which corresponds to the general that mutual recognition promotes free movement within a single legal area, and a 'shall rule', which corresponds to what is referred to in this book as concrete norms deriving from mutual recognition, with implications regarding the level of trust in the legal systems of other Member States (without prior harmonisation), the degree of automaticity and speed by which decisions need to be taken.¹⁵⁶ More recently, comparative research has called the 'transplant' of mutual recognition from the internal market to the Area of Freedom, Security and Justice to be both feasible and desirable.¹⁵⁷ The 'philosophy' of mutual recognition has been explained as being designed to strengthen cooperation between Member States but also to enhance judicial protection of individual rights, that its implementation presupposes that Member States have trust in each other's criminal justice systems and that such trust is grounded in particular on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.¹⁵⁸

Furthermore, it is argued, mutual recognition implies a real effort towards as much automaticity as possible, simplification and acceleration of judicial cooperation. Accordingly, most controls should be performed in the issuing State and not in the executing State. Protection of human rights and respect for individual guarantees must, however, be taken into account as well. 'Therefore the challenge is to

¹⁵¹ Nilsson 2001; Wouters & Naert 2004; Janssens 2013.

¹⁵² Nilsson 2001, p. 155.

¹⁵³ Nilsson 2001, p. 155.

¹⁵⁴ Nilsson 2001, p. 155.

¹⁵⁵ Suominen 2011, p. 343.

¹⁵⁶ Suominen 2011, p. 341: 'One could argue that the recognition of foreign decisions should be as automatic as possible and that balancing different principles against e.g.; the rights of the defendant before recognition could jeopardise this recognition.'

¹⁵⁷ Janssens 2013, p. 319.

¹⁵⁸ Weyembergh 2013, p. 970.

reconcile both concerns and to find a right balance between them, i.e. avoiding as much as possible double checks and controls, but avoiding at the same time blind confidence and “deresponsibilisation” of the competent executing authorities’.¹⁵⁹

Some others even claim that home State control¹⁶⁰ is appropriate in the Area of Freedom, Security and Justice and (ideally) should apply fully.¹⁶¹ The differences in the practical observance of fundamental rights are not deemed an obstacle as any regulation of European legislation of mutual recognition and the application of that legislation by the Member States involved is subject to full respect for fundamental rights.¹⁶² The requirement of dual criminality and judicial cooperation based on ‘host State control’ is squarely rejected since with it borders are kept intact and dual regulation remains possible, which is deemed incompatible with the Area without internal borders.¹⁶³ In any event, basing legislation on mutual recognition does not necessarily mean that the principle should be applied fully. Legislation could leave exceptions as an intermediary step.¹⁶⁴

3.5. *Assessment*

As pointed out in Chapter 1, the current academic debate on mutual recognition is seeking to determine the implications it has for the substantive and procedural norms of the Member States, followed by attempts to formulate conditions for or limits to its application. In general the negative views on the potential role of mutual recognition are caused by the impression that mutual recognition is incompatible with national sovereignty and/or the defence of fundamental rights. In particular there seems to be the perception that mutual recognition leads to a loss of regulatory authority of Member States to protect those rights and interests. Hence, academics either reject the application of mutual recognition to judicial cooperation in

¹⁵⁹ Weyembergh 2013, p. 972.

¹⁶⁰ Meaning in the internal market that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls. In the Area of Freedom, Security and Justice, judicial cooperation this means that judicial decisions of one Member State can and should be recognised and executed by other Member States, because they have already satisfied home State controls.

¹⁶¹ Barents 2006, p. 363 (in Dutch): ‘Ook bestuursrechtelijke en gerechtelijke beslissingen komen daarvoor in aanmerking. Het is dan het vonnis of andere beslissing die vrij kan circuleren en overal in de ruimte de rechtsgevolgen kan ontplooiën die het recht van de lidstaat van oorsprong voorziet. Toepassing van het oorsprongslandbeginsel vormt daarom in theorie de ideale methode om het concept van de ruimte zonder grenzen ten uitvoer te leggen’.

¹⁶² Barents 2006, p. 365.

¹⁶³ Barents 2006, p. 363 (in Dutch): ‘Daarmee is overigens niet gezegd dat op basis van het bestemmingslandbeginsel geen strafrechtelijke samenwerking tussen de lidstaten zou kunnen plaatsvinden (...) Waar het om gaat, is dat deze methode ongeschikt is om gestalte te geven aan het concept van de ruimte zonder binnengrenzen, zoals dit is vastgelegd in de Europese verdragen. Tussen dit concept en het vereiste van dubbele strafbaarheid bestaat een inherente contradictie.’

¹⁶⁴ Barents 2006, p. 364.

criminal matters or calls for exceptions to its application, and/or additional harmonisation.

The problem with both the protagonists and antagonists of the application of mutual recognition to judicial cooperation in criminal matters is that assumptions are being made based on the definitions proposed by the Commission in the internal market,¹⁶⁵ and the Area of Freedom, Security of Justice in accordance with which mutual recognition implies the free movement of judicial decisions and hence an obligation for (EU) citizens to be prosecuted and sentenced across the Union:

Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extra-national implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.¹⁶⁶

When one approaches mutual recognition as an integration method, it is seen as equivalent to home State control, implying that products/services lawfully put on the market in one Member State can and should be allowed access to the markets in other Member States, because they have already satisfied home State controls. The Commission has been tempted to use home State control and mutual recognition interchangeably in its quest to avoid harmonisation in establishing the internal market. The same seems to have been the case as regards the establishment of the Area of Freedom, Security and Justice, although its policy documents show that the Commission was well aware of the need for the harmonisation of criminal procedure¹⁶⁷ and the fact that, in the absence of the harmonisation of substantive criminal

¹⁶⁵ SEC (2009) 673: 'The mutual recognition principle in the non-harmonised area consists of a rule and an exception: (a) The general rule that, notwithstanding the existence of a national technical rule in the Member State of destination, products lawfully produced or marketed in another Member State enjoy a basic right to free movement, guaranteed by the EC treaty; and (b) The exception that products lawfully produced or marketed in another Member State do not enjoy this right if the Member State of destination can prove that it is essential to impose its own technical rule on the products concerned based on the reasons outlined in Article 30 or in the mandatory requirements developed in the Court's jurisprudence and subject to the compliance with the principle of proportionality.'

¹⁶⁶ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 2; Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant: 'Since the European arrest warrant is based on the idea of citizenship of the Union [...], the exception provided for a country's national, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union.'

¹⁶⁷ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 16, 19-20 (notably the procedural rights of suspects and criminal jurisdiction rules).

law, certain exceptions to free movement needed to be accepted.¹⁶⁸ The subsequent programme of measures of the Council and Commission was, however, already less ambitious regarding the abolition of the dual criminality requirement. Furthermore, it reverted to a declaration of general trust in each other's criminal justice systems instead of proposing concrete measures to safeguard the rights of suspects.¹⁶⁹ 9/11 shook up the implementation of the programme of measures in the sense that the application of mutual recognition to extradition procedures both concerning suspects and sentenced persons was introduced ahead of schedule.¹⁷⁰

As discussed in Chapter 2, the 'mutual recognition' paragraph in the *Cassis* judgment, should not be read as mandating home State control, since it stresses that the host State has to justify the application of its norms to products lawfully produced and marketed in another Member State.¹⁷¹ At the same time, the Court expanded the public interests that can be used to justify host State intervention (exceptions to free movement) in accordance with the 'rule of reason',¹⁷² meaning:

- the aim of the measure must be so important that it takes precedence over the objective of free movement;
- the measure must be proportional, meaning that it is both necessary and not more restrictive than needed;
- the measure cannot discriminate according to nationality, meaning it should apply to domestic and foreign products alike; and
- the measure may not duplicate a Community measure.¹⁷³

Although the case law on labelling requirements shows that there can be free movement in the absence of compliance with equivalent standards,¹⁷⁴ a wider assessment of the Court's case law regarding product requirements reveals that, particularly in more sensitive areas such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, the Court will not insist on market access without equivalent standards.

The mutual recognition of professional qualifications, discussed in Chapter 2, section 4, is more instructive for the application of mutual recognition in the Area of Freedom, Security and Justice. Based on *Vlassopoulou*, as codified by the Professional

¹⁶⁸ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 11 (on excluding from the scope of 'mutual recognition', 'some behaviours which are criminalised in certain Member States, but not in others.').

¹⁶⁹ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters 2001 O.J (C 12) 10.

¹⁷⁰ See *infra* section 5 on the European Arrest Warrant.

¹⁷¹ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 14.

¹⁷² Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 8.

¹⁷³ Gormley 2005, p. 23.

¹⁷⁴ *Cassis de Dijon* itself is an example of a product with a lower alcohol content being marketed with a label indicating the difference.

Qualifications Directive, a recognition procedure has to be in place within which the host State has to compare a migrant's qualifications and abilities with those required by the national system to see whether the applicant has the 'equivalent' skills to have access to the profession in the host Member State. If certain criteria are met, this equivalence is assumed. Member States are, however, still allowed to take compensatory measures based on objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity. Member States have to ensure an effective judicial remedy against the decision taken by their authorities.

The area of professional qualifications also better reflects the essence of mutual recognition, which is that effect needs to be given to factual and legal situations (established in other Member States) irrespective of the existence of harmonisation to 'take into account the interests of market [European] integration that the national legislation simply ignored'.¹⁷⁵ Looking at it from that perspective, the perceived consequences in terms of automaticity, simplification and acceleration of judicial cooperation are left up to political decision making in the specific context in which the principle is applied, which shields the Court from accusations of political activism on those matters.¹⁷⁶ However, at the same time the criminal justice equivalents of bureaucracy and protectionism need to be rooted out as they have no place in a single legal area.

Seeing mutual recognition as an obligation to be 'other-regarding' within a single legal area also militates against the idea of imposing limits on it. Certainly there are different interests at stake in a criminal justice context, but they do not affect mutual recognition as such but rather the way in which those interests are reconciled in the process of executing the judicial decision. We have seen in Chapter 2 that the Court and EU legislator have found a number of different ways to reconcile fundamental freedoms and public interests. It cannot be assumed that the application of mutual recognition to judicial decisions in criminal matters automatically implies that it is the suspect or sentenced person who should move. They will often not want to be moved and, for instance, in the context of the European arrest warrant, they may claim that detention and surrender are disproportionate interferences with their fundamental rights, including those based on their status of EU citizen and/or national of a Member State, if applicable, which have been infringed or will be infringed, as part of or following the surrender process.¹⁷⁷

The 'free movement of judicial decisions' might imply an infringement of individual rights, for instance, the right to liberty and security (Art. 6 EU Charter), the right to family life (Art. 7 EU Charter), the right to an effective remedy and to a fair trial (Art. 47 EU Charter) and the presumption of innocence and right of defence (Art. 48 EU Charter).¹⁷⁸ In accordance with Article 52 of the EU Charter, any limita-

¹⁷⁵ Maduro 2007, p. 820.

¹⁷⁶ Hatzopoulos 2008, p. 44-65 particularly criticising the Court's decision in Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633 as 'a striking application of the principle of mutual recognition, strengthened in this occasion by "trust" and "solidarity".'

¹⁷⁷ Cf. Opinion of AG Sharpston in Case C-396/11, para. 97; *infra* section 5.3.

¹⁷⁸ See *infra* section 5.3.

tion on the exercise of the rights and freedoms recognised by the Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union of the need to protect the rights and freedoms of others.¹⁷⁹ The principles of European law with which mutual recognition interacts, such as the proportionality principle, therefore take on another (an additional), meaning in the Area of Freedom, Security and Justice and apply differently from reconciling free movement and public interests in the internal market, except when free movement and fundamental rights need to be reconciled.¹⁸⁰

The basic idea behind mutual recognition is the establishment of a *single* legal area, the Area of Freedom, Security and Justice, in which exceptions to free movement based on national sovereignty have no place. However, that is the ideal, or the end goal, of a single legal area. It is noted that in the internal market this end goal is far from being achieved as new barriers to the internal market appear every time new market regulation is introduced. Exceptions both to the free movement of goods and persons are (still) accepted based on public policy in Treaty provisions as well as secondary EU legislation, but it needs to be recalled that these exceptions are subject to the control of the Court of Justice.¹⁸¹ If the Member States would be allowed a continuous call on national public policy without such control, even after the adoption of secondary EU legislation, it would undermine the application of that legislation and hence constitute a violation of the loyalty principle.¹⁸²

With the academic criticism in mind, in the next sections, the nature of mutual recognition will be further explored by looking at its interaction with the aims and principles of the Area of Freedom, Security and Justice, and its application in two specific fields (the European arrest warrant and *ne bis in idem*).

4. Aims of the Union as an Area of Freedom, Security and Justice

The historical overview and academic debates presented above reveal that a number of assumptions have been made by the European institutions and academics

¹⁷⁹ For examples of the application of this test see Case C-129/14, *Spasic*, not yet published, further discussed in section 3.5.3; Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others*, not yet published.

¹⁸⁰ See *infra* section 4.3; for examples of the reconciliation of free movement and fundamental rights in the internal market see Case C-112/00, *Schmidberger v Austria* [2003] ECR 5659; Case C-36/02, *Omega Spielhallen* [2004] ECR 9609.

¹⁸¹ Case 34/79, *Henn & Darby* [1979] ECR 3795; Case 41/74, *Van Duyn* [1974] ECR 1337; Case C-36/02, *Omega Spielhallen* [2004] ECR 9609; Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. (L 158) 77, Arts. 27 and 28.

¹⁸² Kessedjian 2007, p. 33-34; 'Initially it was thought that the public policy exception could still work as an exception to this negative obligation. However, in recent years it has become increasingly clear that even the public policy exception is limited by the principle of cooperation.'

about the contents of mutual recognition, its political and legal framework and consequences in the Area of Freedom, Security and Justice.

These assumptions will be tested against an analysis of the aims of the Union as an Area of Freedom, Security and Justice, its relationship with mutual recognition and the application of mutual recognition to extradition procedures between the Member States and as regards the definition of final decisions concerning the same acts in criminal matters barring further prosecution (*ne bis in idem*).

As mentioned in section 2, French President Giscard d'Estaing already called for a 'European Judicial Area' in the 1970s. In 1997 the Treaty of Amsterdam finally introduced a concept similar to the one Giscard has called for. Within this Area introduced by the Treaty of Amsterdam, 'Freedom', 'Security' and 'Justice' are offered to the European citizen. What this means exactly is still not clear, since these three individual aims and the relationship they have with each other has not been defined by the Treaty. We therefore have to look at Treaty provisions concerning concrete policy areas, multi-annual policy programmes drafted by the Member States, the Commission's communications, and actual policy developments to see how these notions have been implemented.

4.1. *The Notion of a European Area*

In accordance with ex Article 2 EU within the Area of Freedom, Security and Justice, the free movement of persons had to be ensured and appropriate measures with respect to external border controls, asylum, migration, and the prevention and combating of crime had to be taken. The Treaty of Lisbon further stresses the 'Area' aspect by clarifying that within it there can be no internal frontiers (and hence common policies need to be framed, a common approach needs to be developed at EU level).¹⁸³ Article 3(2) TEU now reads:

The Union shall offer its citizens an area of freedom, security and justice *without internal frontiers*, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

The appreciation of the aim of the Union's objective to maintain and develop itself as an 'Area of Freedom, Security and Justice' seems to differ depending upon in which language version it is read. One of the earliest comments on the 'Area of Freedom, Security and Justice' and the principle of mutual recognition in Dutch doctrine, by Swart, advised the reader to read the term in French (*Liberté, Sécurité et Justice*) for him to understand its true significance.¹⁸⁴ As already mentioned in Chapter 2, section 2, Schrauwen points out that the English term 'area' is not capable of covering the French term *espace*, which derives from the Latin *spatium*, which refers both to time and space, something which the English language fails to

¹⁸³ Duff 2009, p. 96.

¹⁸⁴ Swart 2001, p. 5; De Kerchove & Weyembergh 2000.

capture.¹⁸⁵ The establishment of the *espace* is, therefore, a project as such and not just a factual determination as the English word ‘area’ or the Dutch *ruimte* would suggest. This reading is confirmed by Vernimmen, Surano and Weyembergh 2009 who write that ‘la reconnaissance mutuelle est indissociable de l’idée d’un espace commun’, which translates as stating that one cannot dissociate mutual recognition from the idea of a common (legal) area.¹⁸⁶

Remnants of intergovernmentalism

Until the entry into force of the Treaty of Lisbon, the Area of Freedom, Security and Justice has been divided over two pillars (i.e. First Pillar – corresponding with the former Title IV of the Treaty establishing the European Community and the EU ‘Third Pillar’ – former Title VI, Provisions on police and judicial cooperation in criminal matters). As will be explained further below, judicial cooperation in criminal matters, as part of the ‘Area of Freedom, Security and Justice’, was governed by a more intergovernmental institutional structure. This division has masked that, also in judicial cooperation in criminal matters, we are dealing with aims that need to be achieved over a certain period of time. We only found a referral to them in the Community part covering asylum, migration, visa, border control and judicial cooperation in civil matters which in Article 61(e) EC (Nice) stated:

In order to establish progressively an area of freedom, security and justice the Council shall adopt: (...) – measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating within the Union in accordance with the provisions of the Treaty on European Union.

In the former Article 29 EU, the first article dealing with police and judicial cooperation in criminal matters, the objective stated in Article 2 EU, the establishment of an ‘area of freedom, security and justice, within which European citizens enjoy a high level of safety’ was repeated. That objective had to be achieved by ‘preventing and combating crime’, through ‘closer cooperation between judicial and other competent authorities of the Member States in accordance with the provisions of Articles 31(a) to (d) and 32¹⁸⁷ and the ‘approximation where necessary, of rules on criminal matters in the Member States in accordance with the provisions of Article 31(e)’.

The ‘pillar structure’ also had consequences for the type of legislation that could be proposed, allowing the use of conventions and so called ‘framework decisions’,¹⁸⁸ which were similar to directives in the sense that they required implementation but were excluded from having direct effect (although the Court of Justice accorded indirect effect to them in its case law).¹⁸⁹ The ‘pillar structure’ affected the

¹⁸⁵ Schrauwen 1997, p. 140.

¹⁸⁶ Vernimmen-van Tiggelen, Surano & Weyembergh 2009, p. 11.

¹⁸⁷ Art. 29 was amended by the Treaty of Nice to include a reference to Eurojust: ‘facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions’.

¹⁸⁸ Art. 34(2)(a) EU (Nice).

¹⁸⁹ Case C-105/03, *Pupino* [2005] ECR 5285.

role of the Commission and the Member States in proposing legislation, with each Member State being able to propose legislation alongside the Commission,¹⁹⁰ the role of the European Parliament and Council in deciding upon the adoption of this legislation, with the Council deciding by unanimity and the Parliament only having consultation right,¹⁹¹ and the role of the Court of Justice in adjudicating upon this legislation, providing for a right for national courts to ask preliminary questions dependent upon national government's acceptance of the Court's jurisdiction¹⁹² and it also resulted in the Commission not having the right to bring infringement procedures.¹⁹³

Treaty of Lisbon: confirmation of mutual recognition as a policy principle

After the entry into force of the Treaty of Lisbon,¹⁹⁴ the provisions relating to police and judicial cooperation in criminal matters have been moved from the EU Treaty to the Treaty on the Functioning of the EU. The *Treaty Establishing a Constitution for Europe* was intended to confirm the status of mutual recognition as a policy principle in the Area of Freedom, Security and Justice.¹⁹⁵ Although this specific provision was dropped in the negotiations on the Treaty of Lisbon, mutual recognition of judicial decisions in criminal matters has now been incorporated into the Treaty on the Functioning of the European Union.¹⁹⁶ In accordance with Article 67(3) TFEU:

The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

In accordance with Article 82(1) TFEU: 'judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States'. Approximation of criminal jurisdiction rules (Art. 82(1)(b) TFEU) and the definition of criminal offences (Art. 83(1) TFEU) is possible irrespective of the existence of mutual recognition measures.¹⁹⁷ Approximation of procedural rights in criminal proceedings and rules on the mutual admissibility of evidence (Art. 82(2) (a) and (b) TFEU) are, however, limited to the extent they are 'necessary' to facilitate

¹⁹⁰ Art. 34 EU (Nice).

¹⁹¹ Art. 39(1) EU (Nice).

¹⁹² Art. 35(1-4) EU (Nice).

¹⁹³ Art. 35(7) EU.

¹⁹⁴ For an overview of the institutional framework after the entry into force of the Lisbon Treaty see Peers 2011a, p. 41-107.

¹⁹⁵ Art. I-42: '1. The Union shall constitute an Area of Freedom, Security and Justice: (b) by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions', O. J. (C 310) 32 of 16.12.2004.

¹⁹⁶ Consolidated version of the Treaty on the Functioning of the European Union, O.J. (C 115) 47 of 09.05.2008.

¹⁹⁷ Arts. 82(1) and 83(1) TFEU.

mutual recognition, meaning it is subjugated to measures implementing the principle of mutual recognition in the area of judicial cooperation in criminal matters.¹⁹⁸

In this regard, it is interesting to note that there is no equivalent provision to Article 114(3) TFEU (harmonisation internal market) which would require a high level of procedural rights when implementing the principle of mutual recognition of judicial decisions in criminal matters. Even though the mere mentioning of the term ‘high level of procedural rights’ might not be a perfect solution either, as it would not compel the enactment of a measure in accordance with the standards pertaining to the countries with the highest levels of protection. It merely requires that a high level of protection should be taken as the base.¹⁹⁹ With this caveat, the insertion of such a requirement would at least be more forward looking given the context of the EU’s fundamental rights obligations based on Article 6 TEU, which refers to the EU Charter and fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States.

One might even take this discussion one step further and wonder why the rights of suspects are placed under the heading of judicial cooperation in criminal matters at all. Just like data protection, which used to be treated as a derivative of the internal market but which has now achieved its own legal basis in Article 16 TFEU, the rights of suspects could be grouped in a separate chapter on access to justice implementing these provisions of the EU Charter close to the provisions on European citizenship.

Variable geometry

As a general rule, the ordinary legislative procedure now applies (Commission proposal, co-decision with Parliament and qualified majority voting in the Council of Ministers)²⁰⁰ to harmonisation in the area of judicial cooperation in criminal matters, although one-quarter of the Member States (currently seven) is still allowed to propose EU legislation in the area.²⁰¹

Member States have also foreseen an ‘emergency brake’ system, which allows a Member State to object to a measure in case it has concerns that measures concerning procedural rights (Art. 82(2)) would affect ‘fundamental aspects of its criminal justice system’ and thereby ask for the proposal to be referred to the European Council. The European Council can, within a period of four months, either decide to return the proposal to the Council and let it continue under the ordinary legislative

¹⁹⁸ Wade 2014, p. 63: ‘The criminal justice-related remit assigned to the EU thus far to, above all, regulate repressive powers but not equivalent ones defending the liberty of citizens is in core not only a governance (and external public relations) problem for the Union, but fundamentally a greater threat to individual rights still.’

¹⁹⁹ Craig & De Búrca 2011, p. 592: ‘Article 114(3) was included to placate countries such as Germany and Denmark, which were concerned that the harmonisation measures might not be stringent enough. The wording of Article 114(3) does not, however, compel the enactment of a measure in accordance with the standards pertaining the countries with high levels of protection; it merely requires that a high level of protection should be taken as the base.’

²⁰⁰ Art. 82(1) TFEU.

²⁰¹ Art. 76 TFEU; Peers 2011a, p. 60.

process, or, if the European Council cannot agree, and at least nine Member States wish to, they can establish an enhanced cooperation.²⁰²

Furthermore, the UK and Ireland have negotiated a special protocol (No. 21) allowing them to decide within three months whether they would like to 'opt in' to the proposal or initiative.²⁰³ In accordance with protocol No. 22, Denmark can decide within six months after the adoption of a measure whether it wishes to implement it in national law.²⁰⁴

Also in terms of enforcement, special arrangements remain. Protocol No. 36 on transitional provisions froze the competence of the Court of Justice and Commission regarding police and judicial cooperation measures adopted before the entry into force of the Treaty of Lisbon (including the FD EAW) for a five year transitional period (until 1 December 2014), unless the measure was amended. This means that, until then, the Commission has not been able to bring infringement procedures concerning these measures and the Court's jurisdiction remained dependent upon its acceptance by national governments. This protocol also allowed the UK not to accept the extended powers for Commission and Court over these pre-Lisbon measures. However, this implied that those measures ceased to apply to the UK as of the end of the transitional period, although it opted back into a number of the measures individually, with the agreement of the other Member States.²⁰⁵

The 'Area' therefore now has an institutional structure which better reflects the Community method. It remains clear, however, that Member States are not ready to pool their sovereignty completely, building in possibilities for opting in, staying out and enhanced cooperation. Furthermore, until 1 December 2014, the Commission and Court were limited in their power to effectively enforce the *acquis* adopted before the entry into force of the Treaty of Lisbon. Any substantive appreciation of the Area of Freedom, Security and Justice will have to take these factors into account.

4.2. *Justice*

The confusion surrounding the aims of the 'Area of Freedom, Security and Justice' has not limited itself to the 'Area' part. The 'Justice' part has been interpreted incorrectly as well. Until the entry into force of the Treaty of Lisbon, the Dutch language version of Article 2 TEU, for instance, read *rechtvaardigheid*,²⁰⁶ which would make it a substantive aim for the European Union to strive for 'fairness'. Read in combination with the Court's interpretation of its mandate based on Article

²⁰² Art. 82(3) TFEU; Peers 2011a, p. 93.

²⁰³ Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. (C 83) 295 of 30.03.2010.

²⁰⁴ Protocol (No. 22) on the position of Denmark, O.J. (C 83) 299 of 30.03.2010.

²⁰⁵ Protocol (No. 36) on transitional provisions, O.J. (C 83) 322 of 30.03.2010; Peers 2011a, p. 61-64; Council of the European, 'UK notification according to Article 10(4) of Protocol No. 36 to TEU and TFEU', document No. 12750/12 of 26 July 2013; *infra* section 5.3.1.2.

²⁰⁶ Consolidated version of the Treaty on European Union, O.J. (C 321E), 29.12.2006, p. 11, Art. 2 (Dutch): 'handhaving en ontwikkeling van de Unie als een ruimte van vrijheid, veiligheid en rechtvaardigheid (...).'

19 TEU to 'ensure that in the interpretation and application of the Treaties the law is observed',²⁰⁷ one would at least assume it to mean compliance with the 'rule of law' as laid down in Articles 2 and 6 TEU.²⁰⁸

With the entry into force of the Treaty of Lisbon, the Dutch version of Article 3(2) TEU has been corrected to read *recht*.²⁰⁹ If 'Justice' does need to be interpreted as meaning 'rule of law', we are immediately faced with a second question, however, which is what the rule of law should mean in the context of European Law,²¹⁰ whether it implies minimum standards,²¹¹ and, if so, how the Parliament, Commission, Council and Court of Justice are to enforce them.²¹²

Aspects of the 'rule of law' have been defined, for instance, by the Council of Europe's Venice Commission, but there is no standard definition.²¹³ In accordance with Article 2 TEU:

²⁰⁷ Case 294/83, *Les Verts*, para. 23: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty.' Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation*, ECR [2008] 6351 para. 281: 'In this connection it is to be borne in mind that the Community is based on the rule of law, in as much as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions (Case 294/83 *Les Verts v Parliament* [1986] ECR 1339, para. 23).'

²⁰⁸ Art. 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail; Art. 6 TEU: The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

²⁰⁹ Barents & Brinkhorst 2006, p. 588; Consolidated version of the Treaty on European Union, O.J. (C 115) 17 of 09.05.2008, Art. 3: (Dutch) 'De Unie biedt haar burgers een ruimte van vrijheid, veiligheid en recht (...)'; (French) 'L'Union offre à ses citoyens un espace de liberté, sécurité et de justice(...)'; (German) 'Die Union bietet ihren Bürgerinnen und Bürgern einen Raum der Freiheit, der Sicherheit und des Rechts' (...); (English) 'The Union shall offer its citizens an area of freedom, security and justice (...)'.
²¹⁰ Pech 2009.

²¹¹ Anne Birgitte Gammeljord, The European approach, 'Are there minimum standards for the rule of law in Europe?', speech held to commemorate the 50th anniversary of the Bundesrechtsanwaltskammer', on file with the author.

²¹² The Commission proposes to compare the quality of justice systems; Communication from the Commission, 'The EU Justice scoreboard, a tool to promote effective justice and growth', COM (2013) 160: seeking accountability for the human rights violations due to the CIA rendition programme and the sliding of democracy in Hungary have, however, represented unresolved challenges to the EU's institutional system in accordance with the enforcement mechanism laid down in articles 6 and 7 TEU; corruption equally poses a challenge to the rule of law, see Communication from the Commission, 'Fighting corruption in the EU', COM (2011) 308.

²¹³ Report on the rule of law, CDL-AD (2011), Strasbourg 4 April, 2011, para. 41.

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

In accordance with Article 6(1) TEU:

The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties,

and, in accordance with Article 6(3) TEU:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

When reading Articles 2 and 6 EU together, one may assume that the 'rule of law' referred to in Article 2 at least covers respect for the fundamental rights referred to under Article 6 EU. This reading is confirmed by Article 67(1) TFEU which stipulates that 'the Union shall constitute an area of freedom, security and justice *with respect for fundamental rights* and the different legal systems and traditions of the Member States'. It is further supported by the fact that the Charter of Fundamental Rights became binding with the entry into force of the Treaty of Lisbon. *Tridimas* makes a distinction between systemic principles, principles deriving from the rule of law and other principles of European law, as discussed in Chapter 1.²¹⁴ Principles deriving from the rule of law include respect for fundamental rights. The compatibility of measures based on mutual recognition with these principles deriving from the rule of law will be revisited in the section on the European arrest warrant.

4.3. *Freedom vs. Security?*

In the absence of clear definitions in the Treaty itself, the substantive implications of the Area of Freedom, Security and Justice were first assessed by a European Commission Communication²¹⁵ and then by a Commission and Council 'Action plan' in 1998.²¹⁶ They stated that the notions of Freedom, Security and Justice are 'closely interlinked' since 'freedom loses much of its meaning if it cannot be enjoyed in a secure environment and with the full backing of a system of justice in which all

²¹⁴ Tridimas 2006, p. 4.

²¹⁵ Commission Communication, *Towards an Area of Freedom, Security and Justice*, COM (1998) 459 of 14 July 1998.

²¹⁶ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the Area of Freedom, Security and Justice, O.J. (C 19) of 23 January 1999, p. 1.

Union citizens and residents can have confidence' and that since one could not be achieved in full without the other two, the right balance between them had to be 'the guiding thread for Union action'.²¹⁷

The Commission and Council policy plans and multi-annual programmes have interpreted the three concepts (freedom, security and justice) in a way which stresses the security²¹⁸ concept within all three. In their 1998 'Action plan', for instance, the Council and Commission described 'Freedom' as the 'free movement of persons' plus the 'freedom to live in a law-abiding environment' and 'respect for privacy',²¹⁹ 'Security' as to 'prevent and combat crime'²²⁰ and 'Justice' as 'facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society',²²¹ 'facilitation of procedures and, where necessary approximation of legislation'²²² and 'adequate and comparable procedural guarantees' in criminal matters.²²³

Furthermore, these policy plans and programmes let go of the conceptual division between 'freedom', 'security' and 'justice'. The Stockholm programme,²²⁴ which followed on from the Tampere and the Hague programmes as the Union's main policy document for the development of the Area of Freedom, Security and Justice for the 2010-2014 period was divided into six chapters (spanning 82 pages) including a chapter called 'making people's lives easier: a Europe of law and justice'. In this chapter 'mutual recognition' was treated, which makes life easier for some for sure, but not for others...

The blurring of the concepts of freedom and security to the advantage of the latter and the idea of the need to balance freedom and security lead to a deviation from international and European human rights norms, as pointed out by Bigo, Carrera and Guild who criticise the idea that freedom and security are analogous subjects, which can be compared to and weighed against each other, instead of justifying security measures as necessary and proportionate interferences with fundamental rights:

²¹⁷ Commission Communication, *Towards an Area of Freedom, Security and Justice*, COM (1998) 459 of 14 July 1998, p. 1, below 'the objectives'; Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the Area of Freedom, Security and Justice, O.J. (C 19) of 23.01.1999, p. 2, para. 5.

²¹⁸ For a critical analysis of this metaphor, see Bigo 2006, p. 35: 'I would suggest saying that we need to adapt the titles to their actual content by renaming the three parts: 1. strengthening security, 2. strengthening security, 3. strengthening security.' Guild, Carrera & Balzacq 2010, p. 39.

²¹⁹ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the Area of Freedom, Security and Justice, O.J. (C 19) of 23 January 1999, p. 3, paras. 6 and 7.

²²⁰ Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on the Area of Freedom, Security and Justice, O.J. (C 19) 3 of 23.01.1999, para. 11.

²²¹ *Ibidem*, para. 15.

²²² *Ibidem*, para. 17.

²²³ *Ibidem*, para. 19.

²²⁴ The Stockholm programme an open and secure Europe serving and protecting the citizens, Council document 17024/09 of 02.12.09.

‘The precedence of liberty as a value that must be protected by all states, EU institutions and mechanisms is key to ensuring that security in its coercive form is used only as a tool to support freedom and is subject to its priority. Hence the individual is entitled to freedom and any interference with that freedom must be justified by the state on limited grounds and be subject to the important procedural requirements set out in European and international fundamental and human rights instruments.’²²⁵

It will be seen in the sections on the European arrest warrant and *ne bis in idem* to what extent the blurring of freedom and security and the idea that one can balance freedom and security as promoted by the Commission and Council policy have had an impact on the application of mutual recognition.

4.4. Role of the European Citizen

As mentioned in relation to Article 3(2) TEU, ‘the Union shall offer its citizens an area of freedom, security and justice *without internal frontiers* (...)’ This calls for a further investigation into the relationship between the European citizen and the AFSJ.²²⁶ In this context, a helpful suggestion made by Klip is to revisit the *Van Gend en Loos* case²²⁷ in the context of the development of European (Union) criminal law:

‘The recognition of rights for European Union nationals outside the economic sphere will require the formulation of additional or new general principles of Union law. This may lead to principles that are much more oriented towards fundamental rights, than to the economic well-being of the European Union. Such principles may relate, for instance, to the relationship between the principle of proportionality and the principle of mutual recognition in surrender proceedings or to the meaning of the rights of the defence in the context of mutual recognition. In this regard it is useful to recall the conclusion of the Court in *Van Gend en Loos*, when it dealt with the new legal order that had come into being: “The subjects of the new legal order are comprised not only of the Member States, but also of their nationals”.’²²⁸

Van Gend en Loos is a prime example of the Court employing a teleological interpretation²²⁹ to further European integration. In particular the key assertion of this

²²⁵ Guild, Carrera & Balzacq 2010, p. 41. On the interpretation of Art. 6 EU Charter on the right to liberty and security see the EU network of independent experts on fundamental rights, Commentary of the Charter of Fundamental Rights of the European Union, June 2006, p. 67, available at: <http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf> (last consulted on 3 May 2015).

²²⁶ Mitsilegas 2012, p. 322: ‘This system of cooperation has a significant impact on the reconfiguration of the relationship between the individual and the State in the Area of Freedom, Security and Justice. Cooperative systems have been designed privileging the interests of the State and have resulted in a considerable extension of the reach and power of the State. In this scheme, the protection of the rights of the affected individuals has not been given detailed consideration.’

²²⁷ Case 26/62, *Van Gend en Loos* [1963] ECR 1; see section 3.2 on the relationship with general principles.

²²⁸ Klip 2012, p. 471.

²²⁹ A method which interprets provisions in the light of the purpose, values, legal, social, and economic goals these provisions aim to achieve.

case is that a citizen can rely on European Law against his or her own Member State.

When one compares this with the Area of Freedom, Security and Justice ‘offering’ a high level of safety to the European citizen, what stands out immediately is this notion of a European citizen being offered something by the Member States instead of enforcing its rights in accordance with EU law. European citizens are, however, increasingly empowered to make use of democratic and legal rights to steer European integration in this Area, which has been implemented for the last 15 years by the Member States and to a lesser degree the Commission and the European Parliament. Instead of offering an Area of Freedom, Security and Justice to European citizens with checks and balances between transnational law enforcement and defence rights, they have been mostly occupied with demonstrating collective punitive will.²³⁰

The European Parliament is now directly involved in the shaping of most of the EU criminal justice legislation through the ordinary legislative procedure, with the Directive on Access to a Lawyer and the European Investigation Order as notable examples. Furthermore, the transitional period expired on 1 December 2014. Since then, the Commission is able to bring infringement procedures concerning criminal justice measures, like the FD EAW, and the Court of Justice has full jurisdiction to receive questions on the interpretation of these measures. The European Parliament, Commission and Court of Justice are therefore growing in their roles of offering democratic scrutiny and fundamental rights accountability over ASFJ policies and actions.²³¹ The European citizen now has more power to act through the legal and democratic channels available to it.

Mutual recognition measures, such as the Framework Decision on Transfer of Prisoners have clarified that these measures should be applied in accordance with applicable primary and secondary EU law on EU citizenship.²³² In this context, it should be recalled that Union citizens who have resided legally for a continuous period of five years in the host Member State obtain the right of permanent residence, strengthening the feeling of Union citizenship as a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.²³³

²³⁰ Wade 2014, p. 65: ‘Therefore where collective executives demonstrate above all punitive will, this too will become the nature of supra-national criminal justice. Despite its unique nature as a governance level, there is little evidence to suggest the EU for which fundamental criminal justice tenets and mechanisms developed so far were mostly created within the context of the inter-governmental, pre-Lisbon pillar-forms a particular exception to this.’

²³¹ Zimmermann, Glaser & Motz 2011, p. 65: ‘Regardless of whether there is still a democratic deficit in the legislation of the EU, harmonisation measures upon which the European Parliament has decided pursuant to the ordinary legislative procedure would allow citizens to influence the creation of supranational standards that would apply to every national measure in the field of criminal law.’

²³² Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. (L 327) 27 of 05.12.2008, recitals 15-16.

²³³ Directive 2004/38/EC, Art. 16, recital 17.

Legislation on Union citizenship, however, does not deal with any *obligation* to stand trial across the Union as defined by the European Commission. The closest provision deals with circumstances in which Member States may expel EU nationals or their family members on public policy or security grounds defined in Article 28 of Directive 2004/38 which could, however, be applied *mutatis mutandis* to the situation in which a person is surrendered to serve a sentence in another Member State without his or her consent.²³⁴

Moreover the protection against discrimination European citizens enjoy vis-à-vis host State nationals only applied when there is intra-EU mobility or when the person exercises free movement. In the AFSJ, although this exercise of free movement by the EU citizen leads to an obligation of mutual recognition between Member States and the discrimination is not against host State nationals but those of the State of origin. That discrimination consists of being subjected to differences in criminal law, criminal procedures, sentencing policies as well as prison conditions.²³⁵ Furthermore there seems to be a tendency to limit rights derived from EU citizenship, instead of expanding them to fundamental rights to liberty and fair trial.²³⁶

Another aspect concerns the notion that individual liberty needs to be traded in for collective security instead of a rights-based approach in which the State has to justify its individual actions as being necessary and proportionate to fight crime. It should be noted here that the European citizen is not a unitary concept and the chance of someone becoming involved with the criminal justice system, either as a suspect, witness or victim, might mean finding oneself at the wrong side of the

²³⁴ Directive 2004/38/EC, Art. 28. Protection against expulsion: '1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin; 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security; 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989'; Case C-145/09, *Pangiotis Tsakourdis*, paras. 50-52 in particular; Craig & De Búrca 2011, p. 756-759.

²³⁵ With the possible exception of the Nordic Member States which are very close to each other in these matters, see Suominen 2014.

²³⁶ Van den Brink 2012, p. 280: 'The question that needs to be answered is whether all EU fundamental rights are EU citizenship rights. A positive answer would have the result that the infringement of an EU citizen's fundamental rights could bring the situation by its nature and consequences within the scope of Union law. A European citizen would then be able to rely on EU fundamental rights in a purely internal situation.' Kochenov 2013, p. 515: 'Answering the question 'the right to have what rights?' is crucial in assessing EU citizenship's future, as well as the interrelation between EU citizenship and the Charter of Fundamental Rights as potentially competing vehicles of EU human rights protection.'

trade-off made by someone else.²³⁷ Bigo, Guild and Carrera rightly ask for whom collective security is a public good:

‘Who is collective security a public good for? Can the individual who is falsely imprisoned be the recipient of a public good? Or is such a person rather the object of interference with their right to freedom? In order to seek to define coercive security as a public good one must accept that the recipient of the public good is the public. But that public is composed of many different individuals, families and groups. Economic and social disparities among them mean that access to public goods, and this is particularly true of coercive security, mean that access to public goods is far more available for the protection of some individuals and groups and their property than it is for others.’

The problem here is that the EU institutions, notably the European Parliament, which could give voice to the concerns, are still struggling to establish their democratic legitimacy. As long as that legitimacy is in doubt, Member States and their courts are happy to fill the security²³⁸ and liberty²³⁹ gaps. The question is whether that is a permanent state of affairs calling for a rethinking of European integration in this area or whether the ever closer Union is on the horizon after all.

As noted when concluding on the concept of the internal market, the fact that it strives for a highly competitive social market economy provides entails a procedural as well as a substantive goal. This is important to make sure that both free movement and government intervention are ensured, otherwise it is just an area without values promoting free movement as such. Applying this logic the Area of Freedom, Security and Justice seeks to merge the criminal justice systems of the Member States into a European Union criminal justice area. This calls for a rethinking of the possibilities for the various actors in these criminal justice systems, and most notably for the individual. So far, the consequences of the right of individuals as European citizens to free movement and residence are not sufficiently recognised in the Area of Freedom, Security and Justice and its judicial cooperation instruments. It is to be expected that the enhanced powers of the European Parliament and the end of the transitional period will result in this relationship being explored further during the upcoming period.

²³⁷ Guild, Carrera & Balzacq 2010, p. 40.

²³⁸ Council of the European Union, Living in an Area of Freedom, Security and Justice, see <http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/PU2088_BROCH_JAI_EN.qxd.pdf> (last consulted on 3 May 2015), p. 4: ‘The creation of an area of freedom, security and justice is closely tied to completion of the Single Market and its four “freedoms”. The free movement of persons, one of the four fundamental freedoms, resulted in the abolition of controls at internal borders of the countries belonging to the Schengen Area. This raises issues for the internal security of each Member State and of its residents.’

²³⁹ German Constitutional Court, decision of 30 June on the Act approving the Treaty of Lisbon, see <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html> (last consulted on 3 May 2015); Zimmermann, Glaser & Motz 2011, p. 63.

4.5. *Relationship with Mutual Recognition*

It remains unclear what the substantive implications of the 'Area of Freedom, Security and Justice' are. Is it just a completion of the Single Market by extending the rights of free movement and residence to all European citizens, plus measures to compensate for the perceived 'security gaps' created by this new situation? Or is there more on offer in terms of an obligation to create a true 'European criminal justice area' similar to the obligation to create a 'highly competitive social market economy' as now codified by Article 3 TEU?²⁴⁰ Such an area could, for instance, draw on the constitutional traditions common to the Member States and ECHR case law, while taking into account the specific supranational context of the European Union.²⁴¹

For the moment, subject to future steps taken by the EU's institutions, notably the European Court of Justice – also having in mind opinion 2/13 on the draft agreement providing for EU accession to the ECHR²⁴² and the European Parliament, the more modest interpretation remains more persuasive. The Area of Freedom, Security and Justice was born out of the 'uncompleted aims' of the Single Market, particularly the free movement of persons. At the same time, the consequences of this free movement were seen in terms of law enforcement cooperation. Hence the project was launched. As pointed out in Chapter 1, in the EU's supranational context that means that there must be trust in the judicial decisions of the other Member States, instead of relying on the reciprocity principle. However, that trust is undermined by the fact that there has been a transitional period as regards the enforcement powers of the European Commission, the jurisdiction of the Court of Justice, and the more permanent possibilities to opt in to or engage in enhanced cooperation. This has led to an uneven development of the AFSJ for citizens and Member States alike and to the harmonisation of procedural rights trailing behind judicial cooperation measures and parts of the *acquis* not being applicable in certain Member States' due their choice not to opt in.²⁴³ This is all the more troublesome in an area in which immediate action is often required to avert or remedy fundamental rights violations.

Certain translations of the word 'justice' could have led to it being mistaken by some as meaning that the Union strives for fairness in a general way. The ambition is probably more modest in the sense that the Union aims to respect the rule of law, and notably fundamental rights derived from it. Even so, such an interpretation would not be without value, since in accordance with its own law it subjects itself to the EU Charter and fundamental rights, as guaranteed by the ECHR and as they

²⁴⁰ For a discussion on priorities for such a European criminal justice area see Wade 2014; European Criminal Policy Initiative 2013.

²⁴¹ Wade 2014, p. 66-67.

²⁴² Opinion 2/13, on the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, not yet published; Chapter 1, section 3.4.1.

²⁴³ Cf. Mitsilegas, Carrera & Eisele 2014.

result from the constitutional traditions common to the Member States, as principles of European law.

The lack of clarity as regards the substantive implications and ambitions of the 'Area of Freedom, Security and Justice' makes it difficult to place mutual recognition (of judicial decisions in criminal matters) within its context.

It is interesting that the origin of mutual recognition in the Area of Freedom, Security and Justice has at least two 'founding fathers'. The idea of the UK, although it mentioned the Single Market as a good example, mostly tried to avoid harmonisation in accordance with the 'vertical solution' of the *Corpus Juris*. The Commission based the idea on the perceived success of mutual recognition in the internal market. The Nordic Member States supported the UK's efforts, given the close cooperation among them. This list does not even include the response and perception of other Member States such as Spain and Germany, where the debate surrounding mutual recognition is phrased either in the context of the fight against terrorism or national sovereignty.²⁴⁴

In spite of its emphasis on security, the Commission's 2000 Communication on final decisions in criminal matters was very perceptive in picking up on the relationship between mutual recognition, harmonisation and fundamental rights. The Member States' interpretation of 'mutual recognition' remained one in which this relationship is either underestimated or one in which room for exceptions based on national sovereignty, such as dual criminality, is retained.²⁴⁵ Given the fact that the Member States have been dominant in the institutional framework concerning judicial cooperation in criminal matters, it is this interpretation that has prevailed over the last decade and a half.

There has not been a Community nor coherent approach to mutual recognition in the Area of Freedom, Security and Justice so far. In the next sections it will be presented to what extent the conclusion drawn in Chapter 2 on the internal market, that mutual recognition has the power to work as a catalyst for further integration may also be applied the Area of Freedom, Security and Justice.

5. European Arrest Warrant

In the previous sections this book has analysed the nature and core value of the mutual recognition of judicial decisions in criminal matters by looking at the historical developments of EU criminal justice cooperation, the discussions in the scholarly literature concerning its application to this field and the relationship between mutual recognition and the aim for the Union to become an Area of Freedom, Security and Justice.

From these sections it becomes clear that there are at least three different (and to a certain extent competing) theories on the origins of mutual recognition in the Area of Freedom, Security and Justice, without taking into account the responses by other Member States:

²⁴⁴ See, for example, Jimeno 2007 on Spain and Schünnemann 2006 on Germany.

²⁴⁵ Cf. Zeder 2009.

- the UK's idea which, although inspired by the operation of mutual recognition in the internal market, mostly tried to avoid the 'vertical solution' of the *Corpus Juris*, European Public Prosecutor;
- the Commission's idea which promotes the mutual recognition of judicial decisions in criminal matters, based on the perceived success of mutual recognition in the internal market; and
- the Nordic Member States' position of supporting the UK's efforts, given the close cooperation among them.²⁴⁶

Furthermore, Member States are not ready to pool their sovereignty completely in the Area of Freedom, Security and Justice, and therefore they built in a transitional period and possibilities for opting in, staying out and enhanced cooperation.

Moreover there is a lack of clarity as regards the substantive implications and ambitions of the 'Area of Freedom, Security and Justice' and its relationship with the European citizen. These issues make it difficult to appreciate the nature of mutual recognition (of judicial decisions in criminal matters) within its context.

There is also still an active academic debate regarding the question whether mutual recognition can be applied in criminal matters, an area which is very close to national sovereignty and fundamental rights. Even among those who accept its application, there are still calls for limits and exceptions to its application and/or additional harmonisation of the criminal procedures and substantive criminal laws of the Member States.

In this section, on the FD EAW,²⁴⁷ the first of two case studies (while the second will be on *ne bis in idem* and addressed in *supra* section 6) will further explore the nature of mutual recognition in accordance with the methodology outlined in Chapter 1, by:

- looking at the impact of the application of mutual recognition to extradition procedures in the FD EAW and particularly its impact on fundamental rights, exploring, where relevant, its national implementation and interpretation by the Court of Justice and domestic courts (section 5.1);
- looking at its interaction with additional harmonisation/approximation measures focusing on procedural rights of suspects and accused persons and flanking judicial cooperation/mutual recognition measures (section 5.2),²⁴⁸ and

²⁴⁶ Most recently culminating in the Nordic Arrest Warrant, see Suominen 2014.

²⁴⁷ 2002 O.J. (L 190) 1.

²⁴⁸ For the relationship with substantive EU criminal law see the Commission Communication Towards and EU criminal policy: ensuring the effective implementation of EU policies through criminal law, COM (2011) 573: European Parliament resolution of 24.04.2012 on an EU approach to criminal law, P7 (2012)0208, in particular recital F: 'whereas the principle of mutual recognition is gaining acceptance in an increasing number of political fields, in particular in relation to judgments and judicial decisions, and whereas it is a principle based on mutual trust, which requires the establishment of minimum protection standards at the highest possible level'; Klip 2012.

- looking at its relationship with principles of EU law outside the context of harmonisation, in particular the rule of law and the principles that derive from it,²⁴⁹ such as fundamental rights and proportionality (section 5.3).

Before addressing these discussions, the FD EAW will be shortly introduced below. As mentioned in section 2 above, in accordance with the Tampere European Council's conclusions, the introduction of the concept of mutual recognition of judicial decisions in criminal matters implied that extradition procedures for sentenced persons needed to be replaced by a 'simple transfer of such persons in accordance with Article 6 TEU'²⁵⁰ and that these conclusions also proposed to consider 'fast track extradition procedures, without prejudice to the principle of fair trial'²⁵¹ for persons wanted for prosecution in another Member State.²⁵²

In response to the 9/11 attacks on New York and Washington, these fast track extradition procedures, now renamed 'surrender' were, however, introduced ahead of schedule to meet the immediate need to more effectively fight terrorism. Also, the FD EAW²⁵³ extradition for prosecution and execution of a sentence were combined in a single instrument.²⁵⁴

The urgency surrounding the adoption of the FD EAW is also reflected by the speedy negotiations leading to the adoption of the complex measure within less than a year (where negotiations can easily take two to three years in comparable dossiers). The Commission submitted its 'Proposal for a FD EAW and the Surrender Procedures between the Member States'²⁵⁵ on 19 September 2001. On 21 September 2001 an Extraordinary European Council then directed the Justice and Home Affairs Council to elaborate an agreement on this Framework Decision at the latest by 6-7 December 2001.

In accordance with Article 39(1) EU (Nice), the Council consulted the European Parliament on the Commission proposal. On 29 November 2001 the European

²⁴⁹ Tridimas 2006, p. 4, as discussed in section Chapter 1, section 3.2.

²⁵⁰ Presidency Conclusions - Tampere European Council, 15-16/10-1999, Bull. 10/1999, point 35.

²⁵¹ *Ibidem*.

²⁵² The 2001 Programme of measures implementing the mutual recognition of judicial decisions in criminal matters equally retained a split between sentenced persons and suspects. Regarding sentenced persons, the Programme of measures proposed to adopt an instrument 'abolishing the formal extradition procedure and allowing a person attempting to flee justice after final sentencing to be transferred to the sentencing State in accordance with Article 6 of the Treaty on European Union'. Regarding suspects the Programme of measures proposed to 'seek means of establishing, at least for the most serious offences in Article 29 of the Treaty on European Union, handing-over arrangements based on recognition and immediate enforcement of the arrest warrant issued by the requesting judicial authority'. Those arrangements would, *inter alia*, 'spell out the conditions under which an arrest warrant would be a sufficient basis for the individual to be handed over by the competent requested authorities with a view to creating a single judicial area for extradition'.

²⁵³ 2002 O.J. (L 190) 1.

²⁵⁴ For its interaction with Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union see section Chapter 3, section 5.1.4 on nationals and residents below.

²⁵⁵ COM (2001) 522.

Parliament proposed 44 amendments to the Commission proposal and called for renewed consultations if the Council intended to amend the Commission proposal substantially.²⁵⁶ The European Parliament called on the Council to resort to closer cooperation (i.e. the mechanism which allows, under certain conditions, a limited number of Member States to adopt measures if not all Member States wish to take part)²⁵⁷ 'in the event that unanimity cannot be attained or can only be attained by substantially weakening the proposal'.²⁵⁸

At its meeting on 6-7 December 2001, the Justice and Home Affairs Council failed to agree on the Framework Decision because Italy opposed the compromise text reached by the 14 other Member States.²⁵⁹ However, as Italy dropped its opposition fairly quickly, the Committee of Permanent Representatives was able to conclude, on 12 December 2001, that a provisional agreement existed on the 6-7 December compromise.²⁶⁰

The Council decided to re-consult the European Parliament on the proposal. On 6 February 2002 the European Parliament approved the Council's draft without amendments,²⁶¹ although a minority continued to oppose the measure.²⁶² Given this decision and the withdrawal of all parliamentary scrutiny reservations, the Council finally adopted the FD EAW and surrender procedures in the Member States, which was published in the Official Journal on 13 June 2002.²⁶³

²⁵⁶ European Parliament legislative resolution on the proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States (COM (2001) 522-CS-0453/2001-2001/0215 (CNS)), 29 November 2001, 2002 O.J. (C 153E) 276 of 27.06.2002, 276.

²⁵⁷ Ex Arts. 40, 43 and 44 TEU (currently Art. 20 TEU).

²⁵⁸ European Parliament legislative resolution on the proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States (COM (2001) 522-CS-0453/2001-2001/0215 (CNS)), 29 November 2001, 2002 O.J. (C 153E) 276 of 27.06.2002.

²⁵⁹ Council Doc. 14867/1/01 Rev 1 Add 1, COPE N 79, CATS 50, 12 December 2001, Annex.

²⁶⁰ Council Doc. 14867/1/01 Rev 1 Add 1, COPE N 79, CATS 50, 12 December 2001.

²⁶¹ European Parliament legislative resolution A5-0003/2002 on the Draft Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States, 06.02.2002, 2002 O.J. (C 284E), p. 193-194.

²⁶² Report on the Commission proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States (COM (2001) 522-CS-0453/2001-2001/0215 (CNS)), European Parliament. Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, 2002 O.J. (C 153E), p. 276-284. The minority opinion pointed out, *inter alia*, that the Commission's proposal contained such detailed stipulations that the Member States were left with no freedom of choice. The opinion stresses that the proposal – in conjunction with the simultaneously submitted proposal for a framework decision on combating terrorism – encroaches significantly on the Member States' rules of criminal procedure, which entailed a significant risk of undermining legal certainty.

²⁶³ 2002 O.J. (L 190) 1.

5.1. *Mutual Recognition as Applied to Extradition Procedures in the Framework Decision on the European Arrest Warrant*

The FD EAW allows for the surrender of suspects and sentenced persons based on a standard form contained in the annex called 'Arrest Warrant'.²⁶⁴ In Article 1(1) of the FD EAW a European arrest warrant is described as 'a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'. In accordance with Article 1 paragraph 2 FD EAW, judicial authorities need to 'execute any European arrest warrant on the basis of the principle of mutual recognition' and 'in accordance with the provisions of'²⁶⁵ the Framework Decision.

Perhaps as a combined result of the speedy negotiation process, the real differences between the criminal justice systems of the Member States and the lack of extensive debates with a co-legislator, the FD EAW does not define the concepts of 'criminal prosecution' nor of '(issuing and executing) judicial authority'²⁶⁶ further.

The lack of clarity offered by the FD EAW on these points has led to various problems in national implementation and practice, particularly in cases in which surrender was requested by a prosecutor,²⁶⁷ for cases that were not 'trial-ready'²⁶⁸ resulting in potentially extensive periods of pre-trial detention, and in cases of 'minor offences'. This includes offences, like theft, for which surrender must formally be granted, as the conditions laid down in Article 2(1) FD EAW are met since the offences in relation to which arrest is requested are punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum of at least twelve months or, if the surrender is requested for the execution of a prison sentence or detention order, that the imposed sentence is for at least four months, for instance, 'theft'. In practice it often concerned petty crimes like stealing a bicycle for which demanding surrender may be deemed a disproportionate interference with individual rights and freedoms, as well as a waste of public resources.²⁶⁹ Given their particular significance for the criminal justice area, these

²⁶⁴ FD EAW, Art. 8, Annex.

²⁶⁵ *Ibidem*, Art. 1.

²⁶⁶ *Ibidem*, Art. 6, para. 1. On the concept of 'judicial authority' see Doobay 2014, p. 22-24; UK Supreme Court judgment of 30 May 2012 in *Assange v Swedish Prosecution Authority* [2012] UKSC 22; Carrera, Guild & Hernanz 2013, p. 18; the discussion of the European Investigation Order in section 5.2.2 below; European Parliament resolution of 27 February 2014 with recommendations to the European Commission on the review of the European arrest warrant, P7_TA-PROV(2014)0174, recital F: 'Whereas concern exists, *inter alia*, about (...) (vi) the lack of definition of the term 'judicial authority' in Framework Decision 2002/584/JHA and other mutual recognition instruments which has led to a variation of practice between Member States, causing uncertainty.'

²⁶⁷ Doobay 2014, p. 22-24; UK Supreme Court judgment of 30 May 2012 in *Assange v Swedish Prosecution Authority* [2012] UKSC 22.

²⁶⁸ Weyembergh 2014, p. 38-42.

²⁶⁹ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States, COM (2011) 175, p. 7: 'Con-
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fundamental rights, including proportionality issues will be revisited in section 5.3 below.

Returning to the discussion of Article 1(2), it is submitted that this provision refers to the mutual recognition of arrest warrants on two levels:

- first, on the institutional level, when it refers to ‘the principle of mutual recognition’ as now laid down in Article 82 TFEU;²⁷⁰ and
- second, on the normative level, when it refers to the provisions of the FD EAW seeking to apply mutual recognition to extradition procedures.

Both dimensions will be taken on board when analysing the nature of mutual recognition on the basis of the FD EAW.

This also ties in with the institutional context equally mentioned in recital 5 which talks about the ‘objective set for the Union to become an Area of Freedom, Security and Justice leading to the abolition of extradition relations between member states and replacing it by a system of surrender between Member States’.²⁷¹ Subsequent Court of Justice case law has explicitly referred to this notion of a system of surrender being a consequence of the Union’s objective of *becoming* an ‘Area of Freedom, Security and Justice’,²⁷² reminiscent of the Court of Justice case law cited

fidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences’; Carrera, Guild & Hernanz 2013; Fair Trials International 2011, ‘The European arrest warrant seven years on, the case for reform’, available at: <<http://www.fairtrials.org/publications/policy-and-campaigns/the-european-arrest-warrant-seven-years-on-the-case-for-reform/>> (last consulted on 3 May 2015) and Fair Trials International (2014), ‘Stockholm’s sunset, new horizons for justice in Europe’, available at: <<http://www.fairtrials.org/publications/policy-report-stock-holms-sunset-new-horizons-for-justice-in-europe/>> (last consulted on 3 May 2015).

²⁷⁰ Case C-388/08, *PPU Leymann and Pustovarov* [2008] ECR I-0000, para. 51: The principle of mutual recognition, which underpins the Framework Decision, also means that, in accordance with Art. 1(2) of the Framework Decision, the Member States are in principle obliged to act upon a European arrest warrant. They must or may refuse to execute a warrant only in the cases listed in Arts. 3 and 4.

²⁷¹ FD EAW, recital 5: ‘The objective set for the Union to become an area of freedom, security and justice leads to abolishing extradition between Member States and replacing it by a system of surrender between judicial authorities. Further the introduction of a new simplified system of surrender of sentenced or suspected persons for the purposes of execution or prosecution of criminal sentences makes it possible to remove the complexity and potential for delay inherent in the present extradition procedures. Traditional cooperation relations which have prevailed up till now should be replaced by a system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an area of freedom, security and justice.’ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, para. 6.1 ‘enforcing decisions’: ‘recognizing a decision means first and foremost to do what is ordered in the decision, to enforce it’.

²⁷² Court of Justice Case C-42/11, *Lopes da Silva Jorge*, para. 28; Court of Justice Case C-192/12 *PPU West*, para. 53; Court of Justice Case C-396/11, *Radu*, paras. 33 and 34: ‘as is apparent in particular from Article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authori-

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in Chapter 2 which addressed national markets needing to be merged into a single market, bringing about conditions as close as possible to that of a genuine internal market.²⁷³ This is despite the fact, as seen in section 3, that the ‘variable geometry’ of the Area of Freedom, Security and Justice makes such a development towards a single legal area very difficult.

At the same time, the Court of Justice case law has confirmed that the ‘system of surrender’ may also be constrained by the aims and principles of European Law and that hence there is no absolute obligation to execute a European arrest warrant. One of the principles of European law with which the free movement of judicial decisions may conflict is the respect for fundamental rights in accordance with Article 6 EU,²⁷⁴ a principle which is explicitly referred to in Article 1(3) and recitals 10, 12 and 13 of the Framework Decision and therefore also returns as a norm.²⁷⁵

The norm relating to mutual recognition laid down in Article 1(2) was accompanied by (and refers to) a number of other norms, *inter alia*, one procedural norm, concerning the recognition procedure and four substantive norms, relating to the dual criminality requirement, jurisdiction, the surrender of nationals and residents, and human rights.

Below, these norms as they were laid down in the Framework Decision’s provisions as impacted by the application of mutual recognition to extradition/surrender procedures will be analysed,²⁷⁶ with a focus on the impact on individual rights, where relevant, taking into account the Commission proposal, the European Parliament’s and Council’s positions, national implementation and subsequent case law.

As regards individual rights, the focus of this paragraph will be on the conditions in accordance with which EU citizens residing and staying in the executing Member State may have their sentence or detention order executed there in accordance with Article 4(6) FD EAW and the fundamental/procedural rights exceptions laid down in the FD EAW. The focus of section 5.2 will then be on the impact on

ties, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (...) Framework Decision 2002/584 thus seeks, by the establishment of a simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective for the Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.’

²⁷³ Case 15/81, *Schul* [1982] ECR 1409, para. 33, as discussed in section Chapter 2, sections 2 and 5 (the conclusion to Chapter 2).

²⁷⁴ FD EAW, recital 10; Opinion of AG Cruz delivered on 6 July 2019 in Case C-306/09, *I.B.*, para. 43; Court of Justice Case C-306/09, *I.B.*, para. 50. While the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not, as is clear from Arts. 3-5 of the Framework Decision mean that there is an absolute obligation to execute the arrest warrant that has been issued.

²⁷⁵ Recital 10 refers to the rule of law, 12 to Art. 6 TEU, the EU Charter and Member States’ constitutional rules related to due process, whereas recital 13 prohibits removing, expelling or extraditing persons to a State where there is a risk that he or she would be subject to the death penalty torture or other inhuman or degrading treatment or punishment; Keijzer 2006, p. 55-58.

²⁷⁶ A more extensive comment on the text of the FD EAW was provided by Blekxtoon 2005, p. 221-278.

fundamental rights of and within additional harmonisation measures, whereas in section 5.3. I will tackle fundamental rights, outside the context of harmonisation, as a principle of EU law, together with the proportionality principle.

5.1.1. Recognition Procedure

Time limits

Articles 14-17 the FD EAW stipulate that, in situations where the wanted person objects to its surrender,²⁷⁷ Member States have to foresee a surrender procedure²⁷⁸ for European arrest warrants to be completed within 60 days, with an optional extension of 30 days.²⁷⁹ These deadlines were subject of discussion in Case C-168/13, PPU, *Jeremy F.*²⁸⁰

The case concerned a UK national whose surrender was sought from France on charges of child abduction. The suspect consented to his surrender, without, however, waiving the speciality rule, contained in Article 27 FD EAW preventing prosecution for another offence committed to his surrender, other than that for which he was surrendered. After Jeremy F. was surrendered to the UK, the Court of Appeal of Bordeaux received a request for a prosecution for sexual relations with the minor who was the subject of the alleged abduction. Jeremy F., however, appealed the decision of the Court of Appeal to the *Court de Cassation*, which ultimately led to the *Conseil Constitutionnel*, raising questions with the Court of Justice regarding the compatibility with the FD EAW of an appeal to a decision to consent to surrender for another offence committed prior to his surrender, other than that for which he was surrendered, having in mind the principle of equality before the law and the right to an effective judicial remedy.

The Court, after stressing that the objective of the FD EAW is to establish a simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law,²⁸¹ pointed out that the FD EAW did not foresee an appeal to a decision to consent to prosecution for other offences committed prior to surrender.²⁸² At the same time, it recalled that the FD EAW respects fundamental rights as expressed in Article 1(3) and recital 12, deeming the right to an effective remedy as set out in Articles 13 ECHR and 47 EU Charter of special importance in the case at hand.²⁸³

On the two conflicting obligations (surrender versus fundamental rights) the Court recalled that, provided that the application of the FD EAW was not frustrated, it does not prevent a Member State from applying its constitutional rules

²⁷⁷ In case he or she consents in accordance with Art. 13, a decision on execution of the European arrest warrant has to be taken within 10 days in accordance with Art. 17 para. 2 of the FD EAW.

²⁷⁸ FD EAW, Arts. 14-17.

²⁷⁹ *Ibidem*, Art. 17 paras. 3 and 4.

²⁸⁰ Case C-168/13, PPU, *Jeremy F.*, not yet published.

²⁸¹ Case C-168/13, para. 36.

²⁸² Case C-168/13, para. 37.

²⁸³ Case C-168/13, paras. 40-42.

relating, *inter alia*, to respect for the right to a fair trial.²⁸⁴ However, it also took a lot of effort in stressing that the procedures foreseen by the FD EAW already comply with the requirements of Article 47 of the Charter since, both on the issuing and executing side, they are subject to supervision by judicial authorities.²⁸⁵ National appeals procedures would have to respect the time limits laid down in the FD EAW.²⁸⁶ In this case, the 30-day deadline contained in Article 27(4) would need to be respected meaning that the initial decision by the executing judicial authority on whether to allow prosecution for other offences would have to be taken by then.²⁸⁷ In case of an appeal, the 'final decision' would at least have to respect the deadlines laid down in Article 17.²⁸⁸

Comment

The FD EAW allows the possibility for Member States to organise appeals,²⁸⁹ but only in relation to the initial European arrest warrant. It does not provide for an appeal in cases related to requests for prosecution for other offences allegedly committed prior to the person's surrender. This can now have be read into the FD EAW as a possibility, although in any event the FD EAW is deemed to comply with the right to an effective remedy given the references to respect for fundamental rights in Article 1(3) and recital 12. In reality, however, the drafters of the FD EAW did not foresee such an appeal, as is clear from the wording of Article 17, which sets deadlines with a view of the person consenting (10 days), or 60 days after arrest, with a possible extension of 30 days. The Court now sought a way out by combining this Article with the 30 days deadline in Article 27, which on the one hand solves a problem (national appeals procedures may stay in place) but on the other hand creates another one (are the deadlines of the FD EAW appropriate in these circumstances?).

This case teaches us something about how the Court reconciles free movement and fundamental rights, notably the right to an effective remedy. Hence it is also instructive as regards the role mutual recognition plays in this environment. The Court's contention that a fundamental right laid down in primary EU law (*inter alia*, the EU Charter) should be applied without 'frustrating' the FD EAW, a piece of secondary EU legislation that did not foresee an appeals procedure in its Article 27 leads one to question the general view of the Court on the relationship between individual liberty and security interests.²⁹⁰ A rights-based approach would insist on

²⁸⁴ Case C-168/13, para. 53.

²⁸⁵ Case C-168/13, paras. 45-47.

²⁸⁶ Case C-168/13, para. 59.

²⁸⁷ Case C-168/13, para. 60.

²⁸⁸ Case C-168/13, para. 64.

²⁸⁹ Although it is silent in this regard. See Weyembergh 2013, p. 959.

²⁹⁰ With reference to the discussion of the aims of the Union as an Area of Freedom, Security and Justice, as discussed in section 4.

a just outcome, within reasonable time limits, and not take the default position that appealing a decision would in some way be an abuse of the system.²⁹¹

Grounds for non-execution, conditions that may be imposed

The surrender procedure contains possibilities for the executing judicial authority to refuse surrender or to make it subject to certain conditions.

