Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters

Ouwerkerk, Jannemieke

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A COMPARATIVE LAW PERSPECTIVE ON THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS

Jannemieke Ouwerkerk

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Promotor:
Prof. dr. M.S. Groenhuijsen
Copromotor:
Dr. J.B.H.M. Simmelink

Promotiecommissie:
Prof. dr. M. Claes
Prof. dr. C.J.C.F. Fijnaut
Prof. dr. S. Gless
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Utrecht, December 2010.

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LIST OF ABBREVIATIONS

ABA	American Bar Association
ALI	American Law Institute
AWA	Attendance of Witnesses Act (Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings)
BGE	*Bundesgerichtsentscheidung*
CCP	Code of Criminal Procedure (*Schweizerische Strafprozessordnung*)
CFR	Charter of Fundamental Rights
CISA	Convention Implementing the Schengen Agreement (1990)
CO	Framework Decision on the application of the recognition principle to confiscation orders
EAW	Framework Decision on the European arrest warrant and the surrender procedures between Member States
EC Treaty	Treaty establishing the European Community (replaced by TFEU)
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECJ	European Court of Justice (Court of Justice of the European Union)
ECR	European Court Reports
ECtHR	European Court of Human Rights
EIO	Draft directive on the European investigation order
EEC	European Economic Community
EEO	Framework Decision applying the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
EEW	Framework Decision on the European evidence warrant for obtaining objects, documents and data for use in proceedings in criminal matters
EPO	Draft directive on the European protection order
ESO	Framework Decision 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

EU Treaty	Formerly Treaty on European Union (replaced by TEU)
FC	Federal Constitution (*Schweizerische Bundesverfassung*)
FCCP	Federal Code of Criminal Procedure (*Bundesgesetz über die Bundesstrafrechtspflege*)
FLJS	Federal Law on the Judicial System (*Bundesgesetz über das Bundesgericht*)
FO	Framework Decision on the execution of orders freezing property or evidence
FP	Framework Decision on the application of the principle of mutual recognition to financial penalties
IADA	Interstate Agreement on Detainers Act
ICAOS	Interstate Commission for Adult Offender Supervision
ICC	Interstate Commission on Crime
ICCPR	International Covenant on Civil and Political Rights
JHA	Justice and Home Affairs
MPC	Model Penal Code
NCCUSL	National Conference of Commissioners on Uniform State Laws
NIC	National Institute of Corrections
OJ	Official Journal of the European Union
PC	Framework Decision on taking account of previous convictions in the course of new criminal proceedings
PD/AS	Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
RIP	Regulation 1346/2000 on insolvency proceedings
RUC	Regulation 805/2004 creating a European Enforcement Order for uncontested claims
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCEA	Uniform Criminal Extradition Act
U.L.A.	Uniform Laws Annotated
US	United States of America
USA	United States of America
USC	United States Code
USCA	United States Code Annotated

INTRODUCTION

1. WHAT IS THIS BOOK ABOUT?

A Dutch citizen stays in Hungary for business purposes. During his three-week trip, he rents a car to be able to drive easily between the several companies he has to visit. During one of his free weekends, an enjoyable restaurant visit ends up less positively. He discovers a heavy parking fine under the windscreen wipers of the rental car. Back in the Netherlands, the Dutch businessman decides not to pay the fine. But, some weeks later, he receives a payment slip, which orders him to pay the fine. The payment slip, however, is not sent by the Hungarian authorities, but by the Dutch Central Fine Collection Agency (Centraal Justitieel Incasso Bureau, CJIB). This is a direct result of the application of the principle of mutual recognition in the context of financial penalties.[1] *This principle instructs the Member States of the European Union to recognise each other's decision "without any further formality being required" and to "forthwith take all the necessary measures for its execution" (Article 6).*[2]

A group of young Portuguese adults are on a holiday trip driving between Spanish coastal towns. One day, at the end of an evening partying, the group goes back to the hotel by car. Shortly after departure, the Portuguese car suddenly crashes into another car with disastrous consequences: the Spanish driver of the other car dies immediately and two Portuguese passengers are severely wounded. Police officers come and administer a breathalyser test, which reveals that the Portuguese driver has a far too high blood alcohol level. The Portuguese driver is arrested and brought to the police station for further investigation. The Spanish prosecutor decides to start criminal prosecutions against the Portuguese national and soon after he is sent to prison for the offences of driving while intoxicated and manslaughter. As soon as the judgment becomes final, the Spanish authorities forward the judgment to the

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1 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition of financial penalties, OJ 22.03.2005, L76/16.

2 OJ 22.03.2005, L76/19.

Portuguese authorities, which then agree with the Spanish authorities on when to transfer the sentenced person to Portugal. After all, the Portuguese authorities are in principle obliged to enforce the custodial sentence and to put their own national in a Portuguese jail for the duration as prescribed by the Spanish judgment. This is foreseen in the future practice of cooperation, as the direct result of applying the principle of mutual recognition to judgments imposing custodial sentences or measures involving the deprivation of liberty.[3]

The principle of mutual recognition is the central focus of this book. The notion of mutual recognition of judicial decisions in criminal affairs must be understood in the context of the free movement of persons within the European Union. Within today's European Union, any national citizen of one of the Member States has the right to travel and reside freely on the whole territory of the European Union, whether for the purpose of holiday, work, education, health care, shopping or whatever. Many EU citizens, especially those residing in border areas, frequently use the opportunities this brings. I belong to a generation for whom these possibilities are so common, that benefiting from achievements of the European Union might easily be taken for granted.

However, the guarantee and exercise of the free movement rights have a significant negative side effect in the free movement of criminals and crimes. It goes without saying that with the removal of internal borders, it becomes easier for wrongdoers to flee the state on which territory they committed a crime. In addition, organised crime groups became facilitated to operate simultaneously on the territories of several Member States, or to constantly shift their activities from Member State to Member State. This was likely to undermine the development of "an area of freedom, security and justice", as envisaged in the 1997 Amsterdam Treaty.

Although over the years several legislative initiatives – either bilaterally, or multilaterally, and either in the framework of the Council of Europe, or in the framework of the European Union – were taken for the purpose of international cooperation in criminal affairs, it was felt during the 1990s that an EU-wide system of cooperation would better fit the need for efficient and fast cooperation procedures in which the rights of the individual would be guaranteed to be strengthened.[4] As stated by the European Council in 1999, such an EU-wide system should be based on the principle of mutual recognition: judicial decisions and judgments handed

[3] Council Framework Decision 2008/909/JHA of 27 November 2008 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, OJ 05.12.2008, L327/27.

[4] Tampere European Council, 15 and 16 October 1999, Presidency Conclusions (Tampere Conclusions), par. 33.

down in the course of criminal proceedings by a criminal judge in any Member State should be given legal force in any other Member State.[5]

A subsequent programme of the Council and the Commission, in which several legislative measures were proposed,[6] has been followed by the introduction of framework decisions and directives covering different kinds of judicial decisions and applying to all stages of criminal proceedings. Today, the principle of mutual recognition applies to custodial sanctions, financial penalties, probation measures, alternative sanctions, confiscation orders, arrest warrants, certain evidence warrants, pre-trial supervision measures and, finally, to the existence of previous convictions for the purpose of taking them into account in the course of new criminal proceedings. In its purest form, the principle of mutual recognition is primarily characterised by: the direct contact between judicial organs instead of political organs; the removal of grounds to refuse the acceptance and enforcement of foreign decisions; the abolishing of the principle of double criminality; the end of the *exequatur* procedure; and the strict and fixed deadlines as well as standard forms to be used by the judicial authorities.

2. REASONS TO RESEARCH

The idea of mutual recognition in its purest form gives rise to several fundamental questions. A first concerns the lack of a uniform definition of mutual recognition. What is mutual recognition? What exactly must be recognised? Even though mutual recognition has recently gained a legal basis in the new Lisbon Treaty, no definition is yet provided. To be able to define mutual recognition, that the principle of mutual recognition has originally been developed and evolved under the regime of the former First Pillar must be taken into consideration. As from the creation of a mutual recognition principle in the context of free trade (the free movement of goods),[7] its scope has gradually been expanded to the other freedoms under former Community law as well as to the area of judicial decisions in civil and commercial matters. For the aim of defining mutual recognition in the area of judicial decisions in criminal affairs, it is obvious to look to the experience built up in erstwhile Community law, as this provides a source of inspiration. However, this in turn raises several constitutional questions, because at the time that the Tampere Conclusions were launched, the area of judicial cooperation in criminal matters was still governed by the intergovernmental regime of the Third Pillar, while Community law was brought under the

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5 Tampere Conclusions, par. 33, 35-37.

6 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 15.01.2001, C 12/10.

7 The principle originates from the *Cassis de Dijon* case, 20 February 1979, Case C-120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Brantwein*, [1979] ECR 649.

supranational First Pillar regime. It should be examined whether the "Community law-like" realisation of the mutual recognition principle can be transferred to the area of judicial cooperation in criminal affairs and what consequences this would have for the meaning of mutual recognition in this specific area.[8]

A second question relates to the application of mutual recognition in practice. As mentioned, the idea of pure mutual recognition is characterised by the abolishing of most intermediate checks, such as the proof of double criminality, or the possibility to convert a foreign sentence into a sentence meeting domestic standards. Mutual recognition was rather to be typified by an automatic acceptance and enforcement of the foreign judicial decision as if that decision were handed down within the domestic legal order. This appears clearly from the parameters listed by the Council in the 2001 programme of measures – these parameters are a tool to measure the effectiveness of each mutual recognition instrument. They *inter alia* consider whether the fulfilment of the double requirement has been dropped or maintained, whether recognition may be refused on certain grounds or not, and whether the foreign judicial decision is required to be enforced directly or whether a validation procedure is provided.[9] The removal of these intermediate checks has caused much criticism from politicians and lawyers, who fear for the protection of national sovereignty and the protection of individual and fundamental rights.[10]

Now that a range of legal instruments has been adopted which apply the principle of mutual recognition to separate categories of judicial decisions and judgments, the time has come to investigate what obstacles still hinder the full implementation of the mutual recognition principle. In this regard, it came to my attention that now and then references were made to precedents for mutual recognition within federal countries. These precedents are considered to be sources of inspiration for the future of mutual recognition within the European Union.[11] Swart mentions the United

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8 Several academics have shed light on this question, see for instance: R. Barents, 'De denationalisering van het strafrecht', *Sociaal-economische wetgeving*, 54 (2006), pp. 358-374; S. Gless, 'Zum Prinzip der gegenseitigen Anerkennung', *Zeitschrift für die gesamte Strafrechtswissenschaft*, 116 (2004), pp. 353-367; S. Peers, 'Mutual recognition and criminal law in the European Union: Has the Council got it wrong?', *Common Market Law Review*, 41 (2004), pp. 5-36.

9 OJ 15.01.2001, C 12/11.

10 See for instance: M. Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Inconvenience?', *European Law Journal*, 15 (2009) pp. 70-97; S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant', *European Law Journal*, 10 (2004), pp. 200-217; C. Brants, 'Het "Tampere" principe van wederzijdse erkenning: problemen van strafrechtelijke rechtsbescherming in de Europese Unie', in: K. Boele-Woelki, C.H. Brants, and G.J.W. Steenhoff (eds.), *Het plezier van de rechtsvergelijking. Opstellen over unificatie en harmonisatie van het recht in Europa aangeboden aan prof. mr. E.H. Hondius*, Deventer: Kluwer, 2003, pp. 103-122.

11 I would like to mention the so-called Schünemann project, partly based on the Swiss cooperation model: B. Schünemann (ed.), *Alternativentwurf Europäische Strafverfolgung*, Carl Heymanns Verlag KG, 2004; see further B. Amirdivani, Y. Jeanneret and A. Jung, 'La coopération intercantonale

States of America and the Swiss Confederation as the most well known examples of federal countries being characterised by full mutual recognition of judicial decisions in criminal affairs.[12] Moreover, in a meeting of the European Convention's Secretariat,[13] the invited expert Van Kerchove proposed "to incorporate the principle of mutual recognition of judgments in civil and criminal matters (along the lines of the 'full faith and credit clause' in the US Constitution)".[14] The hypothesis that underlies such statements implies that the experience built up in federal countries, such as Switzerland and the USA, with mutual recognition of out-of-jurisdiction judicial decisions in criminal matters, would be helpful to learn from for the future development and application of the mutual recognition principle in the context of judicial cooperation in criminal affairs within the European Union.

3. CENTRAL QUESTION

In the foregoing, I put forward several questions related to the meaning and application of the principle of mutual recognition of judicial decisions in criminal matters. Taken together, they are combined in one central research question:

> How should the principle of mutual recognition of judicial decisions in criminal matters be defined and interpreted and how should this principle be applied in the future?

This central question divides into several subquestions. Each subquestion needs a separate chapter to be examined thoroughly. At the end of each chapter, the subquestion will be answered by means of concluding remarks.

The different chapters are categorised in three parts. This will be further clarified in the following section. Beforehand, it has to be emphasised that in the framework of this research the possible special positions of certain Member States (e.g. opt-outs) will not be addressed; the principle of mutual recognition and relating provisions

suisse en matière pénale: un modèle pour l'Europe?', in: G. de Kerchove and A. Weyembergh, *La reconnaissance mutuelle des décisions judiciaires pénale dans l'Union européenne*, Editions de l'Université de Bruxelles, 2001, pp. 227-243.

12 A.H.J. Swart, *Een ware Europese rechtsruimte. Wederzijdse erkenning van strafrechtelijke beslissingen in de Europese Unie*, Deventer: Gouda Quint, 2001 (inaugural lecture), p. 232.

13 The European Convention has brought together the different parties in the European Union for the aim of preparing a European Constitution. It ended up its work in 2003. Their website is still online: http://european-convention.eu.int/ (last accessed on August 30, 2010).

14 The European Convention, Brussels 16 October 2002, from the Secretariat to Working Group X "Freedom, Security and Justice", Summary of the meeting held on 8 October 2002, CONV 346/02, available for consultation at the following link (last accessed on August 30, 2010): http://register.consilium.europa.eu/pdf/en/02/cv00/cv00346.en02.pdf.

as well as other legislative obligations mentioned in this book are approached as being applicable to all Member States equally.

4. THE STRUCTURE OF THIS BOOK

This research is divided into two parts (Part I and Part II), interconnected by a Transitional Part.

PART I. DEFINING MUTUAL RECOGNITION IN THE EUROPEAN UNION: BETWEEN COMMUNITY LAW AND UNION LAW

This part focuses on the internal comparison: the principle of mutual recognition in the area of judicial cooperation in criminal matters is compared with the principle of mutual recognition both in the internal market and in the field of judicial cooperation in civil and commercial matters. The aim of this part of the book is to create a clear definition of mutual recognition in the context of criminal law. For this purpose, two subquestions need to be scrutinised, both categorised in separate chapters:

Chapter 1: The principle of mutual recognition in European Community law

— How to define mutual recognition in the contexts of the internal market and the judicial cooperation in civil and commercial matters (formerly governed by the First Pillar regime of Community law)?

The principle of mutual recognition originates from the landmark decision of the European Court of Justice in the *Cassis de Dijon* case. Its scope has subsequently been expanded to the other freedoms of the internal market – these are the free movement of services, capital and persons – as well as to the judicial cooperation in civil and commercial matters. All these areas have been developed under the flag of the former First Pillar of the European Union commonly referred to as Community law. To find out what mutual recognition means in these fields of Community law, I will also give an overview of the origin and evolution of the principle.

Chapter 2: The principle of mutual recognition in European Union law

— How to define mutual recognition in the area of judicial cooperation in criminal affairs (formerly governed by the intergovernmental Third Pillar)?

Having defined the principle of mutual recognition in the framework of the former Community law areas, the next question to be answered concerns whether this

definition can also be used for judicial decisions and judgments handed down in the course of criminal proceedings. This is a question of EU constitutional law, which brings us back to the old pillar regime. What is the relationship between the erstwhile First and Third Pillars and what does this say about the meaning of mutual recognition in the field of criminal law? At first sight, things might seem changed by the fact that a legal basis for mutual recognition in the meantime has been provided for in the new Lisbon Treaty and that with the entry into force of this Treaty, the pillar structure belongs to the past.[15] However, the internal comparison made here does not relate to the existence of different pillars as such, but primarily to the analogy or dissimilarity of one single principle within very different areas of competence. This issue remains of utmost relevance in view of the aim of defining the principle of mutual recognition, irrespective of whether the Lisbon Treaty provides a legal basis, and irrespective of whether all relevant areas of competence are currently governed by the same regime.

TRANSITIONAL PART. THE IMPLEMENTATION PROCESS OF THE PRINCIPLE OF MUTUAL RECOGNITION IN THE FIELD OF CRIMINAL LAW: THE IDENTIFICATION OF OBSTACLES AND BOTTLENECKS

The completion of Part I of this research brought me to the conclusion that – irrespective of the analogy I found between the area without internal borders and the area of freedom, security and justice – the field of criminal law needs a specific approach. Assuming that the field of criminal law – from the perspective of mutual recognition – knows specific sensitivities and problem areas that do not occur in the framework of civil law or international trade, it would be of additional relevance to make use of the long-term experience built up in federal countries as to the topic of this research: the inter-jurisdictional recognition of judicial decisions in criminal affairs. But as a first step, I have to verify the assumption that such criminal law-related obstacles do indeed exist. The aim of this chapter is thus to identify the obstacles that hinder the full implementation of the principle of mutual recognition of judicial decisions in criminal matters.

Chapter 3: Implementing Mutual Recognition: Obstacles and Bottlenecks

— What are the obstacles that still hinder the full implementation of mutual recognition in the area of judicial cooperation in criminal matters?

[15] Article 82(1) Treaty on the Functioning of the European Union. The consolidated version of this treaty has been published in OJ 30.03.2010, C 83/47.

As it would be too much, in fact impossible, to address every possible problem area, I restricted myself to those issues that are considered to be characteristics of the principle of mutual recognition of judicial decisions in criminal matters. I have already mentioned that in 2001, the Council adopted a programme of measures to implement the principle of mutual recognition in the field of criminal law.[16] As a result of this programme, several framework decisions were proposed. Furthermore, seven parameters were formulated as a tool to determine the effectiveness of mutual recognition instruments: "[T]he extent of the mutual recognition exercise is very much dependent on a number of parameters which determine its effectiveness".[17] The availability of such a tool presupposes different levels of effectiveness (varying on a scale from ineffective to effective). It is clear from the 2001 programme and its follow-up programmes and evaluations, an individual measure is regarded as effective when it applies full mutual recognition without any intermediate requirements and limits, such as the requirement of double criminality or its application to limited offences.[18] As worded in, for instance, the Hague Programme "further efforts should be made to facilitate […] the full employment of mutual recognition".[19] The established parameters concern the questions of whether the mutual recognition instrument:[20]

1. is of general application or limited to special offences;
2. maintains or drops the fulfilment of the double criminality requirement as a condition for recognition;
3. contains mechanisms for safeguarding the rights of third parties, victims and suspects;
4. defines minimum common standards necessary to facilitate application of the principle;
5. requires direct or indirect enforcement of the decision, and the definition and scope of a validation procedure;
6. determines grounds for refusing recognition and to what extent these grounds are applicable;

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16 OJ 15.01.2001, C 12/10.

17 OJ 15.01.2001, C 12/10.

18 "Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations", Communication from the Commission, COM (2004) 401 final; "Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States", Communication from the Commission, COM (2005) 195 final; Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1 (see also its follow-up documents and evaluations).

19 The Hague Programme, OJ 03.03.2005, C 53/11, par. III.3.

20 OJ 15.01.2001, C 12/11.

7. provides liability arrangements for the Member States in the event of acquittal.

These parameters address the requirements of working together effectively on the basis of mutual recognition. The different mutual recognition instruments will all be assessed in the light of them. Three interrelated subquestions arise. First, it will be determined whether each parameter occurs in the recognition instruments. If so, it will then be examined whether the requirements entailed by the parameters apply wholly or partially, and, thirdly, whether they can be considered to be permanent or provisional. Answering these subquestions will give an overview of the progress towards full application of the recognition principle in the field of criminal law, which will raise several issues concerning its application. Eventually, with a view to the next part of this research, these issues will form the points of departure in the comparative law study.

PART II. MUTUAL RECOGNITION IN THE FEDERATIONS OF SWITZERLAND AND THE UNITED STATES OF AMERICA: LESSONS FOR THE EUROPEAN UNION

In this part, how the obstacles identified in Chapter 3 are dealt with in the cooperation practices between the Swiss jurisdictions as well as between the American jurisdictions will be investigated. The aim of this part of the book is to find out what lessons the Swiss and American examples bring for the future of mutual recognition within the European Union context.

Chapter 4: The Case of Switzerland

— How are the problematic issues, related to the implementation of mutual recognition of judicial decisions in criminal affairs between the EU Member States, approached in the context of the inter-jurisdictional acceptance and enforcement of judicial decisions in criminal affairs within the Swiss federation?

The Swiss federation consists of 27 jurisdictions: the *Bund* and 26 cantons. Being organised as states, all cantons have their own legislative, executive, and judicial powers. They also have their own constitution and statutory law. Besides the big differences in political structure, the cantons also vary widely in culture, language, religion, geography, size and population. As such, the Swiss federation can be considered an entity very similar structured in appearance to the European Union. The question arises as to how the obstacles identified in the framework of the European Union are dealt with in the Swiss practice of inter-cantonal and federal-cantonal recognition of each other's judicial decisions in criminal affairs. Finding an answer to this question is the purpose of this chapter.

Chapter 5: The Case of the United States of America

— How are the problematic issues, related to the implementation of mutual recognition of judicial decisions in criminal affairs between the EU Member States, approached in the context of the inter-jurisdictional acceptance and enforcement of judicial decisions in criminal affairs within the United States of America?

The United States of America is a federation consisting of 50 states and a federal government. In addition, there is the federal district of Washington, DC The country also possesses several territories that are not part of a state. To a large extent, the American states are sovereign and autonomous entities: they have structured their own legislative, executive and judicial powers. They have enacted their own constitution and statutory legislation. Besides the differences as to these points, the states also diverge enormously in size, population, geography, culture and ethnicity. The American federation is long since familiar with the phenomenon of crime across state lines. The question arises as to how the obstacles identified in the context of the European Union are dealt with in the American framework of interstate and federal-state recognition of each other's judicial decisions in criminal affairs. Answering to this question is the purpose of this chapter.

Chapter 6: Analysis: The European Union, Switzerland and the United States of America Compared

— What lessons can be derived from the Swiss and American examples concerning mutual recognition of extra-territorial judicial decisions?

Having studied the mutual acceptance and enforcement of extraterritorial judicial decisions in criminal matters within the Swiss and American federation, and having examined how these federations deal with the bottlenecks in mutual recognition between European Union Member States, the question arises as to what lessons can be drawn for the future of mutual recognition in the European Union. The aim of this chapter is to derive such lessons from the Swiss and American examples. For this purpose, I will set the different approaches side by side. These differences will subsequently been explained and estimated, after which final lessons can be formulated.

5. RESEARCH METHODS

This research is basically legal research, in which relevant legislation, case law and literature will be analysed. The majority of academic literature was found in the university library of Tilburg University (Tilburg, The Netherlands), the library of the Max-Planck-Institut für ausländisches und internationales Strafrecht (Freiburg im

Breisgau, Germany), the Law Library of Basle University (Basle, Switzerland), the Law Library of the University of Zürich (Zürich, Switzerland), the Library of New York University School of Law (New York, NY, USA), and the Library of Columbia Law School (New York, NY, USA). An addition role of importance is further given to the method of comparative law. The comparative part of this research comprises both internal comparative research and external comparative research, as will be explained below. I will draw my final conclusions on the basis of the outcome of the several comparisons to be made.

5.1. INTERNAL COMPARISON

I applied the method of internal comparative law in Part I: in this part, I examine how the same principle (mutual recognition) within the same institutional structure (the European Union) factually functions in varying areas of competence. I address the question of what it means to transfer a principle from the internal market framework to the context of judicial cooperation in criminal matters. For this purpose, I have to describe the precise origin, development and meaning of the principle of mutual recognition in the framework of the internal market, as well as in the area of judicial cooperation of civil and commercial matters. These overviews are based on legal texts, policy documents, case law of the European Court of Justice and secondary literature. The outcome of these overviews will be used for the aim of defining mutual recognition in the area of judicial cooperation in criminal affairs.

5.2. EXTERNAL COMPARISON

The method of external comparative law is applied in Part II: the idea of mutual recognition of judicial decisions in criminal affairs between the Member States of the European Union is compared to – and here I choose a more general formulation – the idea of inter-jurisdictional acceptance and enforcement of judicial decisions in criminal matters between Swiss jurisdictions and, secondly, between American jurisdictions. Why Switzerland and why America? And what about comparing a non-federal institution with federal countries?

Switzerland consists of 26 cantons and a federal government. In the field of criminal law, it is notable that the country has a single Penal Code as from 1942 and a single Code of Criminal Procedure as from the start of 2011. Up until 31 December 2010, all cantons as well as the federal jurisdiction had different codes of criminal procedure, which were really quite divergent. After all, bordered by Germany, France, Italy, Austria and Liechtenstein, it is obvious that the different cantons have different sources of inspiration to lean on for designing the cantonal rules of criminal procedure. Though not a member of the European Union, Switzerland is situated in the midst of the European Union and the varying sources

of inspiration are thus European too. Because within the country, no cantonal border checks exist and Swiss citizens are free to travel through and reside on the territory of the whole country, crime commonly crosses cantonal borders. It will be examined how the Swiss federation deals with the recognition of judicial decisions in criminal matters that are handed down by a judge of another jurisdiction of the country, also in relation to the existence of shared norms of criminal law and criminal procedure.

The United States of America is a federation consisting of 50 states and a federal government. A separate criminal justice system exists in each jurisdiction. The mutual differences are enormous. An example that strongly appeals to the imagination regards the issue of the death penalty. While more and more states have abolished the death penalty, people can still be sentenced to death in 37 states and by the federal government. To what extent are the American jurisdictions willing and obliged to recognise each other's judicial decisions in criminal affairs, and under what conditions? This will be studied in this research too.

Comparison of the European Union with the Swiss federation and the American federation has been done many times, in particular on polity questions, such as the institutional structures, forms of government, constitutional law and division of powers.[21] Comparison has less often made with regard to the area of cooperation in criminal affairs, although there are a few examples.[22] Comparing both federations with the European Union is interesting because then the European Union is set alongside a European civil law country (Switzerland) as well as alongside a transatlantic common law country (United States of America). However, what about comparing two federations with the non-federal European Union? After all, the European Union is clearly not a federation. At the same time, there is also no clear way to define the

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[21] To mention only a few: A. Menon and M.A. Schain (eds.), *Comparative Federalism. The European Union and the United States in Comparative Perspective*, New York: Oxford University Press, 2008; H. Kristoferitsch, *Vom Staatenbund zum Bundesstaat? Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Vienna: Springer, 2007; T. Fischer, 'An American Looks at the European Union', *European Law Journal*, 12 (2006), pp. 226-278; A. Schrauwen (ed.), *Flexibility in constitutions: forms of closer cooperation in federal and non-federal settings; 2nd post-Nice edition* (The Hogendorp Papers), Amsterdam: Europa Law Publishing, 2002; K. Nicolaidis and R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, New York: Oxford University Press, 2001; M. Cappelletti, M. Seccombe and J. Weiler (eds.), *Integration Through Law. Europe and the American Federal Experience. Volume 1: Methods, Tools, and Institutions. Book 1: A Political, Legal and Economic Overview*, Berlin: Walter de Gruyter, 1986.

[22] For instance: Schünemann (2004), Y. Buruma, 'Federaal Europa en het strafrecht', *Delikt en Delinkwent*, 32 (2002), pp. 657-671; Amirdivani, Jeanneret and Jung (2001), pp. 227-243; M.J.J.P. Luchtman, *Grensoverschrijdende sfeercumulatie. Over de handhavingssamenwerking tussen financiële toezichthouders, fiscale autoriteiten en justitiële autoriteiten in EU-verband*, Nijmegen: Wolf Legal Publishers, 2007 (this dissertation addresses the Swiss approach towards tax law and financial supervision issues for the purpose of finding solutions for existing problems in the European Union context, see the summary in English on pp. 757-768).

European Union. It has been defined in many ways: "a confederation",[23] an "international organization",[24] an "exceptionally weak federation",[25] a "limited, multi-level constitutional polity",[26] a "Union of States",[27] a "quasi-federal" legal order,[28] or "*ein Staatenbund and der Schwelle zur Bundesstaalichtkeit*".[29] It is, however, clear that the European Union is not a nation-state, while Switzerland and the United States of America are. After all, whereas the European Union consists of nation-states, the Swiss and American federations are both nation-states consisting of independent entities (respectively cantons and states). To compare such differing structures is, nonetheless, justifiable. The nation-state has long since been the most important figure for political scientists to describe and analyse political powers, forms of government, etc.[30] An alternative encompassing doctrine to fit the European Union structure is not available, and for this reason academics have focused and still focus on the material similarities between the European Union and federal countries, instead of disposing of the federal examples simply because the European Union is not a federal state. The many federal characteristics of the European Union, combined with the fact that European Union history has shown many similarities with federal history, has brought about many publications in which the European Union has been compared to federal countries.[31]

The abundance of predecessors encouraged me to compare the European Union with the federations of Switzerland and the United States of America, and to use both federations as a source of inspiration for the future. Although the comparison does not regard polity questions, but rather deals with questions of criminal law, the political analyses are useful and needed in order to be able to explain the characteristics of the respective systems and to determine their value as a source of inspiration for the European Union context. The questions of criminal law that this research focuses on concern the existing tools and instruments that enable

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23 D.J. Elazar, 'The united States and the European Union: Models for their Epochs', in: Nicolaidis and Howse (2001), p. 38.

24 J.D. Donahue and M.A. Pollack, 'Centralization and Its Discontents', in: Nicolaidis and Howse (2001), p. 116.

25 A. Moravcsik, 'European Federalism', in: Nicolaidis and Howse (2001), p. 186.

26 Idem, p. 187.

27 C.W.A. Timmermans, 'General aspects of the European Union and the European Communities', in: Kapteyn & VerLoren van Themaat, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International, 2008 (4th edition), p. 55.

28 M. Cappelletti, M. Seccombe, and J.H.H. Weiler, 'Integration Through Law: Europe and the American Federal Experience. A General Introduction', in: Cappelletti, Seccombe, and Weiler (1986), p. 12.

29 Kristoferitsch (2007), p. 338.

30 Kristoferitsch (2007), pp. 333-336.

31 Supra note 21.

the mutual acceptance and enforcement of judicial decisions in criminal matters handed down in the legal order of another jurisdiction.

5.3. TERMINOLOGY

Comparative research brings the problem of terminology. This problem exists where different parts of the same legal systems are compared (internal comparison), but also where different legal systems are compared as to a single legal question (external comparison). On the one hand, equal terms may have differing meanings in several law branches and also in several legal systems. On the other hand, an equal or similar phenomenon may be defined otherwise in different law branches, and also in different legal systems. Where different legal systems are compared, things may become all the more complicated when the various legal systems have varying official languages.

As to the internal comparative law research (Part I), to solve the terminology problem is part of the plan. For the purpose of defining the principle of mutual recognition in the area of criminal law, it will be examined what mutual recognition means and how it functions in the context of European trade and in the area of civil law. It will subsequently be investigated whether the outcomes are useful for the criminal law context.

I am aware of the terminology issues that play a role in the external comparative law research (Part II of this book). Comparing three different criminal justice systems, terminological errors are likely to be made. In this respect, it must be mentioned that the European Union has 23 official languages (the vast majority of documents are always available in English), Switzerland has 4 official languages (I was only able to consult German and French sources), and only in America is English the first language of the country.

The awareness of diverging terminology is of clear importance with regard to the term "mutual recognition". In the European Union context, the designation mutual recognition indicates the occasion that one Member State accepts and, if necessary, enforces a judicial decision handed down in the course of criminal proceedings in another Member State. Irrespective of whether the term mutual recognition would exist within the Swiss and American contexts of cooperation in criminal matters, the purpose of Part II of this book is to see to what extent the inter-jurisdictional acceptance and enforcement of judicial decisions in criminal matters does exist and under what conditions.

PART I

DEFINING MUTUAL RECOGNITION IN THE EUROPEAN UNION: BETWEEN COMMUNITY LAW AND UNION LAW

The first part of this book contains two chapters. Chapter 1 deals with the principle of mutual recognition in the field of the internal market as well as concerning judicial decisions in civil and commercial matters (part of the erstwhile First Pillar). This chapter will provide an overview of origin and evolution of the principle of mutual recognition. Some flanking developments will be described additionally, in order to contribute to a better understanding of the principle. The main purpose is to define mutual recognition in two different ways, focusing on its essential consequences as well as on its subject.

Chapter 2 examines the principle of mutual recognition in the field of judicial cooperation in criminal matters. It will describe how the principle of mutual recognition occured in the erstwhile Third Pillar and how it has developed up until today, also in view of the entry into force of the Lisbon Treaty. It will further be investigate whether the principle of mutual recognition can be given the same meaning in the field of criminal law as in the internal market and the field of civil and commercial law. To this end, the former pillar structure of European Union law needs to be elaborated on extensively.

CHAPTER 1

THE PRINCIPLE OF MUTUAL RECOGNITION IN EUROPEAN COMMUNITY LAW

1. INTRODUCTION

The concept of mutual recognition within the European Union is nothing new. It has all come about thanks to a consignment of French liqueur, called "Cassis de Dijon", which was meant to be imported to Germany. Because of its insufficient alcohol percentage according to German national law, the Monopoly Administration in Germany refused to import the French liqueur. The question was raised as to whether this refusal could be regarded as an illegal hindrance of the intra-Community trade, specifically as "a measure of equivalent effect to quantitative restrictions", forbidden by Article 34 of the Treaty on the Functioning of the European Union[32] (TFEU, formerly Article 28 of the Treaty establishing the European Community, EC Treaty[33]). Suffice to say in this introduction that the European Court of Justice (ECJ) decided that the German measure hindered the free movement of goods and had to be regarded as a measure of equivalent effect. As a solution for the future, the ECJ introduced a new principle: mutual recognition.[34]

Since the *Cassis de Dijon* case, the concept of mutual recognition has developed step by step. Nowadays mutual recognition is applicable in various fields of EU law which has resulted in different meanings. When speaking about the meaning of the principle of mutual recognition it is helpful to make a distinction between the

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32 The consolidated version has been published in OJ 30.03.2010, C 83/47.

33 The last consolidated version of the Treaty establishing the European Community has been published in OJ 29.12.2006, C 321E/1. Formerly Article 28 EC Treaty is the equivalent of the previous Article 30 of the Treaty establishing the European Economic Community (Treaty of Rome), 25 March 1957.

34 20 February 1979, Case C-120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Brantwein*, [1979] ECR 649.

consequential meaning and the methodical meaning.[35] While the consequential meaning places the accent on the consequences of recognition, the methodical meaning defines the specific subject of recognition.

The methodical meaning of mutual recognition can be subdivided into so-called "substantive law recognition" and "procedural law recognition".[36] Procedural law recognition is the mode of recognition that relates to documents with legal force. The document, for example a judgment of a court, together with its legal force forms the subject of recognition; the judgment will be taken over and enforced. In contrast, substantive law recognition is the mode of recognition that relates to the mere application of foreign justice in the domestic legal order. A legal fact originating from foreign law (e.g. a legal status) is attached to legal effects domestically; after all, the legal fact in question is the subject of recognition. In this context, Mansel speaks about recognition of legal norms ("*Rechtsnormen*"), recognition of legal status ("*Rechtslagen*"), and recognition as the application of foreign public law ("*Anwendung ausländischen öffentlichen Rechts*").[37] It is questionable whether or not there is an essential difference between these options. The recognition of legal norms or legal status both seem to apply foreign public law. Mansel himself also doubts the given distinction.[38] However, I think Mansel has provided useful perspectives on the possible methodical explanations of mutual recognition, which can be used in the conceptualisation of the principle in other fields of law.

In this chapter, I will classify the several meanings of mutual recognition as they apply in the internal market as well as in the field of judicial cooperation in civil and commercial matters. Both areas of EU competence were until recently governed by the supranational First Pillar, precluding the current Lisbon Treaty under which the pillar regime was abolished. In the first section of this chapter, I will focus on the meaning of mutual recognition in the internal market, especially the marketing of goods, for here the principle of mutual recognition originated. Only a few notes will be made on the application of the recognition principle in the other freedoms of the internal market (2). Subsequently, I will explore mutual recognition of judicial decisions in civil and commercial matters, in order to define mutual recognition in this area of EU law (3). This chapter will close with some concluding remarks (4).

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35 The term "methodical meaning" has been translated by the author from German. The original term "*methodische Bedeutung*" was introduced by H.P. Mansel in: 'Anerkennung als Grundprinzip des Europäischen Rechtsraums. Zur Herausbildung eines europäischen Anerkennungs-Kollisionsrechts: Anerkennung statt Verweisung als neues Strukurprinzip des Europäischen internationalen Privatrechts?', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 70 (2006), pp. 651-731.

36 Both terms have been translated from the German terms "*materiellrechtliche Anerkenning*" and "*verfahrensrechtliche Anerkennung*", introduced in Mansel (2006), pp. 651-731.

37 Mansel (2006), p. 679.

38 Mansel (2006), note 124 on p. 679, also p. 681.

Beforehand, it must be emphasised that I do not pretend to give a complete overview of recognition in the erstwhile First Pillar of EU law. The sole aim of this chapter is to give an insight into the most important elements of the concept, and to find out what the concept means in those areas of law. This will contribute to a better understanding of its essence and to determine what mutual recognition actually means, or should mean, in the field of criminal law.

2. MUTUAL RECOGNITION IN THE INTERNAL MARKET

The aim of this section is to define mutual recognition as it functions in the internal market. Therefore, I will describe the introduction of the principle in the context of the free movement of goods, followed by a description of the most important limitations and related developments. By means of a few examples, some attention will also be paid to the principle of mutual recognition in the contexts of the other freedoms of the internal market (freedom of persons, services and capital). Based on these descriptions, the consequential and methodical meanings of mutual recognition will be provided.

2.1. THE INTRODUCTION OF MUTUAL RECOGNITION IN THE CONTEXT OF GOODS MARKETS

On the basis of Article 26(1) TFEU, the European Union is obliged to take measures that serve the ongoing establishment of the internal market. It appears from the same provision that the internal market must comprise "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Article 26(2) TFEU). This indicates a struggle for economic integration.[39]

With the internal market as one of the main goals of the European Union, it is reasonable that the free movement of goods may not be hindered by means of quantitative restrictions on imports and exports (limits or quotas on amount or commodity); such restrictions are forbidden (Articles 34 and 35 TFEU). This also applies to measures having an equivalent effect. In the landmark case of *Dassonville*, delivered a few years before the *Cassis de Dijon* case, the ECJ defined measures of equivalent effects as "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade".[40]

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[39] J.F. Appeldoorn and G.T. Davies, *Vier vrijheden: een inleiding tot het recht van de Europese interne markt*, Den Haag: Boom Juridische Uitgevers, 2003, p. 11.

[40] 11 July 1974, Case C-8/74, *Procureur du Roi* v. *Benoît and Gustave Dassonville*,[1974] ECR 837.

2.1.1. The Cassis de Dijon *judgment*

The central question in the *Cassis de Dijon* case was whether Germany maintained a "measure having equivalent effect", by refusing the French liqueur for reasons of an insufficient alcohol content according to German national law. At first sight, the German requirement for a minimum alcohol percentage does not look like an equivalent measure, since the measure made no distinction between national and foreign products (non-discriminatory measure): the minimum requirement applied to foreign products as well as to German products. The ECJ decided, nevertheless, that the German measure had to be regarded as a measure of equivalent effect, because of its hindering effect on intra-Community trade. Not the mere form of the German measure, but its effect was decisive for the ECJ. As a result, it may be that national product standards, applied to national products as well as to imported products, may in a certain case be considered measures of equivalent effect: "*Même si elles sont indistinctement applicables […] des réglementations techniques nationales ne peuvent empêcher l'accès au marché national […]*".[41]

The approach chosen by the ECJ in the *Cassis de Dijon* case is likely to cause several problems. Where measures are judged on their effects, more and more measures will appear to be illegal. Because this will equally impede the free movement of goods, it may be counterproductive. To avoid this, the ECJ introduced a new principle: the principle of mutual recognition:

> "The concept of 'measures having effect equivalent to quantitative restrictions on imports' contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where the importation of alcoholic beverages *lawfully produced and marketed in another Member State* is concerned" (emphasis added).[42]

Put another way, Member States cannot refuse products from other Member States having access to their market if these products are manufactured and marketed in accordance to the regulations and procedures of the other Member State, even if these regulations and procedures differ from their own. Foreign products have to be dealt with as if they originated under the national legislation. The consequence is that a product "*in die gesamten Gemeinschaft rechtlich unbehindert zirkulationsfähig*

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41 A. Mattera, 'L'article 30 du traité CEE, la jurisprudence «Cassis de Dijon» et le principe de la reconnaissance mutuelle. Instruments au service d'une Communauté plus respectueuse des diversités nationales', *Revue du Marché Unique Européen*, 4 (1992), p. 31.

42 20 February 1979, Case C-120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Brantwein*, [1979] ECR 649, par. 15.

ist".[43] The basic assumption of this new approach is that all standards in all Member States, including the lowest, are acceptable and reliable and must be seen as such.[44]

The application of the principle of mutual recognition involves the persistence of divergence of national rules. This divergence is dealt with in practice by the idea of "home-country control": goods are subjected to the rules of the Member State in which they are produced and marketed. Because the other Member States have to accept the access of these goods on their national markets, mutual recognition implies "a horizontal transfer of sovereignty".[45]

2.1.2. Exceptions to the rule of mutual recognition

Summarising, a non-discriminatory measure can be regarded as an equivalent measure when it hinders intra-Community trade. In that respect the non-discriminatory measure violates Article 34 TFEU, which is contrary to the recognition principle laid down by the ECJ in *Cassis de Dijon*. In spite of this, there are two grounds justifying quantitative restrictions or equivalent measures. First, the hindering measure may be justified on grounds of:

> "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property" (Article 36 TFEU).

The public policy ground is worthy of extra attention. As will be demonstrated later on in this chapter, this justification ground occurs in other areas of EU competence as well. Being closely related to state sovereignty, it constitutes a sensitive exception. It appears from literature and ECJ case law that the ground of public policy has to be interpreted very strictly; it functions as the final correction (*ultima ratio*) to the principle of mutual recognition, which means that it arises when the other grounds are not applicable. In only one case before the ECJ has the public policy justification been accepted; this makes it easier to say what is not included under this heading than what is.[46] To mention just a few examples, it has appeared that Member States

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43 Mansel (2006), p. 666.

44 L. Woods, *Free movement of Goods and Services within the European Community*, UK, University of Essex: Ashgate, 2004, p. 70.

45 S.K. Schmidt, 'Introduction', in: S.K. Schmidt (ed.), *Mutual Recognition as a New Mode of Governance*, London: Routledge, 2008, pp. 5 and 6.

46 23 November 1978, Case C-7/78, *R.* v. *Thompson*, [1978], ECR 2247. In this case, the United Kingdom banned the importation of coins. This restriction on import was held to be justified on grounds of public policy because it stemmed from the need to protect the right to mint coinage, a field related to a central attribute of a sovereign state. See also Woods (2004), p. 120.

may not use the public policy exception for the protection of economic interests,[47] nor to maintain public order.[48] As held in a 1977 case, to invoke the ground of public policy, there must be an important and directly threatened interest: "recourse by a national authority to the concept of public policy presupposes, in any event, the existence of a genuine and sufficiently serious threat affecting one of the fundamental interests of society".[49]

A second route to justify measures with a hindering effect on intra-Community trade stems from the *Cassis de Dijon* case itself and is referred to as the "Cassis justification".[50] In this case, the ECJ has formulated some mandatory requirements, usually called the "rule of reason"-exceptions. As held in *Cassis de Dijon*:

> "In the absence of Common rules […] obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognized 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".[51]

The acceptance of a "rule of reason" exception in an individual case would result in "a reasonable measure" despite its hindering effect. It should be stressed that the

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47 However, it is often hard to draw the line between public policy and economic interests for they are often strongly linked, as has been demonstrated by several authors. See for instance Woods (2004), p. 120 *et seq*.; Also C. Barnard and I. Hare, ´The Right to Protest and the Right to Export: Police Discretion and the Free Movement of Goods' *Modern Law Review Limited*, 60 (1997), p. 403 *et seq*. The ECJ has been severe to divide both objectives; only in one case was public policy successfully raised, namely in the *R.* v. *Thompson case*, see supra note 46. It appears from this case that, although minting coinage has everything to do with economic policy, the ECJ accepted the need to protect the right to mint coinage as a ground of public policy because the economic policy was not the primary consideration here; it rather dealt with "some more general proprietary right in the currency itself". Also Woods (2004), p. 120.

48 In several cases, public policy was relied on where demonstrators protested against the import or export of certain products: e.g. 29 January 1985, Case C-231/83, *Cullet* v. *Centre LeClerc*, [1985], ECR 305; 9 December 1997, Case C-265/95, *Commission* v. *France*, [1997] ECR I-6959). However, according to the ECJ, the basic principle of Community loyalty implies that Member States are obliged to take action to ensure the free movement of goods under the formerly Article 28 *in conjunction with* Article 10 EC Treaty; see also Woods (2004), pp. 121-122 as well as Barnard and Hare (1997), pp. 405-406.

49 27 October 1977, Case C-30/77, *Régina* v. *Pierre Bouchereau*, [1977] ECR 1999. This case concerns the free movement of persons, but its main essence is applicable to the other freedoms as well, see also Woods (2004), p. 119.

50 Appeldoorn and Davies (2003), p. 51.

51 20 February 1979, Case C-120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Brantwein*, [1979] ECR 649, par. 8.

"Cassis justification" only applies to non-discriminatory measures of equivalent effect, thus measures applicable to domestic and imported products alike which are regarded – in spite of the absence of distinction – as measures with an effect equivalent to quantitative restrictions on imports. Therefore, the "rule of reason" can neither be regarded as an expansion of Article 36 TFEU,[52] nor as a restriction of the substantive scope of Article 34 TFEU. Rather, the "rule of reason" doctrine provides a mechanism to balance the needs of the internal market and the needs of other general interests (such as public health): "Following the expansion of Article 28 [now Article 34 TFEU] to cover indistinctly applicable measures, the rule of reason can be seen as an attempt not to tip the balance too far towards a deregulated environment".[53] In that sense, the creation of the "rule of reason" reflects the recognition that EU law at that time did not guarantee certain interests and values sufficiently. The rule of reason was needed as an interim method to accept some national measures until legal guarantees could be created.[54]

It demonstrates the dynamic character of the mutual recognition principle that there are different justification grounds for non-discriminatory measures that can be regarded as equivalent to quantitative restrictive measures.[55] After all, although Member States are in principle obliged to recognise products from other Member States, the principle of mutual recognition could be set aside whenever the level of protection of certain public interests in the Member State of origin is not equivalent to the own level of protection.

2.2. MUTUAL RECOGNITION IN THE CONTEXT OF THE OTHER INTERNAL MARKET FREEDOMS

As from the introduction of the mutual recognition principle in the *Cassis de Dijon* case, it has gradually been applied to the other freedoms of the internal market as well. In the 1985 White Paper, the Commission already confirmed that "what is true for goods, is also true for services and people".[56]

The application of the principle of mutual recognition on the freedom of services, persons and capital relates to the fact that, for the aim of completing the internal market, it is prohibited to restrict the exercise of these freedoms (e.g. Articles

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52 L.W. Gormley, 'The Genesis of the Rule of Reason in the Free Movement of Goods', in: A. Schrauwen (ed.), *Rule of Reason. Rethinking another Classic of European Legal Doctrine* (The Hogendorp Papers), Europa Law Publishing, 2005, p. 28.

53 Woods (2004), p. 68.

54 Gormley (2005), pp. 23-24, 28.

55 M. Fichera and C. Janssens, 'Mutual Recognition of judicial decisions in criminal matters and the role of the national judge', *ERA Forum* 8 (2007), p. 180.

56 COM (85) 310 final, par. 58.

45(2) and 49 TFEU) – by analogy to the prohibition of quantitative restrictions and measures of equivalent effect in the context of the free movement of goods. The forbidden restrictions could concern national measures discriminating on grounds of nationality explicitly, but also non-discriminatory measures (measures without distinction).[57]

It follows from the treaty that restrictive measures with and without distinction are only justifiable by imperative grounds of "public policy, public security or public health" (e.g. Articles 45(3) and 52(1) TFEU).[58] In addition to these grounds, the ECJ formulated some extra justification grounds in the cases of *Kraus and Gebhard*. Departing from the rule that Member States are not entitled to maintain national conditions "liable to hamper or to render less attractive the exercise by Community nationals […] of fundamental freedoms guaranteed by the Treaty",[59] such national conditions (e.g. related to the use of professional titles, the compliance with professional conduct) may be upheld (1) if they are applied non-discriminatorily; (2) if they are justified by imperative requirements in the general interest; (3) if they are suitable for securing the attainment of the objective which they pursue; and (4) if they do not go beyond what is necessary in order to attain this objective.[60] This has been explained as extending the rule of reason to the other freedoms.[61]

In conclusion, only on well-determined imperative grounds are Member States allowed to restrict the exercise of the freedoms of the internal market. Where these justifications grounds do not apply, the Member States are in principle obliged to apply the principle of mutual recognition. Although it would go too far to pursue in depth all other internal market fields where mutual recognition is applied – such would be superfluous given the aim of this chapter and given the high degree of overlap and analogy with the meaning of mutual recognition in the context of the free movement of goods – a few examples will be addressed very briefly below, in order to give an insight into the scope of mutual recognition in the internal market.

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57 This follows from the 1993 *Kraus* case, decided in the context of diploma recognition (free movement of workers and the freedom of establishment): 31 March 1993, Case C-19/92, *Dieter Kraus* v. *Land Baden Württemberg*, [1993] ECR I-1663, par. 32.

58 For some general notions on the "public policy" ground, see Section 2.1.2.

59 30 November 1995, Case C-55/94, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, par. 37 (with reference to the *Kraus* case, par. 32, supra note 57). This formulation has surely been copied from the *Dassonville* case where the ECJ decided that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade", supra note 40.

60 30 November 1995, Case C-55/94, *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, [1995] ECR I-4165, par. 37.

61 S. Claessens, *Free Movement of Lawyers in the European Union*, Nijmegen: Wolf Legal Publishers, 2008, p. 23.

2.2.1. Recognition of diplomas

The free movement of professionals, being part of the freedom of establishment under the free movement of persons, was already governed by the principle of mutual recognition before the decision in the *Cassis de Dijon* case (current Article 53 TFEU). Through the mutual recognition of professional qualifications, barriers to mobility were to be reduced. In the 1960s, the Council had started efforts for basic harmonisation of education and qualification requirements throughout the Union, by means of several directives. This Union-wide assimilation took place profession by profession (sectoral system) and preceded the adoption of recognition directives for each profession separately.[62] As to some professions, however, only one recognition directive was adopted without a preceding harmonising directive.[63]

However, in the 1980s, the approach to diploma recognition changed course under the influence of developments in the context of the free movement of goods. After all, in the cases of *Dassonville* and *Cassis de Dijon*, the ECJ had departed from the idea of recognition without the existence of harmonised rules being necessary; it introduced a recognition system not based on prior minimal harmonisation, but on mutual trust. Following this path, efforts have been made since to establish a comprehensive and uniform system of diploma recognition in the European Union. Several new directives were adopted, finally having resulted in one single 2005 directive that replaces a number of existing directives.[64] Only in a number of professional fields does the sectoral system still apply.[65]

2.2.2. Recognition of companies

Not only persons, but also companies can cross the internal borders of the European Union as part of the freedom of establishment. Being legal persons, companies are entitled to operate undertakings, or to set up agencies, branches or subsidiaries anywhere in the European Union territory, provided that they are formed in ac-

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62 W. Obwexer and E. Happacher Brezinka, 'Diplomanerkennung in der EU. Berufliche und akademische Anerkennung von Qualifikationen im Binnenmarkt', *Zeitschrift für öffentliches Recht*, 56 (2001), p. 474. The professions covered in the sectoral approach were, *inter alia*, the professions of doctors, architects and midwives. These professions are all characterised by great similarities in requirements and education through the European Community; harmonising measures were not very difficult to bring about. See also: H.E.G.S. Schneider and S. Claessens, 'The Recognition of Diplomas and the Free Movement of Professionals in the European Union: Fifty Years of Experiences', in: International Association of Law Schools (Ed.), *Conference proceedings IALS*, Montreal: IALS, 2008, available at http://www.ialsnet.org/meetings/assembly/HildegardSchneider.pdf, par. 4.1 (last accessed on August 30, 2010).

63 This applied, for instance, to the profession of lawyers (see Directive 77/249 EEC), published in OJ 26.03.1977, L 78/17.

64 Directive 2005/36/EC on the recognition of professional qualifications, OJ 30.09.2005, L 255/22.

65 Schneider and Claessens (2008), par. 4.5. This applies to some categories of lawyers.

cordance with the law of a Member State and have their registered office, central administration or principle place of business within the European Union (Article 54 in conjunction with Article 49 TFEU).

The ability for companies to cross the internal borders of the European Union contributes to the further integration of the common market. For a long time, the issue of corporate mobility was not approached with any great priority. The former treaty directed the Member States to enter into negotiations with each other with the aim of ensuring the mutual recognition of companies and firms, the retention of legal personality for companies and firms should they transfer their seat to another Member State, and the merger possibilities for those companies and firms that would be governed by the laws of different Member States (formerly Article 293 EC Treaty). This provision, however, has appeared to be a dead letter.[66] It is true that, on the basis of this provision, attempts were made in 1986 to agree on a Convention on the Mutual Recognition of Companies and Legal Entities, but this convention has never been ratified.[67]

A new impetus was brought about with a number of court decisions from Luxembourg in the aftermath of the *Cassis de Dijon* judgment. In the case of *Überseering BV*, for instance, the ECJ held that Member States are in principle obliged to recognise the legal capacity of a company that desires to exercise its freedom of establishment on their territory, provided that the company is formed in accordance with the law or any other Member State in which it has its registered office.[68] In a similar case, the ECJ explained that this applies without the need for harmonised rules in principle: "the fact that company law is not completely harmonised in the Community is of little consequence".[69]

2.2.3. Recognition of driving licences

With a view to the mutual recognition of driving licences, a 1980 directive[70] adopted the first model for national driving licences, which in the meantime has been amended several times.[71] The most recent amendment was adopted by means of Directive 2006/126/EC.[72] Mutual recognition of driving licences aims to improve

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66 P. Pellé, 'Companies crossing borders within Europe', *Utrecht Law Review*, 4 (2008), p. 7.

67 Idem.

68 5 November 2002, Case C-208/00, *Überseering B.V.* v. *Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] ECR I-9919, par. 82.

69 9 March 1999, Case C-212/97, *Centros Ltd* v. *Erhvervs-og Selskabsstyrelsen*, [1999] ECR I-1459, par. 28.

70 Directive 80/1263/EEC of 4 December 1980, OJ 31.12.1980, L 375/1.

71 Directive 91/439/EEC of 29 July 1991, OJ 24.08.1991, L 237/1; Directive 96/47/EC of 23 July 1996, OJ 17.09.1996, L 235/1.

72 Directive 2006/126/EC of 20 December 2006, OJ 30.12.2006, L 403/18.

road safety and facilitate the free movement of persons travelling within the Union or taking residence in a Member State other than the one issuing their driving licence.

This area of law is characterised by combining harmonised rules and the principle of mutual recognition. As stated in the preamble to the first 1980 directive, "the mutual recognition of driving licences issued by the different Member States […] will only be possible further to an initial harmonization of the regulations governing the issue and validity of licences".[73] In my view, the mutual recognition side of the coin explicitly serves the free movement of persons, whereas the harmonisation side of the coin is considered particularly essential from the viewpoint of road safety.[74]

With each new directive, new steps have been taken in harmonising the issuance of driving licences in accordance with the European model of national driving licences. In addition, the degree of mutual recognition has been intensified in the meantime. Whereas the 1980 directive obliges holders of foreign driving licences to exchange it for a national driving licence (Article 8), the second directive of 1991 left the choice to the holder of the foreign driving licence; he could either use the foreign licence, or exchange it for a national licence (Article 8). The mandatory exchange was, after all, considered to be in violation of the principle of mutual recognition. Since the entry into force of this directive, driving licences issued in any Member State in accordance with the regulations of the directive are valid in the entire European Union.

Member States remain able to apply their national provisions on driving licences issued in another Member State, for instance with regard to the frequency and content of medical checks or on the duration of validity of the driving licence. However, the application of such national provisions "must not hinder or make less attractive for Community nationals the exercise of their right to free movement of persons and freedom of establishment", for instance by requiring the mandatory registration of driving licences issued in another Member State.[75] After all, the directive prescribes mutual recognition without any further formality being required. Provided that such national measures are applied to a non-discriminatory matter (to national and non-national driving licences thus), the only way to justify such a hindering measure could be found in imperative reasons of public interest, in its appropriateness for guaranteeing the attainment of the objective pursued, and in that it does not go beyond what is necessary to attain that objective.[76]

The most recent 2006 directive, currently applicable, again provides for a more harmonised legislation on driving licences; it provides a model licence (Article 1)

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73 Directive 80/1263/EEC of 4 December 1980, OJ 31.12.1980, L 375/1.

74 In the preamble to the 2006 Directive has explicitly related harmonisation to road safety, see par. 8 preamble to Directive 2006/126/EC of 20 December 2006, OJ 30.12.2006, L 403/18.

75 10 July 2003, C-246/00, *Commission of the European Communities* v. *Kingdom of the Netherlands*, [2003] ECR I-7485, par. 66.

76 Idem.

as well as detailed provisions on matters such as vehicle categories, minimum ages (Article 4), and the issuing, validity and renewal of national driving licences (Article 7). In addition, this directive includes two different modes of recognition. On the one hand, it obliges the Member States to recognise driving licences issued by another Member State, for the aim of the unhindered exercise of the free movement of persons (Article 2(1). On the other hand, it obliges the Member State to refuse to recognise the validity of such a driving licence if the issuing Member State has restricted, suspended, withdrawn, or cancelled the driving licence (Article 11(4)); in fact, this means mutual recognition of administrative or penal sanctions imposed on the holder of a driving licence.

This newness might be the result of ECJ decisions delivered under the regime of the former directives; several times, the ECJ has held that the revocation of a driving licence in a first Member State does not prevent a second Member State issuing a new driving licence, on the basis of which the holder can drive on the territory of the first Member State as well, as a result of the application of the principle of mutual recognition.[77] Whereas these cases were decided on the basis of the 1991 directive, future case law is expected to conclude otherwise, which is very reasonable from the perspective of road safety, at least one of the purposes of the many directives.

2.3. MUTUAL TRUST, EQUIVALENCE AND HARMONISATION OF LEGISLATION

A certain degree of mutual trust between the Member States is regarded as a precondition for the principle of mutual recognition. And, if such a level of trust is not there, mutual recognition serves to impose mutual trust: "At a more conceptual level, [mutual recognition] operates to suggest a level of community and trust amongst the Member States".[78] In the context of trade, mutual trust means "the presumption of equality between the levels of protection" in the regulations of all Member States.[79] In my opinion, it is clearer to speak of "the presumption of equal quality standards".

It goes without saying that the existence of mutual confidence is more likely in areas where the regulations of the different Member States are equivalent. Yet, whether national standards are indeed equivalent, or similar, or uniform, is basically irrelevant for mutual recognition to be applied. After all, the principle of mutual

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77 29 April 2004, Case C-476/01, *criminal proceedings against Felix Kapper*, [2004], ECR I-5205; 20 November 2008, Case C-1/07, *criminal proceedings against Frank Weber*, [2008] ECR I-8571; 19 February 2009, Case C-321/07, *criminal proceedings against Karl Schwarz*, [2009] ECR I-1113.

78 Woods (2004), p. 70.

79 J.S.Watson, 'Wederzijdse erkenning binnen de interne markt: een nieuwe impuls', *Nederlands tijdschrift voor Europees recht*, (2000), p. 41.

recognition is made conditional neither upon the equivalence of national legislation, nor upon the harmonisation of national legislation aimed at such equivalence. In a perfectly accomplished internal market, harmonised measures are not even required because of full application of the principle of mutual recognition: "*Das gemeinschaftrechtliche Prinzip der gegenseitige Anerkennung soll somit idealiter zu der Beseitigung von Handelshemmnissen ohne Rechtsangleichung führen*".[80]

However, whether there is equivalence or not is a relevant factor for the Member State to determine whether grounds for refusal may be invoked. It appears from a 1979 communication on the consequences of the *Cassis de Dijon* judgment[81] that the European Commission has made a distinction between cases where harmonisation of regulations and standards is required and cases where harmonisation is not considered essential. As to the latter fields, the regulations of the Member States are considered equivalent and absolute mutual recognition should be the rule, without the possibility to invoke the exceptions, referred to as "judicial mutual recognition".[82] The absence of a common standard would not then be used as a trade barrier, for mutual recognition should be applied as a solution for the time being until common European standards would have been developed.

If, however, harmonisation were considered essential, the various regulations of the Member States are not considered equivalent. This applies with regard to health and safety regulations. Because of the absence of equivalence, the derogations provided for in the treaties and by means of case law (Section 2.1.2) may be invoked by the Member State in which recognition is sought. Here, the only way to guarantee the free movement of goods is to establish equivalence by creating common objectives, rather than attempting to unify technical standards: "Once objectives are commonly defined, the lack of equivalence can no longer be a reason to hinder imports".[83] Where the principle of mutual recognition is applied as to goods produced and marketed in accordance with common objectives, there is no absolute mutual recognition. The benefit is twofold: on the one hand, the Member States are left with more room to exercise national regulatory autonomy – hence: "regulatory mutual recognition"[84] – while on the other hand, the free movement of goods is assured since, as a result of the equivalent objectives, derogations can no longer be invoked.

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80 Mansel (2006), p. 665.

81 "Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon')", OJ 03.10.1980, C 256/2.

82 J. Pelkmans, 'Mutual recognition in goods. On promises and disillusions', in: S.K. Schmidt (ed.), *Mutual Recognition as a New Mode of Governance*, London: Routledge, 2008, p. 36.

83 Pelkmans (2008), p. 36.

84 Pelkmans (2008), p. 36.

The European Commission's proposal to combine harmonisation measures with a strategy based on mutual recognition, as done in a 1985 white paper on the completion of the internal market, must be understood in light of the foregoing distinction between mutual recognition based on equivalence and mutual recognition in the absence of equivalence for which approximating efforts have to be made.[85] As demonstrated by Pelkmans, mutual recognition in its regulatory variant has appeared to be more successful than in its absolute judicial variant.[86]

The combination between harmonised standards and applying the principle of mutual recognition has also been the dominant approach in the context of the other freedoms. This has been demonstrated in the fields of professional qualifications and driving licences.

2.4. DEFINING MUTUAL RECOGNITION IN THE INTERNAL MARKET

What is the consequence of goods produced in a Member State being mutually recognised in any other Member State? And, what is the consequence of diplomas and driving licences issued in a Member State, or companies formed in a Member State, having to be recognised in any other Member State of the European Union? As mentioned in the introduction to this chapter, mutual recognition can be defined in different ways, namely through the description of its consequences as well as through the designation of the subject of mutual recognition. Both meanings will be explained below.

2.4.1. Consequential meaning

Starting with goods, a clear indication for defining mutual recognition in terms of its consequences has been provided for in the *Cassis de Dijon* judgment itself. In reiteration, the Court's key words include that:

> "The concept of 'measures having effect equivalent to quantitative restrictions on imports' contained in Article 30 of the EEC Treaty is to be understood to mean that the fixing of a minimum alcohol content for alcoholic beverages intended for human consumption by the legislation of a Member State also falls within the prohibition laid down in that provision where

[85] "Completing the internal market", White Paper from the Commission to the European Council, COM (85) 310 final. See about this distinction also M. Möstl, 'Preconditions and limits of mutual recognition', *Common Market Law Review* 47 (2010), pp. 411-412, 416.

[86] Pelkmans (2008), pp. 36-48.

> the importation of alcoholic beverages *lawfully produced and marketed in another Member State* is concerned [emphasis added]".[87]

Based on this formula, the consequential meaning of mutual recognition in the marketing of goods can be defined as the acceptance of market access for goods that are originated, manufactured and marketed in accordance with the regulations and procedures of another Member State, although these may differ from the domestic regulations and procedures, as if these foreign goods were national products.

In the other freedoms, the consequences of mutual recognition are the same. This follows from the most recent directive on diploma recognition (referred to in Section 2.2.1). This instrument determines that the recognition of professional qualifications by a Member State other than in which the qualification was issued "allows the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals" (Article 4(1) Directive 2005/36/EC). This provision contains the most important features of mutual recognition in the context of products trade.

With little problem, the consequential meaning formulated in this area, can be adapted to the fields of diplomas, driving licences, and companies. This results in the following definition: mutual recognition means the acceptance of professional qualifications, driving licences and companies that are originated, issued or formed in accordance to the regulations of the other Member State, although these regulations may differ from the own regulations, as if these professional qualifications, companies, and driving licences were originated, issued or formed in the domestic legal order.[88]

2.4.2. Methodical meaning

The consequential meaning defines what the principle of mutual recognition *does*. However, it does not answer the question what mutual recognition *is*. What exactly is recognised by the Member State that allows the unhindered access of foreign goods on its national market of goods? What is the exact subject of recognition?

There are several indications available to answer this question. The first indication is included in the notion of mutual trust, previously explained as "the presumption of equal *quality standards* in the different regulations of all Member States" (Section

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[87] 20 February 1979, Case C-120/78, *Rewe Zentral AG* v. *Bundesmonopolverwaltung für Brantwein*, [1979] ECR 649, par. 15.

[88] Compare also Mansel (2006), p. 672: "*eine Ware, eine Dienstleistung etc., die in einem Mitgliedstaat (Herkunftsstaat) nach dessen Vorschriften rechtmässig hergestellt und/oder in der Verkehr gelangt ist, in der gesamten Gemeinschaft rechtlich unbehindert zirkulationsfähig ist, auch wenn der Rechtsbereich, nach welchem die Ware, Dienstleistung etc. zu beurteilen ist, noch nicht voll gemeinschaftsrechtlich harmonisiert wurde*".

2.4). This description of the subject of trust corresponds with the characterisation of mutual recognition used in the 1985 White Paper, which, as a second indication, speaks of "immediate and full recognition of differing quality standards".[89] As a result, mutual recognition of goods can be defined as the recognition of legal quality standards. This mode of recognition corresponds with what Mansel has defined as recognition of *Rechtsnormen*.[90] Because the recognition of legal quality standards implies that a legal fact originating from a foreign legal order is taken over and applied in the domestic legal order, this mode of recognition is to be classified as substantive law recognition.

However, under certain circumstances, the mutual recognition of goods may also be procedural law recognition, if a document with legal force forms the subject of recognition. After all, it may happen that the mere admission of goods to the market requires the issuance of administrative documents (*Verwaltungsakten*). To effectuate the Union-wide application of such documents, specific recognition document are required (*Anerkennungsakten*).[91] In such a case, mutual recognition means recognition of a document with legal force, which is to be classified as procedural law recognition.

What about the methodical meaning of mutual recognition in the other internal market areas? What exactly is recognised by the Member State that, for instance, accepts a foreign company to establish and pursue activities on its national territory. Different wordings have been used, indicating either the companies legal capacity (*Rechtsfähigkeit*),[92] or the right of foundation (*das Gründungsrecht*) being possible subjects of recognition.[93] As these modes of recognition imply that a legal fact originating from a foreign legal order is taken over and applied in the legal order of another Member State, this is substantive law recognition.

In contrast, recognition of driving licences dominantly means procedural law recognition. After all, Member States are prescribed to grant legal effects to driving licences issued in another Member State. The driving licence functions as a document with legal force and as such constitutes procedural law recognition. The same applies to the area of diploma recognition. It appears from the most recent instrument, Directive 2005/36/EC, that a person seeking recognition of his professional qualifications may be required to submit an attestation of competence or evidence of formal qualifications (Article 13 Directive 2005/36/EC). For a specific profession, e.g. that of doctors where minimum training conditions have been harmonised throughout the European Union, recognition requires that evidence of

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89 COM (85) 310 final, par. 77. See also Mansel (2006), p. 665.

90 Mansel (2006), p. 680.

91 Mansel (2006), p. 680.

92 5 November 2002, Case C-208/00, *Überseering B.V.* v. *Nordic Construction Company Baumanagement GmbH (NCC)*, [2002] ECR I-9919.

93 Mansel (2006), p. 672.

formal qualifications be issued, accompanied by one of the certificates (listed in the annex to the directive) (Article 21 Directive 2005/36/EC). In conclusion, the many provisions addressing the recognition of diplomas and professional qualifications require certain documents to be submitted. These documents will be the subject of recognition, which indicate procedural law recognition.

There is no single methodical meaning of mutual recognition in the framework of the internal market. The mode of recognition may relate to substantive as well as to procedural law aspects.

3. MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CIVIL AND COMMERCIAL MATTERS

The principle of mutual recognition is also applicable to judicial decisions and judgments delivered in matters of civil and commercial law. In this section, I will summarise the evolvution of mutual recognition in this area, followed by some illustrative, but short descriptions of various mutual recognition instruments. This information will serve the aim of this chapter, which is to provide the consequential and methodical meanings of mutual recognition in the field of civil and commercial law.

3.1. JUDICIAL COOPERATION IN CIVIL AND COMMERCIAL MATTERS

The principle of mutual recognition in civil affairs has a long history. The Treaty of Rome (1957) already mentioned the possibility for Member States to negotiate about "the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards" (Article 293 EC Treaty, formerly Article 220). It has formed the starting point for the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (1968),[94] meanwhile incorporated into Community law by Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (usually defined as the Brussels I Regulation).[95] This Regulation applies to the whole field of civil law, except certain well-defined matters, named in its first provision.

The 1968 Brussels Convention aimed at the simplification of formalities concerning the recognition and enforcement of judgments. This aim must be understood in the light of the general goal of achieving a Union without internal

[94] OJ 31.12.1972, L 299/1 (last consolidated version: OJ 26.01.1998, C 27/1).

[95] OJ 16.01.2001, L 12/1.

borders. The development of this Union without internal borders (at that time referred to as Community without borders) initially led to the recognition of judicial cooperation in civil (and criminal) affairs as a "matter of common interest" in 1992 (art. K.1.6. Maastricht Treaty on European Union[96]), and, finally, resulted in the communautarisation of judicial cooperation in civil matters. After all, some years after the adoption of the Maastricht Treaty, the Amsterdam Treaty[97] entered into force, connecting judicial cooperation in civil matters to the free movement of persons. As a result, several areas of competence, including judicial cooperation in civil matters, were transferred from the Third Pillar (Treaty on European Union, EU Treaty) to the First Pillar (title IV, art. 61 and art. 65 EC Treaty). From that moment on, the principle of mutual recognition in civil affairs became "First Pillar business", governed by an autonomous field of law instead of international treaties (supranationality instead of intergovernmentality).[98] The above-mentioned incorporation of the Brussels Convention into Community law must be understood in view of these developments.

Shortly after the entry into force of the Amsterdam Treaty, the European Council declared in the so-called Tampere Conclusions that the principle of mutual recognition of judicial decisions must "become the cornerstone of judicial co-operation in both civil and criminal matters within the Union".[99] With regard to the area of judicial cooperation in civil matters, this declaration did not entail a fundamental change. After all, mutual recognition has already formed the basic principle in this field since 1968. Nevertheless, the accompanying call for further reduction of intermediate procedures (such as *exequatur*) and the endeavours for a decreased number of grounds to refuse recognition and enforcement,[100] are worth mentioning. These issues were indeed elaborated on in the 2001 programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.[101] Several authors saw a link with the principle of mutual recognition as applied to the internal market. According to Andenas, "[t]he European Council determined that its long term goal would be to create an area of free movement of judgments in the same way that there is free movement of

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96 Maastricht Treaty, 7 February 1992, OJ 29.7.1992, C 191/1.

97 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 10.11.1997, C 340/1 (entry into force 1 May 1999).

98 A. Stadler, 'From the Brussels Convention to Regulation 44/2001: Cornerstones of a European Law of Civil Procedure', *Common Market Law Review* 42 (2005), p. 1638.

99 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions (Tampere Conclusions), par. 33.

100 Tampere Conclusions, par. 34; see also A.M.C. Boerwinkel and P.M.M. van der Grinten, ´Wederzijdse erkenning van rechterlijke beslissingen', *Justitiële verkenningen*, 30 (2004), pp. 55-57

101 Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 15.01.2001, C 12/1.

goods, persons, services and capital within the European Union".[102] Using the same terminology, Stadler stated that "the new Regulation 44/2001 has practically ensured the free movement of judgments within the Member States today".[103] Until today, the call for strengthening mutual recognition in civil matters goes on, constantly insisting on the reduction of intermediate measures and grounds for refusal.[104] In the new Lisbon Treaty, it his explicitly determined that judicial cooperation in civil matters must be based on the principle of mutual recognition (Article 81 TFEU).

The following will describe briefly some of the instruments implementing the principle of mutual recognition to judgments and judicial decisions in civil affairs, in order to illustrate the scope of mutual recognition in this area of competence.

3.1.1. The Brussels I Regulation

In 2001, the Council adopted Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).[105] The first chapter of this regulation provides rules of jurisdiction with the aim of avoiding jurisdictional conflicts. The second chapter lays down rules on the recognition and enforcement of judgments handed down in nearly all civil and commercial matters; only a few matters are excluded from its scope, such as the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy, social security and arbitration (Article 1 Brussels I).

As to the recognition part of this instrument, it explicitly aims at the simplification of formalities "with a view to rapid and simple recognition and enforcement of judgments" (par. 2 preamble). The Member States are in principle obliged to recognise a foreign judgment without any special procedure required (Article 33 Brussels I). This includes the prohibition to review such a foreign judgment as to its substance (Article 36 Brussels I).

Nevertheless, the instrument provides several grounds obliging Member States to refuse the recognition of a foreign civil judgment ("shall not be recognised", Articles 34 and 35(1) Brussels I). This obligation exists:

a. If recognition is manifestly contrary to public policy in the Member State in which recognition is sought;

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102 M. Andenas, 'National Paradigms of Civil Enforcement: Mutual Recognition of Harmonisation in Europe?', *European Business Law Review*, 17 (2006), p. 532.

103 Stadler (2005), pp. 1638 and 1656.

104 See e.g: Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1. Also: "Implementing the Hague Programme: the way forward", Communication from the Commission, COM(2006) 331, final.

105 OJ 16.01.2001, L 12/1.

b. If the defendant was not served with the document which instituted the proceedings (or with an equivalent document) in sufficient time and in such a way as was necessary for his defence, unless the defendant failed to commence proceedings to challenge the judgment when he had the possibility to do so;

c. If recognition is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;

d. If recognition is irreconcilable with the principle of *ne-bis-in-idem*;

e. If recognition conflicts with certain rules of jurisdiction, provided for in this Regulation.

Were the civil judgment to be recognised without one of the grounds for refusal being applicable, the foreign judgment could not be enforced immediately, however, as it first needs to be declared enforceable. Such a declaration of enforceability can only be delivered on the application of an interested party, being required to produce a copy of the judgment (provided that its authenticity can be verified) and a certificate (for which a standard form is given in an annex to the regulation) (Articles 38(2), 53 and 54 Brussels I).

It is true that, in fact, the existence of grounds for refusal contravenes the very idea of mutual recognition, as expressed in several policy documents. The same applies to the existence of the enforceability procedure: "*Schlusspunkt […] soll die Abschaffung des Exequaturs für alle Entscheidungen in Zivil- und Handelssachen sein*".[106] Nevertheless, compared with its predecessor, the 1968 Brussels Convention, this instrument is a significant step towards simplifying the application of the principle of mutual recognition.

3.1.2. The Brussels II-bis Regulation

In 2003, the Council adopted Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.[107] The first chapter of this regulation provides rules of jurisdiction in order to avoid jurisdictional conflicts and, in cases where children are involved, to ensure that the interests of the child are best served. The second chapter of this instrument sets out rules on the recognition and enforcement of judgments handed down in matters of divorce, legal separation, marriage

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[106] K. Stoppenbrink, 'Systemwechsel im internationalen Anerkennungsrecht: Von der EuGVVO zur geplanten Abschaffung des Exequaturs', *European Review of Private Law* 5 (2002), p. 647.

[107] OJ 23.12.2003, L 338/1 repealing Regulation 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 30.06.2000, L 160/19.

annulment, and parental responsibility. Within the framework of this regulation, the term "judgment" may be somewhat misleading. This term only refers to judicial decisions leading to a divorce, a legal separation or an annulment of marriage. However, it appears from its preamble (par. 22) that authentic instruments as well as agreements between parties are also covered by the regulation. Some matters are explicitly excluded from its scope, such as decisions on adoption, the names and forenames of the child and measures taken as a result of criminal offences committed by children (Article 1(3) Brussels II-bis).

Within the scope of this instrument, Member States are in principle obliged to recognise judgments given in another Member State without any special procedure being required (Article 21(1) Brussels II-bis). This includes that the Member State in which recognition is sought may not weigh the fact that domestic legislation would not allow divorce, legal separation or marriage annulment on the same facts (Article 25 Brussels II-bis). Furthermore, a review as to substance in this Member State is not allowed (Article 26 Brussels II-bis).

The Brussels II-bis Regulation nevertheless provides several grounds for refusal. Most are equivalent to the Brussels I Regulation (Section 3.1.1). Some additional grounds for refusal have been envisaged for judgments relating to parental responsibility (Articles 22 and 23 Brussels II-bis). However, regarding the recognition and enforcement of access orders as well as orders for the return of a child, rights may not be refused on any ground (Articles 41(1) and 42(1) Brussels II-bis).

An important difference to judicial decisions falling under the scope of Brussels I relates to the enforcement stage of recognised decisions. After all, decisions related to the legal status of person (e.g. a married person, or a divorced person) have not necessarily to be enforced. On the contrary, several other judicial decisions falling within the scope of this regulation do need to be enforced; mainly decisions relating to parental responsibility, for instance orders for the return of a child to a certain Member State (pursuant to Article 11 Brussels II-bis).

As to this second category, two enforcement regimes can be distinguished: the "standard track" and the "fast track".[108] Its name already indicates that the standard track applies in most enforcement situations. A declaration of enforceability is then required (Article 28 Brussels II-bis). Such a declaration of enforceability can only be delivered on the application of an interested party, it being required producing a copy of the judgment (provided that its authenticity can be verified) and a certificate (for which a standard form is given in an annex to the regulation (Articles 37 and 39 Brussels II-bis)). In contrast, judgments imposing access orders and orders for the return of a child are directly enforceable without the need for a special declaration. Such judgments fall under the regime of the fast track (Articles 40, 41(1) and 42(1) Brussels II-bis).

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[108] See P. McEleavy (ed.), 'Current developments. Private International Law', *International and Comparative Law Quarterly* 53 (2004), p. 511.

On some points, Brussels II-bis goes further than Brussels I in applying the principle of mutual recognition, partly because the scope of the first instrument is limited to less controversial areas.[109] The Tampere Conclusions make reference to the Brussels II-bis Regulation, considering it the first step towards the entire abolishment of the *exequatur* procedure.[110] It appears from the given description that, for some kinds of judicial decisions, this goal has been achieved.

3.1.3. The Regulation on insolvency proceedings

Simultaneously with Brussels II-bis, the Council adopted Regulation 1346/2000 on insolvency proceedings (RIP).[111] This regulation is based on two pillars. It first contains rules governing jurisdiction for opening insolvency proceedings and for judgments directly based on insolvency proceedings, or closely connected with such proceedings. At the same time, this regulation prescribes the Member State to mutually recognise those judgments, which thus may include the opening of insolvency proceedings or the appointment of a liquidator (Article 2(e) RIP). The aim of this instrument is to avoid natural or legal persons transferring assets or judicial proceedings to another Member State in order to obtain a more favourable legal position (par. 4 preamble); the proper functioning of the internal market requires this (par. 2 preamble).

The Member States are in principle obliged to recognise any judgment opening insolvency proceedings or appointing a liquidator handed down by a court of another Member State without any further formalities being required (Articles 16(1) and 17(1) RIP). Insolvency proceedings concerning insurance undertakings, credit institutions and (collective) investment undertakings are excluded (Article 1(2) RIP). Were a liquidator to be appointed, he would have to be assigned all powers conferred on him by the law of the Member State in which the insolvency proceedings were opened (Article 18(1) RIP). Only where recognition and enforcement would be manifestly contrary to the executing Member State's public policy, in particular to the fundamental principles or constitutional rights and liberties of the individual provided in its domestic legal order, may recognition be refused (Article 26 RIP).

3.1.4. The European Enforcement Order for uncontested claims

Regulation 805/2004 creating a European Enforcement Order for uncontested claims (RUC), adopted by the Council in 2004,[112] is considered the next significant step forwards. It contributes to the enhancement of mutual recognition, by applying this

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109 Fichera and Janssens (2007), p. 181.

110 Tampere Conclusions, par. 34.

111 OJ 30.06.2000, L 160/1.

112 OJ 30.04.2004, L 143/15.

principle to judgments, court settlements and authentic instruments on uncontested claims as well as to decisions delivered following challenges to such judgments, court settlements and authentic instruments. Being restricted to uncontested claims, the regulations covers those situations in which the debtor does not object to the nature or extent of a pecuniary claim and those situations in which the creditor has obtained either a court decision against that debtor or an enforceable document that requires the debtor's express consent (Article 3(1) RUC). Only a few matters are excluded from application, such as the status or legal capacity of natural persons, the rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy and social security (Article 2(2) RUC).

A decision on an uncontested claim delivered in any Member State can, upon application at any time to the court of origin, be certified as a European Enforcement Order, provided that a few requirements are fulfilled, *inter alia* that the decision is enforceable in the Member State of origin and does not conflict with the jurisdiction rules of the regulation (Article 6 RUC). To certify the decision, the court of origin must use one of the six standards forms (annexed to the regulation).[113]

The regulation obliges the Member States to recognise any decision certified as a European Enforcement Order without the possibility to refuse it and without the need for a declaration of enforceability (Article 5 RUC). Therefore, this instrument offers an important contribution to the development of the principle of mutual recognition, especially if compared to the Brussels I Regulation which also applies to the recognition and enforcement of pecuniary claims: "Such a procedure should offer significant advantages in that there is no need for approval by the judiciary in a second Member State with the delays and expenses that this entails" (par. 9 preamble).[114] This corresponds to the considerations of the Council in the 1999 Tampere Conclusions, referring to this measure (as well as to the Brussels II-bis Regulation) as providing a possibility for the total abolishment of the *exequatur* procedure.[115] The high degree of automatic and direct recognition that is indeed reached by this Regulation has been partly possible by its scope, which – as Regulation Brussels II-bis – covers areas that are hardly, if at all, controversial.[116]

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113 As from 2008, an individual can also decide to apply for a European order for payment, instead of a European enforcement order, to a court within the Member State of the defendant. Were the court to issue such a payment order, and a challenge made by the defended remained forthcoming, the claimant is entitled to execute the payment order in all member States, see Regulation 861/2007, OJ 30.12.2006, L 399/1.

114 See also N. Rosner, *Cross-Border Recognition and Enforcement of Foreign Money Judgments in Civil and Commercial Matters*, Groningen: 2004, p. 176.

115 Tampere Conclusions, par. 34.

116 Fichera and Janssens (2007), p. 181.

3.2. THE PUBLIC POLICY EXCEPTION

In most instruments, several grounds are envisaged on the basis of which Member States must decide to refuse recognition of a judicial decision. One of these grounds obliges the Member State in which recognition is sought to decline recognition if such would be manifestly contrary to public policy (Article 34(1) Brussels I, Article 23(a) Brussels II-bis, Article 26 RIP). Due to the open formulation of these grounds for refusal, some explanatory notes are necessary.

The criterion of public policy has an *ultima ratio* character. It functions as the last correction to the principle of mutual recognition: "*Zur Gewährleistung eines effektiven Grundrechtsschutzes ist die ordre-public-Kontrolle […] unverzichtbar*".[117] As a result, the public policy exception has been interpreted quite strictly by the ECJ. Whereas the 1968 Brussels Convention did enable the Member State in which recognition was sought to refuse recognition "if such recognition is contrary to public policy in the State in which recognition is sought" (Article 27(1) Brussels Convention), the successive mutual recognition instruments enable refusal if recognition would be "*manifestly* contrary to public policy" (emphasis added). This is probably a result of the restrictive interpretation given by the ECJ.[118] In the well-known *Krombach* case, for example, the ECJ held that the public policy exception could only be invoked:

> "where recognition or enforcement of the judgments delivered in another Contracting State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle".[119]

It appears from the text of the respective provisions that the Member State in which recognition is sought may not refuse recognition for the reason that the foreign judicial decision itself would conflict with its public policy; rather, recognition of the foreign judicial decisions needs to be contrary to its public policy.[120]

3.3. MUTUAL TRUST AND HARMONISATION OF LEGISLATION

A high degree of mutual confidence between the Member States is considered an essential condition for the application of the principle of mutual recognition in the field of judicial cooperation in civil and commercial affairs. The Brussels I Regulation

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117 Stoppenbrink (2002), p. 652.

118 Rosner (2004), p. 161

119 28 March 2000, Case C-7/98, *Krombach* v. *Bamberski*, [2000] ECR I-1935, par. 37.

120 Rosner (2004), p. 161.

refers in its preamble to mutual trust as the justification for automatic recognition: "Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute" (par. 16 preamble Brussels I). Furthermore, the preamble to the Regulation on insolvency proceedings indicates mutual trust as the very basis of mutual recognition: "Recognition of judgments delivered by the court of the Member States should be based on the principle of mutual trust" (par. 22 preamble RIP).

The assumption of mutual trust is not undisputed. According to several academics, the condition of mutual trust must be regarded as problematic in view of the increased removal of intermediate formalities and procedures. The foreseen full abolishment of the *exequatur* procedure, for instance, requires a high degree of mutual trust and it is doubted whether such a high level of confidence exists indeed. In addition, the level of trust is expected to be influenced by the further enlargement of the European Union, as took place in the last decade.[121] Also, it remains to be seen whether the abolition of *exequatur* would not be likely to have a negative effect on European integration, encouraging the Member States to enforce judgments in the domestic legal order.[122]

By means of harmonised rules, however, efforts have been made to strengthen the level of mutual trust between the Member States; in turn, an increased level of confidence would serve the application of the principle of mutual recognition. The need for harmonisation in order to facilitate mutual recognition was clearly expressed in the Tampere Conclusions, where the European Council invited the Council and the Commission to work on "those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States".[123] Subsequent policy documents, such as the Hague Programme, have continued on this path[124] and under the Lisbon Treaty it appears that approximating measures may be adopted with the aim of the development of judicial cooperation in civil affairs being a cooperation system based on the principle of mutual recognition (Article 81 TFEU). A combination of harmonised rules and mutual recognition of judicial decisions and judgments has been referred to as the typical internal market solution, which means, "to have a combined framework

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121 Stoppenbrink (2002), p. 666.

122 T. Andersson, 'Harmonisation and Mutual Recognition: How to Handle Mutual Distrust', *European Business Law Review*, 17 (2006), p. 750.

123 Tampere Conclusions, par. 37.

124 "The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice", Communication from the Commission, COM(2005) 184 final, p. 11.

predicated on the principles of mutual recognition but supplemented by a network of complementary Community legislation".[125]

3.4. DEFINING MUTUAL RECOGNITION IN CIVIL AND COMMERCIAL MATTERS

The question arises as to what it means to recognise judicial decisions and judgments handed down in matters of civil and commercial law. This question is answered below, focusing first on the consequences of mutual recognition and secondly on the specific subject of recognition.

3.4.1. Consequential meaning

The different mutual recognition instruments dealt with above (Sections 3.1.1-3.1.4) contain several indications that the principle of mutual recognition in the field of civil and commercial law has consequences similar to the internal market. This is not surprising in view of the close link between both fields of EU competence. After all, judicial cooperation in civil affairs is explicitly connected to the free movement of persons, which is one of the internal market freedoms.

The consequences of mutual recognition are, for instance, formulated in the Brussels II-bis Regulation, which determines that "any judgment delivered by a court of another Member State […] shall be enforced in the Member State of enforcement as if it had been delivered in that Member State" (Article 47(2) Brussels II-bis). A similar wording follows from the preamble to the Regulation creating a European Enforcement Order for uncontested claims, which envisages that "a judgment that has been certified as a European Enforcement Order […] should, for enforcement purposes, be treated as if it has been delivered in the Member State in which enforcement is sought" (par. 8 preamble RUC). In addition, the preamble to the Regulation on insolvency proceedings prescribes that "the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States" (par. 22 preamble RIP).

Although these citations demonstrate the similarity between the consequential meanings of mutual recognition in the internal market and judicial decisions in civil and commercial matters, they also show that the second area brings an additional factor of relevance. After all, recognition of judicial decisions and judgments often automatically includes the enforcement of the decision or judgment. This element has to be added to the consequential definition of mutual recognition. In addition, whereas in the internal market fields, mutual recognition is made conditional upon the requirement that goods, services, etc. have been produced, manufactured, issued,

[125] Andenas (2006), p. 543.

etc. in accordance with the regulations and proceedings of the Member State of origin, such a requirement has not explicitly been provided for in the context of civil and commercial law. On the contrary, several instruments have prohibited review of the foreign judicial decision (e.g. Article 36 Brussels I Regulation).

This results in the following definition: mutual recognition means the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State, as if these judicial decisions had been delivered in the domestic legal order, even though they could never have been so delivered.

3.4.2. Methodical meaning

Judicial decisions delivered in matters of civil and commercial law may have varying forms. The question arises as to which modes of recognition are applicable as to judicial decisions and judgments in civil and commercial matters.

The Brussels II-bis Regulation is the clearest example of substantive law recognition. Covering decisions related to matrimonial matters and matters of parental responsibility, this instrument partially addresses the civil status or legal status of individuals, such as being married or divorced. Insofar as (changes in) this legal status were caused by a voluntary judicial action (e.g. marriage), the legal status (or: legal fact) as such is the subject of recognition. The Member State in which recognition is sought is in principle obliged to accept persons as married or divorced if such a decision was formally drawn up in another Member State. In this case, recognition means substantive law recognition.

However, Brussels II-bis also addresses changes in legal status that are not voluntary. Such changes may concern judicial decisions related to issues of parental responsibility for children (e.g. after divorce), which commonly follow from judgments of a court and which may impose obligations or rights on the parent(s) involved. Here, the court judgment is the subject of recognition. Being a legal document with legal force, recognition of such a judgment means procedural law recognition.

This procedural law mode of recognition is also applicable in the context of the other examples dealt with above (Sections 3.1.1-3.1.4). In the Brussels I Regulation, recognition will always aim at the recognition of a judicial decision delivered by a civil court. The same applies to judgments related to insolvency proceedings, and judgments, out of court settlements and authentic instruments certifying decisions on uncontested claims. All these different kinds of judicial decisions involve documents with legal force and as such mean procedural law recognition.

4. CONCLUDING REMARKS

The main goal of this chapter was to define the principle of mutual recognition as it functions in the internal market as well as to judicial decisions in civil and commercial matters (both areas being former Community law areas).

With the focus on the consequences of this principle in the internal market, mutual recognition is defined as the acceptance of foreign products, services, professional qualifications, companies and firms, driving licences, and so on, originated, manufactured, marketed, formed or issued in accordance to the regulations and procedures of another Member State – although these may differ from the domestic regulations and procedures – as if these were national products, services, professional qualifications, companies and firms, driving licences, and so on. As to judicial decisions in civil and commercial matters, mutual recognition is defined as the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State, as if these judicial decisions had been delivered in the domestic legal order, even though they could never have been so delivered.

Two differences emerge. The first difference is very much issue-related. After all, in the field of civil and commercial law, court judgments are often recognised. In many situations, final court judgments are yet to be enforced, or must continue to be enforced. As a result, mutual recognition is likely to entail enforcement as well. This aspect has been included in the consequential definition.

The second difference relates to the phrase "in accordance to the regulations and procedures of another Member State", included in the consequential meaning of mutual recognition in the internal market. However, there is no sign that the application of the principle of mutual recognition is made conditional upon this requirement in the context of civil and commercial law. Rather judicial decisions should be recognised "even though they could never have been delivered in the domestic legal order".

On a level other than the mere consequences of mutual recognition, the principle has also been defined while focusing on its specific subject. It emerged that in the internal market, mutual recognition may have methodical meanings other than concerning judicial decisions in civil and commercial affairs. The subject of recognition may concern substantive as well as procedural law elements. Procedural law recognition is the main method in the field of civil and commercial law, given the fact that it predominantly concerns the recognition of judgments, being documents with legal force. However, procedural law recognition occurs in the internal market as well, particularly in the fields of driving licences and professional qualifications.

Substantive law recognition is the main mode of recognition in the internal market trade of goods, generally concerning quality or technical standards that have to be recognised in order to accept foreign goods on the national market. In addition, in the field of civil law, substantive law recognition occurs as to the civil status of persons; in this case, the legal fact of a certain civil status (e.g. being married) is the subject of recognition.

The next step will be to define the principle of mutual recognition as it applies to judicial decisions handed down in the course of criminal proceedings (Chapter 2).

CHAPTER 2

THE PRINCIPLE OF MUTUAL RECOGNITION IN EUROPEAN UNION LAW

1. INTRODUCTION

Judicial cooperation in criminal matters in Europe has a long history. Activities in this field already started before the existence of the (Maastricht) Treaty on European Union (EU Treaty).[126] One of Maastricht's innovations was that it recognised judicial cooperation in criminal matters as "a matter of common interest" (art. K.1.7) and placed it within the framework of the then-new Third Pillar. At the end of the 1990s, the European Council launched the principle of mutual recognition as the future cornerstone of judicial cooperation in criminal affairs between the Member States of the European Union. From that time onwards, efforts have been made to implement and apply the principle of mutual recognition to different kinds of judicial decisions and judgments.

Despite the high number of studies and publications on the principle of mutual recognition in the field of criminal law, a real definition of the concept has not yet been provided. The many descriptions of the concept are restricted to describing the consequences of mutual recognition. Therefore, the aim of this chapter is to define the principle of mutual recognition, not only as to its consequences (consequential meaning), but especially to its subjects (methodical meaning).

Because the principle of mutual recognition is borrowed from the single market context,[127] it is obvious that inspiration was provided by the definition of mutual recognition in the context of the erstwhile First Pillar of EU law (Chapter 1). However, this brings questions related to the former pillar structure of the European Union, combined with the different character of the fields of competence (internal

[126] Maastricht Treaty, 7 February 1992, OJ 29.7.1992, C 191/1 (entry into force 1 November 1993).

[127] Infra note 172.

market, civil and commercial law, criminal law). These issues will be addressed insofar as is necessary.

For the aim of defining the principle of mutual recognition, this chapter will start with an overview of the development of the principle of mutual recognition in the area of judicial cooperation in criminal affairs (2). Subsequently, whether the relationship between the different fields of competence (formerly governed by the First Pillar and the Third Pillar) justifies the extension of mutual recognition to judicial decisions in criminal matters will be pursued in depth. This question is related to constitutional law issues as well (3). Based on this, the principle of mutual recognition will be defined as to its consequences as well as its subjects, by means of setting aside three framework decisions implementing the mutual recognition principle (4). Hereafter, with a view to the next part of this research, the characteristics of criminal law in comparison to the fields of economic trade and civil and commercial law will be addressed. It will appear that, in spite of the close analogy between the different fields of EU competence, the practical implementation of mutual recognition in the area of criminal law needs a specific approach (5). This chapter will close with some concluding remarks (6).

2. MUTUAL RECOGNITION IN THE THIRD PILLAR: FROM TAMPERE TO LISBON

Judicial cooperation in criminal matters is traditionally based on the "request principle", which essentially means that cooperation starts with a request from one state (the requesting state) to another state (the requested state). the requested state must then decide whether or not it will comply with the request.

In 1999, for reasons of efficiency, timeliness and legal security, the European Council changed the paradigm of judicial cooperation between the Member States of the European Union. Instead of the traditional "request principle", judicial cooperation had from that time onwards to be based on the principle of mutual recognition. According to the Council, this change of paradigm would be in line with the development of an "area of freedom, security and justice" as envisaged in the follow-up of the Maastricht Treaty, which is the Amsterdam Treaty.[128] The very first time that the European Council recognised the necessity of mutual recognition in the relationships between the Member States dates back to 1998; it appears from the "Cardiff Conclusions" that the European Council had asked the Council to "identify the scope for greater mutual recognition of decisions of each others'

[128] Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 10.11.1997, C 340/1 (entry into force 1 May 1999).

courts".[129] One year later, a few weeks after the Amsterdam Treaty had entered into force, the European Council declared in the so-called "Tampere Conclusions" that the principle of mutual recognition of judicial decisions must "become the cornerstone of judicial co-operation in both civil and criminal matters within the Union".[130]

The advantages of the mutual recognition approach lie in more simplified, efficient and rapid cooperation, which according to Tampere would not only lead to the enforcement of sentences throughout the entire Union, but also to a better protection of individual rights. The main characteristics of a system based on recognition are often listed as follows: direct contact between judicial organs instead of political organs; the removal of grounds to refuse the acceptance and enforcement of foreign decisions; the abolishing of the principle of double criminality; and the strict and fixed deadlines as well as standard forms to be used by the judicial authorities.

2.1. MUTUAL RECOGNITION BEFORE TAMPERE

In 1999, the principle of mutual recognition was not completely unknown in the field of criminal law. Prior to the conclusions of Tampere, even before the entry into force of the Maastricht Treaty, several instruments had already achieved a degree of recognition of foreign decisions.[131] However, because none of these instruments had come into force between all Member States – the majority were never ratified at all – they lacked Union-wide application. In addition, it appears from the 2001 programme of measures to implement the principle of mutual recognition of decisions in criminal matters (hereafter: 2001 programme of measures) that it was preferred that modern measures were taken by means of framework decisions (Article 34 EU Treaty) instead of conventions, in order to reach "as full as possible a mutual recognition system to be envisaged".[132]

Despite the failure of most instruments initiated before Tampere, some of them have to be considered express signs of the movement towards a more integrated European Union, also concerning judicial cooperation in criminal matters. Whereas the 1995 and 1996 Conventions on Extradition aimed at simplifying the extradition procedure by abolishing the grounds for refusal for political offences and grounds

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129 Cardiff European Council, 15 and 16 June 1998, Presidency Conclusions (Cardiff Conclusions), par. 39.

130 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions (the Tampere Conclusions), par. 33.

131 E.g.: the European Convention on the International Validity of Criminal Judgments of 28 May 1970; the Convention of the European Union on Driving Disqualifications of 17 June 1998; the Convention on laundering, search, seizure and confiscation of the proceeds from crime (1990).

132 Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 15.01.2001, C 12/10.

based on nationality,[133] the 2000 Convention on mutual legal assistance emphasised the significance of direct contact between judges.[134] These elements, the abolishment of grounds for refusal as well as the enabling of direct contact between judges, are mentioned as features of a system based on the principle of mutual recognition.

The 1990 Convention implementing the Schengen Agreement (CISA) has to be mentioned here as well. Together with the 1985 Schengen Agreement, initially concluded between the Benelux, Germany and France, the CISA constitutes the commonly called *Schengen acquis*. Both the Schengen Agreement and the CISA provide the EU Member States with important tools for mutual assistance in criminal matters. By means of a protocol to the Amsterdam Treaty, the Schengen provisions were incorporated into Title VI on police and judicial cooperation in criminal matters. In the framework of this research, Article 54 CISA is of special relevance. Some authors have argued this *ne bis in idem* provision to be the first mutual recognition clause based on the former EU Treaty.[135] After all, in the joined cases of *Gözütok and Brügge*, the ECJ based its reasoning for a Union-wide and uniform interpretation of Article 54 CISA on the principle of mutual recognition. According to the ECJ, *ne bis in idem* implies mutual trust and thus recognition of the criminal law in force in the other Member States, because neither Title VI of the EU Treaty nor Article 54 CISA itself have made the application of *ne bis in idem* conditional upon harmonisation or approximation of the criminal laws of the different Member States.[136] As such, this case presents a clear example of the deductive method utilised by the ECJ in the context of the then existing Third Pillar of EU law:

> "The Court was just as ready to deduce a principle of mutual trust […] from the rule of *ne bis in idem* laid down in Article 54 of the Schengen Implementing Convention, as it had been to accept such a principle in the context of the free movement of goods".[137]

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133 European Union Convention on Simplified Extradition Procedure 1995, Council Act of 10 March 1995, OJ 30.03.1995, C 78; Convention relating to Extradition between the Member States of the European Union, Council Act of 27 September 1996, OJ 23.10.1996, C 313.

134 The Convention of 29 May 2000 on mutual legal assistance in criminal matters, OJ 12.07.2000, C 197.

135 M. Wasmeier and N. Thwaites, 'The development of *ne bis in idem* into a transnational fundamental right in EU Law: comments on recent developments', *European Law Review*, 31(3) (2006), pp. 3-4.

136 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345, par. 33; see also Wasmeier and Thwaites (2006), pp. 3-4.

137 P.J. Kuijper, 'The evolution of the Third Pillar from Maastricht to the European Constitution: institutional aspects', *Common Market Law Review*, 41 (2004), p. 624. See, on the deductive method, also Section 3.2.2.2.

2.2. FROM TAMPERE TO LISBON

Although the principle of mutual recognition was not completely unknown before 1999, the Tampere Conclusions are considered a breakthrough because from that moment onwards, the principle of mutual recognition would play an important and fundamental role; the first careful steps concerning recognition of judicial decisions would become the main point. The interpretation of Article 54 CISA given by the ECJ in the joined cases *Gözotük and Brügge* has to be understood as a confirmation of this new policy. Subsequent to the Tampere Conclusions, several policy documents were made to prepare the legislative programme for the establishment of a recognition system. All these policy documents gave expression to the central and fundamental position of the mutual recognition principle. The 2001 programme of measures, for instance, stressed that mutual recognition would come in various shapes and would apply to every stage of criminal proceedings, before, during and after trial.[138]

Shortly after, in 2001, the first legislative measure implementing the mutual recognition principle was initiated and adopted, applying the principle to European arrest warrants. This first instrument was designed to replace the then current extradition system by a system of automatic surrender on the basis of obliged recognition.[139] An initiative on the mutual recognition of orders freezing property or evidence soon followed, and was adopted in 2003.[140]

Pending the multi-annual the Hague Programme (2005-2009),[141] seven other framework decisions implementing the mutual recognition principle were adopted.[142] Together, they cover several kinds of judicial decisions in all phases of criminal proceedings: financial penalties,[143] confiscation orders,[144] custodial sanctions,[145] probation decisions and alternative sanctions,[146] evidence warrants,[147] and pre-trial supervision measures.[148] In addition, in 2008, the Council adopted a framework decision that obliges the Member State to take account of previous convictions handed down in another Member State in the course of new domestic criminal

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138 OJ 15.01.2001, C 12/10.

139 Council Framework Decision 2002/584/JHA of 13 June 2002, OJ 18.07.2002, L 190/1.

140 Council Framework Decision 2003/577/JHA of 22 July 2003, OJ 02.08.2003, L 196/45.

141 Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1.