The FD EAW introduces mandatory and optional grounds for 'non-execution'. Article 3 mentions the following mandatory grounds for non-execution:

- amnesty (Art. 3(1));
- the person has been finally judged by a Member State and the sentence has been served or is currently being served (Art. 3(2), see *infra* under human rights and section 6 on *ne bis in idem*); and
- the person is below the age of criminal responsibility (Art. 3(3)).

Article 4, as originally drafted, mentions the following optional grounds for non-execution:

- a lack of criminalisation of the acts in the executing Member State (except for a list of criminal offences mentioned in Art. 2(2) FD EAW, Art. 4(1), see *infra* under dual criminality);
- the fact that the requested person is being prosecuted for the same acts in the executing Member State (Art. 4(2)) or the judicial authorities of the executing Member State have decided either not to prosecute for the offence;
- a decision to halt proceedings or where a final judgment had been passed upon the requested person (Art. 4(3), see *infra* section 6 on *ne bis in idem*);
- the fact that the executing Member State has jurisdiction and the imposition of the punishment is statute barred according to the law of the executing Member State (Art. 4(4));
- the fact that the requested person has been finally convicted by a third State for the same acts (Art. 4(5), see *infra* section 3.6 on *ne bis in idem*);
- the fact that the person is resident or national of the executing Member State and this State undertakes to execute the sentence or detention order under its domestic law (Art. 4(6), see *infra* under nationals); and

²⁹¹ Cf. Mitsilegas 2012, p. 322: 'Moreover enhanced inter-state cooperation is justified under a logic of abuse: cooperation needs to be facilitated to compensate for the ease in which individuals can cross borders in the Area of Freedom, Security and Justice. The need to ensure state enforcement trumps the requirement to examine in detail, on a case-by-case basis, the fundamental rights implications of the execution of a request by another Member State.' According to the Commission's 2011 implementation report of the FD EAW the average surrender procedure now takes 48 days. See Report from the Commission on the implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, COM (2011) 175.

- the fact that the offences have been committed on the territory of the executing Member State or outside the territory of the issuing Member State and the law of the executing Member State would not allow prosecution in case the offences would have been committed outside its territory (Art. 4(7), see *infra* under jurisdiction).

In addition, in accordance with Article 5 as originally drafted, the executing judicial authorities were allowed to make the execution of the European arrest warrant subject to the following conditions:

- in case the European arrest warrant is issued for a decision rendered *in absentia*; the condition that the issuing judicial authority gives the necessary assurances that the requested person will have an opportunity to apply for a retrial (Art. 5(1), see *infra* under human rights);
- in case the offence on the basis of which the European arrest warrant was issued is punishable by a custodial life sentence of life-time detention order; the condition of the executing Member State having provisions in its legal system allowing for a review of the penalty or measure imposed at the latest after 20 years (Art. 5(2)); and
- in case the person is national or resident of the executing Member State; the condition that the person is returned to the executing Member State to serve the custodial sentence or detention order passed against him (Art. 5(3), (see *infra* under nationals).

The system of grounds for non-execution and guarantees in Articles 4 and 5 of the FD EAW has been altered by Framework Decision 2009/299 on the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (*in absentia*).²⁹²

In accordance with this Framework Decision, the guarantee contained in Article 5(1) is deleted and a more narrowly defined ground for non-execution is inserted (Art. 4(a)) to be applied in case the European arrest warrant was issued for the purpose of executing a custodial sentence or detention order if the person did not appear in person at the trial resulting in the decision.²⁹³

²⁹² O.J. (L 81) 24 of 27.03.2009 (hereafter 'Framework Decision *in absentia*').

²⁹³ In accordance with Art. 2 of the Framework Decision *in absentia* convictions the new ground for non-execution inserted in the FD EAW (Art. 4(a) new) may not be applied in case 'The European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State: (a) in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and (ii) was informed that a decision may be handed down if he or she does not appear for the trial or (b) being aware of the scheduled trial had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed →

Comment

In spite of the application of mutual recognition to extradition procedures the FD EAW still foresees a recognition/validation procedure. We can therefore not speak of a system based on home State control which would imply the direct and automatic recognition of the judicial decision taken in the other Member States.²⁹⁴

The application of mutual recognition to extradition procedures consequently also does not determine which rules apply to a certain criminal prosecution. The FD EAW instead puts in place a surrender procedure in accordance with which the executing judicial authority is allowed to review a number of substantive and procedural aspects of the case, in particular as regards the existence of dual criminality, jurisdiction, the rights and interests of nationals and residents arrested for the purpose of the execution of a European arrest warrant including the safeguarding of their fundamental/procedural rights. The specific impact of mutual recognition on these aspects of the surrender procedure will be discussed below.

5.1.2. Dual Criminality

In its proposal, the Commission provided a total abolition of the dual criminality requirement as a condition for surrender as a logical consequence of the application of the mutual recognition principle:

The principle of double criminality is abolished. This removal arises logically from the mutual recognition principle: the Decision of the judicial authority of another Member State is recognised in all its effects, *ipso facto* and without *a priori* review. It will hardly matter therefore, if the offence for which the arrest warrant was issued does not exist, or that its components differ in the executing State. Under this principle each Member State not only recognises the entire criminal law of the other Member States but also agrees to assist them in enforcing it.

defended by that counsellor at the trial; (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed: (i) expressly states that he or she does not contest the decision; or (ii) did not request a retrial or appeal within the applicable time frame; or (d) was not personally served with the decision but: (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.' A consolidated version of the FD EAW may be retrieved here: <<http://eur-lex.europa.eu/lexuriserv/lexuriserv.do?uri=consleg:2002f0584:20090328:en:pdf>> (last consulted on 3 May 2015). The impact of this Framework Decision will be discussed further in section 5.1.5. on human rights grounds for non-recognition below.

²⁹⁴ Communication from the Commission to the Council and the European Parliament-Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495, p. 17, as discussed in section 2.

This mechanism will make it possible in particular to solve the difficulties connected with delays in amendment of the Member States' criminal law when new forms of crime emerge.²⁹⁵

Member States were, however, to be able to establish a 'negative list' of conduct for which they would refuse surrender.²⁹⁶ It proposed the following wording:

Without prejudice to the objectives of article 29 TEU, each Member State may establish an exhaustive list of conduct which might be considered as offences in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that it would be contrary to fundamental principles of the legal system in that State.

The European Parliament slightly disagreed with the Commission in the sense that it did not want to allow exceptions for crimes referred to in Article 29 TEU (Nice) and crimes that had been harmonised at the EU level.²⁹⁷

The Member States, however, reached a different compromise. The FD EAW,²⁹⁸ as a general rule, requires that the act in relation to which an arrest is requested is punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum of at least 12 months or, if the surrender is requested for the execution of a prison sentence or detention order, that the imposed sentence is for at least four months (Art. 2(1) FD EAW).²⁹⁹ Based on Article 2(4) FD EAW, surrender may, however, 'be subject to the condition that the acts for which the European arrest warrant has been issued constitute an offence under the law of the executing Member State, whatever the constituent elements or, however,

²⁹⁵ Proposal for a Council Framework Decision on the European Arrest Warrant and the surrender procedures between the Member States, COM (2001) 522-C5-0453/2002-2001/0215 CNS of 25.09.2001, p. 16.

²⁹⁶ *Ibidem*: 'But there are two restrictions in Articles 27 and 28. Under Article 27, each Member State may draw up a list of forms of conduct for which it declares in advance it will refuse to execute European arrest warrants ("negative list" system). This list may include forms of conduct that do not constitute offences in the Member States making the list which are in other Member States. Offences which have been decriminalised over the years (abortion, drug use, euthanasia, etc.) are typical of what might be on this list. Decriminalisation in these cases can be seen as the outcome of a democratic debate within the State which, consequently, no longer agrees to cooperate with other States which still treat these forms of conduct as criminal offences. (...).'

²⁹⁷ In its Amendment 68 it proposed: 'Excluding the crimes referred to in article 29 TEU and crimes which have been harmonised at European Union level, each Member State may establish an exhaustive list of conduct which might be considered as offences in some Member States, but in respect of which its judicial authorities shall refuse to execute a European arrest warrant on the grounds that the activities in question are not considered criminal offences in that State.'

²⁹⁸ 2002 O.J. (L 190) 1.

²⁹⁹ Art. 2(1) FD EAW: 'A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.'

it is described'. Most Member States have implemented this provision. This system may be described as single qualified dual criminality.

The exception to the dual criminality requirement has been laid down in Article 2(2). For 32 offences (a 'positive list'), there is only a *single qualified criminality requirement* (the acts should be punishable by a deprivation of liberty of at least three years in the issuing Member State). If this condition is fulfilled, the warrant gives rise to surrender 'without verification of the dual criminality of the act'.³⁰⁰

The abolition of the dual criminality requirement has met with opposition in academic literature, since it would lead to a radically punitive criminal justice system in violation of the *ultima ratio* principle or since the requirement is necessary to establish the equivalence of the claim upon which mutual recognition rests.³⁰¹

As such, these claims have not been addressed by the Court of Justice. However, in the case of *Advocaten voor de Wereld*,³⁰² which brought an action before the *Arbitragehof* (Constitutional Court) seeking the annulment of the Belgian law implementing the FD EAW claiming incompatibility with the Belgian Constitution and the ECHR,³⁰³ the *Arbitragehof* did raise questions with the Court of Justice regarding the compatibility of the non-verification of dual criminality in accordance with Article 2(2) FD EAW with Article 6(2) EU and more specifically with the principle of legality in criminal proceedings and the principle of equality and non-discrimination.

The legality principle implies that legislation must clearly define offences and the penalties which they attract.³⁰⁴ *Advocaten voor de Wereld* claimed a violation of

³⁰⁰ Art. 2(2): 'The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: participation in a criminal organization, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, illicit trafficking in weapons, munitions and explosives, corruption, fraud, including that affecting the Financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests, laundering of the proceeds of crime, counterfeiting currency, including of the Euro, computer-related crime, environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties, facilitation of unauthorized entry and residence, murder, grievous bodily injury, illicit trade in human organs and tissue, kidnapping, illegal restraint and hostage-taking, racism and xenophobia, organized or armed robbery, illicit trafficking in cultural goods, including antiques and works of art, swindling, racketeering and extortion, counterfeiting and piracy of products, forgery of administrative documents and trafficking therein, forgery of means of payment, illicit trafficking in hormonal substances and other growth promoters, illicit trafficking in nuclear or radioactive materials, trafficking in stolen vehicles, rape, arson, crimes within the jurisdiction of the International Criminal Court, unlawful seizure of aircraft/ships, sabotage.' Commented by Klip 2012, p. 365; Keijzer 2005, p. 137-163.

³⁰¹ Schünemann 2006; Peers 2004 as discussed in section 3.

³⁰² Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633; Klip 2012; Mitsilegas 2012; Geyer 2008.

³⁰³ Case C-303/05, para. 10.

³⁰⁴ C-303/05, para. 50.

this principle as Article 2(2) FD EAW does not provide precise legal definitions of the offences for which verification of dual criminality is renounced.³⁰⁵

The Court, however, held this principle not to be violated since it is the crime as defined in the substantive criminal law of the issuing Member State that should be taken as a point of reference. The issuing Member States must ensure respect for the legality principle in accordance with Article 6 EU.³⁰⁶

The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.³⁰⁷ *Advocaten voor de Wereld* furthermore claimed that this principle was also violated since the difference in treatment between citizens surrendered for list items (offences for which the dual criminality requirement is renounced) and non-list items (for which the dual criminality test remains) was not objectively justified. The Court, without going into the question whether there was actually a risk of differentiated treatment,³⁰⁸ however, replied that the seriousness of the 32 categories of crime warranted dispensing with the verification of dual criminality, particularly in the light of the high degree of trust and solidarity between the Member States.³⁰⁹

Comment

Mutual recognition and the application of the dual criminality requirement are uneasy bedfellows as already indicated in the Commission's proposal for a FD EAW. In effect, dual criminality questions the decisions made by the judicial authority in the other Member States and the substantive criminal law based on which those choices are made. It therefore also does not fit well with the aim of the Union becoming a *single* Area of Freedom, Security and Justice.³¹⁰

Nevertheless, the norm and its application in the context of the FD EAW have been heavily debated in academic literature. One line of reasoning would argue that there is no such thing as a *single* legal area and that therefore it is perfectly legitimate for decisions taken in other Member States to be questioned before they are recognised and executed.

Another approach, in this case compatible, challenges the presumption of equality of the decisions and underlying substantive criminal law, in the absence of harmonisation, and therefore sees the application of the dual criminality test as a means to ensure/restore that equality. The other side of that coin is an approach

³⁰⁵ C-303/05, para. 13.

³⁰⁶ C-303/05, para. 53.

³⁰⁷ C-303/05, para. 56.

³⁰⁸ Criticised by Geyer 2008, p. 160-161 who wonders whether the issue is not in fact one of proportionality: 'The seriousness of offences cannot always be considered as an objective justification for any kind of unequal treatment. Such an understanding would render the legal test inane and could serve to justify any obvious discrimination. Instead, whether something qualifies as an objective justification seems to eventually depend on the concrete circumstances of the dispute.'

³⁰⁹ Case C-303/05, para. 57.

³¹⁰ Cf. Barents 2006, p. 365.

which sees the application of the dual criminality requirement as a token of mistrust against the decisions and systems of the other Member States frustrating effective judicial cooperation.

The drafting of the FD EAW reveals that Member States (it is reminded that the European Parliament was merely consulted at the time) were not ready to follow the radical solution proposed by the European Commission for their 'entire criminal law' but only for the list of 32 offences deemed serious enough. In a way one might see this as an element of home State control. Once the issuing Member State verifies the criteria of Article 2(2) FD EAW, the executing Member State has to trust that the person is suspected of facts which are sufficiently serious to warrant surrender, irrespective of the degree of harmonisation of the 32 underlying offences.³¹¹

Even so, the distinct vagueness of this list of 'serious crimes' has led to questions concerning the proportionality of letting go of the dual criminality requirement combined with fears of a resulting radically punitive (EU) criminal justice area, legal certainty and equality and non-discrimination between EU citizens and residents. The Court of Justice defended the FD EAW by pointing to the principles of trust and solidarity. The price for that trust and solidarity is, however, paid by EU citizens and residents that, in absence of proper approximation, will have to be keenly aware of the criminal law of other Member States, including on abortion, drug use, euthanasia, but also racism and xenophobia and facilitation of unauthorised entry on which no *uniform* definition exists.³¹² This could perhaps be required of citizens and residents in case they were to feel safe when following the law inside their own jurisdiction, but the realities of the interconnected societies through IT and free movement of people, exacerbated by the exercise of extraterritorial jurisdiction combined with widely varying interpretations of the crimes for which the dual criminality requirement is no longer imposed by Member States, make such a requirement impossible to meet in practice.³¹³ The question can be rightly raised

³¹¹ Mitsilegas 2012, p. 338: '*Advocaten voor de Wereld* can be seen as an endorsement of the system of surrender based on mutual recognition established by the FD EAW regardless of the degree of harmonisation of EU criminal law, with the limited caveat that it is for the authorities of the issuing Member State to ensure respect for fundamental rights and the principle of legality in particular.'

³¹² Klip 2012, p. 367: 'Particularly with regard to crimes for which a common obligation to criminalise exists, it may be assumed that Member States have criminalised the conduct. However, this does not mean that they have implemented it in an identical manner. The issuing Member State determines its own national definition - not necessarily based on the definition in the Union legal act - for a list offence. There is no autonomous European Union interpretation of the list offences. Member States interpret them unilaterally.' Geyer 2008, p. 159.

³¹³ Cf. Zimmermann, Glaser & Motz 2011, p. 77 referring to the same concerning regarding the European Evidence Warrant: 'What is special within the EU is that Member States have the possibility to enforce their criminal laws outside their territory. Therefore citizens could have been subjected to investigative measures although they were not aware that their behaviour was punishable in at least one Member State.' In this context it is worth noting the decision of the Court in Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd and others*, in which it declared Directive 2006/24 void. In para. 59 of that judgment the Court criticizes the

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'how far'³¹⁴ the Court can extend this type of jurisprudence in the absence of equivalent protection for European citizens and residents. For the sake of European integration, consumers may be required to accept a good onto the market, which does not comply with domestic standards, as long as the difference becomes clear from the label. However, individuals should not be confronted with the obligation to read and interpret the criminal laws of the 27 other Member States.

5.1.3. Jurisdiction

This section addresses a norm laid down in the FD EAW, the grounds for non-execution based on territoriality, in case the issuing Member State exercises extraterritorial jurisdiction. In its proposal, the Commission put forward the following exception:

The executing judicial authority may refuse to execute a European arrest warrant issued in respect of an act which is not considered an offence under the law of the executing Member State and which did not occur, at least in part, on the territory of the issuing Member State.

The Commission motivated its proposal as follows:

When a Member State exercises extraterritorial jurisdiction in relation to an offence which is not an offence under the law of the State in which execution is requested, the latter State will be able to refuse to execute the European arrest warrant. A State is considered to exercise extraterritorial jurisdiction when none of the components of the offence is located on its territory. Member States are generally required to provide mutual assistance and execute European arrest warrants issued by the judicial authorities of the other Member States, even where they exercise extraterritorial jurisdiction on the basis of their national law.

However, the obligation does not apply in cases involving offences which do not constitute offences in the State in which execution is requested. This avoids obliging a State to execute a European arrest warrant committed entirely on its territory but not classified as such by its own law. The criterion to be taken into account here, to consider the restoration of the principle of double criminality, will be the definition of the offence in the substantive criminal law rather than the question of the jurisdiction of the State in which execution is requested for an identical offence.

absence of a link between the person whose data are retained and serious crime: 'Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.'

³¹⁴ Hatzopoulos 2008, p. 44-65, particularly criticising the Court's decision as 'a striking application of the principle of mutual recognition, strengthened in this occasion by "trust" and "solidarity"'.
 absence of a link between the person whose data are retained and serious crime: 'Moreover, whilst seeking to contribute to the fight against serious crime, Directive 2006/24 does not require any relationship between the data whose retention is provided for and a threat to public security and, in particular, it is not restricted to a retention in relation (i) to data pertaining to a particular time period and/or a particular geographical zone and/or to a circle of particular persons likely to be involved, in one way or another, in a serious crime, or (ii) to persons who could, for other reasons, contribute, by the retention of their data, to the prevention, detection or prosecution of serious offences.'

In other words, the execution of the European arrest warrant could be refused if the issuing State exercised extraterritorial jurisdiction and if the offence justifying the exercise of this jurisdiction does not exist in the State in which execution is requested. The assessment of whether the offence is provided for by the legislation of the executing Member State must be done on a strict basis and not include the question of jurisdiction in a similar case. Thus, if the offence exists in law but the courts of the executing State have no jurisdiction on the facts, the European arrest warrant must be executed.

Being consistent with its line taken on the issue of dual criminality, the European Parliament disagreed with the Commission as far as it applied to the crimes in Article 29 or crimes which have been harmonised.

The Member States, however, decided to mirror the classical territoriality exception from the 1957 Council of Europe convention on extradition. Article 4(7) FD EAW contains two optional grounds for refusal of an arrest warrant. The first ground applies when the European arrest warrant relates to offences (acts)³¹⁵ which (partially) took place on the territory of the executing Member State or in a place treated as such.³¹⁶ The second ground of non-execution applies when the offences have been committed outside the territory of the issuing State and the law of the executing State does not allow prosecution for the same acts when committed outside its territory.³¹⁷

Comment

The difference between the Commission proposal and the final text is that an element of reciprocity³¹⁸ remains in the shape of the second exception. As such, one might deem it incompatible with the concept of a *single* Area of Freedom, Security of Justice as already pointed out when discussing the requirement of dual criminality, certainly for offences that have been approximated at EU level, including as regards the exercise of jurisdiction.

A non-execution of a European arrest warrant based on the first territoriality exception can, however, be understood as long as there are no criminal jurisdiction rules at the EU level.³¹⁹ Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings³²⁰ is aimed at preventing positive conflicts of jurisdiction and avoiding parallel prosecutions involving the same facts for the same person at an earlier stage.

In accordance with this Framework Decision, at the moment it is established that parallel proceedings exist, the competent authorities of the Member States concerned have to enter into consultations in order to reach consensus on any effective

³¹⁵ The correct term to be used here should have been 'acts', see Blekxtoon 2005, p. 237.

³¹⁶ FD EAW, Art. 4(7) a.

³¹⁷ FD EAW, Art. 4(7) b.

³¹⁸ Blekxtoon 2005, p. 238.

³¹⁹ Klip 2012, p. 382: 'The very fact that Union acts based on the principle of mutual recognition in criminal law do not regulate jurisdiction would be an argument to deviate from absolute recognition.'

³²⁰ O.J. (L 328) 42 of 15.12.2009.

solution aimed at avoiding the adverse consequences arising from such parallel proceedings, which *may*, where appropriate, lead to the concentration of the criminal proceedings in one Member State.³²¹ This Framework Decision is therefore not able to tackle the problem of parallel proceedings effectively, as recognised by the Court in *Spasic*.³²²

As set out in the internal market chapter, mutual recognition furthers free movement within a single legal area. The fact that the European Union is not a uniform territory in terms of exercising criminal jurisdiction and Member States jurisdictions overlap or conversely might leave holes in prosecuting crime complicates its application.

Further approximation of criminal jurisdiction rules is possible, either by a piecemeal approach, when approximating crimes in accordance with Article 83 TFEU, for the crimes within the remit of the future European Public Prosecutor,³²³ which are currently limited to crimes affecting the financial interests of the Union in accordance with Article 86(1) TFEU,³²⁴ or a more ambitious horizontal scheme based on Article 82(2)(b) TFEU.

As already touched upon when discussing the impact of the non-application of the dual criminality requirement, the impact is felt directly by citizens and residents of the executing Member State that should be aware of the possible exercise of extraterritorial criminal jurisdiction even if they act within the executing Member State. Ordinarily that citizen or resident will wish to be judged by the rules of and in the territory of the executing Member State. This further highlights the need for EU criminal jurisdiction rules in which the interests of everyone involved should be taken into consideration.³²⁵

It also brings the conflict between the free movement of judicial decisions into focus, which is facilitated by mutual recognition and the rights of citizens and residents in accordance with the provisions of the EU treaties and secondary legislation on free movement and EU citizenship, the Charter, the ECHR, or national constitutions.

5.1.4. Nationals, Residents and those Staying in the Executing Member State

The extradition of nationals is implied by the term ‘free movement of judicial decisions’ applied in the fifth recital to the FD EAW.³²⁶ According to the European

³²¹ O.J. (L 328) 42 of 15.12.2009, Art. 10.

³²² Case C-129/14, para. 68, further discussed in section 6.

³²³ Proposal for a Council regulation on the establishment of the European Public Prosecutors’ Office, COM (2013) 534; European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office, P7_TA-PROV(2014)0234; Proposal for a directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM (2012) 363; Ligeti 2013.

³²⁴ Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM (2012) 363.

³²⁵ Klip 2009, p. 429, as discussed in section 3.3.

³²⁶ FD EAW, recital 5.

Commission European Union citizens were not only to have rights under the EU Treaty but also obligations:

Since the European arrest warrant is based on the idea of citizenship of the Union [...], the exception provided for a country's national, which existed under traditional extradition arrangements, should not apply within the Common Area of Freedom, Security and Justice. A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union.³²⁷

In the negotiations within the Council, the Commission's point of departure met with opposition, particularly regarding the execution of sentences, resulting in the following provisions:

In accordance with Article 4(6) the executing judicial authority may refuse to execute an arrest warrant in case the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law.³²⁸

In accordance with article 5(3) the executing judicial authority may make surrender conditional upon the guarantee that the national or resident will be returned to the executing Member State to serve the custodial sentence or detention order passed against him in the issuing Member State.

A lack of clarity of the definition of 'nationals, staying in or residents of' in accordance with Articles 4(6) and 5(3), and the diverging implementation of these provisions in the Member States,³²⁹ has resulted in several cases being referred to the European Court of Justice for interpretation, notably *Kozłowski*,³³⁰ *Wolzenburg*³³¹ and *Lopes de Silva Jorge*.³³²

The *Kozłowski* case concerned a Polish national against whom a European arrest warrant arrived for the execution of a five-month prison sentence while he was already imprisoned in Germany for subsequent crimes committed there.³³³ The German court raised questions regarding the scope of the terms 'resident' and 'staying' contained in Article 4(6) of the Framework Decision to gauge whether Germany could refuse surrender and execute the sentence in accordance with its domestic law, which allows for the refusal of surrender of a foreign national, who

³²⁷ Explanatory Memorandum to the Proposal for the Framework Decision on the European Arrest Warrant.

³²⁸ On the implementation in the Netherlands see Van Ballegooij & Hartmanova 2006; see *infra* regarding Case C-123/08, *Wolzenburg* [2009] ECR 9621.

³²⁹ On the Netherlands see Van Ballegooij & Hartmanova 2006.

³³⁰ Case C-66/08, *Kozłowski* [2008] ECR 6041.

³³¹ Case C-123/08, *Wolzenburg* [2009] ECR 9621.

³³² Case C-42/11, *Lopes da Silva Jorge*, not yet published.

³³³ Case C-66/08, *Kozłowski* [2008] ECR 6041, paras. 17-21.

has his habitual residence in Germany and ‘has an interest in execution of the sentence in Germany that deserves protection and predominates’,³³⁴

The Court held that a requested person is ‘resident’ in the executing Member State when he has established his actual place of residence there and he is ‘staying’ there when, following a stable period of presence in that State, he has acquired connections with that State which are of a similar degree to those resulting from residence.³³⁵

In order to ascertain whether there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term ‘staying’ within the meaning of Article 4(6), it is for the executing judicial authority to make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the length, nature and conditions of his presence and the family and economic connections which that person has with the executing Member State.³³⁶

The *Wolzenburg* case concerned a German citizen who had been living with his wife and working in the Netherlands for over a year when a European arrest warrant arrived for the execution of a prison sentence in Germany.³³⁷ The Dutch law on the surrender of persons (*Overleveringswet*) contained a mandatory ground for the refusal of arrest warrants for the execution of sentences imposed on Dutch nationals.³³⁸ It also barred the surrender of other EU nationals in the possession of a residence permit of indefinite duration.³³⁹ Mr. Wolzenburg did not qualify for such a residence permit as he had not resided in the Netherlands for a continuous period of five years.³⁴⁰

The District Court of Amsterdam decided to refer a number of questions to the Court of Justice, including whether the requirement of an executing Member State (the Netherlands) of a certain period of lawful residence and a residence permit of indefinite duration was compatible with Article 4(6) of the FD EAW and whether

³³⁴ Case C-66/08, *Kozłowski* [2008] ECR 6041, paras. 27-30.

³³⁵ Case C-66/08, para. 46.

³³⁶ Case C-66/08, para. 48.

³³⁷ Case C-123/08, *Wolzenburg* [2009] ECR 9621, para. 28.

³³⁸ Case C-123/08, *Wolzenburg* [2009] ECR 9621, para. 20. Law on the surrender of persons, Art. 6(2): ‘The surrender of a Netherlands national shall not be permitted if that surrender is sought for the purposes of execution of a custodial sentence imposed on him by final judicial decision.’

³³⁹ Case C-123/08, *Wolzenburg* [2009] ECR 9621, para. 21. Law on the surrender of persons, Art. 6(5): ‘Paragraphs 1 to 4 shall also apply to a foreign national in possession of a residence permit of indefinite duration in so far as he may be prosecuted in the Netherlands for the offences on which the European arrest warrant is based and in so far as he can be expected not to forfeit his right of residence in the Netherlands as a result of any sentence or measure which may be imposed on him after surrender.’

³⁴⁰ Case C-123/08, *Wolzenburg* [2009] ECR 9621, para. 25: ‘Article 21(1)(a) of the Vw provides that an application for a residence permit of indefinite duration within the meaning of Article 20 of that Law can be refused only where the foreign national has not been lawfully resident for a continuous period of five years immediately preceding that application, as referred to in Article 8 of the Vw.’ Cf. para. 38.

the distinction made between Dutch nationals and other EU citizens in the implementation by the Netherlands violated the non-discrimination principle.³⁴¹

In his opinion Advocate General Bot rejected the requirement of a residence permit as the right to free movement and residence is a direct right under the Treaty, not limited by secondary legislation.³⁴² Bot also rejected the mandatory five year residency requirement. In his view, even someone who has been staying in the executing Member State for a shorter period of time may nevertheless have other sufficiently strong connections with that State, such as having his principal residence there, living with his family and exercising a professional or trade activity in that State.³⁴³

With reference to the criteria laid down by the Court in the *Kozłowski* case, in Bot's opinion, the period of residence in the executing Member State of a requested person under a European arrest warrant, for the purpose of determining whether the requested person is staying or resident in that State within the meaning of Article 4(6) of the FD EAW, must be sufficient to establish that, in the light of the other objective factors which characterise that person's specific situation, he has connections with that State which give grounds for concluding that execution of his prison sentence in the executing Member State is likely to facilitate his reintegration.³⁴⁴

Bot held the Dutch legislation contravened the principle of non-discrimination, not only as regards the five year residency requirement for other EU nationals, but also as regards mandatory ground for the refusal of arrest warrants for the execution of sentences imposed on Dutch nationals.³⁴⁵ He recalled that in accordance with the principle of mutual recognition:

'Where a decision is taken by a judicial authority in accordance with the law of the Member State concerned, that decision has full and direct effect throughout the Union, with the result that the competent authorities of any other Member State must provide their assistance in executing it as if it originated from a judicial authority of their own State.'³⁴⁶

Furthermore, following the Commission's reasoning in its Proposal for the FD EAW cited above,³⁴⁷ Bot expressed the opinion that:

'Since a Union citizen now has, in every Member State, largely the same rights as those of that State's nationals, it is fair that he should also be subject to the same obligations in criminal matters. That means that, if he commits an offence in the host Member State, he should be prosecuted and tried there before the courts of that State, in the same way as nationals of the State in question, and that he should serve his sentence

³⁴¹ Case C-123/08, *Wolzenburg* [2009] ECR 9621, para. 39.

³⁴² Opinion of AG Bot in Case C-123/08, *Wolzenburg*, paras. 76-79.

³⁴³ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, para. 68.

³⁴⁴ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, para. 70.

³⁴⁵ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, paras. 120-132.

³⁴⁶ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, para. 131.

³⁴⁷ Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant.

there, unless its execution in his own State is likely to increase his chances of reintegration.³⁴⁸

The Court agreed with its Advocate General that possession of a residence permit is not a necessary precondition for the application of Article 4(6).³⁴⁹ It, however, disagreed on the issue of a five-year residency requirement. It recalled that the purpose of the FD EAW is to replace the multilateral system of extradition between Member States with a system of surrender, based on the principle of mutual recognition.³⁵⁰ It held that this principle means that, in accordance with Article 1(2) FD EAW, the Member States are in principle obliged to act upon a European arrest warrant, unless the grounds for non-execution in Article 3 and 4 FD EAW apply.³⁵¹

It held the Dutch length of residency requirement to be compatible with the FD EAW as:

A national legislature which, by virtue of the options afforded it by Article 4 of the FD EAW, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice.³⁵²

By limiting the situations in which the executing judicial authority was allowed to refuse to execute a European arrest warrant, such legislation only facilitated the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) FD EAW.³⁵³

Even though the Court recognised the objective of reintegrating the person into society, this objective could not stand in the way of a Member State implementing the FD EAW in line with the principle of mutual recognition.³⁵⁴ The Court then tackled the difference in treatment between Dutch nationals and foreign (EU) nationals created by the mandatory ground for refusal of arrest warrants for the execution of sentences imposed on Dutch nationals,³⁵⁵ whereas a five-year residency requirement was imposed on other EU nationals. The Court held this difference in treatment to be discriminatory, but it was justified since it was in line with Directive 2004/38/EC on the rights of free movement and residence for EU citizens and their families³⁵⁶ and Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences

³⁴⁸ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, para. 142.

³⁴⁹ Case C-123/08, para. 53.

³⁵⁰ Case C-123/08, para. 56.

³⁵¹ Case C-123/08, para. 57.

³⁵² Case C-123/08, para. 58.

³⁵³ Case C-123/08, para. 59.

³⁵⁴ Case C-123/08, para. 62.

³⁵⁵ Case C-123/08, paras. 68-70.

³⁵⁶ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 2004 O.J. (L 158) 77.

or measures involving the deprivation of liberty for the purpose of their enforcement in the European Union ('FD Transfer of Prisoners').³⁵⁷

Directive 2004/38/EC defines conditions governing the exercise of the right of free movement and residence as well as the right of permanent residence in the territory of the Member States by Union citizens and their family members. Union citizens who have resided legally for a continuous period of five years in the host Member State obtain the right of permanent residence, strengthening the feeling of Union citizenship as a key element in promoting social cohesion, which is one of the fundamental objectives of the Union.³⁵⁸

The FD Transfer of Prisoners complements the FD EAW by providing a system in accordance with which a judgment may be forwarded directly to another Member State for the purpose of recognition of the judgment and execution of the sentence there, 'with a view to facilitating the social rehabilitation of the sentenced person'.³⁵⁹

It also applies in the situation when an EAW for the execution of a sentence has been refused and the executing Member State has agreed to execute the sentence itself instead in accordance with Article 4(6) of the FD EAW (after a refusal of an EAW for the execution of a sentence).

It furthermore applies in the situation when a person has been surrendered under a European arrest warrant with the guarantee that he or she is to be returned to the executing Member State to serve his or her sentence there (as a condition for the execution of an EAW for prosecution in accordance with Article 5(3) FD EAW).³⁶⁰

In accordance with Article 4(1) FD Transfer of Prisoners the judgment plus a standard form containing further information³⁶¹ may be forwarded to:

³⁵⁷ Case C-123/08, paras. 71 and 72; Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. (L 327) 27 of 05.12.2008: Vermeulen *et al.* 2011; Klip 2012, p. 378-380, who refers to it as the 'Framework Decision on Custodial sentences'; Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving the deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM (2014) 057 final.

³⁵⁸ Directive 2004/38/EC, Art. 16, recital 17.

³⁵⁹ FD Transfer of Prisoners, Art. 3(1).

³⁶⁰ FD Transfer of Prisoners, Art. 25 (Enforcement of sentences following a European arrest warrant); 'Without prejudice to Framework Decision 2002/584/JHA, provisions of this Framework Decision shall apply, mutatis mutandis to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision, or where, acting under Article 5(3) of that Framework Decision, it has imposed the condition that the person has to be returned to serve the sentence in the Member State concerned, so as to avoid impunity of the person concerned.'

³⁶¹ It has no specific name beyond 'Certificate', see Annex I.

- (i) the Member State of nationality of the sentenced person in which he or she lives; or
- (ii) the Member State of nationality, to which, while not being the Member State where he or she lives, the sentenced person will be deported, once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure taken as a consequence of the judgment by any Member State other than a Member State referred to in; or
- (iii) the competent authority of which consents to the forwarding of the judgment and the certificate to that Member State.

Article 4(7)(a) contains an optional provision allowing the competent authority of a Member State to forward a judgment to another Member State for execution if the sentenced person lives and has been legally residing there continuously for at least five years and will retain a permanent right of residence in that State. If the other Member State has made the same notification, consent in accordance with Article 4(1) (iii) is no longer required.³⁶²

In accordance with Article 6(2), the person's consent is not required in case (i) the judgment is forwarded to the Member State of nationality in which the sentenced person lives; (ii) to the Member State to which the sentenced person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment; or (iii) in case he or she fled or returned to the executing Member State to avoid prosecution or execution of the sentence in accordance with Articles 4(1)(a) and (b).³⁶³ The sentenced person has no possibility to appeal the decision on where the sentence will be executed, nor is (s)he entitled to legal representation.³⁶⁴ There is merely an obligation to obtain the person's opinion in accordance with Article 6(3). The Commission's implementation report confirms this situation, although it states that 'implementing legislation should provide for a transfer of the sentenced person without his consent only in the three limited circumstances as indicated in this Article [6(2)]'.³⁶⁵

³⁶² FD Transfer of Prisoners, Art. 4(7): 'Each Member State may, either on adoption of this Framework Decision or later, notify the General Secretariat of the Council that, in its relations with other Member States that have given the same notification, its prior consent under paragraph 1(c) is not required for the forwarding of the judgment and the certificate: if the sentenced person lives in and has been legally residing continuously for at least five years in the executing State and will retain a permanent right of residence in that State.'

³⁶³ FD Transfer of Prisoners, Art. 6; cf. Schengen Agreement, Arts. 67-69.

³⁶⁴ Verbeke, De Bondt & Vermeulen 2013, p. 28.

³⁶⁵ Cf. Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving the deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM (2014) 057 final, para. 4.1. role of the person concerned in the transfer process: 'The implementing legislation should provide for a transfer of the sentenced person without his consent only in the three limited circumstances as indicated in this Article. There should as a minimum be provisions on the →

Furthermore, Article 9 does not contain a ground for non-execution based on the fact that the executing Member State is not the one with which the sentenced person has the closest ties or has the best chances of social rehabilitation. The other side of that coin is that Member States have to take back their nationals. Poland, however, obtained a 5-year derogation 'in the light of the increased mobility of Polish citizens in the Union'.³⁶⁶

Before concluding this section, the final case to be mentioned in this context is that of *Lopes da Silva Jorge*,³⁶⁷ which concerned a Portuguese national who had been sentenced for drug trafficking in 2003. In 2006 the Portuguese authorities issued a European arrest warrant for the execution of his sentence.³⁶⁸ Mr. Lopes da Silva, who had moved to France, found a job there and married a French national, preferred that the execution of the sentence took place in France and hence contested surrender to Portugal as a disproportionate interference with his right to respect for private and family life.³⁶⁹ However, in accordance with the French implementation of Article 4(6) FD EAW, the execution of a sentence could only be refused in cases of nationals.³⁷⁰ The Court of Appeal decided to stay the proceedings and to ask the Court of Justice whether French implementing legislation was discriminatory on grounds of nationality within the meaning of Article 18 TFEU.³⁷¹

Starting his reasoning from a fundamental rights perspective, citing Article 1(3) FD EAW, Advocate General Mengozzi held that:

'In the area covered by the Framework Decision, and more generally in the area of police and judicial cooperation in criminal matters, the principle of mutual recognition which lies at the heart of the mechanism behind the European arrest warrant cannot conceivably be applied in the same way as it is in the case of the recognition of a university qualification or a driving licence issued by another Member State. Nor can there be any question of the Member States contributing to the creation of an area of freedom, security and justice the effect of which would be to neglect the fundamental rights of those whose conduct may have constituted a threat to freedom, security or justice.'³⁷²

He therefore held that the principle of mutual recognition, more specifically where it is applied in relation to a European arrest warrant issued for the purposes of

taking into account the opinion of the sentenced person (where he is still in the issuing state); on giving information to the sentenced person; on consultation between the Competent Authorities; and on the possibility for the authorities of the executing State to give a reasoned opinion.

³⁶⁶ FD Transfer of Prisoners, recital 11: 'Poland needs more time than the other Member States to face the practical and material consequences of transfer of Polish citizens convicted in other Member States, especially in the light of an increased mobility of Polish citizens within the Union. For that reason, a temporary derogation of limited scope for a maximum period of five years should be foreseen.'

³⁶⁷ Case C-42/11, *Lopes da Silva Jorge*, not yet published.

³⁶⁸ Case C-42/11, para. 18.

³⁶⁹ Case C-42/11, para. 18.

³⁷⁰ Case C-42/11, para. 16.

³⁷¹ Case C-42/11, para. 26.

³⁷² Opinion by AG Mengozzi in Case C-42/11, *Lopes da Silva Jorge*, para. 28.

executing a sentence, 'cannot be applied automatically but must, on the contrary, be viewed in the light of the personal and human context of the individual situation underlying each request for the execution of that warrant.' In the light of the 'higher principle represented by the protection of human dignity', the cornerstone of the protection of fundamental rights within the European Union legal order, what he described as the *free movement of judgments in criminal matters*, 'must not only be guaranteed but also, where appropriate, limited'.³⁷³

Mengozzi further discussed the statement by the Court in *Wolzenburg* that mutual recognition means that, in accordance with Article 1(2) FD EAW, the Member States are in principle obliged to act upon a European arrest warrant, unless the grounds for non-execution in Articles 3 and 4 FD EAW apply.³⁷⁴ In pointing to the objective of Article 4(6) FD EAW (social rehabilitation), he pointed out that the principle of mutual recognition as implemented by the FD EAW, 'important though it is, was none the less not intended to be absolute by the European Union legislature.'³⁷⁵

Reading the provision in this way would not

'by any means provide for the impunity of the requested person or call into question the principle of mutual recognition, since the executing State can in fact refuse to execute the European arrest warrant only on the express condition that it undertakes to execute the sentence in its territory, without ever calling into question the decision by which that sentence was imposed'.³⁷⁶

He furthermore pointed out that Member States cannot, in the context of the implementation of a framework decision, infringe European Union law, in particular the provisions relating to the freedom accorded to every citizen of the Union to move and reside freely within the territory of other Member States.

'The corollary of the freedom of movement and residence enshrined in European Union law is that it is now no longer a matter of irrebuttable presumption that a sentenced person has the best chance of reintegrating into society only in the State of which he is a national.'

He therefore held the French legislation, according to which execution of a sentence could only be refused in cases of nationals, to be discriminatory.³⁷⁷

In line with its decision in *Wolzenburg*, the Court repeated that Member States, when implementing Article 4(6) FD EAW may limit the situations in which it is possible, as an executing Member State, to refuse to surrender a person who falls within the scope of Article 4(6).³⁷⁸ However, in the light of the aims pursued by Article 4(6), to increase the chances of reintegrating a person sentenced to a custodial sentence in another Member State into society, the nationals of the Member States of execution and the nationals of other Member States staying or resident in

³⁷³ Opinion by AG Mengozzi in Case C-42/11, para. 28.

³⁷⁴ Case C-123/08, para. 57.

³⁷⁵ Opinion by AG Mengozzi in Case C-42/11, para. 36.

³⁷⁶ Opinion by AG Mengozzi in Case C-42/11, para. 39.

³⁷⁷ Opinion by AG Mengozzi in Case C-42/11, para. 51.

³⁷⁸ Case C-42/11, para. 34.

the Member State of execution and who are integrated into the society of that State should not, as a rule, be treated differently.³⁷⁹

The French government claimed it could not execute sentences of nationals of other EU Member States until the national implementation of Framework Decision 2008/909 would enter into force as it only applied the 1983 Council of Europe Convention on the Transfer of Sentenced Persons in case of French nationals.³⁸⁰ The Court, however, rejected this argument. It noted that other Member States interpreted the concept of national as including certain categories of persons staying in or resident in that State without being nationals thereof.³⁸¹ In line with the *Pupino* case,³⁸² the Court reminded that the interpretation of national law would have to be given as far as possible in the light of the wording and purpose of the Framework Decision concerned in order to achieve the results by it,³⁸³ in this case also allowing other EU nationals with sufficient connections (to France) to benefit from the application of this ground for non-execution.³⁸⁴

Assessment

The application of mutual recognition to the extradition of nationals, residents and those staying in the executing Member States puts in focus how two policy objectives of the European Commission evolved in the negotiation, implementation and interpretation of the relevant provisions of the FD EAW:

- (i) Once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extra-national implications – should automatically be accepted in all other Member States and have the same or at least similar effects there,³⁸⁵ implying the free movement of judicial decisions;³⁸⁶ and
- (ii) A Citizen of the Union should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union.³⁸⁷

As already discovered in the previous sections, Member States were not ready to follow the European Commission's proposals for the free movement of judicial decisions for their entire criminal law, and they built in two territoriality exceptions to surrender. They also kept a nationality exception for the execution of sentences,

³⁷⁹ Case C-42/11, para. 40.

³⁸⁰ Case C-42/11, para. 45.

³⁸¹ Case C-42/11, para. 48.

³⁸² Case C-105/03, *Pupino* [2005] 5285.

³⁸³ Case C-42/11, para. 53.

³⁸⁴ Case C-42/11, para. 58.

³⁸⁵ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 2, further discussed in section 2.2.

³⁸⁶ FD EAW, recital 5.

³⁸⁷ Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant.

where the requested person is staying in or is a national or a resident of the executing Member State (Art. 4(6) FD EAW), connected with the possibility for the executing judicial authority to make surrender conditional upon the guarantee that the national or resident will be returned to the executing Member State to serve the custodial sentence or detention order passed against him in the issuing Member State (Art. 5(3) FD EAW).

The *Kozłowski*, *Wolzenburg* and *Lopes da Silva Jorge* cases illustrate how divergent the concepts of ‘staying in’, ‘national’ and ‘resident’ were implemented in the Member States, with France limiting the exception to nationals, Germany expanding it to habitual residents with an interest in the execution of the sentence in Germany that deserves protection and predominates, and the Netherlands demanding a five-year period of lawful residence and a residence permit of indefinite duration.

The Court was then asked to provide the correct interpretation of Article 4(6) FD EAW. In doing so, it had to take into account the right of the individual to social rehabilitation as laid down in the FD Transfer of Prisoners adopted in 2008. Furthermore, as pointed out by Advocate General Mengozzi, the freedom accorded to every citizen of the Union to move and reside freely within the territory of other Member States means that it can no longer be assumed that the sentenced person has the best chance of reintegrating into society only in the State of which he is a national.

The question then becomes how to apply the ‘free movement of judicial decisions’, the obligations for EU citizens to face being prosecuted and sentenced wherever they have committed an offence and the freedom of movement and residence, the right to social rehabilitation, fundamental rights more generally at the same time. In terms of the FD EAW, this goes into the relationship between Article 1(2) FD EAW (recognition and execution) and Article 1(3) FD EAW (fundamental rights).

In *Wolzenburg*, the Court seems to have made a normative choice favouring the ‘free movement of judicial decisions’ over the interests of free movement and residence as well as social rehabilitation, as, by limiting the situations in which the executing judicial authority was allowed to refuse to execute a European arrest warrant, the Dutch legislation only facilitated the surrender of requested persons in accordance with the principle of mutual recognition set out in Article 1(2) FD EAW.³⁸⁸

It thereby limited the rights of EU citizens to equal treatment in terms of the execution of prison sentences to those with continuous lawful residence for five years, a matter which that same Court, in *Kozłowski*, left up to the national judicial authority to determine in view of various objective factors. The difference between the two decisions is that the Netherlands had laid down specific conditions for residents of other EU Member States to comply with before they could benefit from

³⁸⁸ Case C-123/08, para. 59; Mitsilegas 2012, p. 341: ‘The Court justified this departure from *Kozłowski* upholding the Dutch limitation of exclusion of a great number of EU nationals from the protective scope of Article 4(6) by accepting the logic of abuse put forward by the Dutch government, which justified the adoption of the Dutch implementing law on the “high degree of inventiveness” in the arguments put forward in order to prove that they have a connection to Netherlands society.’

the mandatory refusal of a European arrest warrant for the execution of a prison sentence.

It has been considered that a narrow interpretation of exceptions to ‘mutual recognition’ is ‘in line with the Court’s traditional internal market case law’.³⁸⁹ In my view this is not a correct interpretation of mutual recognition. The implementation by the Netherlands simply imposed extra conditions for other EU nationals to comply with before they could benefit from equal treatment with nationals for the purpose of the application of the non-execution ground of Article 4(6) FD EAW. The Court deemed one of those extra conditions, the five-year residency requirement, proportionate.

While it is true that exceptions to free movement have to be construed narrowly, in line with the proportionality principle, it needs to be underlined that internal market case law, ever since *Cassis de Dijon*, does not make a normative choice in favour of free movement over other interests, such as the environment or consumer protection. Also, particularly in more sensitive areas, such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, the Court will not insist on market access without equivalent standards.³⁹⁰ In this case judicial authorities should have been left with more room to determine the level of social integration taking various objective factors into account.³⁹¹ I agree with Advocate General Bot that allowing the Netherlands to maintain a mandatory ground for non-execution for nationals might also be seen as unjustified discrimination, particularly if they may benefit from this exception even though they did not reside in the Netherlands, whereas a permanent resident of four or five years with family ties in the country would be surrendered.

The validity of the sentence and the security interest is not being disputed by the application of the exception contained in Article 4(6) FD EAW, since, as Advocate General Mengozzi pointed out, the executing Member State can refuse to execute the European arrest warrant only on the express condition that it undertakes to execute the sentence in its territory,³⁹² without ever calling into question the decision by which that sentence was imposed. In other words, there is no impunity for the wanted person. The central question is (and should be) where the sentence should be executed in the interest of social rehabilitation.³⁹³

It is important to distinguish the principle of mutual recognition from the free movement of judicial decisions by focusing on the underlying security interest. The recognition of the sentence as such has to be differentiated from the question on *where* the sentence should be executed in view of obtaining social rehabilitation. The security interest can be met while at the same time determining the best place to

³⁸⁹ Janssens 2010, p. 842.

³⁹⁰ See the discussion in Chapter 2, section 3.4.

³⁹¹ Klip 2010, commenting on the consequent case law of the District Court of Amsterdam (translation): ‘In my view the court is focusing too much on the duration of the residence and is not investigating other factors.’

³⁹² Opinion by AG Mengozzi in Case C-42/11, para. 39.

³⁹³ See also Thunberg Schunke 2013 talking about mutual trust on p. 95: ‘In the case of *Wolzenburg* the CJEU, however, gave some statements on the interpretation of the principle of mutual recognition, which in this respect sounded almost like automatic recognition.’

execute the sentence for the social rehabilitation of the sentenced persons, taking into account the Treaty provisions on European citizenship (which is after all the purpose of the FD Transfer of Prisoners), by an individual assessment, taking into account all relevant factors using the length of residence as a yardstick both for nationals with a rebuttable presumption in favour of execution in their Member State of nationality and residents with a rebuttable presumption in favour of execution in the Member State of residence after five years of continuous legal residence.³⁹⁴

The conflict between the free movement of judicial decisions and the rights of EU citizens also come to the foreground very strongly in the FD Transfer of Prisoners. The mandatory nature of the execution of sentences in case the convicted person is a national is remarkable, since even in this case it may be disputable what would objectively and in the individual case be the best place for the person to serve its sentence to obtain social rehabilitation.³⁹⁵

In general it seems that the protection of individual rights, and notably the right to social rehabilitation, are not adequately followed through in the Articles of FD Transfer of Prisoners. The recitals do, however, contains references to fundamental rights, *inter alia*, clarifying that the Framework Decision should be applied in accordance with applicable Community legislation, including Directive 2004/38/EC on the rights of free movement and residence for EU citizens and their families.³⁹⁶ The Court of Justice has an extensive body of case law concerning the circumstances in which Member States may expel EU nationals or their family members on public policy or security grounds, more recently based on Article 28 of Directive 2004/38, which could be applied *mutatis mutandis* to the situation in which a person is surrendered to serve a sentence in another Member State without his or her consent.³⁹⁷

³⁹⁴ Cf. Mitsilegas 2012, p. 342 and 343: 'The automatic exemption of own nationals from the scope of the Framework Decision challenges one of the main innovations of this instrument (which is to abolish the limits to the surrender of own nationals), and sits at odds with the construction of the Union as a borderless Area of Freedom, Security and Justice, where the European arrest warrant serves to compensate for the ease with which those wanted to face justice may move from one Member State to another. The automaticity embraced by the Court is also at odds with the Area of Freedom, Security and Justice in that it is based upon the presumption that a national of an EU Member State has more connection with his/her Member State of origin than with another Member State and thus cannot be better integrated in another Member State.'

³⁹⁵ Verbeke, De Bondt & Vermeulen 2013, p. 22: 'The principle of article 3.1 FD Transfer of Prisoners – that enforcement of a sentence in the executing state should enhance the possibility of social rehabilitation of the sentenced person, – implies that no competent authority can even take a decision to transfer a prisoner or recognise and enforce a sentence when this would not be the case. Such an assessment seems to necessitate consideration of both the conditions to which that individual would be subjected as a result of a transfer to the executing state (rehabilitation) and the individual's personal situation (social rehabilitation).'

³⁹⁶ O.J. (L 77) 158 of 30.04.2004; FD Transfer of Prisoners, recitals 13-16; Mitsilegas 2012, p. 329.

³⁹⁷ Directive 2004/38/EC, Article 28 Protection against expulsion: '1. Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural →

This also begs the question whether the sentenced person has an effective remedy in arguing any of these points in accordance with Article 47 EU Charter. Recital 5 to the FD Transfer of Prisoners inexplicably states:

Notwithstanding the need to provide the sentenced person with adequate safeguards, his or her involvement in the proceedings should no longer be dominant by requiring in all cases his or her consent to the forwarding of a judgment to another Member State for the purpose of its recognition and enforcement of the sentence imposed.

If consent is no longer required, at the very least based on the application of the EU Charter, a possibility should exist for the sentenced person to appeal the decision. Recital 5, even if it stems from the pre-Lisbon time, is all the more remarkable given the fact that, in the negotiations on the Directive on Access to a Lawyer, a provision was agreed to on dual representation in European arrest warrant cases. That would seem a pyrrhic victory in case there would be no such right of appeal under the FD Transfer of Prisoners.³⁹⁸ The automaticity of execution by the Member State of nationality without a right to appeal seems to fly in the face of EU primary and secondary law on fundamental rights and EU citizenship casting doubts over the validity of the FD Transfer of Prisoners as such.

5.1.5. *Ne Bis in Idem and in Absentia Decisions*

A number of specific mandatory and optional grounds for non-execution based on fundamental rights made it into the FD EAW:

- The person has finally been judged by a Member State and the sentence has been served or is currently being served (FD EAW, Art. 3(2), a decision to halt proceedings or where a final judgment had been passed upon the requested person (FD EAW, Art. 4(3)); the fact that the requested person has been finally

integration into the host Member State and the extent of his/her links with the country of origin; 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security; 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: (a) have resided in the host Member State for the previous ten years; or (b) are a minor, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989'; Case C-145/09, *Pangiotis Tsakourdis*, paras. 50-52 in particular: Craig & De Búrca 2011, p. 756-759.

³⁹⁸ Verbeke, De Bondt & Vermeulen 2013, p. 37: 'Prisoners could be granted the right to legal assistance during the transfer process in order for their procedural rights to be protected and acknowledged. The detained person could also be granted a right to a judicial review of the transfer decision when he/she is not happy with the issuing state's competent authority's final decision on his/her transfer. The right to be heard by a judge reflects the European Commission's course of action to enhance procedural rights within the EU and should therefore be encouraged.' Cf. Mitsilegas 2012, p. 329: 'The Framework Decision on the transfer of sentenced persons is an instrument designed with the interests of the State firmly in mind and with very little consideration for the position of the affected individuals.'

convicted by a third State for the same acts (FD EAW, Art. 4(5)), *Ne bis in idem*, which will be dealt with more extensively in section 6); and

- *In absentia* convictions on which a separate FD was adopted in 2009 which, as discussed, deleted the guarantee contained in Article 5(1) and added a ground for non-execution (FD EAW, Art. 4(a)):
 1. The executing judicial authority may also refuse to execute the European arrest warrant issued for the purpose of executing a custodial sentence or a detention order if the person did not appear in person at the trial resulting in the decision, unless the European arrest warrant states that the person, in accordance with further procedural requirements defined in the national law of the issuing Member State:
 - (a) in due time:
 - (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled data and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and
 - (ii) was informed that a decision may be handed down if he or she does not appear for the trial
 or
 - (b) being aware of the scheduled trial had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial;
 or
 - (c) after being served with the decision and being expressly informed about the right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed:
 - (i) expressly states that he or she does not contest the decision; or
 - (ii) did not request a retrial or appeal within the applicable time frame;
 or
 - (d) was not personally served with the decision but:
 - (i) will be personally served with it without delay after the surrender and will be expressly informed of his or her right to a retrial, or an appeal, in which the person has the right to participate and which allows the merits of the case, including fresh evidence, to be re-examined, and which may lead to the original decision being reversed; and
 - (ii) will be informed of the time frame within which he or she has to request such a retrial or appeal, as mentioned in the relevant European arrest warrant.

Surrender procedures in which these grounds were raised subjected judicial authorities to several questions as to their role in resolving an apparent conflict between the free movement of judicial decisions and upholding fundamental rights.

The *Mantello* case,³⁹⁹ which concerned the interpretation of the concept of *ne bis in idem*, may be mentioned as a first example. Mr. Mantello was convicted in 2005 by the Catania District Court for possession of drugs.⁴⁰⁰ In 2008 he was arrested in Germany, based on a European arrest warrant issued from Italy, on charges of participation in a criminal organisation and drug trafficking,⁴⁰¹ acts the Italian prosecutors were aware of but had not prosecuted him for in 2005. The Higher Regional Court of Stuttgart doubted whether it should refuse the European arrest warrant for violation of the *ne bis in idem* principle in accordance with Article 3(2) FD EAW, since the Italian authorities has sufficient evidence to prosecute him for these acts in 2005, as part of the criminal proceedings leading to his conviction for the possession of drugs, but they did not pass this information on to the investigating judge.⁴⁰² The Regional Court of Stuttgart referred the following questions to the Court of a Justice for a preliminary ruling:

- (1) Is the existence of the “same acts” within the meaning of Article 3(2) of the Framework Decision ... to be determined:
 - (a) according to the law of the issuing Member State, or
 - (b) according to the law of the executing Member State, or
 - (c) according to an autonomous interpretation, based on the law of the European Union, of the phrase “same acts”?
- (2) Are acts consisting in the unlawful importation of narcotic drugs the “same acts”, within the meaning of Article 3(2) of the Framework Decision, as participation in an organisation the purpose of which is illicit trafficking in such drugs, in so far as the investigating authorities had information and evidence, at the time at which sentence was passed in respect of such importation, which supported a strong suspicion of participation in such an organisation, but omitted for tactical reasons relating to their investigation to provide the relevant information and evidence to the court and to institute criminal proceedings on that basis?⁴⁰³

These questions not only went into the interpretation of the concept of ‘same acts’ in Article 3(2) FD EAW, but they also addressed the role of the executing judicial authority in interpreting this concept. In this context, Advocate General Bot argued that, even though it is in accordance with the principle of mutual recognition, it is not for the executing judicial authority to ascertain of its own motion whether the *ne bis in idem* principle is observed. It cannot execute a European arrest warrant if it has sufficient evidence that that principle has been infringed, including in cases in which the acts have already formed the subject-matter of a final judgment in the issuing Member State.⁴⁰⁴ An execution procedure was foreseen in the FD EAW in which *ne bis in idem*, as an expression of a fundamental right, was included as a ground for non-execution, and therefore it was also incumbent on the executing

³⁹⁹ Case C-261/09, *Mantello*, not yet published.

⁴⁰⁰ Case C-261/09, para. 22.

⁴⁰¹ Case C-261/09, paras. 15-18.

⁴⁰² Case C-261/09, para. 27.

⁴⁰³ Case C-261/09, para. 30.

⁴⁰⁴ Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, para. 9.

judicial authority to verify whether this condition was fulfilled.⁴⁰⁵ He distinguished the matter from a purely internal situation in which there would have to be trust in the decision of the issuing judicial authority, as, under Article 3(2) the executing judicial authority would need to verify compliance with a fundamental principle of EU law.⁴⁰⁶ On substance he reminded that:

‘According to settled case law, the relevant criterion for assessing the *idem* element is identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected.’⁴⁰⁷

He, however, rejected the notion that the *ne bis in idem* principle would require the investigating authorities to prosecute, when charges are first brought, in respect of all of the acts which may be attributed to the person concerned and to put them before the court.⁴⁰⁸

The Court, however, held that the questions of the Higher Regional Court of Stuttgart related more to the interpretation of the concept of ‘final decision’ aspect of the *ne bis in idem* principle.⁴⁰⁹ It then held that it is up to the Member State in which the (original) judgment was delivered to determine whether or not a person has been finally judged.⁴¹⁰ If further prosecution for certain acts would be possible in accordance with the law of the issuing Member State, no bar to further prosecution could be raised in another Member State.⁴¹¹ As in this case the issuing judicial authority expressly stated that the earlier judgment did not constitute a final judgment for the acts referred to in the European arrest warrant issued by it and therefore did not preclude further criminal proceedings, the executing judicial authority had no reason to apply the ground for non-execution based on *ne bis in idem*.⁴¹²

Another case to be mentioned in this context is *I.B.*⁴¹³ This case concerned a Romanian citizen who had been convicted *in absentia* to four years’ imprisonment for trafficking in nuclear and radioactive material. He had since moved to

⁴⁰⁵ Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, paras. 76-78.

⁴⁰⁶ Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, paras. 93-95.

⁴⁰⁷ Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, para. 119; Case C-288/05, *Kretzinger* [2007] ECR 6441.

⁴⁰⁸ Opinion of AG Bot delivered on 7 September 2010 in Case C-261/09, *Mantello*, para. 126.

⁴⁰⁹ Case C-261/09, *Mantello*, paras. 42-44.

⁴¹⁰ Court of Justice Case C-261/09, *Mantello*, para. 46. Criticised by Weyembergh 2013, p. 950: ‘We understand its decision as rejecting the conclusions of the Advocate General, i.e. as excluding, in the circumstances of the case, a double-check of the respect of *ne bis in idem* by the issuing and executing authorities, as admitting only such a control by the issuing State and as demanding, of the executing authority, to trust the issuing authority. If our interpretation of the ECJ decision is correct, we do not see how to reconcile such case law with the mandatory nature of the grounds for refusal based on article 3(2) of the 2002 Framework Decision on the EAW. This case shows anyway very clearly the sensitiveness of the question of the extent of the control the executing authority is authorised to perform on the EAW by the principle of mutual recognition and the uneasiness of the Court when confronted with it.’

⁴¹¹ Court of Justice Case C-261/09, *Mantello*, para. 47.

⁴¹² Court of Justice Case C-261/09, *Mantello*, para. 51.

⁴¹³ Case C-306/09, *I.B.* [2010] ECR 10341.

Belgium.⁴¹⁴ Belgian authorities took him into custody based on a Romanian entry into the Schengen Information System seeking his arrest and surrender for the execution of the sentence in Romania.⁴¹⁵ Since I.B. had not been properly summoned for the original trial, the Belgian Constitutional Court questioned whether it could insist on a retrial plus retransfer to Belgium for the execution of the possible sentence. The question was whether the court had the power to do this since, under Article 5(1) FD EAW only a retrial may be demanded but not retransfer in accordance with Article 5(3) FD EAW, as that condition may only be imposed in case the EAW was issued for prosecution purposes, not for the execution of a sentence.⁴¹⁶

In his opinion, Advocate General Cruz stated that the interpretation to be given of the content and the purposes of the FD EAW must take into consideration all of the objectives sought by the text and, although mutual recognition is an instrument for strengthening the area of security, freedom and justice, according to him it is equally true that the protection of fundamental rights and freedom is a precondition which gives legitimacy to the existence and development of this area.⁴¹⁷ Therefore, although Article 5(1) contained a guarantee which is recognised by the European Court of Human Rights regarding decisions rendered *in absentia*, he emphasised too that Articles 4(6) and 5(3) also reflect a requirement contemplated by the European Convention on Human Rights and by the associated Court, in particular the right to private and family life in accordance with Article 8 ECHR (Art. 7 EU Charter).⁴¹⁸

The Court confirmed Advocate General Cruz's opinion in underlining that there is no absolute obligation to execute European arrest warrants and that fundamental rights may require a broader interpretation of the conditions under Article 5 FD EAW:

While the system established by Framework Decision 2002/584 is based on the principle of mutual recognition, that recognition does not, as is clear from Articles 3 to 5 of the framework decision, mean that there is an absolute obligation to execute the arrest warrant that has been issued.⁴¹⁹

It clarified that the situation of a person who was sentenced *in absentia*, to whom it is still open to apply for a retrial was, in its view, comparable to that of a person who is the subject of a European arrest warrant for the purpose of prosecution. Therefore there is no objective reason for excluding the possibility for the executing judicial authority to condition the execution of the EAW on both an opportunity to apply

⁴¹⁴ Case C-306/09, para. 28.

⁴¹⁵ Case C-306/09, para. 29.

⁴¹⁶ Case C-306/09, para. 41; Art. 5(1) FD EAW: 'In case the European arrest warrant is issued for a decision rendered in absentia; the condition that the issuing judicial authority gives the necessary assurances that the requested person will have an opportunity to apply for a retrial.' Art. 5(3) FD EAW: 'In case the person is national or resident of the executing Member State; the condition that the person is returned to the executing Member State to serve the custodial sentence or detention order passed against him.'

⁴¹⁷ Opinion of AG Cruz delivered on 6 July 2019 in Case C-306/09, *I.B.*, para. 43.

⁴¹⁸ Opinion of AG Cruz delivered on 6 July 2019 in Case C-306/09, *I.B.*, para. 43.

⁴¹⁹ Court of Justice Case C-306/09, *I.B.*, para. 50.

for a retrial in accordance with Article 5(1) FD EAW and the guarantee that the person will be returned to the executing Member State to serve the sentence in accordance with Article 5(3) FD EAW.⁴²⁰

The case of Mr. Melloni⁴²¹ also concerned a European arrest warrant based on an *in absentia* conviction. In 1996, Mr. Melloni fled Spain after he was granted bail in extradition procedures from Spain to Italy.⁴²² He was then convicted *in absentia* in Italy for fraudulent bankruptcy, a decision which was confirmed on appeal in 2003, following the issuance of a European arrest warrant in 2004. Mr. Melloni was arrested by the Spanish authorities in 2008. In the consequent surrender procedure he, *inter alia*, claimed that he could only be surrendered to Italy if he would be offered the opportunity to ask for a review of his conviction.⁴²³

Such a right is foreseen in Article 24 of the Spanish Constitution, but it is excluded by Article 4(a) of the FD EAW, as inserted by the Framework Decision on *in absentia* if the person 'being aware of the scheduled trial, had given the mandate to a legal counsellor, who was either appointed by the person concerned or by the State to defend him or her at the trial a was indeed defended by that counsellor at trial'.⁴²⁴ The Spanish Constitutional Court decided to refer the following questions to the Court of Justice for a preliminary ruling:

1. Must Article 4a(1) of Framework Decision 2002/584/JHA, as inserted by Council Framework Decision 2009/299/JHA, be interpreted as precluding national judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant conditional upon the conviction in question being open to review, in order to guarantee the rights of defence of the person requested under the warrant?
2. In the event of the first question being answered in the affirmative, is Article 4a (1) of Framework Decision 2002/584/JHA compatible with the requirements deriving from the right to an effective judicial remedy and to a fair trial, provided for in Article 47 of the Charter ..., and from the rights of defence guaranteed under Article 48(2) of the Charter?
3. In the event of the second question being answered in the affirmative, does Article 53 of the Charter, interpreted schematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the constitution of the first-mentioned Member State?

⁴²⁰ Court of Justice Case C-306/09, para. 57; Klip 2012, p. 376: 'This result represents an exemplary use of the applicable principles. On the one hand, the solution in practice must comply with the necessity of speeding up extradition proceedings. On the other hand, the rights of the requested person must be respected. The most appropriate decision takes account of both interests.'

⁴²¹ Case C-399/11, *Melloni*, not yet published.

⁴²² Case C-399/11, para. 13.

⁴²³ Case C-399/11, para. 16.

⁴²⁴ Case C-399/11, para. 23.

In his opinion on the questions raised by the Spanish Constitutional Court, Advocate General Bot pointed out that, in the Framework Decision on *in absentia*, the European Union legislature had exhaustively regulated the conditions under which the European arrest warrant would have to be executed in *in absentia* situations. It therefore removes the discretion of the executing judicial authorities to ask for a retrial beyond those particular situations.⁴²⁵ The Court, looking at the 'wording, scheme and purpose' of Article 4(a), as inserted by the Framework Decision on *in absentia*,⁴²⁶ agreed with this reading.⁴²⁷

In response to the second question raised by the Spanish Constitutional Court, it also held that Article 4(a), as inserted in the FD EAW by the Framework Decision on *in absentia* is compatible with Article 47 of the Charter (right to an effective remedy) and the rights of defence guaranteed under Article 48(2) of the Charter.⁴²⁸ The Court also got around the resulting difference in (higher) protection between that provided by the Spanish Constitution and that in the Framework Decision on *in absentia*, by relying on the primacy, unity and effectiveness of EU law as limits to more extensive fundamental rights protection:

60. (...) National authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

Responding to the third question, according to the Court allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State would undermine the efficacy of the Framework Decision on *in absentia*:

63. (...) allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise the efficacy of that framework decision.

Comment

After the Court was confronted with the question of the relationship between the mutual recognition of judicial decisions and the principles of non-discrimination and legality in the *Advocaten voor de Wereld* case and again with non-discrimination

⁴²⁵ Opinion of AG Bot in Case C-399/11, paras. 62-72.

⁴²⁶ Court of Justice Case C-399/11, para. 39.

⁴²⁷ Court of Justice Case C-399/11, para. 43.

⁴²⁸ Court of Justice Case C-399/11, paras. 49 and 50.

and European Citizenship in *Kozłowski* and *Wolzenburg*, cases like *Mantello*, *I.B.* and *Melloni* really go to the heart of some of the exceptions and conditions laid down in the Framework Decision itself.

In *I.B.* the Court chose an expansive approach, even adding new rights for the wanted person, whereas in *Mantello* the Court leaves it up to the discretion of the issuing judicial authority to determine whether acts have been finally judged and in *Melloni* it very strictly enforces EU legislation removing all discretion as regards *in absentia* convictions. Perhaps the difference between those cases may be explained by the fact that the Court shied away from giving the executing judicial authority too much power to refuse surrender in *Mantello*, whereas in *I.B.* the fundamental rights argument was inescapable and moreover would not lead to a possible non-execution, just an 'extra' condition being imposed.

In the case of *Melloni*, however, allowing for the Spanish authorities to demand a retrial would in fact add a ground for non-execution against the explicit wording of provision inserted in the FD EAW by the FD on *in absentia*. As this wording was found to be in compliance with the ECHR and the EU Charter, allowing the Spanish authorities to demand a retrial would disrupt the uniformity of EU law.

This *status quo* reveals two sets of tensions. The first concerns the fact that grounds for refusal based on the non-existence of dual criminality and the exercise of extraterritorial jurisdiction have been borrowed from extradition procedures, which relied on collaboration between sovereign countries. As such, these are strange transplants to the Area of Freedom, Security and Justice, which, as discovered in section 2, is premised on the idea of a single legal area. The creation of a single legal area is one of the foundations for mutual recognition as a principle of European law. Exceptions based on national sovereignty therefore need to be phased out as progress is made on approximating criminal definitions of Euro-crimes in accordance with Article 83 TFEU and criminal jurisdiction rules in accordance with Article 82 TFEU.

The second tension concerns the compliance with fundamental rights. Here the presumption of trust in the criminal justice systems and decisions of the issuing judicial authorities finds its limits in case there are concrete indications of irregularities and abuses. The Court understood this well in its *I.B.* decision. The Council, probably aware of this tension, sought to approximate the conditions to be applied by the executing judicial authorities in cases of *in absentia* decisions. As will be illustrated in the section on *ne bis in idem*, it has proved more difficult to approximate matters in that area and the choice has been made to rely on the interpretation of the *ne bis in idem* principle in the case law of the Court of Justice.

In the case of *in absentia* decisions, the Court of Justice has since concluded that there is no margin of appreciation for the executing judicial authority beyond the provisions of the FD EAW as amended, which it has held to be compliant with the EU Charter and ECHR case law in *Melloni*. However, even in the absence of such approximation, the Court has wished to restrain executing authorities from checking fundamental rights concerns of individuals related to the existence of a second prosecution for the same acts, taking trust in the issuing judicial authorities assessment as point of reference in *Mantello*.

It has been observed that the Council agreement on the Framework Decision on *in absentia* (as this was before the entry into force of the Treaty of Lisbon, the European Parliament had merely been formally consulted) was reached based on the lowest common denominator.⁴²⁹

It may be seen as regrettable that the Framework Decision on *in absentia* has struck a balance at the level of the lowest common denominator in terms of the protection of fair trial rights. It has been held to be compatible with the ECHR and the Charter, but it does not comply with the safeguards laid down in national constitutions, leading to a conflict regarding supremacy, mutual recognition and the responsibility for fundamental rights protection. This problem will be revisited when discussing the (other) additional harmonisation measures in section 5.2.

The *Melloni* case furthermore reveals an underlying conflict between the ‘free movement of judicial decisions’ and their collective impact on the fair trial rights of the individual. As already pointed when discussing the non-verification of dual criminality, the logic of having to accept goods onto the market complying with standards of other Member States might work for beer,⁴³⁰ but it becomes complicated when involving the transfer of individuals for prosecution in another Member State or imposing sentences ‘produced there’. One has to go back to the origins and purpose of mutual recognition and question whether a European criminal justice area, in which criminals are brought to justice and individuals have equivalent rights, whether they are involved in domestic or transnational criminal proceedings, is best achieved by a policy based on a system of the free movement of judicial decisions and the *credo* that EU citizens not only have a right to free movement but also the obligation to be prosecuted across the Union.

This brings us to the wider relationship between mutual recognition of judicial decisions in criminal matters and the additional harmonisation measures adopted since the FD EAW, with the European Parliament now in a role of co-legislator, which will be the subject of the next section.

5.2. Relationship with Additional Harmonisation Measures

The European arrest warrant is the mutual recognition procedure which comes closest to that of an actual trial situation attracting similar rights to those provided for in Articles 5 and 6 ECHR on the rights to liberty and the right to a fair trial, as it involves the deprivation of liberty and transfer of a person for prosecution or the execution of a sentence, now also governed by the FD Transfer of Prisoners.⁴³¹ Other

⁴²⁹ Tinsley 2012: ‘Wherever cooperation obligations and fundamental rights standards conflict, the lowest common denominator (ECHR) prevails. The more we cooperate, the more this race to the bottom continues.’

⁴³⁰ Case 178/84, *Commission v Germany* [1987] ECR 1227.

⁴³¹ Council framework decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. (L 327) 27 of 05.12.2008.

mutual recognition procedures, such as the European Investigation Order,⁴³² do so in a less intrusive or direct manner, although similar procedural rights may be applicable.⁴³³

The EU Charter of Fundamental Rights, which will be discussed more extensively in section 5.3., underscores the applicability of fundamental rights safeguards to judicial cooperation in criminal matters. This relationship between procedural rights and judicial cooperation was also recognised in the original Commission proposal for the FD EAW.⁴³⁴

The Commission proposal provided the following rights for the wanted person:

- access to a lawyer and an interpreter (Art. 11);
- conditional release of the surrendered person in the executing Member State (Art. 14);
- the guarantee of a retrial for a person against whom a judgment had been given *in absentia* (Art. 35);
- the use of videoconferencing as an alternative to surrender (Art. 33);
- encouragement of the execution of a penalty in the place where the condemned person can best be integrated (Art. 34).

The European Parliament's opinion even called for legal assistance to be free of charge in case the requested person had insufficient means.⁴³⁵

The FD EAW is far less generous in providing procedural rights to the wanted person. It does stipulate a right of access to a lawyer and an interpreter in Article 11,⁴³⁶ however, both the manner in which the requested person is to be informed of those rights and the contents of those rights are left up to national law by this article.

Since 2002, the procedural rights of wanted persons have, however, been (or are in the process of being) expanded in a separate directive in accordance with the 'Road map for strengthening procedural rights of suspected or accused persons in criminal proceedings',⁴³⁷ as previously discussed in section 2. Furthermore, a num-

⁴³² Directive 2014/41/EU of 3 April 2014 regarding the European Investigation Order in criminal matters, O.J. (L 130) 1 of 01.05.2014.

⁴³³ Thunberg Schunke 2013, p. 10; for a general overview of defence rights in criminal proceedings see Cape *et al.* 2010; Spronken & De Vocht 2011; Blackstock 2012; Blackstock *et al.* 2014.

⁴³⁴ COM (2001) 522.

⁴³⁵ Amendment 54: 'From the moment a requested person is arrested for the purpose of the execution of a European arrest warrant, that person shall have a right to be assisted by a legal counsel, and, if necessary by an interpreter. *Where the requested person does not have the means to pay them, he or she shall be entitled to be assisted free of charge.*'

⁴³⁶ Art. 11, rights of the requested person: '1. When a requested person is arrested, the executing competent judicial authority shall, in accordance with its national law, inform that person of the European arrest warrant and of its contents, and also of the possibility of consenting to the issuing judicial authority; 2. A requested person who is arrested for the purpose of the execution of a European arrest warrant shall have a right to be assisted by a legal counsel and by an interpreter in accordance with the national law of the executing Member State.'

⁴³⁷ Council document 14552/1/09 of 21.10.2009.

ber of ‘flanking’ mutual recognition measures have been adopted that further clarify the scope of the FD EAW or impact on its practical application on the wanted person. The FD on *in absentia*⁴³⁸ and FD Transfer of Prisoners⁴³⁹ have been discussed already. In the second part of this section, the potential impact of the European Investigation Order will be assessed.

The provisions of the EU procedural rights measures, to the extent these measures also apply *mutatis mutandis* to European arrest warrant procedures, and flanking measures now have to be read in conjunction with the provisions of the FD EAW. They will be discussed below in order for us to explore the relationship between mutual recognition as applied in the FD EAW and additional harmonisation measures, and the impact these additional harmonisation measures have had on mutual recognition as applied to extradition procedures.

5.2.1. Impact of Measures Adopted on the Rights of Suspects and Accused Persons in Criminal Proceedings

Soon after the adoption of the FD EAW, the Commission produced a Green paper on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union.⁴⁴⁰ In this Green paper, the Commission recalled what it had said in its 2000 Communication on mutual recognition, that it would have to be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the process but that the safeguards would even be improved through the process.⁴⁴¹

As discussed in section 4, in a way, this ambition is quite normal if seen from an internal market perspective where measures aimed at approximating the Single Market, in accordance with Article 114 TFEU, need to take a high level of health, safety, environmental protection and consumer protection as their basis.⁴⁴² As well as reassuring Member States and national constitutional courts that EU legislation does not lower domestic standards, it also recognises that while the European

⁴³⁸ O.J. (L 81) 24 of 27.03.2009.

⁴³⁹ Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, O.J. (L 327)27 of 05.12.2008.

⁴⁴⁰ COM (2003) 75.

⁴⁴¹ COM (2000) 0495, p. 16, as discussed in section 2.

⁴⁴² Art. 114 TFEU: ‘1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. (...) 3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.’

Convention on Human Rights enshrines core defence rights such as the rights to liberty and a fair trial (Arts. 5 and 6 ECHR), the casuistic nature of the judgments of its Court make it difficult to draw general consequences from them for the laws and practices of the Member States. This leaves aside the fact that the execution of ECtHR judgments is primarily a responsibility for the State parties.⁴⁴³ EU legislation does provide such a direct possibility for harmonisation and supranational enforcement.

Proposal for a Framework Decision on certain procedural rights in criminal proceedings throughout the European Union

Based on the replies to its Green paper in 2004, the Commission adopted a proposal aiming at guaranteeing basic fair trial rights of suspects or accused persons as laid down in the European Convention on Human Rights, including:

- access to legal advice, both before the trial and at trial (Arts. 2-5);
- access to interpretation and translation (Arts. 6-9);
- ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention (Art. 10, 11);
- the right to communicate, *inter alia*, with consular authorities in the case of foreign suspects; and
- notifying suspected persons of their rights (by giving them a written 'Letter of Rights').⁴⁴⁴

This proposal was, however, subject to protracted negotiations which broke down in 2007. Member States claimed that the EU legislation foreseen did not properly respect the differences in the way procedural rights are guaranteed in their criminal justice systems and that they would entail high costs to implement. The European Parliament, which supported the Commission proposal, could not play an active role in the negotiations as it merely needed to be consulted by the Member States.⁴⁴⁵

5.2.1.1. Road Map for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings

In 2009 the Commission and Member States then agreed to an alternative approach, a 'Road map', in accordance with which one right (of suspects and accused persons) at a time would be negotiated, starting with the right to interpretation and translation (measure A), followed by the right to information about rights (measure B), the right to legal assistance and legal aid (measure C), the right to communicate with

⁴⁴³ Spronken & De Vocht 2011, p. 444; Blackstock *et al.* 2014, p. 3 and 22.

⁴⁴⁴ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328; Morgan 2005, p. 195-208.

⁴⁴⁵ European Parliament legislative resolution of 12 April 2005 on the proposal for a Council framework decision on certain procedural rights in criminal proceedings throughout the European Union, P6-TA(2005)0091.

consular officials and a third party (measure D), the rights of vulnerable suspects (measure E) and finally a green paper on detention conditions.⁴⁴⁶

The implementation of the Road Map coincided with the entry into force of the Treaty of Lisbon, providing for an explicit legal basis in Article 82 TFEU for directives harmonising the rights of individuals in criminal procedures. However, these measures may only be adopted 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension'.⁴⁴⁷ The point of reference is not Article 6 of the TEU and the Charter⁴⁴⁸ as one might expect if one compares it with the legal basis for consumer protection legislation in the internal market (Art. 114 TFEU).

EU legislation on translation and interpretation,⁴⁴⁹ the right to information,⁴⁵⁰ the right of access to a lawyer, and the right to communicate upon arrest⁴⁵¹ has since been adopted in co-decision with the European Parliament. The Commission has also adopted a Green paper on detention conditions,⁴⁵² to which the European Parliament responded with a resolution adopted in December 2011, in which it called for EU legislation on decisions regarding pre-trial detention and prison conditions more generally.⁴⁵³ In November 2013 the European Commission presented a package of proposals for a Directive to strengthen the presumption of innocence and the right to be present at trial in criminal proceedings;⁴⁵⁴ a Directive on special safeguards for children suspected or accused of a crime,⁴⁵⁵ together with a recommendation on procedural safeguards for vulnerable persons suspected or accused in

⁴⁴⁶ Council document 14552/1/09 of 21.10.2009; incorporated by the Stockholm programme, Council document 14449/09 of 16 October 2009; section 2.4.

⁴⁴⁷ Art. 82(2) TFEU; as discussed in section 4.

⁴⁴⁸ Based on Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters O.J. (L 30) 1 of 01.05.2014, recital 39, discussed in section 5.2.2. below.

⁴⁴⁹ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, O.J. (L 280) of 26.10.2010.

⁴⁵⁰ Directive 2012/13/EU on the right to information in criminal proceedings, O.J. (L 142) 1 of 01.06.2012.

⁴⁵¹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. (L 294) 1 of 06.11.2013.

⁴⁵² Green Paper on the application of EU criminal justice legislation in the field of detention - Strengthening mutual trust in the European judicial area COM (2011) 327.

⁴⁵³ EP resolution of 15 December 2011, P7_TA-PROV(2011)0585, para. 4: 'Calls on the Commission and EU institutions to come forward with a legislative proposal on the rights of persons deprived of their liberty, including those identified by the EP in its resolutions and recommendations, and to develop and implement minimum standards for prison and detention conditions, as well as uniform standards for compensation for persons unjustly detained or convicted; calls on the Commission and Member States to keep the issue high on their political agenda and to devote appropriate human and financial resources to addressing the situation.'

⁴⁵⁴ COM (2013) 821/2.

⁴⁵⁵ COM (2013) 822/2.

criminal proceedings;⁴⁵⁶ and a Directive on the right to provisional legal aid for suspects and accused persons deprived of liberty and legal aid in European arrest warrant proceedings,⁴⁵⁷ together with a recommendation on the right to legal aid for suspects or accused persons in criminal proceedings.⁴⁵⁸

5.2.1.2. *Interpretation and Translation*

The Directive on interpretation and translation (measure A), adopted in 2010, provides for the right of suspects and accused persons to interpretation and translation in criminal proceedings.⁴⁵⁹ Interpretation should be free of charge, during police interrogation, for communication with their lawyer and at trial.⁴⁶⁰ Documents essential for suspects or accused persons to be able to exercise their right of defence must be translated.⁴⁶¹

It also provides for interpretation during the surrender procedure in the executing Member States and translation of the European arrest warrant in a language which the requested person understands.⁴⁶² The transposition deadline was 27 October 2013.⁴⁶³

5.2.1.3. *Right to Information*

As regards information regarding rights, the Directive on the Right to Information in Criminal Proceedings (measure B),⁴⁶⁴ adopted in 2012, requires that the suspected or accused persons are promptly provided with information about, at least:

- the right of access to a lawyer;
- any entitlement to legal advice free of charge and the conditions for obtaining it;

⁴⁵⁶ C (2013) 8178/2.

⁴⁵⁷ COM (2013) 824.

⁴⁵⁸ C (2013) 8179/2.

⁴⁵⁹ Blackstock *et al.* 2014, p. 7, 24-26, 431-433.

⁴⁶⁰ Directive 2010/64/EU, Art. 4.

⁴⁶¹ Directive 2010/64/EU, Art. 3; Blackstock *et al.* 2014, p. 25: 'The right to translation, which is not explicitly mentioned in the ECHR extend under the Directive to translation of all documents essential to ensure an effective defence. The Directive therefore clarified the ECHR right to interpretation and explicitly fills the gap left by the ECHR's silence on the subject.'

⁴⁶² Directive 2010/64/EU, Art. (2)7: 'In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide persons subject to such proceedings who do not speak or understand the language of the proceedings with interpretation in accordance with this Article.' Art. 3(6): 'In proceedings for the execution of a European arrest warrant, the executing Member State shall ensure that its competent authorities provide any person subject to such proceedings who does not understand the language in which the European arrest warrant is drawn up, or into which it has been translated by the issuing Member State, with a written translation of that document.'

⁴⁶³ Directive 2010/64/EU, Art. 9.

⁴⁶⁴ Directive 2012/13/EU on the right to information in criminal proceedings, O.J. (L 142) 1 of 01.06.2012; Blackstock *et al.* 2014, p. 8-11, 26-29, 433-435.

- the right to be informed of the accusation in accordance with Article 6;⁴⁶⁵
- the right to interpretation and translation; and
- the right to remain silent.

These rights are to be communicated either orally or in writing in simple and accessible language, taking into account any particular need of vulnerable suspected or accused persons.⁴⁶⁶

Upon arrest the suspect or accused person is to be provided promptly with a 'Letter of Rights', which, in addition to the information mentioned above, should also contain information regarding:

- the right of access to the materials of the case;⁴⁶⁷
- the right to have consular authorities and one person informed;
- the right of access to urgent medical assistance;
- for how many hours/days he or she may be deprived of liberty before being brought before a judicial authority.⁴⁶⁸

Member States also have to ensure that any person who is arrested for the purpose of the execution of a European arrest warrant promptly receives an appropriate Letter of Rights containing information on his rights according to the national law implementing the FD EAW in the executing Member State.⁴⁶⁹ The Directive contains two annexes. The first contains an indicative model Letter of Rights to be presented

⁴⁶⁵ Directive 2012/13/EU, Art. 6 which determines that information about the criminal act of which the person must be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

⁴⁶⁶ Directive on the right to information in criminal proceedings, Art. 3.

⁴⁶⁷ In accordance with Art. 7 of the Directive on the right to information in criminal proceedings, which provides that access to the case file must be granted in due time to allow the effective exercise of the right of the defence and at the latest upon submission of the merits of the accusation to the judgment of the court. Access may, however, be refused if such access may lead to a serious threat to the life or the fundamental rights of another person or if such refusal is strictly necessary to safeguard and important public interest, such as in cases where access could prejudice an ongoing investigation or could seriously harm the national security of the Member State concerned. A decision to refuse access to certain materials should be taken by a judicial authority or subject to judicial review.

⁴⁶⁸ Directive on the right to information in criminal proceedings, Art. 4.

⁴⁶⁹ Directive on the right to information in criminal proceedings, Art. 5; recital 39 clarifies: 'The right to written information about rights on arrest provided for in this Directive, should also apply, *mutatis mutandis*, to persons arrested for the purpose of the execution of a European arrest warrant under Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States. To help Member States draw up a Letter of Rights for such persons, a model is provided in Annex II. That model is indicative and may be subject to review in the context of the Commission's report on the implementation of this Directive and also once all the Road map measures have come into force.'

upon arrest.⁴⁷⁰ The second contains an indicative model Letter of Rights for persons arrested on the basis of a European arrest warrant.⁴⁷¹

Comment

It is unfortunate that the right to information was presented as the second measure of the Road Map, which in effect leads to a Commission proposal which contained 'half a letter of rights', partly excluding specific rights concerning the moment of access to a lawyer, his/her role during questioning, and the right to communicate upon arrest, the conditions for obtaining legal aid, the right to remain silent (to the extent it is there), the rights of vulnerable suspected or accused persons and possibilities for obtaining release during the pre-trial phase. Be that as it may, the Letter of Rights should be updated once these more substantive fair trial rights are approximated.

5.2.1.4. *Access to a Lawyer and the Right to Communicate upon Arrest*

Commission proposal (2011) 326, which combined measure C (minus legal aid) and D,⁴⁷² sought to improve the rights of suspected or accused persons as regards the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest with a third person such as a relative, employer or consular authority.

It determined that access to a lawyer should be granted before the start of any questioning by the police or other law-enforcement authorities,⁴⁷³ which is the moment from which the suspect or accused person's defence rights may be adversely affected,⁴⁷⁴ and from the outset of the deprivation of liberty.⁴⁷⁵ Access to a lawyer can also be very important before evidence-gathering acts, such as confrontations with witnesses or victims, participation in identity parades or reconstruction of the crime scene. The Commission proposal therefore also foresaw a right of access to a lawyer upon carrying out any procedural or evidence-gathering act at which the person's presence is required or permitted as a right in accordance with national law, unless this would prejudice the acquisition of evidence.⁴⁷⁶ The Commission proposal also foresaw a right for the lawyer to check the conditions in which the suspect or accused person is detained.⁴⁷⁷

⁴⁷⁰ Annex I.

⁴⁷¹ Annex II clarifies: 'The sole purpose of this model is to assist national authorities in drawing up their Letter of Rights at national level. Member States are not bound to use this model. When preparing their letter of Rights, Member States may amend this model in order to align it with their national rules and add further useful information.'

⁴⁷² COM (2011) 0326; Blackstock *et al.* 2014, p. 12-19, 29-32, 435-439.

⁴⁷³ COM (2011) 0326, Art. 3(1)(a).

⁴⁷⁴ See ECtHR 27 November 2008, *Salduz v Turkey*, ECHR, No. 36391/02, in which the ECtHR held that access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right.

⁴⁷⁵ COM (2011) 0326, Art. 3(1)(c).

⁴⁷⁶ COM (2011) 0326, Art. 3(1)(b).

⁴⁷⁷ COM (2011) 0326, Art. 3(4).

Derogations from these rights were foreseen in a separate article, justified by compelling reasons pertaining to the urgent need to avert serious adverse consequences for the life or physical integrity of a person, not based exclusively on the type or seriousness of the alleged offence, not going beyond what is necessary, limited in time as much as possible, and in any event not extending to the trial stage, and not prejudicing the fairness of the proceedings. Furthermore, the Commission insisted on derogations only to be authorised by a duly reasoned decision taken by a judicial authority on a case-by-case basis.⁴⁷⁸

ECtHR case law determines that statements made by the suspect or accused person or evidence obtained in breach of his or her right of access to a lawyer should not be used at any stage of the procedure as evidence against him or her.⁴⁷⁹ The Commission proposal repeated this wording, adding ‘unless the use of such evidence would not prejudice the rights of the defence’.⁴⁸⁰

The Commission proposal also covered the right to communicate upon arrest, implying the possibility for a third party to take care of the suspect or accused person’s affairs while they are in detention. Children should be entitled to inform their parent, guardian or another appropriate adult.⁴⁸¹ The Commission proposal obliged Member States to ensure that the confidentiality of meetings between the suspect or accused person and his lawyer is guaranteed, as well as the confidentiality of correspondence, telephone conversations and other forms of communication permitted under national law between the suspect or accused person and his lawyer.⁴⁸²

Finally, the Commission proposal also covered the right of access to a lawyer in European arrest warrant proceedings, both in the executing and issuing Member State, enabling genuine reasons for non-execution to be properly argued.⁴⁸³

On 7 June 2012, the Council reached an agreement on a general approach to the Commission’s proposal.⁴⁸⁴ The proposal was not well received by Member

⁴⁷⁸ COM (2011) 0326, Art. 3(1)(a).

⁴⁷⁹ See ECtHR 27 November 2008, *Salduz v Turkey*, ECHR, No. 36391/02, in which the ECtHR held that ‘Even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction, whatever its justification, must not unduly prejudice the rights of the accused under article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements during police interrogation without access to a lawyer are used for a conviction.’

⁴⁸⁰ COM (2011) 0326, Art. 11.

⁴⁸¹ COM (2011) 0326, Arts. 5 and 6.

⁴⁸² COM (2011) 0326, Art. 4.

⁴⁸³ COM (2011) 0326, Art. 9. Such a right has not (yet) been determined by the case law of the ECHR, see Council of Europe, Opinion of the secretariat on the Commission’s proposal for a Directive of the European Parliament and of the Council on ‘the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest’, Strasbourg, 9 November 2011, para. 15; ECtHR of 04.05.2010, Application No. 56588/07, *Stapleton v Ireland*; ECtHR, Application No. 14929/08, *Pianese v Italy and the Netherlands* (declared inadmissible on 27 September 2011).

⁴⁸⁴ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest [First reading] – General approach, Council document 10467/12 of 31.05.2012, see <<http://db.euro.crim.org/db/en/doc/1748.pdf>> (last consulted on 3 May 2015); Cras 2014.

States, with a coalition of five (NL, BE, FR, UK and IRL) leading the way in claiming that allowing early access to a lawyer would reduce the effectiveness of law enforcement and lead to disproportionate costs.⁴⁸⁵ This resulted in a number of adaptations of the text, in particular as regards the exclusion of ‘minor offences’ from the scope of the measure, the moment of access, the modalities of the lawyer’s participation during questioning, his/her participation in evidence-gathering acts, the possibility to inspect prison conditions, derogations from access to a lawyer, lawyer-client confidentiality, and remedies against breaches of the right of access to lawyer. The idea of having a dual defence (both in the issuing and executing Member State) in European arrest warrant proceedings was also taken out by the Council, simply stipulating a number of guarantees for the wanted person in the executing Member State.⁴⁸⁶

Spain and Italy, however, joined the Commission in a joint declaration expressing their discontent with the level of fundamental rights protection achieved in the general approach, arguably in violation of the 2011 Council conclusions on the effective implementation of the Charter in which it commits itself to ensure the fundamental rights compliance of its initiatives and amendments to Commission proposals:⁴⁸⁷

The Commission, Spain and Italy note that in the course of the negotiations in the Council good progress has been made towards strengthening procedural rights, notably on the access to a lawyer in criminal proceedings in the European Union. The draft Directive as it currently stands still does not satisfy all our concerns as far as protection of fundamental rights and procedural guarantees is concerned. We notably continue to have some important concerns about the derogations included in the current compromise text, including to the principle of confidentiality of the communication between the lawyer and the suspect or accused person, which is a key pillar of the fundamental rights of the person concerned. Our objective is to achieve a high level of protection of fundamental rights on the basis of the standards set out in the Charter of Fundamental Rights. As a matter of principle the application of derogations should be subject to law and judicial control.

Further, as regards minor offences, we believe that exclusions from the scope should be limited to those which are duly and objectively justified.

However, we believe that the time is now ripe for starting negotiations with the European Parliament on the draft Directive and we will therefore support the Presidency in

⁴⁸⁵ Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest – Note by Belgium/France/Ireland/the Netherlands/the United Kingdom, Council document 14495/11.

⁴⁸⁶ Council General approach, Art. 9.

⁴⁸⁷ Council conclusions of 25 February 2011 on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 6387/11 FREMP 13 JAI 101 COHOM 44 JUSTCIV 19 JURINFO 5, see <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/143099.pdf> (last consulted on 3 May 2015).

carrying on negotiations with the European Parliament on these issues, taking full account of our remaining concerns.⁴⁸⁸

The European Parliament's orientation vote of 12 July 2012 largely followed the Commission proposal on the scope of the measure, the moment of access to a lawyer, participation in evidence-gathering acts, and lawyer-client confidentiality. However, the orientation vote was already less strict on the mandatory exclusion of evidence (with the exception of the mandatory exclusion of evidence obtained in violation of the right of access to a lawyer, taking into account the differences among Member States as regards rules and systems on the admissibility of evidence).

Extensive negotiations between the European Parliament resulted in a first reading agreement contained in Directive 2013/48/EU.⁴⁸⁹ The United Kingdom and Ireland, however, decided not to 'opt in' in accordance with protocol No. 21 to the Treaty of Lisbon and Denmark is not bound by it in accordance with protocol No. 22, raising doubts as regards the degree to which judicial cooperation with these Member States can operate on the basis of mutual recognition, since they have not committed to the minimum level of harmonisation achieved in the Directive on Access to a Lawyer deemed necessary to ensure 'a sufficient degree of trust'⁴⁹⁰ in their criminal justice systems.⁴⁹¹

The Directive resulting from these negotiations contains a number of points on which Parliament managed to defend its position, notably on avoiding derogations to lawyer-client confidentiality in the articles of the Directive (Parliament was strongly supported by the European Commission on this point in line with the joint declaration adopted to the general approach).⁴⁹² As regards other points, notably limiting derogations from the right of access to a lawyer, Parliament had to compromise. Some of the main provisions of this Directive will be highlighted below, taking into account the negotiation history.

⁴⁸⁸ Council document 10908/12, p. 3.

⁴⁸⁹ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. (L 294) 1 of 06.11.2013.

⁴⁹⁰ Directive 2013/48/EU, recitals 4-8, notably the second part of recital 6: 'Strengthening mutual trust requires detailed rules on the protection of the procedural rights and guarantees arising from the Charter, the ECHR and the ICCPR. It also requires, by means of this Directive and by means of other measures, further development within the Union of the minimum standards set out in the Charter and in the ECHR.'

⁴⁹¹ Cf. Mitsilegas, Carrera & Eisele 2014; Cras 2014, p. 43: 'While recognizing the rules of *Europe a la carte* as created by the Lisbon Treaty, one could admit that such an opt-in by Ireland - but also by the UK and, if it would have been possible, by Denmark - would to a certain extent be "fair", since it would ensure that the same minimum standards that apply in 25 Member States in respect of British and Irish citizens would also apply in the UK and Ireland as regards citizens of the other Member States.'

⁴⁹² For a more detailed discussion on confidentiality (Art. 4) see Cras 2014, p. 41-42.

Scope

The scope of the Directive was the first main battleground, with a number of Member States insisting on the exclusion of access to a lawyer in cases where the person was suspected of committing a ‘minor offence’, a distinction not made by ECHR case law.⁴⁹³ In the context of the previous measures on interpretation and translation and the right to information in criminal proceedings, the European Parliament had already agreed to exclude administrative offences (including traffic violations) from the scope. It could be feared, however, that the aim of the Council⁴⁹⁴ was to create a further carve-out from the Directive, leading to a situation in which suspects of many standard cases would no longer benefit from the right of access to a lawyer.⁴⁹⁵

⁴⁹³ ECtHR, *Engel and Others v the Netherlands*, 8 June 1976, paras. 82 and 83; Council of Europe, Opinion of the secretariat on the Commission’s proposal for a Directive of the European Parliament and of the Council on ‘the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest’, Strasbourg, 9 November 2011; Council of Europe, Opinion of the secretariat on the Commission’s proposal for a Directive of the European Parliament and of the Council on ‘the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest’, Strasbourg, 20 September 2012, para. 10: ‘Although there is not yet case-law on the issue of minor criminal offences and the right of access to a lawyer, it cannot be ruled out that the European Court of Human Rights may decide in the future that an issue regarding legal assistance arises under Article 6 ECHR in respect of such an offence, while the draft Directive has excluded it from its scope. In this context, it should be stressed in particular that while, as to date, almost all judgments in which the European Court of Human Rights has acknowledged a suspect’s right to access to a lawyer related to a case where the suspect was deprived of his liberty, the Strasbourg court has never limited the benefit of the right to legal assistance from the first interrogation to suspects deprived of their liberty. In other words, deprivation of liberty is not a precondition to the benefit of that right. Furthermore, it should be borne in mind that the fact that the draft Directive would not apply to a certain type of (minor) offences would not prevent Article 6 ECHR from applying to them according to the Strasbourg Court’s case-law, the right to access to legal assistance from the first interrogation might nonetheless have to be ensured by the member state concerned.’

⁴⁹⁴ General approach, Art. 2(4): ‘In relation to minor offences, where the law of a Member State provides that only a fine can be imposed as the main sanction and deprivation of liberty cannot or shall not be imposed as such a sanction, this Directive shall only apply once the case is before a court having jurisdiction in criminal matters’: cf. recital 10(a): ‘In some Member States, the law provides that imprisonment can be imposed as a sanction in relation to minor offences, as an alternative for a fine. However, in the systems of these Member States, in practice imprisonment is only imposed under exceptional circumstances in particular when a person commits the same minor offence very frequently in a short period of time. In the vast majority of cases, it is already clear from the outset that in relation to certain minor offences, no deprivation of liberty will be requested by the prosecution service and imposed by a court having jurisdiction in criminal matters. Where the law of a Member State provides that imprisonment can be imposed as a sanction, but in practice, for example due to officially published guidelines, which are binding for the prosecution service, shall only in very limited cases be requested by the prosecution service and imposed by a court having jurisdiction in criminal matters, this Directive should not apply to cases where it is excluded that the prosecution service will request imprisonment to be imposed.’

⁴⁹⁵ Spronken 2012, p. 37 (author’s translation of Dutch editorial): ‘In Article 3 of the Directive, minor offences are defined as criminal offences that can be settled out of court or where a custodial sanction is not expected. This appears to be in line with the considerations, but if we translate this provision to the Dutch context then we are dealing with the penal orders from →

Furthermore, there was a discussion on the question whether access to a lawyer should be foreseen for those not deprived of liberty, raising the fear that the right of access to a lawyer would only commence at the moment of pre-trial detention *after* police questioning and custody.⁴⁹⁶ In the end, the European Parliament managed to obtain the guarantees that access to a lawyer should be granted in cases where deprivation of liberty can be imposed as a sanction and in case the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.⁴⁹⁷

Article 2

Scope

1. This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.

(...)

4. Without prejudice to the right to a fair trial, in respect of minor offences:

- (a) where the law of a Member State provides for the imposition of a sanction by an authority other than a court having jurisdiction in criminal matters, and the imposition of such a sanction may be appealed or referred to such a court; or
 - (b) where deprivation of liberty cannot be imposed as a sanction;
- this Directive shall only apply to the proceedings before a court having jurisdiction in criminal matters. In any event, this Directive shall fully apply where the suspect or accused person is deprived of liberty, irrespective of the stage of the criminal proceedings.

Although this subjective approach to classifying minor offences may still be criticised,⁴⁹⁸ in any event in the relevant recitals to the Directive, it is acknowledged that this exclusion for minor offences may be overruled by future developments in Strasbourg case law.⁴⁹⁹

the public prosecutor (*strafbeschikkingen*) that could be imposed for offences punishable by up to six years imprisonment.'

⁴⁹⁶ Spronken 2012, p. 37.

⁴⁹⁷ Cras 2014, p. 37.

⁴⁹⁸ Joint NGO briefing on the Directive on the right of access to a lawyer in criminal proceedings and the right to inform a third party upon deprivation of liberty, 15 April 2013: 'As currently drafted, the exclusion of minor offences could still mean that individuals facing other types of punishment that may have a serious impact on their lives, employment, family and financial situation could be questioned by the police without the presence of a lawyer.'

⁴⁹⁹ Directive 2013/48/EU, recitals 17 and 18: '(17) In some Member States certain minor offences, in particular minor traffic offences, minor offences in relation to general municipal regulations and minor public order offences, are considered to be criminal offences. In such situations, it would be unreasonable to require that the competent authorities ensure all the rights under this Directive. Where the law of a Member State provides in respect of minor offences

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Moment of access to a lawyer

The Member States also wished to postpone the moment of access to a lawyer⁵⁰⁰ to when an 'official interview' would commence,⁵⁰¹ obviously leaving room for 'unofficial interviews' before that time. The outcome of the negotiations on this point is that access should be granted before questioning, whereby it should be added that the wording 'as from whichever of the following points in time' in the first part of Article 3 paragraph 2 of the Directive implies an ongoing right:

Article 3

The right of access to a lawyer in criminal proceedings

1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.
2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:
 - (a) before they are questioned by the police or by another law enforcement or judicial authority;
 - (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
 - (c) without undue delay after deprivation of liberty;
 - (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

However, the recitals clarify that preliminary questioning, for the purpose of identification, the verification of the possession of weapons and in the context of road side checks, is allowed.⁵⁰²

that deprivation of liberty cannot be imposed as a sanction, this Directive should therefore apply only to the proceedings before a court having jurisdiction in criminal matters: (18) The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial including obtaining legal assistance from a lawyer.'

⁵⁰⁰ On the practical implications of the right of access to a lawyer see Art. 3(4): 'Member States shall endeavour to make general information available to facilitate the obtaining of a lawyer by suspects or accused persons. Notwithstanding provisions of national law concerning the mandatory presence of a lawyer, Member States shall make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to exercise effectively their right of access to a lawyer, unless they have waived that right in accordance with article 9'; recitals 27 and 28; Cras 2014, p. 35-36.

⁵⁰¹ General approach, Art. 3(2): 'The suspect or accused person shall have access to a lawyer without undue delay. In any event, the suspect or accused person shall have access to a lawyer from the following moments in time, whichever is the earliest: (a) before he is officially interviewed by the police or other law enforcement or judicial authorities (...).'

⁵⁰² Directive 2013/48/EU, recital 20: 'For the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for →

Participation during questioning

As regards the modalities of the lawyer's participation during questioning, the agreed text talks about 'effective' participation of the lawyer during questioning.⁵⁰³ Member States, however, in their turn insisted on having a reference to national procedures.⁵⁰⁴

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure in accordance with the law of the Member State concerned.⁵⁰⁵

This wording is a bit of an anomaly when one considers that it refers to a directive which has to be implemented in national law anyway. The European Parliament only accepted this reference under the condition that this paragraph would also clarify that those national procedures should not prejudice the effective exercise and essence of the right concerned.

Derogations

Furthermore, Member States insisted on possible derogations from the right of access to a lawyer, notably for the purpose of obtaining essential information urgently

example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified.'

⁵⁰³ The word 'active' was also considered during the negotiations. However, this option was discarded, since it might suggest that the lawyer could intervene without being mandated to do so by the suspect or accused person.

⁵⁰⁴ Cras 2014, p. 38: 'The Member States, however, wanted to ensure that lawyers would respect certain rules of conduct during questioning, in order to avoid the risk that the criminal investigation would be jeopardized.' For examples of national rules see Cape & Hodgson 2014, p. 462.

⁵⁰⁵ To be read in conjunction with Directive 2013/48/EU, recital 25: 'Member States should ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when they are questioned by the police or by another law enforcement or judicial authority, including during court hearings. Such participation should be in accordance with any procedures under national law which may regulate the participation of a lawyer during questioning of the suspect or accused person by the police or by another law enforcement or judicial authority, including during court hearings, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. During questioning by the police or by another law enforcement or judicial authority of the suspect or accused person or in a court hearing, the lawyer may, inter alia, in accordance with such procedures, ask questions, request clarification and make statements, which should be recorded in accordance with national law.'

needed to avert serious adverse consequences for the liberty or physical integrity of a person and where immediate action is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent the destruction or alteration of essential evidence or to prevent interference with witnesses;⁵⁰⁶

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:
- (a) where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - (b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.

The relevant recitals clarify that any abuse of these derogations would in principle irretrievably prejudice the rights of the defence (and hence the evidence obtained would need to be excluded).⁵⁰⁷

Derogations to the right of access to a lawyer may only be authorised by a duly reasoned decision taken on a case-by-case basis, either by a judicial authority or by another competent authority on the condition that the decision can be submitted to

⁵⁰⁶ Alongside a specific derogation in Art. 3(5) related to geographical remoteness: '5. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of points (c) of paragraph 2 where the geographical remoteness of a suspect or accused person makes it impossible to ensure the right of access to a lawyer without undue delay after deprivation of liberty.'

⁵⁰⁷ Directive 2013/48/EU, recitals 31 and 32: 'Member States should be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase when there is a need, in cases of urgency, to avert serious adverse consequences for the life, liberty or physical integrity of a person. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without the lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence; Member States should also be permitted to derogate temporarily from the right of access to a lawyer in the pre-trial phase where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. During a temporary derogation on that ground, the competent authorities may question suspects or accused persons without a lawyer being present, provided that they have been informed of their right to remain silent and can exercise that right, and provided that such questioning does not prejudice the rights of the defence, including the privilege against self-incrimination. Questioning may be carried out for the sole purpose and to the extent necessary to obtain information that is essential to prevent substantial jeopardy to criminal proceedings. Any abuse of this derogation would in principle irretrievably prejudice the rights of the defence.'

judicial review. The duly reasoned decision shall be recorded using the recording procedure in accordance with the law of the Member State concerned.⁵⁰⁸

Remedies

The compromise on remedies cites ECHR case, which determines that statements made by the suspect or accused person or evidence obtained in breach of his or her right of access to a lawyer should not be used at any stage of the procedure as evidence against him or her in a recital,⁵⁰⁹ but the Article merely states that the rights of the defence and fairness of the proceeding need to be respected.

Article 12

Remedies

1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.
2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.

This Article has – unfortunately rightly – been described as ‘only a shadow of the corresponding text in the Commission proposal’.⁵¹⁰ It is also an example of a provision where EU legislation offers a lower level of protection than that offered in certain Member States which have strict rules prohibiting the use of illegally

⁵⁰⁸ Directive 2013/48/EU, Art. 8(2).

⁵⁰⁹ Directive 2013/48/EU, recital 50: ‘Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.’

⁵¹⁰ Cras 2014, p. 40.

obtained statements.⁵¹¹ This may lead to problems in judicial cooperation between Member States that offer a level of protection in line with the minimum requirements of the Directive and those that offer a higher level of protection.⁵¹²

European arrest warrant proceedings

The right of dual representation in European arrest warrant cases is, however, reflected in the final text, which will hopefully also contribute to a better preparation of the case in the executing state, a swifter resolution of cases and a limitation of unnecessary periods of detention.⁵¹³ The text limits the role of the lawyer in the issuing Member State to providing the lawyer in the executing Member States with information and advice with a view to the effective exercise of the rights laid down in the FD EAW. However, it seems likely that the two lawyers working together on a case will interpret that mandate broadly.

Article 10

The right of access to a lawyer in European arrest warrant proceedings

1. Member States shall ensure that a requested person has the right of access to a lawyer in the executing Member State upon arrest pursuant to the European arrest warrant.
2. With regard to the content of the right of access to a lawyer in the executing Member State, requested persons shall have the following rights in that Member State:
 - (a) the right of access to a lawyer in such time and in such a manner as to allow the requested persons to exercise their rights effectively and in any event without undue delay from deprivation of liberty;
 - (b) the right to meet and communicate with the lawyer representing them;
 - (c) the right for their lawyer to be present and, in accordance with procedures in national law, participate during a hearing of a requested person by the executing judicial authority. Where a lawyer participates during the hearing this shall be noted using the recording procedure in accordance with the law of the Member State concerned.
3. The rights provided for in Articles 4, 5, 6, 7, 9, and, where a temporary derogation under Article 5(3) is applied, in Article 8, shall apply, *mutatis mutandis*, to European arrest warrant proceedings in the executing Member State.
4. The competent authority in the executing Member State shall, without undue delay after deprivation of liberty, inform requested persons that they have the right to appoint a lawyer in the issuing Member State. The role of that lawyer in the issuing Member State is to assist the lawyer in the executing Member State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA.

⁵¹¹ Cras 2014, p. 40: 'In the light of the above, it is hoped that the Member States and the Court of Justice of the European Union will give substantial emphasis to Art. 12.1, according to which Member States should ensure that suspects and accused persons have an *effective* remedy under national law in the event of a breach of the rights under this Directive.'

⁵¹² Erbeznik 2012.

⁵¹³ Thunberg Schunke 2013, p. 75.

5. Where requested persons wish to exercise the right to appoint a lawyer in the issuing Member State and do not already have such a lawyer, the competent authority in the executing Member State shall promptly inform the competent authority in the issuing Member State. The competent authority of that Member State shall, without undue delay, provide the requested persons with information to facilitate them in appointing a lawyer there.

6. The right of a requested person to appoint a lawyer in the issuing Member State is without prejudice to the time-limits set out in Framework Decision 2002/584/JHA or the obligation on the executing judicial authority to decide, within those time-limits and the conditions defined under that Framework Decision, whether the person is to be surrendered.

Relationship with mutual recognition

There is an interesting reference to the relationship with mutual recognition in recital of 54 the Directive which emphasises that:

This Directive sets minimum rules. Member States may extend the rights set out in this Directive in order to provide a higher level of protection. Such higher level of protection should not constitute an obstacle to the mutual recognition of judicial decisions that those minimum rules are designed to facilitate. The level of protection should never fall below the standards provided by the Charter or by the ECHR, as interpreted by the case-law of the Court of Justice and of the European Court of Human Rights.⁵¹⁴

This recital has a number of problematic aspects. First, as discussed and criticised before, in accordance with Article 82 TFEU, harmonisation of the rights of individuals in criminal procedures is limited 'to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension',⁵¹⁵ instead of directly referring to the Charter and the ECHR.

Second, this recital may cause confusion as it seems to squeeze national (constitutional) law and judicial authorities seeking to apply it between the fundamental rights laid down in the Charter and ECHR and 'mutual recognition', to which it 'should not constitute an obstacle'. This may create the false impression that national (constitutional) law offering a higher level of protection than the minimum standards prescribed in the Directive on Access to a Lawyer may no longer be applied in mutual recognition procedures.⁵¹⁶ In *Melloni* the Court held that this would only be the case if such application would lead to compromising the primacy, unity and effectiveness of EU law:

60. (...) National authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by

⁵¹⁴ Directive 2013/48/EU, recital 54.

⁵¹⁵ Art. 82(2) TFEU, as discussed in section 4.

⁵¹⁶ Cf. Thunberg Schunke 2013, p. 67.

the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised;⁵¹⁷

Third, this recital (therefore) confuses the security interest mutual recognition seeks to further in the FD EAW and other mutual recognition instruments with the principle itself. If the idea was to refer both to mutual recognition as a principle of EU law and to its implementation in secondary EU legislation, the recital should have been phrased as follows:

This Directive sets minimum rules in accordance with the standards provided by the Charter and by the ECHR, as interpreted in the case law of the European Court of Justice and the European Court of Human Rights. Member States may extend the rights set out in this Directive in order to afford a higher level of protection. Such higher level of protection may not compromise the primacy, unity and effectiveness of EU law [including the principle of mutual recognition holding that effect needs to be given to factual and legal situations established in the territories of other Member States].

To interpret the recital otherwise would also go against the idea of EU law not leading to a regression in fundamental rights protection as expressed in Article 14:

Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.⁵¹⁸

As the Commission stated in its proposal,

The purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of lowering standards in certain Member States and that the standards set in the Charter and in the ECHR are maintained. Since this Directive provides for minimum rules, in line with Article 82 TFEU, Member States remain free to set standards higher than those agreed in this Directive.⁵¹⁹

Articles 52(3)⁵²⁰ and 53 EU Charter⁵²¹ clarify that the rights and principles of the EU Charter are to be seen as offering a minimum standard of protection. Member States

⁵¹⁷ Case C-399/11, *Melloni*, not yet published, para. 60.

⁵¹⁸ Directive 2013/48/EU, Art. 14.

⁵¹⁹ COM (2011) 326, p. 9.

⁵²⁰ Art. 52(3) EU Charter: '3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'

⁵²¹ Art. 53 EU Charter: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the →

may go beyond that minimum standard based on other human rights documents, notably the ECHR and national constitutions. Lenaerts has suggested, *inter alia*, based on the Court's judgment in *Omega Spielhallen*, concerning the prohibition of laser games in Germany given their alleged violation of human dignity (Art. 1 EU Charter), as the game involved simulated killing,⁵²² that in accordance with Article 53 a certain difference in measures chosen to protect fundamental rights may be accepted.⁵²³

The current wording of recital 54 is particularly unhelpful given that there are potential conflicts when national courts, which may wish to provide a higher level of protection, based on their national constitution, than that foreseen in this EU instrument.⁵²⁴ As Ventrella put it:

'Mutual trust should not be achieved by overriding national identities as protected by Article 4(2) of the EU Treaty. This risk could exist when the Court of Justice delivers a judgment in conflict with fundamental constitutional principles. National constitutions are the result of national identities and should contribute to shaping EU law by enhancing the quality of EU decision making. In this context, Article 4(2) of the EU Treaty adds the 'explicit recognition of national constitutional input' to the process of EU decision-making.'⁵²⁵

In this context, one might mention Article 12 of the Access to a Lawyer Directive on remedies, which is quite weak in not prescribing the exclusion of evidence obtained in absence of a lawyer. When a Member State that has higher norms, what will that mean for their ability to refuse an EAW based on evidence obtained in absence of a lawyer?⁵²⁶

Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

⁵²² Case C-36/02, *Omega Spielhallen* [2004] ECR 9609, paras. 37 and 38, as discussed in Chapter 2.

⁵²³ Lenaerts 2012, p. 398: 'It is not indispensable for the restrictive measures issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental rights or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another Member State. This means that, in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the Member States the question of determining the level of protection of fundamental rights they consider consistent with their national constitution.'

⁵²⁴ Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. A 442/13 (119/13); Vogel 2013, Bundesverfassungsgericht of 30.06.2009 – 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 and 182/09 (Treaty of Lisbon).

⁵²⁵ Ventrella 2013, p. 308.

⁵²⁶ Erbeznik 2012, p. 11: 'A common understanding of the exclusionary rules is missing at EU level, whereby it is not clear what would happen if the new EU rules on harmonising criminal procedures were not to be followed. Thus, even if the introduction of the "Road map" measures is remedying the situation to an important extent, it does not address some other important topics of criminal procedural law, such as admissibility of evidence (Article 82(2) TFEU).'

Comment

If one compares the procedural rights integrated in the Commission proposal for the FD EAW with the rights that have been approximated in accordance with the Road Map, it is interesting to note that the core rights of interpretation, translation, the right to information and access to a lawyer have been approximated, although the demand of the European Parliament that this assistance be free of charge for those who cannot afford it has notably not been met, and given the experience with the negotiations on the Directive on Access to a Lawyer and the spending cuts on legal aid in times of crisis, agreement will be hard to achieve. There is therefore a need to continue the implementation of the Road Map given the complementary nature of procedural rights and the gaps left open due to the casuistic nature and insufficient enforcement mechanisms of ECHR case law.⁵²⁷

Blackstock *et al.* argue in favour of a 'suspect-focused perspective', clarifying that 'procedural rights belong to or are possessed by persons who are suspected or accused of a crime'. It is not for lawyers, prosecutors or police officers to determine whether or not they wish to exercise these procedural rights. As recital 54 to the Directive on Access to a Lawyer reveals, even within the EU this individual rights perspective is not a commonplace. The approach based on delivering collective security to States still has to shift to an approach based on delivering liberty and security to individuals.

The wording of this recital also wrongly assumes a conflict between fundamental rights protection and mutual recognition. One may use the example of a Member State which has higher standards than prescribed by the Access to a Lawyer Directive on the admissibility of evidence. In case one of its judicial authorities would be faced with a European arrest warrant from another Member State, which applies lower standards in line with the minimum standards laid down in the Directive, the question of whether to apply a fundamental rights exception based on the national constitutional principle would be raised in the context of the execution of the EAW. Whether it would be acceptable to apply such an exception would warrant a preliminary reference to the Court of Justice, certainly in absence of EU legislation on the mutual admissibility of evidence between Member States.⁵²⁸

As regards other procedural rights foreseen in the Commission's proposal for the FD EAW, the FD on *in absentia* has put the bar lower than the original Commission proposal in removing the guarantee for a retrial from the FD EAW, sowing the seeds for the conflict with the Spanish Constitution leading to the *Melloni* judgment. The encouragement of the execution of a penalty in the place where the condemned person can best be integrated has now been covered by the FD Transfer of Prisoners, although, as discussed, this FD (unduly) limits the participation of the sentenced person in the process of deciding on where the sentence should be executed. The extent to which that may be remedied by reference to primary law remains to be seen.

⁵²⁷ Spronken & De Vocht 2011, p. 485.

⁵²⁸ Art. 82(2)(a) TFEU.

Finally, the conditional release of the suspect in the pre-trial phase and the use of alternatives to surrender leads to the next section where the flanking measures will be discussed.

5.2.2. Impact of 'Flanking' Mutual Recognition Measures; Notably the European Investigation Order and the European Supervision Order

In addition to the FD *in absentia* and the FD Transfer of Prisoners previously discussed, a number of flanking mutual recognition instruments may soften the impact of the FD EAW or provide alternatives to surrender. The impact of two of these measures, the European Investigation Order and European Supervision Order will be discussed below.

5.2.2.1. European Investigation Order

The FD EAW deals with the surrender of suspects or accused persons for prosecution. As such, its impact might be softened by alternatives to surrender, such as hearing by video or telephone conference. At the same time, applying mutual recognition to mutual legal assistance also has its implications on the rights of suspects, when a hearing is conducted in person but also on instance in cases of searches and seizures, the use of special investigative measures like uncover agents, surveillance measures, or controlled deliveries, and the ultimate acceptance of the evidence obtained in court.

The Stockholm programme foresaw a measure on the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition since 'the existing instruments in this area constitute a fragmentary regime which lacks efficiency and flexibility'.⁵²⁹ However, it continued, 'A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance'.⁵³⁰ The measure would have to have a broad scope and should cover all types of evidence, taking account of the measures concerned.⁵³¹ In its Action plan for implementing the Stockholm programme the Commission consequently provided:

- a legislative proposal on a comprehensive regime on obtaining evidence in criminal matters based on the principle of mutual recognition and covering all types of evidence; and

⁵²⁹ Stockholm programme, Council doc 14449/09 of 16 October 2009; Action plan implementing the Stockholm programme, COM (2010) 0171 of 20.04.2010.

⁵³⁰ *Ibidem.*

⁵³¹ *Ibidem.*

- a legislative proposal to introduce common standards for gathering evidence in criminal matters in order to ensure its admissibility.⁵³²

Before the Commission came up with legislative proposals, in 2010 a group of Member States decided to launch their own initiative for a Directive regarding the European Investigation Order,⁵³³ on which a general approach in the Council was reached in December 2011.⁵³⁴ Negotiations with the European Parliament, whose Committee on Civil Liberties, Justice and Home Affairs (LIBE) took an ‘orientation vote’ on the Member State proposal in May 2012,⁵³⁵ resulted in a first reading agreement November 2013, confirmed by Parliament during its February 2014 plenary session.⁵³⁶ Directive 2014/41/EU of 3 April 2014 regarding the European investigation order in criminal matters was published on 1 May 2014.⁵³⁷

European Investigation Order; scope and definition

A European Investigation Order is a standard form⁵³⁸ which allows for the carrying out of one or more specific investigating measures⁵³⁹ in another Member State with a view to obtaining evidence. It may also be used for obtaining evidence which is already in the possession of the competent authorities of the executing State, thereby replacing the Framework Decision on the European Evidence Warrant.⁵⁴⁰

The Directive also contains a specific regime for obtaining certain investigative measures: temporary transfer to the issuing State of persons held in custody for the

⁵³² Action plan implementing the Stockholm programme, COM (2010) 0171 of 20.04.2010, p. 19: Commission Green paper on obtaining evidence in criminal proceedings from one Member State to another and securing its admissibility, COM (2009) 624 of 11.11.2009.

⁵³³ Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Council document No. 9288/10; Zimmermann, Glaser & Motz 2011; Sawyers 2011.

⁵³⁴ Council document No. 18225/1/11, available at: <<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2018225%202011%20REV%201%20ADD%201>> (last consulted on 3 May 2015).

⁵³⁵ The orientation vote result may is available at: <<http://www.europarl.europa.eu/docement/activities/cont/201205/20120523ATT45657/20120523ATT45657EN.pdf>> (last consulted on 3 May 2015).

⁵³⁶ European Parliament legislative resolution of 27 February 2014 on the draft directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, P7_TA-PROV(2014)0165.

⁵³⁷ O.J. (L 30) 1 of 01.05.2014.

⁵³⁸ Directive 2014/41/EU, Art. 5, annex.

⁵³⁹ In accordance with Art. 3 of Directive 2014/41/EU only joint investigation teams will continue to be governed by mutual legal assistance and Framework Decision 2002/645 on joint investigation teams (O.J. (L 162) of 20.06.2002); See also recitals 8 and 9 (on the exclusion of cross border surveillance): ‘This Directive should not apply to cross-border surveillance as referred to in the Convention implementing the Schengen Agreement.’

⁵⁴⁰ Directive 2014/41/EU, Art. 1, 34; Framework Decision 2008/978 on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, O.J. (L 350) 72 of 30.12.2008; commented on by Vervaele 2005a; Zeder 2009.

purpose of carrying out an investigative measure (Art. 22); temporary transfer to the executing state of persons held in custody for the purpose of carrying out an investigative measure (Art. 23); hearing by videoconference or other audio-visual transmission (Art. 24); hearing by telephone conference (Art. 25); information on bank and other financial accounts (Art. 26); information on banking and other financial operations and the monitoring of banking transactions (Arts. 27 and 28); covert investigations and controlled deliveries (Arts. 28 and 29) and interception of telecommunications (Arts. 30 and 31).

The European Parliament initially favoured a more limited scope in its orientation vote by explicitly excluding covert investigations, controlled deliveries and the interception of telecommunications (it did not delete the interception of telecommunications as this measure was not included in the scope of the original Member State proposal),⁵⁴¹ deeming those measures too sensitive to be subjected to an approach based on mutual recognition.⁵⁴² However, this point was conceded in the negotiations with Council.

Issuing and executing authority

A 'European Investigation Order' (hereafter EIO) is issued directly by a judicial authority, which in the general approach was defined as a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned or any other competent authority as defined by the issuing State and, in the specific case, acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law.⁵⁴³ In accordance with the general approach it could be executed by 'an(y) authority having competence to recognize an EIO and ensure its execution in accordance with this Directive'.⁵⁴⁴

The European Parliament's orientation vote differed from the Council on the concept of issuing judicial authority where it deleted the concept of 'another competent authority' being able to issue an EIO, while stressing that the executing authority had to be a judicial authority as well.⁵⁴⁵ Its amendments underline the concerns regarding forum shopping by issuing authorities in seeking to avoid procedural requirements that would apply in a domestic case.⁵⁴⁶ Furthermore, judicial control was deemed necessary to prevent disproportionate requests as has occurred based on the FD EAW.⁵⁴⁷

⁵⁴¹ Orientation vote, Amendments 87 and 88, to Art. 3, available at: <<http://www.europarl.europa.eu/document/activities/cont/201205/20120523att45657/20120523att45657en.pdf>> (last consulted on 3 May 2015).

⁵⁴² One may even question their place in a judicial instead of police cooperation instrument. See Sawyers 2011, p. 8.

⁵⁴³ General approach, Art. 2(a).

⁵⁴⁴ General approach, Art. 5(a), para. 3.

⁵⁴⁵ Amendment 22 to Art. 2.

⁵⁴⁶ Cf. Zimmermann, Glaser & Motz 2011, p. 73: 'Furthermore the risk remains that the issuing authority might try to circumvent defence rights by sending an EIO to a Member State where the rules for collecting evidence are less strict than in its own legal order.'

⁵⁴⁷ Discussed in sections 5.1 and 5.3.

These concerns, although legitimate from a point of view of ‘legality, impartiality and proportionality of serious interferences with fundamental rights’,⁵⁴⁸ are, however, difficult to alleviate by exactly determining which authority should be able to issue an EIO. There are wide differences between the Member States as regards who is competent to issue an EIO.⁵⁴⁹ The answer should therefore rather be found in insisting on a substantive review that meets these requirements.⁵⁵⁰ The intervention by a judicial authority on the executing side is equally important to ensure compliance with human rights and proper consideration of the grounds for non-execution.⁵⁵¹ This is reflected by the compromise reached between Parliament and Council, which puts in place a validation procedure by a judicial authority (either a judge, court, investigating judge, or a public prosecutor) in case the issuing authority is not a judicial authority and an addition clarifying that a court order might be needed before certain EIOs are executed:

Article 2 Definitions

For the purposes of this Directive the following definitions apply:

- (a) ‘issuing State’ means the Member State in which the EIO is issued;
- (b) ‘executing State’ means the Member State executing the EIO, in which the investigative measure is to be carried out;
- (c) ‘issuing authority’ means:
 - (i) a judge, a court, an investigating judge or a public prosecutor competent in the case concerned; or
 - (ii) any other competent authority as defined by the issuing State which, in the specific case, is acting in its capacity as an investigating authority in criminal proceedings with competence to order the gathering of evidence in accordance with national law. In addition, before it is transmitted to the executing authority the EIO shall be validated, after examination of its conformity with the conditions for issuing an EIO under this Directive, in particular the conditions set out in Article 6.1, by a judge, court, investigating judge or a public prosecutor in the issuing State. Where the EIO has been validated by a judicial authority, that authority may also be regarded as an issuing authority for the purposes of transmission of the EIO;
- (d) ‘executing authority’ means an authority having competence to recognise an EIO and ensure its execution in accordance with this Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State where provided by its national law.⁵⁵²

Proportionality

The discussions regarding the definition of the issuing and executing judicial authority therefore tie in with those regarding the ways in which proportionality of EIOs may be ensured, as Article 5(a) of the general approach introduced a proportionality test to be performed by the issuing judicial authority:

⁵⁴⁸ Zimmermann, Glaser & Motz 2011, p. 74.

⁵⁴⁹ Council document 1220/10; Weyembergh 2013, p. 963.

⁵⁵⁰ Sawyers 2011, p. 9: ‘There is a need to secure the independence of this process, as the issuing body should not be the same body requiring evidence that issues the request.’

⁵⁵¹ Sawyers 2011, p. 9.

⁵⁵² Directive 2014/41/EU, Art. 2.

1. An EIO may be issued only when the issuing judicial authority is satisfied that the following conditions have been met
 - (a) the issuing of the EIO is necessary and proportionate for the purposes of the proceedings referred to in article 4; and
 - (b) the investigative measure(s) mentioned in the EIO could have been ordered under the same conditions in a similar national case.⁵⁵³
2. These conditions shall be assessed by the issuing authority in each case.

The European Parliament, however, proposed a more far reaching proportionality test, on the one hand referring to the general idea of proportionality, with a view to the rights of the suspect and on the other hand adding situations where the investigative measure concerns 'minor offences'. It also foresaw a consultation procedure between the issuing and executing judicial authority:

These conditions shall be assessed by the issuing authority in each case. Where the executing authority has reasons to believe that:

- (a) the investigative measure is not proportionate;
- (b) it concerns an offence which it might consider being very minor;

the executing authority shall consult the issuing authority on the importance to execute the investigative measure in the specific case if such an explanation has not been made in the EIO. After such consultation, the issuing authority may decide to withdraw the EIO.⁵⁵⁴

In the end, a compromise was found which obliges the issuing judicial authority to consider whether the investigative measure is necessary and proportionate in the case at hand, taking into account the rights of the suspected person:⁵⁵⁵

Article 6

Conditions for issuing and transmitting an EIO

1. An EIO may be issued only when the issuing judicial authority is satisfied that the following conditions have been met:
 - (a) the issuing of the EIO is necessary and proportionate for the purposes of the proceedings referred to in article 4, taking into account the right of the suspected person; and
 - (b) the investigative measure(s) mentioned in the EIO could have been ordered under the same conditions in a similar national case.⁵⁵⁶
2. These conditions shall be assessed by the issuing authority in each case
3. Where the executing authority has reasons to believe that the conditions in Article 5(a) 1 have not been met, the executing authority can consult the issuing authority on

⁵⁵³ Sawyers 2011, p. 16 deems this wording insufficient and calls for the proportionality test to be linked to what *would* be issued instead of what could be issued.

⁵⁵⁴ Amendment 100 to Art. 5(a).

⁵⁵⁵ O.J. (C 83) 389 of 30.03.2010.

⁵⁵⁶ Sawyers 2011, p. 16 deems this wording insufficient and calls for the proportionality test to be linked to what *would* be issued instead of what could be issued.

the importance of executing the EIO. After such consultation, the issuing authority may decide to withdraw the EIO.⁵⁵⁷

Recital 12 clarifies the sentence on the ‘rights of the suspected person’ citing Article 48 EU Charter (rights of the defence) in combination with Article 52 EU Charter (proportionality):

When issuing an EIO the issuing authority should pay particular attention to ensuring full respect for the rights as enshrined in Article 48 of the Charter of Fundamental Rights of the European Union (the Charter). The presumption of innocence and the rights of defence in criminal proceedings are a cornerstone of the fundamental rights recognised in the Charter within the area of criminal justice. Any limitation of such rights by an investigative measure ordered in accordance with this Directive should fully conform to the requirements established in Article 52 of the Charter with regard to the necessity, proportionality and objectives that it should pursue, in particular the protection of the rights and freedoms of others.⁵⁵⁸

Parliamentary amendments combining the proportionality test with an explicit ground for non-execution based on proportionality were defeated during the orientation vote in the LIBE committee, although as will be discussed further in section 5.3, with reference to the opinion of Advocate General Sharpston in *Radu* one might argue that it is covered by the more general idea of compliance with the fundamental rights and the rule of law more broadly.⁵⁵⁹ In any event the consultation procedure in Article 6(3) does not stipulate what is supposed to happen in case the issuing authority does not withdraw an EIO after the executing authority has raised proportionality concerns, leaving open the possibility of the executing authority refusing to execute the EIO if it is not satisfied with the replies provided by the issuing judicial authority.

Indirectly, the disproportionate use of the EAW has also been addressed in the Directive on the EIO. Recital 26 calls on issuing judicial authorities to consider issuing an EIO instead of an EAW in case they would like to hear a person.⁵⁶⁰

Recognition procedure and grounds for non-execution

The recognition and execution procedure is foreseen in Articles 9, 10 and 11 of the Directive under the title ‘procedures and safeguards for the executing state’, with deadlines foreseen in Article 12.

Article 10 contains provisions on having recourse to a different type of investigative measure. This Article is of particular importance to ensure that the way in which the evidence is collected complies with the procedures of the issuing Member

⁵⁵⁷ Directive 2014/41/EU, Art. 6, recitals 10-12.

⁵⁵⁸ Directive 2014/41/EU, recital 12.

⁵⁵⁹ Case C-396/11, *Radu* [2013] ECR 39.

⁵⁶⁰ Directive 2014/41/EU, recital 26: ‘With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.’

State and therefore will be admissible in its courts.⁵⁶¹ Article 10 contains a number of situations prescribing recourse to another investigative measure; when the investigative measure indicated in the EIO does not exist under the law of the executing State (para. 1(a)), the investigative measure indicated in the EIO would not be available in a similar domestic case (para. 1(b)).⁵⁶²

In accordance with Article 10(2), recourse to another investigative measure is, however, not allowed in case the EIO concerns the following investigative measures, which always have to be available under the law of the executing State:

- (a) the obtaining of information or evidence which is already in the possession of the executing authority and the information or evidence could have been obtained, in accordance with the law of the executing State, in the framework of criminal proceedings or for the purposes of the EIO;
- (b) the obtaining of information contained in databases held by police or judicial authorities and directly accessible by the executing authority in the framework of criminal proceedings;
- (c) the hearing of a witness, expert, victim, suspected or accused person or third party in the territory of the executing State;
- (d) any non-coercive investigative measure as defined under the law of the executing State;
- (e) the identification of persons holding a subscription of a specified phone number or IP address.⁵⁶³

The Council had also wanted to include searches and seizures requested in relation to one of the crimes for which the dual criminality is no longer required in Article 10(2). On this point Parliament objected, fearing the disproportionate use of an instrument which is very intrusive for individuals. Nevertheless, the list for which recourse to alternative measures is not allowed concerns both existing evidence, Articles 10(2)(a) and (b), for which such a simplified regime might be acceptable and evidence to be obtained, including through hearings (10)(2)(c) and any other 'non-coercive measures' (10)(2)(d),⁵⁶⁴ without specification, except for the examples mentioned in recital 16,⁵⁶⁵ which are more problematic in terms of proportionality and legal certainty.⁵⁶⁶ This has been underlined by a letter sent by the Council to Parliament on April 2014 (after the plenary vote of 27 February 2014) requesting to limit the interpretation of the word coercive to measures entailing physical coercion

⁵⁶¹ Zimmermann, Glaser & Motz 2011, p. 72.

⁵⁶² Directive 2014/41/EU, Art. 10(1).

⁵⁶³ Directive 2014/41/EU, Art. 10(1), Art. 10(2).

⁵⁶⁴ Zimmermann, Glaser & Motz 2011, p. 74: [referring to the limitations to alternative measures introduced by the general approach] 'Apparently this was the 'prize' for the introduction of other grounds for refusal. However, there is no good reason for this restriction and the solution in the original initiative appeared preferable.' Sawyers 2011, p. 11: 'The clear intention is to restrict the executing state's capacity to refuse the EIO even if the measure is not one that would normally be undertaken in a national case.'