142 A brief introduction to each of these instruments will be provided in Chapter 3.

143 Council Framework Decision 2005/214/JHA of 24 February 2005, OJ 22.03.2005, L 76/16.

144 Council Framework Decision 2006/783/JHA of 6 October 2006, OJ 24.11.2006, L 328/59.

145 Council Framework Decision 2008/909/JHA of 27 November 2008, OJ 05.12.2008, L 327/27.

146 Council Framework Decision 2008/947/JHA of 27 November 2008, OJ 16.12.2008, L 337/102.

147 Council Framework Decision 2008/978/JHA of 18 December 2008, OJ 30.12.2008, L 350/72.

148 Council Framework Decision 2008/829/JHA of 23 October 2009, OJ 11.11.2009, L 294/20.

proceedings.[149] To carry further the principle of mutual recognition in both civil and criminal affairs was an important goal expressed in the Hague Programme. However, in view of this goal, the Hague Programme also stressed the need to strengthen the level of mutual trust between the Member States as well as the need to develop "equivalent standards for procedural rights in criminal proceedings".[150] The need to make efforts in these fields was reiterated in a 2006 communication from the Commission, in which mutual trust and harmonisation measures were interconnected, in the sense that harmonisation is needed to built up mutual trust, which in turn would facilitate the application of the principle of mutual recognition.[151]

This line of policy has continued in the current multi-annual policy programme, called the Stockholm Programme (2010-2014).[152] It appears from the programme that attempts will be made to further develop the principle of mutual recognition and to review and evaluate the current state of implementation at the national level of the individual Member States. To this end, efforts will also be made to enhance the level of mutual trust in the legal systems of the Member States *inter alia* by means of creating minimum rights for the individual involved in criminal proceedings. After all, such a set of minimum rights would improve the development of the mutual recognition principle.[153] It is true that the creation of minimum rights was an aim under the Hague Programme as well and that several attempts have been made. However, because these initiatives failed, new initiatives in this field are still foreseen, as appears from the new policy programme. In view of Stockholm's main focus on the interests and needs of citizens, work on the creation of minimum rights fits well in this programme. In addition, the Lisbon Treaty provides for a clear legal basis to adopt common minimum norms of procedural law as far as necessary to facilitate mutual recognition.

Since the adoption of the Stockholm Programme, two mutual recognition instruments have been initiated. The first one aims at the application of the principle of mutual recognition to protection orders, in order to better protect a victim who decides the travel or to move to another Member State.[154] The second initiative seeks

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149 Council Framework Decision 2008/675/JHA of 24 July 2008, OJ 15.08.2008, L 220/32.

150 Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1, par. 3.2 and par. 3.3.1 respectively.

151 "Implementing The Hague Programme: the way forward", Communication from the Commission, COM (2006) 331 final, par. 2.5.

152 Council, "The Stockholm Programme, An open and secure Europe serving and protecting the citizens", OJ *0*4.05.2010, C 115/1.

153 Council, "The Stockholm Programme, An open and secure Europe serving and protecting the citizens", OJ *0*4.05.2010, C 115/1.

154 Initiative of the Member States with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order, OJ 18.03.2010, C 69/5. For the last public version followed on discussion in the Council, see Council document 10384/10, Brussels, 28 May 2010.

to apply the principle of mutual recognition to investigation orders. Its purpose is to broaden the scope from evidence warrants only issuable for certain kinds of evidence to orders issuable for almost all kinds of evidence and investigation measures.[155]

The start of the Stockholm Programme's term of duration followed only one month after the entry into force of the Lisbon Treaty, by means of which the Treaty on European Union (EU Treaty) has been amended (it will be abbreviated differently, namely as TEU) and the Treaty establishing the European Community (EC Treaty) has been replaced by the Treaty on the Functioning of the European Union (TFEU). With regard to the principle of mutual recognition, one of Lisbon's novelties in the field of police and judicial cooperation concerns the codification of this principle. Under the heading of "area of freedom, security and justice" (Title V TFEU), the Union has to make attempts to ensure a "high level of security" through, *inter alia*, "the mutual recognition of judicial decisions in criminal matters" (Article 67(3) TFEU). Furthermore, judicial cooperation in criminal matters between the Member States is to be "based on the principle of mutual recognition of judicial decisions and judgments" (Article 82(1) TFEU).

2.3. FLANKING DEVELOPMENTS: MUTUAL TRUST AND HARMONISATION OF LEGISLATION

Mutual recognition is built on the assumption of mutual trust between the EU Member States. Without confidence in the "adequacy" of each others' rules and the "correct application" of these rules by the competent authorities, recognition cannot really function; the term recognition implies mutual trust.[156] Mutual trust presumes the different criminal justice systems in the European Union to be equivalent, in the sense that existing differences do not obstruct recognition.[157]

Despite the assumption of a sufficient level of mutual confidence, the Council concluded in the Hague Programme that a lack of mutual trust was still hindering the full implementation of mutual recognition. Therefore, the Council stressed the need to take measures for the strengthening of mutual trust between the Member States; by means of training and networking, mutual knowledge and understanding among judicial authorities of the different legal systems would be improved, which in turn would strengthen the level of reciprocal confidence.[158] In addition,

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155 Council document 9288/10, Brussels, 21.05.2010 (this is the most recent text).

156 "Mutual recognition of final decisions in criminal matters", Communication from the Commission, COM (2000) 495 final, par. 3.1; see also A.H.J. Swart, *Een ware Europese rechtsruimte*, Deventer: Gouda Quint, 2001, p. 17.

157 Swart (2001), p. 17.

158 Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1, par. 3.2. See also: "The Hague Programme: Ten priorities for the next five years", Communication from the Commission, COM (2005) 184 final, par. 2.3.

common minimum standards should be developed in order to further realise mutual recognition, especially in the field of procedural criminal law, but also as to substantive criminal law.[159]

These viewpoints illustrate the fact that, while mutual recognition had in the beginning been regarded as the alternative solution in view of the difficulties with harmonisation,[160] the vision today is that a minimum level of common rules is conditional to mutual recognition. Both concepts are clearly linked to the principle of trust as well, as expressed in several policy documents; it appears that the creation of common minimum standards of criminal law and criminal procedure is assumed to build up the level of mutual trust, which in turn contributes to the further implementation and application of the principle of mutual recognition.[161]

However, harmonisation of criminal law is, according to Weyembergh, also necessary for the better protection of fundamental rights and procedural guarantees. Asserting that mutual recognition may have the effect of the "lowest common denominator", leading to a decreasing level of fundamental rights guarantees, the making of common minimum rules in the field of criminal law should not only serve the pursuit of mutual recognition, it should also protect the level of individual rights. After all, a levelling down of individual rights would conflict with the "freedom" part of the area of freedom, security and justice[162].

In the context of developing mutual recognition, the harmonisation debate has concentrated on the establishment of minimum common norms regarding procedural safeguards for the individual. A clear example was provided for in an earlier draft of the framework decision on the European evidence warrant. This draft not only proposed rules for the application of the recognition principle, but also introduced several minimum safeguards for the purpose of quicker and more effective cooperation practices between the Member States:

> "[I]n particular where coercive measures are envisaged, the Commission considers that the building of mutual trust should be fostered by specific action at the Union level in order to achieve a common minimum level of safeguards".[163]

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159 Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1, par. 3.3.2.

160 S. Alegre and M. Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant', *European Law Journal*, 10(2) (2004), p. 201.

161 Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM (2004) 334 final, par. 1.1; "Implementing The Hague Programme: the way forward", Communication from the Commission, COM (2006) 331 final, par. 2.5.

162 A. Weyembergh, 'The Functions of Approximation of Penal Legislation within the European Union', *Maastricht Journal of European and Comparative Criminal Law*, 12(2) (2005), p. 159.

163 See par. 42 of the Explanatory Memorandum to the proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings

However, the harmonising provisions were removed from the version finally adopted in 2008.

Besides the attempts made in the context of evidence gathering, efforts to establish a general legal instrument on procedural rights in criminal proceedings were started before the Hague Programme. In 2004, a draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union was initiated,[164] in order to solve the lack of trust between the Member States.[165] This draft proposed a fairly comprehensive set of minimum rights, such as the right to legal advice and the right to free and accurate interpretation and translation. At that time, however, it appeared too ambitious. Pending the current Stockholm Programme, another turn was taken with the creation of a "roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".[166] This roadmap aims at the step-by-step creation of minimum procedural rights. By addressing the procedural rights step-by-step, the Council assumes that overall consistency will best be ensured. The first measure taken concerns the issue of translation and interpretation; recently, a directive on this issue was adopted by the Council and the European Parliament.[167] In addition, a proposal was initiated on the right to information in criminal proceedings, being the second step; it addresses the suspect's right to be informed about his rights and the charges against him.[168] The next two issues to be regulated through directives were the right to legal advice and legal aid, and the right to communicate with relatives, employers and consular authorities.[169]

Further initiatives are expected in the field of evidence admissibility. The European Commission recently consulted the Member States on the question of whether common standards should be designed to secure the admissibility of evidence that has been obtained in another Member State.[170]

That the mutual recognition of judicial decisions in criminal affairs goes hand in hand with the approximation of procedural criminal law is further expressed in the

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in criminal matters, COM(2003) 688 final.

164 Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

165 See par. 24 and par. 25 of the Explanatory Memorandum to COM (2004) 328 final.

166 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 4.12.2009, C 295/1.

167 Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 26.10.2010, L 280/1.

168 Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392/3.

169 "Delivering an area of freedom, security and justice for Europe's citizens. Action Plan implementing the Stockholm Programme", Communication from the Commission, COM(2010) 171 final, p. 14.

170 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, par. 4.2.

new Lisbon Treaty. Minimum rules of procedural criminal law, *inter alia* concerning the rights of individuals in criminal proceedings and the mutual admissibility of evidence, may only be established for the aim of facilitating the mutual recognition of judicial decisions (Article 82(2) TFEU).

3. THE ANALOGY BETWEEN MUTUAL RECOGNITION IN DIFFERENT FIELDS OF COMPETENCE

As demonstrated in Chapter 1, the recognition principle originates from a field of competence totally different from the area of criminal law, namely the internal market, specifically commodity trade. In spite of this, mutual recognition has been presumed to have the same meaning in both fields of EU competence. After all, shortly after the 1998 Cardiff Conclusions, the United Kingdom suggested that the principle of mutual recognition in the former Third Pillar should be approached in a way "comparable to that used to unblock the single market".[171] And, in a 2000 Communication on mutual recognition, the European Commission stated that "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".[172]

However, the question arises as to how to characterise the relationship between both fields of EU competence in the light of the then institutional structure of the European Union. At the time mutual recognition was introduced and developed in the *Cassis de Dijon* judgment, the free movement of goods as well as the other market freedoms were governed by the supranational regime of the so-called First Pillar, whereas judicial cooperation in criminal matters was governed by the intergovernmental regime of the so-called Third Pillar. Through the Tampere Conclusions in 1999, the First Pillar principle of mutual recognition was transferred to the Third Pillar area of cooperation in criminal affairs. To fully understand today the background to mutual recognition in the former Third Pillar, and to be able to formulate the meaning of the principle in the field of criminal law, it is necessary to explore the relations between the different fields of competence in EU law.

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171 "Mutual recognition of court decisions in criminal justice", Council Document No. 10600/98 of 27 July 1998, p. 2.

172 "Mutual Recognition of Final Decisions in Criminal Matters", Communication from the Commission, COM (2000) 495 final.

3.1. CRIMINAL LAW AND LEGISLATIVE COMPETENCES IN THE EUROPEAN UNION

The European Union is characterised by the existence of a central authority having limited powers: all powers not expressly delegated to Union level are left within the national spheres. It has been determined in the founding treaties, and again in the Lisbon Treaty, that "competences not conferred upon the Union in the Treaties remain with the Member States" (Article 4(1) TEU, principle of conferred powers[173]). Furthermore, the non-exclusive powers[174] of the central government are in the European Union restrained by the principle of subsidiarity (Article 5(3) TEU):

> "[T]he Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

Despite such principles as conferred powers and subsidiarity, the European Union's history has shown a gradual expansion of central powers over the years.[175] Not only have more and more powers been transferred to the European level (centralisation), but original Third Pillar competences have also gradually transferred to the First Pillar regime (communautarisation).[176]

These developments have affected the area of criminal law as well. In the EU context, this is best understood as part of the development towards one legal order, in which the area without internal borders (the internal market) and the area of freedom, security and justice (including police and judicial cooperation in criminal matters) gradually converged and have now totally merged following the entry into force of the Lisbon Treaty. These developments started from the entry into force of the 1992 Maastricht Treaty: while the original goals of the EU, which are to create an area without internal frontiers and to develop a common market, remained governed by supranational law (First Pillar), the newly added goal since Maastricht, namely

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173 Kapteyn & VerLoren van Themaat, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International, 2008 (4th edition), pp. 138-139.

174 The area of police and judicial cooperation in criminal matters is such a non-exclusive power, since competences in this field (the area of freedom, security and justice) are determined to be shared competences between the Union and the Member States (Article 4 TFEU).

175 A clear overview up until 2001 has been given by J.D. Donahue and M.A. Pollack, 'Centralization and its Discontents; The Rhythms of Federalism in the United States and the European Union', in: K. Nicolaidis and R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, New York: Oxford University Press, 2001, pp. 95-116; see also, especially with regard to criminal law, A. Klip, *European Criminal Law. An Integrative Approach*, Antwerp: Intersentia, 2009, pp. 17-20 (Sections 3.3 and 3.4).

176 These developments have been clearly described in: Kapteyn & VerLoren van Themaat (2008), pp. 30-44.

to achieve a high level of safety by developing an area of freedom, security and justice, was brought under the regime of the intergovernmental (or: international) Third Pillar. Such an area was to be developed by common action in the field of police and judicial cooperation, but other topics (such as judicial cooperation in civil affairs, asylum and immigration) were governed by the Third Pillar as well. The most important differences between the supranational regime of the First Pillar and the intergovernmental regime of the Third Pillar are clearly related to the degree of sovereign rights transferred to Union level. Under the intergovernmental regime of the former Third Pillar, by which criminal law was primarily governed thus, Member States were left more autonomy and discretion than on topics governed by the supranational regime of the First Pillar. Since, in the Third Pillar, legal instruments could only be adopted in the Council with unanimity; the right of initiative is not exclusively attributed to the Commission, but is shared with the Member States; the European Parliament is only consulted in the legislative process; and the European Court of Justice has only limited competence.[177]

The Third Pillar regime soon gained a kind of exceptional character. With the entry into force of the Amsterdam Treaty in 1997, the further development of the area of freedom, security and justice partly became a First Pillar issue. Judicial cooperation in civil affairs, as well as asylum and immigration matters were transferred to the First Pillar and the only Third Pillar issue left was the topic of common action in the fields of police and judicial cooperation. Although this meant that in the field of criminal law the Member States were left relatively more sovereign powers, communautarisation nonetheless affected the intergovernmental area of criminal law. In this framework, an important role was played by the European Court of Justice, which has contributed actively[178] to this ongoing convergence of the pillars.[179] This can be best illustrated by mentioning the Court's extensive interpretation of Community competence in the field of criminal law at the time this area was still governed by the intergovernmental Third Pillar[180] and also by referring to its decision that the Member States have an obligation to enforce Third Pillar law – the same as applies to First Pillar law – and that national courts must interpret national law in conformity with the wording and purpose of Framework Decisions.[181]

All this has recently culminated in the entry into force of the Lisbon Treaty, by means of which the pillar structure is abolished and all areas of competence,

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177 Articles 34, 39, and 35 of the former EU Treaty respectively.

178 See on the active role of the ECJ in general: H. Kristoferitsch, *Vom Staatenbund zum Bundesstaat? Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Vienna: Springer, 2007, pp. 220-226.

179 Klip (2009), p. 18.

180 13 September 2005, Case C-176/03, *Commission* v. *Council*, [2005] ECR I-7879; 23 October 2007, Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097.

181 16 June 2005, Case C-105/03, *criminal proceedings against Maria Pupino*, [2005] ECR I-5285.

including the traditional intergovernmental area of police and judicial cooperation, are now brought under the single supranational structure of today's European Union. This brings important consequences for the Member States' sovereignty in the field of criminal law, in the sense that national sovereign powers have decreased. After all – with the reservation that these changes will enter into force only five years after the entry into force of the Lisbon Treaty[182] – legal instruments now require a (qualified) majority in the Council (Article 238, TFEU); the Court of Justice now has general competence (Article 19(3) TEU), also to review a Member State's compliance or non-compliance with Union law; and such a review may be initiated by the Commission as a result of an infraction procedure (Article 258 TFEU).

3.2. TOWARDS A CONSTITUTIONAL BASIS FOR MUTUAL RECOGNITION IN CRIMINAL MATTERS

As from the publication of the 1999 Tampere Conclusions, several critics have doubted the legitimacy of mutual recognition in the then Third Pillar of EU law. The lack of any literal reference in the founding treaties would indicate the absence of a constitutional basis, or at least the presence of a quite weak one. For instance, De Hert stated in 2004 that

> "until October 1999 no reference to the concept of mutual recognition was given in one of the European constitutional documents. The introduction of the concept since Tampere and its next application in framework decisions rests on a weak constitutional basis".[183]

Also Cullen and Buono have mentioned the relatively weak basis of mutual recognition that "does not (yet) find an echo in the EU's founding treaties".[184] It is true that the Amsterdam Treaty did introduce the concept of closer cooperation. This objective addressed the cooperation between national authorities and Europol and Eurojust, and further enabled the approximation of criminal law, insofar as necessary to achieve the objective of providing citizens with a high level of safety (Articles 29 and 31 EU Treaty). However, according to De Hert, this objective does not imply the introduction of the unequal option, the principle of mutual recognition.[185]

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182 Protocol No. 36 annex to the Lisbon Treaty.

183 P. de Hert, 'Het einde van de Europese rechtshulp. De geboorte van een Europese horizontale strafprocesruimte', *Justitiële verkenningen* 30) (6) (2004), p. 111.

184 P. Cullen and L. Buono, 'Creating an Area of Criminal Justice in the EU: Putting Principles in Practice', *ERA Forum* 8 (2007), p. 170.

185 De Hert (2004), p. 112.

Although a clear legal basis for mutual recognition is currently provided for in the Lisbon Treaty (Articles 67(3) and 82(1) TFEU), it remains important to investigate whether or not these statements are justified, if only to understand the backgrounds of the principle and the institutional structure of the European Union in the pre-Lisbon era.

3.2.1. A constitutional basis in the erstwhile Third Pillar?

The principle of mutual recognition was introduced by the ECJ in the framework of the internal market, following the legal obligations under the EC Treaty (Article 2 in conjunction with Article 14) to serve the ongoing establishment of the internal market, which means to ensure the free movement of goods, persons, services and capital. The principle of mutual recognition has been applied to judicial decisions and judgments in civil and commercial matters as well, based on Article 293 EC Treaty. However, today, mutual recognition in this area can also be defended as being based on Articles 2 and 14 EC Treaty. After all, as from the entry into force of the Amsterdam Treaty, judicial cooperation in civil affairs has been connected to the free movement of persons explicitly. For that reason, the application of the recognition principle to judicial decisions in civil matters can be considered a measure serving the establishment of the internal market. Given this, what about mutual recognition in the area of criminal law? As will be demonstrated below, the situation is similar.

The European Single Act (1986)[186] formally established the internal market, an area without internal frontiers. The foundation of this area was meant to ensure the four freedoms, including the free movement of persons. Since the entry into force of the European Single Act, it has indeed become easier for persons to move and reside freely throughout the European Union, either for work, study or holiday purposes. However, this has had a negative side effect too: the number of transnational crimes has increased. Obviously, in an area without internal borders, criminals throughout Europe can easily operate in international criminal organisations, dealing in drugs, human trafficking, etc. In addition, given that many citizens frequently reside outside the territory of their home Member State, crimes are much more likely to involve foreign suspects or foreign victims. Moreover, because of the right to travel freely, suspected or convicted persons can escape to other Member States where they have can have the advantages of foreign legal order and residence outside the territory of their home country.

It was undisputed that a European answer was necessary,[187] because of this negative influence of the free movement of persons on the amount and character

[186] Single European Act, OJ 29.06.1987, L 196/1 (entry into force 1 July 1987).

[187] Criminal law measures in the context of the EU (security and justice) are part of the aspect of positive integration, whereas negative integration in the EU has to do with the removal of internal

of criminality in Europe. A first answer was given by the adoption of the Maastricht Treaty (1992); by means of the new intergovernmental Third Pillar, it opted for so-called flanking measures to prevent and combat criminality in Europe: "Judicial cooperation in criminal matters was characterised more and more by the adoption of measures meant to compensate for the withdrawal of checks on persons and goods at the internal borders of the European Community".[188]

With the Amsterdam Treaty (1997), a more ambitious approach to criminal law competences of the Union was foreseen with the creation of "the area of freedom, security and justice". This area became the legal ground on which the Union is allowed to take, *inter alia*, measures concerning criminal law.[189] The creation of an area of freedom, security and justice cannot, from its initial introduction, be regarded a goal in itself. After all, it appears from Article 2 EU Treaty that the creation of this area is linked to the free movement of persons; this provision determined that one of the main objectives of the Union is:

> "to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".

Under the pillar regime of the former treaties, the connection between the free movement of persons and the area of freedom, security and justice did in fact connect the Communitarian area without internal frontiers with the Union area of freedom, security and justice. Some have interpreted this connection as being the logical outcome of the convergence between both areas, they being conceptually uniform.[190] Others believe the convergence between the areas was not so obvious under the former pillar regime, although developments went increasingly in that direction.[191]

The above-mentioned connection between the area without internal borders and the area of freedom, security and justice has also been expressed in Article 61 EC Treaty. This provision regulates the area of freedom, security and justice in part, namely as to matters of external border controls, asylum and immigration and the prevention and combating of crime. On the basis of this provision and for

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borders (freedom); see for example R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Deventer: Kluwer, 2006, pp. 587-588.

188 Swart (2001), p. 4 (translated from Dutch by the author).

189 See for explanation and interpretation of and (critical) reflections on the terms "freedom", "security" and "justice" Swart (2001), 7.

190 R. Barents, 'De denationalisering van het strafrecht', *Sociaal-economische wetgeving* 54 (2006), p. 360; Barents and Brinkhorst (2006), p. 587.

191 For instance Klip (2009), p. 18.

the purpose of the progressive establishment of an area of freedom, security and justice, the Council was to adopt measures:

> "aimed at ensuring the free movement of persons […], in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, […] and measures to prevent and combat crime …" (Article 61(a) EC Treaty).

With regard to the prevention and combating of crime, this provision referred (under e) to the former EU Treaty, it being the main legal ground on which to take measures. Bearing in mind that asylum and immigration matters (as elements of the area of freedom, security and justice) also originally figured in the EU Treaty – since the Amsterdam Treaty, these issues were transferred to the erstwhile First Pillar of Community law – it must be concluded that the then Union area was partly communautarised; only its criminal law element remained in the Third Pillar. This shows how the area of criminal law relates to the other areas of EU competence, as will be elaborated on in the next sub-section.

3.2.1.1. The Third Pillar as "complementary" to the First Pillar

Under the former pillar regime, matters of criminal law were the exception as to how all other issues of EU competence were approached; the criminal law-aspect of the area of freedom, security and justice was considered to be the exception to the internal market area without internal frontiers.[192] After all, it appears from Article 29 EU Treaty that the Union had to take criminal law measures in the area of freedom, security and justice "without prejudice to the powers of the European Community". In addition, by means of the "*passerelle*" provision (Article 42 EU Treaty), criminal law can also be decided by the Council as falling under the scope of Title IV of the former EC Treaty (covering policies relating to the free movement of persons).[193]

With the uniform notion as a starting point, the Third Pillar has to be regarded as "complementary" to the First Pillar.[194] The aim is to bring all European topics under one denominator, for which the frame of reference is "without doubt the acquis

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192 As stated by Barents (2006), p. 360: "*De regeling van het strafrechtelijke aspect van de ruimte (van vrijheid, veiligheid en rechtvaardigheid) in het kader van de derde pijler vormt een uitzondering op de eenvormige regeling van de ruimte in het EG-verdrag*". See also: A. Klip, 'Europese integratie en harmonisatie en het strafrecht', *Handelingen Nederlandse Juristen-vereniging*, 2006, who refers to the area of freedom, security and justice as "the criminal law translation" of the internal market (quoted phrase is translated from Dutch by the author), p. 133.

193 Barents (2006), p. 360.

194 The same applies to the Second Pillar, but it is not relevant to deal with this in depth.

communautaire", as De Zwaan wrote in 1998.[195] And it is true: through the years, the range of the Third Pillar has become smaller and smaller, especially since the transfer of several topics to the First Pillar. Only because of the reserved approach of the Member States to leave matters of criminal law to the communitarian regime, these matters are still regulated by the more intergovernmental Third Pillar.

The legal basis for the statement that the Third Pillar is complementary to the First Pillar can be found in the Article 1 EU Treaty: "The Union shall be founded on the European Communities". In addition, Article 47 EU Treaty held that nothing in the EU Treaty "shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them". This article thus gives priority to Community law over Union law.[196]

Being convergent to the area without internal frontiers it is reasonable that Article 2 EU Treaty called for measures to maintain and develop the area of freedom, security and justice. This call has to be regarded as the equivalent of Article 2 EC Treaty where the European Community is assigned to take measures for the establishment of a common market. In view of this, it is not surprising that a "First Pillar solution" was ultimately implemented in the Third Pillar area of criminal law.

3.2.2.2. Mutual recognition in the Third Pillar: teleological deduction

In the post-Amsterdam period, the Union found its ultimate answer to fulfilling the obligations of the EU Treaty (Article 2 in conjunction with Title VI) in the "First Pillar concept" of mutual recognition. Introduced via Tampere and Cardiff, its application to judicial decisions in criminal matters was confirmed by the ECJ in 2001.[197] In a "genuine European area" mutual recognition facilitates the prosecution, conviction and sentencing of criminals throughout the European Union without being hampered by borders and different legal orders of other Member States. Mutual recognition has thus to be regarded as a criminal law measure aimed at providing a high level of safety for Union citizens in an area of freedom, security and justice.

In the 1979 *Cassis de Dijon* judgment, the introduction of the principle of mutual recognition was legitimised by the aim of improving intra-Community trade; to oblige the Member State to accept products lawfully produced and marketed in another Member State into their own legal order would facilitate the free movement of goods and, in turn, contribute to the higher aim of completing the internal market. As such, the invention of a new principle, the principle of mutual recognition, was in line

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195 J.W. de Zwaan, *Het recht als fundament van de Europese Unie. Schets van belangrijke beginselen en recente vernieuwingen*, Deventer: Kluwer 1998, p. 28.

196 De Zwaan (1998), p. 28. See also Klip (2009), who states that "[t]o a certain extent, one could say that the internal market prevailed over the area of freedom, security and justice", p. 18.

197 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345.

with the legal obligation of the then applicable treaty provisions. What happened is that the ECJ deduced concrete measures from general goals. This is known as the method of teleological interpretation (purposeful approach): "the 'lower' rules have to be interpreted in the light of the higher goals".[198] The ECJ is long familiar with the teleological interpretation of Union provisions,[199] which, as Prechal asserts, fitted very well in the hierarchical structure of the former EC Treaty.[200]

Reasoning along these lines, the application of the principle of mutual recognition under the regime of the former treaties can be justified as to judicial decisions in civil and commercial matters, and, finally, concerning judicial decisions in criminal matters as well. With regard to the mutual recognition principle in the field of judicial decisions in civil matters, the very basis for mutual recognition lies in Articles 2 and 14 EC Treaty. Being connected (since the Amsterdam Treaty) with the free movement of persons (see Title IV, Articles 61 and 65 EC Treaty), the judicial authorities of the Member States have to cooperate in order to ensure this free movement of persons, and, in turn, to contribute to the completion of the internal market. Given this, the application of the principle of mutual recognition would facilitate and improve the practice of judicial cooperation, which is thus in accordance with the legal obligations of the former EC Treaty. The teleological approach has been known for years in the field of civil law, especially in matters of Article 65 EC Treaty (which mentions mutual recognition).[201]

In the same way, the introduction of mutual recognition in the field of judicial cooperation in criminal matters corresponds with the legal duties of the Union – as originally founded on the European Communities. It appears from the *Gözütok and Brügge* decisions that the teleological approach has meanwhile been introduced by the ECJ in the erstwhile Third Pillar as well. However, is it not true that, in particular in this Third Pillar, the objectives were frequently formulated in a quite vague and open manner? According to Prechal the ultimate goal of the EU has become a "misty view", inevitably disqualifying the possibility of using the method of teleological interpretation.[202] Nonetheless, as demonstrated in the previous sections, the erstwhile Third Pillar had to be regarded as complementary to the erstwhile First Pillar, which means that its goals are to be understood in the light of the area without internal frontiers. The gradual communautarisation of the former Third

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198 S. Prechal, *Juridisch cement voor de Europese Unie*, Groningen: Europa Law Publishing, 2006, p. 13 (translated from Dutch by the author).

199 See: P.S.R.F. Mathijsen, *Teleologische interpretatie der Europese Verdragen*, Nijmegen: Dekker & Van de Vegt, 1970.

200 Prechal (2006), p. 12.

201 Barents and Brinkhorst (2006), p. 617.

202 Prechal (2006), p. 19 (quoted words are translated from Dutch by the author). However, as Barents and Brinkhorst assert, this cannot be the object of the Union, because the important developments were permitted and accepted by the Member States without knowing precisely what would be the ultimate "design" of the European Union, see Barents and Brinkhorst (2006), pp. 41-42.

Pillar matters has culminated in the abolishment of the pillar structure. It confirms that only a teleological approach to the EU rules can clarify the aims of the future Union and lead to concrete measures in the frame of the Third Pillar, such as the introduction of the principle of mutual recognition.

With this in mind, the legitimacy of mutual recognition in criminal matters under the previous pillar regime of EU law can be found in Articles 2 and 14 EC Treaty. Although nowhere literally referred to, mutual recognition in the former Third Pillar was expected to facilitate closer cooperation between judicial authorities and to simplify the approximation of rules on substantive criminal law, in accordance with the Union's task as laid down in Article 29 EU Treaty (second and third lines). This has to be regarded in the light of the aim of providing citizens with a high level of safety (first line), which in turn should serve the development of the Union as an area of freedom, security and justice (Article 2 EU Treaty, fourth line). The development of an area of freedom, security and justice should ensure the free movement of persons (Article 2 in conjunction with Article 14 EC Treaty) and thus improve the area without borders, to which the Union area is convergent (Article 14 EC Treaty). Ultimately, mutual recognition can be interpreted as contributing to the general goals of the European Union.

3.2.2.3. Tackling the absence of a reference in the former EU Treaty

This section started by bringing to mind the critics of the legal basis of mutual recognition in the former Third Pillar. However, it appears from the previous subsections that the objection by critics of mutual recognition in the former Third Pillar were not reasonably based on the argument that a reference was not made in the treaties. After all, the absence of any literal reference to mutual recognition in the framework of the free movement of goods has not been regarded as a constitutional problem as from the introduction by the ECJ. Given that the recognition principle entered the Third Pillar in a way analogous to its entrance in the First Pillar, there is no sensible reason to use the argument of no literal reference in the case of the complementary Third Pillar regime.

In addition, although it is true that Articles 29 and Article 31(e) EU Treaty only mentioned the possibility of approximating rules on criminal matters, to derive from this the exclusion of other solutions to serve the purposes of the EU Treaty would be a step too far. History has shown that a legislative measure does not necessarily need to be provided for literally in the text of Articles 29-31 EU Treaty. To illustrate this, in 2001 the Council adopted a Framework Decision on the standing of victims in criminal proceedings.[203] This instrument has meanwhile been implemented into the national legislation of the Member States. Although the preamble of this framework

[203] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ 22.03.2001, L 82/1.

decision does refer to Article 31 EU Treaty, it cannot be said to rely on a specific part of the above-mentioned articles of the EU Treaty. Nevertheless, no objections have been put forward against the legal basis of this framework decision. In his conclusion to the 2005 *Pupino* case, where the interpretation of this instrument was at issue, Advocate General Kokott stressed the legitimacy of this instrument, given that, in his view, the list in Article 31 EU Treaty is not exhaustive: "The fields of common action expressly listed are not exhaustive […]. The individual policy fields therefore describe only potential legislative spheres, without thereby strictly delimiting the competence of the Union".[204] As argued by Kokott, this appears most clearly from the French version of the former EU Treaty, which instead of the word "include" uses the words "*viser entre autres*".[205] Therefore, the competence of the European Union to take legislative measures must be regarded "in the light of the general objectives" of Article 29 EU Treaty,[206] which is in accordance with the teleological approach of the ECJ, described in the foregoing sub-section.

Finally, if there should be any doubt about the legitimacy of mutual recognition in the Third Pillar, it should be removed by its binding character. As indicated earlier, the ECJ held that the *ne bis in idem* provision of Article 54 CISA applies Union-wide; it implies mutual trust and thus recognition of the criminal law in force in the other Member States.[207] Subsequent cases have confirmed this decision and today the principle of mutual recognition has already been implemented in EU legislation by way of a range of framework decisions.[208] In addition, the new Lisbon Treaty provides a clear reference anyhow.

3.2.2. A constitutional basis in the Lisbon Treaty

It has been mentioned several times that the Lisbon Treaty provides a clear legal basis for the application of the principle of mutual recognition on judicial decisions and judgments handed down by a criminal judge in the course of criminal proceedings in any Member State of the European Union. In order to ensure a high level of security for the people, the Union is obliged to pass legislation aimed at the

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204 Opinion of Advocate General A. Kokott delivered on 11 November 2004, Case C-105/03, c*riminal proceedings against Maria Pupino*, [2005] ECR I-5285, par. 50.

205 Opinion of Advocate General A. Kokott delivered on 11 November 2004, Case C-105/03, c*riminal proceedings against Maria Pupino*, [2005] ECR I-5285, par 50.

206 Opinion of Advocate General A. Kokott delivered on 11 November 2004, Case C-105/03, c*riminal proceedings against Maria Pupino*, [2005] ECR I-5285, par 50. Also: H. Hijmans, 'De derde pijler in de praktijk: leven met gebreken. Over de uitwisseling van informatie tussen de listaten', *Sociaal-economische wetgeving*, 54 (2006), p. 379.

207 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345, par. 33; see also Wasmeier and Thwaites (2006), par. 33. See also, Wasmeier and Thwaites (2006), pp. 3-4.

208 Cullen and Buono (2007), p. 170.

application of the principle of mutual recognition to judicial decisions in criminal affairs; judicial cooperation in criminal matters between the Member States must be based on this principle of mutual recognition (Articles 67(3) and 82(1) TFEU).