⁵⁶⁵ Cf. recital 16: 'Non-coercive measures could be, for example, such measures that do not infringe the right to privacy or the right to property, depending on national law.'

⁵⁶⁶ Sawyers 2011, p. 17 insists that if there is to be a division between coercive and non-coercive measures, the distinction should be plainly defined from the individual's perspective.

in several language versions before publication in the Official Journal.⁵⁶⁷ Parliament refused by stressing that for it the term non-coercive had to be understood in a broader sense also covering intrusive measures into privacy and property, as clarified in recital 16. Parliament's insistence was vindicated by the ruling of the Court in joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others*,⁵⁶⁸ underlining the impact of surveillance measures on fundamental rights. The executing judicial authority may, however, have recourse to another investigative measure if this measure has the same result as the measure indicated in the EIO by less intrusive means (para. 3).⁵⁶⁹

In Article 11(1), without prejudice to the fundamental rights safeguard clause contained in Article 1(4),⁵⁷⁰ a number of grounds for non-execution are provided:

- (a) there is an immunity or a privilege under the law of the executing State which makes it impossible to execute the EIO or there are rules on determination and limitation of criminal liability relating to freedom of the press and freedom of expression in other media, which make it impossible to execute the EIO;
- (b) in a specific case the execution of the EIO would harm essential national security interests, jeopardise the source of the information or involve the use of classified information relating to specific intelligence activities;
- (c) the EIO has been issued in proceedings referred to in Article 4 (b) and (c) and the investigative measure would not be authorised under the law of the executing State in a similar domestic case;
- (d) the execution of the EIO would be contrary to the principle of *ne bis in idem*;⁵⁷¹
- (e) the EIO relates to a criminal offence which is alleged to have been committed outside the territory of the issuing State and wholly or partially on the territory of the executing State, and the conduct in connection with which the EIO is issued is not an offence in the executing State;
- (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter;

⁵⁶⁷ I.e. *Ermittlungsmaßnahmen ohne Zwangscharakter* instead of *Nicht invasive Ermittlungsmaßnahmen* in German or *Niet-dwingende onderzoeksmaatregelen* instead of *Onderzoeksmaatregelen van niet-dwingende en niet-intrusieve aard* in Dutch, *measures non coercitives* instead of *mesures non intrusives* in French.

⁵⁶⁸ Not yet published.

⁵⁶⁹ Directive 2014/41/EU, Art. 10(3).

⁵⁷⁰ Directive 2014/41/EU, Art. 1(4): 'This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.'

⁵⁷¹ Cf. Directive 2014/41/EU, recital 17: 'The principle of *ne bis in idem* is a fundamental principle of law in the Union, as recognised by the Charter and developed by the case-law of the Court of Justice of the European Union. Therefore the executing authority should be entitled to refuse the execution of an EIO if its execution would be contrary to that principle. Given the preliminary nature of the proceedings underlying an EIO, its execution should not be subject to refusal where it is aimed to establish whether a possible conflict with the *ne bis in idem* principle exists, or where the issuing authority has provided assurances that the evidence transferred as a result of the execution of the EIO would not be used to prosecute or impose a sanction on a person whose case has been finally disposed of in another Member State for the same facts.'

- (g) the conduct for which the EIO has been issued does not constitute an offence under the law of the executing State, unless it concerns an offence listed within the categories of offences set out in Annex D, as indicated by the issuing authority in the EIO, if it is punishable in the issuing State by a custodial sentence or a detention order for a maximum period of at least three years; or
- (h) the use of the investigative measure indicated in the EIO is restricted under the law of the executing State to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO.

The reference to national security interests (para. b) is a bit surprising given that it is a mutual recognition instrument.⁵⁷² On the *ne bis in idem* principle, attempts by Council to qualify the principle in its general approach were rejected in negotiations with Parliament.⁵⁷³ The territoriality exception (para. e) is a compromise between the Council's position⁵⁷⁴ and that of the European Parliament, which had wanted to mirror the territoriality exceptions contained in the FD EAW.⁵⁷⁵ A residual dual criminality test remains (para. h) but only for measures that do not fall under the list of offences for which dual criminality is abolished (para. g) and to the exclusion of the measures listed in Article 10(2).⁵⁷⁶

Fundamental rights

The Commission, having had the right of initiative taken away from it, originally responded critically to the Council initiative. Although it supported the limited number of grounds for non-execution, it suggested including two more based on the *ne bis in idem* principle (without qualification) and in case there was an indica-

⁵⁷² Zimmermann, Glaser & Motz 2011, p. 69: 'The initiative maintains a ground for refusal of more or less political character which already existed in art. 13 1(g) FWD EEW. As the mutual recognition approach is intended to avoid the shortcomings of traditional mutual assistance, this may appear a bit outmoded.'

⁵⁷³ General approach, Art. 10(1)(e): 'The execution of the EIO would be contrary to the principle of *ne bis in idem*, unless the issuing authority provides an assurance that the evidence transferred as a result of an execution of an EIO shall not be used to prosecute a person whose case has been finally disposed of in another Member State for the same facts, in accordance with the conditions set out under Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement.' Sawyers 2011, p. 10 criticises this compulsory consultation as undermining the *ne bis in idem* principle.

⁵⁷⁴ General approach, Art. 10(1)(f): 'The EIO relates to a criminal offence which is alleged to have been committed exclusively outside the territory of the issuing State and wholly or partially on the territory of the executing State, the EIO seeks the use of a coercive measure and the conduct in connection with which the EIO is issued is not an offence in the executing State.' This wording is criticized by Sawyers 2011, p. 10: 'This leaves the executing state with no power to refuse an EIO in relation to any offences that are also recognized as offences within its own law. This, together with its muted double criminality provisions, challenge a state's power to control legal intrusions from other states.'

⁵⁷⁵ As discussed in section 5.1.3, the exception contained in Art. 4(7)(a) FD EAW is mirrored and combined with the requirement that there is no dual criminality. The extraterritoriality ground contained in Art. 4(7)(b) is rightfully not reproduced.

⁵⁷⁶ Directive 2014/41/EU, Art. 11(2).

tion of substantial grounds that the person to be transferred would face the genuine risk of being subjected to inhuman or degrading treatment or punishment.⁵⁷⁷

The EU Fundamental Rights Agency, whose opinion was requested by the European Parliament,⁵⁷⁸ equally called for the inclusion of a ground for non-execution in case of allegations of human rights violations. It, however, also outlined its view on the relationship between such a ground for non-execution and mutual recognition, calling for parameters that would ensure that Member States comply with EU primary law (on fundamental rights) without deviating from EU secondary law (mutual recognition measures):

A fundamental rights-based refusal ground could act as an adequate tool to prevent fundamental rights violations occurring during cross-border investigations. At the same time, the executing state would be required to be familiar with the criminal law rules and procedures of the issuing state, as well as the details of the case at hand. Therefore, a fully-fledged fundamental rights assessment in every case would not only counteract the idea of mutual recognition, but due to complex and long procedures it might also undermine some of the fundamental rights standards set out in section 2.2.

For this reason, any establishment of a fundamental rights-based refusal ground in the directive should ideally be complemented by explicit parameters. Such parameters could limit the refusal ground to circumstances where an EU Member State has a well-founded fear that the execution of an EIO would lead to a violation of fundamental rights of the individual concerned. In this way, a fundamental rights-based refusal ground could serve as a ‘safety-valve’, facilitating EU Member States’ compliance with fundamental rights obligations flowing from EU primary law without Member States having to deviate from EU secondary law.⁵⁷⁹

The European Parliament’s orientation vote added the following ground for non-execution based on fundamental rights:

There is clear and objective evidence of an infringement of a fundamental right as laid down in the Charter of Fundamental Rights or in the European Convention on Human Rights or where executing a measure would clearly contradict the fundamental national constitutional principles with regard to criminal proceedings;⁵⁸⁰

It furthermore added grounds for non-execution based on the *ne bis in idem* principle, without qualifying it, and based on a lack of validation by a judicial authority in the issuing Member State (which was lost during the negotiations on Article 6,

⁵⁷⁷ Commission Comments on the EIO Initiative, COM (2010) 5789, available at: <<http://register.consilium.europa.eu/pdf/en/10/st13/st13446.en10.pdf>> (last consulted on 3 May 2015).

⁵⁷⁸ In accordance with Rule 139 of the Rules of Procedure of the European Parliament.

⁵⁷⁹ The opinion may be retrieved here: <<http://fra.europa.eu/en/opinion/2011/fra-opinion-draft-directive-regarding-european-investigation-order-eio>> (last consulted on 3 May 2015).

⁵⁸⁰ Compromise amendment on Art. 10; Sawyers 2011, p. 16 recommends ‘A “substantial risk” that the execution of an EIO would breach the human rights of any person involved should justify the mandatory refusal to execute the order. Executing authorities should be obliged to consider this judicially before executing the EIO.’

proportionality).⁵⁸¹ The outcome of these negotiations is the fundamental rights exception contained in Article 11(1) f:

- (f) there are substantial grounds to believe that the execution of the investigative measure indicated in the EIO would be incompatible with the executing State's obligations in accordance with Article 6 TEU and the Charter;⁵⁸²

Article 11(1)(f) should be read together with recitals 18 and 19, providing further clarification as regards the executing State's obligations in accordance with Article 6 TEU and the Charter.

(18) As in other mutual recognition instruments, this Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union (TEU) and the Charter. In order to make this clear, a specific provision is inserted in the text.

(19) The creation of an area of freedom, security and justice within the Union is based on mutual confidence and a presumption of compliance by other Member States with Union law and, in particular, with fundamental rights. However, that presumption is rebuttable. Consequently, if there are substantial grounds for believing that the execution of an investigative measure indicated in the EIO would result in a breach of a fundamental right of the person concerned and that the executing State would disregard its obligations concerning the protection of fundamental rights recognised in the Charter, the execution of the EIO should be refused.⁵⁸³

The wording of recital 19 clarifies that compliance with minimum standards cannot be presumed, in particular when there are alleged violations of basic fundamental rights. The wording follows that of the Court of Justice in the joined Cases C-411/10, *NS v Secretary of State for the Home Department*, and C-493/10, *M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform*, in which it has held that the obligation to return asylum seekers to the Member State of first entry may not be based on the 'conclusive presumption' that fundamental rights will be observed (mutual trust), particularly in view of the Member States' obligation under Article 4 of the EU's Charter of Fundamental Rights (EU Charter) to prevent inhuman or degrading treatment.⁵⁸⁴ That reasoning has therefore now been expanded to judicial cooperation in criminal matters by the EU's co-legislators.

⁵⁸¹ Reference to specific amendments related to procedural rights related to the transfer of persons, video and telephone conferencing is omitted; for comments see Sawyers 2011, section 2.3.

⁵⁸² Directive 2014/41/EU, Art. 11(1)(f).

⁵⁸³ Directive 2014/41/EU, recitals 18 and 19.

⁵⁸⁴ Joined Cases *NS v Secretary of State for the Home Department*, Case C-411/10 and *M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform*, C-493/10 [2011] ECR 13905, para. 106: 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of →

The fundamental rights exception should be read in the context of the more general article on respect for fundamental rights, Article 1(4) and its recital 3:

(1)4. This Directive shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 of the TEU, including the rights of defence of persons subject to criminal proceedings, and any obligations incumbent on judicial authorities in this respect shall remain unaffected.

39. This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application. Nothing in this Directive may be interpreted as prohibiting refusal to execute an EIO when there are reasons to believe, on the basis of objective elements, that the EIO has been issued for the purpose of prosecuting or punishing a person on account of his or her sex, racial or ethnic origin, religion, sexual orientation, nationality, language or political opinions, or that the person's position may be prejudiced for any of these reasons.

Recital 39 in particular provides interesting reading as it states that the Directive respects Member States constitutions. There had already been a debate between Parliament and Council during the trialogues on whether the wording of the fundamental rights exception contained in Article 11(1)(f) 'Article 6 of the Treaty on European Union (TEU) and the Charter',⁵⁸⁵ would somehow imply that violation of a national constitutional principle, would not be enough on which to base a non-execution of the EIO. Recital 39 does not cause this confusion by addressing the observance 'of the principles recognised by Article 6 of the TEU and in the Charter' leaving sufficient room for national courts to base a refusal on their constitutional provisions.

It has been commented that the EP insisted on this recital because it felt that the CJEU jurisprudence on *Melloni* went too far:

The EP considered that the CJEU jurisprudence on *Radu* and *Melloni* (dealing with the implementation of the EAW) and giving priority to EU law also against constitutional principles in the Member States was going too far, so it insisted upon making explicit reference to the Member States' constitutions.

(...)

Will this text be sufficiently clear to push the CJEU to recognise a wider "margin of appreciation interpretation" of national authorities as regards JHA, as suggested by the former Advocate General Francis Jacobs some time ago? We may have still to wait for years before knowing the right answer. However, it could be arguable that in the meantime, the CJEU should take the rules in this Directive regarding the relationship

being subjected to inhuman or degrading treatment within the meaning of that provision.' Opinions by AG Trstenjak, 22 September 2011. For a commentary on the AG's opinion see Peers 2011b.

⁵⁸⁵ Directive 2014/41/EU, Art. 11(1)(f).

between human rights and mutual recognition into account when interpreting other mutual recognition instruments, such as the EAW.⁵⁸⁶

That would not be my interpretation of the *Melloni* judgment, as it addressed the primacy of a specific piece of secondary EU legislation, which has comprehensively harmonised a particular fundamental rights ground for non-execution, over constitutional provisions addressing the same issue. However, whereas the relationship between constitutional principles and mutual recognition was dealt with at a technical level during the negotiations on the Access to a Lawyer Directive, Parliament's rapporteur on the Directive for a European Investigation Order, Nuno Melo (EPP, PT), was firm in his view that judicial cooperation needs to respect national constitutional principles and held on to it during the trilogue negotiations.

The result is, however, an (apparent) inconsistency between two pieces of EU legislation adopted within a year of each other. Recital 54 to the Access to a Lawyer Directive stipulates that 'a higher level of protection [offered by national law] should not constitute an obstacle to the mutual recognition of judicial decisions'.⁵⁸⁷ However, recital 39 to the Directive on the EIO (the first mutual recognition measure adopted afterwards) states that it

respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter (...) and in the Member States' constitutions in their respective fields of application. As argued before, to prevent this inconsistency it would have been better if recital 54 would have followed the (already contested) language of the Court more closely by replacing 'constitute an obstacle to mutual recognition of judicial decisions' with 'compromise the primacy, unity and effectiveness of EU law.

The phrasing of these two recitals underlines the sensitivity of the debate concerning mutual recognition, supremacy and fundamental rights protection.⁵⁸⁸ In this debate, the (majority of) the European Parliament, often priding itself in being the

⁵⁸⁶ De Capitani & Peers 2014; Directive 2014/41/EU, recital 39: 'This Directive respects the fundamental rights and observes the principles recognised by Article 6 of the TEU and in the Charter, notably Title VI thereof, by international law and international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and in Member States' constitutions in their respective fields of application.'

⁵⁸⁷ Directive 2013/48/EU, recital 54.

⁵⁸⁸ Cf. Erbeznik 2012, p. 15 addressing the consequences of mutual recognition on different national (constitutional) rules on the admissibility of evidence: 'Therefore, it seems that mutual recognition could in specific examples require from Member States with a guarantistic "court-based approach" to adhere to a more "enforcement oriented approach", whereby they would have to execute measures that possibly oppose basic principles of their national constitutions, as for the moment no explicit non-recognition ground exists in that regard. Such an understanding and application of mutual recognition would be in contradiction to article 4(2) TEU and article 67 TFEU calling for respect of fundamental rights and the different legal systems of the Member States, and would ignore the necessary democratic legitimacy of criminal law as a category based on historical experience and a long national process of internalisation of basic principles' (with reference to *Bundesverfassungsgericht* of 30.06.2009 – 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 and 182/09 (Treaty of Lisbon), para. 253).

defender of fundamental rights as regards the application of mutual recognition to the area of criminal law, finds itself torn between an approach which stresses, ‘co-dependency of the EU and national constitutional structures’⁵⁸⁹ and one which insists on supremacy and effectiveness of judicial cooperation.

Special investigative measures notably involving the transfer and hearing of persons

As mentioned, the EIO also contains a number of provisions regarding temporary transfer to the issuing State of persons held in custody for the purpose of carrying out an investigative measure (Art. 22); temporary transfer to the executing State of persons held in custody for the purpose of carrying out an investigative measure (Art. 23); hearing by videoconference or other audio-visual transmission (Art. 24) and hearing by telephone conference (Art. 25). Therefore, alongside offering alternatives to surrender in accordance with the FD EAW, the EIO also presents new challenges to the protection of procedural rights of suspects.

This is reflected in a number of amendments by the European Parliament regarding the temporary transfer of persons calling for prison conditions in the issuing state to meet the person’s physical and mental needs,⁵⁹⁰ and that, where applicable, the rights to translation and interpretation, information and access to a lawyer are applied.⁵⁹¹

In case of temporary transfer to the executing State the general approach foresees a right for the person to state his/her opinion before a decision to issue an EIO is taken.⁵⁹² The European Parliament went one step further in foreseeing a procedure allowing the person to appeal against the transfer in line with the right to an effective remedy as laid down in Article 47 of the Charter of Fundamental Rights of the European Union,⁵⁹³ and introduced an additional ground for non-execution if the transfer is liable to prolong his or her detention.⁵⁹⁴ The Council’s position was in line with the FD Transfer of Prisoners as it did not allow an effective judicial remedy against the decision by the issuing judicial authority concerning the Member State where the sentence is to be served.

The negotiations on the temporary transfer articles resulted in two grounds for non-recognition or non-execution, in addition to those referred to in Article 11 in case the person in custody does not consent or the transfer is liable to prolong the detention of the person in custody.⁵⁹⁵ Where the executing State considers it necessary in view of the person’s age or physical or mental condition, the opportunity to state the opinion on the temporary transfer shall be given to the legal representative of the person in custody.⁵⁹⁶ The practical arrangements regarding the temporary transfer of the person including the details of his custody conditions in the issuing

⁵⁸⁹ Erbeznik 2012, p. 18.

⁵⁹⁰ Orientation vote, compromise amendment 14, Art. 19(4).

⁵⁹¹ Orientation vote, compromise amendment 14, Art. 19(8)(a).

⁵⁹² General approach, Art. 20(1)(a).

⁵⁹³ O.J. (C 83) 389 of 30.03.2010.

⁵⁹⁴ Orientation vote, compromise amendment 15, Art. 20(2)(a), amendment 161, Art. 20(2)(aa).

⁵⁹⁵ Directive 2014/41/EU, Art. 22(2).

⁵⁹⁶ Directive 2014/41/EU, Art. 22(3).

State and the dates by which he must be transferred from and returned to the territory of the executing State shall be agreed between the issuing State and the executing State, ensuring that the physical and mental condition of the person concerned, as well as the level of security required in the issuing State, are taken into account.⁵⁹⁷ The period of custody in the territory of the issuing State shall be deducted from the period of detention which the person concerned is or will be obliged to undergo in the territory of the executing State.⁵⁹⁸

As regards videoconferencing and hearing by telephone conference, both the Council and Parliament's text pointed to the right not to testify, with Parliament's text also insisting on an obligation to inform the person of his or her wider fair trial rights.⁵⁹⁹ The European Parliament's text also stated that a telephone conference should only be used in exceptional cases where no other means of taking evidence are available and the evidence is not disputed.⁶⁰⁰ Negotiations resulted in an Article (24) on hearing by videoconference that contains two grounds for non-recognition or non-execution, in addition to those referred to in Article 11 in case the suspected or accused person does not consent or the execution of such an investigative measure in a particular case would be contrary to the fundamental principles of the law of the executing State.⁶⁰¹ It also contains provisions ensuring that suspected or accused persons shall be informed in advance of the hearing of the procedural rights which would accrue to them, including the right not to testify, under the law of the executing State and the issuing State. Witnesses and experts may claim the right not to testify which would accrue to them under the law of either the executing or the issuing State and shall be informed about this right in advance of the hearing.⁶⁰² As regards hearing by telephone conference, Article 25(1) stipulates that issuing an EIO for the purpose of hearing a witness or expert by telephone conference should only be considered, 'where it is not appropriate or possible for the person to be heard to appear in its territory in person, and after having examined other suitable means'.⁶⁰³

5.2.2.2. *European Supervision Order*

Member State implementation of the 2009 Framework Decision on the European Supervision Order⁶⁰⁴ should also reduce the impact on the life of defendants being

⁵⁹⁷ Directive 2014/41/EU, Art. 22(5); cf. recital 15: 'This Directive should be implemented taking into account Directives 2010/64/EU (5), 2012/13/EU (6), and 2013/48/EU (7) of the European Parliament and of the Council, which concern procedural rights in criminal proceedings.'

⁵⁹⁸ Directive 2014/41/EU, Art. 22 (7); Art. 23(2): 'Paragraph 2 (a) and paragraphs 3 to 9 of Article 22 are applicable mutatis mutandis to the temporary transfer under this Article.'

⁵⁹⁹ Orientation vote, compromise amendment 16.

⁶⁰⁰ Orientation vote, compromise amendment 17.

⁶⁰¹ Directive 2014/41/EU, Art. 24(2).

⁶⁰² Directive 2014/41/EU, Art. 24(5).

⁶⁰³ Directive 2014/41/EU, Art. 25(1).

⁶⁰⁴ Council Framework Decision 2009/829/JHA on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; Fair Trials International, 'A guide to the Euro-
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subject to prosecution in another Member State, by offering the possibility to await trial in the Member State of residence subject to supervision measures (like regular reporting to the police).⁶⁰⁵ This should improve on the current practice where non-resident defendants are kept in pre-trial detention, due to the assumed risk of flight, or are released but are not allowed to leave the country.

In accordance with Article 10 of the Directive, the competent authority of the trial/issuing Member States may forward a decision on a supervision measure together with the standard form ('European Supervision Order') indicating the supervision measures imposed, to the Member State of the defendants' residence/executing Member State.⁶⁰⁶ As with the other mutual recognition measures, the competent authority of the executing Member State should decide on the recognition of the European Supervision Order in accordance with a recognition procedure (Art. 12) containing the traditional grounds for non-execution including the lack of dual criminality (with exclusion of the list of the 32 categories of crime mentioned in the FD EAW) and *ne bis in idem* (Arts. 14 and 15). In case the person breaches the supervision measures, this may lead to the trial Member State issuing an arrest warrant leading to surrender in accordance with the FD EAW (Arts. 19 and 21).

The European Supervision Order is one of the few mutual recognition measures that serve the interests of suspects by allowing them to await trial in their home State.⁶⁰⁷ However, there is no direct link with the FD EAW, which is unfortunate. In case an EAW is issued, the suspect will always have to be surrendered to the issuing Member State first before an ESO may be sent. As Doobay comments:

'It is still necessary for the requested person to be surrendered to the issuing Member State, but following surrender the Courts in the issuing Member State should proceed in appropriate cases to grant bail in the knowledge that the individual will return voluntarily for the trial proceedings, or if not, another European arrest warrant could be executed speedily so as to ensure their return. However, this will require both the implementation of the Framework Decision and trust between Member States that conditions will be enforced.'⁶⁰⁸

The implementation report of the Commission issued in February 2014, however, reveals that the trust between Member States seems not to be readily available yet, as 16 Member States had not yet transposed this Framework Decision by then, well over a year after the deadline (of 1 December 2012).⁶⁰⁹

pean Supervision Order', available at: <http://www.ecba.org/extdocserv/projects/eso/ES_O_GUIDEfinal_FTI.pdf> (last consulted on 3 May 2015).

⁶⁰⁵ Framework Decision European Supervision Order, Art. 8.

⁶⁰⁶ Framework Decision European Supervision Order, Art. 9, which also contains the possibility of sending the ESO to another Member State.

⁶⁰⁷ Cf. Thunberg Schunke 2013, p. 8.

⁶⁰⁸ Doobay 2014, p. 63.

⁶⁰⁹ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving
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Comment

Although the EU Charter includes a number of fair trial rights that are also applicable to surrender procedures, the legal basis for approximating these rights still limits the scope of these measures to the extent necessary to further mutual recognition. Even so, a number of key fair trial rights have been implemented, notably foreseeing translation and interpretation, the right to information and access to a lawyer both in the issuing and executing Member State, although the demand of the European Parliament that assistance be free of charge for those who cannot afford it remains to be met.

The multiplication of grounds for non-execution in the EIO is in part caused by the European Union continuing down the path of mutual recognition without integrating and adopting accompanying measures concerning procedural rights, criminal jurisdiction and substantive criminal law.⁶¹⁰ The question of how the resulting 'transnational criminal proceedings'⁶¹¹ are to be found compatible with the principle of a fair trial is thus far left unanswered.⁶¹²

The Access to a Lawyer and EIO Directives also reveal a continued ambiguity among co-legislators as regards the nature of mutual recognition and its relationship with national sovereignty and fundamental rights. The relationship with national sovereignty is problematic, whereas it is fully compatible with fundamental rights, as long as there is a rebuttable presumption of trust in the criminal justice system and decisions of the issuing judicial authorities.

As a result, unfortunately an inaccurate approach to mutual recognition made it into a recital to the Directive on Access to a Lawyer. By re-interpreting the *Melloni* judgment, the co-legislators in this Directive caused confusion as regards the difference between the 'free movement of judicial decisions' and mutual recognition. The danger here is that the executing judicial authority is no longer certain whether it can apply fundamental rights safeguards going beyond the minimum standards agreed to in the Directives adopted under the Road Map. The recital to the subsequent EIO Directive answers this question in the affirmative, but at the same time it omits a reference to the primacy, unity and effectiveness of European law. The EIO now seems to leave too much space to judicial authorities to intervene based on national law, whereas the Access to a Lawyer Directive seems to leave too little.

Further confusion may be avoided by dropping the 'necessary for mutual recognition' requirement for the approximation of procedural rights of suspected or accused persons in Article 82 TFEU and by replacing it with a direct reference to the

the deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, COM (2014) 057 final.

⁶¹⁰ Cf. Zimmermann, Glaser & Motz 2011, p. 80; Sawyers 2011, p. 6: 'The [mutual recognition] agenda, thus far, has developed without establishing minimum procedural safeguards of individual protection, save for the belated return to the procedural safeguards agenda with the Swedish Presidency's Road map published in 2009. The Stockholm programme confirmed its commitment to developing such standards. Why then, is the EIO being pursued when such basic safeguards are still not in place?'

⁶¹¹ The term is taken from Thunberg Schunke 2013.

⁶¹² Cf. Ouwerkerk 2011, p. 77.

Charter and the ECHR. Furthermore, it should be clarified that ‘mutual recognition’ does not lead to a disapplication of national constitutional standards. This is only the case if a certain fundamental rights exception has been comprehensively approximated in secondary EU legislation implementing the principle of mutual recognition.

5.3. *Relationship with Principles of EU Law, Notably Fundamental Rights and Proportionality*

Seeking recognition in the European Union context affects both the relationship between the individual and the State and among States. In his opinion in the *Advocaten voor de Wereld* case, Advocate General Colomer pointed to the fact that the FD EAW has added a third dimension to the bilateral judicial cooperation in criminal matters, namely the rights of the individual concerned.⁶¹³

As discussed in the previous sections, at the time of drafting the FD EAW, this dimension was, however, not the main preoccupation of the Member States negotiating the FD EAW. The core fair trial rights of access to a lawyer, the right to information, translation and interpretation have since been approximated also as regards surrender procedures, but other key rights, such as that to legal aid, have not, underlining the need to continue work on harmonising procedural rights to ensure their effective enforcement by individuals within the European Union.

In addition, the lack of clarity offered by the FD EAW regarding what constitutes a ‘criminal prosecution’ and a(n) ‘(issuing and executing) judicial authority’⁶¹⁴ has led to various problems in national implementation and practice. This is so particularly in cases in which surrender was requested by prosecutors before the case was ‘trial ready’ and for ‘minor offences’, meaning offences like theft for which surrender must formally be granted as the conditions of the FD EAW were met, but in practice often concerned petty crimes for which demanding surrender may be deemed disproportionate, particularly in view of its impact on individual rights.⁶¹⁵ More recent EU legislation based on mutual recognition, such as the European Investigation Order, has sought to address these deficiencies⁶¹⁶ and shows more deference to fundamental rights,⁶¹⁷ although tensions remain. There is also still now a residual relationship between the issuing and executing Member State, which will

⁶¹³ Opinion of AG Colomer in Case C-303/05, para. 69.

⁶¹⁴ FD EAW, Art. 1.

⁶¹⁵ Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and surrender procedures between Member States, COM (2011) 175, p. 7: ‘Confidence in the application of the EAW has been undermined by the systematic issue of EAWs for the surrender of persons sought in respect of often very minor offences’; Carrera, Guild & Hernanz 2013; ‘Wanted, for chicken rustling’, *Economist*, 2 January 2010, available at: <http://www.economist.com/world/britain/displaystory.cfm?story_id=15179470> (last consulted on 3 May 2015).

⁶¹⁶ Directive on the European Investigation Order, Art. 2 (definitions), Art. 6 (conditions for issuing and transmitting an EIO).

⁶¹⁷ Directive on the European Investigation Order, Art. 11(1)(f) (fundamental rights exception).

not want its criminal justice system to be disproportionately employed to the benefit of other Member States.⁶¹⁸

As examined in section 4, the aims and principles of the Area of Freedom, Security and Justice will have to be taken into account. This legal framework has consequences for ‘the free movement of judicial decisions’ in accordance with the FD EAW. In particular, this free movement of judicial decisions is subject to compliance with the ‘Justice’ aspect of the Area of Freedom, Security and Justice, which links in with the notion of the ‘rule of law’ as laid down in Articles 2 and 6 TEU.⁶¹⁹ From this notion of the rule of law, the exact substance of which is still being explored,⁶²⁰ related principles such as respect for fundamental rights, including proportionality, may be derived.⁶²¹

In accordance with Article 6 TEU, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.⁶²² Since the entry into force of the Treaty of Lisbon, Member States have to respect the rights, principles and freedoms contained in the EU’s Charter of Fundamental Rights when they are implementing Union law in accordance with Article 51 of the EU Charter.⁶²³

⁶¹⁸ Klip 2012, p. 388 points to the fact that: ‘In the past, only the interests of the Member States were considered in the conduct of co-operation between those Member States. Over time, however, the interests of the accused or convicted person have come to be taken more seriously.’

⁶¹⁹ Art. 2 TEU; The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail; Art. 6 TEU; The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States; see also Case 294/83, *Les Verts*, para. 23: ‘It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty.’

⁶²⁰ Attempts have been made by the Council of Europe’s Venice Commission to define the elements of the concept further: Legality, including a transparent, accountable and democratic process for enacting law; Legal certainty; Prohibition of arbitrariness; Access to justice before independent and impartial courts, including judicial review of administrative acts; Respect for human rights; and non-discrimination and equality before the law, Report on the rule of law, CDL-AD(2011), Strasbourg 4 April, 2011, para. 41.

⁶²¹ Tridimas 2006, p. 4, as discussed in section Chapter 1, section 3.

⁶²² Art. 6 TEU; European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, P7_TA-PROV(2010)0184.

⁶²³ Art. 6(1) TEU: ‘1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.’ EU Charter, Art. 51(Field of application):‘1. The provisions of this →

EU Charter

The EU Charter contains a number of provisions that contain a number of rights and freedoms that are applicable those subjects to surrender procedures, notably Article 1 on the right to human dignity;⁶²⁴ Article 4 on prohibition of torture and inhuman or degrading treatment or punishment; Article 6 on the right to liberty and security; Article 7 on the respect for private and family life; Article 10 on the freedom of thought, conscience and religion; Article 11 on the freedom of expression and information; Article 12 on the freedom of assembly and of association; Article 19 on protection in the event of removal, expulsion and extradition; Articles 20 and 21 on equality before the law and non-discrimination; Article 45 on the freedom of movement and residence, corresponding to the rights derived from EU citizenship; Article 47 on the right to an effective remedy and to a fair trial; Article 48 on the presumption of innocence and right of defence; Article 49 on the principles of legality and proportionality of criminal offences and penalties; and Article 50 on the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

Free movement of judicial decisions and respect for fundamental rights

Irrespective of fundamental rights being part of the principles of European Law, and their consolidation in the EU Charter, in Article 1(3) of the FD EAW there is also a concrete reference to the fact that the Framework Decision is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles.

Although it does not amount to an explicit fundamental rights ground for non-execution,⁶²⁵ this provision is backed up by a number of recitals referring to the possibility to suspend the cooperation based on this instrument with Member States in the event of a serious and persistent breach of the fundamental rights and funda-

Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties; 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.' O.J. (C 83) of 30.03.2010.

⁶²⁴ Opinion by AG Mengozzi in Case C-42/11, *Lopes da Silva*, para. 28.

⁶²⁵ See the Commission proposal for the FD EAW, COM (2001) 522, Art. 26 (general provision): 'The executing judicial authority may refuse to execute a European arrest warrant under the circumstances described in Articles 27 to 34.' Explanation: 'The grounds for refusing to execute a European arrest warrant in a Member State are listed exhaustively in this Framework Decision, subject, of course, to the general rules for the protection of fundamental rights, and particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union, it will not be possible for the judicial authority of a Member State to refuse to execute a European arrest warrant on a ground not provided for here.'

mental legal principles referred to in Article 6 TEU,⁶²⁶ the possibility to refuse surrender in case it is suspected that the arrest warrant has been issued for discriminatory purposes, referring to the continued application of constitutional rules related to due process, freedom of association, freedom of the press and freedom of expression in other media,⁶²⁷ plus reminding judicial authorities that no one should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.⁶²⁸ These recitals largely reflect the provisions of the EU Charter mentioned above.

However, since none of these fundamental rights, except for the qualified right of an accused person to appear in person at the trial, covered by the right to a fair trial and the right of defence mentioned in Article 47 and 48 EU Charter (*in absentia*) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence mentioned in Article 50 EU Charter (*ne bis in idem*), were laid down in the FD EAW as grounds for non-execution, a number other rights, such as those to equality before the law and non-discrimination (Art. 21 EU Charter), the freedom of movement and residence (Art. 45 EU Charter) and the principle of legality (Art. 49 EU Charter), have been raised in the context of the application of traditional grounds for non-execution, such as those regarding dual criminality⁶²⁹ and nationality.⁶³⁰

The relationship between the ‘free movement of judicial decisions’ and the specific grounds for non-execution laid down in the FD EAW were already discussed in section 5.1. The following section will investigate the relationship between the free movement of judicial decisions and respect for fundamental rights protected by the EU Charter more broadly, including considerations regarding proportionality.

5.3.1. Proportionality from an Individual Rights Perspective

Unlike the European Investigation Order adopted more recently, the FD EAW does not refer to the application of the principle of proportionality. By means of definition, it is recalled that, as discussed in Chapter 1, the principle of proportionality, on the one hand, is used as an instrument of market integration and, on the other hand, is applied to protect individual rights.⁶³¹ From Article 5 TEU, we can derive proportionality as a ground for review of national measures derogating from the rules on free movement. Proportionality is an important condition for successfully invoking a justification ground,⁶³² as it imposes suitability and a necessity test on national

⁶²⁶ FD EAW, recital 10.

⁶²⁷ FD EAW, recital 12.

⁶²⁸ FD EAW, recital 13.

⁶²⁹ Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633.

⁶³⁰ Case C-123/08, *Wolzenburg* [2009] ECR 9621.

⁶³¹ Jans 2000, p. 243.

⁶³² De Vries 2006, p. 16.

measures affecting free movement. The latter criterion is interpreted as meaning whether no 'less restrictive alternatives' are available.⁶³³

The principles of legality and proportionality of criminal sentences also feature in Article 49 of the EU Charter.⁶³⁴ Article 52 of the EU Charter determines that any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The proportionality principle therefore takes on an extra dimension when applied in the area of criminal law.

In the context of judicial cooperation in criminal matters, *Klip* identifies three types of proportionality. First, there is the measure of mutual recognition (evidence or arrest) in light of the circumstances. The second is inherent in the conditions of the respective mutual recognition instruments, as all these set a certain threshold. The third relates to the question whether the measure chosen is proportionate in the light of the fundamental freedoms and other rights to which a European national or other person is entitled.⁶³⁵

As regards the FD EAW, the first type of proportionality might be achieved by the future issuance of a European Investigation Order, for instance, for hearing a suspected or accused person by videoconference, as an alternative to a European arrest warrant.⁶³⁶ The second threshold relates to the criteria for issuing a European arrest warrant, notably the act in relation to which the arrest is requested is punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum of at least 12 months or, if the surrender is requested for the execution of a prison sentence or detention order, that the imposed sentence is for at least four months.⁶³⁷

The focus in the next section will be on the third type of proportionality mentioned by *Klip*, the relationship with individual freedoms and rights, concentrating on the rights and freedoms laid down in the EU Charter. In other words, the next section will look at proportionality from an individual rights perspective.

⁶³³ Tridimas 2005, p. 113.

⁶³⁴ O.J. (C 83) of 30.03.2010.

⁶³⁵ *Klip* 2012, p. 390-391.

⁶³⁶ Directive 2014/41/EU, recital 26: 'With a view to the proportionate use of an EAW, the issuing authority should consider whether an EIO would be an effective and proportionate means of pursuing criminal proceedings. The issuing authority should consider, in particular, whether issuing an EIO for the hearing of a suspected or accused person by videoconference could serve as an effective alternative.'

⁶³⁷ Art. 2(1) FD EAW: 'A European arrest warrant may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.' Cf. section 5.1.2.

5.3.2. Positions Council, Commission, European Parliament

The Council/Member States, Commission and European Parliament have issued reports, guidelines and resolutions as regards the correct implementation and interpretation of the FD EAW on the matters of fundamental rights and proportionality.⁶³⁸ The European Parliament has even called for legislative reform.⁶³⁹ Their positions will be outlined below.

Council position

The Council has conducted mutual evaluations on 'The practical application of the European arrest warrant and corresponding surrender procedures between Member States'⁶⁴⁰ which was adopted by the Council on 4-5 June 2009. It mentions that some experts noted the different approaches to incorporating Article 1(3) and related recitals 12 and 13 of the FD EAW to the implementing law and the creation of a specific mandatory ground for refusal on this basis in some Member States.⁶⁴¹ In this document no further statements are made as regards the appropriateness of such an explicit implementation of Article 1(3), although in specific country reports the Council did in some circumstances advise Member States to scrap their explicit implementation of Article 1(3) FD EAW, for instance, regarding the Netherlands:

This ground for non-execution goes, strictly speaking, beyond the provisions of the Framework Decision since it is not included in Articles 3 and 4 of the Framework Decision. The experts team is familiar with recital 12 of the Framework Decision but considers that this recital should not have been elevated to a ground for non-recognition, in view also of the fact that all Member States are signatories to and hence are bound by the Convention on Human Rights and Fundamental Freedoms. The experts are of the view that this ground for non-recognition is the expression of a lack of confidence in the criminal law systems of the other Member States.⁶⁴²

⁶³⁸ Final report on the fourth round of mutual evaluations The practical application of the European arrest warrant and corresponding surrender procedures between Member States, Council document 8302/2/09 REV 2, 18 May 2009; COM (2005) 63; COM (2007) 407 and COM (2011) 175.

⁶³⁹ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014) 0174.

⁶⁴⁰ Final report on the fourth round of mutual evaluations The practical application of the European arrest warrant and corresponding surrender procedures between Member States, Council document 8302/2/09 REV 2, 18 May 2009.

⁶⁴¹ Council document 8302/2/09 REV 2, p. 13.

⁶⁴² Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between Member States' – report on the Netherlands, Council document 15370/2/08 REV 2 of 27 February 2009, p. 47; Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between member states' – report on the United Kingdom, Council document 9974/2/07 REV 2, p. 65: 'The UK act also provides for the express possibility of refusing surrender on the basis of ECHR issues which derive from Article 1.3 of the FD. However, ECHR jurisprudence has established that such →

Furthermore it includes a section entitled ‘proportionality check’ distinguishing between a proportionality check in the issuing Member States as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing the EAW in the light of the circumstances of the case. This encompasses different aspects, mainly the seriousness of the offence in connection with the consequences of the execution of the EAW for the individual and dependents and the possibility of achieving the objective sought by less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.⁶⁴³ In this context the Council also amended its ‘Handbook on how to issue a European Arrest Warrant’.⁶⁴⁴ However, as regards a proportionality check by the executing judicial authority, the mutual evaluation report concludes that ‘There seemed to be a wide consensus (although not unanimity) that no proportionality check should be carried out at the level of the executing authorities.’⁶⁴⁵

Commission position

The European Commission has issued three reports on the implementation of the FD EAW.⁶⁴⁶ In its first evaluation report the Commission called the introduction of grounds of refusal for violation of fundamental rights by two thirds of the Member States ‘disturbing’, as ‘these grounds should be only invoked in exceptional circum-

arguments can only succeed if there is a substantial risk of a flagrant breach of fundamental rights. Since the UK courts have accepted this jurisprudence refusal to surrender on such grounds should only happen in exceptional cases.’ Evaluation report on the fourth round of mutual evaluations ‘the practical application of the European arrest warrant and corresponding surrender procedures between Member States’ – report on Germany, Council document 7058/1/09 REV 1, p. 44: ‘During the interviews the expert team heard numerous complaints about EAWs being issued in some other Member States for petty cases, causing a lot of work for virtually “nothing”. Critical comments were directed in particular towards Poland. Moreover, according to the information provided, a number of EAWs were refused by German authorities with referral to Section 73 of the IRG, on the basis that a minimum proportionality standard had not been observed in issuing them. The experts share the German authorities’ concerns in this regard. They note, however, that the practice of controlling the proportionality of the EAW at the level of the executing authorities is to be criticised. Such control is confrontational and contrary to the spirit of mutual trust on which the EAW is based. Furthermore, giving the executing Member State an opportunity to refuse an EAW on this ground opens the way to a vague and unpredictable new category of grounds for non-execution which is not in conformity with the explicitly limited mandatory and optional grounds for refusal in Articles 3 and 4 of the Framework Decision.’

⁶⁴³ Council document 8302/2/09 REV 2, p. 13; Preliminary draft reply to question for written answer E-012918/2013 – Philippe Boulland (PPE), Principle of proportionality as regards the European arrest warrant, available at: <<http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%205494%202014%20INIT>> (last consulted on 3 May 2015).

⁶⁴⁴ Final version of the European handbook on how to issue a European arrest warrant, Council document 82/1/08 REV 2 COR 1 of 24 June 2008; updated in 2010. The revised version is available at: <<http://register.consilium.europa.eu/pdf/en/10/st17/st17195-re01.en10.pdf>> (last consulted on 3 May 2015).

⁶⁴⁵ Council document 8302/2/09 REV 2, p. 14.

⁶⁴⁶ COM (2005) 63; COM (2007) 407 and COM (2011) 175.

stances in the Union'.⁶⁴⁷ It confirmed its criticism in its second implementation report.⁶⁴⁸ The third implementation report, however, strikes a different tone. It mentions 'a number of judgments of the ECtHR which have highlighted deficiencies in some prisons within the EU',⁶⁴⁹ notably as regards violations of Article 3 ECHR (corresponding to Art. 4 EU Charter on prohibition of torture and inhuman or degrading treatment or punishment) to stress that:

It is clear that the Council Framework Decision on the EAW (which provides in Article 1(3) that Member States must respect fundamental rights and fundamental legal principles, including Article 3 of the European Convention on Human Rights) does not mandate surrender where an executing judicial authority is satisfied, taking into account all the circumstances of the case, that such surrender would result in a breach of the requested person's fundamental rights arising from unacceptable detention conditions.⁶⁵⁰

The third implementation report also highlights the issue of proportionality in a separate section, reiterating the need for a proportionality check by the issuing judicial authority endorsing the approach of Council in this regard:

There is a disproportionate effect on the liberty and freedom of requested persons when EAWs are issued concerning cases for which (pre-trial) detention would otherwise be felt inappropriate. In addition, an overload of such requests may be costly for the executing Member States. It might also lead to a situation in which the executing judicial authorities (as opposed to the issuing authorities) feel inclined to apply a proportionality test, thus introducing a ground for refusal that is not in conformity with the Council Framework Decision or with the principle of mutual recognition on which the measure is based.⁶⁵¹

European Parliament

Having debated the disproportionate use of the European arrest warrant on several occasions,⁶⁵² and building on the negotiations in the context of the European Investigation Order the European Parliament's Civil Liberties, Justice and Home

⁶⁴⁷ COM (2005) 63: 'Although more efficient and faster than the extradition procedure, the arrest warrant is still subject to full compliance with the individual's guarantees. Contrary to what certain Member States have done, the Council did not intend to make the general condition of respect for fundamental rights a ground for refusal in the event of infringement. A judicial authority is, of course, always entitled to refuse to execute an arrest warrant, if it finds that the proceedings have been violated by infringement of article 6 of the Treaty on European Union and the constitutional principles common to the Member States. However, in a system based on mutual trust, such a situation should remain exceptional.'

⁶⁴⁸ COM (2007) 407 (under section 2.2.3, more still needs to be done, listing defects in transposition): 'Introduction of grounds for refusal going beyond the Framework Decision or not provided for therein, such as those based on the application of treaties or conventions not expressly rules out by the Framework Decision.'

⁶⁴⁹ COM (2011) 175, p. 7 with references in footnote 19 to the ECtHR cases *Peers v Greece* (19 April 2001), *Salejmanovic v Italy* (16 July 2009), *Orchowski v Poland* (22 January 2010).

⁶⁵⁰ COM (2011) 175, p. 7.

⁶⁵¹ COM (2011) 175, p. 8.

⁶⁵² For instance, in plenary on 08 June 2011 (2011/2563(RSP)).

Affairs (LIBE) Committee decided to embark on a Legislative own initiative report in accordance with Article 225 TFEU.⁶⁵³ The LIBE committee appointed Baroness Sarah Ludford (ALDE, UK) as rapporteur. The European Parliamentary Research Service (EPRS) produced a study in collaboration with Professor *Weyembergh*⁶⁵⁴ and Mr. Doobay⁶⁵⁵ investigating the legal and policy considerations at stake when considering reform of the FD EAW and/or the mutual recognition instruments more generally. The European Parliament resolution of 27 February 2014, adopted with 495 votes in favour and 51 against, requested the Commission to submit, within a year following the adoption of its resolution, on the basis of Article 82 of the Treaty on the Functioning of the European Union, legislative proposals providing, *inter alia*, for:

- a procedure whereby a mutual recognition measure can, if necessary, be validated in the issuing Member State by a judge, court, investigating magistrate or public prosecutor, in order to overcome the differing interpretations of the term ‘judicial authority’;
- a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person, including the protection of private and family life, the cost implications and the availability of an appropriate less intrusive alternative measure;
- a standardised consultation procedure whereby the competent authorities in the issuing and executing Member State can exchange information regarding the execution of judicial decisions such as on the assessment of proportionality and specifically in regard to the EAW; and
- a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State’s obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with its reference to the principle of proportionality.

In the Annex to the resolution, concrete drafting proposals are made as regards the terms judicial authority, proportionality and fundamental rights.⁶⁵⁶

⁶⁵³ Art. 225 TFEU: ‘The European Parliament may, acting by a majority of its component Members, request the Commission to submit any appropriate proposal on matters on which it considers that a Union act is required for the purpose of implementing the Treaties. If the Commission does not submit a proposal, it shall inform the European Parliament of the reasons.’

⁶⁵⁴ Weyembergh 2014.

⁶⁵⁵ Doobay 2014.

⁶⁵⁶ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014) 0174, para. 7, Annex (Recommendations as to some envisaged legislative proposals): ‘Validation procedure for Union mutual legal recognition instruments: - ‘Issuing authority’ in Union criminal legislation shall be defined as: (i) a judge, a court, an investigating magistrate or a public prosecutor competent in the case concerned; or (ii) any other competent authority as →

As regards proportionality, the European Parliament does not call for an explicit proportionality check by the executing judicial authority, following the recommendations of professor *Weyembergh* on this point, who reasoned it would be against ‘the philosophy of mutual recognition’, implying that most controls are performed in the issuing State so as to avoid to the largest extent controls in both States, thus trusting the checks performed in the issuing State.⁶⁵⁷ Instead, it preferred a combination of a proportionality check by the issuing judicial authority combined with a consultation procedure in which information on the proportionality of executing the judicial decision at hand may be exchanged. At the same time, Parliament calls for an explicit ground for non-execution based on fundamental rights.

Informally, however, MEPs were told in a meeting with Parliament’s Legal Service that the fundamental rights exception may subsume the issue of proportionality, which the EP resolution describes as a

Disproportionate use of the EAW for minor offences or in circumstances where less intrusive alternatives might be used, leading to unwarranted arrests and unjustified and excessive time spent in pre-trial detention and thus to disproportionate interfer-

defined by the issuing Member State, provided that the act to be executed is validated, after examination of its conformity with the conditions for issuing the instrument, by a judge, court, investigating magistrate or a public prosecutor in the issuing Member State. Proportionality check for the issuing of Union mutual recognition legal instruments: When issuing a decision to be executed in another Member State, the competent authority shall carefully assess the need for the requested measure based on all the relevant factors and circumstances, taking into account the rights of the suspected or accused person and the availability of an appropriate less intrusive alternative measure to achieve the intended objectives, and shall apply the least intrusive available measure. Where the executing authority has reason to believe that the measure is disproportionate, the executing authority can consult the issuing authority on the importance of executing the mutual recognition decision. After such consultation, the issuing authority may decide to withdraw the mutual recognition decision; Consultation procedure between the competent authorities in the issuing and executing Member State to be used for Union mutual recognition legal instruments: Without prejudice to the possibility of the competent executing authority to avail itself of the grounds for refusal, a standardised procedure should be available whereby the competent authorities in the issuing and executing Member State can exchange information and consult each other with a view to facilitating the smooth and efficient application of the relevant mutual recognition instruments or the protection of the fundamental rights of the person concerned such as the assessment of proportionality, including, with regard to the EAW in order to ascertain trial-readiness. Fundamental rights refusal ground to be applied to Union mutual recognition legal instruments: There are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State’s obligations in accordance with Article 6 TEU and the Charter.’

⁶⁵⁷ *Weyembergh* 2014, p. 37. *Weyembergh* further argued that a proportionality test by the executing authority is difficult to accept because it is partially subjective and largely depends on the facts and circumstances of the case, and requires a certain familiarity, if not knowledge of the criminal justice system of the issuing Member State; *Weyembergh* 2013.

ence with the fundamental rights of suspects and accused persons as well as burdens on the resources of Member States.⁶⁵⁸

The reasoning behind this was that surrender constitutes an interference with the right to liberty and security (Art. 6 EU Charter). Given that this right corresponds to the right to liberty in accordance with Article 5 ECHR,⁶⁵⁹ the case law of the ECtHR is applicable, for example the case of *Saadi v Italy*.⁶⁶⁰ Although this case concerned an expulsion order, it does offer a good example of the ECtHR considering arguments regarding alleged violations of Articles 3 (inhuman or degrading treatment or punishment), 6 (fair trial) and 8 ECHR (family life), including the proportionality considerations raised under Article 8.⁶⁶¹

Commission response

The response by the European Commission, received on 24 July 2014 (confirmed by the new Justice Commissioner Věra Jourová during the hearing procedure by the European Parliament in October),⁶⁶² was, however, that proposing legislative change would be 'premature', in the light of:

- the increased enforcement powers of the Commission after the end of the transitional period;
- the development of other mutual recognition instruments 'that both complement the European arrest warrant system and in some instances provide useful and less intrusive alternatives to the European arrest warrant'; and
- the on-going work 'to further improve this context by ensuring respect for fundamental rights by providing common minimum standards of procedural rights for suspects and accused persons across the European Union'.⁶⁶³

On the issue of the fundamental rights exception the Commission first, referred to its work on procedural rights as 'the best approach to finding the right balance in the European arrest warrant system between the essential adherence to fundamental rights and the key principle of mutual recognition'. Second, it called this

⁶⁵⁸ European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European arrest warrant (2013/2109(INL)), P7_TA-PROV(2014)0174, recital F.

⁶⁵⁹ See Art. 52(3) EU Charter.

⁶⁶⁰ ECtHR of 28.02.2008 (Application No. 37201/06).

⁶⁶¹ See also Weyembergh 2014, p. 37: 'One should not forget the fundamental rights ground for refusal, which may be resorted to when disproportionate EAWs amount to a violation of fundamental rights.'

⁶⁶² See the Evaluation letter of the European Parliament's committees on Civil Liberties, Justice and Home Affairs, Legal Affairs, Internal Market and Consumer Protection and Women's Rights and Gender Equality of 9 October 2014, available at: <<http://www.elections2014.eu/resources/library/media/20141021RES75568/20141021RES75568.pdf>> (last consulted on 3 May 2015).

⁶⁶³ Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, received by the European Parliament on 24 July 2014.

approach 'more effective than re-opening the European arrest warrant legislation to insert an explicit refusal ground on the basis of fundamental rights that will have to be considered in each case'. Third, it stated that 'such an approach has the potential to undermine the principle of mutual recognition'. And, fourth, it deemed such an explicit exception 'not warranted in circumstances where the primacy of fundamental rights is already underlined in Article 1.3 of the Framework Decision' referring to its 2011 implementation report:

As the Commission set out in its 2011 implementation report, a refusal is possible on fundamental rights grounds in exceptional cases. Therefore, within the current framework (which is enhanced by the agreed minimum procedural rights standards), there exists an already-established role of the judicial authorities as the guardian of the fundamental rights of requested persons.⁶⁶⁴

On the issue of proportionality, the Commission signals improvements through guidelines and better cooperation between judicial authorities:

The Commission notes that the proportionality issue arises only in a small number of Member States and has improved because of the dissemination of such guidelines and good bi-lateral contacts. This illustrates that legislative action is not always the best approach, and underlines the essential role of good co-operation between Member States to ensure that, building on the "framework" already available at EU level, the European arrest warrant functions optimally in practice.⁶⁶⁵

Council response

A Council document called 'issues of proportionality and fundamental rights in the context of the operation of the European arrest warrant', dated 20 May 2014, was

⁶⁶⁴ Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, received by the European Parliament on 24 July 2014: 'The Commission does not share the Parliament's view that improving the European arrest warrant system requires a revision of the Framework Decision either alone or in conjunction with a revision of other mutual recognition instruments. Given the risks of interference with a largely successful system and the fact that the issues identified by the Parliament are already and can be further addressed and improvements achieved without re-opening the core legislation, this leads the Commission to the conclusion that the best course of action for improving the European arrest warrant is to continue the work that is already on-going to address the issues raised by the Parliament.'

⁶⁶⁵ Follow up to the European Parliament resolution with recommendations to the Commission on the review of the European arrest warrant adopted by the Commission on 28 May 2014, received by the European Parliament on 24 July 2014: 'The Commission does not share the Parliament's view that improving the European arrest warrant system requires a revision of the Framework Decision either alone or in conjunction with a revision of other mutual recognition instruments. Given the risks of interference with a largely successful system and the fact that the issues identified by the Parliament are already and can be further addressed and improvements achieved without re-opening the core legislation, this leads the Commission to the conclusion that the best course of action for improving the European arrest warrant is to continue the work that is already on-going to address the issues raised by the Parliament.'

attached the European Parliament resolution.⁶⁶⁶ In this document, the Greek Council Presidency referred to the ‘Handbook on how to issue a European arrest warrant’⁶⁶⁷ and the view that any proportionality check should be conducted by the issuing judicial authority. This time the Council Presidency also referred to the ‘philosophy of mutual recognition’:

This interpretation is consistent with the provisions of the Framework Decision on the EAW and with the general philosophy behind its implementation, with a view to making the EAW an effective tool for combating serious and organised crime in particular. Prosecutors may also wish to have reference to the *Advocaten voor de Wereld* case in Annex VII and Article 49 of the EU Charter on Fundamental Rights.⁶⁶⁸

As mentioned in section 5.1, however, the individual Member States have very different approaches towards mutual recognition and a number of them may not share the ‘philosophy of mutual recognition’.

Assessment

The issue of fundamental rights and proportionality leads to a discussion on whether an explicit reference to these principles in the FD EAW is both necessary and desirable.

The European Parliament, in line with the agreement reached in the context of the Directive on the European Investigation Order, demands the inclusion in the FD EAW or a horizontal mutual recognition instrument of a proportionality test by the issuing judicial authority and a ground for non-execution based on fundamental rights, it being understood that (severe) proportionality issues could, for instance, lead to a violation of Article 6 EU Charter on the right to liberty and security or Article 7 EU Charter on the respect for private and family life.

The Council’s position so far is that new legislation is not necessary. It has tried to address the proportionality issue by soft law measures, although it has of course also agreed to the inclusion of an explicit proportionality test to be conducted by the issuing judicial authority in the context of the European Investigation Order.

The European Commission agrees with the Council, although it acknowledges that a refusal based on fundamental rights is possible, particularly with regard to possible violations of Article 4 of the EU Charter. On proportionality it refers to guidelines and bi-lateral cooperation.

The Commission refers to its increased enforcement powers after the end of the transitional period. Ensuring a better implementation of the European Supervision Order and other mutual recognition measures helps. It is, however, unclear

⁶⁶⁶ Council document 9968/14, p. 4.

⁶⁶⁷ Final version of the European handbook on how to issue a European arrest warrant, Council document 82/1/08 REV 2 COR 1 of 24 June 2008; updated in 2010. The new version is available at: <<http://register.consilium.europa.eu/pdf/en/10/st17/st17195-re01.en10.pdf>> (last consulted on 3 May 2015).

⁶⁶⁸ Council document No. 9968/14.

what the Commission wishes to enforce as regards fundamental rights and proportionality. From an individual rights perspective, references to bilateral cooperation and guidelines do not offer any legal certainty, nor does a statement that judicial authorities may refuse to execute a European arrest warrant over fundamental rights concerns in exceptional cases.

The Commission's refusal to come up with a new legislative proposal is all the more remarkable given the clearly identified shortcomings in the FD EAW and the patchwork of other EU mutual recognition legislation and procedural rights legislation that has to be read in conjunction with the FD EAW. In the long run, a codification of the judicial cooperation instruments adopted so far and those still to be adopted would be very desirable.⁶⁶⁹ One has to realise, however, that the FD EAW was adopted over 12 years ago, during a period when the European Parliament did not yet have ordinary legislative powers in the area of police and judicial cooperation and the EU Charter was not yet legally binding. This poses questions regarding the on-going legitimacy of this piece of legislation and its compatibility with these new realities.⁶⁷⁰

The real reason behind the Commission's inaction is probably that it wished to avoid that the 'progress' made in the current mutual recognition instruments, being understood as a reduction in the grounds for non-execution as opposed to the traditional extradition and mutual legal assistance arrangements would be undone. It is better not to open 'Pandora's box' or, as Weyembergh put it:

'The reflection on a potential EU legislative initiative must be handled extremely carefully because of the real risk of regress in the event that the negotiations on the EAW were re-opened. The dangers of taking a step backward and departing from the philosophy of mutual recognition must be taken very seriously. The consequences of a regress would be highly regrettable both symbolically and practically. Consequently the necessity of EU legislative action must be weighed against this risk.'⁶⁷¹

If that is what is meant by a potential undermining of 'mutual recognition', we again are confusing mutual recognition (the process) with free movement (the aim) and home State control (a method). From this perspective, it is seen as good to reduce grounds for non-execution, because they limit the free movement of judicial decisions. However, certain grounds for non-execution (which the FD EAW currently lacks) are essential fundamental rights safeguards. Effective judicial cooperation

⁶⁶⁹ Weyembergh 2014, p. 65: 'This codification should take place only once the MR landscape is complete. This will only be the case once legislative instruments on disqualifications are adopted, the abovementioned gaps are filled in (especially conflicts of jurisdiction, *ne bis in idem*, transfer of proceedings) or the problem of admissibility of evidence is solved.'

⁶⁷⁰ For a similar assessment of Council's position see Marin 2014, p. 337: 'Reading between the lines, it seems that the Council is worried that pursuing the road of legislative reform, which would be needed for some recommendations, might turn into a failure. It is therefore clear that amending the EAW Handbook is an actual shortcut, which might lead to some improvements while avoiding the EP in politically sensitive issues. This is a sign of everything but loyal cooperation between Brussels institutions and also not really a symptom of respect for democracy and rule of law at EU level.'

⁶⁷¹ See also Weyembergh 2014, p. 7.

and the application of those safeguards and compliance with fundamental rights can only be achieved through a close collaboration between the issuing and executing judicial authorities, instead of home State control. There may be trust, but indications to the contrary need to be followed up with the issuing authority. And, in case the problem is not addressed satisfactorily, a ground for non-execution must be invoked. On this particular point it is suggested to revisit the ‘philosophy of mutual recognition’, as has already occurred in the European Investigation Order.

Another part of the hesitation might have been that any new directive under Article 82 TFEU would allow certain Member States not to opt in to it,⁶⁷² whereas others would stay out.⁶⁷³ This ‘variable geometry’ undermines the coherency of EU area of criminal justice and thereby the basis for mutual recognition as such.⁶⁷⁴ However, this is an unfortunate side effect of the institutional design of the Treaty of Lisbon, which is not only affecting the European arrest warrant. It is also very likely to happen as regards the European Public Prosecutors Office, for instance.

The Commission’s argument that the work on the Road Map on procedural rights would somehow clarify the issues of how to deal with fundamental rights and proportionality concerns is not convincing.⁶⁷⁵ Clearly, it helps to have better standards in place, but the argument can also be turned around. Should we trust the UK less because it has not opted into the Access to a Lawyer Directive (despite its continued participation the European arrest warrant), for instance?⁶⁷⁶

Furthermore, even among those Member States that do implement this Directive, differences in their criminal justice systems remain. It is also very unfortunate that the Commission uses the ‘balance’ terminology in this regard. The danger of using a balance metaphor in talking about freedom and security issues was highlighted already in section 4.

5.3.2.1. *Implementation in a Number of Member States, Interpretation by the Court of Justice*

As the Commission will not propose any reforms in the foreseeable future, the problem will now have to be dealt with by the European Court of Justice, which will have to interpret the FD EAW in line with the EU Charter to the extent possible.

⁶⁷² Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. (C 83) 295 of 30.03.2010.

⁶⁷³ Protocol (No. 22) on the position of Denmark, O.J. (C 83) 299 of 30.03.2010.

⁶⁷⁴ Weyembergh 2014, p. 63: ‘Variable geometry constitutes one of the main challenges for the establishment of a consistent EU area of criminal justice. Allowing MSs to “escape” from some parts of a consistent system creates risks and entails the danger of severe imbalances, comprising the establishment of a true area of criminal justice.’

⁶⁷⁵ Weyembergh 2014, p. 11: ‘It must be recalled that the flanking measures adopted do not ensure that fundamental rights will always be respected in practice. In any event, these flanking measures are not comprehensive and do not solve the ambiguities resulting from the absence of a clear fundamental rights ground for refusal.’

⁶⁷⁶ See Mitsilegas, Carrera & Eisele 2014, p. 23: ‘The UK’s non-participation in measures on defence rights, including the Directive on access to a lawyer, undermined the effective operation of the Framework Decision on the European Arrest Warrant as far as the UK is concerned.’

The case law of the Court of Justice on the interpretation of Article 1(3) FD EAW, without a connection with one of the grounds for non-execution mentioned in Articles 3 and 4 FD EAW and the application of the proportionality principle is still limited.⁶⁷⁷ Therefore, it will be preceded by a short overview of the implementation and application of the fundamental rights clause and proportionality principle in Germany,⁶⁷⁸ the UK⁶⁷⁹ and the Netherlands,⁶⁸⁰ all of which have implemented Article 1(3) FD EAW and have experienced legal challenges based on the proportionality principle,⁶⁸¹ with the UK and Germany being the highest receivers of EAWs between 2005 and 2011.⁶⁸²

Germany

In accordance with FD EAW, the executing judicial authority needs to presume that the issuing judicial authority respects the fundamental rights of the wanted person (in accordance with the EU Charter), with infringement procedures by the European Commission being the only option for correcting violations.⁶⁸³

In a decision declaring the first law implementing the FD EAW void, the German Constitutional Court, however, placed limits to the extent of this mutual trust.⁶⁸⁴ The Court stated that ‘a strict enforcement of this principle [of mutual recognition] and a common proclamation of the Member States does not synchronize the different constitutional systems and particularly cannot limit constitutional guarantees of human rights’.⁶⁸⁵ One of those constitutional guarantees laid down in Article 16(2) of the German Basic Law⁶⁸⁶ was interpreted by the German Constitutional Court as implying that ‘A German, who commits a crime within his own legal area, must not reckon to be extradited for this act’.⁶⁸⁷

A second implementing law was therefore required, including a ground for non-execution related to crimes allegedly committed by German citizens with a

⁶⁷⁷ Case C-396/11, *Radu* [2013] ECR 39.

⁶⁷⁸ For a more extensive overview of the implementation of the European arrest warrant in Germany see Bose 2012; Satzger 2012, para. 8 (II); Wahl 2009, with further references.

⁶⁷⁹ For a more extensive overview of the implementation of the European arrest warrant in the UK see Nichols, Montgomery & Knowles 2013; Blackstock 2012; Mitsilegas 2009; Spencer 2009.

⁶⁸⁰ For a more extensive overview of the implementation of the FD EAW in the Netherlands see Glerum 2013; Ouwerkerk 2011; Sanders 2007.

⁶⁸¹ For a more general overview of the implementation of the FD EAW see Guild 2006; Guild & Marin 2009; Vernimmen-van Tiggelen & Surano 2009.

⁶⁸² Carrera, Guild & Hernanz 2013, p. 6 estimate that 65,925 EAWs were received by Germany and 32,079 EAWs were received by the UK.

⁶⁸³ Protocol (No. 36) on transitional provisions, O.J. (C 83) 322 of 30.03.2010; Peers 2011a, p. 61-64; section 3.4.1 on the notion of a European ‘Area’.

⁶⁸⁴ *Bundesverfassungsgericht*, 18 July 2005 - 2 BvR 2236/04; Wahl 2009, p. 117.

⁶⁸⁵ *Bundesverfassungsgericht*, 18 July 2005 - 2 BvR 2236/04, para. 118; Geyer 2006, p. 118.

⁶⁸⁶ Art. 16(2) German Basic Law: ‘No German may be extradited to a foreign country. A different regulation to cover extradition to a Member State of the European Union or to an international court of law may be laid down by law, provided that constitutional principles are observed,’ as cited in English by Geyer 2006, p. 103.

⁶⁸⁷ *Bundesverfassungsgericht*, 18 July 2005 - 2 BvR 2236/04, para. 85.

significant domestic connecting factor.⁶⁸⁸ This law also explicitly implements Article 1(3) FD EAW in Article 73 of its ‘Act on International Cooperation in Criminal Matters’ entitled ‘Limitations on Assistance (*ordre public*)’.⁶⁸⁹ In practice, however, objections related to procedural rights or the rights of the defence, including those based on the claim that the prison conditions in the issuing Member State qualify as inhuman or degrading treatment in accordance with Article 3 ECHR (4 EU Charter), have rarely been successful. Instead, German courts, when there are concerns regarding detention conditions leading to possible inhuman or degrading treatment, aim to guarantee that the accused is placed in certain jails of that particular country or is medically supervised.⁶⁹⁰

As reported in the mutual evaluation report of the Council, German Courts have also applied Article 73 of the Act on International Cooperation in Criminal Matters to refuse the execution of EAWs on the basis that a minimum proportionality standard had not been observed in issuing them.⁶⁹¹ The Higher Regional Court of Stuttgart developed a particular approach to the issue of proportionality in accordance with Article 49(3) of the EU Charter (on the principles of legality and proportionality of criminal offences and penalties) and the German Constitutional principle of the rule of law.⁶⁹² In particular, the Court held that the principle of propor-

⁶⁸⁸ *Europäische Haftbefehl Gesetz*, EuHbG of 20 July 2006; Satzger 2012, p. 121.

⁶⁸⁹ Art. 73, (Translation provided by Prof. Dr. Michael Bohlander and Prof. Wolfgang Schomburg): ‘Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system. Requests under Parts VIII, IX and X shall not be granted if compliance would violate the principles in Article 6 of the Treaty on the European Union.’ The full text of the Act on International Cooperation in Criminal Matters is available on the website of the German Ministry of Justice, see <http://www.gesetze-im-internet.de/englisch_irg/index.html> (last consulted on 3 May 2015).

⁶⁹⁰ Wahl 2009, p. 135 and 145.