4. DEFINING MUTUAL RECOGNITION IN THE CONTEXT OF CRIMINAL LAW

As demonstrated in the foregoing sections, the principle of mutual recognition of judicial decisions in criminal matters has come into existence and has been developed analogously to the mutual recognition principle in the former First Pillar areas of competence. This paves the way for defining the principle of mutual recognition in the area of criminal law in a similar way to how the principle was defined in the other areas of competence. This means that a consequential as well as a methodical definition will be provided in this section. With that aim, three mutual recognition instruments will be analysed.[209]

4.1. THREE EXAMPLES OF MUTUAL RECOGNITION INSTRUMENTS

Because the principle of mutual recognition is meant to apply to every stage of criminal proceedings, each instrument corresponds to one stage, thus applying the principle of mutual recognition before, during or after trial.

4.1.1. Recognition in the pre-trial phase: Framework Decision on the European supervision order

In 2009, the Council adopted the Framework Decision on the application of the principle of mutual recognition to decisions on pre-trial non-custodial supervision measures (ESO).[210] Such supervision measures may include, for instance, an obligation not to enter certain locations, an obligation to avoid contact with specific persons, or an obligation to report weekly to the police.

This instrument was created to reduce the number of pre-trial detentions imposed on suspects who are nationals or residents of another Member State. The Union-wide application of pre-trial non-custodial supervision measures would serve the suspects' interest in undergoing the supervision measure in his "natural environment", while the court proceedings are pending in the other Member State.

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209 The complete set of framework decisions and directives implementing the principle of mutual recognition is addressed in Chapter 3.

210 OJ 11.11.2009, L 294/20.

This framework decisions establishes rules for the mutual recognition and enforcement of non-custodial pre-trial supervision measures. Pending a court decision, the issuing Member State should issue a supervision order together with a certificate (annex to the proposal a standard form is given), which should be recognised by the Member State of normal residence of the suspect (Article 10 ESO). This means that this Member State has to take all measures necessary to monitor the supervision measures included. The executing Member State has to monitor these supervision measures as if they were handed down in the domestic legal order (Article 12(1) ESO). There are nevertheless several grounds on the basis of which the executing Member State may decide to refuse to monitor the foreign supervision measure, for instance if such would violate the principle of *ne bis in idem*, or national immunity or prescription provisions, or where the information submitted by the issuing Member State does not suffice (Article 15 ESO).

4.1.2. Recognition during the trial phase: Framework Decision on taking account of previous convictions[211]

In a cooperation system based on full mutual recognition, the range of recognition has to encompass all stages of the criminal procedure, and even after completion of the custodial sentence or after payment of a fine. The 2001 programme of measures already opted for the adoption of instruments which should enable a court in a Member State to take account of final criminal judgments for the purpose of "assessing the offender's criminal record and establishing whether he has re-offended, and in order to determine the type of sentence applicable and the arrangements for enforcing it".[212] In 2008, the Council adopted the Framework Decision on taking account of previous convictions in the course of new criminal proceedings (PC).[213] This enables national courts to attach consequences to previous foreign convictions such as to previous national convictions, with a view to provisional detention, the nature of the penalty, concurrence or confusion with previous penalties, etc.

This instrument does not imply the execution of foreign convictions. It rather obliges the Member States to attach to earlier convictions handed down in another Member State equivalent legal effects as earlier convictions handed down by a national court (Article 3(1) PC), as provided for in the national legal framework. It thus addresses the consequences of an earlier conviction in view of, for example, provisional detention, the nature of the penalty or confusion with previous penalties.

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211 At the national level, previous convictions can have effects at all stages of criminal proceedings. However, this section deals with recognition during the trial stage only, while the proposed Framework Decision covers all different procedural stages. Nevertheless, the proposal is appropriate here, as its functioning and consequences during the trial stage is suitable for clarification.

212 OJ 15.1.2001, C12/13.

213 OJ 15.08.2008, L 220/32.

The intended consequence of mutual recognition is thus that Member States deal with previous foreign convictions as if these were previous national convictions, handed down in the domestic legal order, without exception.

4.1.3. Recognition in the post-trial phase: Framework Decision on mutual recognition of financial penalties

The Framework Decision on the application of the principle of mutual recognition to financial penalties (FP) is the first instrument that applies the principle of mutual recognition to final judgments.[214] It is currently implemented in the national legislations of the different Member States. This framework decision covers judicial decisions requiring financial penalties imposed as (a) a sum of money on conviction of an offence; (b) compensation for the benefit of victims; (c) a sum of money in respect of the costs of court or administrative proceedings; (d) a sum of money to a public fund or a victim support organisation (Article 1(b) FP).

The judicial and administrative authorities of the issuing Member State may send the decision, together with a certificate (for which a standard form is given annex to the framework decision) to the authorities of the Member State in which the convicted natural of legal person has property or income, is normally resident, or, in case of a legal person, has its registered seat (Article 4(1) FP). This Member State is in principle obliged to recognise the judicial decision "without any further formality required". After all, mutual recognition contravenes the maintaining of grounds for refusal and other intermediate checks. Although some grounds for refusal are still provided for in this framework decision, they are clearly reduced in number compared to traditional instruments. The most important grounds still maintained relate to the principle of *ne bis in idem* and the principle of territoriality (Article 7 FP). In addition, the double criminality requirement may only be verified for a limited number of offences (Article 5 FP).

The obligation to recognise a foreign judicial decision requiring a financial penalty includes the obligation to execute the financial penalty; the necessary measures to be taken in order to receive the money shall be the same as if the financial penalty were imposed by a judge in the domestic legal order (Article 9 FP). Even if the executing Member State did not recognise the criminal liability of legal persons, a foreign penalty imposed to a legal person has to be recognised and enforced (Article 9(3) FP).

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214 OJ 22.03.2005, L 76/16.

4.2. CONSEQUENTIAL MEANING

It appears that the principle of mutual recognition is firstly characterised in that the recognition of a foreign judicial decision may include the imperative execution of the decision. After all, the recognition by one Member State of a foreign financial penalty, or a custodial sanction would be pointless if this Member State were also not obliged as well to execute the fine, or to put the convicted person in jail. A second feature of mutual recognition in the context of criminal law is that in principle the recognition of a foreign judicial decision implies the attachment of those effects that would also be attached to similar national judicial decisions. Thirdly, this obligation exists without being it relevant in principle that the judicial decision at stake was handed down in accordance with the constitutional and criminal laws of the issuing Member State. The Commission worded it as follows, 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 similar effects there".[215]

In comparison to the consequential meanings of mutual recognition in the internal market as well as concerning judicial decisions in civil and commercial matters, it appears that the latter field of competence provides the best model to define mutual recognition in the area of criminal law. As a result, mutual recognition can be defined as the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State, as if these judicial decisions were delivered in the domestic legal order, even though they could never have been so delivered.

4.3. METHODICAL MEANING

Having defined the recognition principle as to its consequences, the question arises as to what exactly has to be recognised in order to fulfil the duties imposed through the different instruments on mutual recognition.

Departing from the examples used in this section, it appears that recognition can address both substantive law and procedural law. As to supervision orders as well as financial penalties, the issuing Member State has to forward the judicial decision together with a (completed) standard certificate to the Member State in which recognition is sought. This Member State, the executing Member State, has to accept the certificate in combination with the underlying judicial decision

[215] "Mutual Recognition of Final Decisions in Criminal Matters", Communication from the Commission, COM (2000) 495 final.

as documents with legal force. This mode of recognition can be categorised as procedural law recognition.

As will be demonstrated in Chapter 3, where the complete range of mutual recognition decisions will be summed up, that procedural law recognition is the dominant mode of recognition in the field of criminal law. The only exception concerns one of the examples given above, the Framework Decision on taking account of previous convictions in the course of new criminal proceedings. In the context of this instrument, no documents or judicial decisions are required to be forwarded by the sentencing Member State. Rather, the existence as such of a previous conviction has to be recognised by any other Member State, as enabled by domestic law. The conviction itself, being a legal fact construed in another Member State, is the subject of recognition; this legal fact is applied in the domestic legal order. This indicates that the mode of recognition is substantive law recognition.

In conclusion, there is no sole methodical meaning of mutual recognition in the field of criminal matters; it can be procedural or substantive and it depends on the instrument as to which recognition method applies.

5. IMPLEMENTING MUTUAL RECOGNITION IN CRIMINAL MATTERS: THE NEED FOR A SPECIFIC APPROACH

As demonstrated in the previous sections, the convergence between the area without internal frontiers and the area of freedom, security and justice has led to a strong positioning of the principle of mutual recognition in the legal framework of the European Union. As a result, the experience built up in these fields of law function as an important source of inspiration when it comes to exploring the background of mutual recognition in the field of criminal law, as well as to defining its principle. Nevertheless, the unique character of this field of law brings several reasons why as to certain elements the implementation of mutual recognition can neither be inspired by the internal market experience, nor by the civil law experience. The most important reasons are dealt with below.

5.1. RESTRICTIVE IMPACT ON INDIVIDUALS

It is undeniable that criminal law is a field of law dealing with topics very different from issues such as economic trade, asylum, immigration and judicial cooperation in civil and commercial matters. It has always been true that criminal law is a quite sensitive field of law, closely related to politics and appealing to people's feelings of safety and public confidence. In addition, criminal law may have radical and terrible consequences for those who have been suspected or accused of having committed a crime.

This equally applies in the context of international cooperation, and all the more where different jurisdictions mutually recognise each other's judicial decisions handed down in the course of criminal proceedings. After all, full application of mutual recognition within the European Union implies that no Member State will be a safe haven for those fleeing from justice. And, full mutual recognition means a greater chance of being arrested in another Member State on the basis of a warrant issued in the person's home Member State, and to be placed in detention under circumstances that are possibly quite terrible, if only because language problems may easily arise and because of the likely absence of family and social ties. Furthermore, pure mutual recognition includes an increased chance of being arrested at home on the basis of a warrant issued by another Member State and to be surrendered to that Member State, even where the act underlying the warrant is not punishable at home.

To several critics, these restrictive consequences of applying the principle of mutual recognition invalidate the functioning of this principle in a way analogous to its functioning in the other fields of competence, which are the internal market and the area of civil and commercial law.[216] To examine the tenability of this viewpoint, the restrictive consequences for the individual need to be examined as to whether they arise exclusively in applying mutual recognition in the criminal law area, or whether they may also occur in the other fields of competence. At this point, it must be recognised that in these other fields the non-restrictive effects of mutual recognition obviously have the upper hand. Because of the obligation to mutually recognise professional qualifications, diplomas and professional experience, the possibility for people to be employed in foreign companies and to practice their profession in another Member State have been enhanced.[217] And, as a result of the obligation to mutually recognise the legal status of companies and firms founded in accordance with the regulations and procedures of any Member State, the horizon of the self-employed has been broadened significantly. Furthermore, the mutual recognition of judicial decisions on matrimonial matters and matters of parental responsibility encourages people with children to move to another Member State after a divorce, in order to build a new life there, without the other parent losing claims. At the same time, the other parent can be reassured that his parental rights will not disappear after the move. Moreover, if, as a result of the application of the principle of mutual recognition, marriage documents have legal force Union-wide,

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216 E.g. Möstl (2010), pp. 409, 418; V. Mitsilegas, 'The constitutional implications of mutual recognition in criminal matters in the EU', *Common Market Law Review*, 43 (2006), p. 1280 *et. seq*; B. Hecker, *Europäisches Strafrecht*, Berlin, Heidelberg: Springer Verlag, 2005, p. 442, par. 44.

217 However, Schmidt has recognised that in this field it may depend on the perspective taken as to whether mutual recognition works out positively; this mainly applies to highly qualified professionals, whereas for lower-qualified people, the risk of exploitation readily grows, see S.K. Schmidt, 'Introduction', in: S.K. Schmidt (ed.), *Mutual Recognition as a New Mode of Governance*, London: Routledge, 2008, p. 10.

European citizens may more easily leave their home country in order to benefit from the marriage rules of another Member State.

It is true that the application of the principle of mutual recognition to judicial decisions in civil and commercial matters may include restrictions for individuals. This applies in particular to civil proceedings where individuals may be condemned to pay financial compensation for damages or to pay the costs of the whole trial. However, the positive consequences of mutual recognition prevail to a large extent over the restrictive consequences. As mentioned, the opposite applies in the field of criminal law, where, in addition, the restrictive consequences of mutual recognition are potentially very radical; they possibly entail the deprivation of a person's liberty.

It must, nonetheless, be recognised that applying mutual recognition in the field of criminal law may bring several benefits for individual citizens too. The application of mutual recognition is assumed to contribute to the creation of an area of freedom, security and justice. As demonstrated previously (Section 3.2), this area closely connects to ensuring the free movement of persons in the European Union. How should this be explained in view of the observation that criminal law may have restrictive consequences for individuals? Here, it is necessary to make a distinction between the consequences for suspected, accused and convicted persons and for those who are not (including victims of crime). After all, the above-mentioned area must be an area of freedom, but also an area of security. Assuming that the application of mutual recognition contributes to the effective prevention and combating of crime, it increases the level of safety in the European judicial area. In a safer area, people will feel more free to travel and move throughout the entire European Union, because of the lower level of danger and the increased confidence in the response by public authorities should any danger occur.

For those individuals who become involved in criminal proceedings against them, however, the non-restrictive effects – not to mention the positive effects – may seem absent or at least harder to discover. However, the criminal law coin has two sides. Traditionally, criminal law is not only a judicial instrument to catch the thief; it also provides suspects with protective instruments against abuse of power and errors before, during and after the criminal process. If the changed frequency and nature of modern crime ought to be approached on a European level, so should procedural safeguards – before, during and after trial – in order to guarantee a minimum level of fundamental rights and legal certainty. This intention was at the heart of the implementation process, as appears from a 2000 Communication, in which the Commission stated that: "It must […] be ensured that the treatment of suspects and the rights of the defence, would not only not suffer from the implementation of the principle, but that the safeguards would even be improved".[218] And later, in the Hague Programme, the Council stressed that mutual

[218] "Mutual Recognition of Final Decisions in Criminal Matters", Communication from the Commission, COM (2000) 495 final, par. 10; see also other official EU documents concerning mutual recognition,

recognition would imply the development of "equivalent standards for procedural rights in criminal proceedings".[219] In the meantime, efforts have been made to create minimum procedural rights. Unfortunately, these efforts have so far been relatively unsuccessful, although the final effect of mutual recognition is meant to result in the levelling of procedural and fundamental guarantees for those involved in criminal proceedings. The new route chosen with the "roadmap" is encouraging; it creates the chance for levelling of procedural rights in criminal proceedings within the European Union (see Section 2.3).

It must be stressed here that some of the instruments adopted are quite advantageous for suspects and convicted persons. The obliged mutual recognition of custodial sanctions, for instance, as provided for in a 2008 framework decision,[220] enables convicted persons to serve the term of imprisonment or other deprivation of liberty in the institutions of the home Member State or the Member State of normal residence. In view of social rehabilitation, language considerations and the possible social and family ties in this country, this instrument may benefit convicted persons to an important extent. The same applies to a 2009 framework decision,[221] obliging the Member States to recognise and monitor pre-trial supervision measures, imposed on own nationals by the judicial authorities of another Member State. This provides the same benefits as the 2008 instrument, although in this situation for suspected persons who can undergo the supervision measures at home, while pending the court proceedings in the other Member State.

In spite of these positive consequences of mutual recognition, even for suspects and convicted persons, the fact remains that applying mutual recognition brings mainly restrictive consequences. And these restrictions are potentially quite radical, as they may involve the deprivation or restriction of liberty. It justifies all the more that all eyes are kept on the protection of fundamental rights and guarantees, more strictly than is necessary in the other areas of competence.[222]

5.2. A BIGGER NEED FOR MUTUAL TRUST

In view of the potential impact mutual recognition may have on the individual citizen, it is obvious that Member States are less eager to comply with any request from other Member States, especially if such a request would imply the mutual recognition

such as the Tampere Conclusions, par. 33, and the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 15.01.2001, C 12/10.

219 Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1, par. 3.3.1.

220 Council Framework Decision 2008/909/JHA of 27 November 2008, OJ 05.12.2008, L 327/27.

221 Council Framework Decision 2008/829/JHA of 23 October 2009, OJ 11.11.2009, L 294/20.

222 See also Barents (2006), pp. 365-366.

of a judicial decision restricting or depriving a person's liberty. This applies all the more given that a minimum set of common standards of procedural rights is still lacking. After all, despite the fact that all Member States have joined the ECHR, the differences as to procedural rights and guarantees still remain enormous. And besides these variations, many divergences exist as to the specific design of criminal proceedings and the division of powers in each Member State internally. In view of the close connection between criminal law, national sovereignty and political as well as ideological viewpoints, Member States are frequently convinced that their rules are the better rules.

For these reasons, it has been argued that the application of mutual recognition as to judicial decisions in criminal matters requires a higher level of trust between the Member States than in the field of economic integration.[223] To achieve such a high level of mutual trust is, however, more difficult than in such a field as economic cooperation. Mutual recognition in the field of criminal law mostly requires the executing Member State to take measures for the enforcement of the judicial decision delivered abroad; in most cases, recognition includes enforcement. However, in contrast to the internal market field, but similar to the area of civil law, recognition and enforcement has not been made conditional upon the issuing or sentencing Member State's compliance with domestic rules of criminal procedure in delivering the judicial decision at issue. After all, to fight the alleged non-compliance with procedural rules, the defendant has to apply to the authorities of the issuing Member State; the executing Member State is in principle not allowed to assess the extent of the foreign judicial decision.

As such, jurisdiction to enforce has been totally disconnected from national territory. Although mutual recognition, in contrast to harmonisation, does not require the Member States to adapt their national laws, it obliges a Member State to enforce on its own territory judicial decisions that would never have been delivered in its domestic legal order. Here, the close link between judicial decisions in criminal affairs and fundamental rights and freedoms makes it more difficult to accept a judicial decision that would never have been handed down domestically. It concerns a barrier uniquely occurring to such a degree in the field of criminal law.

5.3. THE CONDITION OF EQUIVALENCE AND THE ABSENCE OF A PUBLIC POLICY EXCEPTION

The application of mutual recognition in the internal market requires equivalence between the different national regulations and procedures. This equivalence may be

[223] S. Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', in: S.K. Schmidt (ed.), *Mutual Recognition as a New Mode of Governance*, London: Routledge, 2008, pp. 100, 105-106.

the result of the adoption of harmonised standards or may have evolved spontaneously.[224] If the national standards are equivalent, the principle of mutual recognition has to function automatically; then, the Member States are obliged to recognise each other's products, professional qualifications, and so on in the domestic legal order. However, in the absence of such equivalence, common standards have to be adopted to ensure a minimum level of comparability; while awaiting such common standards, Member States may invoke the exceptions and refuse recognition.[225] As worded elsewhere: "Equivalence is thus the underlying principle and the *condicio sine qua non* for mutual recognition to play its role".[226]

One of the exceptions potentially invoked in the absence of comparability between the level of protection in the Member State of origin and the domestic level of protection relates to public policy in the case of discriminatory measures. As to non-discriminatory measures, the rule of reason may be invoked.

In the field of civil law, it is also presumed that the civil law systems of the various Member States are equivalent. The principle of mutual recognition is based on this presumption. The application of the principle of mutual recognition has never been made conditional upon the existence of harmonised standards; after all, equivalence was presumed to exist. Nonetheless, in the past decades several attempts have been made to create common standards of civil law, based on the reasoning that these would strengthen the level of confidence between the Member States, which in turn would facilitate the application of the mutual recognition principle. Not surprisingly, the development towards a growing body of shared rules has accompanied the movement towards more automatic recognition, as expressed in the reduced number of grounds for refusal and the restriction of the *exequatur* procedure.

Some of the mutual recognition instruments mentioned in the context of civil and commercial matters have provided the Member State in which recognition is sought with the possibility to decline recognition of the foreign judicial decision, if such recognition would be "manifestly contrary to public policy". This ground is considered the last resort for avoiding mutual recognition, namely in those cases where the level of comparability between the domestic legal order and the legal order of the issuing Member State is insufficient.[227]

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224 S. Peers, 'Mutual recognition and criminal law in the European Union: has the Council got it wrong?', *Common Market Law Review*, 41 (2004), pp. 19-20. Here, Peers describes mutual recognition of professional qualifications (the horizontal and sectoral system) and shows that at least a basic degree of comparability is required, "whether brought about by harmonized standards or whether it exists automatically as a result of the relevant Member States' traditions". See also Möstl (2010), pp. 411-412, 416.

225 See Chapter 1, Section 2.1.2.

226 Fichera and Janssens (2007), p. 180.

227 28 March 2000, Case C-7/98, *Krombach* v. *Bamberski*, [2000] ECR I-1935. See also Chapter 1, Section 3.2.

A similar ground for refusal is not provided for in the context of criminal law. What is similar to the contexts of the internal market and civil law is that mutual recognition is based on the presumption of equivalence between the various criminal justice systems, mainly founded in the fact that all Member States have acceded to the ECHR.[228] In principle, this equivalence is presumed to exist irrespective of whether there is harmonisation of legislation. At the time mutual recognition was launched as the future cornerstone of judicial cooperation in criminal matters, the principle of mutual recognition was even considered the better solution for creating common standards of law. Currently, however, harmonisation of legislation is seen as an important facilitator of mutual confidence between the Member States and as such of the principle of mutual recognition.

In contrast to the other fields of competence, a public policy exception cannot be invoked by the Member State confronted with a foreign judicial decision, recognition of which would be manifestly contrary to its national public policy. An insufficient level of comparability between the legal orders of the executing Member State and the issuing Member State cannot be thus repaired. Given that the restrictive effect of applying mutual recognition dominates in the field of criminal law (Section 5.1), as a result of which a higher level of mutual confidence is necessary (Section 5.2), it is surprising that a public policy exception has not been listed in any of the mutual recognition instruments. On the contrary, most mutual recognition instruments are characterised by the partial abolishment of double criminality, which "is intended to achieve the entirely opposite result and preclude […] a comparability test".[229] It has been suggested that a "rule of reason" would be necessary in the context of surrender, which was the first criminal law issue regulated by the principle of mutual recognition. With the aim of protecting "human rights standards and procedural safeguards", it should be possible to refuse the recognition of a European arrest warrant, because such an aim provides "overriding reasons relating to the public interests". Such would be "an effective way […] to meet the requirement to maintain and develop the Union as an area of freedom, security and justice and to ensure [that] the loss of the 'double criminality requirement' does not result in a loss of legal certainty".[230]

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228 Equivalence in the field of criminal law is commonly related to equivalence of fundamental rights standards, which is more than just protecting general interests, see Möstl (2010), p. 418.

229 Peers (2004), p. 23.

230 W. van Ballegooij and G. Gonzales, 'Mutual Recognition and Judicial Decisions in Criminal Matters. A "Rule of Reason" for Surrender Procedures?', in: A. Schrauwen (ed.), *Rule of Reason. Rethinking another Classic of European Legal Doctrine*, Hogendorp Papers (10), Europa Law Publishing 2005, pp. 163-182.

5.4. MUTUAL RECOGNITION OF EVIDENCE OBTAINED ABROAD: THE RISK OF A DISTURBED BALANCE

The foreseen application of the principle of mutual recognition in the context of mutual legal assistance is not only featured in that the executing Member State is obliged to recognise and execute evidence warrants and investigation orders coming from any other Member State. Of course, that part of the process is governed by the application of the principle of mutual recognition. However, to enable the authorities of the issuing Member State to make use of the evidence gathered and obtained in the executing Member State, the results need to be forwarded to the issuing Member State, under whose jurisdiction the criminal proceedings has been started. Concretely, this means that Member State X would in principle be obliged to execute an evidence warrant or investigation order issued by Member State Y, for instance because a judge of Member State Y requires the search of certain premises and the seizure of any smuggled cigarettes found there. As soon as Member State X executes the search order and seizes the cigarettes found there, the results have to be forwarded to Member State Y. These results are meant to be used as evidence in the court trial against three suspects in a smuggling case.

According to some critics, the problems will arise at this latter stage, the stage of transferring evidence. A first difficulty would arise from the many divergences between national rules and requirements of admissible evidence; to weigh the probative value of evidence that has been obtained in a totally different system and under completely different conditions would be a hard job for a national judge unfamiliar with the rules of the other Member State.

Secondly, it has been argued that evidence cannot be transferred at all, for evidence constitutes a single element woven into a complete criminal procedure. This would apply in contrast to final decisions which can be regarded as the outcome of an out-balanced criminal procedure: "*… die unter Anwendung einer in sich konsistenten Verfahrensordnung zustande gekommen ist*".[231] Decisions on evidence, however, would serve a specific aim in the context of a national criminal justice system; being a "legal construct"[232] not detachable from the original national legal context, evidence decisions cannot be regarded in isolation: "*Hier soll etwas verkehrsfähig gemacht werden, das – ohne weitere Sicherungsmaßnahmen – keinen von der jeweiligen nationalen Rechtsordnung abgelösten Bedeutungsgehalt, keine davon losgelöste Legitimationsgrundlage hat*".[233]

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231 B. Hecker, *Europäisches Strafrecht*, Berlin, Heidelberg: Springer Verlag, 2005, p. 444.

232 S. Gless, 'Mutual recognition, judicial inquiries, due process and fundamental rights', in: J.A.E. Vervaele, *European Evidence Warrant. Transnational Judicial Inquiries in the EU*, Antwerp-Oxford: Intersentia, 2005, p. 123.

233 S. Gless, 'Zum Prinzip der gegenseitigen Anerkennung', *Zeitschrift für die gesamte Strafrechtswissenschaft* 116 (2004), p. 365. Zie ook: S. Gless, 'Die "Verkerhsfähigkeit von Beweisen" im Strafverfahren',

The solutions unanimously proposed to solve these problems are sought in the creation of common minimum standards as to the gathering of evidence, the rights of the accused and the admissibility of evidence in court.[234] As mentioned, future initiatives are expected in this field, for the European Commission has recently consulted the Member States on the question of whether common standards should be designed to secure the admissibility of evidence that has been obtained in another Member State.[235] But so far, national regulations diverge widely.

6. CONCLUDING REMARKS

As from 1999, the principle of mutual recognition has functioned as the cornerstone of judicial cooperation in criminal matters. The introduction and implementation of mutual recognition on judicial decisions in criminal affairs serves the development of the area of freedom, security and justice, as envisaged in EU law. Indirectly, developing this area contributes to the fundamental goals of the European Union. As demonstrated, there is a close connection between the area of freedom, security and justice on the one hand and the internal market area without internal borders on the other hand; the latter area includes the former.

To define the principle of mutual recognition in the context of criminal matters, inspiration is provided in the other fields of EU competence thus. Focusing on its consequences, mutual recognition has the same meaning as in the context of civil law. After all, both fields of law are characterised in that mutual recognition may include the enforcement of the foreign judicial decision, and without being it required that the foreign judicial decision has been delivered in accordance with the procedural rules of the issuing Member State. As a result, the consequential meaning of mutual recognition of judicial decisions in criminal matters is the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State, as if these judicial decisions were delivered in the domestic legal order, even though they could never have been so delivered.

Focusing on the subject of recognition – what exactly has to be recognised? – it appears that mutual recognition mainly means procedural law recognition. In most situations, the executing Member State will receive from the issuing Member State a certificate accompanied by the underlying judicial decision. This certificate, being a document with legal force, is the subject to be recognised by the executing Member

Zeitschrift für die gesamte Strafrechtsiwssenschaf 115 (2003), p. 148. According to Klip, this applies to all kinds of judicial decisions delivered in a national legal order, Klip (2006), p. 134.

234 See for instance N. Kotzurek, 'Gegenseitige Anerkennung und Schutzgarantien bei der Europäischen Beweisanordnung', *Zeitschrift für Internationale Strafrechtsdogmatik*, 1(3) (2006), pp. 123-139; Gless (2005), pp. 128-129; Hecker (2005), pp. 444-445.

235 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, par. 4.2.

State. Only where mutual recognition addresses the consequences of earlier foreign convictions in the course of new criminal proceedings does mutual recognition mean substantive law recognition. The subject of recognition is the mere existence of a previous conviction, being a legal fact to be applied in the legal order of the other Member State.

Although much inspiration stems from the fields of economic integration and judicial cooperation in civil matters, it remains the case that criminal law is a field of law with features not occurring, or occurring in a much lesser degree, in these other fields of EU law. For instance, applying mutual recognition to judicial decisions in criminal matters predominantly brings restrictive effects for the individual, even though benefits may be included. These restrictions may even result in the deprivation of freedom and liberty. Partly because of this, it has been mentioned that mutual recognition in the context of criminal law needs a higher degree of mutual confidence, although it is hard to simultaneously strengthen the level of trust. In view of this, things seem to be made more difficult in the absence of a public policy exception or a rule of reason to be invoked by the Member State as the *ultima ratio* correction to mutual recognition. A final unique difficulty of mutual recognition in the field of criminal law lies in the foreseen transfer of evidence as a result of the mutual recognition of foreign evidence warrants and investigation orders; transferring evidence to another legal order is likely to disturb the balance of a national criminal justice system.

To further the implementation and application of the principle of mutual recognition in the area of criminal law, an external approach is needed. Part II of this book will investigate how the inter-jurisdictional acceptance and enforcement of judicial decisions is approached in the federal systems of Switzerland and the United States of America. Initially, however, the current level of mutual recognition will be assessed in order to identify the dominant obstacles and bottlenecks that hinder the functioning of the principle of mutual recognition.

TRANSITIONAL PART

THE IMPLEMENTATION PROCESS OF THE PRINCIPLE OF MUTUAL RECOGNITION IN UNION LAW: THE IDENTIFICATION OF OBSTACLES AND BOTTLENECKS

This part of the book contains one chapter. Chapter 3 provides a bridge between the first and the second part. It will give an overview of the different framework decisions and directives implementing the principle of mutual recognition on judicial decisions in criminal matters. It will further measure the scope of mutual recognition in these instruments, by means of seven parameters. The main purpose of this chapter is to conclude what matters have a hindering effect on the implementation and application of the principle of mutual recognition.

CHAPTER 3

IMPLEMENTING MUTUAL RECOGNITION: OBSTACLES AND BOTTLENECKS

1. INTRODUCTION

It follows from the first part of this book (Chapters 1 and 2) that from its inception the principle of mutual recognition in the area of criminal law has developed analogously to its origin and evolution in the erstwhile First Pillar of Community law, covering the internal market as well as judicial cooperation in civil and commercial matters. Because of this analogy, the principle of mutual recognition has the same consequential and methodical meanings in the various areas of EU law.

Despite the close analogy, however, it has been shown that the area of criminal law is characterised by several unique features not found in the other areas of EU competence. More so than in economic and civil cooperation, the restrictive consequences of criminal law measures prevail over the advantages for individuals to a large extent. The use of criminal law measures – the introduction of the principle of mutual recognition is an example of such a measure – frequently results in radical restrictions for individuals, possibly even depriving them of their liberty. As a result of the introduction of mutual recognition, these consequences have become reality, since working together on the basis of recognition makes it easier for judicial authorities to arrest and sue suspects Union-wide, even outside the borders of the suspects' home country. Therefore, it appears that the introduction of mutual recognition into the area of criminal law requires a specific approach, fitting the special needs of a balanced and practicable system of police and judicial cooperation.

To find a recommended approach, the second part of this book will scrutinise the issue of inter-jurisdictional enforcement of judicial decisions in criminal affairs in federal countries. Initially, however, it has to be revealed what specific issues relate to the introduction of mutual recognition in the area of judicial cooperation. With that aim, I will give an overview of the various legislative instruments applying mutual recognition on different kinds of judicial decisions (2). Subsequently, I

will delineate the scope of mutual recognition by means of so-called parameters, established by the European Council (3), which in turn will result in the identification of the most important obstacles and bottlenecks (4). This chapter will close with some concluding remarks (5).

2. IMPLEMENTING THE PRINCIPLE OF MUTUAL RECOGNITION: AN OVERVIEW OF LEGAL INSTRUMENTS

This section focuses on the different legislative instruments that implement the principle of mutual recognition. As frequently expressed in European policy documents, the principle of mutual recognition is meant to encompass judicial decisions in all stages of criminal proceedings, before, during and after trial, as well as judicial decisions otherwise relevant to such proceedings.[236] The following will provide an overview of the different instruments and their respective characteristics.

2.1. MUTUAL RECOGNITION OF EUROPEAN ARREST WARRANTS

Shortly after the 2001 programme of measures, the first legislative recognition measure was adopted by the European Council: the Framework Decision on the European arrest warrant and the surrender procedures between Member States (EAW).[237] In view of increasing transnational criminality and the further withdrawal of internal borders in the European area, the EAW would be the first step towards a free movement of judicial decisions in criminal matters. It addresses the automatic and direct enforcement of arrest warrants on the basis of mutual recognition between Member States, replacing the traditional slow and cumbersome extradition procedure.

With a standard form to be filled in by the competent judicial authorities (annex to the framework decision), the issuing Member State may transmit the arrest warrant for (a) the carrying out of a criminal prosecution or (b) the execution of a custodial sentence or detention order (Article 1(1) EAW). The executing Member State is in principle obliged to recognise and enforce the arrest warrant without any further formalities required (Article 1(2) EAW). It is also obliged to pay all costs that would arise on its territory (Article 31 EAW).

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[236] See for example: Council, "The Hague Programme: strengthening freedom, security and justice in the European Union", OJ 03.03.2005, C 53/1, par. 3.3.1.

[237] Council Framework Decision 2002/584/JHA of 13 June 2002, OJ 18.07.2002, L 190/1.

In its last annual evaluation of the implementation of the EAW in the Member States' national legislation as well as on its practical application (2007),[238] the Commission points out the success of the European arrest warrant, thereby confirming and strengthening the positive outcome of two earlier reports (2005 and 2006).[239] There is a continual increase in issuing and executing arrest warrants throughout the Union. Earlier difficulties, especially as to the surrender of nationals, are overcome and the 43-day average time for arrest warrants to be executed has decreased. Although some work still needs to be done, the Commission regards the overall situation as quite successful.

2.2. MUTUAL RECOGNITION OF EUROPEAN EVIDENCE WARRANTS

The application of mutual recognition to the obtaining of evidence was given the highest priority in the 2001 programme of measures, which initially led to the 2003 initiative by France, Sweden and Belgium for an instrument concerning freezing orders.[240] It finally resulted in the Framework Decision on the execution of orders freezing property or evidence (FO).[241] It appears from the latest available official information that this framework decision has been implemented in most of the Member States' national legislation.[242] It establishes rules for the recognition and enforcement of freezing orders issued by the judicial authorities of another Member State. It only applies to freezing orders for reasons of (a) securing evidence or (b) the subsequent confiscation of property. As such, the recognition principle is applied to provisional measures only.

A freezing order is a judicial decision that may be transmitted by the issuing Member State to the executing Member State, together with a certificate for which a standard form is given (annexed to the framework decision) (Article 4(1) FO). The executing Member State is in principle obliged to recognise and enforce the freezing order immediately and without any further formalities required (Article 5(1) FO). The issuing Member State must reimburse the executing Member State for any sums paid in damages to any interested party for injuries falling under

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238 Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, COM(2007), 407 final.