⁶⁹¹ Evaluation report on the fourth round of mutual evaluations ‘the practical application of the European arrest warrant and corresponding surrender procedures between Member States’ – report on Germany, Council document 7058/1/09 REV 1, p. 44: ‘During the interviews the expert team heard numerous complaints about EAWs being issued in some other Member States for petty cases, causing a lot of work for virtually “nothing”. Critical comments were directed in particular towards Poland. Moreover, according to the information provided, a number of EAWs were refused by German authorities with referral to Section 73 of the IRG, on the basis that a minimum proportionality standard had not been observed in issuing them. The experts share the German authorities’ concerns in this regard. They note, however, that the practice of controlling the proportionality of the EAW at the level of the executing authorities is to be criticised. Such control is confrontational and contrary to the spirit of mutual trust on which the EAW is based. Furthermore, giving the executing Member State an opportunity to refuse an EAW on this ground opens the way to a vague and unpredictable new category of grounds for non-execution which is not in conformity with the explicitly limited mandatory and optional grounds for refusal in Articles 3 and 4 of the Framework Decision.’

⁶⁹² Higher Regional Court Stuttgart, Decision of 25 February 2010 – 1 Ausl. (24) 1246/09, as reported in Vogel 2010. Art. 20(3) ‘The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice’. The full text of the Basic Law is available on the website of the German Parliament (*Bundestag*), see <https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf> (last consulted on 3 May 2015).

tionality of criminal offences and penalties forms part of the constitutional traditions common to the Member States and is a general principle of Union law, which is now also reflected by the EU Charter. Whereas Member States (and their judicial authorities) who decide on surrender are implementing EU law and they have to respect the EU Charter.

However, the Court *also* held that a German arrest order is a sovereign act by a German State authority and remains so even if it is issued in the execution of a European arrest warrant. Therefore the German order had to be fully in conformity with German constitutional law. This meant that the principle of proportionality, which forms part of the rule of law under the German Constitution, fully applies to extradition orders even if issued in execution of a European arrest warrant.

The Court then went on to hold that a German extradition arrest warrant must include – at least – the following aspect of the specific case at hand:

- the requested person's right to liberty and security,
- cost and effort of a formal extradition proceeding including extradition arrest;
- the significance of the charge;
- the severity of the possible penalty;
- the interest of the issuing Member State to prosecute;
- the limits of Article 1(3) FD EAW (fundamental rights clause); and
- reasonable alternative options for the issuing Member State, such as the requested persons' formal summoning and/or questioning and/or in absentia proceedings insofar they comply with European standards and can be executed in case of a conviction.

The Court held that, in particular, extradition arrest can be disproportionate if the charges relate to petty offences and the expected sanctions are out of proportion with arrest and extradition as a burden both for the requested person and for the executing Member State.⁶⁹³ As discussed, in the subsequent *Melloni* case, the Court of Justice held that a higher level of protection provided for by a national constitution may only be demanded to the extent the primacy, unity and effectiveness of EU law are not compromised.⁶⁹⁴ This judgment has, however, met resistance from German courts which continue to refer to the need to respect their national *ordre public*,⁶⁹⁵ an example being the judgment of the Superior Regional Court of Munich

⁶⁹³ Higher Regional Court Stuttgart, Decision of 25 February 2010 – 1 Ausl. (24) 1246/09, as reported in Vogel 2010.

⁶⁹⁴ Case C-399/11, *Melloni*, paras. 59 and 60: '59. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I-6079, paragraph 21, and Opinion 1/09 [2011] ECR I-1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, *inter alia*, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C-409/06 *Winner Wetten* [2010] ECR I-8015, paragraph 61). 60. It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.'

⁶⁹⁵ Cf. Art. 4(2) TEU: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and →

in a 2013 European arrest warrant case, basing itself on the German Constitution and the German Constitutional Court's decision on the Treaty of Lisbon.⁶⁹⁶

United Kingdom

The UK implemented Article 1(3) FD EAW explicitly. Section 21 of the UK Extradition Act contains an explicit fundamental rights exception in accordance with which a judge 'must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998'.⁶⁹⁷ Initially this exception was construed in line with the presumption of trust in fundamental rights compliance (by the issuing Member State) on which the FD EAW is based.⁶⁹⁸ Until recently, cases where evidence to the contrary was offered have rarely been successful. The courts did, however, hold that a finding by the European Court of Human Rights that there had been systemic violations of the Convention rights of prisoners could lead to a refusal.⁶⁹⁹ This would be in line with the decision of the ECtHR in *MSS v Belgium and Greece*.⁷⁰⁰ The 2011 report of the Human Rights Joint Committee of the UK parliament on the human rights implications of UK extradition policy concluded:

constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

⁶⁹⁶ Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. A 442/13 (119/13); Vogel 2013. *Bundesverfassungsgericht* of 30.06.2009 – 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 and 182/09 (*Treaty of Lisbon*).

⁶⁹⁷ Extradition Act 2003, section 21; The Council's evaluation report on the practical application of the FD EAW in the United Kingdom reported no refusals based on the human rights exception, Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between member states' – report on the United Kingdom, Council document 9974/2/07 REV 2, p. 46.

⁶⁹⁸ 2011 report of the Human Rights Joint Committee of the UK parliament, on the human rights implications of UK extradition policy, para. 32, with reference to *Dabas v High Court of Justice in Madrid, Spain* [2007] UKHL 6, [2007] 2 AC 31, para. 4: available at: <<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/15602.htm>> (last consulted on 3 May 2015). Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between member states' – report on the United Kingdom, Council document 9974/2/07 REV 2, p. 65: 'The UK act also provides for the express possibility of refusing surrender on the basis of ECHR issues which derive from Article 1.3 of the FD. However, ECHR jurisprudence has established that such arguments can only succeed if there is a substantial risk of a flagrant breach of fundamental rights. Since the UK courts have accepted this jurisprudence refusal to surrender on such grounds should only happen in exceptional cases'. Thunberg Schunke 2013, p. 33-37.

⁶⁹⁹ *Targosinski, R (on the application of) v Judicial Authority of Poland* [2011] EWHC 312 (Admin) as cited in para. 36 of the 2011 report of the Human Rights Joint Committee of the UK parliament, on the human rights implications of UK extradition policy.

⁷⁰⁰ As pointed out by JUSTICE and Fair Trials International in their submissions, see para. 51 of the 2011 report of the Human Rights Joint Committee of the UK parliament, on the human rights implications of UK extradition policy.

Sections 21 and 87 of the Extradition Act 2003 do not, in practice, offer adequate human rights protection for those subject to proceedings and that the courts have set their interpretation of the threshold too high. We welcome recent developments that have seen UK courts apply an apparently lower threshold (...). The defendant should have a realistic opportunity to rebut the presumption that their human rights will be respected if extradited to a country which is a signatory to the ECHR or with which the UK has good relations.

That realistic opportunity to rebut the presumption of respect for human rights has been offered by a more recent decision. In the 2013 *Campbell* case,⁷⁰¹ the High Court of Justice of Northern Ireland, for instance, refused to execute a European arrest warrant from Lithuania on the grounds that it would lead to a breach of Article 3 ECHR because Mr. Campbell was likely to be held in conditions which would be inhuman and degrading. In arriving at its decision, the Court took into account the ECtHR decision of *Savenkovas v Lithuania*⁷⁰² in which it held that the inhuman conditions of detention on account of the overcrowding and unsanitary conditions at the relevant Lithuanian prison (*Lukiskes*) amounted to degrading treatment in breach of Article 3 ECHR.⁷⁰³ The test applied by the Court was whether there were substantial grounds for believing extradition would result in a real risk of exposure to inhuman or degrading treatment or punishment.⁷⁰⁴ The Court held that the presumption of Lithuanian compliance with the ECHR was effectively rebutted in this case:

In the present case the requested person has placed before the court cogent material to displace the presumption that the requested person's Article 3 rights would be vindicated and protected during his likely detention in the relevant prison. There is convincing evidence, which is fortified by the drawing of reasonable inferences flowing from the evidence, that the conditions criticised by Strasbourg in *Savenkovas* still obtain at the relevant prison.⁷⁰⁵

The Court concluded in stating that the question should not be whether a breach of Article 3 is inevitable, but whether there is a very real risk and, in reality a strong probability, that absent of any assurance by the Lithuanian authorities to the contra-

⁷⁰¹ High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19.

⁷⁰² ECtHR of 18.11.2008, Application No. 871/02, *Savenkovas v Lithuania*.

⁷⁰³ ECtHR of 18.11.2008, Application No. 871/02, *Savenkovas v Lithuania*, paras. 80-82. It furthermore considered a number of reports published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) following visits to Lithuania in 2001, 2006 and 2008 identifying issues of overcrowding and allegations of ill-treatment and the inadequate responses of the Republic of Lithuania to those reports as well as the evidence submitted by professor Rod Morgan, who was a member of one of the delegations which visited Lithuania, and a report of the Seimas Ombudsman linking overcrowding in the prisons to a number of issues including tension amongst prisoners increasing the number of cases and the use of violence, self-injury and suicides also increasing, see High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19, paras. 12-19.

⁷⁰⁴ With reference to ECtHR of 07.07.1989, Application No. 14038/88, *Soering v United Kingdom*.

⁷⁰⁵ High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19, para. 31.

ry, the person will be treated like all the other prisoners at the relevant prison and will be detained for at least significant parts of his remand (which may well be very lengthy) in the same type of conditions as were categorised as inhuman and degrading in *Savenkovas*.⁷⁰⁶

The case was followed by a decision of the High Court of England and Wales in *Badre v Italy*, given its poor prison conditions amounting to a systemic breach of Article 3 ECHR.⁷⁰⁷ The Court based itself on the ECtHR decision in the case of *Torreggiani and others v Italy*.⁷⁰⁸ The Italian authorities did offer assurances but those were deemed insufficiently specific by the court as they did not say anything about the local conditions in the facility where Mr. Badre might be detained.⁷⁰⁹

In *Razvan-Flaviu Florea v Romania*,⁷¹⁰ the High Court of England and Wales demanded an undertaking from the Romanian authorities that the wanted person would serve his sentence in semi-open conditions in a cell where he had personal space in excess of two meters,⁷¹¹ while stating that:

It is clear that the scheme of EU law is subject to the requirements of ECHR law and an otherwise lawful order for return under an EAW may be set aside if there are substantial grounds for fearing a real risk of treatment that would amount to inhuman or degrading treatment. If there are such grounds removal is not possible however compelling the public interest in return.⁷¹²

⁷⁰⁶ High Court of Justice in Northern Ireland Queen's Bench Division decision of 16 January 2013, *Lithuania v Liam Campbell* [2013] NIQB 19, para. 32.

⁷⁰⁷ High Court of England and Wales Queens's Bench Division decision of 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin).

⁷⁰⁸ ECtHR of 08.01.2013, Application No. 43517/09, *Torreggiani and others v Italy*.

⁷⁰⁹ High Court of England and Wales Queens's Bench Division decision of 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin), paras. 65-67, in particular 67: 'By allowing the appeal on this ground, I find that it is important to state that, in my judgment, this does not mean that, in the period in which Italy seeks to resolve the systemic prison problems identified by the European Court, individuals cannot be extradited there from the United Kingdom. Miss Hinton sought an adjournment, to enable further instructions to be taken in terms of a more specific assurance than that already given. That application was refused, for the reasons given by McCombe LJ; but the fact that it was made suggests that more consideration might have been given to the terms of the assurance in this case. To overcome the consequences of *Torreggiani*, one would expect to see an assurance that (e.g.) the individual, if returned to Italy, would be detained in a particular prison, with an indication of the conditions in that prison and why they are not open to the criticism of Italian prisons in general. Where there is an assurance of some specificity, the presumption that a signatory state will comply with its assurances will once more apply. However, for the reasons given above, the assurance in this case is insufficient to persuade me that, if the Appellant were returned to Italy, he would not face the risk of being exposed to prison conditions that would breach his Article 3 rights.'

⁷¹⁰ High Court of England and Wales Queens Bench Division decision of 30 July 2014, *Razvan-Flaviu Florea v Romania* [2014] EWHC 2528 (Admin).

⁷¹¹ High Court of England and Wales Queens Bench Division decision of 30 July 2014, *Razvan-Flaviu Florea v Romania* [2014] EWHC 2528 (Admin), para. 44.

⁷¹² High Court of England and Wales Queens Bench Division decision of 30 July 2014, *Razvan-Flaviu Florea v Romania* [2014] EWHC 2528 (Admin), para. 31.

Proportionality

In the United Kingdom, the issue of the proportionality has been hotly debated in the media and political discourse as the number of EAWs received, in particular from Poland and Romania, has provoked extreme sensitivity to the point that the UK authorities were considering to withdraw from the whole field of EU criminal justice.⁷¹³ An example is the case of *Zak v Poland*, which concerned a European arrest warrant for the theft of a mobile phone.⁷¹⁴ Another example is the ‘chicken rustling’ case of *Sandru v Romania*, which concerned the execution of a sentence for the theft of ten chickens.⁷¹⁵ In both cases surrender was allowed. However, more recently, UK courts have started refusing surrender in a number of cases concerning Polish nationals taking into consideration arguments based on family life in accordance Article 8 ECHR and the (undue) delay in prosecuting the case.⁷¹⁶ Poland has since enacted new legislation aimed at diminishing the amount of disproportionate EAWs.⁷¹⁷

Reform of domestic legislation

On 9 July 2013 the UK Home Secretary, Theresa May, made an announcement on the UK’s general approach towards ‘opting out’ of EU police and criminal justice measures adopted before the entry into force of the Treaty of Lisbon, by 1 December 2014, in accordance with Article 10 of Protocol 36 of the TFEU.⁷¹⁸ After a heated discussion among the coalition partners, the UK government decided it wanted to exercise the possibility to opt out of these approximately 130 measures but re-join 35 of them, including the FD EAW,⁷¹⁹ although seeking to reform it, most notably on

⁷¹³ Carrera, Guild & Hernanz 2013, p. 10; ‘Wanted, for chicken rustling’, *Economist*, 2 January 2010, available at: <<http://www.economist.com/node/15179470>> (last consulted on 3 May 2015).

⁷¹⁴ *Zak v Regional Court of Bydgoszcz Poland*, Court of Appeal – Administrative Court, 27 February 2008, [2008] EWHC 470 (Admin), para. 4; available at: <<http://high-court-justice.vlex.co.uk/vid/-52629773>> (last consulted on 3 May 2015).

⁷¹⁵ *Sandru v Government of Romania* [2009] EWHC 2879 (Admin) (28 October 2009). For more examples see Doobay 2014, p. 57-59.

⁷¹⁶ Doobay 2014, p. 65; *Goman v District Court in Lublin, Poland* [2013] EWHC 3606 (Admin); *Garbowski v Regional Court in Warsaw, Poland* [2013] EWHC 3695 (Admin); *Podolski v Provincial Court in Pulawy, Poland* [2013] EWHC 3593 (Admin); *Majchrzak v District Court in Poznan, Poland* [2013] EWHC 3584 (Admin); *Tomaszewicz v Regional Court in Bialystock, Poland* [2013] EWHC 3670 (Admin); *Gorka v District Court in Grzegorz, Poland* [2013] EWHC 3519 (Admin).

⁷¹⁷ Doobay 2014, p. 61; Weyembergh 2014, p. 36 cites a reduction from 4844 EAWs issues by Poland in 2009 to 3497 issued in 2012.

⁷¹⁸ Home Secretary oral statement – Tuesday 9 July 2013, The UK’s opt-out decision pursuant to Article 10 of Protocol No. 36 of the TFEU; Council of the European, ‘UK notification according to Article 10(4) of Protocol No. 36 to TEU and TFEU’, document No. 12750/12 of 26 July 2013.

⁷¹⁹ On the subsequent vote which took place in the House of Commons on 10 November 2014 see Peers 2014b.

the insertion of a proportionality test.⁷²⁰ The attached Command Paper stopped short of calling for reform of the FD EAW in terms of the insertion of an explicit ground for non-execution based on fundamental rights, as it deemed Article (1)3 FD EAW combined with recital 12 sufficient for this purpose.⁷²¹ At the same time, the Home Secretary announced a number of reforms to domestic legislation. The subsequent Anti-Social Behaviour, Crime and Policing Bill received Royal Assent to become an Act of Parliament on 13 March.⁷²²

Beyond the surrenders for minor crimes, the main concern seems to have been to prevent exposure to the sometimes very lengthy pre-trial detention periods in abominable prison conditions existing in certain Member States due to surrender being requested before the case was 'trial ready'.⁷²³ During the treatment in the House of Lords, a statement was made on behalf of the UK government clarifying its intentions:

'I want to make clear that the purpose of and intention behind this clause is to ensure that the case is sufficiently well advanced in the issuing country. We want to ensure that ordinary mutual legal assistance arrangements are used fully and properly. It is not our intention that a parochial approach to this clause should be taken. As the Court of Appeal has said, the Extradition Act 2003 should be interpreted in a cosmopolitan sense and be mindful of the stages of criminal procedure in other member states which do not use the common law. It is important that there is a clear intention to bring the case to trial. An EAW must, after all, be issued only for the purposes of conducting a criminal prosecution, as Article 1 of the framework decision makes very clear. We want an EAW to be used only for its proper purpose.'⁷²⁴

This is reflected in a new section 12A on absence of a prosecutorial decision:

12A Absence of a prosecution decision

- (1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)
- (a) it appears to the appropriate judge that there are reasonable grounds for believing that:
 - (i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions); and

⁷²⁰ 'Britain to keep European arrest warrant, but try to reform it', *the Guardian*, 8 July 2013, available at: <<http://www.theguardian.com/law/2013/jul/08/britain-european-arrest-warrant-reform>> (last consulted on 3 May 2015); Mitsilegas, Carrera & Eisele 2014.

⁷²¹ Home secretary oral statement – Tuesday 9 July 2013, The UK's opt-out decision pursuant to Art. 10 of Protocol 36 of the TFEU: HM Government, Decision pursuant to Art. 10 of Protocol 36 to The Treaty on the Functioning of the European Union, 9 July 2013 (Cm 8671), para. 86, available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235912/8671.pdf> (last consulted on 3 May 2015).

⁷²² *Ibidem*; Anti-social behaviour, crime and policing act, available at: <<http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>> (last consulted on 3 May 2015).

⁷²³ See <<http://www.fairtrials.net/cases/andrew-symeou>> (last consulted on 3 May 2015); Thunberg Schunke 2013, p. 77.

⁷²⁴ Statement by Lord Taylor of Holbeach, Hansard, 20 January 2014.

- (ii) the person's absence from the category 1 territory is not the sole reason for that failure; and
- (b) those representing the category 1 territory do not prove that:
 - (i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try; or
 - (ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.
- (2) In this section "to charge" and "to try", in relation to a person and an extradition offence, mean:
 - (a) to charge the person with the offence in the category 1 territory; and
 - (b) to try the person for the offence in the category 1 territory.
- (3) In a case where the Part 1 warrant (within the meaning of the Extradition Act 2003) has been issued before the time when the amendments made by this section come into force, those amendments apply to the extradition concerned only if, at that time, the judge has not yet decided all of the questions in section 3011(1) of that Act.⁷²⁵

Furthermore, a Section 21 A has been inserted in the Extradition Act, in accordance with which the judge will be required to consider whether extradition/surrender will be both compatible with the requested/wanted person's fundamental rights, and whether surrender would be disproportionate. In doing so, the Act restricts the consideration of proportionality to three defined issues:

- (i) the seriousness of the alleged conduct;
- (ii) the likely penalty that would be imposed if found guilty; and
- (iii) the possibility of the relevant authorities taking less coercive measures.

Surprisingly, from an individual rights perspective, 'the likely consequences of extradition for the suspect and their family'⁷²⁶ is not listed as a criterion:

21A Person not convicted: human rights and proportionality.

- (1) If the judge is required to proceed under this section (by virtue of section 11), the judge must decide both of the following questions in respect of the extradition of the person ("D"):
 - (a) whether the extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998;
 - (b) whether the extradition would be disproportionate.
- (2) In deciding whether the extradition would be disproportionate, the judge must take into account the specified matters relating to proportionality (so far as the judge thinks it appropriate to do so); but the judge must not take any other matters into account.
- (3) These are the specified matters relating to proportionality:
 - (a) the seriousness of the conduct alleged to constitute the extradition offence;

⁷²⁵ Anti-social behaviour, crime and policing bill (HL Bill 78), section 12A available at: <<http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>> (last consulted on 3 May 2015).

⁷²⁶ As demanded by Fair Trials International in its Report stage briefing of 30 September 2013, available at: <<http://www.fairtrials.org/wp-content/uploads/Extradition-Briefing-UK-September-2013.pdf>> (last consulted on 3 May 2015).

- (b) the likely penalty that would be imposed if D was found guilty of the extradition offence;
 - (c) the possibility of the relevant foreign authorities taking measures that would be less coercive than the extradition of D.
- (4) The judge must order D's discharge if the judge makes one or both of these decisions:
- (a) that the extradition would not be compatible with the Convention rights;
 - (b) that the extradition would be disproportionate.
- (5) The judge must order D to be extradited to the category 1 territory in which the warrant was issued if the judge makes both of these decisions:
- (a) that the extradition would be compatible with the Convention rights;
 - (b) that the extradition would not be disproportionate.
- (6) If the judge makes an order under subsection (5) he must remand the person in custody or on bail to wait for extradition to the category 1 territory.
- (7) If the person is remanded in custody, the appropriate judge may later grant bail.
- (8) In this section "relevant foreign authorities" means the authorities in the territory to which D would be extradited if the extradition went ahead. The Act restricts the consideration of proportionality to three defined issues: the seriousness of the alleged conduct; the likely penalty that would be imposed if found guilty; and the possibility of the relevant authorities taking less coercive measures.⁷²⁷

The Anti-social Behaviour, Crime and Policing Act also mentions that:

In deciding any question whether section 21A of the Extradition Act 2003 is compatible with European Union law, regard must be had (in particular) to Article 1(3) of the framework decision of the Council of the European Union made on 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA) (which provides that that decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union).⁷²⁸

It seems that the UK legislator has sought to ensure compliance of section 21.A with the FD EAW or at least it will argue this to be the case if questions on its compatibility are raised before the Court of Justice.

The Netherlands

The Netherlands, finally, also explicitly implemented Article 1(3) of the FD EAW based on pressure by the Dutch parliament, which was very concerned about reminding the executing judicial authorities to uphold fundamental rights.⁷²⁹ In

⁷²⁷ Anti-social Behaviour, Crime and Policing Act 2014, available at: <<http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>> (last consulted on 3 May 2015); Garner 2014.

⁷²⁸ Anti-social Behaviour, Crime and Policing Act, section 157 on proportionality, para. 4, available at: <<http://www.legislation.gov.uk/ukpga/2014/12/contents/enacted>> (last consulted on 3 May 2015).

⁷²⁹ The Netherlands' Minister of Justice, in a letter sent to Parliament accompanying the Council's evaluation, indicates that he will not follow this recommendation by the expert team; c.f. →

accordance with Article 11 of the Law on the surrender of persons (*Overleveringswet*),⁷³⁰ surrender shall not be allowed in cases in which, in the opinion of the Court, there is justified suspicion, based on facts and circumstances, that granting the (surrender) request would lead to a flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention on Human Rights.⁷³¹

Article 11 contains two main hurdles:

- (i) The defence needs to support the claim of a fundamental rights violation with concrete facts and circumstances in an individual case; and
- (ii) The violation of fundamental rights guaranteed by the European Convention on Human Rights need to be 'flagrant'.⁷³²

So far, no plea based on Article 11, claiming inhuman or degrading treatment, has been successful. Similar to the UK courts' initial rulings, however, it has been accepted that an ECtHR decision condemning a Member State for prison conditions amounting to inhuman or degrading treatment in accordance with Article 3 ECHR could indicate a 'flagrant' violation of a fundamental right.⁷³³ It would of course be interesting to see whether the District Court of Amsterdam and the Public Prosecutor's Office would be willing to undertake a closer scrutiny of the prison conditions in a number of issuing Member States which have been condemned by the ECtHR due to their poor prison conditions, including requests for diplomatic assurances in individual cases, as the UK courts have done in their more recent decisions. Having referred cases to the Court of Justice in the past, the District Court might also be persuaded to raise questions with Luxembourg as regards the compatibility of demanding diplomatic assurances with Article 1(3) of the FD EAW. In this context, it would also be interesting to note that, in accordance with Article 23 TFEU,

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection.

Interestingly, the current implementation of the FD EAW by the Member States seems to have led to a situation in which, within the European Union, European

Keijzer 2006, p. 57: 'An advantage of explicitly including the Human Rights exception in the Implementation Acts is that otherwise it could perhaps be overlooked.'

⁷³⁰ Glerum 2013, p. 195-199.

⁷³¹ Unofficial translation to English: 'Surrender shall not be allowed in cases in which, in the opinion of the court, there is justified suspicion, based on facts and circumstances, that granting the request would lead to flagrant breach of the fundamental rights of the person concerned, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms concluded in Rome on 4 November 1950', available at: <<http://www.ejtn.eu/PageFiles/6533/2014%20seminars/omsenie/Dutch%20Surrender%20Act.pdf>> (last consulted on 3 May 2015).

⁷³² Cf. ECHR of 07.07.1989, Application No. 14038/88, *Soering v United Kingdom*.

⁷³³ District Court of Amsterdam 22 October 2010, KJN BO1448; Glerum 2013, p. 201.

citizens seem to be entitled to the protection of *none* of the diplomatic or consular authorities of the Member States.

In its early case law, the District Court of Amsterdam did refuse surrender on a number of occasions when it held that surrender would cause a flagrant breach of the right to a fair trial ex Article 6 ECHR, particularly the right to be tried within a 'reasonable term', without there being an 'effective remedy' as called for ex Article 13 ECHR.⁷³⁴ A 2008 decision of the Dutch Supreme Court has, however, put an end to this practice.⁷³⁵

Article 29 of the Law on the Surrender of Persons determines that there shall be no recourse against the verdict of the District Court of Amsterdam, other than an appeal for the ruling to be quashed on legal grounds, as per Article 456 of the Code of Criminal Procedure.⁷³⁶ However, the strict reliance on mutual trust by the Netherlands Supreme Court makes it doubtful whether a different stance on the issue of fundamental rights protection would be taken by the Dutch courts if an ordinary appeal would have been foreseen.

Proportionality

In the *Advocaten voor de Wereld* case, the Court held that the FD EAW was not disproportionate since dispensing with the verification of dual criminality for 32 categories of crime was warranted, particularly due to their seriousness and in the

⁷³⁴ Evaluation report on the fourth round of mutual evaluations 'the practical application of the European arrest warrant and corresponding surrender procedures between Member States' – report on the Netherlands, Council document 15370/2/08 REV 2 of 27 February 2009, p. 29. One is the District Court of Amsterdam, AT8580, 1 July 2005. The case concerned a criminal investigation by the Spanish authorities instigated against the requested person on 27 March 1997. The person was released on bail on 6 October 1997. Considering the facts and circumstances, the Court ruled that there was a flagrant violation as set out in Article 11 Surrender Act, because:

- the requested person was caught in the act and detained immediately;
- the prosecuting authorities had released requested person on bail in October 1997 and had not done anything to get the case to trial until January 2005;
- the information given by the issuing authorities to explain this lapse of time had not been satisfactory to the Court. In addition to all that, the Spanish authorities were not able to say when the case would go to trial. The second question was whether there is still an 'effective remedy' as mentioned in Art. 13 ECHR. Based on the principle of mutual trust, the Court had to rely on the Spanish authorities to have such a remedy. The question was whether it was effective enough. The Court distinguished between the situation where there was a threat of flagrant violation and the situation where the violation had already taken place. Every (additional) day the investigation lasted longer, the requested person's uncertainty would grow. The Court therefore held that there was no longer an effective remedy as per ex Art. 13 ECHR. This led to a refusal of surrender based on a violation of Art. 11 of the Surrender Act.

⁷³⁵ See Supreme Court of the Netherlands, 17 June 2008, Case BC6913; Keijzer 2006, p. 58: 'Undue delay, for example, can often be compensated by reduction of punishment, it will also have to be substantiated that such a reparation will probably not take place, in other words that the state of issue does on the relevant point not provide an effective remedy as required under Article 13 ECHR.' (footnote omitted)

⁷³⁶ See also Weyembergh 2014, p. 13.

light of the high degree of trust and solidarity between the Member States.⁷³⁷ In this context the District Court of Amsterdam has developed a policy that qualifies the solidarity with other Member States. Even though the Surrender Division of the District Court of Amsterdam has not yet refused to execute any EAWs for minor offences, it has carved out the authority to do so in exceptional cases. The District Court of Amsterdam first did so in a surrender decision of 30 December 2008.⁷³⁸ The defence counsel had asked the District Court whether, in cases of minor offences, the Court would have the room to refuse surrender if it concerned *de minimis* crimes, in any event crimes that in practice would not be punished or received minor punishment. Counsel referred to a number of fundamental community freedoms, such as European citizenship ex Articles 18 and 49 EC and Directive 2004/38 EC. Given the minor nature of the accusations, Counsel did not deem the infringement of those rights justified. According to Counsel, the proportionality principle was affected. He pointed out that the Court of Justice has accepted the principle of proportionality as a general principle of Community law in the *Ferwerda* case (Court of Justice of 5 March 1980, Case 256/78) and the *Hauer* case (Court of Justice of 13 December 1979, Case 44/79).⁷³⁹

The District Court held that, regarding the question whether there would be disproportionality, one needs to distinguish between the so called 'system proportionality' of the Law on the surrender of persons and the 'proportionality of the issuing of a European arrest warrant'. The system of the Law on the surrender of persons is in accordance with the Framework Decision that it implements, not to go beyond the achievement of the goals of the Framework Decision.⁷⁴⁰ In spite of this, the District Court held that the concrete application of the Law on the surrender of persons, particularly the issuing of a European arrest warrant, could disproportionately affect the interests of the requested person. It then referred to the 'Handbook on how to issue a European arrest warrant',⁷⁴¹ in which Member States attempted to set out some guidelines to prevent the excessive use of the instrument, to reiterate its point. It concluded by stating that, given the general proportionality of the Framework Decision, an appeal regarding the disproportionate nature of a European arrest warrant could only succeed under special circumstances. In this case, the Court had not been made aware of circumstances that would be special to the extent that surrender would have to be refused.⁷⁴²

⁷³⁷ Case C-303/05, para. 57.

⁷³⁸ District Court of Amsterdam of 30 December 2008, LJN BG 9037.

⁷³⁹ District Court of Amsterdam of 30 December 2008, LJN BG 9037, para. 6.2.

⁷⁴⁰ The District Court referred to recital 7 to the FD EAW and the legal framework of the Framework Decision, as it was formulated by the ECJ in its case of 3 May 2007 (Case C-303/05, *Advocaten voor de Wereld VZW v Council* and the Opinion in this case by AG Ruiz-Jarabo Colomer of 12, September 2006, paras. 18-26.

⁷⁴¹ Final version of the European handbook on how to issue a European Arrest Warrant, Council document 82/1/08 REV 2 COR 1 of 24 June 2008; updated in 2010. The new version is available at: <<http://register.consilium.europa.eu/doc/srv?!=en&f=st%2017195%202010%20REV%201>> (last consulted on 3 May 2015).

⁷⁴² District Court of Amsterdam of 30 December 2008, LJN BG 9037, para. 6.3.

Since then, the defence has been raised on several occasions,⁷⁴³ which led to one instance of refusal of a European arrest warrant issued from Poland for a wanted person that was terminally ill. His life expectancy was an estimated 12 months. In addition he was undergoing treatment in hospital, treatment which could not be offered inside a prison. The defence supported its claim that surrender would be disproportionate by calling on Article 3 ECHR (inhuman or degrading treatment).⁷⁴⁴

The clear mention of the rights derived from European citizenship in the context of the proportionality of surrender is interesting. This goes back to the question raised in Chapter 1 whether European citizenship has an added benefit in the context of judicial cooperation beyond equal treatment with nationals in demanding the guarantee that the sentence may be served in the executing Member State in accordance with Article 4(6) and 5(3) FD EAW.⁷⁴⁵ The German Constitutional Court has read a limited right not to be extradited into Article 16 of its Basic Law. The next question would be whether such a right should be seen as a right of all EU citizens, perhaps based on Article 45 EU Charter on the right to move *and* reside freely within the territory of the Member States, read in conjunction with Article 20 TFEU and Directive 2004/38/EC triggering the application of the proportionality principle.

Court of Justice

The Court of Justice has so far refused to read an explicit ground for refusal based on fundamental rights into the FD EAW, although it has provided a broader interpretation of its provisions to accommodate fundamental rights in *I.B.*, as discussed in section 5.1.5.⁷⁴⁶

The degree to which the executing judicial authority may verify compliance with fundamental rights was raised in the *Radu* case.⁷⁴⁷ Mr. Radu appealed a decision for him to be surrendered from Romania to Germany for prosecution on various counts of robbery.⁷⁴⁸ One of his claims was that the judicial authorities of the executing Member State were obliged to ascertain whether the fundamental rights guaranteed by the Charter and ECHR were being observed in the issuing Member State. If that was not the case, those authorities would be justified in refusing.⁷⁴⁹ A failure on that State's part to do so would represent a ground for refusal to execute the European arrest warrant in question.⁷⁵⁰ In those circumstances, the Court of Appeal of Constanța decided to stay the proceedings and to refer a number of questions to the Court for a preliminary ruling, notably:

⁷⁴³ District Court of Amsterdam of 4 March 2009, LJN BH6183; District Court of Amsterdam of 25 March 2009, LJN BI0772; Klip 2010.

⁷⁴⁴ District Court of Amsterdam of 01 March 2013, LJN BZ3203.

⁷⁴⁵ Cf. District Court of Amsterdam of 25.06.2013, 13/2418; quashed on legal grounds by the Supreme Court of the Netherlands of 18.03.2014, 13/05071.

⁷⁴⁶ Case C-306/09, *I.B.* [2010] ECR 10341.

⁷⁴⁷ Case C-396/11, *Radu* [2013] ECR 39.

⁷⁴⁸ Case C-396/11, para. 16.

⁷⁴⁹ Case C-396/11, para. 16.

⁷⁵⁰ Case C-396/11, para. 19.

- whether the deprivation of liberty and forcible surrender of the requested person that the European arrest warrant procedure entails constitute an interference with that person's right to liberty and whether, for that interference to be authorised by Article 5(1) of the ECHR and Article 6 of the EU Charter, it must satisfy the requirements of necessity and proportionality (questions 2 and 3);⁷⁵¹ and
- whether an executing Member State may refuse to implement a European arrest warrant where to do so would infringe or would risk infringing the requested person's rights under Articles 5 and 6 of the ECHR or Articles 6, 48 and 52 of the EU Charter (question 4).⁷⁵²

Advocate General Sharpston answered the combined questions 2 and 3 by interpreting Strasbourg case law on Article 5(1) f of the ECHR f. on 'the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. She pointed out that such detention should be 'lawful', entailing that 'any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness'.⁷⁵³ To avoid such arbitrariness, the detention would have to be carried out in good faith, closely connected to the ground of detention relied on by the executing judicial authority, the place and conditions of detention should be appropriate and the length of the detention should not exceed that reasonably required for the purposes pursued, thus satisfying the proportionality test.⁷⁵⁴

In building her argument, Sharpston pointed to the Commission's 2011 implementation report, discussed above, in which it points to the systemic issuing of EAWs for the surrender of persons sought in respect of often very minor offences which are not serious enough to justify the measures and cooperation which the execution of such warrants requires. It has a disproportionate effect on the liberty and freedom of requested persons when European arrest warrants are issued concerning cases in which (pre-trial) detention would otherwise be felt inappropriate.⁷⁵⁵

Question 4 presented an invitation to the Court of Justice to elaborate on the division of labour between the issuing and executing judicial authority in safeguarding fundamental rights protection. Advocate General Sharpston accepted this invitation by pointing out that:

'While the record of the Member States in complying with their human rights obligations may be commendable, it is also not pristine. There can be no assumption that, simply because the transfer of the requested person is requested by another Member State, that person's human rights will automatically be guaranteed on his arrival there. There can, however, be a presumption of compliance, which is rebuttable only on the

⁷⁵¹ Case C-396/11, para. 20, as summarised by AG Sharpston in para. 53 of her opinion.

⁷⁵² Case C-396/11, para. 20, as summarised by AG Sharpston in para. 63 of her opinion.

⁷⁵³ Opinion of AG Sharpston in Case C-396/11, para. 57.

⁷⁵⁴ Opinion of AG Sharpston in Case C-396/11, para. 62.

⁷⁵⁵ Opinion of AG Sharpston in Case C-396/11, para. 60.

clearest possible evidence. Such evidence must be specific, propositions of a general nature, however well supported, will not suffice.⁷⁵⁶

Advocate General Sharpston recognised the Court's previous case law in which it had insisted that the grounds for non-execution in Articles 3 and 4 of the FD EAW were exhaustive. However, that did not exclude the normative impact of the fundamental rights safeguard clause contained in Article 1(3) as 'it is implicit that these rights may be taken into account in founding a decision not to execute a warrant. To interpret article 1(3) otherwise would risk its having no meaning, otherwise, possibly, than an elegant platitude'.⁷⁵⁷

She then referred to the ECHR case law on exceptions to extradition based on Articles 3 ECHR (4 EU Charter) 5 and 6 ECHR (6, 47, 48 EU Charter), in particular the case of *Soering v UK*⁷⁵⁸ and the fact that the Court of Justice – following a similar ECtHR ruling⁷⁵⁹ – has held that the obligation to return asylum seekers to the Member State of first entry may not be based on the 'conclusive presumption' that fundamental rights will be observed (mutual trust), particularly in view of the Member States' obligation under Article 4 EU Charter to prevent inhuman or degrading treatment,⁷⁶⁰ to propose a standard for executing judicial authorities to apply in exceptional cases:⁷⁶¹

'(...) the competent judicial authority of the State executing a European arrest warrant can refuse the request for surrender without being in breach of the obligations authorised by the founding Treaties and the other provisions of Community law, where it is

⁷⁵⁶ Opinion of AG Sharpston in Case C-396/11, para. 41.

⁷⁵⁷ Opinion of AG Sharpston in Case C-396/11, para. 70.

⁷⁵⁸ Opinion of AG Sharpston in Case C-396/11, para. 75; ECHR of 07.07.1989, Application No. 14038/88, *Soering v United Kingdom*.

⁷⁵⁹ See *MSS v Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011, paras. 233, 234, 263, 264, 366-368: The European Court of Human Rights declared the return of an asylum seeker from Belgium to Greece in accordance with the EU's Dublin II regulation (Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) to be incompatible with Art. 3 ECHR due to inhumane detention conditions in the latter Member State. Before returning an asylum seeker to the Member State of first entry the authorities of the expelling Member State have to satisfy themselves that the conditions in the receiving Member State in practice comply with ECHR standards.

⁷⁶⁰ Opinion of AG Sharpston in Case C-396/11, para. 76; Joined Cases *NS v Secretary of State for the Home Department*, Case C-411/10 and *M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform*, C-493/10 [2011] ECR 13905, para. 106: 'Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.' Opinions by AG Trstenjak, 22 September 2011. For a commentary on the AG's opinion see Peers 2011b.

⁷⁶¹ Opinion of AG Sharpston in Case C-396/11, para. 81.

shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process. However such a refusal will be competent only in exceptional circumstances. In cases involving Articles 5 and 6 of the Convention and/or Articles 6, 47 and 48 of the Charter, the infringement in question must be such as fundamentally to destroy the fairness of the process. The person alleging infringement must persuade the decision-maker that his objections are substantially well founded. Past infringements that are capable of remedy will not found such an objection.⁷⁶²

The Court, based on the substance of the case, however, narrowed its approach to formulating an answer to the question whether the fact that the issuing judicial authority did not hear the requested person before issuing the European arrest warrant posed a violation of its fair trial rights.⁷⁶³ Hence it did not elaborate on the proportionality issue. As regards fundamental rights, it stressed that the grounds for non-execution contained in the FD EAW are exhaustive,⁷⁶⁴ and continued by stating that not having been heard does not feature among the grounds for non-execution, and, in any event, granting such a right would not be feasible as it would take away 'the element of surprise'.⁷⁶⁵ The Court therefore concluded that the executing judicial authority cannot refuse to execute a European arrest warrant on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.⁷⁶⁶

5.3.2.2. *Assessment*

The factual background of the *Radu* case might justify why the Court of Justice chose not to answer the question on how executing judicial authorities should act in case there are allegations of fundamental rights violations, particularly along the lines of the proposal by Advocate General Sharpston of a rebuttable presumption of compliance. Furthermore it would have been interesting to see whether the Court would be willing to extend its case law concerning asylum,⁷⁶⁷ to prison conditions amounting to inhuman or degrading treatment in accordance with Article 3 ECHR, a question which often arises in the national courts, and wider claims of violations of the rights to liberty and fair trial rights.

Instead, the Court continues to mandate trust in the system of the issuing Member State disregarding the reality of violations of fundamental rights that occur on an everyday basis.⁷⁶⁸ That is unfortunate both from the perspective of furthering judicial cooperation and from the perspective of fundamental rights protection.

⁷⁶² Opinion of AG Sharpston in Case C-396/11, para. 97.

⁷⁶³ Case C-396/11, paras. 28-31.

⁷⁶⁴ Case C-396/11, para. 36.

⁷⁶⁵ Case C-396/11, para. 40.

⁷⁶⁶ Case C-396/11, para. 43.

⁷⁶⁷ Joined Cases C-411/10, *NS v. Secretary of State for the Home Department* and Case C-493/10, *M.E. and Others v. Refugee Applications Commissioner, Minister for Justice and Law Reform* [2011] ECR I3905.

⁷⁶⁸ For a similar view see Thunberg Schunke 2013, p. 65: 'As it now stands, there is a risk that the judgment leaves room for the dangerous conclusion that States are not allowed to consider →

As mentioned when discussing the nationality, residency exception and additional harmonisation measures, it is not ‘mutual recognition’ which is being disputed here. The security interest of prosecuting Mr. Radu is fully recognised. Answering the outstanding legal question on how executing judicial authorities should act in case fundamental rights violations are being claimed does not put the application of mutual recognition at risk, although it might lead to the EAW not being executed.

Moreover, if Luxembourg does not provide the answers, judicial authorities will look elsewhere to find guidance (Constitutional Courts, the ECHR) and seek to formulate their own solutions. In addition, in the United Kingdom, political upheaval over unjust surrenders amid claims of fundamental rights violations has now also led to reforms of domestic legislation.

Doobay (2014) cites paragraph 36 of the Court’s decision in *Melloni* in arguing for an explicit ground for refusal at the EU level:

‘The Court also appears concerned that “casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision.” Given this explicit ground for refusal at EU level would ensure that there was clarity and could provide certainty as to the test to be applied.’

Beyond legal certainty there is a more general question of access to justice, whereas in Member States that do not foresee a fundamental rights ground for refusal ‘it seems significantly more difficult not only to invoke fundamental rights violations, but also to bar the execution of an EAW on such grounds’.⁷⁶⁹

The various national implementations and the negotiations on other mutual recognition instruments like the European Investigation Order discussed in the previous paragraph prove how difficult it is to carve out and apply fundamental rights exceptions that, on the one hand, respect the presumption of trust in the protection offered in the issuing Member States, including possible remedies, but, on the other hand, fulfil the EU’s collective responsibility under the ECHR and EU Charter, irrespective of how they organise judicial cooperation between them.⁷⁷⁰

human rights violations in an issuing State at all, because the express grounds for refusal in the FD on EAW are exhaustive.’

⁷⁶⁹ Weyembergh 2014, p. 9 based on the sources mentioned in footnote 72.

⁷⁷⁰ Klip 2012, p. 392: ‘Whereas the ECHR ensures rights to individuals *vis-à-vis* a particular state, the Charter guarantees fundamental rights of the Union’s citizens *vis-à-vis* the Union. This implies that the Court will have to make some decisions that also have an impact on the division of state responsibilities under the ECHR.’ Weyembergh 2013, p. 950: ‘The changes announced by the prospect of EU adhesion to the ECHR should not be neglected either. In this respect, and since the idea is to treat the EU as much as possible as a “normal” contracting party to the Convention and avoid privileged treatment the very sensitive question is to know to what extent the ECtHR will maintain the presumption of equivalence of protection as accepted in its *Bosphorus* decision of 30 June 2005 and to what extent such case law would benefit mutual recognition, mutual confidence underlying mutual recognition and reduction of controls implied by mutual recognition.’

Member States should be obligated to organise their transnational model of cooperation in ways which guarantee defence rights across borders,⁷⁷¹ making sure they do not suffer but even benefit from increased intra-EU cooperation. Besides the fact that this is an outstanding promise by the European Commission made in its 2000 Communication on mutual recognition,⁷⁷² it would also reflect an ambition for the EU being a single legal area, an Area of Freedom, Security and Justice.

Also, as regards the application of a proportionality test, the closed system of exceptions in the FD EAW has to be underlined. It is therefore not surprising that individuals have sought to seek the application of those exceptions to further their interests. In the long run, dual criminality can, however, not be upheld for the simple reason that it still implies 'dual checks' on judicial decisions from other Member States.⁷⁷³

In *Advocaten voor de Wereld*, the Court of Justice held that the non-verification of dual criminality did not violate the legality principle. I can agree with that reasoning to the extent that Member States issue arrest warrants for acts that took place on their territory. A possible infringement may, however, occur in case the issuing Member State exercises extraterritorial jurisdiction⁷⁷⁴ in the absence of effective EU rules on the exercise of criminal jurisdiction in transnational cases.⁷⁷⁵

Here there is essentially a lacuna in that the FD EAW does not provide for criminal jurisdiction rules, except of course the optional territoriality and extraterritoriality exceptions of Article 4(7) and the guidance that may be sought from Euro-just in case there are competing European arrest warrants.⁷⁷⁶

In the absence of guidance by the Court of Justice, the District Court of Amsterdam has called upon the proportionality principle directly to carve out the authority for itself to refuse surrender, distinguishing general trust in the FD EAW from trust in individual decisions. The OLG Stuttgart also took this decision, based on a distinction between obligations stemming from EU law, on the one hand, and

⁷⁷¹ Thunberg Schunke 2013, p. 88 and 112-117.

⁷⁷² COM (2000) 495, p. 16 in which it is stated that it would have to be ensured that the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the process but that the safeguards would even be improved through the process.

⁷⁷³ Barents 2006, p. 363: 'Waar het om gaat, is dat deze methode ongeschikt is om gestalte te geven aan het concept van de ruimte zonder binnengrenzen, zoals dit is vastgelegd in de Europese verdragen. Tussen dit concept en het vereiste van dubbele strafbaarheid bestaat een inherente contradictie'.

⁷⁷⁴ Communication from the Commission to the Council and the European Parliament - Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, para. 16: 'If (...)the requirement of dual criminality were given up, and no system of jurisdiction that for each case identified one Member State as exclusively competent were created, one of the following two situations could arise: A Member State sanctions behaviour which in another Member State is not an offence. The latter Member State would then be obliged to recognise the former Member State's decision, and under certain circumstances would have to enforce a sentence handed down for an act that is not an offence under its law. (...)'

⁷⁷⁵ See Commission Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings COM (2005) 696 of 23.12.2005; Framework Decision 2009/948/JHA on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009.

⁷⁷⁶ FD EAW, Art. 16.

compliance with requirements based on the rule of law under German Constitutional law, on the other hand. The UK courts have also invoked the proportionality principle, basing it on the ECHR, and now it has been introduced through legislation.

A rule of reason for surrender procedures

Pending changes to the FD EAW, or the mutual recognition instruments more generally related to the insertion of a fundamental rights exception,⁷⁷⁷ and the proportionality test in the issuing State, as demanded by the European Parliament in its legislative own initiative report on the European arrest warrant and inserted in the Directive on the European Investigation Order, a way to address the legal vacuum at the EU level could be for the Court of Justice to develop a ‘rule of reason’ for surrender procedures, implying an extra ground for non-execution based on fundamental rights, including proportionality as referred to in Article 52 EU Charter *or*, to put it better, accepting that legitimate concerns based on fundamental rights could lead to a decision not to execute an EAW. Taking into account the four aspects of the rule of reason cited in the paragraph on the mutual recognition of product requirements:

- (i) *The aim must be so important that it takes precedence over the objective of free movement*

This requires a weighing of the interests of the individual and the prosecuting State among other elements for which the decision of the Higher Regional Court of Stuttgart provides a number of good indicators. However, again the limits of the idea that interests can be balanced in the area of judicial cooperation needs to be underlined, taking into account the difference between ‘absolute rights’ and ‘rights subject to limitations’ to be justified under strict conditions, like the right to liberty and security.⁷⁷⁸ For instance, the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in Article 4 of the EU Charter is absolute. It is therefore not possible to ‘balance’ this prohibition against interests of national security.⁷⁷⁹ The rights to liberty and security (Art. 6 EU Charter) and defence (Art.

⁷⁷⁷ Weyembergh 2014, p. 1-10 supports this solution: ‘(...) as seen previously, practice has shown that in those MS that have no ground for refusal relating to fundamental rights, judicial authorities are more reluctant to disregard their express MR [mutual recognition] obligations, by taking fundamental rights concerns into consideration and to apply directly norms of a higher rank. Consequently, introducing an explicit ground for refusal based on fundamental rights would not appear superfluous. It would indeed increase the visibility of fundamental rights and improve the legal certainty both for practitioners and for the persons concerned.’

⁷⁷⁸ In accordance with Art. 6 and 52 of the EU Charter of fundamental rights.

⁷⁷⁹ Commission staff working paper, Operational guidance on taking account of fundamental rights in Commission impact assessments, SEC (2011) 567, p. 9 with reference to ECtHR (Grand Chamber), *Saadi v Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 140.

48 EU Charter) are, however, not absolute, which does not mean that they cannot lead to a refusal under any circumstances.⁷⁸⁰

(ii) *The measure must be proportional, meaning that it is both necessary and not more restrictive than needed.*

This leads to an interesting conflict between proportionality as an instrument for (market) integration and where it is applied to protect fundamental rights⁷⁸¹ in accordance with Article 49 EU Charter 'Principles of Legality and Proportionality of Criminal Offences and Penalties in combination' with Article 52 EU Charter.⁷⁸²

On the one hand, the issuing Member State needs to justify why the EAW is proportionate, taking into account the rights of the wanted person and alternatives like requesting other types of judicial cooperation.⁷⁸³ One might say within the single area of freedom, security and justice that the primary responsibility for ensuring compatibility with fundamental rights lies with the issuing judicial authority. However, in line with the Court of Justice's case law on asylum, as has been laid down in the Directive on the European Investigation Order, there is a presumption of compliance, which may be rebuttable.⁷⁸⁴

On the other hand, a decision not to execute a European arrest warrant would equally need to be justified with reference to the disproportionate interference with the wanted person's fundamental rights or another legitimate concern recognised by the Treaty or principles of European law. Where possible, in consultation with the issuing judicial authority, other types of judicial cooperation should be offered as an alternative.

(iii) *The measure cannot discriminate according to nationality, meaning that it should apply to domestic and foreign products alike*

In the area of criminal law, the principle of non-discrimination takes on a broader meaning. It requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.

It becomes problematic if the proportionality test is applied in case of nationals and non-qualifying residents. This comes back to the problems with the nationality

⁷⁸⁰ Opinion of AG Sharpston in Case C-396/11, *Radu*, discussed in section 5.3; Thunberg Schunke 2013, when addressing the ECHR judgment in *Stapleton v Ireland* (ECHR of 04.05.2010, Application No. 56588/07) states that it must not be concluded that within the mutual recognition model State responsibility for an executing State regarding a violation of Article 6 in an issuing State is excluded altogether.

⁷⁸¹ Jans 2000, p. 243 as discussed in Chapter 1, section 3.2.

⁷⁸² Art. 52 EU Charter: Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

⁷⁸³ As now also pointed to in recital 26 to Directive 2014/41/EU on the European Investigation Order discussed in section 5.2.

⁷⁸⁴ Directive 2014/41/EU, Art. 11(1)f, recitals 18 and 19.

exception in the FD EAW and the FD on the Prisoners, underlining that in the context of judicial cooperation objective factors are necessary to tie an individual to a certain Member State.

(iv) *The measure may not duplicate a Community measure*⁷⁸⁵

As was illustrated by the *Melloni* case, once an issue (*in absentia* decisions) has been exhaustively dealt with in EU legislation (in compliance with the Union's fundamental rights obligations) the room for judicial manoeuvre is limited.

The interaction between the fundamental rights and freedoms of EU citizens and residents and the obligation to surrender in accordance with the FD EAW has, however, not been addressed comprehensively. This is so in particular due to the lack of harmonisation of the rights of suspects and accused persons in criminal proceedings, a lack of criminal jurisdiction rules in which the interests of all stakeholders are taken into account in deciding upon the place of prosecution, the place of execution of the sentence, pre-trial detention and prison conditions, which justifies the intervention by the Court of Justice.

As regards the rule of reason in the internal market, *Gormley* stated that 'it allows Member States to defend national measures aimed at protecting certain national interests not explicitly recognized by the Treaty exceptions but compatible with its aims and values'.⁷⁸⁶ Fundamental rights recognised by the EU Charter include a number of rights, such as the right to liberty and security and respect for private and family life (Arts. 6 and 7 EU Charter). Add to that the rights pertaining to European citizenship (Art. 45 EU Charter) and it seems that the *rationale* of the rule of reason has been complied with as well.

It is to be hoped that the Court of Justice will take the next opportunity to create this rule of reason for surrender procedures and clarify more generally that the free movement of judicial decisions does not operate in a legal vacuum. Fundamental rights and freedoms need to be accounted for, if not taken as the starting point as indicated above.

5.4. Conclusion

The FD EAW is the first piece of legislation in which the mutual recognition of judicial decisions in criminal matters was implemented. Its drafting reveals a certain duality. On the one hand, the maintenance of a validation procedure, in spite of the application of mutual recognition to extradition, reveals that mutual recognition of arrest warrants is not to be confused with home State control, implying direct and automatic recognition of the judicial decisions taken in the other Member States.

The FD EAW instead puts in place a surrender procedure in accordance with which the executing judicial authority is allowed to review a number of substantive and procedural aspects of the case, in particular as regards the existence of dual criminality, jurisdiction, the rights of nationals and residents, and wider fundamen-

⁷⁸⁵ Schrauwen 2005b, p. 6.

⁷⁸⁶ Gormley 2005, p. 23.

tal rights considerations in accordance with the provisions of the FD EAW, the principles and aims of the Area of Freedom, Security and Justice.

The preamble, as interpreted by subsequent Court of Justice case law, confirms that mutual recognition itself is to be seen as a principle implementing the Union's objective of becoming an Area of Freedom, Security and Justice not unlike national markets needing to be merged into a single market bringing about conditions as close as possible to that of a genuine internal market.

On the other hand, the FD EAW, as drafted, implemented and interpreted by domestic courts and the Court of Justice retains elements of home State control and further inconsistencies with the general idea of free movement within a single legal area. In particular, mutual recognition and the application of the dual criminality requirement are uneasy bedfellows. In effect, dual criminality questions the decision taken by the judicial authority of the other Member State and the (criminal justice) system based on which it was taken. It therefore does not fit well with the aim of the Union becoming a single Area of Freedom, Security and Justice.

The intermediate solution chosen, to allow for a positive list system with the automatic recognition of a list of 32 'serious crimes', has led to questions concerning proportionality, legal certainty and non-discrimination between EU citizens and residents, certainly in the absence of proper approximation of the criminal definitions of the crimes mentioned on the list and EU criminal jurisdiction rules. In other words, it is not clear what is benefiting from free movement and whether it has a good reason to benefit from free movement, given the absence of a single set of criminal jurisdiction rules that take the interests of everyone involved (prosecution, victim, suspect) into account.

In the *Advocaten voor de Wereld* case, the Court, however, defended the positive list system by pointing to the principles of trust and solidarity, which are the natural allies of mutual recognition in the internal market. Based on this case, one could say that the mutual recognition of arrest warrants goes further than, for instance, the recognition of professional qualifications in the internal market, where under the general system of recognition there is still a verification of equivalence with host State requirements.

Another anomaly in the text of the FD EAW and the subsequent FD Transfer of Prisoners is the difference in treatment between nationals and EU citizens in terms of a refusal of a European arrest warrant for the execution of a sentence, while undertaking to execute the sentence in accordance with domestic law or surrendering for prosecution upon the guarantee that the national or resident will be returned to the executing Member State to undergo the sentence. According to the Commission's logic, an EU citizen should face being prosecuted and sentenced wherever he or she has committed an offence within the territory of the European Union. Arguably there should be no difference in treatment between nationals and residents as long as the resident proves the possibility for social integration and hence the best opportunity for social rehabilitation. Conversely the Member State of nationality might no longer be the place with which the suspect or sentenced person has the closest ties. In general the Commission's idea on mutual recognition, implying that EU citizens have economic rights and political obligations, needs revisiting.

Unfortunately in *Wolzenburg* the Court allowed Member States to impose a strict five-year residency requirement before residents are entitled to benefit from equal treatment. It has been argued that this approach is necessary to benefit from mutual recognition. The question is, however, what benefit is to be had. Execution of the sentence, as such, is not disputed. The question simply is *where* the sentence is to be executed in view of the objective of social rehabilitation. Support for this reasoning can also not be found by referring to internal market case law. While it is true that exceptions to free movement have to be construed narrowly, in line with the proportionality principle, it needs to be underlined that internal market case law, ever since *Cassis de Dijon*, does not make a normative choice in favour of free movement over other interests, such as the environment or consumer protection.

The confusion between mutual recognition and home State control also permeates the approach towards the two human rights grounds for non-execution taken up in the FD EAW, on *ne bis in idem* and *in absentia* decisions. The *Mantello* and *Melloni* cases both testify to a Court that wants to limit the power of the executing authority to an absolute minimum as regards second guessing European arrest warrant s. In *Melloni* the Court even relied on the primacy, unity and effectiveness of EU law to prevent executing authorities from making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the issuing Member State. Again, it is not the surrender of the person as such that is being disputed but the opportunity to demand for a review, and it is this opportunity that is seen as in conflict with mutual recognition. However, in this case exhaustive harmonisation had taken place in the FD *in absentia*, which was held compliant with the Charter and ECHR, through a higher level of ambition should have been chosen to avoid a conflict on supremacy and fundamental rights protection.

Nevertheless, there are indications that the *status quo* might be coming to an end as the countervailing interests that the FD EAW has not developed are finding increasing recognition, notably in the opinions of the Advocate Generals. In this context it is unfortunate that the Court did not follow the opinion of Advocate General Bot in *Wolzenburg* on the question to what extent Member States are allowed to discriminate between their nationals and other residents in refusing a European arrest warrant for the execution of a prison sentence. The Court extended this line of reasoning with its judgment in the *Kozłowski* case, in which it left it up judicial authority to rule on this question, taking into account various objective factors pointing to the level of social integration of the resident.

The relationship with additional harmonisation measures confirms that these measures, notably the FD *in absentia* and FD Transfer of Prisoners were not drafted to further fundamental rights but to further judicial cooperation. Although the now binding EU Charter includes a number of fair trial rights that are also applicable to surrender procedures, the legal basis for approximating these rights unfortunately still limits the scope of these measures to the extent necessary to further mutual recognition. Even so, a number of key fair trial rights have been approximated, notably foreseeing translation and interpretation, a letter of rights and the opportunity to have access to a lawyer both in the issuing and executing Member State, although the demand of the European Parliament that assistance be free of charge for those who cannot afford it remains to be met.

Wording that confuses mutual recognition with free movement was included in a recital to the Directive on Access to a Lawyer. By re-interpreting the *Melloni* judgment in this way, the co-legislators cause confusion as regards the difference between the execution of judicial decisions and their recognition. The danger here is that the executing judicial authority is no longer certain whether it can apply its fundamental rights safeguards, including those building on directives implementing the Road Map for strengthening procedural rights of suspected or accused persons in criminal proceedings. The recital to the EIO Directive states that it can, which might be good for fundamental rights protection, at least in the Member State concerned, but at the same time, it could pose a threat to the primacy, unity and effectiveness of European law.

A number of provisional conclusions as regards the relationship of the European Investigation Order with mutual recognition as applied to extradition in the FD EAW may be drawn. Furthermore, the negotiations on the EIO teach us something as regards the evolving nature of mutual recognition based on how it is applied to evidence gathering.

As regards the relationship with the FD EAW it is expected that the EIO will become the go-to instrument when evidence needs to be obtained from a person, be it a suspect, witness or sentenced person. The broad nature of the instrument, including anything from searches and seizures to transfer for questioning, hearing by videoconference and telephone conference, will reduce the number of European arrest warrants issued for cases where the secret purpose is not to prosecute a person but to obtain evidence.

Mutual recognition as applied to evidence gathering has also undergone a few strange developments, with Member States reducing grounds for non-execution such as those based on dual criminality and territoriality, while, however, insisting on national security. The European Parliament, however, has also demonstrated an ambiguous approach, on the one hand, insisting on proportionality and fundamental rights exceptions but, on the other hand, also strengthening grounds for non-execution based on national sovereignty such as territoriality and dual criminality.

The EIO again reveals a continued lack of clarity among EU co-legislators as regards the nature of mutual recognition and its relationship with sovereignty and fundamental rights. Its relationship with sovereignty is problematic, whereas it is fully compatible with fundamental rights, as long as the presumption of trust in the criminal justice system and decisions of issuing judicial authorities is rebuttable.

Based on the assessment of the relationship between mutual recognition, the rule of law, fundamental rights, and proportionality, it should be clarified that, even though mutual recognition ensures the recognition of the interest in prosecution in another Member State, the execution of a European arrest warrant and the surrender of the wanted person involved should take the rights of the wanted person into account, particularly if a violation of fundamental rights is claimed.

Mutual recognition of European arrest warrants needs to comply with the rule of law. The rule of law is an interesting concept when applied to upholding fundamental rights. Based on the rule of law, the criminal justice system and decision of the issuing judicial authority needs to comply with the fundamental rights and norms the EU subscribes to. On the side of the executing judicial authority,

there should be a presumption of compliance with these fundamental rights. However, mutual recognition works in the context of a *single* legal area which strives to adhere to fundamental rights in accordance with the provisions of the Treaties, the EU Charter and the general principles deriving from the rule of law. Therefore there cannot be a conclusive presumption of compliance and the executing judicial authority needs to intervene if specific evidence to the contrary is offered. Within a single legal area adhering to the standards laid down in the ECHR and the EU Charter, Member States have to take collective responsibility for adequate fundamental rights protection irrespective of the type of judicial cooperation chosen. This cooperation cannot result in EU citizens and residents being caught between a rock and a hard place.

As regards the application of a proportionality test, the closed system of exceptions in the FD EAW has to be underlined. It is therefore not surprising that individuals have sought to seek the application of dual criminality and territoriality exceptions to further their interests. The legal vacuum as regards the interaction between mutual recognition and the rights of the wanted person needs to be filled either through judicial intervention based on primary EU law (the creation of a rule of reason for surrender procedures as outlined) or a revision of the FD EAW/the proposal of a horizontal instrument addressing the issues of fundamental rights and proportionality.

6. *Ne Bis in Idem*

6.1. *Introduction*

The second case study to be conducted in this chapter to further clarify the nature of mutual recognition concerns the recognition of final decisions in criminal matters taken in another Member State having a barring effect to further prosecution in accordance with the *ne bis in idem* principle.⁷⁸⁷

The *ne bis in idem* principle both has a shielding function for the individual and a sword function by obliging respect for the *res iudicata* of other Member States.⁷⁸⁸ Depending on its drafting and interpretation, it can either bar a second prosecution, double punishment or both.⁷⁸⁹ It has a long history in international legal instruments, particularly as a domestic human rights safeguard.⁷⁹⁰

EU law does not generally regulate the application of the *ne bis in idem* principle, although it did develop into a principle of European Law in the context of European competition law.⁷⁹¹ It might be relevant where the proceedings concern a

⁷⁸⁷ More generally on the *ne bis in idem* principle, see Van Bockel 2010; Klip 2012, p. 251-262; Schomburg 2012.

⁷⁸⁸ Van Bockel 2010, p. 25.

⁷⁸⁹ Respectively known under the German terms *Erledigungsprinzip* and *Anrechnungsprinzip*.

⁷⁹⁰ *Inter alia*, in Art. 14(7) International Covenant on Civil and Political Rights, Art. 4 of Protocol 7 to the European Convention on Human Rights.

⁷⁹¹ Case C-252/99p and C-254/99p, *Limburgse Vinyl Maatschappij and others v Commission* [2002] ECR 8375, para. 59; 'The principle of non bis in idem, which is a fundamental principle of →

substantive criminal law issue inherent to EU law.⁷⁹² As such, it has been incorporated in the EU Charter of Fundamental Rights.⁷⁹³ Article 50 of the EU Charter on the 'right not to be tried or punished twice in criminal proceedings for the same offence' states that:

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.⁷⁹⁴

In accordance with the explanations relating to the Charter of Fundamental Rights, Article 50, when applied within the same Member States, has 'the same meaning and the same scope'⁷⁹⁵ as Article 4 of protocol No. 7 to the ECHR.⁷⁹⁶

The explanations to the Charter further clarify that Article 50 applies not only within the jurisdiction of one State but also between the jurisdictions of several Member States. That corresponds to the *acquis* of the European Union, including Articles 54-58 of the Schengen Convention Implementation Agreement (hereafter CISA).⁷⁹⁷ This entails a risk of a divergent interpretation between the 'internal' and 'cross-border' application of the principle,⁷⁹⁸ which also carries the risk of discrimination between individuals, including European citizens.

Community law also enshrined in Art. 4(1) of Protocol No. 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.' Van Bockel 2010, Chapter 4.3.

⁷⁹² Peers 2014a.

⁷⁹³ O.J. (C 303) 1 of 14.12.2007.

⁷⁹⁴ On the interpretation of Art. 50 EU Charter, see Case C-617/10, *Akerberg Fransson*, not yet published.

⁷⁹⁵ O.J. (C 303) 17 of 14.12.2007, p. 31.

⁷⁹⁶ Art. 4 of protocol No. 7 stipulates: 'No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state.

1. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and the penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceeding, which could affect the outcome of the case;

2. No derogation from this Article shall be made under Article 15 of the Convention.'

⁷⁹⁷ O.J. (L 239), 22.09.2000; See more extensively Van Bockel 2010, Chapter 2.

⁷⁹⁸ O.J. (C 303) 17 of 14.12.2007, p. 31; For the difficulties this might cause see Lenaerts 2012, p. 396: 'Moreover, the interpretation of Article 50 of the Charter (the *ne bis in idem* principle) appears to be particularly complex, since its scope and meaning fluctuate according to the context in which that provision is invoked. In this regard, the explanations relating to Article 50 of the Charter state that, if the *ne bis in idem* principle is relied upon in a cross border situation, then that principle must be interpreted in compliance with the EU *acquis*, i.e. in light of the case-law of the ECJ under the Convention implementing the Schengen Agreement. By contrast, where the *ne bis in idem* principle is relied upon in a purely internal situation, then that principle has the same meaning and the same scope as the corresponding right in the ECHR. Such a dual regime may be problematic, notably in cases where it is difficult to ascertain whether a situation is purely internal. However, one must point out that

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The *rationale* underlying in the CISA and the Schengen Convention as such was to facilitate the internal market as an area without internal frontiers. The Schengen Convention therefore sought to regulate the free movement of persons, without them having to fear double prosecution if they have already been tried for the same acts by another ‘Contracting Party’.⁷⁹⁹ As mentioned in Chapter 2, section 2 and this Chapter, section 4, the Area of Freedom, Security and Justice was not part of the *acquis* yet at the time of the Single European Act, when the Schengen Convention was drawn up between a number of Member States, as not all of them were willing to submit to the full consequences of European integration for the free movement of persons. This was corrected in three stages by the incorporation of provisions on European citizenship in the Maastricht Treaty, the incorporation of the Schengen Conventions by in the European Community and Union Treaties by a protocol to the Treaty of Amsterdam,⁸⁰⁰ and the incorporation of the EU Charter by the Treaty of Lisbon.⁸⁰¹

Finally, *ne bis in idem* appears as a ground for refusal in the context of mutual legal assistance and extradition treaties⁸⁰² and, as discussed in the previous paragraph, *ne bis in idem* also serves as a ground for mandatory non-execution in Article 3(2) of the FD EAW.⁸⁰³ In this section the focus will be on the interpretation of CISA articles introduced below taking into account the increasing impact of the EU Charter as well as its impact on the (free movement) rights of European citizens.⁸⁰⁴

CISA provisions on ne bis in idem

The CISA’s main provision on *ne bis in idem* is Article 54 CISA. For the *ne bis in idem* rule to apply, the person’s prosecution regarding the ‘same acts’ has to be ‘finally disposed of’. If a penalty has been imposed, the condition is that it ‘has been enforced, is being enforced or can no longer be enforced’:

in *Sergey Zolotukhin v Russia* the ECtHR has recently decided to interpret the concept ‘idem’ in the light of the case-law of the ECJ, so that in interpreting the principle of *ne bis in idem*, the approach of both courts converges.’

⁷⁹⁹ O.J. (L 239) of 22.09.2000, recitals.

⁸⁰⁰ Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis*, O.J. (L 176) 17 of 10.07.1999. The Council decided to incorporate the SCIA’s Arts. 54-58 in Title VI of the EU Treaty (police and judicial cooperation in criminal matters).

⁸⁰¹ O.J. (C 115) 01 of 09.05.2008.

⁸⁰² Council of Europe Convention on Extradition (Paris, 1957, E.T.S. No. 24).

⁸⁰³ Framework Decision 2002/584/JHA, Art. 3: ‘The judicial authority of the Member State of execution (hereinafter executing judicial authority) shall refuse to execute the European arrest warrant in the following cases: (...) 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State.’ Court of Justice case C-261/09, *Mantello*.

⁸⁰⁴ On the relationship between the SCIA provisions on *ne bis in idem* and Art. 50 EU Charter see Schomburg 2012.

A person whose trial has been finally disposed of in a Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Article 55, however, contains a number of declarations Member States were allowed to make upon ratification. They include the possibility not to be bound in case the acts wholly or partly took place in their own territory, unless they partially took place in the territory of the State in which the judgment was delivered. Article 56 determines that in case further charges are brought against a person whose trial in respect of the same act has been finally disposed of in another Contracting Party, the period of deprivation of liberty already served should be taken into account. Article 57 allows for exchange of information between the competent authorities of the Contracting Parties to clarify whether a *ne bis in idem* situation exists. In accordance with Article 58, the Schengen provisions do not preclude a more liberal national approach to *ne bis in idem*.

Harmonisation attempts including for the prevention of conflicts of jurisdiction

The *ne bis in idem* principle was mentioned as a subject for harmonisation under the 'Programme of measures to implement the principle of mutual recognition of decisions in criminal matters',⁸⁰⁵ in the more general context of preventing conflicts of jurisdiction from occurring in the first place.⁸⁰⁶ Greece then drafted a proposal for a framework decision concerning the application of the *ne bis in idem* principle,⁸⁰⁷ followed by a Commission Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings.⁸⁰⁸ A Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings was adopted,⁸⁰⁹ aimed at preventing parallel prosecutions concerning the same facts and the same person, 'as a first substantial step in preventing breaches of the "*ne bis in idem*" principle during criminal proceedings and in avoiding the risk of the inadequate exercise of jurisdiction by Member States'.⁸¹⁰ As mentioned in the historical introduction, this Framework Decision is seen as too weak and, as a number of the other framework decisions, suffers the fate of poor implementation by the Member States.⁸¹¹

⁸⁰⁵ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, 2001 O.J. (C 12) 10.

⁸⁰⁶ Cf. Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009, as discussed in section 5.1.3.

⁸⁰⁷ 2003 O.J. (C 100) 24.

⁸⁰⁸ Commission Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM (2005) 696.

⁸⁰⁹ Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009.

⁸¹⁰ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM (2014) 313, p. 11.

⁸¹¹ *Ibidem*.

Harmonisation attempts were, however, overshadowed by the development of the *ne bis in idem* principle in the case law of the Court of Justice. Therefore in the sections below, I will focus on the latter, exploring the interpretation the Court has given to the main elements of the notion, ‘final decision’ and ‘same acts’ and the ‘enforcement condition’, in accordance with the aims and principles of European law (section 6.2.), before drawing conclusions regarding the question what this case law teaches us with regard to the nature of mutual recognition (section 6.3).

6.2. Court of Justice Case Law on *Ne Bis in Idem*

As a consequence of the CISA’s incorporation by the Treaty of Amsterdam, courts of Member States, which accepted the jurisdiction of the Court of Justice regarding matters falling under the ‘third pillar’, could also raise questions concerning the interpretation of Articles 54-58 CISA.

Gözütok and Brügge: mutual recognition is declared as a principle

The first ruling of the Court of Justice interpreting Article 54 CISA under ex Article 35 EU was in the joined cases of Mr. Gözütok and Mr. Brügge. Mr. Gözütok was offered an out-of-court settlement by the Dutch public prosecutor after Dutch police found drugs in his snack bar in January 1996. He was consequently tried and convicted again in Germany for the same facts. Mr. Gözütok appealed this decision. The Higher Regional Court of Cologne eventually decided to refer preliminary questions on the interpretation of Article 54 CISA. The case was joined with that of Mr. Brügge, a German citizen who was accused of having assaulted a Belgian citizen in Oostduinkerke (Belgium). He was offered and accepted an out-of-court settlement offered by the public prosecutor in Bonn (Germany). The Belgian Court then raised the question whether it could still require him to appear before it in criminal proceedings.

In its 2003 judgment in the joined cases of *Gözütok* and *Brügge*,⁸¹² the Court of Justice held that the application of Article 54 CISA did not rely on the prior harmonisation of the criminal laws of the Member States. The Court held that it could apply the *ne bis in idem* rule, as formulated in Article 54 CISA, directly. Neither the CISA nor Title VI of the EU Treaty had made the application of Article 54 CISA dependent upon the harmonisation of the criminal laws of the Member States regarding the procedures terminating prosecution.⁸¹³ Therefore, there was the ‘necessary implication’ that Member States had *mutual trust* in each other’s criminal justice systems and recognise the criminal law of the other Member States, even if the outcome would be different if its own national law had been applied.⁸¹⁴

⁸¹² Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR I-1345; Vervaele 2005b.

⁸¹³ C-187/01 and C-385/01, para. 32.

⁸¹⁴ C-187/01 and C-385/01, para. 33.

Comment

Before moving into the specifics of the Court's ruling on whether further prosecution is barred by an out-of-court settlement offered in another Member State, it is worth reflecting on the step the Court took to declare that mutual recognition of final decisions in criminal matters barring further prosecution does not depend on prior harmonisation regarding the procedures terminating the prosecution.

Thwaites points out that, with this judgment, the Court introduced 'mutual recognition' regarding the Member States' systems of criminal justice and their outcome, not dissimilar to the way it introduced mutual recognition of product requirements in its *Cassis de Dijon* judgment 25 years earlier.⁸¹⁵

Furthermore, with regard to the Court's insistence that recognition is necessary 'even if the outcome would be different in case its own national law had been applied', *Klip* points out: 'This is logical, because if recognition required harmonisation, it would not be an issue at all. Mutual recognition presumes the existence of differences.'⁸¹⁶

One may draw the parallel between the *Gözütok* and the *Cassis* decisions, also referring back to the foundations of the principle of mutual recognition, being free movement within a single legal area. Procedural differences cannot stand in the way of the achievement of this single legal area, the Area of Freedom, Security and Justice.⁸¹⁷ However, at the same time, in *Cassis* the Court reiterated that countervailing interests (health, safety, consumer protection etc.) could be defended by calling on exceptions laid down in the Treaty or recognised by the Court in accordance with the 'rule of reason'. As is also pointed out in the explanations relating to the Charter of Fundamental Rights, such limits are explicitly accepted in accordance with Article 52 (1) of the Charter:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁸¹⁸

Furthermore, as was seen in the section on the mutual recognition of product requirements and professional qualifications, there are limits to free movement when the underlying regulatory approach differs too much. The security interest of the State and the differences in regulatory approach will need to be borne in mind when reading the consequent development of the Court's case law.

⁸¹⁵ *Thwaites* 2003, p. 260.

⁸¹⁶ *Klip* 2012, p. 253.

⁸¹⁷ C-187/01 and C-385/01, paras. 35-38, see *infra* section 6.3.

⁸¹⁸ O.J. (C 303) 17 of 14.12.2007, p. 31: 'The very limited exceptions in those Conventions [including the SCIA] permitting the Member States to derogate from the 'non bis in idem' rule are covered by the horizontal clause in Article 52(1) of the Charter concerning limitations.'

Developments after Gözütok: interpretation of 'final decision' and 'same act'

In *Gözütok* and *Brügge* the Court also laid the foundation for a line of case law interpreting the various aspects of the *ne bis in idem* principle. In particular this principle presents three major issues:

- First, what may be perceived as a 'final decision'? Does it include out of court settlements and acquittals, for instance?
- Second, what is to be understood as the 'same act'? Does 'same act' mean the same material acts, the legal description of those acts or should we take into account the interests protected by the legal description of those acts?
- Third, when has a penalty 'been enforced', when is it 'being enforced' and when can it 'no longer be enforced'?

The Court's case law on these three issues will be explored in sections 6.2.1, 6.2.2 and 6.2.3 below.

6.2.1. 'Final Decision'

In *Gözütok* and *Brügge*,⁸¹⁹ the particular question was raised whether discontinuation of proceedings through a financial settlement offered by a public prosecutor would have a barring effect to further prosecution in other Member States. The Court of Justice replied that the exact nature of the body that dispenses of a case is not relevant since this is a matter of 'procedure and form'. The Court attaches more importance to the 'effects' of the procedure. It is sufficient that the proceedings have been discontinued by 'an authority required to play a part in the criminal justice system in the national legal system involved'.⁸²⁰ The procedure has to penalise the unlawful conduct which the accused is alleged to have committed.⁸²¹

As discussed, the Court then mentioned the need for Member States to have mutual trust in each other's criminal justice systems and the need for them to recognise the criminal law of the other Member States, even if the outcome would be different in case its own national law had been applied.⁸²² The Court further supported its view by, *inter alia*, pointing to the Treaty goal of establishing an Area of Freedom, Security and Justice in which the free movement of persons is ensured. Article 54 CISA could not play an effective role in achieving this aim if it did not also apply to out-of-court settlements.⁸²³

In *Van Straaten* the Court expanded the scope of what is to be understood as a 'final decision'. Mr. Van Straaten was involved in proceedings in the Netherlands where he demanded the deletion of an alert for his surrender introduced into the Schengen Information System by Italy. In 1999 an Italian judge sentenced Mr. Van Straaten *in absentia* for the possession and exportation of five kilograms of heroin

⁸¹⁹ Joined Cases C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR I-1345; Vervaele 2005b.

⁸²⁰ C-187/01 and C-385/01, para. 28.

⁸²¹ C-187/01 and C-385/01, para. 29.

⁸²² C-187/01 and C-385/01, para. 33.

⁸²³ C-187/01 and C-385/01, paras. 35-38.

from Italy to the Netherlands on or around 27 March 1983. A Dutch court, however, already convicted him in 1983 and sentenced him to 20 months imprisonment for the possession of one kilogram of heroin on or around 27 to 30 March 1983. The Dutch court acquitted him of the charge for the importation of these drugs since there was insufficient evidence.

A question raised from this case was whether an acquittal should also bar further prosecution. In his opinion of 8 June 2006, Advocate General *Colomer* proposed that an acquittal should indeed bar further prosecution, since in that situation the court has already decided on the merits, exhausting the State's *ius puniendi*.⁸²⁴ In its judgment, the Court followed the opinion of Advocate General *Colomer*, partially based on a literal reading of Article 54 CISA. The first paragraph of Article 54 CISA only mentions that a trial has to be 'finally disposed of' and the second paragraph states that *in the event of* a conviction the penalty has to have been enforced, is in the process of being enforced or can no longer be enforced.⁸²⁵ The Court relied on the objective of Article 54 CISA being that nobody should be prosecuted on account of having exercised his right of free movement⁸²⁶ and pointed to the legitimate expectations and legal certainty the individual should have and be able to rely on after acquittal.⁸²⁷

In *Gasparini* the Court held that a 'decision on the merits' is not a condition for the recognition of a final decision.⁸²⁸ The members of the Gasparini family c.s. were being trialled before the provincial court of Málaga. The Portuguese Supreme Court of Justice had, however, already acquitted two of the defendants due to the fact that their prosecution was time barred under Portuguese law. One of the questions raised by the provincial court of Málaga was whether the finding of the Court in one Member State that an offence is time barred is binding on the courts in the other Member States.

Just as in *Van Straaten* (both judgments were delivered on 28 September 2006) the Court of Justice concluded that Article 54 CISA did not require a conviction for a case to be finally disposed of.⁸²⁹ When entering into the question whether a decision to acquit due to the fact that the offence was time barred also bars further prosecution, the Court first mentioned the 'free movement of persons' argument,⁸³⁰ then the argument that harmonisation is not necessary to apply the *ne bis in idem* rule, with the 'necessary consequence' that States should have trust in each others' systems of

⁸²⁴ Opinion of AG Colomer of 08.06.2006 in Case C-150/05, para. 65.

⁸²⁵ Case C-150/05, para. 56.

⁸²⁶ Case C-150/05, paras. 57 and 58.

⁸²⁷ Case C-150/05, para. 59.

⁸²⁸ See, however, Case C-398/12, *Procura della Repubblica v M*, not yet published, para. 30, with reference to Case C-469/03, *Miraglia* [2005], para. 30: 'Now, a judicial decision, such as that at issue in the case in the main proceedings, taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA.'

⁸²⁹ Case C-467/04, para. 24, referring to Case C-150/05, para. 56.

⁸³⁰ Case C-467/04, paras. 27 and 28.

criminal justice,⁸³¹ to arrive at the conclusion that the *ne bis in idem* principle does apply in case of a final decision acquitting a person because prosecution of the offence is time barred.

The Court did not follow the Opinion of Advocate General Sharpston.⁸³² Sharpston held that the *ne bis in idem* principle of Article 54 CISA should be applicable in case previous criminal proceedings have involved any significant consideration of the merits of the case.⁸³³ She distinguished general trust in the way criminal proceedings are conducted in other Member States from ‘trusting a decision that no substantive assessment of the offence can take place at all because the prosecution is time barred’. She described the latter as ‘tantamount to de facto harmonisation around the lowest common denominator’.⁸³⁴

After this, Advocate General Sharpston referred to the *exceptions* to the principle of mutual recognition in the EC treaty and under the ‘rule of reason’. Consequently she mentioned that, for its ‘full application’, the ‘qualifications or features of the persons, goods or services seeking to rely upon the free movement provisions be *comparable* to those required in the host or importer state.’ [emphasis added]⁸³⁵ Sharpston wrote that these ‘exceptions’ and ‘comparability’ requirements would *a fortiori* have to be applicable in the field of criminal law, which is less integrated in EC law and ‘codifies the moral and social values of national societies’.⁸³⁶ Sharpston expressed the view that society should have one full chance to settle its accounts with the individual.⁸³⁷ She disagrees with the view that the time limits set by one CISA Party should bar the other CISA Parties from commencing further prosecution procedures, since the Union is not a single society, but a collection of societies.⁸³⁸ According to Sharpston, mutual trust on its own was an insufficient basis for attaining the objectives of Title VI EU. In a situation where national laws differ substantially on matters such as time bars, only a degree of harmonisation could ensure free movement.⁸³⁹

For her point that Article 54 CISA should not apply when the merits of the case have not been assessed, Sharpston also found support in the earlier case law of the European Court of Justice, in its decision in *Miraglia*⁸⁴⁰ in particular. Mr. Miraglia was arrested in December 2000 and held in pre-trial detention in the Netherlands for the exportation of narcotics from the Netherlands to Italy. He was released awaiting trial in January 2001, against which the public prosecutor appealed unsuccessfully. In the meantime the Italian authorities had also started an investigation against Mr. Miraglia regarding the same criminal acts. The Dutch

⁸³¹ Case C-467/04, paras. 29 and 30.

⁸³² Opinion of AG Sharpston in Case C-467/04, *Gasparini*.

⁸³³ Opinion of AG Sharpston in Case C-467/04, *Gasparini*, paras. 94-96.

⁸³⁴ Conclusion of AG Sharpston in Case C-467/04, para. 109.

⁸³⁵ Conclusion of AG Sharpston in Case C-467/04, para. 110.

⁸³⁶ Conclusion of AG Sharpston in Case C-467/04, para. 111.

⁸³⁷ Opinion of AG Sharpston in Case C-467/04, *Gasparini*, paras. 74 and 75.

⁸³⁸ Conclusion of AG Sharpston in Case C-467/04, paras. 111 and 112.

⁸³⁹ Conclusion of AG Sharpston in Case C-467/04, para. 114.

⁸⁴⁰ Conclusion of AG Sharpston in Case C-467/04, paras. 62 and 97, referring Case C-469/03, *Miraglia* [2005] ECR 2009, para. 34.

public prosecutor therefore decided not to bring proceedings against him, upon which the Dutch court declared the case closed.

After this, in February 2001 Mr. Miraglia was arrested in Bologna, Italy. In January 2002 he was released again awaiting trial. A later request by the Italian public prosecutor for legal assistance was refused by the public prosecutor's office of the district court of Amsterdam in November 2002, due to the fact that the 2001 decision of the Dutch public prosecutor not to bring proceedings against Mr. Miraglia had a barring effect on further prosecution in the Netherlands.⁸⁴¹ The Netherlands had entered a reservation to Article 2(b) the 1959 Council of Europe Convention on Mutual Assistance allowing it to refuse cooperation if the prosecution in the other State would be incompatible with the *ne bis in idem* principle.⁸⁴²

The Italian court was then faced with a situation in which it was unsure whether the *ne bis in idem* principle applied. It therefore decided to ask the Court whether Article 54 CISA also applied when 'a decision from a court in the first State consists of discontinuing the prosecution without any adjudication on the merits of the case and on the sole ground that proceedings have already been initiated in another State'.

The Court held that:

A judicial decision, such as that at issue in the case in the main proceedings, taken after the public prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been initiated in another Member State against the same defendant and in respect of the same acts, but where no determination has been made as to the merits of the case, cannot constitute a decision finally disposing of the case against that person within the meaning of Article 54 of the CISA.⁸⁴³

The Court weighed the 'free movement of persons' argument but then stated that applying Article 54 to a situation such as the one at hand in the case of Miraglia would effectively make it impossible to penalise the conduct with which the defendant was charged.⁸⁴⁴ Prosecution would be barred by a closing of prosecution proceedings in another Member State, even if it was the fact that prosecution proceedings were started in the second Member State that was the reason for the discontinuance of the prosecution in the first Member State. The Court held that this would clearly run counter to the objectives of the Area of Freedom, Security and Justice.⁸⁴⁵

Another example of a case where the Court had a nuanced position on the absolute nature of a decision by the authorities of another Member State barring further prosecution is the case of Mr. Turansky.⁸⁴⁶ He was suspected of having robbed and seriously injured a person in Vienna. After the Austrian authorities

⁸⁴¹ Arts. 36 and 255 Dutch Criminal Code read in conjunction with Art. 552-I of the Dutch Code of Criminal Procedure.

⁸⁴² Strasbourg, 1959, E.T.S. No. 30.

⁸⁴³ Case C-469/03, para. 30.

⁸⁴⁴ Case C-469/03, paras. 32 and 33.

⁸⁴⁵ Case C-469/03, para. 34.

⁸⁴⁶ Case C-491/07, *Turansky* [2008] ECR I11039.

found out that Mr. Turansky had returned to his native Slovakia, they asked the Slovak authorities to initiate an investigation. The Slovak police investigated the matter but decided to suspend the investigation after hearing Mr. Turansky. The Austrian Court wondered whether this decision was to be interpreted as a final decision in accordance with Article 54 CISA.

The Court repeated what it had stated in *Van Straaten*, that Article 54 CISA applies to a decision of the judicial authorities of a Contracting Party by which the accused is finally acquitted due to a lack of evidence.⁸⁴⁷ It then, however, distinguished the situation in *Turansky*:

A decision which does not, under the law of the first Contracting State which instituted criminal proceedings against a person, definitively bar further prosecution at national level cannot, in principle, constitute a procedural obstacle to the opening or continuation of criminal proceedings in respect of the same acts against that person in another Contracting State.⁸⁴⁸

Since the decision of the Slovak police to suspend the investigation did not bar further prosecution,⁸⁴⁹ it was not to be seen as a final decision in accordance with Article 54 CISA.⁸⁵⁰

The Court motivated its decision further by underlining that if a decision to suspend criminal proceedings would have been interpreted as a final decision in accordance with Article 54, it would have the effect of precluding any possibility of prosecuting and perhaps punishing a person on account of his unlawful conduct in another Contracting State in which more evidence may be available.⁸⁵¹ It even strengthened its argument by pointing out that barring further prosecution based on a suspension of an investigation in the first Contracting Party would even 'be contrary to the very purpose of the provisions of Title VI of the Treaty on European Union as stated in the fourth indent of the first paragraph of Article 2 thereof, that is, to take 'appropriate measures with respect to ... prevention and combating of crime while developing the Union as an Area of Freedom, Security and Justice in which the free movement of persons is assured'.⁸⁵² Article 54 was intended to protect a person from being prosecuted for the same act once he had been found guilty and has served his sentence or, where applicable, has been acquitted by a final judgment in a Contracting State. It was, however, not intended to protect a suspect from having to submit to possible subsequent investigations, in respect of the same acts, in several Contracting States.⁸⁵³

The decision concerning Mr. Mantello⁸⁵⁴ was already touched upon in the section on the European arrest warrant. It is recalled that Mr. Mantello was con-

⁸⁴⁷ Case C-491/07, para. 33.

⁸⁴⁸ Case C-491/07, para. 36.

⁸⁴⁹ Case C-491/07, para. 39.

⁸⁵⁰ Case C-491/07, para. 40.

⁸⁵¹ Case C-491/07, para. 42.

⁸⁵² Case C-491/07, para. 43.

⁸⁵³ Case C-491/07, para. 44.

⁸⁵⁴ Case C-261/09, *Mantello* [2010] ECR I11477.

victed in 2005 by the Catania District Court for possession of drugs and in 2008 he was arrested in Germany based on a European arrest warrant based on charges of drug trafficking, an act the Italian prosecutors were aware of but had not prosecuted him for in 2005.

The case therefore seemed to revolve around the question whether the possession of drugs conviction from 2005 and the drug trafficking charges made in 2008 concerned the same acts. In the proceedings before the Court of Justice, the Italian Government claimed that the assessment of the issuing judicial authority that the *ne bis in idem* principle does not apply is binding for the executing judicial authority. The Spanish government claimed that, in accordance with paragraphs 57 to 59 of the *Wolzenburg* judgment, the *ne bis in idem* exception contained in Article 3(2) FD EAW should be interpreted strictly.

These views were rebutted by Advocate General Bot in his opinion. According to him, Article 3(2) is an expression of a fundamental right.⁸⁵⁵ He furthermore pointed out that the FD EAW had foreseen a recognition procedure, with grounds for non-execution and furthermore that the EU legislature had expressly intended for a violation of the *ne bis in idem* principle to be a ground for non-execution and for the observance of this principle not solely to be a matter for the issuing judicial authority but also for the executing judicial authority:

'77. Accordingly, although the system of the Framework Decision is based on the principle of mutual recognition, the European Union legislature ('EU legislature') did not wish to treat a European arrest warrant in the same way as a national arrest warrant, the execution of which falls directly to the police forces of the executing Member State. It provided that the European arrest warrant was based on cooperation between the judicial authorities of the Member States concerned and that the surrender of a requested person was to result in a decision by the executing judicial authority, which could refuse surrender on one of the grounds listed in the Framework Decision.

78. In making the ground set out in Article 3(2) of the Framework Decision a ground for mandatory non-execution, although the issuing judicial authority is supposed to have itself verified that the acts attributed to the person concerned have not already been judged, the EU legislature expressly intended, first, that the *ne bis in idem* principle should constitute not only an obstacle to a second trial of the person concerned, but also an obstacle to his surrender and, secondly, that observance of that principle should not be left solely to the discretion of the issuing judicial authority, but should also be guaranteed by the executing judicial authority.'

The Court held that since the German Court, in its reference for a preliminary ruling, had already distinguished the material acts underlying the conviction in 2005 from those for which the European arrest warrant was sent in 2008, the

⁸⁵⁵ Opinion of AG Bot in Case C-261/09, *Mantello*, para. 76, reinforced by para. 87: 'It is settled case-law that the Member States, when implementing EU law, must do so in a manner consistent with fundamental rights. That case-law is not limited to measures adopted in the context of the EC Treaty. It applies to all the measures taken in the context of the European Union, since, by virtue of Article 6 EU, the Union is founded on the principle of the rule of law and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States.'

questions raised actually concerned whether Mr. Mantello had been finally judged and not whether he was going to be prosecuted for the same acts.

The Court thereby focused on the question whether the German Court was allowed to oppose the execution of the arrest warrant in the application of the *ne bis in idem* principle, since, at the time of the investigation which led to Mr. Mantello's conviction for the possession of drugs, the Italian investigators already had enough evidence to prosecute him for drug trafficking.⁸⁵⁶

The Court then first listed its previous case law on what constitutes a final decision in accordance with Article 54 CISA and then directly referred to its decision in *Turansky*. The Court stated that a decision which, under the law of the Member State which instituted criminal proceedings against a person, does not definitively bar further prosecution at national level in respect of certain acts cannot, in principle, constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person in one of the Member States of the European Union.

The Court did not follow Advocate General Bot on the point of allowing discretion to the executing judicial authority to test whether the *ne bis in idem* principle had been violated. Since, in response to a request for information made by the German judicial authority, the Italian judicial authority had expressly stated and explained that its earlier judgment did not cover the acts referred to in the arrest warrant issued by it and therefore did not preclude the criminal proceedings referred to in that arrest warrant, the German executing judicial authority could not refuse to execute the European arrest warrant based on a violation of the *ne bis in idem* principle.⁸⁵⁷

The last case to be mentioned is that of *Procura della Repubblica v M*.⁸⁵⁸ This case concerned an Italian citizen residing in Belgium who was accused by his daughter-in-law (Q) of sexually abusing his granddaughter. The Court of First Instance of Mons, however, found that there was no ground to refer the case to a trial court because of insufficient evidence. In accordance with Belgian law, a finding of insufficient evidence or *non-lieu* terminates criminal proceedings, unless there is new evidence.

The finding of *non-lieu* was upheld by the Court of Appeal and a further appeal to the *Cour de cassation* was dismissed on 2 December 2009. The daughter-in-law (Q) had, however, also complained to the Italian police, which resulted in a hearing by the *Tribunale di Fermo* on 9 December 2009. At this hearing, M invoked the *ne bis in idem* principle based on the decision of the *Cour de cassation*. This led the Italian court to refer the question to the CJEU whether a finding of *non-lieu* by one Member State would prevent further prosecution in another Member State.⁸⁵⁹

⁸⁵⁶ Case C-261/09, paras. 42-44.

⁸⁵⁷ Case C-261/09, para. 50.

⁸⁵⁸ Case C-398/12, *Procura della Repubblica v M*, not yet published.

⁸⁵⁹ Case C-398/12, *Procura della Repubblica v M*, not yet published, para. 25: 'Does a final judgment of "non-lieu" that terminates criminal proceedings after an extensive investigation but which permits the proceedings to be reopened in the light of new evidence, given by [a court of] a Member State of the European Union and a party to the Convention Implementing the →

In replying to this question, the Court of Justice repeated its findings from its prior case law, revisiting *Gasparini*, by unequivocally stating that a consideration of the merits of the case is a condition for the final decision criterion to be met. It concluded that a finding of *non-lieu* was based on such a consideration:

It is therefore necessary to state that an order making a finding of ‘non-lieu’ at the end of an investigation during which various items of evidence were collected and examined must be considered to have been the subject of a determination as to the merits, within the meaning of *Miraglia* EU: C:2005:156, in so far as it is a definitive decision on the inadequacy of that evidence and excludes any possibility that the case might be reopened on the basis of the same body of evidence.⁸⁶⁰

The Court also concluded that such a finding also definitely barred further prosecution in accordance with its previous judgments on the matter.⁸⁶¹ Then the Court recalled that Article 54 CISA needs to be interpreted in the light of Article 50 of the EU Charter and hence the relevant ECtHR case law on the application of Article 4 of protocol No. 7 to the ECHR.⁸⁶² Based on a discussion of the this case law, in which the ECtHR held that ‘extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion’,⁸⁶³ the Court concluded that, while ‘the possibility of reopening the criminal investigation if new facts and/or evidence become available after a finding of *non-lieu* is not to be seen ‘as extraordinary remedy’, it does ‘involve the exceptional bringing of separate proceedings based on different evidence, rather than the mere continuation of proceedings which have already been closed’.⁸⁶⁴ A decision of *non-lieu* is therefore to be seen as a final decision preventing further prosecution by another Member State.⁸⁶⁵ Furthermore, the Court held that, to ensure that ‘new evidence’ relied on to justify the reopening of the proceedings is indeed new, any

Schengen Agreement (CISA), preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Contracting State?’

⁸⁶⁰ Case C-398/12, *Procura della Repubblica v M*, not yet published, para. 30; Peers 2014a: ‘Also the Court made a general statement that only a ruling on the merits count as a final judgment. This sits oddly with its judgment in *Gasparini*, where it rules that a proceeding which was time barred in one Member State counted as a final judgment. So that case must be seen as an anomaly.’

⁸⁶¹ Case C-398/12, *Procura della Repubblica v M*, not yet published, paras. 31-34.

⁸⁶² Case C-398/12, *Procura della Repubblica v M*, not yet published, paras. 35-37.

⁸⁶³ Case C-398/12, *Procura della Repubblica v M*, not yet published, para. 39: ‘In this respect, it was held in the judgment of the European Court of Human Rights (‘the ECtHR’) in *Sergey Zolotukhin v Russia*, No. 14939/03, § 83, ECHR 2009, that Article 4 of Protocol No. 7 to the ECHR ‘becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.’ On the other hand, extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion. Although these remedies represent a continuation of the first set of proceedings, the ‘final’ nature of the decision does not depend on their being used (*Sergey Zolotukhin v Russia*, No. 14939/03, § 108, ECHR 2009).

⁸⁶⁴ Case C-398/12, *Procura della Repubblica v M*, not yet published, paras. 35-37.

⁸⁶⁵ Case C-398/12, *Procura della Repubblica v M*, not yet published, paras. 35-37.

new proceedings against the same person for the same acts can only be brought State in which the order of *non-lieu* was made.⁸⁶⁶

The Court followed the opinion of Advocate General Sharpston,⁸⁶⁷ who made a number of additional points further emphasising the individual rights and citizenship perspective. In particular in paragraph 45 of her opinion, Advocate General Sharpston stated that a person should not lose the protection he enjoys under national criminal law through exercising his free movement rights:

'45. A person should not lose the protection that he enjoys under national criminal law through exercising his free movement rights. For that reason, the effect of the Belgian Cour de Cassation's decision of 2 December 2009 must be to preclude M from being tried in Italy after that date.'

The case of M is pretty striking because it challenges us (the European society as a whole) to uphold the presumption of innocence even if an individual is suspected of a horrendous crime (child abuse). At the same time, the fact that the daughter-in-law, as the mother of the alleged victim, used both the Belgian and Italian criminal justice system signifies that in this case there was a very real situation of two citizens standing across each from each other making full use of the possibilities the EU offers as a single legal area. In other words, individuals have definitely arrived on the scene of European criminal law.

This links in with another point made by Sharpston in paragraph 51 of her opinion where she pointed out the link with the lack of the harmonisation of criminal jurisdiction rules, stating that the application of the *ne bis in idem* principle is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria:

'51. There is clearly an underlying issue, worthy of serious consideration, about the 'race to prosecute' and possible conflicts of jurisdiction in criminal matters. At present, there are no agreed EU-wide rules on the allocation of criminal jurisdiction. The application of the *ne bis in idem* principle resolves the problem in a limited, sometimes an arbitrary, way. It is not a satisfactory substitute for action to resolve such conflicts according to an agreed set of criteria.'

Comment

The Court's case law as regards the 'final decision' aspect of the *ne bis in idem* principle shows a clear tension between the proposition that free movement needs to be ensured within a single legal area and the security interests of the State and society's interest as a whole to see that alleged perpetrators are brought to justice.

This tension is most visible in *Gasparini* where it is recalled that Advocate General Sharpston submitted that recognition requires a certain level of 'comparability' based on which she argued that in case of a 'final decision' a certain 'consideration of the merits' would be required for 'recognition'. Alternatively, Sharpston argued for a rule of reason to balance free movement with the public interest,

⁸⁶⁶ Case C-398/12, *Procura della Repubblica v M*, not yet published, paras. 35-37.

⁸⁶⁷ Opinion of AG Sharpston in Case C-398/12, *Procura della Repubblica v M*, not yet published.

especially in the area of criminal law, which according to her is less integrated than EC law and ‘codifies the moral and social values of national societies’.

Although I disagree with the assertion that in the area of criminal law the EU is/needs to be less integrated, I concur with the reasoning of Sharpston with regard to the need for a ‘rule of reason’ allowing Member States the opportunity to justify the need for a second prosecution. Furthermore, in more sensitive areas of the internal market, where Member States have a different regulatory approach to public policy, health and safety, I found that the Court will not insist on free movement, especially in cases related to fundamental rights, where a different logic applies in accordance with the EU Charter and notably the ‘limitations’ allowed in accordance with its Article 52(1). Again one needs to distinguish between mutual recognition (of the final decision) and free movement of the individual, since the final decision taken in one contracting State bars further prosecution in another Member State. In this case, it is not even clear what is to be recognised as the prosecution failed due to a time bar.⁸⁶⁸ In *Gasparini* it would have been wiser to follow the more balanced approach of Advocate General Sharpston and allow for reasonable exceptions to free movement.

In spite of the Court’s rejection of Advocate General Sharpston’s reasoning, the Court has in later cases nuanced its approach to ensure that there is a least one opportunity to prosecute a person. In *Turansky* it was determined that a decision to suspend an investigation does not bar further prosecution in another State. In *Mantello* it was then decided that the decision of the public prosecutor not to prosecute for certain offences, even though the material evidence was already available, also does not bar further prosecution for those offences. The problem with this case law is that it lacks conceptual clarity. Why should a procedural rule bar further prosecution and a decision on the merits by a prosecutor does not? Particularly, the Court’s reference to the aims of the Area of Freedom, Security and Justice in *Turansky* comes across as arbitrary given the prior decision in *Gasparini*.

It is to be welcomed that the Court implicitly revisited *Gasparini* in *Procura della Repubblica v M* and relied on the full consequences of the application of the EU Charter by looking at the case law of the ECtHR. However, the risk of that approach is losing sight of the particular context of the European Union in which free movement needs to be guaranteed: a point which was made by Advocate General Sharpston in her opinion together with the need for harmonisation of EU criminal jurisdiction rules.

⁸⁶⁸ Cf. Klip 2012, p. 255 and 266: ‘It is submitted that the *Gasparini* case is conceptually wrong, because a decision that the prosecution is time barred does not deal with an assessment of the merits of the case. In addition, *Gasparini* seems to require the recognition of a decision from a state that has no (longer) jurisdiction over the matter. It is difficult to conceive how a state that has no jurisdiction to deal with the matter can determine that other states that do have jurisdiction may no longer use it.’

6.2.2. 'Same Acts'

In its case law on the interpretation of the words 'same acts' the Court has reached the conclusion that the only relevant criterion for determining the 'same acts' was the identity of the 'material acts'. This becomes apparent from its decisions in *Van Esbroeck*,⁸⁶⁹ *Van Straaten*,⁸⁷⁰ *Gasparini*,⁸⁷¹ and *Kraaijenbrink*.⁸⁷²

Van Esbroeck

In 2000 Mr. Van Esbroeck was convicted to five years imprisonment in Norway for illegally importing drugs into Norway on 1 June 1999. In February 2002 he was provisionally released and sent back to Belgium. He was, however, convicted again by a Belgian court for exporting (those) drugs on 31 May 1999. On appeal in the Belgian Court of Cassation, Mr. Van Esbroeck claimed infringement of the *ne bis in idem* rule of Article 54 CISA. The Court of Cassation was no longer sure whether 'same acts' in Article 54 referred to the legal definition of the offences (in this case there would be no problem in prosecuting Mr. Van Esbroeck for exporting drugs) or the same material acts (in this case further prosecution would be barred).

One of the questions the Court of Cassation therefore decided to refer to the Court of Justice was whether Article 54 CISA should be

construed as meaning that offences of possession for the purposes of export and import in respect of the same narcotic drugs and psychotropic substances of any kind, including cannabis, and which are prosecuted as exports and imports respectively in different countries which have signed the CISA, or where the Schengen *acquis* is implemented and applied, are deemed to be "the same acts" for the purposes of Article 54.

After mentioning the *Gözütok* argument of no need for harmonisation/necessity for mutual trust,⁸⁷³ the Court arrived at the conclusion that the legal qualification of the acts or the protected legal interest cannot be used for qualifying 'idem' since they vary from one State to the other.⁸⁷⁴ The Court added that 'no one should be prosecuted on account of his having exercised his right of free movement'⁸⁷⁵ and arrived at the conclusion that 'the only relevant criterion for the application of Article 54 CISA is identity of the material acts, understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together'. The definitive assessment in that respect, however, is left to the national court.⁸⁷⁶

Interestingly, the Court mentions the fact that there is no harmonisation as a reason for not accepting the legal classification or protected legal interest to reject

⁸⁶⁹ Case C-436/04, *Van Esbroeck* [2006] ECR 2333.

⁸⁷⁰ Case C-150/05, *Van Straaten* [2006] ECR 9327.

⁸⁷¹ Case C-467/04, *Gasparini* [2006] ECR 9199.

⁸⁷² Case C-367/05, *Kraaijenbrink* [2007] ECR 6619.

⁸⁷³ Case C-436/04, paras. 29 and 30.

⁸⁷⁴ Case C-436/04, paras. 29, 30, and 35.

⁸⁷⁵ Case C-436/04, para. 33, referring to Case C-469/03, para. 32 and joined Cases C-187/01 and C-385/01, para. 38.

⁸⁷⁶ Case C-436/04, para. 38.

these as criteria for determining what constitutes ‘same acts’ under article 54 CISA. The reason it mentions this is that applying those criteria would ‘create as many barriers to freedom of movement within the Schengen territory as there are penal systems in the Contracting States’.⁸⁷⁷

Comment

The case may be seen as a logical continuation of its decision in *Gözütok*. The only way in which free movement within a single legal area can be achieved is by determining the ‘same acts’ as the identity of the ‘material acts’, without exception. This approach has been criticised by Keijzer who wrote that ‘by interpreting “idem” as “material act” prosecution for a criminal offence may be barred even if the legal interest protected by the offence description varies widely from the one for which the first prosecution was entered’.⁸⁷⁸ He pointed out that the Court’s approach was out of line with the Resolutions adopted by the International Association of Penal Law at its 2004 Beijing Conference.⁸⁷⁹ Also, here the Court could have allowed Member States a limited opportunity to justify a second prosecution based on a ‘different regulatory approach’, to accommodate the situation in which the second prosecution serves a different legal interest.⁸⁸⁰ On the other hand, one might argue, however, that once a prosecution has been confirmed against a person for a certain set of material acts within the context of the Union as a single legal area, it is for the prosecutors to coordinate, not for the individuals to face a second prosecution on account of their failure to do so. We have to look at the Court’s further case law to see to which extent it nuanced its position.

⁸⁷⁷ Case C-436/04, para. 35.

⁸⁷⁸ Keijzer, who, *inter alia*, remarks that by interpreting ‘idem’ as ‘material act’ prosecution for a criminal offence may be barred even if the legal interest protected by the offence description varies widely from the one for which the first prosecution was entered (Keijzer 2007: 4. *hetzelfde feit? De term ‘materiële feiten’ lijkt te miskennen dat veel gedragingen in wezen bestaan in schending van een rechtsnorm*).

⁸⁷⁹ Keijzer 2007 (6. AIDP. *Doordat de conclusie van de advocaat-generaal er geen melding van maakt blijkt niet of het HvJ kennis heeft genomen van de resoluties die de Association Internationale de Droit Pénal (AIDP) met betrekking tot transnationaal ne bis in idem heeft aangenomen tijdens haar congres in Beijing in 2004. Ook met die resoluties wordt tussen de beide uitersten (uitsluitend letten op de juridische kwalificatie of deze geheel uitsluiten) een tussenstandpunt ingenomen*); Resolutions of the Congresses of the International Association of Penal Law, <<http://www.penal.org/sites/default/files/files/RICPL.pdf>>, p. 168: ‘3. The ‘idem’, in terms of the object of the concurrent proceedings should be identified with regard to substantially the same facts, provided that the first court or authority had the legal competence to examine and decide on all penal aspects of them.’ Further on p. 169: ‘2.2. If substantially the same facts constitute additional serious offences according to the second law applicable pursuant to Section 1.3. which offences are not punishable and, thus, have not been dealt with in the first proceeding, a new proceeding may be admissible only if, according to the principle of deduction, the first sentence, in so far as fully or partly enforced, is accounted for.’

⁸⁸⁰ Schomburg 2012: ‘As a consequence of this case-law there is in particular a natural and foreseeable risk of a violation of the ne bis in idem principle when the case deals with any kind of cross-border trafficking with the involvement of a plurality of European Union/ Schengen-states.’

Van Straaten

In the case of Mr. Van Straaten, the Court had to stretch the concept of ‘same acts’ a bit further since the quantity of drugs he was convicted of having in his possession by the Dutch court (one kilogramme) differed from the quantity of drugs he was convicted of exporting and having in his possession by the Italian court (five kilogrammes).

The Court, however, confirmed its position that the only relevant criterion for determining ‘idem’ was the identity of the ‘material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together’.⁸⁸¹ It then concluded that ‘in the case of offences relating to narcotic drugs, the quantities of the drug that are at issue in the two Contracting States concerned or the persons alleged to have been party to the acts in the two States are not required to be identical’.⁸⁸² ‘Punishable acts consisting of exporting and of importing the same narcotic drugs and which are prosecuted in different Contracting States party to that Convention are, in principle, to be regarded as “the same acts” for the purposes of Article 54 of the Convention.’ The Court, however, also repeated that the definitive assessment in that respect is left to the national court.⁸⁸³

Gasparini

The ‘inextricable link’ criterion received further clarification in *Gasparini*. The provincial court of Málaga also wanted to know whether the sale of the goods in one Member State following their importation into another the Member State could be regarded as independent conduct which may therefore be punished or, instead, as conduct forming an integral part of the importation. The Court of Justice held that this conduct might form part of the ‘same act’ under Article 54 CISA, but that it was up to the national court to assess this in accordance with the criteria given in *Van Esbroek*; ‘a set of facts which are inextricably linked together in time, in space and by their subject-matter’.⁸⁸⁴

Kraaijenbrink

The case of Mrs. Kraaijenbrink⁸⁸⁵ then shed light on the relevance of the intentions of the suspect for the determination of whether one could establish ‘a set of facts which are inextricably linked together in time, in space and by their subject-matter’. In 1998 Mrs. Kraaijenbrink was sentenced in the Netherlands for receiving and handling the proceeds of drug trafficking. In 2001 she was sentenced again in Belgium for exchanging the proceeds of drug trafficking operations in the Netherlands. Mrs. Kraaijenbrink appealed this decision claiming the second conviction concerned the same acts in accordance with Article 54 CISA since there was a ‘common inten-

⁸⁸¹ Case C-150/05, *Van Straaten* [2006] ECR 9327, paras. 41-48, referring to Case C-436/04, paras. 27-36.

⁸⁸² Case C-150/05, para. 49.

⁸⁸³ Case C-150/05, paras. 52 and 53.

⁸⁸⁴ Case C-467/04, paras. 54-57.

⁸⁸⁵ Case C-367/05, *Kraaijenbrink* [2007] ECR 6619.

tion' underlying the unlawful conduct in the Netherlands and the money laundering in Belgium.

The Court held that an 'idem' situation could only be established 'where the court dealing with the second criminal prosecution finds that the material acts, by being linked in time, in space and by their subject matter, make up an inseparable whole'.⁸⁸⁶ The mere fact that the alleged perpetrator of those acts acted with the same criminal intention does not suffice to indicate that there is a set of concrete circumstances which are inextricably linked together covered by the notion of 'same acts'.⁸⁸⁷ In cases such as that of Mrs. Kraaijenbrink, an objective link would have to be established between the sums of money in the two sets of proceedings.⁸⁸⁸

6.2.3. 'Enforcement Condition'

In accordance with Article 54 CISA, if a penalty has been imposed, the condition is that it 'has been enforced, is being enforced or can no longer be enforced'. This is a typical requirement applicable to cross-border situations, as within the same Member State it would logically not occur. Hence Article 50 of the EU Charter and Article 4 of protocol No. 7 to the ECHR do not require an enforcement condition.

The question of when a penalty may be deemed to have been imposed came up in *Spasic*.⁸⁸⁹ The case concerned an Italian criminal conviction of Mr. Spasic, a Serbian national, for fraud, which consisted of a custodial penalty of one year and a fine of 800 Euro.⁸⁹⁰ German authorities were also in the process of prosecuting Mr. Spasic for the same offence (committed against a German national)⁸⁹¹ and obtained his surrender from Austria where he had been serving a sentence for a related crime.⁸⁹² Mr. Spasic did not serve the Italian sentence, but he did pay the fine (by bank transfer). He consequently sought to rely on the *ne bis in idem* principle contained in Article 50 EU Charter, claiming that the Italian sentence prevented further prosecution by Germany. He also claimed that the restrictive provisions of Article 54 CISA (the enforcement condition) could not limit the scope of Article 50 EU Charter and that, since he had paid the fine, he should be released.⁸⁹³

The Higher Regional Court of Nuremberg decided to refer the following questions on the interpretation of Article 50 EU Charter and 54 CISA to the Court of Justice,

1. Is Article 54 [CISA] compatible with Article 50 of the [Charter], in so far as it subjects the application of the *ne bis in idem* principle to the condition that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State?

⁸⁸⁶ Case C-367/05, para. 28.

⁸⁸⁷ Case C-367/05, para. 29.

⁸⁸⁸ Case C-367/05, para. 31.

⁸⁸⁹ Case C-129/14, *Spasic*, not yet published.

⁸⁹⁰ Case C-129/14, para. 32.

⁸⁹¹ Case C-129/14, para. 29.

⁸⁹² Case C-129/14, paras. 30 and 35.

⁸⁹³ Case C-129/14, paras. 36 and 37.

2. Is the abovementioned condition, laid down in Article 54 [CISA], also satisfied if only one part (here: a fine) of two independent parts of the outstanding penalty imposed in the sentencing State (here: a custodial sentence and a fine) has been enforced?⁸⁹⁴

In reply to the first question, the Court held that the enforcement condition is a limitation of the *ne bis in idem* principle which is compatible with Article 52(1) EU Charter.⁸⁹⁵ It accepted that the enforcement condition respected the essence of Article 50 as it did not call into question the application of the *ne bis in idem* principle as such, but it was aimed at avoiding a situation in which persons 'definitively convicted and sentenced in one Contracting State can no longer be prosecuted for the same acts in another Contracting State and therefore ultimately remains unpunished if the first State did not execute the sentence imposed.'⁸⁹⁶ The Court furthermore deemed the enforcement condition to be a proportionate limitation aimed at ensuring a high level of security within the European Union.⁸⁹⁷

In arriving at this conclusion, the Court went through the current judicial cooperation measures and their ability to achieve a high level of security, including the avoidance of a situation in which persons finally convicted in one Member State would go unpunished. The Court referred to the Framework Decision on the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings,⁸⁹⁸ which may lead to an EAW being issued for the execution of the sentence imposed, for instance.⁸⁹⁹ It, however, went on to state that the use of EU judicial cooperation instruments is 'subject to various conditions and depends, in the end, on a decision of the Member State in which the court that delivered a decision on a definitive sentence is located, since that Member State is not obliged under EU law to ensure the effective execution of the penalties arising from that sentence'. Hence it concluded that

the options made available to that Member State by those Framework decisions cannot ensure that, in the area of freedom, security and justice, persons definitely convicted and sentenced in the European Union will not enjoy impunity if the State which imposed the first sentence does not execute the penalties imposed.⁹⁰⁰

Then the Court continued pointing out that Framework Decision on the Transfer of Prisoners is aimed at achieving social rehabilitation not at preventing the impunity of persons definitively convicted and sentenced in the European Union and it is not capable of ensuring the full realisation of that aim.⁹⁰¹

In reply to the second question the Court considered that the payment of the fine was insufficient to fulfil the condition that the penalty has been enforced. In this

⁸⁹⁴ Case C-129/14, para. 41.

⁸⁹⁵ Case C-129/14, paras. 54-57.

⁸⁹⁶ Case C-129/14, para. 58.

⁸⁹⁷ Case C-129/14, paras. 60-74.

⁸⁹⁸ Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009.

⁸⁹⁹ Case C-129/14, paras. 66 and 67.

⁹⁰⁰ Case C-129/14, para. 68.

⁹⁰¹ Case C-129/14, para. 70.

case, two principle penalties had been imposed, one of which had not been enforced.⁹⁰² However, the Court accepted that it would not be proportionate to bring a second set of proceedings in Germany if Italy wanted to enforce its sentence.⁹⁰³

Comment

The reasoning of the Court of Justice in arriving at the conclusion that the enforcement condition is still acceptable is based on conclusion that current judicial cooperation instruments are insufficiently capable of achieving the aim of preventing impunity within the area of freedom, security and justice. Parallel criminal prosecutions remain possible due to poor implementation of the relevant framework decision as well as their weak provisions on the prevention and settlement of conflicts of exercise of criminal jurisdiction.⁹⁰⁴

There is a stark contrast between the ruling of the Court in *Spasic* and the opinion of Advocate General Sharpston in *Procura della Repubblica v M*. In Advocate General Sharpston's opinion to the M case, she stressed that a person should not lose the protection s/he enjoys under national criminal law through exercising his free movement rights and stressed the need for binding criminal jurisdiction rules. In *Spasic*, however, the lack of perceived lack of effective judicial cooperation, for which Member States are responsible due to their lack of ambition, implementation and use in practice plays out to the detriment of the individual that made use of his or her free movement rights.⁹⁰⁵ Instead of reinforcing free movement within a single legal area, the Court insists on a multiplication of prosecutions by Member States.

6.3. Conclusion

When reviewing the Court's case law regarding *ne bis in idem* principle, it is immediately clear that there is a preference for a teleological approach to interpreting the CISA's provisions. The intentions of the Schengen parties are no longer relevant for the Court in interpreting the provisions of the CISA, since those intentions predate the incorporation of Schengen in the EU and the adoption of the Treaty goal of maintaining and developing the Union as an 'Area of Freedom, Security and Justice'. In the absence of harmonisation in which other norms could have been developed, the Court attaches an expanding amount of consequences to the principle of *ne bis in idem* based on the aims of this single legal area in which the free movement

⁹⁰² Case C-129/14, para. 82.

⁹⁰³ Case C-129/14, para. 71: 'However, in the application *in concreto* of the execution condition laid down in Article 54 SCIA in a given case, the national courts may – on the basis of Article 4(3) TEU and the legal instruments of European Union secondary legislation in the area of criminal law referred to by the Commission contact each other and initiate consultations in order to verify whether the Member State which imposed the first sentence really intends to execute the penalties imposed.'

⁹⁰⁴ Report from the Commission to the European Parliament and the Council on the implementation by the Member States of Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, COM (2014) 313, p. 11.

⁹⁰⁵ Cf. Wasmeier 2014, p. 540.

of persons needs to be ensured. The free movement of persons has been interpreted by the Court as meaning that no one should be prosecuted on account of his having exercised his right of free movement.

This confirms that mutual recognition is to be seen as a principle in the Area of Freedom, Security and Justice, as well, allowing comparisons with the *Cassis de Dijon* case. Outside the context of harmonisation, regarding product requirements in *Cassis*, the principle of mutual recognition was applied in such a way that it came along with a 'rule of reason' allowing Member States to maintain reasonable exceptions to free movement.

In its case law on *ne bis in idem* the Court, however, only took the 'mutual recognition' aspect, without combining it with a 'rule of reason'. This becomes clear from the case law on the interpretation of the words 'same acts', where it leaves no opportunity to take into account other aspects other than the 'material acts' in determining whether certain matters are to be viewed as the 'same acts'. However, the Court does offer an opening to national courts by giving them the broad criterion of an 'inextricable link in time, space and subject matter' between the material acts in determining whether Article 54 CISA should apply. In general on this issue, it seems better to find solutions in the direction of better cooperation between public prosecutors, including through Eurojust, instead of allowing exceptions based on differing legal interests.

As regards the 'final decision' aspect, in *Gasparini* Advocate General Sharpston submitted that recognition requires a certain level of 'comparability', citing the Court's case law in the area of the free movement of goods. Based on this, she argued that, in case of a 'final decision', a 'consideration of the merits' would be required for recognition. Alternatively Sharpston argued for a rule of reason to balance free movement with the public interest, especially in the area of criminal law, which according to her is less integrated than EC law and 'codifies the moral and social values of national societies.' The Court rejected Advocate General Sharpston's reasoning in this case but later, in *Procura della Repubblica v M*, the Court revisited its approach to ensure that there is at least one opportunity to prosecute a person. In *Turanksy* it was determined that a decision to suspend an investigation does not bar further prosecution in another State. In *Mantello* it was then decided that the decision of the public prosecutor not to prosecute for certain offences, even though the material evidence was already available, also does not bar further prosecution for those offences.

I concur with the outcome of the reasoning of Sharpston with regard to the need for a 'rule of reason' allowing Member States the opportunity to justify a second prosecution on account of the first prosecution not having made a decision on the merits of the case. However, as regards Advocate General Sharpston's reasoning, I have difficulty with stressing the need for 'comparability' as a requirement for mutual recognition. It may also come as no surprise that the Court rejected Sharpston's assertion that 'the Union is not a single society, but a collection of societies' to defend comparability requirements and exceptions, as this would be an outright rejection of the concept that the Area of Freedom, Security and Justice is a single legal area.

Based on my analysis of mutual recognition in the internal market, I came to the conclusion that there is no need for equivalence for mutual recognition to apply. If equivalence were a precondition, a system imposing a dual burden would remain in place. Rather I concluded that it is to be seen as a 'self-executing' principle. Mutual recognition is a directly applicable principle based on a construction of the aims, principles and provisions of the Treaty.

In the internal market there are, however, exceptions to free movement based on public interests recognised by the Treaty or the Court's case law. Furthermore, in more sensitive areas, where Member States have a different regulatory approach to health, public policy and fundamental rights, I found that the Court will not insist on free movement. It is to be welcomed that the Court revisited *Gasparini* in *Procura della Repubblica v M* and relied on the full consequences of the application of the EU Charter by looking at the case law of the ECtHR. However, the risk of that approach is that it may lose sight of the particular context of the European Union in which free movement needs to be guaranteed. This is a point which was made by Advocate General Sharpston in her opinion together with the need for the harmonisation of EU criminal jurisdiction rules. In the *Spasic* case, however, the lack of harmonised criminal jurisdiction rules resulted in a ruling to the detriment of the individual concerned.

Commenting on the Court's case law regarding Article 54 CISA in 2010 Van Bockel stated:

'In its case law concerning Article 54 CISA, the ECJ has mainly emphasized the provision's function of *promoting free movement* and not the more general *rationale* of the *ne bis in idem* principle such as legal certainty, the right to a fair trial, and the respect for *res iudicata*.'⁹⁰⁶

Van Bockel was right in observing in 2010 that the Court's *rationale* was mostly oriented towards free movement versus security. The fact that *ne bis in idem* also represents a fundamental right seemed to be stressed less until the recent decisions of *Procura della Repubblica v M* and *Spasic*. At the same time, if one reads the cases on the European arrest warrant and *ne bis in idem* together, it becomes clear that the Court seems to interpret mutual recognition so as to prevent the judicial authority in the second State from having too much discretion in assessing whether an exception to the free movement of judicial decisions in criminal matters applies.

In *Wolzenburg* it became clear that exceptions to mutual recognition needed to be written down as narrowly as possible, since this was good for free movement. In *Mantello* the Court demanded trust in what the authorities in the first State submit concerning the existence of a *ne bis in idem* situation. The attempt by Advocate General Bot to highlight the need for judicial discretion on the side of the second/ executing judicial authority, given that *ne bis in idem* constitutes a fundamental right was rejected.

In addition to raising the question whether compliance with fundamental rights obligations may be achieved in this way, doubts may be raised regarding the

⁹⁰⁶ Van Bockel 2010, p. 171.

legitimacy of the Court's case law on this point.⁹⁰⁷ There is a very lively political debate concerning the degree of judicial discretion to be left to the executing judicial authority in mutual recognition legislation, particularly when claims are made of fundamental rights violations. The Court now gives the impression that it is taking sides in this debate.

The Court's case law, on the 'same acts' as a 'final decision' as well as the 'enforcement condition' aspect of the *ne bis in idem* principle also shows the need for harmonisation and better cooperation between prosecutors to prevent and settle conflicts of jurisdiction.⁹⁰⁸ The legal certainty and fundamental rights interest in particular call for EU legislation, instead of relying on the Court to elaborate on such a complicated concept on a case-by-case basis. The point that mutual recognition is not an alternative to harmonisation was already made by Van der Wilt:

'At first sight the principle of mutual recognition of judicial decisions seems an appropriate trick in the prevention of conflicts, as it advocates infinite tolerance towards deviant legal opinions. But it may cover up and conceal harsh realities and lingering tensions. Mutual recognition is often presented as an alternative to full-fledged harmonisation, in view of the reluctance of states to sacrifice their sovereignty and legal opinions. However, the relationship between the two concepts is more complicated. Swart has remarked perceptively that mutual recognition probably requires ongoing harmonisation, because states may simply not be prepared to accept foreign decisions as a basis for cooperation if disparities become insurmountable.' (Swart, 2001, p. 25).⁹⁰⁹

7. Mutual Recognition in the Area of Freedom, Security and Justice

The purpose of this chapter has been to clarify the nature of mutual recognition in the Area of Freedom, Security and Justice. In Chapter 2, on the internal market, the picture was illustrated of a principle according to which effect needs to be given to factual and legal situations established in the territories of other Member States. This principle originates from the procedural ambition to create and develop the internal market and the substantive obligation to further free movement within this area in the context of the wider ambition to develop the Union as a highly competitive social market economy.

The principle of mutual recognition operates in the same environment as other principles of European law that contribute to free movement or police exceptions to free movement within the internal market, which continue to exist, also in line with the Union's wider fundamental rights obligations. Furthermore six concrete norms stemming from the application of mutual recognition in the internal market were

⁹⁰⁷ For a similar assessment see Hatzopoulos 2008.

⁹⁰⁸ Schomburg 2012, p. 320-323 suggests building on the Schengen Information System, information on criminal records, information exchange through the European judicial network, the resolution of conflicts through Eurojust or a specialised chamber of the Court of Justice and using European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972; Wasmeier 2014, p. 55 with reference to the Green Paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM (2005) 996.

⁹⁰⁹ Van der Wilt 2005.

discovered and compiled in a table, together with the exceptions to and conditions for free movement.

The approach to clarifying the nature of mutual recognition in the Area of Freedom, Security and Justice was based on the same methodology as outlined in Chapter 1. In line with this approach, the starting point for the discussion was the 1999 Tampere European Council in which the policy principle was declared and a programme of measures to implement it was announced. The 9/11 attacks on New York and Washington, however, accelerated the negotiations concerning the application of mutual recognition to extradition procedures. Furthermore, in the *Gözütok* and *Brügge* case concerning the interpretation of the CISA's provisions on *ne bis in idem*, the Court extended the principle of mutual recognition to the Area of Freedom, Security and Justice.⁹¹⁰ In line with these historical events and judicial developments, the European arrest warrants and *ne bis in idem* were selected as case studies.

Mutual recognition should not be defined as home State control

As outlined in section 3, academic comments on mutual recognition in the Area of Freedom, Security and Justice range from outright rejection based on a perceived conflict with national sovereignty and fundamental rights to an approach, which believes that mutual recognition is appropriate also in this area and ideally should apply fully. Intermediate approaches hold that mutual recognition is only possible in case the judicial decision complies with equivalent standards and with a number of exceptions or that it needs to be balanced and supported by a certain degree of harmonisation.

The problem with both the protagonist as well as the antagonist approach to the application of mutual recognition is that assumptions are being made based on the definitions proposed by the Commission, which define mutual recognition as home State control. Based on the research conducted, it was, however, concluded that in the Area of Freedom, Security and Justice, mutual recognition can also not be aligned with home State control, since the recognition and execution of judicial decisions taken in other Member States is not automatic. This conclusion could be reached despite the fact that the 'Community method' of cooperation was not applicable to this policy area until the entry into force of the Treaty of Lisbon. Prior to this, it has been the Member States that have mostly shaped this area due to their shared right of legislative initiative and a lack of co-decision by the European Parliament. The Commission and, even more so, the European Parliament have been relegated to the role of spectators. Member States have, however, been divided over approaches to mutual recognition akin to home State control, limited home State control and tacit or even overt rejection of mutual recognition on a national level. This is reflected in the drafting of the FD EAW, which on the one hand lays down mutual recognition as its basis but on the other hand still incorporates a

⁹¹⁰ Joined Cases C-187/01 and C-385/01, as discussed in section 6; for the discussion on the European arrest warrant, see section 5.

number of exceptions based on national sovereignty.⁹¹¹ Also, as regards the application of the *ne bis in idem* principle, it should be up to the judicial authorities of the host Member State to make an individual assessment whether recognition criteria have been met, where necessary seeking the guidance of the Court of Justice. For there to be a *ne bis in idem* situation, it needs to be checked whether a ‘final decision’ was taken and enforced regarding the ‘same acts’. The Court’s case law is, however, still very much under development and the exact division of labour between the authorities of the Member States concerned has not crystallised yet.⁹¹²

Mutual recognition should be seen as an obligation to be ‘other-regarding’ within a single legal area. On the one hand this leaves the exact modalities in terms of automaticity, simplification and acceleration of judicial cooperation up to political decision making on specific issues (surrender, evidence gathering etc.). On the other hand it militates against the idea that one can impose limits on it. Those limits are imposed on free movement, not on mutual recognition. In this context it is to be noted that a public policy exception may be called upon, but only subject to the control of the Court of Justice. Otherwise it would undermine the application of EU legislation in the Area of Freedom, Security and Justice and hence violate the loyalty principle.

Mutual recognition is a legal principle

Also in the Area of Freedom, Security and Justice, the definition of mutual recognition as a general principle was proposed by *Tridimas*: ‘a general proposition of law of some importance from which concrete rules derive’.⁹¹³ Also in this area the origins of mutual recognition are to be found in the procedural ambition to *become* an Area of Freedom, Security and Justice⁹¹⁴ and the substantive obligation to further free movement. Free movement in this context refers to the free movement of persons as well as judicial decisions in criminal matters. This is not only based on the specific mentioning of mutual recognition in Articles 67(3) and 82(1) TFEU as discussed in section 4.

⁹¹¹ As discussed in section 5.

⁹¹² Case C-261/09, *Mantello*; Opinion of AG Bot in Case C-261/09 as discussed in sections 5.1.5 and 6.2.1.

⁹¹³ *Tridimas* 2006, p. 3, as cited in Chapter 1, section 3.2.

⁹¹⁴ As discussed in section 5.1; Court of Justice Case C-42/11, *Lopes da Silva Jorge*, para. 28; Court of Justice Case C-192/12 *PPU West*, para. 53; Court of Justice Case C-396/11, *Radu*, paras. 33 and 34: ‘As is apparent in particular from Article 1(1) and (2) of Framework Decision 2002/584 and from recitals 5 and 7 in the preamble thereto, the purpose of that decision is to replace the multilateral system of extradition between Member States with a system of surrender, as between judicial authorities, of convicted persons or suspects for the purpose of enforcing judgments or of conducting prosecutions, that system of surrender being based on the principle of mutual recognition (...) Framework Decision 2002/584 thus seeks, by the establishment of a simplified and more effective system for the surrender of persons convicted or suspected of having infringed criminal law, to facilitate and accelerate judicial cooperation with a view to contributing to the objective for the Union to become an area of freedom, security and justice by basing itself on the high degree of confidence which should exist between the Member States.’

Mutual recognition also appears directly and independently of these specific provisions in the case law of the Court of Justice on the FD EAW and *ne bis in idem* as a core value within the Area of Freedom, Security and Justice. The AFSJ can simply not function as a single legal area if factual and legal situations established in the territories of other Member States are not recognised.

Relationship with aims

The analysis of this book has focused on the relationship between mutual recognition and the various aspects of the Area of Freedom, Security and Justice, notably the project to maintain and develop a single legal area, which provides the foundation and aim of mutual recognition. From this analysis, it becomes clear that the general legal significance and effects of mutual recognition in the Area of Freedom, Security and Justice have been concealed by its particular institutional arrangements already pointed to above, the procedural possibilities allowing for ‘variable geometry’ in developing the Area of Freedom, Security and Justice and the ambiguity about this Area’s substantive aims.

As discussed in more detail in section 4, the Treaty of Lisbon has put a formal end to the first-third pillar divide applying to justice and home affairs cooperation at the EU level. However, Member States were not ready to move toward a full communitarisation, which is reflected by the retention of mechanisms allowing Member States to stay out or rather to engage in enhanced cooperation on certain aspects of judicial cooperation in criminal matters. The fact that these possibilities are of a permanent nature as opposed to other remnants of intergovernmentalism, such as the transitional provisions provided by Protocol 36 to the TFEU limiting the powers of the Commission and Court in the criminal justice area until the end of 2014,⁹¹⁵ casts doubts on whether one can really speak of the ambition to create a single criminal justice area.⁹¹⁶ In *Gasparini* the Court rejected assertions by Advocate General Sharpston for mutual recognition to be made conditional upon compliance with equivalent standards based on the assumption that the EU consists of ‘a collection of societies’.⁹¹⁷ It may come as no surprise that the Court did not follow Advocate General Sharpston’s approach since this would be an outright rejection of the Area of Freedom, Security and Justice being a single legal area in which there should be no barriers to free movement.⁹¹⁸ Nevertheless, the variable geometry reinforced by the Treaty of Lisbon potentially undermines the political ambition to develop a single legal area and with it the obligation for Member States to recognise and execute each other’s judicial decisions.

⁹¹⁵ Discussed in section 4.

⁹¹⁶ Directive 2014/41/EU on the European Investigation Order is going to apply between all Member States except for Denmark and Ireland. What will be the impact of this on the legal position of the individual affected? Another example would be if a small group of Member States would decide to go ahead with the establishment of a European Public Prosecutor’s office.

⁹¹⁷ Conclusion of AG Sharpston in Case 467/04, paras. 111 and 112, discussed in section 6.3.

⁹¹⁸ See conclusion section 6.

Furthermore, it remains unclear what the substantive implications of the 'Area of Freedom, Security and Justice' are. Within the single legal area introduced 'Freedom', 'Security' and 'Justice' are to be ensured, but what that means exactly is still not clear, since these individual aims and the relationship they have with each other has not been defined by the Treaty, nor has proper guidance been given by Commission and Council in their multiannual programmes implementing the Area of Freedom, Security and Justice. In addition, as discussed in section 4., the Union, which is founded on the rule of law, subjects itself to its own Charter of Fundamental Rights, respects the ECHR and constitutional principles common to the Member States as principles of European law, and is even in the process of acceding to the European Convention of Human Rights. However, so far a clear contextualisation of mutual recognition of judicial decisions of criminal matters within the Union's (new) fundamental rights framework is lacking. Are we witnessing the creation of a European criminal justice area based on the rule of law or simply ensuring the free movement of persons in conjunction with appropriate measures on the prevention and combating of crime as stipulated in Article 3(2) TEU?

In accordance with Article 3(2) TEU 'the Union shall offer its citizens an area of freedom, security and justice without internal frontiers'. The Member States have, however, been concentrating on delivering collective punitive will. The logic of the Commission that the right of free movement of European citizen results in the resulting obligation to stand trial across the Union is not reflected in the legislation on EU citizenship. That legislation focuses on removing discrimination between EU citizens that have exercised their free movement rights and nationals of the host State. However, in case of judicial cooperation, the discrimination that occurs is vis-à-vis the nationals of the Member States of origin. It consists of unequal treatment as regards the application of criminal laws, procedures, sentencing, and prison conditions. Although it seems that the rights derived from EU citizenship cannot properly address that particular problem, at the same time it needs to be noted that individual rights may also be derived from the EU Charter, ECHR and national constitutions.