239 Reports from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, Brussels, COM(2005) 63 final and COM(2006) 8 final (revised version).

240 OJ 07.03.2001, C 75/3.

241 Council Framework Decision 2003/577/JHA of 22 July 2003, OJ 02.08.2003, L 196/45.

242 "Implementation of the Framework Decision on the execution in the European Union of orders freezing property or evidence", Council Document No. 5937/2/06 of 31 October 2006.

the responsibility of the issuing Member State (Article 12 FO). However, the very limited scope of this framework decision resulted in it being hardly used in practice.

A subsequent instrument provides a much broader scope, though still limited nonetheless. In 2008, the Council adopted the Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters (EEW).[243] This instrument may address a prosecutor's request to disclose evidence, a court order to search certain areas, records from police and judicial files, and so on. Being restricted to existing evidence only, the EEW explicitly excludes requests for taking statements from suspects, defendants, witnesses or victims, and procedural investigative measures involving the obtaining of evidence in real time, such as interception of communications and monitoring of bank accounts (Article 4(2) EEW).

The issuing Member State may transmit an evidence warrant to the executing Member State by means of a standard form to be filled in (annexed to the framework decision) (Article 6(1) EEW). The executing Member State is in principle obliged to recognise and enforce the evidence warrant with no intermediate measures (Article 11(1) EEW). The issuing Member State may require the executing Member State to observe certain formalities and procedures, provided that these would not contravene fundamental principles of law of the executing Member State (Article 12 EEW). Had the executing Member State paid damages to any interested party for injuries falling under the responsibility of the issuing Member State, the issuing Member State in principle has to reimburse those sums (Article 19 EEW).

Today's version of the EEW is considered the first step towards "a single EU body of law based on mutual recognition"[244] that should ultimately replace the traditional mutual assistance system in the relationships between the Member States. In the meantime, efforts have been made for this purpose. A group of Member States has recently initiated a proposal for a directive on the European investigation order (draft EIO).[245] It aims at the mutual recognition of investigative measures issued by the issuing Member State to the executing Member State with a view to gathering evidence. Nearly all kinds of evidence are covered; only interception and transmission of telecommunications are excluded. Nearly all investigative measures are included, with the exception of Joint Investigations Teams (Article 3 draft EIO). As mentioned explicitly in the preamble to the draft directive, the approach of the

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243 Council Framework Decision 2008/978/JHA of 18 December 2008, OJ 30.12.2008, L 350/72.

244 Explanatory Memorandum to the Commission's proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects documents and data for use in proceedings in criminal matters, COM (2003) 688 final.

245 Council Document No. 9288/10 of 21.05.2010 (most recent text).

draft EIO is based on the principle of mutual recognition, but it also takes account of "the flexibility of the traditional system of mutual legal assistance".[246]

Transmission of a future European investigation order may be by various means, provided that a written record can be produced enabling the Member State to verify authenticity (Article 6(1) draft EIO). The executing Member State is in principle obliged to recognise and enforce an incoming investigation order. Unless contrary to the fundamental principles of domestic law, the executing Member State has to observe formalities and procedures indicated by the issuing authority as well as to allow authorities of the issuing Member State to assist in the execution of an investigation order (Article 8 draft EIO). A difference between the draft EIO and the EEW concerns the money issue. The draft EIO proposes several provisions related to various specific investigation measures, such as hearings by videoconference and temporary transfer of persons in custody either to the issuing Member State, or from the issuing Member State to the executing Member State. It goes without saying that such measures would be fairly costly. The draft EIO explicitly assigns the issuing Member State as responsible for bearing the transfer expenses (Article 19(9) and Article 20(6) draft EIO) and the expenses arising from the establishing of a video link, the servicing of the video link, the remuneration of interpreters, and allowances to witnesses and experts including their travelling expenses (Article 21(8) draft EIO).

2.3. MUTUAL RECOGNITION OF EUROPEAN SUPERVISION ORDERS

Less priority was given to ensuring cooperation in the situation that a person becomes subject to supervision measures pending a court decision. Nevertheless, in 2009, the Council adopted the Framework Decision 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 (ESO).[247]

The reason for creating this instrument can be found in the observation that EU citizens who are suspected of having committed a crime on the territory of another Member State are frequently kept in pre-trial detention or become subject to a long-term non-custodial supervision measure, while in a similar situation in their state of residence a less coercive supervision measure would have been considered appropriate. The reason for this possible unequal treatment is the "risk of flight" and the "lack of community ties", as a result of which foreign suspects would be "in a more vulnerable position" than a person who has his residence in the prosecuting

[246] See par. 6 of the preamble to the proposal for a directive on the European investigation order, Council Document No. 9288/10 of 21.05.2010.

[247] Council Framework Decision 2008/829/JHA of 23 October 2009, OJ 11.11.2009, L 294/20.

Member State.[248] After all, it is easier for a Member State to choose an alternative for pre-trial detention for its own residents, such as a travel prohibition or reporting to the police. Especially in view of the suspects' interest for a pre-trial supervision measure in his "natural environment", supervision measures need Union-wide application. The purpose of the ESO is to establish rules for the mutual recognition and enforcement of non-custodial pre-trial supervision measures. It is expected that in that way Member States will apply to foreign nationals the same (less coercive) supervision measures as to own nationals, because of their Union-wide application.

Pending a court decision, the issuing Member State should issue a supervision order together with a certificate (a standard form is given annexed to the proposal), which should be recognised by the Member State of normal residence of the suspect (Article 10 ESO). This executing Member State is in principle obliged to recognise the supervision order and to take all measures necessary to monitor the supervision measures included (Article 12 ESO). The executing Member State is obliged to report any breach of a supervision measure to the issuing state (Article 19(3) ESO). Were it necessary to transfer the suspected person between the Member States involved (for instance because the supervision order has been revoked or in the case of a breach), the surrender mechanism of the EAW should be followed (Article 21 ESO). Unless exclusively arisen on the territory of the issuing Member State, all costs related to the monitoring of a foreign supervision measure have to be borne by the executing Member State (Article 23 ESO).

2.4. MUTUAL RECOGNITION OF FINANCIAL PENALTIES

In 2005, the Council adopted a Framework Decision on the application of the principle of mutual recognition to financial penalties (FP).[249] Being the first instrument applying mutual recognition to final decisions, it has been implemented in the national legislations of most Member States.[250]

This instrument aims at the recognition of financial penalties, imposed as (a) a sum of money on conviction of an offence; (b) compensation for the benefit of victims; (c) a sum of money in respect of the costs of court or administrative proceedings; or (d) a sum of money to a public fund or a victim support organisation (Article 1(b) FP). The judicial and administrative authorities of the issuing Member State may send the decision, together with a certificate (for which a standard form

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248 This follows from the explanatory part of the 2008 proposal, see Council Document No. 12665/08 of 9 September 2008.

249 Council Framework Decision 2005/214/JHA of 24 February 2005, OJ 22.03.2005, L 76/16.

250 Report from the Commission based on Article 20 of the Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, COM (2008) 888 final. Updated information was provided in Council Document No. 9226/09 of 29 April 2009.

is annexed to the framework decision) to the authorities of the Member State in which the convicted natural or legal person has property or income, is normally resident, or, in case of a legal person, has its registered seat (Article 4(1) FP). This executing Member State is in principle obliged to recognise and enforce the decision without any further formality being required (Article 6 FP). Both Member States involved have to bear the costs arising on their respective territories as a result of the application of this framework decision (Article 17 FP).

2.5. MUTUAL RECOGNITION OF CONFISCATION ORDERS

On the initiative of Denmark, the European Council adopted in 2006 a Framework Decision on the application of the recognition principle to confiscation orders (CO).[251] With reference to existing European instruments on money laundering, tracing, freezing, seizing and confiscation of proceeds from crime, this framework decision would improve the execution in one Member State of a confiscation order issued in another Member State, especially for the purpose of restitution to victims of crime. The first step was already taken by the FO (Section 2.2). However, in the words of the framework decision "it is not enough merely to ensure mutual recognition within the European Union of temporary legal measures such as freezing and seizure". Rather, to combat economic crime effectively, orders to confiscate these proceeds of crime should be established on the basis of mutual recognition as well.

A confiscation order may be transmitted by the issuing Member State together with a certificate (a standard form is annexed to the framework decision) to the Member State in which the natural or legal person has property or income (if the confiscation order concerns an amount of money) or in which the property (covered by the confiscation order) is located (Article 4 CO). In principle, the executing Member State is obliged to recognise and execute the confiscation order without any intermediate measures (Article 7 CO). In principle, both Member States involved have to bear the costs arising on their respective territories as a result of the application of this framework decision. However, the executing Member State may propose the issuing Member State share those costs that the executing Member State considers to be large or exceptional. The issuing Member State is not obliged to grant such a request (Article 20 CO). Were the executing Member State to have paid damages to any interested party for injuries falling under the responsibility of the issuing Member State, the issuing Member State in principle has to reimburse those sums (Article 18 CO).

[251] Council Framework Decision 2006/783/JHA of 6 October 2006, OJ 24.11.2006, L 328/59.

2.6. MUTUAL RECOGNITION OF CUSTODIAL SANCTIONS

Following an initiative by Austria, Finland and Sweden, the Council adopted in 2008 a Framework Decision applying the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, referred to as the European enforcement order (EEO).[252] This instrument provides a basic duty for Member States to take care and control of the enforcement of final custodial sentences or detention orders imposed on their own nationals (and those permanently legally resident in their territory), also where the custodial sanction is imposed by the courts of another Member State. This would serve the social rehabilitation of sentenced EU citizens. Between the Member States, the EEO replaces the Convention on the Transfer of Sentenced Persons of 21 March 1983.

By way of a European enforcement order (which must contain the information mentioned in a standard form annexed to the framework decision), the final judgment may be sent by the issuing Member State to the competent executing Member State, possibly upon request of the executing Member State itself (Article 4 EEO). The immediate recognition of the enforcement order without any intermediate measures being required, also implies the duty to take measures forthwith for its enforcement (Article 8(1) EEO). In most situations, the consent of the sentenced person involved is not required (Article 6 EEO), though it is up to the issuing Member State to satisfy that transfer of the judgment would indeed serve the rehabilitation of this person (Article 4(2) EEO). All costs related to enforcement have to be paid by the executing Member State, except those costs arising exclusively on the territory of the issuing Member State (Article 24 EEO).

The scope of this instrument is closely related to that of the EAW. Several articles of the EAW apply to the enforcement of sentences as well (Article 25 EEO), for instance, where the sentenced person has been returned to the executing Member State for a given return guarantee by the issuing Member State (Article 5(3) EAW).

2.7. MUTUAL RECOGNITION OF PROBATION DECISIONS AND ALTERNATIVE SANCTIONS

At the end of 2008, the Council adopted a Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (PD/AS).[253] It obliges the Member States to mutually recognise and supervise foreign

[252] Council Framework Decision 2008/909/JHA of 27 November 2008, OJ 05.12.2008, L 327/27.

[253] Council Framework Decision 2008/947/JHA of 27 November 2008, OJ 16.12.2008, L 337/102.

suspended sentences, conditional sentences, alternative sanctions and decisions on conditional release. The aim of this instrument is twofold. To mutually recognise probation decisions would on the one hand serve the social reintegration of the sentenced person into the society he lives in. On the other hand, it indirectly serves the protection of victims to improve the supervision of probation conditions, thereby reducing recidivism (Article 1 PD/AS).

The issuing Member State may forward a judgment, possibly combined with a probation decision, to the Member State in which the convicted person lawfully or ordinarily resides, provided that this person has returned or wants to return to this Member State (Article 5(1) PD/AS). The judgment must be accompanied by a certificate, which is annexed to the initiative (Article 6(1) PD/AS). The Member State of residence, the executing Member State, is in principle obliged to recognise the judgment and the probation decision. It has to take all measures necessary for the supervision of the probation measure or alternative sanction (Article 8(1) PD/AS). This includes the jurisdiction to take all subsequent decisions relating to the probation measure or alternative sanction at issue, for instance if the person involved commits a new crime (Article 14 PD/AS). As such, mutual recognition means in this specific context the "entire transfer of jurisdiction" or the "transfer of responsibility".[254] The executing Member State is also responsible for all expenses made in the application of this framework decision, except for those costs arising exclusively on the territory of the issuing Member State (Article 22 PD/AS)

2.8. MUTUAL RECOGNITION OF THE CONSEQUENCES OF PREVIOUS CONVICTIONS

In 2008, the Council adopted the Framework Decision on taking account of previous convictions in the course of new criminal proceedings (PC).[255] It enables national courts to attach consequences to previous foreign convictions such as to previous national convictions, with a view to provisional detention, the nature of the penalty, concurrence or confusion with previous penalties, etc. Based on the principle of mutual recognition, the need for this instrument was found in the risk of European citizens being on unequal footing, as presently the assignment of equivalent effects to previous foreign convictions differs from state to state and depends on the place where the case is brought before the court.

As defined in the framework decision, Member States are in principle obliged to attach to earlier convictions handed down in another Member State equivalent legal effects as to earlier convictions handed down by a national court (Article 3(1) PC).

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254 See Council Document No. 12285/07 of 2 October 2007, p. 2. See also Article 1(2(b)) PD.

255 Council Framework Decision 2008/675/JHA of 24 July 2008, OJ 15.08.2008, L 220/32.

The assignment of consequences can take place in any stage of criminal proceedings, depending on the applicable national rules of the executing Member State.

2.9. MUTUAL RECOGNITION OF PROTECTION ORDERS

At this moment, efforts are being made to apply the principle of mutual recognition to protection orders. A 2010 draft directive (draft EPO) aims at the better protection of victims throughout the entire territory of the European Union, by enabling the extension of protection measures handed down in any Member State. It should result in the protected person receiving the same protection in his own Member State as he would have received if the protection measure had been issued in this executing Member State. This would ensure victims of crime, especially of gender-related crime, to be able to fully exercise their right to move and reside freely in the European Union, being an area without internal borders.[256]

Protection measures are not automatically handed down by a criminal judge; it differs from Member State to Member State whether protection measures are decided by civil, administrative or criminal judicial authorities. The draft directive nevertheless strives for the Union-wide recognition of all kinds of protection measures, as long as the infringement of obligations and prohibitions contained in the protection order constitute a criminal offence according to the law of the issuing Member State (Article 1(2) draft EPO).

Were a protection measure to be adopted in one Member State, the authorities of this Member State may issue a European protection order if the protected person would (directly or indirectly) so request (Article 5(1) draft EPO). Such a protection order may be transmitted to the executing Member State by various means, provided that a written record can be produced enabling this Member State to verify authenticity (Article 7 draft EPO). The executing Member State is in principle obliged to recognise the incoming protection order and to take all measures with the aim of ensuring the protection of the protected person (Article 8 draft EPO). Were the protection order to be broken by the person or persons against whom the protected person would have been protected, the executing Member State must immediately inform the issuing Member State (Article 8(1)(d) draft EPO). This proposal assigns the executing Member State to bear all costs, with the exception that those costs arising exclusively on the territory of the issuing Member State must be borne by it (Article 17 draft EPO).

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256 Initiative of the Member States with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order, OJ 18.03.2010, C 69/5. For the last public version followed on discussion in the Council, see Council Document No. 17750/10 of 20 December 2010. The proposal addresses victims of gender-related crime in particular.

3. THE SCOPE OF MUTUAL RECOGNITION IN THE LIGHT OF THE PARAMETERS

As demonstrated in the foregoing section, the principle of mutual recognition currently applies to different kinds of judicial decisions and in all stages of criminal proceedings. It appears that there exist separate instruments, each covering a specific type of judicial decision. This makes it tricky to get grip on the exact "status quo" of the implementation process of mutual recognition. With that aim, this section will assess the different mutual recognition instruments in the light of seven parameters included in the 2001 programme of measures. To reiterate, these parameters concern the questions of whether the mutual recognition instrument:

1. is of general application or limited to special offences;
2. maintains or drops the fulfilment of the double criminality requirement as a condition for recognition;
3. contains mechanisms for safeguarding the rights of third parties, victims and suspects;
4. defines minimum common standards necessary to facilitate application of the principle;
5. requires direct or indirect enforcement of the decision, and the definition and scope of a validation procedure;
6. determines grounds for refusing recognition and the extent to which these grounds are applicable;
7. provides liability arrangements for the Member States in the event of acquittal.

The results of this assessment will reveal the extent to which judicial decisions in criminal affairs are currently recognised in the European Union. If a certain parameter is satisfied by means of an additional legal instrument, possibly applying to the whole set of mutual recognition legal instruments, this additional instrument will be highlighted as well.

3.1. THE SERIOUSNESS OR "TRANS-BORDERNESS" OF THE UNDERLYING OFFENCE

The first time mutual recognition was mentioned as a principle to be elaborated in the context of judicial cooperation in criminal matters, it was explicitly linked to the fight against cross-border crime.[257] Shortly after, in a 2000 Communication, the

[257] Cardiff European Council, 15 and 16 June 1998, Presidency Conclusions (Cardiff Conclusions), par. 39.

European Commission stated that mutual recognition would imply the acceptance of judicial measures taken in one Member State in all other Member States "in so far it has extranational implications".[258] The question arises as to how to define "transnational implication". After all, one might say that a crime has transnational implications when it is committed in more than one jurisdiction (e.g. smuggling drug from one state via a second state to a third state), while one might also say that a Dutch national committing a crime in Spain also constitutes a crime with cross-border implications.

However, without deciding on the better definition, it appears from the variety of mutual recognition instruments that cross-border implications of criminal offences are considered irrelevant. Even in its broadest interpretation, the transnationality of criminal offences is not a criterion to be satisfied. Even the framework decision on taking account of previous convictions addresses all convictions, irrespective of the underlying offence. As a result, it can be that a Spanish judge takes account of a conviction imposed by a Dutch judge on a Dutch national for a crime committed on Dutch territory with a Dutch victim.

Nevertheless, though the transnational implications of criminal offences appear to be irrelevant, the Framework Decision on the European arrest warrant does provide restrictions regarding the seriousness of criminal offences. It determines that an arrest warrant may only be issued for offences punishable by imprisonment or a detention order for a period of at least 12 months (surrender for prosecution purposes) or where a final custodial sentence or detention order has been imposed for a period of at least four months (surrender for execution purposes) (Article 2(1) EAW). This framework decision, however, is the only mutual recognition instrument with such an explicit restriction. All remaining instruments apply the principle of mutual recognition to all crimes, without being restricted to serious crimes only. In this respect, the explanatory memorandum annexed to a draft version of the framework decision on the European evidence warrant is illustrative: "Given that the proposal for a Framework Decision is intended to replace the existing mutual assistance regime, its scope should be the same as the EU 2000 Convention. This means that the European Evidence Warrant should be available for use […] with respect to any criminal offence".[259]

It is true that some instruments contain restrictions that follow from the aim and content of the instrument itself. For instance, the framework decision on the European supervision order aims at the recognition and enforcement of supervision measures in the Member State of normal residence of the suspects, even if

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258 "Mutual Recognition of Final Decisions in Criminal Matters", Communication from the Commission, COM (2000) 495 final, p. 2.

259 See par. 33 of the Explanatory Memorandum to the Commission's proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects documents and data for use in proceedings in criminal matters, COM(2003) 688 final.

the supervision measures are imposed in another Member State (see Section 2.3). Because the framework decision addresses supervision measures, it automatically excludes petty crime, since for minor offences no supervision measures can be imposed. Such a restriction is, however, not based on the idea that mutual recognition should apply to serious crimes only; rather it follows automatically from the instrument's purpose and content.

In conclusion, the principle of mutual recognition is applicable to judicial decisions irrespective of whether the criminal offence underlying the decision has transnational implications or exceeds a certain level of gravity. The only exception to this rule concerns European arrest warrants, which can only be issued for the purpose of prosecution for offences that are punishable by at least a fixed term of imprisonment, or for the purpose of execution where a specified minimum of custody has been imposed.

3.2. REQUIRING DOUBLE CRIMINALITY

The requirement of double criminality is considered a fundamental principle from the very beginning of international cooperation in criminal affairs. Double criminality means that a specific conduct is regarded as criminal in both jurisdictions involved. As from the moment the principle of mutual recognition was introduced as a leading principle of judicial cooperation between the EU Member States, the requirement of double criminality has faltered. After all, full application of the principle of mutual recognition implies that a foreign judicial decision is dealt with as if delivered by the national judiciary, even though the own judiciary could not have delivered the decision as such. As a consequence, requiring double criminality would violate the very idea of mutual recognition.

Nevertheless, most recognition instruments enable the executing Member State to require double criminality, though to a limited extent. Most framework decisions set out the same list of offences, "listed offences", which shall give rise to recognition, without verification of the double criminality of the act.[260] For any other offence, recognition may be subject to the condition that the acts underlying the judicial decision at stake are also punishable under the law of the executing Member State.[261] Two deviations occur. First, in the context of evidence gathering, the list applies only with regard to evidence warrants, the execution of which would need a search or seizure. As to all other evidence warrants, the requirement of double criminality

[260] E.g. article 2(2) EAW; article 6(1) CO; article 7(1) EEO.

[261] However, where the offence is related to taxes or duties, customs and exchange the executing state may not refuse recognition and execution on the ground that the national law does not impose the same kind (of regulations) of tax, duties, customs and exchange.

is totally abolished.[262] As to financial penalties, the list of underlying acts that may not be deemed to be double criminality is extended by six other acts, because for such acts financial penalties are commonly imposed.[263]

The creation of a list of offences for which double criminality may not be checked is a solution "for the time being". This can be illustrated quite well by the example of mutual recognition in the context of evidence gathering. The framework decision on the European evidence warrant, currently in force, has abolished the requirement of double criminality almost fully. Only where searches or seizures are required in order to execute the foreign evidence warrant, the well-known list of offences applies; were the evidence warrant to be issued for an act described on the list, double criminality may not be verified. The 2003 draft version of this framework decision recognised in its preamble that requiring double criminality must be considered as being inconsistent with mutual recognition. However, it also recognised that maintaining the list of offences, at least in the framework of search and seizure would be necessary for a transitional period of five years:

> "[I]n order to facilitate the change-over to the European Evidence Warrant exception should be made for a transitional period for those Member States that have under existing rules made execution of a request for search and seizure dependant on the condition of dual criminality".[264]

A directive for a European investigation order is currently under negotiation.[265] The draft text does not mention the issue of double criminality, neither in the list of grounds for refusal, nor in a separate provision. Had the requirement been entered in the draft directive, this "would constitute a step backwards as regards to the current framework of mutual legal assistance as well as in the progressive implementation of the principle of mutual recognition", the Council recently stated.[266] This illustrates that the ultimate goal is to abolish this requirement totally.

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262 Article 14 EEW.

263 Article 5 FP.

264 Par. 10 of the preamble to the Commission's proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects documents and data for use in proceedings in criminal matters, COM (2003) 688 final, p. 33.

265 See Section 2.2.

266 Council Document No. 12201/10 of 20 July 2010, p. 12.

3.3. SPECIFIC ARRANGEMENTS FOR THIRD PARTIES, VICTIMS, AND SUSPECTS TO SAFEGUARD THEIR RIGHTS IN THE CONTEXT OF MUTUAL RECOGNITION PROCEEDINGS

Because the recognition principle has not only been introduced to smooth judicial cooperation between the EU Member States, but also to improve the procedural safeguards of the suspect and the defence, it is self-evident that one of the parameters deals with the question of whether the different mutual recognition instruments focus on certain mechanisms to protect the rights of suspects. Furthermore, it also seeks mechanisms concerning the protection of rights of third parties and victims. It is apparently assumed that such mechanisms would facilitate the application of mutual recognition.

Examination of the different recognition instruments has shown that whether specific arrangements for third parties, victims and suspects are provided for or not differs from framework decision to framework decision. But as described below, most arrangements are found in autonomous instruments, some of them in the recognition instruments. In the following, it will be shown if and how specific attention is paid to safeguarding the individual rights of each group separately.

3.3.1. Suspects

Several specific arrangements for suspects are added to the mutual recognition instruments. In the context of surrender, the suspected is provided a *right to be informed* by the issuing Member State about the arrest warrant, its content and its consequences before it is issued to the executing Member State (Article 11(1) EAW). The right to be informed also includes the right to be informed by the executing Member State of the possibility to consent to surrender (Article 13 EAW). Member States are required to take the necessary measures to ensure that consent is established by the suspect "voluntarily" and "in full awareness of the consequences," namely renunciation of entitlement to the speciality rule. Were the suspect to give no consent to surrender, he has *the right to be heard* by the judicial authorities of the executing Member State, in accordance with national law (Article 14 EAW). Where an arrest warrant is issued for execution purposes, the arrested person is furthermore provided with the right to *legal counsel* and an *interpreter* in accordance with the national law of the executing Member State (Article 11(2) EAW). After being surrendered for prosecution purposes, the suspect may not be prosecuted, sentenced or otherwise deprived of liberty for an offence other than for which he has been surrendered (Article 27(2) EAW). This fundamental principle is defined as the *speciality rule*. Only in limited circumstances does it not apply (e.g. where the suspect has consented to surrender). A final arrangement for the requested person in the EAW provides that surrender has to take place within certain time limits; *expiry of these time limits shall lead to release of the suspect* if still being held in custody (Article 23 EAW).

Further arrangements for suspects are provided for in the context of mutual recognition of custodial sanctions. If the sentenced person is still in the issuing Member State, he is *entitled to give his opinion orally or in writing* (Article 6(3) EEO). The issuing Member State has to take this opinion into account when deciding whether to transfer the judicial decision to the executing Member State. If it has decided to do so, the sentenced person has the *right to be informed* (Article 6(4) EEO). A standard form of notification, to be used to this end, is annexed to the framework decision.

Several instruments require the possibility of *legal remedies* for any interested party, suspects included. The suspect in whose case a freezing order or confiscation order is transmitted to the executing Member State must be ensured legal remedies against recognition and execution of such an order (Article 11 FO, Article 9 CO). In the framework of cross-border evidence gathering, effective remedies for the suspect must be ensured against the use of coercive measures in order to obtain evidence. The exercise of this right should be facilitated, in particular by providing the suspect with relevant and adequate information (Article 18 EEW).

Because the proposed new directive on this issue, the draft directive on the European investigation order, includes several specific provisions for certain investigation measures, it also includes more specific arrangements for persons involved compared to its predecessor. It is possible that an investigation requires the temporary transfer of a person who is in custody in the executing Member State to the issuing Member State for the purpose of investigation (e.g. to ensure that the person is available for a hearing). In such a situation, the period of custody in the issuing Member State must be deducted from the period of detention yet to be undergone in the executing Member State (Article 19(6) draft EIO). Furthermore, that person may not be prosecuted or detained for acts or convictions outside the scope of the investigation order in question and preceding the date of departure from the executing Member State (Article 19(7) draft EIO). It may also be that a suspect whose transfer to the issuing Member States is undesirable or impossible is heard by means of a videoconference. In such a situation, he is entitled to be assisted by an interpreter upon his own request (Article 21(10) in conjunction with Article 21(6)(d) draft EIO).

In addition to specific arrangements in the various mutual recognition instruments, more general arrangements are addressed in specific legal instruments that aim at the minimum harmonisation of procedural rights in criminal proceedings. In recent years, efforts have been made to create common minimum standards of procedural rights, with little success so far. In 2004, a draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union was initiated,[267] in order to solve the lack of trust between the Member

[267] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

States.[268] This draft proposed a comprehensive set of minimum rights, such as the right to legal advice and the right to free and accurate interpretation and translation. At that time, however, it appeared too ambitious. Another turn is now being taken. At the end of 2009, the Council adopted a "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".[269] This roadmap aims at the step-by-step creation of minimum procedural rights. By addressing the procedural rights in this way, the Council assumes that overall consistency will best be ensured in order to best facilitate the principle of mutual recognition. In the preamble to the first legislative measure taking action on following the roadmap, the Council reiterated that:

> "[t]he extent of the mutual recognition exercise is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects and common minimum standards necessary to facilitate the application of the principle of mutual recognition".[270]

This first measure regards the rights to translation and to interpretation; a directive on this issue has recently been adopted.[271] This directive aims at the creation of a basic right for the suspect or the accused person who does not speak or understand the language of the criminal proceedings against him; he should be provided with *written translation of essential documents* as well as with *interpretation in a language he understands*. Recently, a second step on the new route has been taken: it regards the draft directive on the right to information in criminal proceedings. The purpose of this proposal is provide minimum standards on the suspect's right to be *informed about his rights* in the criminal proceedings against him *and also about the charges against him*.[272] It follows from the roadmap that the future issues to be regulated through directives are the right to legal advice and legal aid, and the right to communicate with relatives, employers and consular authorities.

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268 See par. 24 and par. 25 of the Explanatory Memorandum to the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

269 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 4.12.2009, C 295/1.

270 Initiative of the Member States with a view to the adoption of a Directive of the European Parliament and of the Council on the rights to interpretation and to translation in criminal proceedings, OJ 18.03.2010, C 69/1.

271 Supra note 167.

272 Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392/3.

3.3.2. Third parties

In the context of mutual recognition of freezing orders and confiscation orders, any interested party, including *bona fide* third parties, is entitled to have recourse to *legal remedies* (Article 11 FO, Article 9 CO). This implies the right to bring an action before the court against the recognition and execution of a freezing order or confiscation order with the aim of saving their (legitimate) rights of interests. The right to use legal remedies will also apply to any interested party against whom coercive measures have been used in the execution of a foreign evidence warrant or, in the future, an investigation order (Article 19 EEW, Article 13 draft EIO).

It may be that a person who resides on the territory of the executing Member State has to be heard as a witness or expert by the judicial authorities of the issuing Member State by means of a videoconference because physical transfer to the issuing Member State is undesirable or impossible. In such a situation, the witness or expert will in future possibly be entitled to be *assisted by an interpreter* upon his own request (Article 21(6)(d) draft EIO).

3.3.3. Victims

Although none of the framework decisions on mutual recognition contains mechanisms for safeguarding the rights of victims, a separate instrument was adopted in 2001 on the standing of victims in criminal proceedings in 2001, in the meantime implemented into national legislation.[273] According to the preamble, it follows from the 1999 Tampere Conclusions that "minimum standards should be drawn up on the protection of the victims of crimes", apart from arrangements under civil procedure. The instrument does not refer to the principle of mutual recognition and the need for harmonisation explicitly; it is nevertheless illustrative for the development towards one European judicial area based on the principle of mutual recognition for which a minimum level of common rules is auxiliary. The 2001 framework decision requires Member States to adapt their laws and regulations in such a way that victims are guaranteed:

1. the possibility to be heard during proceedings and to supply evidence;
2. access to information of relevance for the protection of their interests (which organisations can support them, the type of support they can obtain, the possibilities of legal advice or aid, release of the suspect etc.), including the right not to receive this information;
3. access to communication and interpretation facilities, in respect of victims having the status of witnesses or parties;

[273] Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, OJ 22.03.2001, L 82/1.

4. access to advice as well as legal aid free of charge, where they have the status of parties;
5. the possibility of being refunded legal costs where they participate as parties or witnesses in the criminal proceedings;
6. a suitable level of protection;
7. the right to be compensated adequately by the offender;
8. the possibility to participate properly in the criminal proceedings of a Member State of which than they are not resident (e.g. by way of a videoconference).

In order to reach a maximum level of protection of the victim's interests, Member States are ordered to enhance and strengthen cooperation with each other, for instance by forming networks of victim support organisations. Outside the courtroom, Member States are ordered to promote mediation in appropriate criminal cases in order to reach a solution between victim and offender by negotiation.

3.4. COMMON MINIMUM STANDARDS TO FACILITATE THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS

Initially, mutual recognition was regarded as an alternative to harmonisation of national criminal law, as it would not require the Member States to adapt their national laws. However, this position rapidly shifted; it appears explicitly from the Hague Programme that a minimum level of harmonisation would be necessary for a workable mutual recognition system.[274] This point of view lasts to this day. Furthermore, under the regime of the Lisbon Treaty, common minimum standards of procedural criminal law may only be established with the aim of facilitating the mutual recognition of judicial decisions (Article 82(2) TFEU).

However, none of the current mutual recognition instruments supply shared minimum norms. Only an early draft of the framework decision on the European evidence warrant combined the application of mutual recognition with harmonised rules on evidence gathering. It proposed, for example, that where there is a need for search and seizure in order to obtain evidence, a search of premises shall not in principle start at night and a person whose premises have been searched shall be entitled to receive a written notification of the search (Article 12(2) of the 2003 draft).[275] The final version of this instrument, however, does not contain the common standards.

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[274] Chapter 2, Sections 2.2. and 2.3.

[275] Commission's proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects documents and data for use in proceedings in criminal matters, COM (2003)

Most efforts for creating shared minimum norms are made outside the mutual recognition instruments, namely in separate framework decisions and directives. In the past years, the debate has concentrated on the establishment of minimum common norms regarding procedural safeguards for the suspect. As mentioned already (Section 3.3.1), the failure to establish a general legal instrument on procedural rights in criminal proceedings is currently replaced by the route of a "Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".[276] The aim is that procedural rights for suspects are now harmonised based on a step-by-step approach. The first steps have already been taken: a directive on the rights to interpretation and to translation in criminal proceedings has been recently adopted, and a directive on the right to information in criminal proceedings has just been presented.[277] Further initiatives, aiming at the facilitation of mutual recognition, are expected in the field of evidence admissibility. The European Commission has recently consulted the Member States on the question of whether common standards should be designed to secure the admissibility of evidence that has been obtained in another Member State.[278]

3.5. DIRECT OR INDIRECT ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS

The principle of mutual recognition prescribes the enforcement of foreign judicial decisions, without room for intermediate measures. As a result, mutual recognition implies that penalties, sentences and other measures are enforced as imposed by the issuing Member State without the executing Member State being entitled to change the legal nature or duration of the sanction or measure. This procedure of direct enforcement is traditionally referred to as "continued enforcement".[279] There are also international treaties and agreements allowing the executing state to convert a sanction into a national sanction by means of a validation procedure. This *exequatur* procedure may enable the executing state to adapt a foreign penalty, sanction or measure to national standards, thereby binding it by the findings of the original judicial decision.[280]

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688 final.

276 Supra note 269.

277 Supra notes 167 and 272.

278 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, par. 4.2.

279 E.g. Article 9(1)(a) Convention on the Transfer of Sentenced Persons, Strasbourg, 21 March 1983. This convention has been ratified by 63 countries, under which non-members of the Council of Europe (http://www.conventions.coe.int). It has been used and is still be used very frequently throughout the years.