Relationship with principles

The nature of mutual recognition is the same in the Area of Freedom, Security and Justice, but its environment is significantly different. This environment not only consists of different aims, interests and institutional regulations, there are also different principles at play, or some that seem the same but take on a different meaning in this context. In the context of criminal law, the principle of non-discrimination also takes on a different role, potentially conflicting with the free movement of judicial decisions. In *Advocaten voor de Wereld*, the FD EAW was even challenged due to the differences of interpretation of the list of 32 categories of crimes for which surrender without verification of dual criminality is enabled.⁹¹⁹ Similarly, the proportionality principle could help the application of mutual recognition of judicial decisions in criminal matters since it would oblige the executing judicial authority

⁹¹⁹ Case C-303/05, discussed in section 4.2.

to take the 'least restrictive' measure if it applied an exception to the free movement of judicial decisions. At the same time, although given the fact that proportionality is also a right under the Charter, the executing judicial authority would have to take the 'least restrictive' measure for the person involved.⁹²⁰

Although the principle of mutual recognition has been mainly applied to further the free movement of judicial decisions in criminal matters, the paragraph on *ne bis in idem* shows that it can also support the application of fundamental rights and freedoms. However, also when mutual recognition is applied to further the free movement of judicial decisions there is no conflict with fundamental rights and proportionality as the whole system of judicial cooperation in criminal matters is subject to compliance with those principles. As argued, even though the FD EAW has a closed system of grounds for non-execution, outside the context of harmonisation this may lead to the application of a rule of reason for surrender procedures in which the rights of the suspect have to be taken into account in accordance with primary law.

The Court has sought to navigate between the various interests at stake in the AFSJ applying its aims and principles. In *I.B.* the Court provided an expansive interpretation of the FD EAW to comply with fundamental rights obligations.⁹²¹ In *Turanski* the Court, however, 'balanced' freedom and security to prevent a suspension of criminal proceedings in one Member State precluding the possibility of prosecuting a person in another Member State.⁹²² Although in more recent case law the Court has shown more deference to the EU Charter,⁹²³ if one reads the Court's case law on the European arrest warrant and *ne bis in idem* together,⁹²⁴ it also becomes clear that the Court seems to interpret mutual recognition in a way that prevents the judicial authority in the executing States from having too much discretion in assessing whether an exception to the free movement of judicial decisions in criminal matters applies. It is submitted that this interpretation, which seeks to further home State control, is not in line with the express drafting of the FD EAW, which foresees a recognition procedure.

Mutual recognition and fundamental rights

I do not see a direct conflict between the application of the principle of mutual recognition and the rights of the defence. In general, the idea of a balance metaphor is problematic in the criminal justice area as it fails to appreciate that security interests need to present a necessary and proportionate deviation from a fundamental right, as becomes clear from Article 52(1) of the EU Charter.⁹²⁵ Furthermore, the elements that need to be weighed are the fundamental rights of the individual and the

⁹²⁰ Cf. conclusion on the application of the proportionality principle to the surrender procedure discussed in section 5.3.

⁹²¹ Case C-306/09, discussed in section 5.1.

⁹²² Case C-491/07, paras. 42-44, discussed in section 6.

⁹²³ Case C-398/12, *Procura della Repubblica v M*, not yet published, as discussed in section 6.

⁹²⁴ In particular its decisions in Case C-123/08, *Wolzenburg* and C-261/09, *Mantello*, as discussed in section 5.

⁹²⁵ Case C-129/14, *Spasic*, paras. 54-57, as discussed in section 6.

security interest of (the other Member) State. Mutual recognition only makes sure that the extra national security interest is indeed recognised. Without additional harmonisation, that is as far as it can go. When the Court does start to prescribe outcomes of the mutual recognition process in its case law, without harmonisation to back it up, authors like Hatzopoulos start to raise the question of how far this can go.⁹²⁶ In doing this, the Court ventures into the realm of political decision making, which it should only and exceptionally do if the legislator has failed to implement a fundamental right (*Gözütok* and *Brügge*) and/or action is clearly needed to further European integration (*Cassis*, *Vlassopoulou*). When the Court goes beyond this mandate, it risks being accused of judicial activism.⁹²⁷

Relationship with norms

In the table below, the norms stemming from the application of mutual recognition and their effect in the area of judicial cooperation in criminal matters are reproduced. In the column on the left, the field and its aim is identified (judicial cooperation in criminal matters). The second column distinguishes between situations in which the Court has elaborated upon mutual recognition directly, based on primary law and fields in which secondary EU legislation was passed. The third column describes the subject of recognition (*what* is to be recognised). This column also answers the question whether such recognition is direct or a procedure has been foreseen. Furthermore the question is answered what the *effect* of recognition is.

In its case law on *ne bis in idem*, the Court has so far held that the decision to offer an out-of-court settlement, an acquittal due to lack of evidence and a decision of *non-lieu* should bar further prosecution in another Contracting Party. A suspension of a police investigation due to lack of evidence should, however, not prevent further prosecution by another Member State, nor should the decision not to prosecute certain acts. The element of ‘same acts’ is to be interpreted as a set of facts which are inextricably linked together in time, in space and by their subject-matter.

As regards arrest warrants, it imposes an obligation on the host Member State to recognise and execute European arrest warrants issued in another Member State, unless exceptions in the FD EAW apply. The recognition process only consists of checking compliance with the formal requirements laid down in Article 8 FD EAW. The effect of recognition is the arrest and taking into custody of the wanted person (in accordance with Arts. 1, 11 and 12). If the wanted person consents, (s)he is surrendered in accordance with Article 13 FD EAW.

Article 4 FD Transfer of Prisoners allows for the direct forwarding of a sentence. Recognition takes place in accordance with Articles 4, 5 and 8 FD Transfer of Prisoners, which allows for adaptation of the sentence. There seems to be an inconsistency between the FD EAW and the FD Transfer of Prisoners on this point since where the return of a national for the execution of a sentence is a condition for

⁹²⁶ Hatzopoulos 2008, p. 44-65 particularly criticising the Court’s decision in Case C-303/05, *Advocaten voor de Wereld* [2007] ECR 3633 as ‘a striking application of the principle of mutual recognition, strengthened in this occasion by “trust” and “solidarity”’.

⁹²⁷ For more on this concept see Dawson, De Witte & Muir 2013.

the execution of an EAW, in the FD Transfer of Prisoners the adaptation of a sentence is part of the recognition procedure. Grounds for non-recognition are mentioned in Article 9(1)(a), (b) FD Transfer of Prisoners. There is also a possibility to postpone recognition (Art. 11 FD Transfer of Prisoners). If the sentenced person is in the issuing State, he or she shall be transferred to the executing State (Art. 15 FD Transfer of Prisoners). Time limits apply in accordance with Article 12 FD Transfer of Prisoners.

Article 3 of the Directive on the EIO allows for an order to be sent for carrying out one or more specific investigative measures. The EIO has to be recognised without any further formality (Art. 9 EIO) and executed within the time limits stipulated in Article 12 EIO. The effect of recognition and execution of an EIO is that the evidence is obtained and transferred to the issuing Member State (Art. 13 EIO), with the possibility of immediate transfer in case the authorities of the issuing Member State assisted directly (Art. 9(4) EIO). This transfer is subject to remedies laid down in Article 14 EIO.

The final column addresses exceptions to, or conditions for, *free movement*. In this context it needs to be observed that the distinction between what belongs to the recognition process and what are the exceptions to free movement (execution of the judicial decision) is not always clearly made. As regards the FD EAW, in case the wanted person objects, a decision on surrender needs to be taken by the executing judicial authority (Art. 15 FD EAW). That decision needs to be taken within certain time limits (Art. 17 FD EAW). The grounds for non-execution are laid down in Articles 3 and 4 FD EAW, while conditions may be imposed in accordance with Article 5 FD EAW. If the guarantee of Article 5(3) is requested (retransfer for sentencing), Article 7 of the FD Transfer of Prisoners may be applied (possibility to reinstate dual criminality before the sentence is recognised and executed). The same is possible in case it concerns an EAW for the execution of a sentence imposed on a national or resident in accordance with Article 4(6) FD EAW.

In case of the FD Transfer of Prisoners it may be noted that consent of the sentenced person is not required in case the sentence is forwarded to, *inter alia*, his/her Member State of nationality in which (s)he lives (Article 6 FD Transfer of Prisoners). Grounds for non-enforcement are mentioned in Articles 9(1) (c)-(l), 10 FD Transfer of Prisoners. Article 10 EIO allows recourse to a different type of investigative measure, except for the investigative measures listed in 10(2). Article 11 EIO mentions the grounds for non-execution. Additional grounds for non-execution apply in case the EIO concerns one of the special investigative measures mentioned in chapter IV EIO.

Table: Norms stemming from the application of mutual recognition and their effect in the area of judicial cooperation in criminal matters

Field	Inside/outside harmonisation	Subject of recognition	Recognition Procedure (yes/no) and effect	Exceptions to, conditions for free movement
Judicial cooperation in criminal matters	Outside	Final decisions for the same acts - Article 54 CISA as interpreted by Court of Justice	No procedure, the principle is that a second prosecution after a final decision (incl. out-of-court settlement, acquittal, and decision of 'non-lieu') for the same (material) acts is barred. - The decision has been enforced - Effect: the person's free movement is ensured	- No final decision; further prosecution is possible in first State - Material acts are not inextricably linked The decision has not been enforced (completely)
Judicial cooperation in criminal matters	Inside	- Decision to prosecute in accordance with FD EAW (2002/584/JHA)	- Yes, but only to check compliance with the requirements laid down in Article 8 of the FD EAW Effect: - The wanted person is arrested and taken into custody (Article 1, 11, 12) - If the wanted person agrees (s)he is surrendered for prosecution (Article 13 FD EAW) - If (s)he disagrees a surrender decision needs to be taken by the executing judicial authority (Article 15 FD EAW) - Time limits apply (Article 17 FD EAW)	- Grounds for non-execution (Articles 3, 4 FD EAW) - Conditions in accordance with Article 5 FD EAW - If guarantee of Article 5(3) is requested possibility to apply Article 7 FD Transfer of Prisoners

<p>Judicial cooperation in criminal matters</p>	<p>Inside</p>	<p>- Sentence (EAW sent)</p>	<p>- Yes, but only to check compliance with the requirements laid down in Article 8 of the FD EAW Effect: - The wanted person is arrested and taken into custody (Article 1, 11, 12) - If wanted person agrees (s)he is surrendered for prosecution (Article 13 FD EAW) - If (s)he disagrees a surrender decision needs to be taken by the executing judicial authority, (Article 15 FD EAW) - Time limits apply (Article 17 FD EAW)</p>	<p>- Grounds for non-execution articles 3, 4 FD EAW - Conditions Article 5 FD EAW - If Article 4(6) is invoked, possibility to apply Article 7 FD Transfer of Prisoners</p>
<p>Judicial cooperation in criminal matters</p>	<p>Inside</p>	<p>- Sentence (Directly forwarded for execution in accordance with Article 4 FD ToP)</p>	<p>- Yes, recognition in accordance with Articles 4, 5, 8 FD ToP; - Possibility to adapt the sentence in accordance with Article 8, - Possibility to reinstate dual criminality (Article 7 FD ToP) - Grounds for non-recognition mentioned in Article 9(1)(a), (b) FD ToP) - Possibility to postpone recognition (Article 11 FD ToP) Effect:</p>	<p>- Grounds for non-enforcement mentioned in Articles 9(1)(c)-(l), 10 FD ToP - N.B.: In case of <i>inter alia</i> Member State of nationality in which the sentenced person lives no consent needed; only duty to ask for his/her opinion (Article 6 FD ToP)</p>

			<ul style="list-style-type: none">- If the sentenced person is in the issuing State (s)he shall be transferred to the executing State (Article 15 FD ToP)- Time limits apply (Article 12 FD ToP)	
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CONCLUSIONS REGARDING THE NATURE OF MUTUAL RECOGNITION IN EUROPEAN LAW

The notion of 'mutual recognition' is a commonplace across European law, engaging the administrative and judicial authorities of the Member States in a process of recognising and giving effect to many types of factual and legal situations established in other Member States. One might think of compliance with consumer protection standards in the case of products, minimum training requirements, expressed by a diploma in case of professionals like doctors and lawyers, or a decision to prosecute or sentence a person in the area of judicial cooperation in criminal matters.

Still, mutual recognition has stirred a lively debate both on the societal, political and academic level. The courts are also struggling with the question of how to implement the need to recognise and give effect to factual and legal situations established in other Member States, while at the same time safeguarding public interests and individual rights. On a societal level, the debate is often triggered when something goes wrong, for instance, when a toy causes harm to a child, a migrant doctor commits a medical error or a doctor that has committed errors is afterwards found to be working in another Member State. Then the general public wakes up and calls for stricter public interest regulation and limitations on free movement and mutual recognition of the standards of the other Member States, which are deemed lower. Since the application of mutual recognition to judicial decisions, there have also been frequent uproars in the media concerning the extradition (now named surrender in EU law) of nationals to other EU Member States for futile issues or awaiting what is perceived to be a hugely unjust criminal justice and (pre-trial) detention system. Here there is a call to stop the free movement and the mutual recognition of the judicial decisions concerned.

On the political level of course these debates filter through, but they are transformed into a discussion on European Union governance. The idea of recognising and giving effect to factual and legal situations and documents is now seen in the light of whose standards may be applied. Does the good, person or judicial decision circulate freely after complying with the standards of the Member State of origin (home State control)? Or does the host State still get to apply its standards (host State control)? A third option is agreeing to the harmonisation of substantive norms and/or the recognition procedure, partially or completely limiting the power of the

authorities of the host State to impose additional conditions above and beyond those agreed in harmonisation.

In this context, mutual recognition is often identified with the first type of governance, meaning home State control. As such, it has been advocated by its proponents as a quintessential principle of European law and integration, facilitating the free movement of goods, people and judicial decisions within the European Union. This has become notably visible by the European Commission's attempts to promote mutual recognition in the area of the free movement of goods following the *Cassis de Dijon* decision and a coalition of Member States led by the UK in promoting the mutual recognition of judicial decisions in criminal matters, later joined by the Commission based on the claimed successful application of mutual recognition in the internal market. Opponents and sceptics have, however, pointed to the (potentially) negative consequences of the application of mutual recognition for public interests, such as consumer protection and fundamental rights, drawing on the reports by NGOs and the Council of Europe concerning the criminal justice systems and prison conditions in a number of Member States.

The Court of Justice, the European Court of Human Rights, national constitutional courts and individual judicial and administrative authorities have also been grappling with the question of how to marry mutual recognition, free movement, European citizenship, public interests, individual rights, and the security interests of the State and the Union as a whole. This underlines the pervasive nature of mutual recognition and hence the potential conflict with all these rights and interests. On the one hand, there have been Court of Justice judgments declaring that mutual recognition is a 'principle' and stating that its application does not depend on prior harmonisation in the internal market and the Area of Freedom, Security and Justice.¹ On the other hand, both the Court of Justice and the ECtHR have pointed out that compliance with minimum standards cannot be presumed, in particular when there are alleged violations of basic fundamental rights.²

The academic debate has sought to address the questions raised by the application of mutual recognition by identifying the implications that mutual recognition has for the substantive and procedural norms of the Member States. The scholarly literature addressing the internal market has assessed the impact of mutual recognition ranging from an interpretation in which it has no significant added value for European integration beyond the proportionality principle, meaning that it merely prohibits the host Member State from barring market access to a product complying with functionally equivalent standards, to an interpretation under which mutual recognition implies a general obligation to allow market access based on mutual trust in the standards of the other Member States. An intermediate category sees specific implications for procedural and even substantive norms of the Member States, based on the loyalty and solidarity principles. The procedural obligations

¹ Case C-110/05, *Commission v Italy* [2009] ECR 519; Case C-187/01, *Gözütok* and C-385/01, *Brügge* [2003] ECR 1345.

² *MSS v Belgium and Greece*, Application No. 30696/09, ECtHR, 21 January 2011; Joined Cases *NS v Secretary of State for the Home Department*, Case C-411/10 and *M.E. and Others v Refugee Applications Commissioner, Minister for Justice and Law Reform*, C-493/10 [2011] ECR 13905.

concern, for instance, putting in place a recognition procedure to establish whether the qualifications of a professional from another Member State are equivalent. The substantive obligations could arise in case market access is granted to a product even though it does not comply with domestic standards, but information on the label informing the consumer of the difference is deemed adequate, although a different regulatory approach may require prior harmonisation or public interest exceptions.

The literature regarding the Area of Freedom, Security and Justice (AFSJ) has ranged from an outright rejection of mutual recognition based on a perceived conflict with national sovereignty and fundamental rights to an interpretation which believes that mutual recognition is appropriate and ideally should apply fully as a consequence of the Union as a European judicial/law enforcement area. The rejection is based on an appreciation of the aims of the AFSJ, not only being to defend but also to protect citizens and their legal interests, combined with the criminal justice notion of proportionality, meaning that the person's right to liberty should be respected and, in particular, deprivation of liberty should be avoided when more lenient measures are available. In this context, it is concluded that judicial cooperation should remain a sovereign decision of the host State. The other side of that debate calls mutual recognition the ideal way to execute an area without internal borders. Allowing the host State to impose its standards would not respect the idea of an area without internal frontiers where freedom of movement is the norm. It notes that concerns regarding compliance with fundamental rights obligations are unfounded as the Union is bound to respect fundamental rights in accordance with Article 6 TEU.

An intermediate category of scholarly contributions maintains that mutual recognition should be based on compliance with equivalent standards or a more broad equivalence of the criminal justice systems of the Member States, calling for exceptions or limits to its application to uphold fundamental rights protection, national interests, a certain degree of harmonisation of criminal law, criminal jurisdiction rules and procedural rights, or a combination of these measures. Attention is also paid to taking into account the rights of (European) citizens and to furthering the 'Freedom aspect' of the Area of Freedom, Security and Justice, alongside the 'Security dimension', which it mainly serves in the case of judicial cooperation in criminal matters.

The current academic debate relating to mutual recognition responds to a need for an on-going reflection concerning the application of mutual recognition in the internal market, on the Europeanisation of criminal law via the application of mutual recognition to judicial cooperation in criminal matters in the context of the Area of Freedom, Security and Justice, the general merging of the economic and criminal justice policies of the Union, and the applicable human rights standards, notably the EU Charter.

However, the literature also reveals that there is an on-going debate regarding the nature of mutual recognition. Should mutual recognition be seen as an integration method (home State control) or as a general principle of European law? Furthermore, by and large, it may be concluded that the current academic debate on mutual recognition in European law is seeking to determine the implications of

mutual recognition for the substantive and procedural norms of the Member States, with attempts being made to formulate conditions for or limits to its application to alleviate its perceived impact on Member States as well as individuals.

However, there is a drawback to an approach which focuses on defining the implications of mutual recognition for the substantive and procedural norms of the Member States as those implications may be different depending upon which field one investigates, during which time and which other field one compares it with. In addition, it has not led to satisfactory answers on how to reconcile mutual recognition and individual rights, particularly in the sensitive area of judicial cooperation in criminal matters.

In order to gain a better insight into the legal implications of the notion of mutual recognition in the European legal system, meaning the consequences of mutual recognition as defined in European law for those who are subject to it (notably Member States, their citizens and residents), this book has sought to re-examine the nature of the notion from an individual rights perspective. This implied looking at the impact of mutual recognition on individual rights derived from primary and secondary EU law, including individual rights recognised in international and European criminal law and classic civil rights guaranteed by the ECHR and resulting from the constitutional traditions common to the Member States. The EU Charter brings the classic fundamental rights and rights derived from EU Citizenship together in one single document, which is binding on the Member States when they are implementing EU law.

This book aimed at analysing the notion of mutual recognition from that perspective by answering the following questions:

- What does the development of mutual recognition in the internal market and the Area of Freedom, Security and Justice reveal about its nature in European law?
- What are the similarities and differences between mutual recognition as developed in the internal market and the Area of Freedom, Security and Justice?; and in particular what role does mutual recognition play in the process of reconciling free movement and individual rights in both areas taking into account their differences as well as their similarities?

These questions have been addressed by examining the relationship between mutual recognition and the aims of the internal market and the Area of Freedom, Security and Justice and (other) principles of European law and norms laid down in primary and secondary EU law by following its development in four specific fields covered by those two areas. Furthermore, the development of mutual recognition was evaluated in a number of specific fields covered by each of the two policy areas.

The examination focused on the mutual recognition of product requirements, professional qualifications, final decisions in criminal matters barring further prosecution (*ne bis in idem*) and judicial decisions in criminal matters, both pre-trial (prosecution) and final decisions (sentence) in accordance with the FD EAW and a number of flanking mutual recognition measures and measures aimed at strengthening the rights of suspects and accused persons in criminal proceedings.

The study was written from an individual rights perspective, with a particular view to the further development of mutual recognition in the criminal justice area. However, where appropriate, this study built on and sought to incorporate other attempts at more narrowly defining mutual recognition in European law. It also made use of a working definition of mutual recognition (recognising and giving effect to factual and legal situations established in the territories of other Member States), already indicating that ‘recognising’ and ‘giving effect’ point to a process which may involve more steps. Furthermore, the definition of mutual recognition was contrasted with definitions of ‘free movement’, including exceptions to free movement, ‘home State control’ and ‘equivalence’. A comparative table was drawn up to illustrate the similarities and differences between the various case studies.³

As mentioned, throughout these case studies, particular attention was paid to the interaction between mutual recognition and a number of general principles of European law, including a determination of whether mutual recognition fulfils the criteria for being treated as a principle of European law proposed by Tridimas. His distinction between principles that derive from the rule of law, systemic principles that underline the constitutional structure of the Union and define its legal edifice and other types of general principles based on the Treaty and statutory interpretation was followed. The focus was on the relationship with principles derived from the rule of law in line with the individual rights perspective chosen in this book, it being noted that Tridimas categorised free movement under the category of other general principles, even though free movement rights of European citizens are now covered by the EU Charter. Furthermore, the relationship with harmonisation was investigated, as mutual recognition has appeared both inside and outside the context of harmonisation in the areas under investigation.

In the following sections, the synthesis and main findings of the chapters dealing with the internal market and Area of Freedom, Security and Justice will be presented. This will be followed by some horizontal considerations and conclusions stemming from the research carried out in this book, particularly regarding the nature of mutual recognition and the role it plays in reconciling free movement and individual rights in European law.

1. The Internal Market

The assessment of mutual recognition in the internal market took into account the fact that the Court of Justice, the Council and the European Parliament have been active players in developing the notion in this area, both as regards the elaboration of the aims of the common and internal market and the two specific fields concerning the mutual recognition of product requirements and professional qualifications. It furthermore highlighted the particular academic debate concerning the Commis-

³ To be found in the Annex to this book.

sion's response to the *Cassis de Dijon* decision⁴ and revisited it in the context of the mutual recognition of product requirements more generally.

Relationship with aims and policies of the Union as an internal market

As regards the relationship between mutual recognition and the aims of the internal market, the development of the 'common market' and internal market concepts from the Rome Treaty until the Treaty of Lisbon reveal a close link with the progressive stages of European integration and the role market integration played in this process. Originally the establishment of a common market was perhaps a rather modest aim after more bold attempts at political union had failed. Nevertheless, the wider implications of this aim were felt when the Court stepped in to clarify what establishing a common market entailed, notably merging the national markets into a single market, bringing about conditions as close as possible to those of a genuine internal market,⁵ and the efforts Member States needed to undertake in terms of mutual recognition.⁶

This led to a negotiation process between the Commission and Council on what the Court of Justice had said resulting in the White paper on completing the internal market⁷ and the formulation of the goal to establish an internal market alongside the common market in the Single European Act. After the Maastricht and Amsterdam treaties left that situation unaffected, the Treaty of Lisbon merged the two concepts again. Based on an assessment of the internal market concept after Lisbon, it was concluded that the aim has been both to achieve the merging of the national market into an internal market (the spatial aspect of the project), which is to be achieved progressively (the temporal aspect of the project), with the broader objective of delivering the goals stipulated in Article 3 TEU, notably the 'highly competitive social market economy' (the substantive aspect of the project). Mutual recognition furthers free movement within the internal market. It is therefore an essential ingredient for merging the national markets into an internal market. It, however, also operates within the context of an internal market which aims to achieve social as well as economic goals implying limits to free movement. At the same time mutual recognition occurs in a context within which another player has entered the stage: the European citizen. This citizen is entitled to free movement and residence within the European Union, but his or her approval is also sought for the on-going economic integration through the guarantee that consumer protection, social and environmental safeguards that citizens (also) need are in place.

Mutual recognition of product requirements

The paragraph on the mutual recognition of product requirements sought to explore the nature of mutual recognition through an assessment of the case law of

⁴ Case 120/78, para. 14.

⁵ Case 15/81, *Schul* [1982] ECR 1409, para. 33.

⁶ Case 120/78, para. 14.

⁷ COM (85) 310 of 14 June 1985.

the Court of Justice, chiefly the *Cassis de Dijon* decision,⁸ in which mutual recognition first appeared, the impact of this decision on the Commission's harmonisation and enforcement policy regarding the free movement of goods and an evaluation of the concerns raised in the literature to the Commission's interpretation of *Cassis de Dijon* and mutual recognition more generally in the light of the Court's wider case law in the area.

The case law of the Court of Justice regarding mutual recognition of product requirements evolved in the context of measures having an effect which is equivalent to a quantitative restriction on imports from another Member State, like an import ban or quota. Tackling these types of measures proved difficult as it often concerned measures on, for instance, the shape, size, composition, or packaging of a product which applied to domestic and imported products alike, often with a public interest in mind. The Commission was faced with the challenge of seeking to address the restrictive effects these measures had with the toolbox of the non-discrimination and proportionality principles available to it.

In *Dassonville* the Court, however, came up with its own approach towards measures having equivalent effects to quantitative restrictions by capturing all trade restrictive measures (an obstacle-based approach). These measures would consequently need to be justified in accordance with the Treaty exceptions. However, at the same time, the Court held that in absence of harmonisation Member States would remain competent to uphold reasonable measures aimed at consumer protection (the rule of reason).

The *Cassis de Dijon* case may be seen as a further definition of the obstacle-based approach and 'the rule of reason'. The rule of reason allows Member States to defend national measures aimed at protecting certain national interests not explicitly recognised by the Treaty exceptions but compatible with its aims and values⁹ if the following conditions are met: the aim must be so important that it takes precedence over the objective of free movement; the measure must be proportional, meaning that it is both necessary and not more restrictive than needed; the measure cannot discriminate according to nationality, meaning that it should apply to domestic and foreign products alike; and the measure may not duplicate a Community measure.¹⁰ At the same time, the Court stressed that Member States should in principle allow the importation of products that had been lawfully produced and marketed in another Member State,¹¹ which has become known as the first expression of mutual recognition as developed and promoted by the European Commission since then.

The Commission's interpretation of the *Cassis de Dijon* decision promoted, at the time and still promotes, a reading of mutual recognition in which products lawfully produced or marketed in another Member State enjoy a basic right to free movement with an exception that products lawfully manufactured or marketed in another Member State do not enjoy this right if the Member State of destination can prove that it is essential to impose its own technical rules on the products concerned

⁸ Case 120/78, para. 14.

⁹ Gormley 2005, p. 23.

¹⁰ Schrauwen 2005a, p. 6.

¹¹ Case 120/78, para. 14.

based on the Treaty exceptions or the public interests recognised by the Court in accordance with the 'rule of reason'.¹² In this reading, free movement became the rule and the ability of Member States to impose reasonable measures to safeguard the public interest became the exception. It may come as no surprise that the Commission, wishing to promote free movement, would stress this interpretation of mutual recognition. However, this reading distorts the original case law of the Court of Justice which expanded the public interests that can be used to justify host State regulation to compensate for the wider net cast by the obstacle-based approach.

In testing the academic debate surrounding mutual recognition against the more recent case law of the Court of Justice, it was discovered that the Commission's attempts to promote mutual recognition as a principle have by and large succeeded. The term 'principle' has explicitly been used by the Court in Case C-110/05, *Commission v Italy*, although the case itself concerned another example of a successful application of the rule of reason. On substance, even though the Court's case law on labelling requirements shows that there can be market access in absence of compliance with equivalent standards, a wider assessment of the case law regarding product requirements reveals a residual relationship between mutual recognition and harmonisation. Particularly in more sensitive areas, such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, for instance, regarding the safety of machinery, the age appropriateness of videogames or whether the import of laser guns used for simulated killing should be banned to protect human dignity, the Court will not insist on market access without compliance with equivalent standards. In those cases a description on a label cannot make up for the difference and additional harmonisation is required.

The European Commission found the Council in its way when trying to impose home State control across the board. It therefore focussed on the management of mutual recognition and the 'new approach' to harmonisation. The Commission's policy of promoting the mandatory insertion of 'mutual recognition clauses' in national regulation was, however, rejected by the Court of Justice, after its Advocate General argued that it was unnecessary and confusing.¹³ After a failed attempt to force Member States to notify exceptions to free movement, a Regulation was agreed setting procedural requirements for denying market access, imposing additional requirements or withdrawing products from the market. Member States have to notify the economic operator when implementing these measures, offering a justification in accordance with a public interest exception recognised by the Treaty or in accordance with the 'rule of reason'. In accordance with the 'new approach' only essential safety requirements are harmonised. Manufacturers only have to show conformity with the essential safety requirements by means of self-certification and allow for inspection. An example of the new approach is the Toy Safety

¹² Staff working document, *Free movement of good. Guide to the application of Treaty provisions governing the free movement of goods* (2nd edition), SEC (2009) 673.

¹³ Opinion of AG Mischo in Case C-24/00, *Commission v France*, paras. 47-56, discussed in Chapter 2, section 3.2.

Directive. This approach relies heavily on the Member States' ability to conduct market surveillance to ensure compliance.

Mutual recognition of product requirements contributes to the free movement of goods within the internal market, which is further supported by a combination of trust (in the average consumer to be able to read the label), harmonisation of minimum health and safety requirements and procedural rules administrative authorities have to comply with when taking measures limiting free movement. At the same time free movement is subject to a number of exceptions based on public interests found in the Treaty and recognised by the Court in its rule of reason case law reflecting the wider aims of this area.

Mutual recognition of Professional Qualifications

The section on the mutual recognition of professional qualifications examined its relationships with the aims, provisions and (other) general principles of European law in the foundational case law of the Court of Justice followed by its application in secondary EU legislation based on the various approaches developed on a sectoral and horizontal level, as consolidated by the Professional Qualifications Directive (as amended). It also studied the interaction between secondary EU legislation based on mutual recognition and the (further) development of the case law of the Court of Justice.

Similar to the area of the free movement of goods, the Court's case law regarding the free movement of persons has evolved from an approach based on non-discrimination to another approach founded on mutual recognition. This culminated in the *Vlassopoulou* judgment,¹⁴ according to which the host Member State needs to have a recognition procedure in place with possibilities for the applicant (the individual seeking recognition of its professional qualifications) to appeal any decision regarding access to the equivalent profession in the host Member State, while allowing the host Member State room to impose compensatory requirements if the professional qualifications are not deemed to be sufficient.

Much like in *Cassis de Dijon* the Court therefore imposes an obligation upon Member States to recognize equivalent standards, while still leaving room for reasonable exceptions to free movement, measures to be imposed based on certain public interests. The main difference is that mutual recognition of professional qualifications requires a procedure in which equivalence is determined. Since its interventions were mainly aimed at making sure Member States have procedures in place for individuals wishing to exercise their right of free movement, we have seen the Court relying on the loyalty principle and fundamental rights, such as that to an effective judicial remedy.

The criteria established in the case law have been supplemented by secondary EU legislation, which has been consolidated in the Professional Qualifications Directive. This directive contains two main approaches. First, there is the approach of the general system in which substantive and procedural conditions for recognition are set out, but recognition is not automatic as the host State may test the equiv-

¹⁴ Case C-340/89 [1991] ECR 2357.

absence of the professional qualifications and impose compensatory measures before access to the profession is granted. A second approach is the vertical approach, in accordance with which access to the profession in the host State is ensured (automatic recognition) subject to compliance with EU-wide minimum training requirements. The fact that there is automatic recognition does not take away the problems regarding the actual exercise of the profession in the host State. This may be illustrated by the recently – agreed amendments to the Professional Qualifications Directive which – after a number of incidents concerning doctors who had committed medical errors that were allowed to continue practising in another Member State – sets up an alert mechanism which introduces an obligation for competent authorities of Member States to inform competent authorities of all other Member States about a professional who has been prohibited, even temporarily, from exercising his or her profession. This issue also shows the link between the free movement of persons and effective judicial cooperation in criminal matters in case criminal charges are brought.

The legal profession has found a third way in accordance with which there is no recognition of the professional qualifications, but the lawyer is entitled, subject to certain conditions, to exercise her/his profession in the host State using her/his home title, with a special procedure to migrate into the host State profession after three years of practice. This regime goes beyond the suggestion by Maduro that differences in regulatory approach may be addressed by insisting on harmonisation or allowing for more exceptions to accompany mutual recognition. Here the whole idea of mutual recognition is abandoned as a preferred option, although applying for recognition under the general system of the Professional Qualifications Directive remains possible.

The procedural harmonisation efforts have also furthered mutual recognition on a substantive level and in any event the Court continues to apply the Treaty provisions alongside secondary EU legislation. By interpreting EU Treaty provisions and secondary legislation in the area in a way which is in favour of free movement, the Court forces Member States to consider the compatibility of their educational systems and professional training requirements, which brings the prospect of the internal market closer. An example of this is the *Morgenbesser* case,¹⁵ in which the Court imposed an obligation to take into account the professional qualifications of those not fully qualified for a profession allowing them to complete their training in the host State.

Mutual recognition of professional qualifications presents a much more diverse picture than that for the mutual recognition of product requirements. The similarities are that equivalent standards need to be taken into account and that exceptions to free movement continue to apply. The differences relate to the fact that most of the time it is a person who is asking for his/her qualifications to be recognised in the context of wanting to exercise its (free movement rights and) profession in another Member State. Hence a recognition procedure is combined with a number of exceptions. At times it has been possible to harmonise training

¹⁵ Case C-313/01, *Morgenbesser* [2003] ECR I-13467.

requirements, determining the level of automaticity that may be achieved, and at other times it has not. Even when there is automatic recognition, wider issues may be raised related to the exercise of the profession by the person involved in the host State. One cannot put a label on a doctor stating he or she might have side-effects. One just has to trust that he or she will abide by the Hippocratic Oath.

The Nature of Mutual Recognition in the Internal Market

Based on the assessment of the aims of the internal market and the mutual recognition of product requirements and professional qualifications, a number of conclusions were drawn regarding the nature of mutual recognition in the internal market.

First, it was concluded that in the internal market mutual recognition needs to be distinguished from an EU governance approach based on home State control, implying that products lawfully put on the market in one Member State can and should be allowed access to the market of other Member States because they have satisfied home State controls, with the same reasoning applicable to individuals that have complied with the professional training requirements of their home State.

Mutual recognition does not entail that market access is automatic upon compliance with the substantive and procedural regulatory requirements of the home State. This conclusion is supported by the fact that during the negotiations leading to the adoption of the Single European Act, the Commission's attempt to achieve automatic recognition of national standards by 1992 was rejected by the Member States. In general, the internal market concept after Lisbon implies that mutual recognition operates within the context of an internal market which aims to achieve social as well as economic goals implying that public interests may entail inherent limits to free movement unless a common (minimum) level of protection is agreed in EU legislation.

Also on a judicial level the Commission has sought to further an interpretation of mutual recognition in line with the idea of home State control, as illustrated by its interpretation of the *Cassis de Dijon* decision and mutual recognition more generally. As stated above, its interpretation of mutual recognition, which insists on a rule (market access) with a limited exception based on the Treaty or public interests recognised in accordance with the rule of reason, is, however, not in line with the wider case law of the Court regarding the mutual recognition of product requirements. In sensitive cases, such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, the Court will not insist on market access without compliance with equivalent standards. The policy of mutual recognition clauses was furthermore rejected by the Court of Justice.¹⁶ This reveals the differences in approach between the Commission and the Court of Justice. The Commission is trying to enhance a policy, whereas the Court is engaged in balancing the interests of market access and state intervention through the application of European law and principles.

¹⁶ Opinion of AG Mischo in Case C-24/00, *Commission v France*, paras. 47-56, discussed in Chapter 2, section 3.2.

It was found that mutual recognition should rather be seen as a principle of European law, meeting the conditions defined by Tridimas.¹⁷ The general premise of law holds that effect needs to be given to factual and legal situations established in other Member States. This includes compliance with the product requirements of the home State, diplomas, certificates and other evidence of formal qualifications. Its origins are to be found in the procedural ambition to merge the national markets into an internal market (spatial and temporal aspect) and the substantive obligation to further free movement within this area in the context of the wider ambitions of developing the Union as a highly competitive social market economy (as laid down in Art. 3 TEU).

Two concrete norms have been derived from the principle of mutual recognition in the free movement of goods area (outside harmonisation in accordance with the *Cassis de Dijon* case law as consolidated in Regulation 764/2008 and inside harmonisation in accordance with Directive 2009/48 on Toy Safety) and four concrete norms were discovered regarding the free movement of persons (outside harmonisation in accordance with the *Vlassopoulou* case law and inside harmonisation in accordance with the general system of the Professional Qualifications Directive, the vertical approach applying to Doctors and the approach found in the Lawyers Establishment Directive). Furthermore the fact that the Court developed an approach based on mutual recognition in *Cassis de Dijon* and *Vlassopoulou* confirms that it is an autonomous source of legal obligations for the host Member State, irrespective of specific treaty articles and the degree of harmonisation achieved. Moreover, it transcends a specific area of law since it applies to both the recognition of product requirements and professional qualifications. Finally, policy makers, notably the European Commission and the Court of Justice, in Case C-110/05 *Commission v Italy*, have explicitly referred to mutual recognition as a principle, confirming its general legal significance and effects.¹⁸

Mutual recognition operates in the context of other principles of European law. The non-discrimination principle also promotes free movement, but it is insufficient to achieve an internal market since it still allows the host State to impose its measures without testing for equivalence. Regarding product requirements mutual recognition pairs up with the principles of solidarity, trust (in the standards of the home Member State) and market access to achieve free movement.¹⁹ Regarding professional qualifications, the loyalty principle supported the procedural interventions required by the Court.²⁰

In both fields studied, exceptions to free movement remain possible based on interests recognised by the Treaty, secondary legislation or based on the Court of Justice case law. In order to successfully invoke these exceptions, host State requirements should comply with the proportionality principle. Mutual recognition and proportionality are not the same in the internal market, since the latter only applies when exceptions to free movement are invoked.

¹⁷ Tridimas 2006, p. 3.

¹⁸ In line with the criteria proposed by Tridimas 2006, as discussed in Chapter 1, section 3.2.

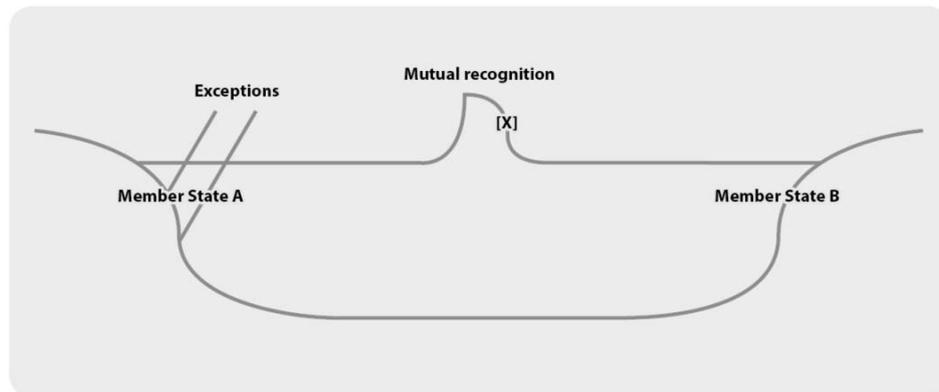
¹⁹ As discussed in Chapter 2, sections 3.1 and 3.4.1.

²⁰ As discussed in Chapter 2, section 4.1.

Mutual recognition is not conditional upon compliance with equivalent standards. However, that does not mean that, on its own, it is sufficient for the creation and development of the internal market, which is illustrated by its relationship with harmonisation. The principle of mutual recognition points to and triggers the need for further harmonisation. And even when harmonisation is agreed, as in the general system of the Professional Qualifications Directive, the mutual recognition process does not guarantee free movement, as there will always be exceptions confirming the tension between free movement and public interest regulation within an internal market that has both social and economic aims.

In the figure below, mutual recognition is depicted as a wave, corresponding to the front cover of this book. The product or person wishing to benefit from free movement is represented by an [x], riding the wave. The single legal area is represented by the fact that there is a single body of water covering the borders between the two Member States connected by the sea. The field involved has clear aims and principles supporting mutual recognition, but mutual recognition and exceptions to free movement based on certain public interests still operate outside its context. One could compare this situation to the mutual recognition of product requirements at the time of *Cassis* or the mutual recognition of professional qualifications in accordance with *Vlassopoulou*. In both fields there has been subsequent harmonisation of the general recognition procedure, in combination with substantive harmonisation or standardisation for specific products or professions, changing the picture and further facilitating free movement.

Figure: The principle of mutual recognition contextualized



2. The Area of Freedom, Security and Justice

Taking the analysis and findings of the nature of mutual recognition in the internal market as a premise, the second part of the book moved into an examination of the nature of mutual recognition in the context of the Area of Freedom, Security and Justice. A similar methodological approach was taken by looking at mutual recognition in the context of the aims and policies of the area concerned and the application

of mutual recognition in a number of specific policy fields. The question was whether the picture that arose in the first part on the internal market, that of a principle holding that effect needs to be given to factual and legal situations established in other Member States, was reflected or confirmed in the Area of Freedom, Security and Justice. In doing so, the differences and similarities between mutual recognition, as developed in the internal market and the Area of Freedom, Security and Justice were studied, as well as the question which role mutual recognition plays in the process of reconciling free movement and individual rights.

Two case studies were explored to ascertain the application of mutual recognition in the context of the Area of Freedom, Security and Justice. Negotiations on the application of mutual recognition to extradition procedures of suspects and sentenced persons were accelerated by the 9/11 attacks on New York and Washington. Furthermore, in the *Gözütok* and *Brügge* cases concerning the interpretation of the Schengen Convention's provisions on *ne bis in idem*, the Court extended the application of the principle of mutual recognition to the Area of Freedom, Security and Justice.²¹ These historical events and judicial developments fundamentally reshaped the setting of priorities and conditions for the execution of the mutual recognition programme in criminal justice cooperation. The European arrest warrant and the *ne bis in idem* principle were hence selected as the two case studies to aid the examination.

Historical development of judicial cooperation in criminal matters in the EU

The historical development of mutual recognition in judicial cooperation in criminal matters revealed that 'transplanting' mutual recognition from the internal market was only one of the justifications for its application in the Area of Freedom, Security and Justice, among a number of others, including the wish to promote an alternative approach to the 'vertical solution of a common set of rules administered centrally by a new European prosecuting agency',²² the need to simplify and speed up judicial cooperation in the fight against terrorism and organised crime and genuine trust between a group of Member States traditionally close to each other. Mutual recognition of judicial decisions in criminal matters entailed the transformation of extradition procedures based on the 1957 Council of Europe Convention, which was thwarted with conditions and exceptions based on national sovereignty such as the refusal to extradite nationals, in case the acts could be seen as political offences (political offence exception), in case the acts would not be punishable under their own jurisdiction (dual criminality requirement) and if the act (partially) took place on their territory (territoriality exception). The ECtHR also developed a bar to extradition in case it threatened to result in a flagrant breach of convention rights without an effective remedy in the requesting State.

²¹ Joined Cases C-187/01 and C-385/01, as discussed in Chapter 3, section 6. For the discussion on the European arrest warrant, see Chapter 3, section 5.

²² Official statement by the British Home Office Minister Kate Hoey, May 1999 cited in Spencer 2004, p. 6.

In 1977 French President Giscard D'Estaing explicitly called for the creation of a European judicial area, based on the idea of shared sovereignty in and shared responsibility for the free movement of persons within the Single Market.²³ It took another 20 years before Member States were ready to integrate such a concept into the Treaties. In the meantime, various intergovernmental initiatives had been undertaken in the context of the Schengen Agreements and the provisions on JHA cooperation inserted by the Maastricht Treaty. However, the main problems from the perspective of judicial cooperation related to the imposition of the nationality exception, political offence exception, dual criminality requirement, and territoriality requirement remained.

The concept of the Area of Freedom, Security and Justice (AFSJ) was then taken advantage of by the UK backed by a number of Scandinavian countries to push for greater mutual recognition of judicial decisions in criminal matters and the enforcement of judgments ending a situation in which a separate decision of the judicial authority of the requested Member State was needed. This could be achieved in stages, where initially a system with limited grounds for refusal would be established followed by progressively making certain types of judicial decisions or judgments directly enforceable. The Scandinavians could support such an idea based on their own experience of close cooperation. Although referring to the way in which mutual recognition had helped to unblock the internal market, the UK had ulterior motives. It wanted to avoid the idea that had been offered in the *Corpus Juris* study commissioned by the European Parliament for the establishment of a European Public Prosecutors office who would prosecute crimes against Community finances before national courts. Based on the concepts of European territoriality, warrants for arrest and decisions related to the offences covered by the courts of any of the Member State would have to be recognised and executed throughout the Union.

At the 1999 Tampere European Council on the implementation on the Area of Freedom, Security and Justice, mutual recognition was declared a 'policy principle' and a programme of measures to implement it was officially announced. The Council had therefore no intention to accept the automatic mutual recognition of judicial decisions at that stage, just like it had rejected the Commission's idea to automatically recognise each other's rules on free movement by 1992, at the time of the adoption of the Single European Act. Before the programme of measures to implement the mutual recognition principle was adopted,²⁴ in 2000 the Commission produced a Communication on the mutual recognition of final decisions in criminal matters.²⁵ In this Communication, the Commission based the mutual recognition of judicial decisions on the concept that, according to it, had successfully worked in the creation of the Single Market: i.e. once a certain measure, such as a decision taken by a judge in exercising her/his official powers in one Member State, had been taken, that measure, in so far as it had extra national implications, would automatically be accepted in all Member States and have the same (or at least similar) effects there.

²³ De Kerchove & Weyembergh 2000.

²⁴ O.J. 2000 (C12) 10.

²⁵ COM (2000) 495.

The Commission behaved therefore in a rather similar fashion as it did in the internal market area, by promoting a policy of automatic recognition, which is equal to home State control if mutual recognition is based on trust in the criminal justice system of the other Member States, instead of legislative harmonisation. In spite of its ambitious agenda, probably inspired by the end goal of a single legal area in which mutual recognition is indeed automatic and hence there is free movement, the Commission was, however, well aware of the fact that, in the absence of harmonisation, certain exceptions to free movement needed to be accepted, such as excluding certain behaviours which were criminalised in one Member State, but not the other from the abolition of the dual criminality requirement. It also pointed to the link with harmonisation as regards the prevention of conflicts of jurisdiction and the rights of suspects. The subsequent programme of measures of the Council and Commission was, however, already less ambitious regarding the abolition of the dual criminality requirement. Furthermore, it reverted to a declaration of general trust in each other's criminal justice systems instead of proposing concrete measures to safeguard the rights of suspects.

As mentioned, 9/11 shook up the implementation of the programme of measures in the sense that the application of mutual recognition to extradition procedures both concerning suspects and sentenced persons was introduced ahead of schedule. The adoption of the FD EAW constituted here a case in point. More recently the FD EAW was joined by a number of flanking measures such as the Framework Decision on *in absentia* decisions and the Framework Decision on the Transfer of Prisoners, together with the measures relating to the Rights of Suspects in criminal proceedings, all of which were the focus of examination in this book. Another mutual recognition measure covered by the research was the European Investigation Order, which covers both existing evidence and the evidence to be obtained through a new investigative measure.

Furthermore, attempts to propose EU legislation on conflicts of jurisdiction and the principle of *ne bis in idem* have been overshadowed by the case law of the Court of Justice, holding that the application of Article 54 of the Schengen Convention Implementation Agreement did not rely on prior harmonisation of the criminal laws of the Member States. A Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings aimed at preventing parallel prosecutions concerning the same facts and the same person is seen as too weak, as well as suffering from poor implementation by the Member States.²⁶

Although an impressive list of EU legislation has been adopted implementing the mutual recognition of judicial decisions in criminal matters, its underlying *rationale* remains unclear and a matter of disagreement between the three EU institutions and Member States, as does its relationship with the continued existence

²⁶ Joined Cases C-187/01 and C-385/01; Commission Green paper on conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings, COM (2005) 696; Framework Decision 2009/948 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, O.J. (L 328) 42 of 15.12.2009; implementation report COM (2014) 313; Joined Cases C-187/01 and C-385/01, as discussed in Chapter 3, section 6.

of a recognition procedure, the dual criminality requirement, jurisdiction rules and territoriality exceptions as well as fundamental rights and procedural safeguards.

From an individual rights perspective, beyond the adoption of a number of procedural rights directives, the fact that the EU Charter is now binding on the Member States has led to fundamental rights considerations being given more prominence in the case law of the Court of Justice, although the Court has not yet comprehensively addressed fundamental rights and proportionality concerns in the application of mutual recognition instruments. The matter will surely require further attention from the Court, also given that the Commission and Council have rejected calls by the European Parliament to introduce legislative amendments to the FD EAW to address these concerns.

The perspective of free movement and European citizenship has recently achieved new prominence, especially in the plans of the European Commission to develop an EU criminal justice area by 2020. The Commission strives for the creation of a European Area of Justice in which citizens can be free, secure and confident, wherever they are, and in which they can freely exercise their right to free movement, both in terms of exercising economic as well as civil rights. The Council seems to have accepted this logic.²⁷ However, how these rights of EU citizens correspond to the obligation to be prosecuted and sentenced wherever they have committed an offence within the territory of the European Union²⁸ is not made clear.

Academic debate revisited

The academic debate on the relationship between mutual recognition and the AFSJ has ranged from a position in which mutual recognition is deemed inappropriate in the field of criminal law, to an approach in which it is deemed to be the ideal method to put into effect and implement this area. Intermediate scholarly approaches have argued in favour of conditions, limitations and the need for legislative harmonisation.

Both the protagonists and antagonists seem to have accepted the definition of mutual recognition proposed by the European Commission:

Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one Member State, has been taken, that measure – in so far as it has extra-national implications – would automatically be accepted in all other Member States, and have the same or at least similar effects there.²⁹

²⁷ Council document EUCO 79/14 of 27 June 2014.

²⁸ Explanatory memorandum to the Proposal for the Framework Decision on the European Arrest Warrant; COM (2014) 144.

²⁹ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 2, further discussed in Chapter 3, section 2.2.

The Commission seems to have been tempted to define mutual recognition as home State control in its quest to avoid harmonisation in establishing a single law enforcement area, although, as mentioned, its policy documents show that it was well aware of the need for harmonisation of criminal procedures³⁰ and the fact that, in the absence of the harmonisation of substantive criminal law, certain exceptions to free movement needed to be accepted.³¹

As discussed in Chapter 2, the ‘mutual recognition’ paragraph in the *Cassis* judgment should, however, not be read as mandating home State control, since it stresses that the host State has to justify the application of its norms to products lawfully produced and marketed in another Member State.³² At the same time, the Court expanded the public interests that can be used to justify host State intervention in accordance with the ‘rule of reason’.³³ And, although the case law on labelling requirements shows that there can be free movement in the absence of compliance with equivalent standards,³⁴ a wider assessment of the Court’s case law regarding product requirements reveals that, particularly in more sensitive areas such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, the Court will not insist on market access without equivalent standards.

A case discussed in Chapter 2, section 4, which is more instructive for the application of mutual recognition in the Area of Freedom, Security and Justice is *Vlassopoulou*, based on which a recognition procedure has to be in place within which the host State has to compare a migrant’s qualifications and abilities with those required by the national system to see whether the applicant has the ‘equivalent’ skills to have access to the profession in the host Member State. This case better reflects the essence of mutual recognition, which is that effect needs to be given to factual and legal situations (established in other Member States), irrespective of the existence of harmonisation to ‘take into account the interests of market [European] integration that the national legislation simply ignored’.³⁵

Looking at it from that perspective, the claimed consequences in terms of automaticity, simplification and acceleration of judicial cooperation are left up to political debate with the Commission or Council if they adopt a home State control approach in a certain proposal. However, at the same time, it is clear that the

³⁰ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 16, 19-20 (notably the procedural rights of suspects and criminal jurisdiction rules).

³¹ Communication from the Commission to the Council and the European Parliament – Mutual recognition of Final Decisions in criminal matters, COM (2000) 0495 final, p. 11 (on excluding from the scope of ‘mutual recognition’, ‘some behaviours which are criminalised in certain Member States, but not in others’).

³² Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 14.

³³ Case 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, para. 8.

³⁴ The drink Cassis de Dijon itself is an example of a product with a lower alcohol content being marketed with a label indicating the difference.

³⁵ Maduro 2007, p. 820.

criminal justice equivalents of bureaucracy and protectionism need to be rooted out as they have no place in a single legal area. In other words, effective judicial cooperation requires that procedures are not unduly long and bureaucratic. In case a judicial decision is not executed, this needs to be justified in accordance with primary or secondary EU law.

Seeing mutual recognition as an obligation to be other-regarding within a single legal area also militates against the idea of imposing limits on it. Certainly there are different interests at stake in a criminal justice context, but they do not affect mutual recognition as such, rather they affect the way in which those interests are reconciled. We have seen in Chapter 2 that the Court and EU legislator have found a number of different ways to reconcile fundamental freedoms and public interests. The 'free movement of judicial decisions' might imply an infringement of individual rights recognised by the EU Charter. In accordance with Article 52 of the EU Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be applied only if they are necessary and genuinely meet objectives of general interest recognised by the Union of the need to protect the rights and freedoms of others. Some of the principles of European law, with which mutual recognition interacts, such as the proportionality principle, therefore often take on another (and additional) meaning in the Area of Freedom, Security and Justice.

The basic idea behind mutual recognition is the establishment of a *single* legal area, the Area of Freedom, Security and Justice, in which exceptions to free movement based on national sovereignty have no place. However, that is the ideal, or the *end goal*, of a single legal area. It is noted that in the internal market this end goal is far from being achieved as new barriers to the internal market appear every time new market regulation is introduced. Those barriers may be justified with reference to the *ordre public* or public policy. However, for exceptions to free movement based on *ordre public* not to challenge the primacy of EU law, this concept and the proportionality of measures taken based on it have to be subject to the control and interpretation by the Court of Justice.³⁶

The Aims of the Union as an Area of Freedom, Security and Justice

Mutual recognition has been declared the preferred option to implement the Area of Freedom, Security and Justice, particularly its 'high level of security' aspect.³⁷ The AFSJ concept is, however, not defined anywhere in the Treaties, nor are the relationships between its components 'Freedom', 'Security' and 'Justice'. The relationship with European citizenship and the internal market is not clarified either, although they are all referred to in Article 3 TEU.

³⁶ Case C-36/02, *Omega Spielhallen* [2004] ECR 9609, as discussed in Chapter 1, sections 3 and Chapter 2, section 3; Case C-399/11, *Melloni* as discussed in Chapter 1, section 3 and Chapter 3, section 5.

³⁷ Art. 67(3) TFEU.

As mentioned when discussing the internal market concept, the Court of Justice was very clear that the ambition should be to merge the national markets into a single market, bringing about conditions as close as possible to those of a genuine internal market.³⁸ Article 3(2) defines the AFSJ as an area without internal frontiers. This could point to a similar ambition of a European criminal justice system (the spatial aspect of the project) over a period of time (the temporal aspect of the project). However, the division of the AFSJ over two pillars (the Community pillar in which provisions on external border controls, asylum and immigration were housed, and the 'Third pillar' which housed police and judicial cooperation in criminal matters) has concealed both aspects.

It should be noted that both the spatial and temporal ambition of the Area have been somehow compromised by its institutional provisions. Even after the Treaty of Lisbon it remains clear that Member States are not ready to pool their sovereignty completely. Furthermore they have built in mechanisms allowing certain Member States to opt in to negotiations on certain judicial cooperation measures, whereas others have to stay out but may choose to implement the measures.³⁹ Furthermore, a group of Member States may decide to go ahead with enhanced cooperation if all States cannot agree to certain measures.⁴⁰ Until 1 December 2014, the competence of the Court and Commission to hear cases from certain jurisdictions and start infringement procedures regarding measures adopted before the entry into force of the Treaty of Lisbon was limited. The UK has achieved the possibility to opt out of these measures altogether and opt back into a number of them individually subject to the agreement of the other Member States.⁴¹

The broader aims of the Area are to be determined by the relationship between 'Freedom, Security and Justice'. To start with the 'Justice' aspect, it was found that this concept can raise different expectations depending upon which language version of the Treaty one takes as a basis. However, a minimalist interpretation would at least assume compliance with the rule of law⁴² and the fundamental rights derived from it referred to in Article 6 TEU. The aspects of 'Freedom' and 'Security' have, however, been interpreted by the Commission and Council in a way that the first is dependent upon the latter and in any event a 'balance' needs to be struck.⁴³

³⁸ Case 15/81, *Schul* [1982] ECR 1409, para. 33.

³⁹ Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, O.J. (C 83) 295 of 30.03.2010; Protocol (No. 22) on the position of Denmark, O.J. (C 83) 299 of 30.03.2010.

⁴⁰ For instance, in accordance with Art. 82(3) TFEU.

⁴¹ Protocol (No. 36) on transitional provisions, O.J. (C 83) 322 of 30.03.2010.

⁴² Art. 2 TEU; 19 TEU; Case 294/83, *Les Verts*, para. 23: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty.'

⁴³ For example, Communication from the Commission to the Council and the European Parliament of 10 May 2005 - The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, COM (2005) 184, p. 10: 'Effective maintenance of law and order and the investigation of cross-border criminality in an area of free movement cannot be allowed to be impeded by cumbersome →

The literature has critically assessed this ‘balance metaphor’ since it treats freedom and security as analogous concepts, which can be compared with and weighed against each other.⁴⁴

This leads to the role of the European citizen, to whom the AFSJ is offered.⁴⁵ What stands out immediately is this notion of a European citizen being offered something by this Area, instead of it safeguarding and enforcing its rights and freedoms. Over the last 15 years the Member States and to a lesser degree the Commission and the European Parliament have progressively implemented the AFSJ. However, instead of offering the AFSJ to the European citizen, Member States have been mostly occupied with demonstrating collective punitive will.⁴⁶ The European citizen can, however, use the legal means available to it to enforce its rights by relying on EU law even against its own Member State. This possibility is, however, limited by the particular institutional provisions and pre-Lisbon measures applicable in the Area of Freedom, Security and Justice, that seem to regard citizens and other individuals as subjects of judicial cooperation, rather than right holders. This is particularly evident since allowing Member States can limit the possibility of their courts to refer preliminary questions to the Court of Justice on the interpretation of framework decisions until the end of the transitional period and can explicitly exclude their direct effect (until they are amended).

The citizen can also shape the European policy agenda through its representatives in the European Parliament and national parliaments. The problem here is that the EU institutions, notably the European Parliament, which can voice its concerns, are still struggling to establish their democratic legitimacy. As long as the democratic legitimacy of the institutions is in doubt, Member States and their courts are happy to fill the perceived security⁴⁷ and liberty⁴⁸ gaps. The question is whether this is a permanent state of affairs, calling for a rethinking of European integration in this area or whether a true ‘European criminal justice area’, similar to the obliga-

procedures for the exchange of information. The Union should support and encourage a constructive dialogue between all parties concerned to identify balanced solutions, fully respecting fundamental rights to privacy and data protection, as well as the principle of availability of information.’

⁴⁴ Guild, Carrera & Balzacq 2010, p. 41.

⁴⁵ Art. 2(2) TEU: ‘2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.’

⁴⁶ Wade 2014, p. 65.

⁴⁷ Council of the European Union, Living in an Area of Freedom, Security and Justice, available at: <http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/PU2088_BROCH_JAI_EN.qxd.pdf>, p. 4: ‘The creation of an area of freedom, security and justice is closely tied to completion of the Single Market and its four “freedoms”. The free movement of persons, one of the four fundamental freedoms, resulted in the abolition of controls at internal borders of the countries belonging to the Schengen Area. This raises issues for the internal security of each Member State and of its residents.’ (last consulted on 10 May 2015).

⁴⁸ German Constitutional Court, decision of 30 June on the Act approving the Treaty of Lisbon. See: <http://www.bundesverfassungsgericht.de/shreddocs/entscheidungen/en/2009/06/es20090630_2bve000208en.html> (last consulted on 10 May 2015).

tion to create a 'highly competitive social market economy' as now codified by Article 3 TEU, is on the horizon.⁴⁹ Furthermore it is important to realise that the AFSJ is only one of the contexts within which the various criminal justice actors operate. In particular, one must remember that individuals are national and also European citizens and right holders according to the internal market provisions of the EU Treaties, the ECHR, Charter and national constitutions.⁵⁰ This not only calls for a political debate but also a legal debate on how best to accommodate all of the interests concerned in the Area of Freedom, Security and Justice, taking the individual's fundamental rights as a starting point in line with the Charter. Within a single legal area, one may, in principle, trust the judicial decisions of other Member States and the enforcement mechanisms of the Member States aimed at ensuring compliance with the protective norms in European Law. However, that trust has its limits when there are indications to the contrary in individual cases. One should also consider that certain rights are absolute (like the prohibition of torture), whereas other rights may be subject to exceptions requiring specific justifications (such as the right to liberty and security and free movement and residence).

The lack of clarity as regards the substantive implications of the 'Area of Freedom, Security and Justice' makes it difficult to place mutual recognition within its context. There is a clear, albeit restricted, aim of a single legal area in which free movement needs to be ensured. Mutual recognition in the criminal justice area principally provides for the free movement of judicial decisions in criminal matters. This plays to the Member State's security interest in ensuring that someone is brought to justice or serves a sentence. However, the bigger picture is unclear and is a matter of disagreement among EU institutions and Member States, which have been dominant in the development of the AFSJ agenda so far. This means that to rely on one or the other aspect of the AFSJ notion would be a slippery path to go down.

The European arrest warrant

The section on the European arrest warrant addressed the happenings of 2002 when, after (speedy) negotiations following 9/11, a Framework Decision was adopted after which mutual recognition was applied to extradition procedures for suspects and sentenced persons: the FD EAW. This section examined the impact that the application of mutual recognition has had on extradition procedures and particularly its impact on individual rights, exploring where relevant its national implementation and interpretation by the Court of Justice and domestic courts. Furthermore, it studied the relationship between the FD EAW and a number of flanking measures, focussing on procedural rights of suspects and accused persons, and flanking judicial cooperation/mutual recognition measures. Finally, the relationship between mutual recognition as applied in the FD EAW and the principles of EU law was explored, focusing on principles most closely tied to the enforcement

⁴⁹ For a discussion on priorities for such a European criminal justice area see Wade 2014; European Criminal Policy Initiative 2013.

⁵⁰ Guild 2012, p. 14, as discussed in Chapter 1, section 3.

of individual rights within the European legal order, notably fundamental rights and proportionality.

Mutual recognition applied to extradition procedures

When looking at the impact mutual recognition has had on extradition procedures, first it must be noted that mutual recognition is not to be equated with a system based on home State control, which would imply direct and automatic recognition of the judicial decisions taken in the other Member States, since there is a surrender procedure with deadlines. Furthermore several grounds for non-execution are foreseen and conditions may be imposed.

The FD EAW allows the possibility for Member States to organise appeals. However, at the same time, it prescribes strict deadlines. The Court reconciles these two possibilities by stating that fundamental rights should be applied without frustrating the application of the FD EAW.⁵¹ An individual rights based approach would, however, insist on a just outcome, within reasonable time limits, and would not take the default position that appealing a decision would in some way be an abuse of the system.⁵² Surely, in case of conflict in an individual case, ensuring compliance with fundamental rights should prevail over meeting a deadline.

A single qualified criminality requirement is introduced for 32 categories of crime, implying free movement subject to the criminal act being punishable by a deprivation of liberty of at least three years in the issuing Member State. This notion has resulted in questions being referred to the Court of Justice regarding the compatibility of the FD EAW with the legality principle and the principle of equal treatment and non-discrimination. The Court, however, held that the legality principle was not violated since it is the crime as defined in the substantive criminal law of the issuing Member State which is to be taken as a point of reference. It furthermore held that the seriousness of the 32 categories of crime warranted dispensing with the verification of dual criminality particularly in the light of the high degree of trust and solidarity between the Member States.

The dual criminality requirement militates against the concept of a single legal area and as such is to be rejected. However, citizens are also entitled to legal certainty, equal treatment and non-discrimination, with limitations of these rights being subject to the proportionality principle. The distinct vagueness of the 32 categories of crime legitimises fears that the application of mutual recognition might lead to a radically punitive system. Differences between the substantive definitions and interpretations of criminal acts among Member States and the resulting discrimination between individuals cannot be swept under the carpet by calling on such eminent principles like trust and solidarity, particularly when the price for that trust is paid by citizens who live in an increasingly interconnected society in which they cannot even feel safe when following the law within their own jurisdiction.

In order to provide legal certainty for the individual, proper and precise definitions in EU harmonisation measures are needed for the 'serious crimes' that are

⁵¹ Case C-168/13, *Jeremy F*, para. 53.

⁵² Cf. Mitsilegas 2012, p. 322.

no longer subject to the verification of dual criminality. In the absence of uniform definitions laid down in EU law and a consistent interpretation by Member States' judicial authorities,⁵³ the proportionality of the unequal treatment of individuals needs to be determined in individual cases, taking into account the impact of arrest and surrender on the rights and liberty and security as well as free movement and residence of individuals. In this context, it is to be noted here that internal market case law does not insist on free movement in case Member States' approaches differ too much in areas related to health and safety, public policy and (particularly) fundamental rights protection.⁵⁴ Furthermore, the Court has also recently highlighted the need to properly define the concept of 'serious crime', when it is used as a basis for justifying limitations on individual rights.⁵⁵

Two territorial exceptions remain in the text of the FD EAW. The first is based on acts which partially took place on the territory of the executing Member State. The second is based on acts which took place in a third State and the law of the executing State would not allow for prosecution when the acts were committed on its territory. The second ground has no place in the context of a Union that aims to be a single legal area as it relies on an element of reciprocity. The first ground would have to be integrated into a wider set of criminal jurisdiction rules in which the interests of everyone involved should be taken into account.⁵⁶ This brings into focus the conflict between the free movement of judicial decisions, facilitated by mutual recognition and the rights of nationals and residents.

The Commission argued that 'A citizen of the Union should face being prosecuted and sentenced where he or she has committed an offence within the territory of the European Union.'⁵⁷ This notion was limited by Member States who foresaw exceptions in case surrender was asked for a national or person staying in or residing in the executing Member State. In that case, the executing Member State could decide to execute the sentence itself or surrender a suspect under the condition that the suspect would be returned to the issuing Member State to serve his/her sentence. These provisions have now been supplemented by the FD Transfer of Prisoners which also allows for the direct forwarding of the sentence for execution.

Given the fact that those staying in, residents and nationals of the executing Member State have more rights in the FD EAW and allow that person to serve his/her sentence in the executing Member State, conflicts have arisen regarding the notions of a person 'staying in' or 'resident in' and in what circumstances one can rely on the FDEAW. In *Kozłowski* the Court held that in assessing whether a person could be qualified as 'staying in' the executing Member State, the executing judicial authority should make an overall assessment of various objective factors characterising the situation of that person, including, in particular, the duration, nature and conditions of his presence and the family and economic connections which that

⁵³ Klip 2012, p. 367.

⁵⁴ See in particular Case C-36/02, *Omega Spielhallen* [2004] ECR 9609.

⁵⁵ Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd. and others*, para. 59.

⁵⁶ Klip 2009, p. 429.

⁵⁷ Explanatory memorandum to the proposal for a Framework Decision on the European Arrest Warrant.

person has in the executing Member State.⁵⁸ In *Wolzenburg*, however, the Court accepted the requirement made in the Dutch implementing legislation of five years of residence before a resident could benefit from equal treatment with nationals, stating that this would ‘reinforce the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice’.⁵⁹ The Advocate General in that case offered a much more nuanced approach in which it would be left up to judicial authorities to decide on the application of the nationality exception to other EU citizens on a case-by-case basis taking into account the extent of social integration and hence chances of social rehabilitation.⁶⁰

It seems that the Court still has not found its way in integrating the rights pertaining to European citizenship, the objective of social rehabilitation and judicial cooperation in criminal matters. Although this is very regrettable, it is also understandable given the Commission’s logic that the free movement of judicial decisions automatically implies that the sentenced person has to move. I disagree with this interpretation, since it overlooks the essence of mutual recognition, which is that the factual and legal decisions established in other Member States have to be recognised and given effect. Such an interpretation also leads to a direct and unnecessary conflict between mutual recognition and the safeguarding of individual rights.