280 E.g. Article 9(1)(b) Convention on the Transfer of Sentenced Persons.

Because, since Tampere, the enforcement of foreign judicial decisions in criminal matters has to take place on the basis of the principle of mutual recognition, the *exequatur* procedure is compulsory. The 2001 programme of measures mentions that "the principle of conversion of the decision should be examined to see to what extent it is compatible with the mutual recognition principle enshrined in the Tampere conclusions".[281] As mentioned above, full mutual recognition implies direct enforcement, rather than conversion. The different mutual recognition instruments demonstrate that the *exequatur* possibilities have indeed decreased. The commonly used phrase "without any further formalities required" expresses that direct or continued enforcement is the basic way of enforcement to be followed. There are, however, some mutual recognition instruments that enable the executing Member State to alter the original penalty, sanction or measure.

1. If a financial penalty has been imposed in the issuing Member State for acts that were not carried out on the territory of the issuing Member State, but that fall within the jurisdiction of the executing Member State, the latter is entitled to reduce the amount of the financial penalty to the maximum amount provided for similar offences under its national laws (Article 8 FP).

2. Financial penalties may further be substituted by another sanction, including a custodial sanction where it is impossible to enforce the judicial decision in its original form, either totally or in part (Article 10 FP). Such an alternative is, however, only allowed upon the consent of the issuing Member State, which must be expressed in the certificate accompanying the original judicial decision.

3. The same applies with regard to confiscation orders. Upon consent of the issuing Member State, the executing Member State may impose another sanction, including a sanction that deprives the person's liberty, as an alternative to the original judicial decision imposing a confiscation order (Article 12(4) CO).

4. If the executing Member State is confronted with a custodial sanction that exceeds the maximum duration provided for in domestic law, it may decide to impose this maximum penalty instead of the original penalty (Article 8(2) EEO). The same applies to foreign probation decisions or alternative sanctions (Article 9(2) PD/AS). However, the duration of probation measures, probation periods and alternative sanctions may also be adapted if it contravenes the law of the executing Member State for reasons other than exceeding the maximum duration provided domestically (Article 9(1) PD/AS).

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[281] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ 15.01.2001, C 12/11.

5. The very nature of sanctions and measures may also be a justification for the executing Member State to apply adaptations. If the executing Member State determines that the nature of a custodial sanction, a probation measure, an alternative sanction or a pre-trial supervision measure is incompatible with the fundamental principles of its domestic law, it is entitled to adapt the original sanction or measure to its national standards (Article 8(3) EEO, Article 9(1) PD/AS, Article 13 ESO).

In conclusion, there is still room for the executing Member State to change and adapt judicial decisions handed down in another Member State. Although restricted to limited circumstances, some provisions are formulated in a relatively open manner, possible leaving more room for discretion to the executing Member State than originally intended. The question arises as to whether conversion procedures can be reduced totally. After all, in view of the differences between the criminal codes of the 27 Member States, it is likely that sanctions imposed in one Member State happen to be unenforceable in another Member State, simply because the criminal code of the executing Member State does not provide the sanction in question.

3.6. GROUNDS TO REFUSE RECOGNITION OF FOREIGN JUDICIAL DECISIONS

Under the influence of the principle of mutual recognition, efforts were made to reduce the number of grounds on the basis of which the executing Member State would be allowed to refuse the recognition and enforcement of a judicial decision handed down in another Member State. In particular, grounds for refusal related to national sovereignty were meant to be reduced. After all, based on the assumption of mutual trust between the Member States, mutual recognition was meant to apply with little room for intermediate checks. The fact that recognition can no longer be refused because the underlying offence constitutes a political or press offence illustrates this.

Nevertheless, more than ten years after the launch of the recognition principle in Tampere, the different mutual recognition instruments do provide different grounds for refusal. Below, two tables are given. Both give an overview of the general grounds for refusal provided for in the (draft) framework decisions and (draft) directives implementing the principle of mutual recognition; those grounds for refusal that relate exclusively to the content of a specific instrument are not included. The only difference between the tables relates to the date of compilation. Whereas the first table was made in 2008 the second table dates from 2010. The difference between the overviews reveals some interesting developments.

The first table describes the grounds for refusal included in nine framework decisions, five of which were still under negotiation at the time. First, it displays a

Table 1. Refusal grounds 2008

(x discretionary refusal ground – xx mandatory refusal ground)

	Measure								
Ground	*EAW*	*FO*	*draft EEW*	*draft ESO*	*draft PC*	*CO*	*FP*	*draft EEO*	*draft PD/AS*
a. *Ne bis in idem* violation	x/xx	x	x/xx	xx	xx	x	x	x	x
b. Amnesty	xx				xx				
c. Immunity/privilege		x	x	x		x	x		x
d. Age	xx			x			x		x
e. Prescription	x			x	x	x	x	x	x
f. Territoriality	x					x	x		
g. Insufficiency of information		x		x		x	x		x
h. No consent of the suspect				xx					
i. Decision *in absentia*	x					x	x	x	x

distinction between mandatory grounds of refusal and optional/discretionary grounds for refusal. Where a ground for refusal is optional, the decision whether to recognise a certain judicial decision remains at the discretion of the executing Member State. On the contrary, a mandatory ground for refusal obliges the executing Member State to refuse recognition whenever the mandatory ground for refusal shows up. Secondly, it appears that grounds for refusal are approached variously throughout the different mutual recognition instruments. Some framework decisions allow just three grounds to decline recognition, while in other framework decisions six or seven grounds for refusal are included.

The second table dates from two years later, 2010. It reproduces the grounds for refusal provided for in nine framework decisions and two directives; both directives are in the draft stage. Compared to the first table, some notable observations can be made. As a first observation, it is noteworthy that the final framework decisions include more grounds for refusal than their corresponding draft versions. This is surprising in view of the fact that mutual recognition would imply a reduced number of grounds for refusal. The more grounds for refusal are included, the more reasons exist for the executing Member State to exercise its discretion and to decline recognition and enforcement of a foreign judicial decision. The increased number of grounds for refusal has resulted in more consistency. After all, the results of the first table, for instance, raised the question of why immunity would constitute a ground to refuse the enforcement of confiscation orders and financial penalties, but

Table 2. Refusal grounds 2010

(x discretionary refusal ground – xx mandatory refusal ground)

	Measure										
Ground	*EAW*	*FO*	*EEW*	*ESO*	*PC*	*CO*	*FP*	*EEO*	*PD/AS*	*draft EIO*	*draft EPO*
a. *Ne bis in idem* violation	x/xx	x	x	x		x	x	x	x		x
b. Amnesty	xx										x
c. Immunity/ privilege		x	x	x		x	x	x	x	x	x
d. Age	xx			x			x	x	x		x
e. Prescription	x			x		x	x	x	x		x
f. Territoriality	x		x			x	x	x	x		x
g. Insufficiency of information	x	x	x	x		x	x	x	x	x	x
h. No consent of the suspect				x				x	x		
i. Decision *in absentia*	x					x	x	x	x		

not to decline the execution of custodial sanctions. However, it appears from the second table that some of the boxes that were empty without reason are now ticked.

Secondly, it appears that nearly all grounds for refusal are formulated as optional grounds. Whereas the first table demonstrates eight mandatory grounds for refusal, these are reduced to four in the second table (only occurring in the context of surrender and pre-trial supervision measures). At first sight, this alteration might show an increased degree of discretion for the executing Member State, which can decide on its own whether or not to invoke an optional ground for refusal. On the other hand, where a specific mandatory ground for refusal is changed in an optional one, the chance of recognition increases too, namely in cases that initially would have been automatically refused.

A further observation worth making concerns the absence of any ground for refusal in the final framework decision on taking account of previous conviction in the course of new criminal proceedings (PC). It is all the more surprising given that the initial draft versions of this framework decision did include a range of grounds for refusal.[282] The number decreased gradually and it did not take long

[282] See Council Document No. 7645/05 of 30 March 2005.

before all grounds were removed from the text of the framework decision. There have been several debates on this issue in the Council. The general point of view was that grounds for refusal were superfluous, because the framework decision obliges Member States to take account of a foreign previous conviction in the same way as a national conviction. If the executing Member State is not allowed on the basis of domestic law to take into account a national conviction because the underlying offence is covered by amnesty rules, it is also not allowed to take account of a similar foreign conviction.[283]

Below, each ground for refusal is briefly described. Because the framework decision on taking account of previous convictions does not include any of them, this framework decision will not be mentioned. "All mutual recognition instruments", means all but the framework decision PC.

a. The principle of ne bis in idem

All mutual recognition instruments, except for one, address the principle of *ne bis in idem* as an optional ground to refuse the recognition and enforcement of foreign judicial decisions. Nearly all instruments simply state that recognition may be refused if execution would infringe (or: be contrary to, or: contravene) the principle of *ne bis in idem*.[284] The draft EIO is silent on *ne bis in idem*, and the framework decisions EAW and FP contain deviating provisions on *ne bis in idem*.

Within the framework of surrender, there is a distinction between mandatory refusal and optional refusal. The executing Member State is obliged to refuse surrender if:

> "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" (Article 3(2) EAW).

It is very probable that the authors of the text were referring to Article 54 CISA, as is evident from the similarities between provisions. Article 54 CISA runs as follows:

> "A person whose trial has been finally disposed of in one 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".

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283 The following Council Documents can successively be consulted to read the discussions: No. 7308/06 of 15 March 2006; No. 8652/06 of 16 May 2006; No. 10676/06 of 21 June 2006.

284 Respectively Article 7(1)(c) FO; Article 13(1)(a) EEO; Article 15(1)(c) ESO; Article 8(2)(a) CO; Article 9(1)(c) EEO; Article 11(1)(c) PD/AS; Article 9(2)(g) draft EPO.

The EAW provision clearly addresses a previous trial for the same acts in another EU Member State. Refusal of surrender is then imperative. Where, however, the executing Member State itself is involved in a previous trial or a simultaneous prosecution, refusal of surrender is allowed, rather than being obliged. After all, the framework decision on the European arrest warrant provides an optional ground for refusal if the requested person is being prosecuted in the executing Member State for the same act, or where the executing Member State has decided not to prosecute for that act, or to halt proceedings, or where a final judgment has already been passed for that act (Article 4(2) and (3) EAW).

The executing Member State may also refuse to recognise and execute a financial penalty for *bis in idem* reasons. The framework decision on this matter provides an optional ground for refusal if a judicial decision against the same person and for the same acts has already been delivered in the executing Member State itself. The same applies where such a judicial decision has already been delivered in another state (not explicitly mentioned as a Member State), provided that this other state has already executed the decision (Article 7(2)(a) FP).

The principle of *ne bis in idem* is currently (Table 2) approached more coherently than compared to some years ago (Table 1). Nevertheless, the above overview shows that there remain several differences between the mutual recognition instruments for which an obvious justification is lacking.

b. The offence is covered by amnesty

Where a Member State issues a European arrest warrant for the surrender of a suspected or convicted person, the executing Member State must refuse surrender if the offence underlying the arrest warrant is covered by national amnesty provisions, provided that the executing Member State had jurisdiction over that offence (Article 3(1) EAW). The draft directive for a European protection order proposes to include the same provision, with the only difference that it is formulated as a discretionary ground for refusal (Article 9(2)(d) draft EPO). It remains unclear why a national amnesty provision can only constitute a ground for refusal in the contexts of surrender and victim protection, while amnesty will not hinder mutual recognition in other contexts, such as the execution of final judgments.

c. Immunity or privilege

In contrast to amnesty, the issue of national immunity provisions is approached much more comprehensively. The existence of immunities or privileges in the national laws of the executing Member State constitutes an optional ground to refuse the recognition and enforcement of all kinds of judicial decisions covered

by the mutual recognition instruments.[285] The only exception concerns European arrest warrants, for reasons unknown to the author.

d. The person cannot be held criminally responsible because of his age

The age at which a person can be prosecuted for having committed a crime differs from Member State to Member State. The issue of age plays a role in the mutual recognition instruments on the execution of final judgments (financial penalties, custodial sanctions, probation measures and alternative sanctions), pre-trial supervision measures and protection orders. As determined in these instruments, recognition may be declined if the suspect or convicted person cannot, according to the laws of the executing Member State, be held criminally responsible for the act or behaviour underlying the foreign judicial decision.[286] Were this to be the situation in the context of surrender, the executing Member State is even obliged to refuse the recognition of a European arrest warrant (Article 3(3) EAW). No reason has been given for this distinction. I assume this is related to the differing consequences refusal may have in differing contexts. Within the framework of surrender, refusal because of age would keep the youth offender or youth suspect within the executing Member State. In contrast, refusal to enforce a custodial sanction because of age would imply that the youth offender has to undergo the sentence in the issuing Member State.

e. Prescription

It may be that a Member State is confronted with a foreign judicial decision the execution of which would be statute-barred under domestic law if it were a national judicial decision. It may also be that a foreign judicial decision is handed down in a current criminal case for an alleged criminal offence prosecution of which would be statute-barred under domestic criminal law. In such situations, the executing Member State may decline recognition and enforcement of the judicial decision, if it concerns a European arrest warrant, a final judgment (a financial penalty, a custodial sanction, a probation measure or an alternative sanction), a pre-trial supervision measure, a confiscation order or a European protection order, and provided that the underlying offence fell within its jurisdictional powers.[287] All mutual recognition instruments related to evidence – the instruments on freezing orders, evidence

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285 Respectively Article 7(1)(b) FO; Article 13(1)(d) EEW; Article 15(1)(f) ESO; Article 8(2)(c) CO; Article 7(2)(e) FP; Article 9(1)(f) EEO; Article 11(1)(f) PD/AS; Article 10(1)(a) draft EIO; Article 9(2)(e) draft EPO.

286 Respectively Article 7(2)(f) FP; Article 9(1)(g) EEO; Article 11(1)(g PD/AS; Article 15(1)(g) ESO; Article 9(2)(h) draft EPO.

287 Respectively Article 4(4) EAW: Article 7(2)(c) FP; Article 9(1)(e) EEO; Article 11(1)(e) PD/AS; Article 15(1)(e) ESO; Article 8(2)(h) CO; Article 9(2)(f) draft EPO.

warrants and investigation orders – lack a similar ground for refusal. This possibly relates to the early stage of criminal proceedings in which evidence warrants are issued, but, if that is the case, would ignore the fact that not only the enforcement period of sanctions can expire, but also the opportunity to prosecute an offence.

f. Territoriality

The principle of territoriality closely relates to national sovereignty, as expressed by the word "territoriality" itself. Territoriality functions as a discretionary ground to refuse European arrest warrants, European evidence warrants, confiscation orders, protection orders and financial judgments (imposing financial penalties, custodial sanctions, probation decisions and alternative sanctions).[288] The executing Member State may invoke the territoriality ground if the underlying offence is regarded as having been committed in whole or in part within its own territory. The underlying offence may also happen to be committed outside the issuing Member State, within the territory of a third state. If according to national law, the executing Member State would not have jurisdiction of such an offence committed outside its national borders, it may decline the execution of European arrest warrants, European evidence warrants, financial penalties and confiscation orders. In this context, it is in particular unclear why European evidence warrants may be refused for territoriality reasons, while the draft directive on European investigations orders lacks a similar ground for refusal.

g. Insufficiency of information

The judicial decision for which recognition is sought should be sent by the issuing state to the executing state, either by way of a warrant (e.g. an arrest warrant) – then the warrant is the subject of recognition – or by sending an order (e.g. freezing order) or judgment (e.g. containing a financial penalty) together with a standard certificate – then the judicial decision is the subject of recognition. Of course, if it concerns a previous conviction, nothing has to be sent to the executing state; here, it is not the judgment or warrant that would be the subject of recognition, but rather the legal fact that an earlier conviction has taken place.[289]

The warrant or the certificate should contain the information required in the relevant mutual recognition instrument. If the information given by the issuing Member State is insufficient or lacking, recognition and enforcement must in general be postponed until additional information is provided. If the issuing Member State

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288 Respectively Article 4(7) EAW; Article 13(1)(f) EEW; Article 8(2)(f) CO; Article 9(2)(i) draft EPO; Article 7(2)(d) FP; Article 9(1)(l) EEW; Article 11(1)(k) PD/AS.

289 Of course, to be able to attach consequences to previous foreign convictions, information on them should be available. Therefore, work is going on to improve the availability of information throughout the entire Union.

were nevertheless to default in sending the required information, the foreign judicial decision can decide not to deal with the judicial decision. This applies to all judicial decisions covered by the mutual recognition instruments.[290]

This gives a strange incongruousness: whereas the instrument makes it imperative for the issuing Member State to provide certain information, the non-fulfilment of such an obligation would have no consequences if the executing Member State so decided.

h. No consent of the suspect

The person's consent as a mandatory condition for recognition plays a role in the context of final sanctions involving deprivation or restriction of liberty. This must be understood for the purposes of social rehabilitation.

The Member State that desires to issue a pre-trial supervision measure, a probation measure or an alternative sanction towards another Member State for the purpose of execution at that place, is only allowed to do so if the person involved has consented (Article 9(1) and (2) ESO, respectively Article 5(1) and (2) PD/AS). If this criterion were not to be met, the executing Member State is allowed to refuse to execute the sanction or measure (Article 15(1)(b) ESO, respectively Article 11(1)(b) PD/AS). This gives the same incongruousness as described under point g. On the one hand, the two framework decisions peremptorily demand the issuing Member State to make sure that the person involved consents to transmission of the judgments. On the other hand, however, the absence of consent does not oblige the executing Member State to return the judicial decision to the issuing Member State.

In the context of custodial sanctions, the consent of the sentenced person seems at first sight to play a similar role. After all, the framework decision on the European enforcement order determines that a judgment imposing a custodial sanction may only be forwarded by the issuing Member State to the executing Member State with the consent of the sentenced person (Article 4(1) in conjunction with Article 6(1) EEO). However, a close look to the exceptions formulated to the rule of consent being required leads to the conclusion that the consent of the sentenced person will only be required in very rare cases. To mention the first exception only, it is determined that consent is not required where the judgment is forwarded to the Member State of nationality of the sentenced person (Article 6(2)(a) EEO), but it will commonly be this Member State to which judgments imposing custodial sanctions will be forwarded. After all, in most situations, the Member State of nationality is also the state of normal residence, making it the best place for social reintegration. In conclusion, in the context of custodial sanctions, the person's consent plays a

[290] Respectively Article 8 in conjunction with Article 15 EAW; Article 7(1)(a) FO; Article 8 in conjunction with Article 16(1)(a) EEW; Article 15(1)(a) ESO; Article 8(1) CO; Article 7(1) FP; Article 9(1)(a) EEO; Article 11(1)(a) PD/AS; Article 5(1) draft EIO; Article 9(2)(a) draft EPO.

smaller role compared to the contexts of pre-trial supervisions measures, probation measures and alternative sanctions. However, were consent to be required in rare cases, its absence does not constitute a mandatory ground for refusal (Article 9(1)(b) EEO).

i. In absentia

That a sentence has been rendered *in absentia* functions as an optional ground for refusal in five relevant mutual recognition instruments: EAW, CO, FP, EEO and PD/AS. Initially, different solutions were chosen in the different framework decisions on the issue of decisions *in absentia*. Under the Slovenian Presidency efforts were promised to create consistency in the approach of the above-mentioned instruments to judgments handed down *in absentia*.[291] This promise has been fulfilled with the adoption of a 2009 framework decision, amending the five framework decisions mentioned above in such a way that an *in absentia* decision – being the result of a trial at which the person did not appear in person – may result in non-recognition.[292]

The basic rule is that recognition may be refused (optional ground for refusal) if the person involved did not appear personally at the trial resulting in the forwarded decision. However, non-appearance of the person can be rectified if the certificate accompanying the judicial decisions states that:

- the person was summoned in person – or by other means actually received information of the scheduled date and place of the trial – and was informed that a decision may be handed down if he would not appear;
- the person, being aware of the trial, had given a mandate to a legal counsellor to defend him, and was indeed defended;
- the person, after being notified of the decision and being expressly informed about the right to a retrial or appeal, stated not to contest the decision or did not request a retrial or appeal within the applicable time-frame.

In addition, some extra provisions, tailored to a single framework decision, provide further reparation possibilities. It would go too far to describe them all here. In view of what has been noted several times, the efforts made with the framework decision on *in absentia* decisions makes an important contribution in terms of coherency and consistency of the mutual recognition system.

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291 Slovenian Presidency of the EU 2008, Informal Meeting of the Justice and Home Affairs Ministers, Brdo pri Kranju, 24-26 January 2008.

292 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 27.03.2009, L 81/24.

3.7. LIABILITY ARRANGEMENTS IN THE EVENT OF ACQUITTAL

Although the connection between the foregoing six parameters is obvious, this last one seems at first sight to be out of place. It is not clear in what sense the provision of liability arrangements in the event of acquittal in a mutual recognition instrument should say something about the effectiveness of the instrument. In addition, it is unclear what is meant precisely by liability arrangements; neither the programme of measures, nor the different recognition instruments, nor any other European document has explained exactly what is meant by this parameter. Suffice it so say here that liability arrangements are nowhere mentioned in any of the mutual recognition instruments or in any autonomous instrument.

4. OBSTACLES AND BOTTLENECKS IN IMPLEMENTING MUTUAL RECOGNITION

Now that the scope of mutual recognition, as expressed in the different instruments, has been delineated, the following will conclude what matters have in particular a hindering effect on achieving enhanced mutual recognition of judicial decisions in criminal matters between the EU Member States. A matter can be concluded as being problematic for several reasons. It may be an issue very clearly contravening the very idea of mutual recognition. It may also concern a matter approached in various ways throughout the different instruments for no obvious reason.

4.1. THE REQUIREMENT OF DOUBLE CRIMINALITY

The principle of dual criminality is a controversial point of discussion in the context of the current developments. It is a principle closely linked to the sovereignty of nation-states. However, mutual recognition implies the enforcement of foreign judicial decisions, irrespective of whether the act underlying the decision constitutes a criminal offence in the executing Member State.

The partial abolishment of the double criminality requirement for a range of acts, the listed offences included in most mutual recognition instruments, is said to be a first step towards total abolishment. A further step has recently been taken as the draft directive on the European investigation order does not mention the issue at all. Nevertheless, at this moment dual criminality cannot be said to be abolished, even in part. After all, the list of acts largely describes offences that are already criminalised in all Member States.[293] In addition, it remains to be seen whether the final text

[293] See for instance A. Klip, *European Criminal Law. An Integrative Approach*, Antwerp: Intersentia, 2009, p. 335; Also G. Vermeulen, 'How Far Can We Go in Applying the Principle of Mutual

of the directive for a European investigation order will remain silent on the issue.

4.2. COMMON MINIMUM STANDARDS

The principle of mutual recognition is based on mutual trust, and as such on the presumption that all Member States meet the international standards of human rights. To facilitate the principle of mutual recognition, efforts were made to create a minimum level of common norms, in particular regarding procedural rights for individuals in criminal proceedings. Nevertheless, due to the many and significant differences between the national criminal justice systems of the Member States combined with the differences of opinion on ideal standards, the results have so far not been very successful. As shown, the new step-by-step approach seems to have better results in prospect.

4.3. DIRECT ENFORCEMENT OR *EXEQUATUR*

Mutual recognition implies that foreign judicial decisions are enforced without intermediate checks and procedures being required. Traditional possibilities to convert foreign decisions into national decisions and to adapt these decisions to national standards (*exequatur*) were considered to be in violation of the very notion of mutual recognition. Nevertheless, it has been demonstrated that some recognition instruments still leave room to convert a foreign sanction into an alternative sanction. The question is whether conversion possibilities can be removed totally; it can be imagined that situations will continue to occur in which the issuing state has imposed a sanction that is impossible to be enforced by the executing state. However, three mutual recognition instruments (the more recent ones) enable the executing Member State to apply adaptations because the original sanction is incompatible with fundamental principles of domestic law in terms of nature or duration. It is up to the executing Member State itself to determine the incompatibility. These provisions are likely to re-open the door to conversion. It must be concluded that the indirect enforcement option is not in the least abolished.

4.4. GROUNDS FOR REFUSAL

Because the invocation of grounds for refusal would basically limit the functioning of pure mutual recognition, even contradict its essence, efforts have been made to reduce their number and nature. This has turned out to be more difficult than was

Recognition?', in: C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Leiden: Martinus Nijhoff Publishers, 2010, p. 243.

probably expected. All mutual recognition instruments, except the framework decision on taking account of previous convictions, provide several grounds for refusal. The overview of Section 3.6 has brought about two issues in particular. Both will be dealt with below.

4.4.1. Incoherency

Looking at the entirety of grounds for refusal scattered over the different legal instruments, it is evident that a clear structure is lacking. To a certain extent, there are obvious reasons for including a specific ground for refusal in some instruments and omitting it from other instruments. This can be illustrated by the example of judgments delivered *in absentia* of the suspect. It is obvious that *in absentia* can give rise to refusal if it concerns the enforcement of custodial or other sentences, or where it concerns the execution of a European arrest warrant issued for the purposes of execution of a judgment. At the same time, it is also obvious that the absence of the suspect at his trial is not at all relevant in the pre-trial stage of evidence gathering.

As to other grounds for refusal, however, the situation is not so logical. Why would the existence of national immunities or privileges not constitute a ground for refusal in surrender proceedings, whereas it does in nearly all other mutual recognition instruments? Furthermore, why would prescription of a confiscation order under the law of the executing Member State not bar its enforcement, whereas prescription can bar the enforcement of judicial decisions imposing a financial penalty, a custodial sanction, a probation measure, and so on? Moreover, why is the framework decision on the European arrest warrant the only instrument providing for mandatory grounds for refusal; all other instruments include discretionary grounds only.

4.4.2. Ne bis in idem

Fewer questions arise concerning the grounds for refusal related to the principle of *ne bis in idem*. As demonstrated in Section 3.6, almost all mutual recognition instruments provide an optional ground for refusal if execution of the judicial decision were to infringe the *ne bis in idem* principle. Only the draft EIO lacks a similar ground for refusal. Furthermore, the framework decisions EAW and FP include more extensive provisions compared to the other instruments. The question arises as to how these grounds for refusal should be assessed in view of international *ne bis in idem* provisions and the flow of Luxembourgian case law on the interpretation of Article 54 CISA.

4.4.2.1. *Ne bis in idem* provisions

It is well known that the legal principle of *ne bis in idem* is essential in all criminal law systems throughout the European Union. Its main goals are to protect citizens

against the *ius puniendi* of the state and to improve respect for the *res judicata* of final judgments.[294] In practice, the principle of *ne bis in idem* may have a negative effect (the prohibition to prosecute or to punish a second time) or a positive effect (the obligation to take into account previous (foreign) convictions).[295] Because of its undisputed importance it is not surprising that *ne bis in idem* plays a part in the different mutual recognition instruments. This immediately raises the question of whether it is in fact guaranteed that suspects in the EU would not be prosecuted or punished twice. After all, a refusal to surrender a requested person because of a *ne bis in idem* infringement would as such not hinder the issuing Member State from continuing proceedings against this person, or to maintain the sentence imposed on him.[296] If *ne bis in idem* simply functions as a ground to refuse recognition, and as such to refuse cooperation, it does not automatically obstruct a new prosecution or punishment.

A distinction must be made between *ne bis in idem* as a "protection against double jeopardy" and as a "guarantee against double jeopardy". Both variations occur in international legal instruments. Where it serves only as a protection, *ne bis in idem* means that double jeopardy is prohibited within national borders, but beyond borders it only prohibits a state from cooperating with *bis in idem*. Imagine, for example, that state A started proceedings against a person already (being) prosecuted in state B for the same acts. State A would not be obliged to halt these proceedings. However, if state A requested state B to surrender the suspect, state B must refuse to comply with this request because this would be contrary with the principle of *ne bis in idem*.

On the other hand, where *ne bis in idem* serves as a guarantee, double prosecution or double punishment is prohibited, without relevance of any national or jurisdictional border. As a result, state A would in the given example be obliged to halt criminal proceedings as soon as it is informed of the previous prosecution in state B.

In this context, it has to be realised that the principle of *ne bis in idem* historically solely applied in the domestic legal order and with regard to final judgments only. This led to conflicting interpretations and various applications of *ne bis in idem* in the national states, especially of the terms *bis* and *idem*, but also with regard to the combination of sanctions imposed in either administrative or criminal proceedings.[297]

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294 J.A.E. Vervaele, 'The transnational *ne bis in idem* principle in the EU. Mutual recognition and equivalent protection of human rights', *Utrecht Law Review*, 1(2) (2005), p. 100.

295 Vervaele (2005), p. 102.

296 J.B.H.M. Simmelink and F.A. te Water Mulder, 'Grensoverschrijdend 'ne bis in idem'', *Verkeersrecht* (edition ANWB), 52(11) (2004), p. 8; see also H. Sanders, *De tenuitvoerlegging van buitenlandse strafvonnissen* (diss. Tilburg), Antwerp: Intersentia, 2004, pp. 73-74.

297 For example: Member States think differently about the term *bis* and the possibility to combine administrative sanctions and criminal sanctions. Some states limit the scope of *ne bis in idem* to the field of criminal law only, which enables a combination of sanctions imposed in the context of different fields of law. But there are also differences of opinion concerning whether out-of-court

The increased international cooperation in criminal matters has led to a multitude of legal provisions in several international human rights legal instruments and in treaties on judicial cooperation in criminal matters. Most of them only provide an international protection, rather than a guarantee, against *ne bis in idem*. The most important articles will be dealt with now.[298]

The principle of *ne bis in idem* is formulated as a fundamental human right in, for instance, the International Covenant on Civil and Political Rights of 19 December 1966 (Article 14 para. 7) (ICCPR) and the Seventh Protocol to the ECHR (Article 4) (Protocol No. 7 of 22 November 1984).[299] Despite the fact that Protocol No. 7 added *ne bis in idem* to the list of human rights, its scope is limited. It literally held that:

> "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" (emphasis added).

This provision only prohibits *ne bis in idem* within one jurisdiction and it is further limited to final acquittals and judgments only, thereby excluding administrative punitive sanctions or out-of-court settlements (such as transactions). Moreover, it also appears from ECtHR case law that the principle is interpreted as an international protection against double jeopardy, rather than as an international guarantee.[300]

Several international treaties on judicial cooperation contain *ne bis in idem* provisions with the same effect, thus allowing the joining states to refuse cooperation if this would infringe the prohibition of double prosecution of punishment. Two other international treaties however, include real international *ne bis in idem* guarantees: first, the European Convention on the International Validity of Criminal

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settlements should hinder a second prosecution for the same acts. In addition, there are various interpretations of the term *idem* (the same facts or the same legal qualification). See: Vervaele (2005), pp. 100-101.

298 Comprehensive overviews are provided by: B. van Bockel, *The* Ne Bis In Idem *Principle in EU Law*, Alphen aan den Rijn: Kluwer Law International, 2010, pp. 9-25; S.F. Jagla, *Auf dem Weg zu einem zwischenstaatlichen* ne bis in idem *im Rahmen der Europäischen Union*, Frankfurt am Main: Peter Lang Verlag, 2007, pp. 46-57, 68-98; R.M. Kniebühler, *Transnationales 'ne bis in idem'. Zum Verbot der Mehrfachverfolgung in horizontaler und vertikaler Dimension*, Berlin: Duncker & Humblot, 2005, §10, §12, and §14.

299 Amended by Protocol No. 11, as from 1 November 1998, ratified by 47 Member States of the Council of Europe, http://www.conventions.coe.int (last assessed on 1 September 2010).

300 See also R. Lööf, '54 CISA and the Principles of *ne bis in idem*', *European Journal of Crime, Criminal Law and Criminal Justice* (2007), pp. 311-313, 316-318; Simmelink and Te Water Mulder (2004), pp. 6-7; Vervaele (2005), pp. 102-103, 117. Though, as concluded by Van Bockel, the ECtHR has adopted a interpretation quite similar to the interpretation given by the ECJ to Article 54 CISA, which has in the meantime resulted in a "single, strong, 'European' *ne bis in idem rule*", Van Bockel (2010), pp. 173-203, 237

Judgments (28 May 1970) and, secondly, the European Convention on the Transfer of Proceedings in Criminal Matters (15 May 1972). Unfortunately, both instruments are of negligible significance due to a very limited number of contracting states.

Nevertheless, there are two *ne bis in idem* provisions that are of importance for the EU Member States. The first one is Article 54 CISA, which in the past decade has proved to have significant added value for the EU Member States. The integration of the Schengen *acquis* into the EU Treaty in 1999 (Articles 54-58 CISA) has provided the legal framework of the European Union with a general guarantee against double prosecution, without it being relevant in principle where the acts took place, nor which interests were violated, unless the state has declared not to be bound in these cases (Article 55 CISA). Article 54 CISA determines that:

> "a person whose trial has been finally disposed of in one 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" (emphasis added).

The second provision of relevance in the relationships between EU Member State is very new. It is included in the Charter of Fundamental Rights (CFR) that binds all Member States as from its entry into force on 1 December 2009.[301] Article 50 CFR provides that:

> "No one shall be liable to be tried or punished again in criminal proceedings for an offense for which he or she has already been finally acquitted or convicted *within the Union* in accordance with the law" (emphasis added).

This provision establishes a Union-wide guarantee against multiple prosecutions and multiple punishments for acts that have already been finally disposed of. Though it is true that this provision uses terminology other than the CISA provision, it clearly appears that Article 50 CFR has an important advantage over Article 54 CISA. Whereas the latter provision only protects against new proceedings if the penalty imposed has been enforced, is being enforced, or can no longer be enforced, Article 50 CFR applies as soon as the conviction or the acquittal becomes final.[302] Whether the enforcement of a potential penalty has taken place, currently takes place, has expired, or can no longer take place for other reasons resulting from domestic law, is thus irrelevant.

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[301] Charter of Fundamental Rights of the European Union, OJ 18.12.2000, C 364/1.

[302] Jagla (2007), p. 54.

4.4.2.2. Legislative initiatives

Aside from the developments in European case law, several proposals have been presented in the meantime in order to achieve a uniform notion of *ne bis in idem* throughout the Union via the legislative route, mostly linked to conflicts of jurisdiction. One of them is the 2003 Greek initiative for a framework decision in order to "provide the Member States with common legal rules relating to the '*ne bis in idem*' principle in order to ensure uniformity in both the interpretation of those rules and their practical interpretation".[303] It aims at replacing Articles 54-58 CISA. Since 2003, the proposal is still in the draft stage, although strongly amended in the meantime.[304] The main criticisms concern the fact that the proposal does not apply *ne bis in idem* to administrative punitive sanctions (unless they are appealable before a criminal court), and also leaves room for too many exceptions.[305]

Also worth mentioning is the so-called Freiburg Proposal, in which a model has been developed to avoid concurrent jurisdictions and as such double jeopardy in the European Union.[306] This private initiative insists on the prohibition of double prosecution and double punishment by proposing a three stage solution. In the first stage coordination of concurrent jurisdictions should be provided (Section 1). In the case of failing coordination, a European *ne bis in idem* provision should apply (Section 2), including every decision taken by prosecuting authorities – it states "finally disposed of" rather than "finally acquitted or convicted", either an administrative punitive or criminal sanction, imposed on either a natural or a legal person – for acts *idem factum*, which means that the facts are not interpreted as to their legal qualification (no need for harmonisation). Finally, where double prosecution has nevertheless taken place, the third stage should apply the accounting principle, in order to mitigate double punishment (Section 3). It aims at the taking into account sanctions already enforced in another jurisdiction, in the sense that they should not be enforced a second time.