Unfortunately the FD Transfer of Prisoners also mixes up the need to ensure the execution of sentences, as such, with the question of *where* the sentence needs to be executed in view of obtaining social rehabilitation. The person is not even offered the possibility to appeal against the decision on where the sentence is to be executed in clear violation of Article 47 EU Charter. It remains to be seen whether these serious shortcomings may be remedied in the implementation process at the national level. In this context, it may be worth recalling the opinion of AG Mengozzi in *Lopes da Silva*, in which he reminded that when transposing the FD EAW, in which mutual recognition is applied to extradition procedures, the protection of fundamental rights must be the overriding concern of the national legislature.⁶¹ This logic also applies to the FD Transfer of Prisoners.

In *Wolzenburg*, the Court seems makes a normative choice favouring the ‘free movement of judicial decisions’ over the interests of free movement and residence as well as social rehabilitation, as, by limiting the situations in which the executing judicial authority was allowed to refuse to execute a European arrest warrant, the Netherlands legislation only facilitated the surrender of requested persons, in accordance with the principle of mutual recognition set out in Article 1(2) FD EAW.⁶² It thereby limited the rights of EU citizens to equal treatment in terms of the execu-

⁵⁸ Case C-66/08, para. 48.

⁵⁹ Case C-123/08, *Wolzenburg*, para. 58.

⁶⁰ Opinion of AG Bot in Case C-123/08, *Wolzenburg*, paras. 58-70.

⁶¹ Opinion by AG Mengozzi in Case C-42/11, para. 28.

⁶² Case C-123/08, para. 59; Mitsilegas 2012, p. 341: ‘The Court justified this departure from *Kozłowski* upholding the Dutch limitation of exclusion of a great number of EU nationals from the protective scope of Article 4(6) by accepting the logic of abuse put forward by the Dutch government, which justified the adoption of the Dutch implementing law on the ‘high degree of inventiveness in the arguments put forward in order to prove that they have a connection to Netherlands society.’

tion of prison sentences to those with a continuous lawful residence for five years, a matter that the same Court left up to the national judicial authority to determine in *Kozłowski* in view of various objective factors. The difference between the two decisions is that the Netherlands had laid down specific conditions that residents of other EU Member States had to comply with before they could benefit from the ground for non-execution implementing Article 4(6) FD EAW.

It has been commented that a narrow interpretation of exceptions to ‘mutual recognition’ is ‘in line with the Court’s traditional internal market case law’.⁶³ I disagree with this interpretation of mutual recognition. The implementation by the Netherlands simply imposed extra conditions for other EU nationals to comply with before they could benefit from equal treatment with nationals for the purpose of the application of the non-execution ground of Article 4(6) FD EAW. The Court deemed one of those extra conditions, the five-year residency requirement, to be proportionate.

While it is true that, in the context of the internal market, exceptions to free movement have to be construed narrowly, in line with the proportionality principle as it is applied there, it needs to be underlined that internal market case law, ever since *Cassis de Dijon*, does not make a normative choice in favour of free movement over other interests, such as the environment or consumer protection. Also, particularly in more sensitive areas such as those related to health and safety, public policy and fundamental rights, where Member States have a different regulatory approach, the Court will not insist on market access without equivalent standards.⁶⁴ In this case judicial authorities should have been left with more room to determine the level of social integration in individual cases, taking various objective factors into account.⁶⁵ Certainly, since individual rights are at issue, a comparison with internal market case law in which free movement and individual rights are in conflict would be warranted.⁶⁶

As regards fundamental rights more generally, two grounds for non-execution are found in the FD EAW. One is based on *ne bis in idem* and the other, in case of an *in absentia* convictions, is in accordance with the FD on *in absentia*. This has led to a discussion as to the freedom the executing judicial authority has to act in these situations. In *I.B.* the Court offered an expansive interpretation of the FD EAW to accommodate fundamental rights.⁶⁷ In *Mantello*, however, it argued in favour of mutual trust, leaving it up the issuing Member State to determine whether or not the person had been finally judged.⁶⁸ In *Melloni* it limited the possibility for the executing authority to make surrender subject to a review, since the conviction had complied with criteria laid down in the FD on *in absentia*. The Court literally said

⁶³ Janssens 2010, p. 842.

⁶⁴ See the discussion in Chapter 2, section 3.4.

⁶⁵ Klip 2010, commenting on the case law of the District Court of Amsterdam (translation): ‘In my view the court is focusing too much on the duration of the residence and is not investigating other factors.’

⁶⁶ Case C-112/00, *Schmidberger*, [2003] ECR 5659, Case C-36/02, *Omega Spielhallen* [2004] ECR 9609.

⁶⁷ Case C-306/09, *I.B.* [2010] ECR 10341, para. 50: Opinion of AG Cruz, para. 43.

⁶⁸ Case C-126/09, *Mantello*, para. 46.

that ‘the FD on *in absentia* ‘improved’ [emphasis added] mutual recognition through harmonisation of the ground for non-recognition’.⁶⁹

The Court has been carefully guarding the closed system of exceptions in the FD EAW and with it the room for manoeuvre for the executing judicial authority to refuse surrender, except in *I.B.* where the fundamental rights argument was inescapable and moreover would not lead to a possible non-execution but just an extra condition being imposed. The *Melloni* decision has been criticised also, given the level of protection chosen in the FD *in absentia*.⁷⁰ However, allowing the Spanish authorities in this case to ask for a review would in fact add an extra ground for non-execution in violation of the FD *in absentia*, which was found to be in compliance with the ECHR, EU Charter and would arguably disrupt the uniformity of EU law.⁷¹ This judgment has met resistance from certain national courts, however, which refer to the need to respect their national *ordre public*.⁷² The resistance illustrates the problem with EU legislation taking ECtHR standards (the lowest common denominator) as a basis for drafting EU legislation and not seeking a higher level of protection in line with national constitutional principles. This was certainly the case with the FD *in absentia*, a pre-Lisbon measure the main purpose of which was to facilitate judicial cooperation not to elevate fundamental rights protection. Article 82(2) TFEU now explicitly points to the fact that EU legislation harmonising procedural rights has to take into account the differences between the legal traditions and systems of the Member States, which should include a proper consideration of national constitutional principles.⁷³

The deference to mutual trust in *Mantello* is more difficult to explain since, in absence of harmonisation, *ne bis in idem* has received an autonomous interpretation by the Court as a fundamental right of EU citizens.⁷⁴

This *status quo* reveals two sets of tensions. The first concerns the fact that grounds for refusal based on the non-existence of dual criminality and the exercise of extraterritorial jurisdiction have been borrowed from extradition procedures which relied on collaboration between sovereign countries. As such, they are strange transplants in the Area of Freedom, Security and Justice, which, as was discovered in Chapter 3, section 2, is premised on the idea of a single legal area and moreover one that has supremacy over the national legal orders.

⁶⁹ Case C-399/11, *Melloni*, para. 43.

⁷⁰ Tinsley 2012.

⁷¹ Case C-399/11, *Melloni*, para. 63.

⁷² Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl. A 442/13 (119/13); Vogel 2013; *Bundesverfassungsgericht* of 30.06.2009 – 2 BvE 02/08, 05/08, 1010/08, 1022/08, 1259/08 and 182/09 (*Treaty of Lisbon*).

⁷³ Art. 4(2) TEU: ‘2.The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.’

⁷⁴ As discussed in Chapter 3, section 6.

The second tension concerns the compliance with fundamental rights. Here the presumption of trust in the criminal justice systems and decisions of the issuing judicial authorities finds its limits when there are concrete indications of irregularities and abuse. The Court understood this well in its *I.B.* decision. The Council, probably aware of this tension, has sought to approximate the conditions to be applied by the executing judicial authorities in cases of *in absentia* decisions. As discussed in the section on *ne bis in idem*, it has proved to be more difficult to approximate matters in this area and the choice has been made to continue to rely on the interpretation of the *ne bis in idem* principle by the Court of Justice.

In the case of *in absentia* decisions, the Court of Justice has since concluded that there is no margin of appreciation for the executing judicial authority beyond the provisions of the FD EAW, as amended, which it has held to be compliant with the EU Charter and ECHR case law in *Melloni*. However, even in the absence of such approximation, the Court has wished to limit executing authorities when checking fundamental rights concerns by individuals related to the existence of a second prosecution for the same acts, taking trust in the issuing judicial authorities' assessment as a point of reference in *Mantello*.

The *Melloni* case, however, does reveal the underlying conflict between the 'free movement of judicial decisions' and their collective impact on the fair trial rights of the individual. The logic of having to accept goods or persons that comply with standards of other Member States onto the market might work for beer,⁷⁵ since banning market access is deemed disproportionate in view of there being an alternative, for example informing the consumer of the difference between 'domestic' and 'imported' beer on the label. That logic, however, becomes complicated when the free movement of judicial decisions resulting in the transfer of individuals for prosecution in another Member State or imposing sentences 'produced there' are at issue. In that case the individual (assuming that (s)he is an EU citizen) may be faced with different treatment in terms of procedural rights or sentencing policy because (s)he made use of his/her free movement rights.

It is necessary to go back to the origins and purpose of mutual recognition and to question whether a European criminal justice area, in which criminals are brought to justice and individuals have equivalent rights, whether they are involved in domestic or transnational criminal proceedings, is best achieved by such a system of free movement of judicial decisions and the *credo* that EU citizens not only have a right to free movement but also may be prosecuted across the Union. The underlying problem here is not just the zeal of the Court of Justice to establish and defend European integration based on this premise but also the drafting of the FD EAW itself, which, by mostly focusing on Member State (security) interest, is not sufficiently taking into account that European interest, in particular the rights of wanted persons either based on the ECHR, the Charter, and their status as European citizens and nationals of a Member State.

⁷⁵ Case 178/84, *Commission v Germany* [1987] ECR 1227.

This leads to the wider relationship between the mutual recognition of judicial decisions in criminal matters and the additional harmonisation measures adopted since the FD EAW, with the European Parliament now in a role of co-legislator.

Relationship with additional harmonisation measures

The discussions regarding the interaction between mutual recognition, as applied to extradition procedures and the FD EAW, the rights of European citizens and fundamental rights more generally raise questions regarding the relationship of mutual recognition with additional harmonisation measures, particularly regarding the rights of suspects in criminal proceedings but also measures flanking mutual recognition measures, like the European Investigation Order.

The European Commission acted on its ambition presented in its 2000 Communication that 'the treatment of suspects and the rights of the defence would not only not suffer from the implementation of the process, but that the safeguards would even be improved through the process'.⁷⁶ It did not only propose a number of procedural rights in the FD EAW itself, but it also put forward a separate framework decision on the issue, on which negotiations broke down in 2007.⁷⁷ In 2009 an alternative approach was agreed upon, in accordance with which one defence right would be negotiated at a time based on Article 82 TFEU, which foresees the establishment of minimum rules on the rights of suspects and accused persons in criminal proceedings to the extent necessary to facilitate mutual recognition. So far this approach has resulted in Directives on translation and interpretation (measure A),⁷⁸ the rights to information (measure B),⁷⁹ the right of access to a lawyer and the right to communicate upon arrest (measure C – legal aid).⁸⁰

All measures adopted cover European arrest warrant procedures, strengthening the rights of the wanted person. Of particular importance is the right of dual representation afforded by the Directive on Access to a Lawyer, which could also contribute to a swifter resolution of cases and a limitation of unnecessary periods of detention. Unfortunately at a technical level, a recital slipped into this Directive which creates the impression that judicial authorities may not rely on a higher level of protection (than that laid down in the Directive on Access to a Lawyer) in the context of mutual recognition procedures.

One example of a situation in which a conflict may occur concerns the exclusion of evidence obtained in the absence of a lawyer. Would an absolute exclusion of evidence obtained in the absence of a lawyer laid down in the constitution of Member State A present an obstacle to mutual recognition of judicial decisions taken in Member State B, which does not have such an absolute exclusionary rule

⁷⁶ COM (2000) 495, p. 16.

⁷⁷ COM (2004) 328; Morgan 2005, p. 195-208.

⁷⁸ Directive 2010/64/EU, O.J. (L 280) of 26.10.2010.

⁷⁹ Directive 2012/13/EU.

⁸⁰ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, O.J. (L 294) 1 of 06.11.2013.

but does comply with the minimum standards laid down in Article 12 of the Directive on Access to a Lawyer? And, if so, how would one justify the resulting difference of treatment between EU citizens depending on whether they are involved in a domestic or transnational case? At the very least, it may be expected that the Court of Justice will be called upon to interpret Article 12 of the Directive as regards the actual level of protection it should provide to ensure an effective remedy in view of the rights of the defence and the fairness of proceedings in accordance with Articles 6, 47 and 48 of the EU Charter and the constitutional principles common to the Member States.

As discussed more extensively in section 3.5.2, it would have been better to stick to the wording of the *Melloni* judgment, which referred to the primacy, unity and effectiveness of EU law and to include a proper definition of mutual recognition clarifying that executing judicial authorities may continue to apply their constitutional standards on due process to the extent they have not been exhaustively harmonised by EU law. This is certainly the case given the already tense relationship between the Court of Justice and national courts on the issues of supremacy in the Area of Freedom, Security and Justice, the responsibility for fundamental rights protection and the consequences of the application of mutual recognition for national sovereignty and fundamental rights. Just like in the application of the nationality and *ne bis in idem* exceptions to surrender discussed above, the wording of the recital in the Directive on Access to a Lawyer seems to be based on a confusion between the security interests that mutual recognition can further and security itself.

This discussion also brings into focus the urgent need to disentangle the rights of suspects from mutual recognition and in particular the wording 'to the extent necessary', which is unworkable in practice, as are other qualifications such as a 'high level of protection'.⁸¹ One may use the example of data protection or, better and more appropriate, EU citizenship, which has disentangled itself from the individual free movement provisions in the internal market and now urgently needs to be integrated into the criminal justice area. It does not suffice to refer to the treaty provisions and secondary legislation on EU citizenship in judicial cooperation instruments. A substantive debate is needed on the impact of judicial cooperation on the free movement and residence rights of EU citizens.

Such a development would be in line with the acceptance by the Commission and Council that within a European Area of Justice citizens should feel secure and confident wherever they are and in which they can freely exercise their right to free movement both in terms of exercising economic as well as civil rights.⁸² That acknowledgement should also result in an independent legal basis under the heading 'access to justice' reflecting the relevant provisions of the EU Charter (Arts. 6, 47 and 48).

⁸¹ Which is used in relation to consumer protection in accordance with Art. 114 TFEU.

⁸² V. Reding, Vice President European Commission, EU Justice Commissioner, Justice past, justice present and justice future, three messages to the European Council, Speech 14/481; Council document EUCO 79/14 of 27 June 2014, Annex I, p. 19.

The adoption of the European Investigation Order (EIO) may also soften the impact of the FD EAW on the treatment of suspects and the rights of the defence by offering an alternative to surrender, such as hearing by videoconference or telephone conference. It is furthermore an interesting measure to look at in terms of the 'lessons learned' from a decade of FD EAW. It seeks to apply mutual recognition to the transfer of existing evidence as well as that which still needs to be obtained, including through special investigative measures like the transfer of a person for questioning, telephone and video conferencing, controlled deliveries, and covert investigations, without, however, regulating the ultimate admissibility of evidence.⁸³ The outcome of the negotiations on this Directive reveals a number of tensions which point to fatigue among the Member States as well as the European Parliament with the way in which mutual recognition measures, most notably the European arrest warrant, have been applied in the past.

This is noticeable by the limitation in scope and demands for a proportionality test and a fundamental rights exception in the Parliament's position. As the measures become more intrusive so do the exceptions based on national sovereignty. This raises the question whether the ultimate result should still be deemed a 'mutual recognition' measure at all or whether we have witnessed a partial return to intergovernmentalism. The next question that needs to be answered is how the EIO and EAW, together with the other mutual recognition measures adopted like the European Supervision Order and the FD on Transfer of Sentenced Persons, is to result in a more coherent system of judicial cooperation in criminal matters compliant with the principles of EU law, including the Union's fundamental rights obligations. In an interesting contrast with the Access to a Lawyer Directive, recital 39 to the Directive on the European Investigation Order explicitly states that it respects Member States' constitutions in their respective fields of application, although this might be good for fundamental rights protection, at least in the Member State concerned, but at the same time poses a threat to the primacy, unity and effectiveness of European law.

Relationship with principles of EU law, notably fundamental rights and proportionality

Having assessed the FD EAW and the flanking measures adopted and under negotiation, the third part of the section on the European arrest warrant dealt with its relationship with principles of EU law, notably those derived from the rule of law. The focus was on fundamental rights and proportionality. (The relationship with non-discrimination was dealt with already in the context of the nationality exception to surrender.)

The Council, Commission and European Parliament have all sought to address the disproportionate use of the European arrest warrant before the case was 'trial ready' and for 'minor offences'. In a resolution based on a legislative own initiative report, the European Parliament has demanded a proportionality check in the issuing Member State, taking into account all relevant factors and circumstances, including the impact on the rights of the requested person as well as a mandatory

⁸³ COM (2009) 624.

ground for refusal in case execution would be incompatible with the executing Member State's obligation in accordance with Article 6 of the TEU and the Charter, notably Article 52(1) thereof with reference to the principle of proportionality. The Commission, however, refuses to propose a proportionality check claiming the problems might be resolved due to its increased enforcement powers after the end of the transitional period and the development and implementation of flanking mutual recognition and procedural rights measures. Furthermore a fundamental rights exception would potentially undermine the principle of mutual recognition and the primacy of fundamental rights is already underlined in Article 1(3) FD EAW. The Council presidency similarly produced a document in which it referred to soft law measures, like the 'Handbook on how to issue a European Arrest Warrant' and the need to respect the 'philosophy of mutual recognition', aimed at making the EAW an effective tool in the fight against terrorism and organised crime, with reference to the *Advocaten voor de Wereld* case.

It is extraordinary that EU legislation, which has existed for over 12 years, which was adopted in a completely different institutional setting (A framework decision lacking direct effect, EU Charter not yet binding, lack of co-decision for the European Parliament) is defended so forcefully by the Commission and the Council. The background to this is that these institutions do not want to open 'Pandora's box' in terms of departing from the 'philosophy of mutual recognition', which is equated to the effectiveness of the EAW. That effectiveness seems to be measured in the number of people whose surrender is obtained.

From this perspective, the introduction of new grounds for non-execution is seen as limiting mutual recognition. Again there seems to be a confusion between mutual recognition and the free movement of judicial decisions. Fundamental rights obligations are not incompatible with mutual recognition, but they might prevent the executing judicial authority from surrendering the person. In other words, the executing judicial authority does have to recognise and give effect to the factual and legal situations established in the other Member State, but at the same time it has the responsibility to uphold fundamental rights. These two parallel obligations have been introduced in the European Investigation Order. It is ironic that in a mutual recognition measure the impact of which is more direct for individual rights, such clarity will not be provided by the EU legislator.

Another risk with introducing new legislation is that certain Member States may not opt in, whereas others will stay out. This variable geometry is an unfortunate side-effect of the design of the Treaty of Lisbon. At the same time, it undermines the Commission's point that work on procedural rights would compensate for not introducing an explicit proportionality test or fundamental rights exception. The same Member States that might not opt in to amendments to the FD EAW are those that have not opted in to the Directive on Access to a Lawyer.

As the Commission will not propose any reforms in the foreseeable future, the problem is now shifted on to the European Court of Justice, which will have to interpret the FD EAW in line with the EU Charter. As its case law on the specific points of compatibility with fundamental rights and proportionality is still limited, the assessment of its case law is supplemented by a selected number of cases from Germany, the UK and the Netherlands, all of which have implemented an explicit

ground for non-execution based on fundamental rights. The UK has now supplemented this with a ground for non-execution based on proportionality, whereas this question has also been discussed by the courts of the Netherlands and Germany.

The section on the relationship with fundamental rights revealed that although all three Member States studied have a fundamental rights ground for non-execution, they have only been used recently in the UK. The fundamental rights claims are often based on poor prison conditions in the issuing Member State, which is solved by obtaining individual guarantees (e.g. in Germany and the UK). However, UK courts have already taken it one step further and have refused surrender in cases in which they were not satisfied with the specific guarantees provided.⁸⁴ The Netherlands seems to be following the German and UK courts' approaches. However, the District Court of Amsterdam ruled that a conviction by a Member State for a systemic violation of Convention rights of prisoners may lead to refusals in the future.⁸⁵

The Court of Justice in the *Radu* case did not go into the suggestions made by AG Sharpston to interpret Article 1(3) of the FD EAW in a manner that would allow the executing judicial authority to refuse surrender in case it is shown that the human rights of the person whose surrender is requested have been infringed, or will be infringed, as part of or following the surrender process, which in cases relating to Articles 6 (liberty and security), 47 (effective remedy and fair trial) and 48 (presumption of innocence and right of defence) of the EU Charter would have to be such as to destroy the fairness of the process fundamentally.⁸⁶

The case law shows that two different situations may be envisaged. The first relates to prison conditions that amount to inhuman or degrading treatment. The second relates to a situation in which the surrender would contribute to a fundamental violation of the person's right to liberty and to a fair trial. As the overview of cases in the UK, Germany and the Netherlands illustrate, both are not unimaginable situations within the European Union, and it would have been useful for the Court to provide some more guidance on how to deal with them. Unfortunately, and this might have to do with the factual background of the *Radu* case, the Court did not enter into this discussion. If Luxembourg does not provide the answers, judicial authorities at Member States levels will look elsewhere to find guidance (Constitutional Courts, or the ECtHR) or seek to formulate their own solutions.

The section dealing with proportionality focused on the situation in which it is claimed that the measure chosen is not proportionate in the light of the fundamental freedoms or other rights to which a European national or other person is entitled.⁸⁷ As the FD EAW does not have a ground for non-execution based on proportionality, claims in this direction have been made in the context of other grounds for non-execution, notably based on dual criminality and territoriality.

⁸⁴ High Court of England and Wales Queens Bench Division decision of 11 March 2014, *Badre v Italy* [2014] EWHC 614 (Admin).

⁸⁵ District Court of Amsterdam 22 October 2010, KJN BO1448; Glerum 2013, p. 201.

⁸⁶ Opinion of AG Sharpston in Case C-396/11, para. 97.

⁸⁷ With reference to the division made by Klip 2012, p. 390-391.

The District Court of Amsterdam has accepted that in individual cases surrender could disproportionately affect the interests of the requested person resulting in a refusal to surrender.⁸⁸ An interesting aspect of the case was that the plea was also based on European citizenship. This goes back to the question whether European citizenship has an added benefit in the context of judicial cooperation beyond equal treatment with nationals in demanding the guarantee that the sentence may be served in the executing State in accordance with Articles 4(6) and 5(3) FD EAW.

UK courts have started to refuse surrender in a number of recent cases, taking into consideration arguments based on family life in accordance with Article 8 ECHR and the (undue) delay in prosecuting the case.⁸⁹ The UK also reformed domestic legislation to allow refusals in case of absence of a prosecutorial decision (trial-readiness) and on human rights and proportionality, which is measured in terms of the seriousness of the alleged conduct, the likely penalty that would be imposed if found guilty and the possibility of the relevant authority taking less coercive measures. Surprisingly, from an individual rights perspective, the likely consequences of extradition for the suspect and his/her family is not listed as a criterion.

German courts have applied Article 73 of the Act on International Cooperation in Criminal Matters (implementing Article 1(3) FD EAW) to refuse a number of EAWs. In Germany, the Higher Regional Court of Stuttgart has carved out room for a proportionality test based on Article 49 of the EU Charter and 20(3) of the German constitution, distinguishing the EAW from the German order. It lists a number of criteria to be taken into account when determining whether this proportionality principle has been violated, including the person's right to liberty and security, the limits of fundamental rights in accordance with Article 1(3) FD EAW, the significance of the charge and the severity of the possible penalty, the interest of the issuing Member State to prosecute and possible alternatives to surrender.⁹⁰ The German courts continue on this path despite the Court of Justice stating in *Melloni* that a higher level of protection provided for by a national constitution may only be demanded to the extent the primacy, unity and effectiveness of EU law are not compromised.⁹¹

⁸⁸ District Court of Amsterdam of 30 December 2008, LJN BG 9037, para. 6.3. In one case a proportionality plea was successful. It, however, concerned a case which was mixed with a claim that surrender would result in inhuman or degrading treatment as it concerned a terminally ill person who could not be guaranteed appropriate treatment in the prison of the issuing country. See District Court of Amsterdam of 01 March 2013, LJN BZ3203.

⁸⁹ *Goman v District Court in Lublin, Poland* [2013] EWHC 3606 (Admin); *Garbowski v Regional Court in Warsaw, Poland* [2013] EWHC 3695 (Admin); *Podolski v Provincial Court in Pulawy, Poland* [2013] EWHC 3593 (Admin); *Majchrzak v District Court in Poznan, Poland* [2013] EWHC 3584 (Admin); *Tomaszewicz v Regional Court in Bialystock, Poland* [2013] EWHC 3670 (Admin); *Gorka v District Court in Grzegorz, Poland* [2013] EWHC 3519 (Admin).

⁹⁰ Higher Regional Court Stuttgart, Decision of 25 February 2010-1 Ausl. (24) 1246/09, as reported in Vogel 2010.

⁹¹ Case C-399/11, *Melloni*, not yet published; Superior Regional Court of Munich, Order of 15 May 2013, OLG Ausl. 31 Ausl A 442/13 (119/13); Vogel 2013.

The Court of Justice in *Radu* did not discuss the point made in the opinion of AG Sharpston that arresting and detaining someone in view of an EAW for minor crimes could amount to arbitrary detention in accordance with Article 5(1) f of the ECHR.

Possible way forward: A rule of reason for surrender procedures

In the absence of amendments to the FD EAW related to the insertion of a fundamental rights exception and proportionality test in the issuing State, or horizontal legislation addressing these issues, as demanded by the European Parliament in its legislative own initiative report on the European arrest warrant and inserted in the Directive on the European Investigation Order, a way to address the legal vacuum at the EU level would be for the Court of Justice to develop a ‘rule of reason’ for surrender procedures. This would introduce an extra ground for non-execution based on fundamental rights, including proportionality as referred to in Article 52 EU Charter. Another, perhaps better, alternative would be to accept that legitimate concerns based on fundamental rights could justify a decision not to execute an EAW. Taking into account the four aspects of the rule of reason cited in the section on the mutual recognition of product requirements:

1. The aim must be so important that it takes precedence over the objective of free movement

This requires a weighing of the interests of the individual and the prosecuting State among other elements for which the decision of the Higher Regional Court of Stuttgart provides a number of good indicators. However, again the limits of the idea that interests can be balanced in the area of judicial cooperation needs to be underlined, taking into account the difference between ‘absolute rights’ and rights subject to limitations’ to be justified under strict conditions, like the right to liberty and security.⁹² For instance, the prohibition of torture and inhuman or degrading treatment or punishment as enshrined in Article 4 of the EU Charter is absolute. It is therefore not possible to ‘balance’ this prohibition against interests of national security.⁹³ The rights to liberty and security (Art. 6 EU Charter) and defence (Art. 48 EU Charter) are, however, not absolute, which does not mean that they cannot lead to a refusal under any circumstances.⁹⁴

⁹² In accordance with Arts. 6 and 52 of the EU Charter of fundamental rights.

⁹³ Commission staff working paper, Operational guidance on taking account of fundamental rights in Commission impact assessments, SEC (2011) 567, p. 9 with reference to ECtHR (Grand Chamber), *Saadi v Italy*, Application No. 37201/06, Judgment of 28 February 2008, para. 140.

⁹⁴ Opinion of AG Sharpston in Case C-396/11, *Radu*, discussed in section 3.5.3; Thunberg Schunke 2013, in addressing the ECHR judgment in *Stapleton v Ireland* (ECHR of 04.05.2010, Application No. 56588/07) states that it must not be concluded that within the mutual recognition model State responsibility for an executing State regarding a violation of Art. 6 in an issuing State is excluded altogether.

2. *The measure must be proportional, meaning that it is both necessary and not more restrictive than needed*

This leads to an interesting conflict between proportionality as an instrument for (market) integration and where it is applied to protect fundamental rights⁹⁵ in accordance with Article 49 EU Charter 'Principles of Legality and Proportionality of Criminal Offences and Penalties in combination' with Article 52 EU Charter.⁹⁶

On the one hand, the issuing Member State needs to justify why the EAW is proportionate, taking into account the rights of the wanted person and alternatives like requesting other types of judicial cooperation. One might say that, within the single area of freedom, security and justice, the primary responsibility for ensuring compatibility with fundamental rights lies with the issuing judicial authority. However, in line with the Court of Justice's case law on asylum, as now has been laid down in the Directive on the European Investigation Order, there is a presumption of compliance, which may be rebuttable.

On the other hand, a decision not to execute a European arrest warrant would equally need to be justified with reference to the disproportionate interference with the wanted person's fundamental rights or another legitimate concern recognised by the Treaty or principles of European law. Where possible, other types of judicial cooperation should be offered as an alternative.

3. *The measure cannot discriminate according to nationality, meaning that it should apply to domestic and foreign products alike*

It becomes problematic if the proportionality test is applied in case of nationals and not qualifying residents/EU citizens. This leads back to the problems with the nationality exception in the FD EAW and the FD on the Transfer of Sentenced Persons, underlining that in the context of judicial cooperation objective factors are necessary to tie an individual to a certain Member State.

4. *The measure may not duplicate a Community measure*⁹⁷

As the Court has stated in the *Melloni* case, once an issue (*in absentia* decisions) has been exhaustively dealt with in EU legislation (in compliance with the Union's fundamental rights obligations) the room for judicial manoeuvre is limited.

The interaction between the fundamental rights and freedoms of EU citizens and residents and the obligation to surrender in accordance with the FD EAW has, however, not been addressed comprehensively, in particular due to the lack of harmonisation of the rights of suspects and accused persons in criminal proceedings, criminal jurisdiction rules in which the interests of all stakeholders are taken

⁹⁵ Jans 2000, p. 243, as discussed in Chapter 1, section 3.2.

⁹⁶ Art. 52 EU Charter: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

⁹⁷ Schrauwen 2005b, p. 6.

into account in deciding upon the place of prosecution, execution of the sentence, pre-trial detention and prison conditions. And even after such harmonisation, individual violations of human rights might occur, justifying intervention by the Court of Justice.

As regards the rule of reason in the internal market, Gormley stated that 'it allows Member States to defend national measures aimed at protecting certain national interests not explicitly recognized by the Treaty exceptions but compatible with its aims and values'.⁹⁸ Fundamental rights, including the principle of proportionality, are not only a value, but also fundamental rights recognised by the EU Charter as are a number of other applicable rights, such as that to liberty and security and respect for private and family life (Arts. 6 and 7 EU Charter). Add to that the rights pertaining to European citizenship and it seems the *rationale* of the rule of reason has been complied with as well.

It is to be hoped that the Court of Justice takes the next opportunity to clarify that the European arrest warrant was meant to tackle serious crimes, not triviality. Furthermore the Court should accept that the free movement of judicial decisions does not operate in a legal vacuum. Fundamental rights and freedoms need to be accounted for, if not taken as the starting point, as indicated above.

Ne bis in idem

The section on *ne bis in idem* dealt with the recognition of final judicial decisions in criminal matters taken in other Member States that have a barring effect to further prosecution. Since harmonisation attempts in the area have so far failed, it dealt with the judicial application of the norm in the Court's case law interpreting Articles 54-58 of the Schengen Convention Implementation Agreement. As *ne bis in idem* has three elements: final decision ('*bis*'), same acts ('*idem*') and the condition of enforcement, the case law was treated accordingly.

The Court's case law regarding *ne bis in idem* clearly illustrates that the intentions of the Schengen parties are no longer relevant for the Court in interpreting the provisions of the CISA, since those intentions predate the incorporation of Schengen in the EU and the adoption of the Treaty goal of maintaining and developing the Union as an 'Area of Freedom, Security and Justice'. In the absence of harmonisation, in which other norms could have been developed, the Court attaches an expanding amount of consequences to the principle of *ne bis in idem* based on the fact the development of the single legal area in which the free movement of persons needs to be ensured. This free movement of persons has been interpreted by the Court as meaning that no one should be prosecuted on account of his having exercised his right of free movement.

Gözütok and *Brügge*,⁹⁹ the first case dealing with the *ne bis in idem* principle, confirmed explicitly that mutual recognition is to be seen as a principle in the Area of Freedom, Security and Justice, leading to comparisons with *Cassis de Dijon*.¹⁰⁰ One

⁹⁸ Gormley 2005, p. 23.

⁹⁹ C-187/01 and C-385/01.

¹⁰⁰ Thwaites 2003, p. 260.

may draw a parallel between the *Gözütok* and the *Cassis* decisions, also referring back to the foundations of the principle of mutual recognition, being free movement within a single legal area. Procedural differences cannot stand in the way of the achievement of this single legal area, the Area of Freedom, Security and Justice. However, at the same time, in *Cassis* the Court reiterated that countervailing interests (health, safety, consumer protection etc.) could be defended by calling on exceptions to free movement laid down in the Treaty or recognised by the Court in accordance with the 'rule of reason'. Furthermore, as was seen in the sections on the mutual recognition of product requirements and professional qualifications, there are limits to this type of recognition when the underlying regulatory approach differs too much.

The fact that the Court did not nuance its position immediately in *Gözütok* brought it into trouble in later cases. The *Gasparini* case is an example in which the Court extended mutual recognition to a final decision acquitting a person because prosecution of the offence is time barred.¹⁰¹ The suggestion by AG Sharpston to follow the logic of the internal market's *exceptions* to the principle of mutual recognition in the EC treaty and under the 'rule of reason'¹⁰² was not followed by the Court. Perhaps this was also due to the fact that AG Sharpston framed her arguments in a context of the Union being less integrated in criminal law¹⁰³ and a 'collection of societies'.¹⁰⁴

Instead, AG Sharpston could have recognised that the Union is a single legal area, but that exceptions to free movement (not 'mutual recognition' as she states, as the decision based on which the person claims that a second prosecution should be barred should always be taken into account, irrespective of the question whether that result may be achieved) should be possible based on the society's interest – as recognised by the Union's aims and values – to have a real chance to settle its claims with the individual.¹⁰⁵ Instead of building in narrowly defined exceptions to free movement in later case law, the Court went down the slippery slope of 'balancing' security and freedom in order to arrive at the conclusion in *Turansky* that a decision (on the merits) to suspend an investigation does not bar further prosecution.¹⁰⁶ In *Mantello* it was then decided that the decision of the public prosecutor not to prosecute for certain offences even though the material evidence was already available also does not bar further prosecution for those offences.¹⁰⁷ Even though decisions like *Turansky* and *Mantello* might be justified in the light of a literal reading of Article 54 CISA, the problem with this case law is that it lacks conceptual clarity. Why should a procedural rule bar further prosecution and a decision on the merits to suspend an investigation not? Particularly the Court's reference to the aims of the Area of Freedom, Security and Justice in *Turansky* comes across as arbitrary given

¹⁰¹ Case C-467/04, paras. 29 and 30.

¹⁰² Conclusion of AG Sharpston in Case C-467/04, para. 110.

¹⁰³ Conclusion of AG Sharpston in Case C-467/04, para. 111.

¹⁰⁴ Conclusion of AG Sharpston in Case C-467/04, paras. 111 and 112.

¹⁰⁵ Opinion of AG Sharpston in Case C-467/04, *Gasparini*, paras. 74 and 75.

¹⁰⁶ Case C-491/07, *Turansky* [2008] ECR I11039.

¹⁰⁷ Case C-261/09, *Mantello* [2010] ECR I11477.

the prior decision in *Gasparini*. More recently the Court seems to have revisited its case law with a call on Article 50 of the EU Charter. Integrating the EU Charter and ECtHR case law is a welcome development, but it also entails the risk that the particular context of the European Union as a supranational legal order, in which free movement rights need to be respected, is pushed to the background.

In its case law on the interpretation of the words ‘same acts’, the Court leaves no opportunity to take into account other aspects other than the ‘material acts’ in determining whether certain matters are to be viewed as the ‘same acts’. However, the Court does offer an opening to national courts by giving them the broad criterion of an ‘inextricable link in time, space and subject matter’ between the material acts in determining whether Article 54 CISA should apply. The Court could have allowed Member States a limited opportunity to justify a second prosecution based on a ‘different regulatory approach’ to accommodate the situation in which the second prosecution serves a different legal interest.¹⁰⁸ On the other hand, one might argue that once a prosecution has been entered against a person for a certain set of material acts within the context of the Union as a single legal area, it is for prosecutors to coordinate and not for individuals to face a second prosecution on account of the prosecutors’ failure to do so.

In the *Spasic* case on the ‘enforcement condition’, the Court highlighted that judicial cooperation fails to completely ensure that an individual does not escape impunity. From an individual rights perspective, the lack of proper transposition of EU judicial cooperation measures, as well as standards of criminal jurisdiction rules concentrating proceedings based on a pre-determined list of criteria, leads to the continued possibility of multiple prosecutions.

In general, the Court’s *rationale* is mostly oriented towards free movement versus security. The fact that *ne bis in idem* also represents a fundamental right as foreseen in Article 50 of the EU Charter (the right not to be tried or punished twice in criminal proceedings for the same criminal offence) had been stressed less until recently. At the same time, if one reads the cases on the European arrest warrant and *ne bis in idem* together, it becomes clear that the Court seems to interpret mutual recognition so as to prevent the judicial authority in the second State from having too much discretion in assessing whether an exception to the free movement of judicial decisions in criminal matters applies.

In addition to raising the question whether compliance with the Union’s fundamental rights obligations may be achieved in this way, doubts may be raised regarding the adequacy and legitimacy of the Court’s case law on this particular point.¹⁰⁹ There is a very lively political debate concerning the degree of judicial discretion to be left to the executing judicial authority in mutual recognition legislation, which has already resulted in a number of changes in more recent EU legislation (the European Investigation Order).

¹⁰⁸ Schomburg 2012, p. 319: ‘As a consequence of this case-law there is in particular a natural and foreseeable risk of a violation of the *ne bis in idem* principle when the case deals with any kind of cross-border trafficking with the involvement of a plurality of European Union/Schengen-states.’

¹⁰⁹ For a similar assessment see Hatzopoulos 2008.

The Court now gives the impression that it is taking sides in this discussion. The Court's case law, both on the 'same acts' as 'final decision' aspect of the *ne bis in idem* principle, also shows the need for harmonisation and better cooperation between prosecutors to prevent and settle conflicts of jurisdiction taking into account the interest of the suspect or accused person, including the option of transferring the proceedings.¹¹⁰ The legal certainty and fundamental rights interest in particular call for EU legislation, instead of relying on the Court to elaborate on such a complicated concept on a case-by-case basis.

3. The Nature of Mutual Recognition in European Law

Based on the research conducted, it was concluded that, just like in the internal market, in the Area of Freedom, Security and Justice, mutual recognition can also not be aligned to an integration method (home State control), since the recognition of judicial decisions taken in other Member States is not automatic and based on mutual trust alone. The Commission on the one hand promoted integration based on home State control, which is visible from the way in which it defended the transplantation of 'mutual recognition' from the internal market to the Area of Freedom, Security and Justice in its 2000 Communication. The Member States have on the other hand been divided between approaches to mutual recognition akin to home State control, limited home State control and tacit or even overt rejection of mutual recognition on a national level, which is reflected in the hybrid nature of the legislation in the area in which mutual recognition and exceptions based on national sovereignty continue to co-exist.

There is sufficient evidence to claim that mutual recognition is also to be seen as a principle in the Area of Freedom, Security and Justice, although there are a number of issues potentially undermining this claim. As discussed in the section on the aims of the Area of Freedom, Security and Justice, also in this area its origins are to be found in the procedural obligation to create and develop a single legal area and the substantive obligation to further free movement. Free movement in this context refers to the free movement of persons as well as judicial decisions in criminal matters. As regards the application of mutual recognition to final decisions for the same acts barring further prosecution (*ne bis in idem*), one may draw a parallel between the *Gözütok* and the *Cassis* decisions referring back to the foundations of the principle of mutual recognition, being free movement within a single legal area. Procedural differences as to how such a final decision is established cannot stand in the way of the free movement of persons within this single legal area, the Area of Freedom, Security and Justice.

However, both the spatial aspect and the temporal aspect of the AFSJ as a single legal area have been concealed by its particular institutional arrangements,

¹¹⁰ Schomburg 2012, p. 320-323 suggests building on the Schengen Information System, information on criminal records, information exchange through the European judicial network, the resolution of conflicts through Eurojust or a specialised chamber of the Court of Justice and using European Convention on the Transfer of Proceedings in Criminal Matters of 15 May 1972.

including the five-year transitional period concerning measures adopted prior to the entry into force of the Treaty of Lisbon limiting the role of the Court of Justice and the European Commission and the procedural possibilities allowing for 'variable geometry' in developing the Area. This variable geometry, reinforced by the Treaty of Lisbon, potentially undermines the political ambition to develop a single legal area and with it the obligation for Member States to recognise each other's judicial decisions.

Furthermore, the Commission and Council have not clarified how the aims of 'Freedom', 'Security' and 'Justice' are to be reconciled. A minimalist interpretation of the 'Justice' aspect would at least assume compliance with the rule of law, which links with the various fundamental rights obligations of the European Union in accordance with Article 6 TEU. The aspects of 'Freedom' and 'Security' have, however, been interpreted by the Commission and Council in a way that the first is dependent upon the second and, in any event, a 'balance' needs to be struck between them. This idea implies a dangerous deviation from the relationship between 'Freedom' and 'Security' as, *inter alia*, established in the ECHR. Hence there has been no proper contextualisation of the mutual recognition of judicial decisions in criminal matters within the Union's fundamental rights framework. This raises questions concerning the substantive ambitions for the Area of Freedom, Security and Justice. Instead of offering the AFSJ to the European citizen, Member States have been mostly occupied by showing collective punitive will, also in the light of 9/11. The European citizen can, however, use the democratic and legal means available to him/her to enforce his/her rights and shape the European policy agenda in the area, albeit subject to a number of barriers due to the particular institutional structure of the AFSJ and the insufficient recognition of its interests in the mutual recognition legislation adopted before the entry into force of the Treaty of Lisbon.

3.1. *The Role of the Principle of Mutual Recognition in Reconciling Free Movement and Individual Rights*

The Court has to navigate between free movement and fundamental rights, in which it is sometimes guided by the balancing of interests logic stemming from the internal market case law on product requirements, often combined with what is in my view a wrong understanding of mutual recognition that identifies it with (the free movement of) security interests, in line with the predominance of these interests AFSJ cooperation so far. At other times, however, the Court refers directly to the Charter and European Court of Human Rights case law.

One needs to differentiate between the product requirements case law on foodstuffs, where free movement was achieved under the condition of a labelling requirement, cases in which there are differences between Member States' regulatory policies on health and safety and cases in which fundamental rights are at stake. It also needs to be understood that although the nature of mutual recognition is the same in the Area of Freedom, Security and Justice (recognising and giving effect to factual and legal situations established in the territories of other Member States), its environment is significantly different. There are different aims and principles at play, such as that of the social rehabilitation of sentenced persons, or some that

seem the same but take on a different meaning in this context, such as the principle of proportionality. In this context, the mutual recognition of professional qualifications is more instructive for a comparison with judicial cooperation in criminal matters, since it highlights what happens when the mutual recognition process supports the free movement of persons and hence concerns individual rights derived from the EU Charter and European citizenship.

It was also seen that there is an on-going struggle in the AFSJ regarding supremacy, fundamental rights protection and mutual recognition. The *Melloni* case illustrates that EU legislation should be aimed at complying with the Charter, national constitutional standards as well the ECtHR if conflicts with national courts over supremacy of EU law and responsibility for fundamental rights protection in the area of judicial cooperation are to be avoided. As the Advocate General in the *Mantello* case correctly stated, since the executing judicial authority was faced with a fundamental rights claim in the context of a mandatory ground for non-execution, it should have been obliged to investigate this claim by itself, not rely on statements by the issuing judicial authority. Limiting the discretion of executing judicial authorities, claiming that it is good for mutual recognition fails to understand the difference between the need to recognise judicial decisions as opposed to enforcing them directly based on compliance with the standards of the home State (home State control).

Mutual recognition entails a *process* of recognising and giving effect to factual and legal situations established in other Member States. That process contributes to free movement but does not guarantee it. The reason for that is that certain exceptions to free movement also find their direct origins in the *aims* of the European Union's internal market and Area of Freedom, Security and Justice, notably compliance with the rule of law and non-economic interests such as health and consumer protection.

In line with the divisions made by *Tridimas*, mutual recognition may be qualified as a systemic principle. As such, it is closely related to the loyalty principle, since through mutual recognition the achievement of free movement within the European Union as a single legal area is brought closer. At the same time, it has close relationships with the principles derived from the rule of law, which is most noticeable as regards the principle of *ne bis in idem*, which is a fundamental right the exercise of which depends on the cross border recognition of final decisions for the same acts. That recognition also benefits the free movement rights of European citizens, which were categorised under the third (other) category of general principles.

The question whether EU citizenship has the potential to support the development of the rights of suspects and accused persons¹¹¹ may be answered by citing AG

¹¹¹ Klip 2012, p. 471: 'The recognition of rights for European Union nationals outside the economic sphere will require the formulation of additional or new general principles of Union law. This may lead to principles that are much more oriented towards fundamental rights than to the economic well-being of the European Union. Such principles may relate, for instance, to the relationship between the principle of proportionality and the principle of →

Sharpston. In her opinion to the *M* case she formulated the relationship between free movement and criminal law as follows: 'A person should not lose the protection that he enjoys under national criminal law through exercising his free movement rights.'¹¹²

As discussed in Chapter 3, section 4, at the moment this is exactly what happens since a person's exercise of free movement leads to different treatment vis-à-vis nationals of the Member State of origin in terms of criminal law, procedure, sentencing policy, and prison conditions. The proportionality of this discrimination should therefore be weighed in individual cases in accordance with Articles 45 and 52(1) of the EU Charter.

There is no direct conflict between the recognition of judicial decisions in criminal matters like the EAW and the free movement rights of European citizens. This conflict only presents itself when deciding on the (modalities) of execution. The potential use of fundamental rights, including proportionality considerations, as a ground for the non-execution of an EAW may be used as an example. Although the closed system of exceptions in the FD EAW should be underlined, the FD EAW leaves a legal vacuum as regards the interaction between the execution of an EAW (free movement) and the rights of wanted persons to remain in a certain Member State or serve their sentence there, which, as was seen in Chapter 3, section 5.3, have been based on the ECHR, the Charter, national constitutional provisions and the rights derived from European citizenship. As those rights are recognised by primary law, that gap should either be filled by EU legislation or, in the absence of such legislation, a 'rule of reason'.

3.2. *The Importance of Distinguishing between Free Movement, Mutual Recognition and Home State Control*

Assertions made by EU policy makers regarding the nature of mutual recognition have obscured its core value and have made the academic debate wrong footed. This debate would benefit from a clear distinction between policy (objectives) and legal obligations. In this context, mutual recognition should not be seen as an integration method (home State control) but as a principle of European law, which finds its roots in the aim to create and uphold a single legal area combined with the obligation to further free movement within it. To put it in another way, home State control is one of the *methods* through which European integration may be achieved. However, in practice none of the fields investigated in this book have been integrated by home State control alone. There is always a certain degree of minimum harmonisation and authority of the host State to impose conditions for and exceptions to free movement (the desired *outcome*) reflecting the aims of the area concerned. When the Court starts to move from insisting that Member States engage in a

mutual recognition in surrender proceedings or to the meaning of the rights of the defence in the context of mutual recognition.'

¹¹² Opinion of AG Sharpston in Case C-398/12, *Procura della Repubblica v M*, not yet published, para. 45.

process (mutual recognition), towards a method (home State control), it risks being accused of engaging in judicial activism by prescribing policy choices.

The comparative table in the Annex, entitled 'norms stemming from the application of mutual recognition and their effect in the fields of European Law covered by this research' compiles the tables discussed in the conclusions to Chapters 2 and 3. It helps to clarify and illustrate the distinction between free movement, mutual recognition and home State control.

In the column on the left of the table, the field and its aim are identified (free movement of goods, persons and judicial cooperation in criminal matters). The second column distinguishes between situations in which the Court has elaborated upon mutual recognition directly, based on primary law, and fields in which secondary EU legislation was passed. The third column describes the subject of recognition (what is to be recognised). This column also answers the question whether such recognition is direct or a procedure has been foreseen. Furthermore the question is answered what the effect of recognition is. The final column addresses exceptions to, or conditions for, free movement. In this context, it needs to be observed that the distinction between what belongs to the recognition process and what are the exceptions to free movement (market access or execution of the judicial decision) is not always clearly made.

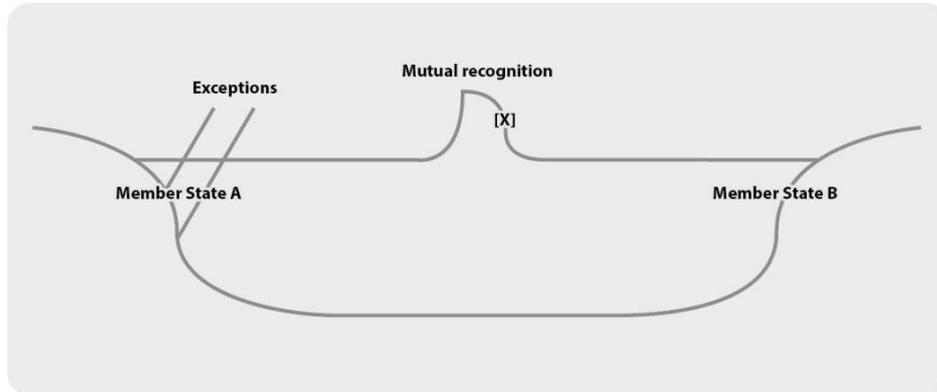
3.3. The Further Development of Mutual Recognition in the Criminal Justice Area

In the Area of Freedom, Security and Justice, more emphasis is needed on harmonisation given the complexity of the area, its direct impact on fundamental rights and the peculiar supranational nature of the European Union which requires a rethinking of the application of international and domestic norms. The particular institutional structure and the tragic events on 9/11 have, however, led to a reshaping of the policy agenda in favour of repressive measures. Both attention for fundamental rights safeguards in judicial cooperation instruments as well as an independent agenda to ensure access to justice within the European Union have been lacking or lagging behind. As regards the case law of the Court of Justice, there are indications of its willingness to start applying more scrutiny to in the criminal justice area based on the EU Charter. That includes more attention for ECtHR case law. The other sources of fundamental rights, national constitutions and European citizenship, which the Charter incorporates, have so far been under-explored.

Mutual recognition facilitates free movement by setting in motion a development within which giving effect to judicial decisions between Member States becomes the norm. This development is hampered by the flexibility mechanisms and remnants of intergovernmentalism in the Union's institutional framework and the ambiguity about the substantive aims of the area, particularly in the context of the Union's fundamental rights obligations. Referring back to the picture shown in the concluding section on the internal market, it is hard to look over to the other side of the sea and recognise the aims and principles that we share, certainly with the amount of fog that has been accumulating. Without those shared aims and prin-

ciples, and in the absence of harmonisation, mutual recognition will not be able to contribute to free movement effectively.

Figure: The principle of mutual recognition contextualised



The Court's *ne bis in idem* case law illustrates how mutual recognition operates and is refined in its interaction with the aims and (other) principles of European law. It, however, also shows the limitations of the judicial application of mutual recognition. The application of mutual recognition to extradition procedures has led to questions and challenges ranging from translation and interpretation to be provided to the suspect to the prison conditions in the Member States. The European Investigation Order, which on the one hand might alleviate concerns by offering an alternative to (disproportionate) surrenders, on the other hand raises new questions regarding the relationship between the application of mutual recognition to evidence gathering measures and the ultimate admissibility of this evidence in the courts of the Member States.

The challenge for the European Commission, European Parliament and Council will be to consolidate the mutual recognition legislation so that the individual measures work together in a way that respects individual rights. The main elements are (almost) there: European Investigation Order, European Arrest Warrant, European Supervision Order, and FD Transfer of Prisoners. They, however, still need to be brought together and to integrate proportionality, procedural rights and respect for the rights under the EU Charter, those deriving from the ECHR, national constitutions and European citizenship. Furthermore, the Road map for strengthening the procedural rights of suspected or accused persons in criminal proceedings needs to be completed, together with rules on pre-trial detention, prison conditions and the admissibility of evidence. The case law of the Court of Justice on the *ne bis in idem* principle shows the need for measures to prevent and settle conflicts of jurisdiction taking the interests of all stakeholders into account as part of a more general reflection on the place of the individual in transnational judicial proceedings based on mutual recognition.

15 years after the Tampere programme on the implementation of the AFSJ, the EU's criminal justice system is still in its infancy. The Court of Justice has drawn the

logical consequences from the AFSJ, being a single legal area, but so far it has insufficiently recognised the importance of issuing and executing judicial authorities upholding individual rights and freedoms within this system, presenting conflicts between 'mutual recognition', fundamental rights protection, and judicial discretion.

Within a single legal area, the trust which is more at stake is not the trust between judicial authorities but rather the confidence of citizens in the area as a whole (i.e. the European Union) based on its capacity to deliver an EU criminal justice system based on the rule of law. The authorities of the Member States are bound to loyal cooperation to achieve that aim of delivering on an EU criminal justice system, independent of the actual degree of trust they have in each other. That is the essence of the supranational context within which mutual recognition operates. Such a contextualisation would allow mutual recognition to play its natural role of the wave transporting 'factual and legal situations established in the territories of other Member States'.

ANNEX: NORMS STEMMING FROM THE APPLICATION OF MUTUAL RECOGNITION AND THEIR EFFECT IN THE FIELDS OF EUROPEAN LAW COVERED BY THIS RESEARCH

Field	Inside/ outside harmonisation	Subject of recognition	Recognition Procedure (yes/no) and effect	Exceptions to, conditions for free movement
Free movement of goods	Inside (as regards the application of exceptions to free movement)	Product Requirements (Regulation 764/2008)	<p>- No, a Member State authority may not prohibit an economic operator from selling products on its territory which are lawfully marketed in another Member State, even where those products were manufactured in accordance with technical rules different from those to which domestic products are subject.</p> <p>- Those products enjoy market access.</p>	<p>- A Member State authority has to notify the economic operator of a denial of market access or other measure listed in Article 2(1) PRR, and has to justify this measure by providing technical or scientific evidence supporting the reliance on a public interest exception recognised by the Treaty or in accordance with 'rule of reason', allowing him/her 20 days to comment. If the Member State insists, the economic operator may appeal under national law. (Article 6 PRR)</p>

Free movement of goods	Inside	Product requirements for toys (Directive 2009/48/EC)	- No, recognition procedure. Member States authorities may not impede the making available on the market in their territory of toys which comply with this Directive (Article 12 TSD) Compliance is presumed, based on self-certification by economic operators; declaration of conformity essential safety requirements, 'CE marking', in accordance with Articles 10-15, 17 TSD.	- Non-compliance with essential safety requirements is discovered by market surveillance authorities (Articles 40-45 TSD).
Free movement of persons	Outside	Professional Qualifications (<i>Vlassopoulou</i> doctrine developed by the Court of Justice)	- Yes, 'compare migrant's qualifications with national requirements' - If equivalent access to the profession has to be granted	Possibility to impose compensatory measures in case of: - Objective differences in legal framework and field of activity - Subject to effective judicial remedy
Free movement of persons	Inside	Professional Qualifications (Professional Qualifications Directive - general system)	Yes, in accordance with Article 13 PQD: 5 levels of professional qualifications + - Attestation of competence or evidence of formal qualifications have to have been issued by a competent authority in the other Member State; and - Second, they should attest that the holder has	Possibility to impose compensatory measures (adaptation period or aptitude test) in a case the training covers substantially differences matters - Specific training required in host State not existing in the Member State of origin - Decision may be appealed (Articles 14, 51 PQD)

			been prepared for the pursuit of the profession in question	
Free movement of persons	Inside	Professional Qualifications Directive-vertical approach-Doctors	<ul style="list-style-type: none"> - Yes: but only meant to check formal compliance with harmonised training requirements in Annex - If shown access to the profession has to be granted (Article 21(2) PQD) 	<ul style="list-style-type: none"> - None, recognition is automatic subject to compliance with harmonised training requirements (Articles 24-30 PQD) NB: 'alert mechanism' on prohibitions or restrictions of the pursuit of the professional activity (Article 56a PQD)
Free movement of persons	Inside	Professional Qualifications- (Lawyers' Establishment Directive, 98/5/EC)	<ul style="list-style-type: none"> - No, with the effect that there is a possibility to practise using home title, subject to registration in the host State (Articles 3,5 LED); or - Yes, possibility under the Lawyers' Establishment Directive to obtain access to the profession using host State title after regular and effective pursuit of the activity in the law of the host State for 3 years supplemented by <i>Vlassopoulou doctrine</i> (Article 10 LED); or through - Professional Qualifications-general system; 	<ul style="list-style-type: none"> - Regular and effective pursuit not shown + public policy subject to appeal (Article 10 LED) - See above

Judicial cooperation in criminal matters	Outside	Final decisions for the same acts - Article 54 CISA as interpreted by Court of Justice	No procedure, the principle is that a second prosecution after a final decision (incl. out of court settlement, acquittal, and decision of 'non-lieu') for the same (material) acts is barred. - The decision has been enforced - Effect: the person's free movement is ensured	- No final decision; further prosecution is possible in first State - Material acts are not inextricably linked The decision has not been enforced (completely)
Judicial cooperation in criminal matters	Inside	- Decision to prosecute in accordance with FD EAW (2002/584/JHA)	- Yes, but only to check compliance with the requirements laid down in Article 8 of the FD EAW Effect: - The wanted person is arrested and taken into custody (Article 1, 11, 12) - If wanted person agrees (s) he is surrendered for prosecution (Article 13 FD EAW) - If (s)he disagrees a surrender decision needs to be taken by the executing judicial authority, (Article 15 FD EAW) - Time limits apply (Article 17 FD EAW)	- Grounds for non-execution (Articles 3, 4 FD EAW) - Conditions in accordance with Article 5 FD EAW - If guarantee of Article 5(3) is requested possibility to apply Article 7 FD Transfer of Prisoners
Judicial cooperation in criminal matters	Inside	- Sentence (EAW sent)	- Yes, but only to check compliance with the requirements laid down in Article 8 of the FD EAW	- Grounds for non-execution Articles 3, 4 FD EAW - Conditions Article 5 FD

			<p>Effect:</p> <ul style="list-style-type: none"> - The wanted person is arrested and taken into custody (Article 1, 11, 12) - If wanted person agrees (s)he is surrendered for prosecution (Article 13 FD EAW) - If (s)he disagrees a surrender decision needs to be taken by the executing judicial authority, (Article 15 FD EAW) - Time limits apply (Article 17 FD EAW) 	<p>EAW</p> <ul style="list-style-type: none"> - If Article 4(6) is invoked, possibility to apply Article 7 FD Transfer of Prisoners
Judicial cooperation in criminal matters	Inside	<ul style="list-style-type: none"> - Sentence (Directly forwarded for execution in accordance with FD Transfer of Prisoners in accordance with Article 4) 	<ul style="list-style-type: none"> - Yes, recognition in accordance with Articles 4, 5, 8 FD ToP; - Possibility to adapt the sentence in accordance with Article 8, - Possibility to reinstate dual criminality (Article 7 FD ToP) - Grounds for non-recognition mentioned in Article 9 (1) (a), (b) FD ToP) - Possibility to postpone recognition (Article 11 FD ToP) <p>Effect:</p> <ul style="list-style-type: none"> - If the sentenced person is in the issuing State (s)he shall be transferred to the executing State (Article 15 FD 	<ul style="list-style-type: none"> - Grounds for non-enforcement mentioned in Articles 9(1) (c)-(l), 10 FD ToP <p>- N.B.: In case <i>inter alia</i> Member State of nationality in which the sentenced person lives no consent needed; only duty to ask for his/her opinion (Article 6 FD ToP)</p>

			ToP) - Time limits apply (Article 12 FD ToP)	
Judicial cooperation in criminal matters	Inside	- Carrying out one or more specific investigative measures (Article 3 EIO)	Yes, the EIO has to be recognised without any further formality (Article 9 EIO) and executed within the time limits stipulated in Article 12 EIO Effect: - The evidence is obtained and transferred to the issuing Member State (Article 13 EIO), with the possibility of immediate transfer in case authorities of issuing Member States assisted directly (9(4) EIO), subject to remedies (Article 14 EIO)	- Article 10 EIO (recourse to a different type of investigative measure, except for the investigative measures listed in 10(2)) - Article 11 EIO (grounds for non-execution) - Additional grounds for non-execution special investigative measures (chapter IV EIO)

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VALORISATION ADDENDUM

1. What is the societal relevance?

Mutual recognition has become commonplace in many areas of European law and policy, ranging from the free movement of goods and the recognition of professional qualifications to judicial cooperation in criminal matters. In these domains mutual recognition engages the Member States in a process of recognising and giving effect to factual and legal situations established in other Member States concerning the marketing of products, allowing access to a profession and pre-trial decisions and judgments in criminal matters.

However, there is an ongoing societal debate in which mutual recognition is connected to free movement and often the inadequate standards with which the products, professionals and criminal justice standards of other Member States are associated.

Societal debates usually arise after incidents are reported in the media. As regards the internal market, the incidents have usually been based on questions such as whether it is 'safe' for one Member State to accept goods, for instance toys, onto their market from other Member States or to allow professionals to practise on their territory without demanding compliance with domestic regulatory standards. A case in point here has been the disparities in the training of doctors across the EU and the consequences for ensuring a similar level of standards for foreign and domestic health staff. Moreover several incidents involving doctors from other Member States committing medical errors with sometimes fatal consequences have heightened the attention paid to this issue in the EU. Without adequate mechanisms in place to see that justice is done in these cases, the idea of mutual recognition and free movement of intra-EU migrants rapidly loses popular support.

In the criminal justice area, to a certain extent, the debate is even more heated given the (potential) impact of recognising prosecutorial decisions and judgments on the fundamental rights of suspects. Here it is not the consumer or patient being confronted with foreign products or professionals, but a suspect or sentenced person that is being moved put into the hands of the criminal justice system of another Member State. In a debate which has been fuelled by a combination of chauvinism and genuine care for fundamental rights protection, differences in the quality of

justice and prison conditions have been raised in arguments that procedural and substantive standards need to be enhanced and enforced before the judicial decisions taken in other Member States are to be recognised and given effect, without subjecting them to domestic standards first.

The societal debate links in with a policy debate between those that would like to integrate the European Union taking as a basis the norms established in the home state (home state control, which is often referred to as ‘mutual recognition’) and those that insist on harmonisation of standards and procedures as a condition for free movement. Finally, the courts are struggling with the question of how to implement the need to recognize and give effect to factual and legal situations established in other Member States while at the same time safeguarding individual rights.

At the moment, the European Union is seeking to defend its legitimacy both in the economic area as well as in the criminal justice area in the face of mounting political and judicial opposition. In this context more clarity and legal certainty as regards the impact of mutual recognition on individual rights is urgently required.

2. To whom are your research results of interest?

A more proper understanding of the nature of mutual recognition in European law should benefit policy makers, administrative and judicial authorities, lawyers and NGOs working on the drafting and interpretation of EU legislation affected by this principle on an everyday basis.

All groups mentioned will benefit from the conclusion that mutual recognition is to be seen as a principle of European Law which creates an autonomous obligation on Member States to recognize and give effect to factual and legal situations established in the territories of other Member States. For administrative and judicial authorities in particular this means they have to comply with the obligations derived from this principle irrespective of the existence of secondary EU legislation in their field of activity (for instance, the recognition of professional qualifications or judicial cooperation in criminal matters between the Member States of the European Union). They will also benefit from the understanding that the principle finds its origins in the aim to create and develop the Union as a single legal area (spatial and temporal aspect) combined with the obligation to further free movement within it (substantive aspect); (topic dissertation).

Furthermore, when drafting EU legislation or applying the norms stemming from mutual recognition in specific fields it will help them to remember that the core function of mutual recognition is to make sure that interests of European integration which national legislation ignored are taken into account. However they should also recognize the limits of the principle’s ability to contribute to free movement of goods, persons and judicial decisions. Mutual recognition engages the host Member State in a process that contributes to free movement (the desired outcome), but it does not guarantee it; the extent to which mutual recognition results in free movement depends on the level of harmonisation achieved in the field to which mutual recognition is applied, and the applicable exceptions to and conditions for free movement in line with primary and secondary EU law. Conversely the application of the principle should not lead to the impression that judicial authorities lose

their ability to invoke norms for instance related to individual rights, as long as their application is compatible with EU law.

This last conclusion is also very important for individuals. This book offers them more legal certainty as regards the nature and implications of the principle of mutual recognition. It also clarifies that the application of mutual recognition cannot be used as an excuse to limit them in their ability to exercise their fundamental rights.

3. Into which concrete products, services, processes, activities or commercial activities will your results be translated or shaped

The conclusions of this research may be applied by policy makers, administrative and judicial authorities as well as lawyers and NGOs active in the fields covered.

The conceptual framework offered for mutual recognition will allow policy makers to more narrowly tailor legislative and non-legislative proposals aimed at applying mutual recognition to specific fields, or supporting its application through the adoption of minimum standards in areas such as consumer protection or the rights of suspects or accused persons in criminal proceedings.

Administrative and judicial authorities are enabled to apply the principle of mutual recognition better in their daily practice and lawyers and NGOs may use the results in their litigation strategies.

4. To what degree can your results be called innovative in respect to the existing range of products, services, processes, activities and commercial activities?

This research is innovating because it introduces a clear distinction between the principle of mutual recognition, integration methods and potential outcomes. It also clarifies the origins of this principle and its core function.

Furthermore it challenges the assertion that mutual recognition and individual rights are in direct conflict, refocussing the debate on how best to reconcile free movement and fundamental rights in individual cases.

The research results offer both a theoretical framework and a practical guide to the application of the principle of mutual recognition in the context of the development of the EU criminal justice area.

5. How will this/ these plan(s) for valorisation be shaped?

The research will be published and therefore made available to the groups that might benefit from its findings.

The research may also be developed further in articles and books building on the finding that the individual rights perspective needs to be integrated further in the European Justice Agenda.

The research could also be used in media articles to underline the differences between mutual recognition and free movement in particular, as well as the relationship with harmonisation, for instance when cases occur of migrant doctors

committing medical errors, or of suspected persons being subjected to inadequate pre-trial detention conditions.

It may also benefit NGOs striving for fair trial conditions across the European Union as well as judicial authorities seeking swift cooperation based on the rule of law.

CURRICULUM VITAE

Wouter van Ballegooij (1978, Oss, The Netherlands) completed secondary school at the Titus Brandsma Lyceum in Oss in 1997. He studied Dutch Law, European Union Law and Comparative Law (European Law School) at Maastricht University between 1997 and 2002. From 2001 until 2002 he studied at the University of Denver, Colorado, United States, with a grant from the International Student Exchange Programme (ISEP), resulting in a Master's degree in American and Comparative Law. In 2002 he also performed an internship at the permanent mission of the Netherlands to the United Nations in New York.

From 2003 until 2007 he was a researcher in European Law at the T.M.C. Asser Institute in The Hague. During this time he co-edited the *Handbook on the European Arrest Warrant* (with Rob Blekxtoon[†]) published by T.M.C. Asser Press in 2004. He was also managing editor for a European Commission funded project on the implementation of the European Arrest Warrant in the Member States (2004/AGIS/043), and lectured European Law at the Universities of Amsterdam and Utrecht.

During his time at the Asser Institute he commenced his PhD research on the topic of mutual recognition, research which he continued after entering the European Parliament in 2007. From 2007 until 2009 he worked as Parliamentary Assistant to Baroness Sarah Ludford MEP following the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE). During this time he also contributed to several collective publications on the European Arrest Warrant and mutual recognition of judicial decisions in criminal matters more generally.

From 2009 until 2015 he worked as an Administrator for Parliament's Internal Market and Consumer protection Committee (IMCO) and Group advisor on matters dealt with by its LIBE Committee, focusing on Data Protection and Police and Judicial Cooperation in Criminal Matters. He was involved in the drafting of an Own Initiative Report on the future of the Single Market, and participated in the negotiations on a number of the Directives on procedural rights of suspects (on the Right to Information in criminal proceedings and Access to a Lawyer in criminal proceedings) as well as negotiations on the Directive on the European Investigation Order and the Legislative Own Initiative Report with recommendations on the review of the Framework Decision on the European Arrest Warrant.

Currently he is an Administrator for the Directorate for Impact Assessment and European Added Value of the European Parliamentary Research Service.

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