4.4.2.3. Towards a uniform notion: ECJ case law

Article 54 CISA has played an important role in the development of *ne bis in idem* from a domestic legal principle into a European one. Under the influence of European developments in the last decade, especially the improvement of judicial cooperation

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303 See par. 7 of the preamble to the Initiative of the Hellenic Republic with a view to adopting a Council Framework Decision concerning the application of the 'ne bis in idem' principle, OJ 26.04.2003, C 100/24.

304 Council Document No. 16258/03 of 20 January 2004.

305 E.g. Vervaele (2005), p. 115; Simmelink and Te Water Mulder (2004), p. 14.

306 A. Biehler, R. Kniebühler, J. Lelieur-Fischer and S. Stein (eds.), *Freiburg Proposal on Concurrent Jurisdictions and the Prohibition of Multiple Prosecutions in the European Union*, Freiburg i. Br: Max-Planck-Institut für ausländisches und internationales Strafrecht, 2003 (edition iuscrim).

and the introduction of mutual recognition, the need for a uniform *ne bis in idem* principle has grown. This should be understood in the context of the transnational judicial area of freedom, security and justice[307] – based on mutual recognition – in which legal principles should be logically applied transnationally as well.[308] Because Article 54 provides for a *ne bis in idem* principle that functions as a general barrier to institute second proceedings (a European guarantee), a uniform notion would lead to its easier, optimised application throughout the different Member States, in correspondence with the notion of one genuine European judicial area in which judicial decisions have effect Union-wide.

Nevertheless, the integration of Article 54 CISA into the EU Treaty as such did not automatically solve all problems. It simply formed the starting point for its interpretation in the European judicial area, especially the notions of *bis* and *idem*. Although many questions are still unanswered, and although there is no finished common standard,[309] important efforts have been made by the ECJ in the meantime. After all, the integration of Schengen simultaneously tasked the ECJ with the interpretation of Article 54 CISA. From that time onwards, several preliminary questions were brought before the ECJ. Below, the most important decisions on the terms *bis* and *idem*, as well as on the so-called enforcement condition will be mentioned concisely, with reference to more extensive comments in other publications. As will be demonstrated, the ECJ has interpreted the *ne bis in idem* principle in the light of the developments around mutual recognition and mutual trust, indicated as a "mutual recognition approach".[310]

Bis

Article 54 CISA prohibits new proceedings where an earlier trial in respect of the same acts has been finally disposed of. The phrase "finally disposed of" relates to the notion of *bis*; a final decision precludes new proceedings (*bis)* in respect of the same acts. In recent years, the ECJ has further clarified the scope of the *bis* component by defining "final decisions". In 2003, in the joined cases *Gözütok and*

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307 In this context, Lööf has explained the approach of the ECJ to the area of freedom, security and justice with the Social Contract Theory, in the sense that apparently the ECJ considers the judicial area as constituting a single "social contractual unit, within which there can be no divergences in the normative status of individuals *vis-à-vis* to the collective", – in other words – in which an individual cannot be a member and a non-member (because he violated the contract of the unit) at the same time, Lööf (2007), pp. 320-325.

308 In the context of surrender, Vervaele has stated that "[m]utual recognition of each other's arrest warrants not only leads to the quicker surrender of suspects within the EU, but also to the fact that legal principles such as the *ne bis in idem* principle have to be applied transnationally", Vervaele (2005), p. 101; See also Van Bockel (2010), pp. 67-69.

309 Eg. Vervaele (2005), p. 114.

310 Wasmeier and Thwaites (2006), p. 569.

Brügge, the ECJ decided that *ne bis in idem* applies to procedures whereby further proceedings are discontinued, also where the discontinuance followed without the involvement of a court and after the fulfilment of certain conditions by the suspect. Such conditions generally involve the payment of a sum of money imposed by the Public Prosecutor, as was also the situation in *Gözütok and Brügge*.[311]

But as appeared from a 2005 ECJ decision, the principle of *ne bis in idem* does not apply to decisions whereby further proceedings are discontinued in any case. In the *Miraglia* case[312] the ECJ determined that a decision in one Member State that barred further proceedings on the sole ground that proceedings had already been initiated in another Member State – without any assessment on the merits of the case – may not be regarded as a "final decision". Enhancing the *ne bis in idem* principle to that extent would go too far because of – in view of the ECJ – its hindering effect on the free movement of persons, on the maintenance and development of the area of freedom, security and justice and on the proper combat of crime: "Such a consequence would clearly run counter to the very purpose of the provisions of Title VI of the Treaty on European Union".[313] [314] The same conclusion was drawn by the court in the 2008 *Turanský* case.[315] The home country of Mr. Turanský, Slovakia, had decided to suspend the criminal proceedings in the early investigation stage, before Turanský had even been officially charged. Such a decision made by a police officer does not, according to Slovakian law, definitively bar a further prosecution for the same acts in the future. As a result, Austria – this Member State had jurisdiction because the alleged crime was committed on its territory – was allowed to initiate criminal proceedings against Turanský.[316]

By analogy, the ECJ decided in the 2010 *Mantello* case that the sole fact that, at the time Mantello was being tried for certain offences in Italy, the Italian authorities were in possession of evidence pertaining to other criminal acts does not hinder the Italian authorities from issuing a European arrest warrant to Germany with regard to these latter offences afterwards. The decision not to bring up these offences in

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311 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345. For an elaborated description and comment on the joined cases *Gözütok and Brügge*, see for instance Vervaele (2005), pp. 110-114.

312 10 March 2005, Case C-469/03, *criminal proceedings against Filomeno Mario Miraglia*, [2005] ECR I-2009.

313 10 March 2005, Case C-469/03, *criminal proceedings against Filomeno Mario Miraglia*, [2005] ECR I-2009, par. 34.

314 For an analysis of the *Miraglia* case, see for example Wasmeijer and Thwaites (2006), pp. 571-572.

315 22 December 2008, Case C-491/07, *criminal proceedings against Vladimir Turanský*, [2008] ECR I-11039.

316 22 December 2008, Case C-491/07, *criminal proceedings against Vladimir Turanský*, [2008] ECR I-11039, par. 38-39.

the context of the first trial does not constitute a final decision according to Italian law, as a result of which the condition "finally disposed of" has not been fulfilled.[317]

The line developed in *Gözütok and Brügge* has been continued in the *Van Straaten* case.[318] The ECJ ruled that *ne bis in idem* also applies to decisions in which the suspected person is finally acquitted because of lack of evidence. The ECJ considers that:

> "not to apply that article to a final decision acquitting the accused for lack of evidence would have the effect of jeopardising exercise of the right to freedom of movement [and, furthermore, it] would undermine the principles of legal certainty and of the protection of legitimate expectations".[319]

The same reasoning has been used in the *Gasparini* case, where the ECJ applied the *ne bis in idem* principle to a final acquittal based on the fact that prosecution was time-barred.[320] This follows the line that a bar being applicable in a first Member State will also cease a prosecution for the same acts in all other Member States.

Idem

Under Article 54 CISA, double prosecution is prohibited in respect of "the same acts", which is the *idem* component of the provision at issue. Since 2004, several cases have been brought before the ECJ seeking further definition of "the same acts". In 2006, the ECJ handed down a decision in the *Van Esbroeck* case.[321] Mr. Van Esbroeck, a Belgian national, was charged and sentenced by the Norwegian

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317 16 November 2010, Case C-261/09, *proceedings concerning the execution of a European arrest warrant issued in respect of Gaetano Mantello*, available at http://curia.europa.eu/, par. 44-49.

318 28 September 2006, Case C-150/05, *Jean Leon van Straaten* v. *The Netherlands and Italy*, [2006] ECR I-9327; see also Lööf (2007), p. 314.

319 28 September 2006, Case C-150/05, *Jean Leon van Straaten* v. *The Netherlands and Italy*, [2006] ECR I-9327, par. 58 -59.

320 28 September 2006, Case C-467/04, *criminal proceedings against Guiseppe Francesco Gasparini and Others*, [2006] ECR I-9199, par. 33. The main difficulties in the context of time limitations on criminal charges are mentioned by Lööf (2007), pp. 315-316; he not only points out that national rules on time-bars differ markedly in the EU Member States, but he also indicates that a time-barred prosecution does not assess in any way the guilt or innocence of the applicant. In spite of contrary conclusions of the Advocate General, based on a long and historical analysis of the *ne bis in idem* provision (Opinion of Advocate General Sharpston delivered on 15 June 2006, Case C-467/04, *criminal proceedings against Guiseppe Francesco Gasparini and Others*, [2006] ECR I-9199), the ECJ decided that the principle "applies in respect of a decision of a court of a Contracting State, made after criminal proceedings have been brought, by which the accused is acquitted finally because prosecution of the offence is time-barred" (par. 33). Some critical notes on this case have also been made by Klip (2009), pp. 240-242.

321 9 March 2006, Case C-436/04, *criminal proceedings against Leopold Henri van Esbroeck*, [2006] ECR I-2333.

authorities in 2000 for illegally importing narcotic drugs into Norway. But he also was charged and sentenced by the Belgian authorities in 2003 for illegally exporting the same narcotic drugs from Belgium. According to the ECJ, the illegal import of certain products may not be regarded as an offence distinct from the illegal export of the same products; Article 54 CISA does not allow Member States to take the identity of violated legal interests as a criterion for the concept of *idem*, since they differ from state to state.[322] Rather, the only relevant criterion for the purposes of "the same acts" is the identity of the material acts, which should be understand as "the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or to the legal interest protected".[323] The ECJ pointed out that the competent national court is tasked with determining whether the material acts in the proceedings at stake constitute such a set of facts.[324]

The ECJ confirmed its approach in the *Van Straaten* case,[325] and even deepened its line in the cases of *Kraaijenbrink* [326] and *Kretzinger*.[327] In the last two cases the question was whether facts should be regarded as "the same facts", if they are linked together by the same criminal intention. The ECJ determined that it is for the national courts to examine whether there is an "objective link" between the material acts in question. It would be insufficient that a competent national court considers them linked together by the same criminal intention. It is rather required that – the situation of the *Kraaijenbrink* proceedings – the sums of money in the first proceedings (receiving and handling the proceeds of drug trafficking) are the same as the sums of money in the second proceedings (money laundering).[328] The same applies to the receipt of smuggled goods in a first state, and the import of these goods into a second state after having taken possession of them. The mere fact that both acts are linked together by the same intention to transport them to

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322 9 March 2006, Case C-436/04, *criminal proceedings against Leopold Henri van Esbroeck*, [2006] ECR I-2333, par. 32.

323 9 March 2006, Case C-436/04, *criminal proceedings against Leopold Henri van Esbroeck*, [2006] ECR I-2333, par. 42.

324 For a more detailed view on the *Van Esbroeck* case, see M. Wasmeier and N. Thwaites, 'The development of *ne bis in idem* into a transnational fundamental right in EU Law: comments on recent developments', *European Law Review*, 31(3) (2006), pp. 572-574.

325 28 September 2006, Case C-150/05, *Jean Leon van Straaten* v. *The Netherlands and Italy*, [2006] ECR I-9327, par. 48, 53.

326 18 July 2007, Case C-367/05, *criminal proceedings against Norma Kraaijenbrink*, [2007] ECR I-6619, par. 26-27.

327 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 29.

328 18 July 2007, Case C-367/05, *criminal proceedings against Norma Kraaijenbrink*, [2007] ECR I-6619, par. 30-31.

a third state does not automatically trigger the prohibition of *ne bis in idem* – the situation in the *Kretzinger* case.[329]

The enforcement condition

In recent years, the ECJ has also clarified the so-called enforcement condition of Article 54 CISA. As mentioned, the principle of *ne bis in idem* applies where, if a penalty is imposed, the penalty either has been enforced, or is actually in the process of being enforced, or can no longer be enforced under the laws of the sentencing state. But when precisely is such the case?

In the *Kretzinger* case, the ECJ had the opportunity to answer three questions on this issue. As mentioned earlier, two offences were subject of different proceedings in the *Kretzinger* case. In Italy, the defendant Kretzinger was sentenced to a suspended custodial sentence for the receipt of a first consignment of contraband foreign tobacco, and to a custodial sentence, not suspended, for the receipt of a second consignment. This custodial sentence was not yet executed by the Italian authorities, but before trial Kretzinger was briefly held in police custody on remand pending trial. Subsequently, the lower judge in Germany sentenced Kretzinger to a custodial sentence for the import of both consignments into Greece.

The first question was whether a suspended custodial sentence must be considered to fulfil the enforcement condition. The ECJ decided in the affirmative. It held that a suspended sentence:

> "must be regarded as 'actually in the process of being enforced' as soon as the sentence has become enforceable and during the probation period. Subsequently, once the probation period has come to an end, the penalty must be regarded as 'having been enforced' […]".[330]

The second question related to the period in police custody before being sentenced for the second offence. In view of the fact that this sentence was never executed, could the period in police custody satisfy the enforcement condition? According to the ECJ, such a conclusion would run counter the phrase "whose trial has been finally disposed of" (Article 54 CISA). After all, "both police custody and detention on remand pending trial precede final judgment".[331]

The third question related to the possibility of the Italian judgment issuing a European arrest warrant to Germany for the purpose of executing the second custodial sentence. Kretzinger himself was of the opinion that the sole existence of

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329 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 34-37.

330 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 42.

331 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 49.

such a possibility automatically fulfils the enforcement condition, as a consequence of which the German conviction would violate Article 54 CISA. This point of view was, however, not incorporated in the rulings of the ECJ. Rather, it held that the sole existence of the possibility of issuing a European arrest warrant does not in anyway relate to the interpretation of the enforcement condition of Article 54 CISA.[332]

In the 2008 case of *Bourquain*,[333] the ECJ also clarified the phrase "can no longer be enforced under the laws of the sentencing state". In this case, the question arose as to whether the *ne bis in idem* principle would apply to penalties that could never have been enforced. In 1961, Mr. Bourquain was found guilty of desertion and international homicide during his service in the French Foreign Legion in Algeria. He was sentenced to death by a French military tribunal. However, it was not possible to enforce this sentence because it was rendered *in absentia*; according to French law, decisions *in absentia* necessitate reopening of proceedings as soon as Bourquain was arrested. However, at the moment Bourquain was found, enforcement of the penalty was no longer possible due the lapse of time. Moreover, in France, the offence underlying the sentence was in the meantime granted amnesty, being an offence committed in relation to the war in Algeria. What consequences should these circumstances have for the enforcement condition of Article 54 CISA? The ECJ was very clear on this issue. It determined that the condition requiring that the penalty can no longer be enforced in the sentencing state is also satisfied if the penalty has never been enforceable, even before the prescription period and before the application of amnesty. The only question to be answered is whether the penalty is enforceable at the moment the new proceedings are initiated:

> "[T]hat condition […] does not require the penalty […] to have been capable of being enforced directly, but requires only that the penalty imposed by a final decision 'can no longer be enforced'. The words 'no … longer' refer to the time when the new proceedings begin".[334]

The court explicitly referred to the exercise of Bourquain's freedom of movement; this freedom has to be effectively guaranteed. Therefore a person has to be sure of being able to move freely within the Schengen area, once being convicted of a sentence that can no longer be enforced. A constant fear of a second prosecution

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332 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 60-61; this is also in line with Lööf's interpretation of Article 54 CISA: "…the apparent possibility for a Contracting Party to refuse surrender on the basis that prosecutions on the same facts as those covered in the EAW are ongoing is in fact inapplicable to the situation where the EAW is issued for the purpose of the execution of a sentence", Lööf (2007), pp. 326-327.

333 11 December 2008, Case C-297/07, *Klaus Bourquain*, [2008] ECR I-9425.

334 11 December 2008, Case C-297/07, *Klaus Bourquain*, [2008] ECR I-9425, par. 47.

for the same acts in another Schengen country would be contrary to the freedom of movement.[335]

4.4.2.4. *Ne bis in idem* and the mutual recognition instruments

As mentioned, the ECJ's reasoning departed from a teleological point of view; it interpreted the *ne bis in idem* provision in the light of the ongoing developments and the aims of the Union, which resulted in the so-called mutual recognition approach.[336] The ECJ highlighted several times the strong link between *ne bis in idem* and mutual recognition; the first implies the latter, since neither the EU Treaty (Title VI) nor Article 54 CISA makes the application of *ne bis in idem* conditional upon harmonisation or approximation of the criminal laws of the Member States.[337] But the restriction the ECJ imposed on the scope of *bis* in the *Miraglia* case has shown that the *ne bis in idem* principle may not result in a principle that hinders the free movement of persons or the combat of crime in the EU. As stated by Wasmeijer and Thwaites, the *Miraglia* decision shows:

> "that the mutual recognition approach is not an aim in itself, but that it may be limited by the objectives of Arts 2 and 29 EU [former EU Treaty, added by the author]: ne bis in idem is not necessarily to be applied in all situations where a further prosecution is barred according to the relevant national law, as this could run contrary to the objective of providing citizens with 'a high level of safety'".[338]

The mutual recognition approach has to be understood in the light of the transnational area of freedom, security and justice. Obviously, it has led to the development of *ne bis in idem* from a domestic legal principle into a transnational and uniform notion. Furthermore, the *Kretzinger* case has shown that Article 54 CISA cannot be regarded on its own, rather in its relationship with the different mutual recognition instruments. Recently, this was expressly confirmed in the *Mantello* case, in

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335 11 December 2008, Case C-297/07, *Klaus Bourquain*, [2008] ECR I-9425, par. 49-50.

336 Wasmeier and Thwaites (2006), p. 569; also Kniebühler, pp. 193-195; see further: 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345, par. 35; also: 10 March 2005, Case C-469/03, *criminal proceedings against Filomeno Mario Miraglia*, [2005] ECR I-2009, par. 31.

337 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345, par. 32-33; 28 September 2006, Case C-467/04, *criminal proceedings against Guiseppe Francesco Gasparini and Others*, [2006] ECR I-9199, par. 29-30; 28 September 2006, Case C-150/05, *Jean Leon van Straaten* v. *The Netherlands and Italy*, [2006] ECR I-9327, par. 43; 9 March 2006, Case C-436/04, *criminal proceedings against Leopold Henri van Esbroeck*, [2006] ECR I-2333, par. 35; 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 33.

338 Wasmeier and Thwaites (2006), p. 5.

which the interpretation of Article 3(2) EAW was at stake. This article provides a mandatory ground to refuse the recognition of a European arrest warrant if such would violate the *ne bis in idem* principle. Because of the "shared objective" of this provision and Article 54 CISA, the ECJ has ruled that "an interpretation […] given in the context of the CISA is equally valid for purposes of the Framework Decision [on the European arrest warrant]".[339] It is therefore interesting to see how the *ne bis in idem* principle occurs in the instruments.

As shown above, all instruments, except the draft EIO, give expression to *ne bis in idem* as a ground to refuse recognition. Most mutual recognition instruments allow the executing Member State to refuse recognition of a foreign judicial decision if execution would infringe the *ne bis in idem* principle. The question arises as to whether it is enough to present this as an option, rather than as an obligation. Imagine person X, being finally convicted for a drug-related offence in the Netherlands. His custodial sentence imposed for that crime has been served in a Dutch prison. At a given moment, German judicial authorities issue a European evidence warrant for the purpose of searching X's house. It appears that Germany has started criminal proceedings against X for the same acts he is already been punished for. Under the current rules, the Dutch authorities are not obliged to refuse to search X's house; they can decide to comply with the order and to send the results to Germany, thereby supporting the second proceedings against him.

It is true that in this example the prohibition to start second proceedings in this case, where a penalty for the same acts has already been enforced, applies to the German government, following Article 54 CISA. Furthermore, were the Dutch sentence to have not yet been enforced, the German government would also be prohibited from starting second proceedings, following Article 50 CFR. Of course, the Dutch government cannot be held responsible for the German decision to initiate second proceedings.

However, to better protect the individual against multiple prosecutions and punishments, it would be useful to provide for a mandatory ground for refusal in case of a violation of *ne bis in idem* in the different mutual recognition instruments. Such a mandatory ground is currently only included in the framework decision on the European arrest warrant. That Member States are not allowed to start second proceedings for the same acts, but are allowed to support such second proceedings in another Member State is at odds with the principle of cooperation.

Traditionally, *ne bis in idem* was applicable within the borders of a single Member State only. Within national borders, it was and is inconceivable that prosecutors of different regions would support each other in proceedings against a person for crimes that had already been finally disposed of. By analogy, given that the European Union has increasingly developed into a single judicial area without internal frontiers,

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[339] 16 November 2010, Case C-261/09, *proceedings concerning the execution of a European arrest warrant issued in respect of Gaetano Mantello*, available at http://curia.europa.eu/, par. 40.

it cannot be that *ne bis in idem* constitutes a discretionary instead of mandatory ground for refusal in most instruments on mutual recognition.

5. CONCLUDING REMARKS

The swift adoption of the first mutual recognition instrument, the Framework Decision on the European Arrest Warrant (EAW), prompted the European Commission and some Member States to initiate proposals for other recognition instruments which indeed soon followed. But agreement on these next proposals appeared harder to reach. Some recurring problem areas in particular have appeared to accompany the process of implementing the mutual recognition principle in the field of judicial cooperation in criminal matters. They relate to:

1. the very existence of grounds for refusal and the incoherent approach towards grounds for refusal as reflected in the entirety of mutual recognition instruments;
2. the failure to abolish or substantially limit the requirement of double criminality along the line;
3. the failure to fully do away with the *exequatur* procedure;
4. the struggle to create a comprehensive set of minimum common standards, especially concerning procedural rights;
5. the *ne bis in idem* provisions of the mutual recognition instruments and the simultaneous developments towards a uniform guarantee against double prosecution for the same offence.

In the following part of this book, we will scrutinise how federal countries, namely Switzerland and the United States of America, deal with the recognition and enforcement of judicial decisions in criminal matters that are handed down by another jurisdiction of the same nation. The instruments that exist in both federations will be assessed in the light of the seven EU parameters. It is true that in the EU context, not all these parameters have appeared to be problematic in view of developing the mutual recognition principle. Nevertheless, all parameters will be measured in order to give an impression of the bigger picture.

PART II

RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS IN THE FEDERATIONS OF SWITZERLAND AND THE UNITED STATES OF AMERICA: LESSONS FOR THE EUROPEAN UNION

The second part of this book contains three chapters. Chapter 4 focuses on the Swiss federation and describes the possibilities for the cantons and the *Bund* to enforce each other's judicial decisions handed down by a Swiss judge at any stage of criminal proceedings. Chapter 5 is structured similarly, but with regard to the American federation. Both chapters aim at examining the Swiss and American approaches towards the issues that were identified in the foregoing chapter as hindering the full implementation of mutual recognition in the European Union. For that reason, the Swiss and American possibilities regarding inter-jurisdictional acceptance and enforcement of judicial decisions in criminal affairs will be assessed in the light of the same seven parameters as used in the previous chapter.

Chapter 6 compares the Swiss and American approaches with the current state of the mutual recognition principle in the European Union as it applies with regard to judicial decisions in criminal affairs. The purpose of this chapter is to draw final conclusions on what the European Union can learn from the Swiss and American experience with the inter-jurisdictional recognition and enforcement of judicial decisions and judgments.

CHAPTER 4

RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS: THE CASE OF SWITZERLAND

1. INTRODUCTION

Switzerland is a federation consisting of the *Bund*[340] and 26 cantons (*Kantone*). All cantons are organised as states, with their own legislative, executive and judicial powers, their own constitution and other cantonal laws. Besides big differences in political structure, the cantons also vary widely in culture, language, religion, geography, size and population.[341] For these reasons, Switzerland can be considered an entity very similar in structure to the European Union. After all, the European Union consists of Member States that all are structured differently and autonomously and that also differ markedly in culture, language, and so on.

Important lessons can be learnt from the practices on judicial cooperation in criminal matters, which is an essential part of Swiss federalism since long. In Chapter 3, I defined the issues related to the application of the mutual recognition principle, on which the judicial cooperation in criminal matters in the European Union is based. It is the aim of this chapter to examine how these issues are dealt with in the cooperation system of the Swiss federation.

This chapter starts with an overview of the Swiss federation, its historical background and development, its political structure, as well as some relevant characteristics of Swiss federalism (2). Subsequently, a description will be given of the basic principles and features of the Swiss criminal justice system (3). After that, I will focus on the cooperation in criminal matters between the judicial authorities of the *Bund* and the cantons (4). Finally, the issues as formulated in the foregoing

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340 Because I have not found an adequate translation, I will continue to refer to the *Bund*.

341 R. Rhinow and M. Schefer, *Schweizerisches Verfassungsrecht*, Basel: Helbing & Lichtenhahn Verlag, 2009, pp. 121-122.

chapter will be reviewed from a Swiss perspective (5). This chapter will close with some concluding remarks (6).

2. THE FEDERATION OF SWITZERLAND

2.1. HISTORICAL DEVELOPMENTS

The Swiss federation (*Schweizerische Eidgenossenschaft*) started as an alliance of three small communities – Uri, Schwyz and Unterwalden – on 1 August 1291. In 1332 Lucerne joined the alliance, after which Zürich, Glarus, Zug and Berne followed suit. In the 15th and 16th centuries, the participation of Fribourg, Solothurn, Basle, Schaffhausen and Appenzell further enlarged the confederation. At the same time, the military and political power of the Swiss confederation continued to grow as well, although it suffered a setback in the Battle of Marignano in 1515. Furthermore, the Reformation in the 16th century led to some inter-cantonal wars. But with the end of the war in 1648, the Peace of Westphalia, the Swiss confederation took a turn for the better; it was formally recognised as an independent and neutral state.

During the Napoleonic period, however, the French revolutionaries initially united Switzerland in the Helvetic Republic, which in fact meant the abolishment of the cantons. Because of the ongoing resistance of the Swiss leaders to this new regime, the federation was restored in 1803 with the Act of Mediation. Switzerland created a written constitution and expanded its territory with the cantons of Aargau, St. Gallen, Graubünden, Ticino, Thurgau, Vaud, Valais, Geneva and Neuchâtel. In addition, the Congress of Vienna in 1815 recognised its permanent independent and neutral status once again. Due to an internal religious war, Switzerland rewrote the constitution in 1848 and 1874, and introduced some new federal institutions, on which the contemporary federal political institutions are based. In 1979 the last canton, Jura, was founded, split off from Berne. The last total revision of the federal Constitution took place in 1999.

Today, the Swiss federation[342] is often defined as a "*vielfältiger, dreistufiger Bundesstaat*".[343] Although gathered in one country, Switzerland consists of 26

[342] Currently, Switzerland is often still referred to as a confederation, although it is common sense that today's structure has to be characterized as a federation. In this research, I will speak of the Swiss federation, or the federation of Switzerland.

[343] Rhinow and Schefer (2009), p. 120 *et seq*. As pointed out here, the *Bundesstaat* is a model of federalism that should be categorised between the *Einheitsstaat* and the *Staatenbund*. See further: U. Häfelin, W. Haller, and H. Keller, *Schweizerisches Bundesstraatsrecht: die neue Bundesverfassung*, Zürich: Schulthess, 2008, p. 279 *et seq.*

cantons[344] that differ notably in size, population, culture, geography, and languages (*vielfältiger Bundesstaat*). As to the last point, Switzerland has four national languages: German, French, Italian and Romansch (Article 4 FC).[345] The cantons also have their own constitution and legal system, and they are financially autonomous. Moreover, each canton is further divided into communities (or: municipalities, *Gemeinde*) (*dreistufiger Bundesstaat*).[346] How these communities are organised varies from one canton to another, as does their degree of autonomy.

Switzerland is renowned for its neutrality in international conflicts; since the permanent establishment of its neutrality in 1815, Switzerland has not been involved in an international war. Furthermore, the Swiss federation has a reputation for being a bit reserved with regard to membership of international organisations. It became a member of the Council of Europe, but it joined neither the United Nations, nor the European Union. As a result, Switzerland is regarded as the perfect place for the main offices of several international organisations, such as the representative office of the United Nations at Geneva (UNOG) and the International Committee of the Red Cross (ICRC).

2.2. POLITICAL INSTITUTIONS

The political institutions of the Swiss federation are organised according to the Montesquieu separation of powers, both at federal and cantonal level. The political structure of the 26 cantons differs considerably, but they all have separate legislative, executive and judicial branches. At federal level, the legislative branch comprises a two-chamber parliament, called the Federal Assembly (*Bundesversammlung)*: the National Council (*Nationalrat*) consists of 200 members and represents the Swiss population as a whole. The Council of States (*Ständerat*) has 46 members and represents the cantons.

The highest executive power rests with the Federal Council (*Bundesrat*), the Swiss government. Its seven members represent four political parties. They are elected by the Federal Assembly for a four-year term. The sessions of the Federal

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344 Originally 23 cantons, but 3 are divided into half-cantons: Basle is divided into the cantons of Basle-City and Basle-Land; Appenzell is divided into the cantons of Appenzell Outer Rhodes and Appenzell Inner Rhodes; Unterwalden is divided into the cantons of Obwald and Nidwald.

345 It appears from Article 70(1) of the Federal Constitution that only German, French and Italian are recognised as official languages. Nevertheless, in communicating with Romansch speaking people, Romansch may serve as an official language as well.

346 The relationship between a canton and its communities is unimportant here, since it does not serve the comparison between the federal system of Switzerland and the judicial system of the European Union; communities do not play a relevant role in the judicial cooperation in criminal matters. Their role will only be heeded if necessary in a certain context.

Council are chaired by the president of the Swiss federation (*Bundespräsident*), who is elected for just one year.

In the Swiss court system, the highest power is given to the Federal Supreme Court (*Bundesgericht*) in Lausanne (with a separate department on insurance in Lucerne). It serves as a court of last instance for civil, criminal and administrative law matters that have been judged by cantonal courts in first and second instances. It also rules on appeals lodged in matters of federal jurisdiction. As to these matters, the Federal Criminal Court (*Bundesstrafgericht*) and the Federal Administrative Court (*Bundesverwaltungsgericht*) function as courts of first instance.[347]

2.3. DIRECT DEMOCRACY AND COOPERATIVE FEDERALISM

Swiss democracy is direct democracy. The two pillars of the Swiss federation, the cantons and the Swiss population, are both represented in the Federal Assembly, as mentioned above. They choose their own representatives in the National Council and the Council of States respectively. But the federal Constitution (hereafter: FC) also provides other possibilities for them to exert their influence. The *Bund* is obliged to hold a referendum for any amendment to the FC; the adoption requires the majority of the cantons and the majority of the popular vote (Article 140 FC). Upon demand of 50,000 people or eight cantons, the adoption of federal law measures may be subject to a facultative referendum (Article 141 FC). Moreover, with at least 100,000 signatures of eligible voters, Swiss people can demand a complete or partial revision of the federal Constitution (Articles 138 and 139 FC).[348] These possibilities to influence the political agenda, combined with the influence through the Federal Assembly, illustrate the importance of the cantons and the people as the building blocks of the Swiss federation: "*Das Schweizervolk und die Kantone […] bilden die Schweizerische Eidgenossenschaft*" (Article 1 FC).

Furthermore, the cantons are autonomous legal entities, with a specific status in relation to the *Bund*. The cantons are sovereign in that their sovereignty is not restricted by the federal Constitution (Article 3 FC), which Rhinow has defined as "shared sovereignty".[349] Here, the essence of Swiss federalism comes into view, which is often referred to as cooperative federalism (*kooperativen Föderalismus*).[350] This means that the different members of the federation, the *Bund* and the cantons

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347 Since 2004 respectively 2007, see R. Hauser, E. Schweri and K. Hartmann, *Schweizerisches Strafprozessrecht*, Basel: Helbing & Lichtenhahn Verlag, 2005 (6th edition), pp. 46-47.

348 "consensus-oriented democracy", T. Fleiner, A, Misic, and N. Töpperwien, *Swiss Constitutional Law*, Kluwer Law International, 2005, pp. 59, 71-72.

349 "[g]eteilten souveränität", Rhinow and Schefer (2009), p. 131 (translation by the author).

350 Rhinow and Schefer (2009), pp. 171-172; Häfelin, Haller and Keller (2008), p. 360 *et seq*.

in particular, use their separate competences in cooperation.[351] The *Bund* and the cantons are constitutionally obliged to work together and to support each other in their vertical and horizontal relationships, both in judicial and non-judicial areas (Article 44 FC). The provisions regarding judicial cooperation in criminal matters, either between the *Bund* and the cantons, or among the cantons are based on this constitutional obligation. Article 44 FC is therefore considered to entail a principle of federal loyalty (*Bundestreue*).[352]

2.4. THE RELATIONSHIPS BETWEEN THE *BUND* AND THE CANTONS

The substantial differences in legal and political matters, in culture and language, combined with the constitutional duties of the *Bund* and the cantons to cooperate result in continuous tension between cantonal (and to a less extent municipal) autonomy and permanent integration.[353] As worded elsewhere: "Swiss federalism is based on the constitutionally guaranteed balance between shared rule and self-rule".[354] The following sets out the basic lines of the typical relationship between the *Bund* and the cantons.

All powers that are not explicitly constitutionally attributed to the *Bund* remain the responsibility of the cantons (Articles 42 and 43 FC). The principle of subsidiarity is relevant here: what could be accomplished by the cantons should be left within their responsibility (Article 5a in conjunction with Article 43a FC). However, if a certain goal can only be achieved adequately by means of federal measures, the *Bund* is competent to act:

> "*Das Subsidiaritätprinzip geht davon aus, dass die Aufgabenerfüllung im kleineren Raum so na wie möglich bei den Bürgern stattfinden soll. Was die untere bundesstaatliche Ebene besser erfüllen kann, soll die grössere nicht an sich ziehen. Damit soll sichergestellt werden, das die Bedürfnisse der Bürgerinnen bestmöglich erfüllen werden können*".[355]

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351 U. Häfelin, *Der kooperative Föderalismus in der Schweiz*, Basel: Helbing & Lichtenhahn Verlag 1969, p. 572.

352 Rhinow has problems with the word *Bundestreue*, since it only emphasises the loyalty from the cantons towards the *Bund*, while Article 44 FC prescribes a loyalty principle in both directions, vertically as well as horizontally, Rhinow and Schefer (2009), p. 176. For the same reason, Fleiner, Misic and Töpperwien prefer to speak about a principle of solidarity "that goes beyond loyalty in the sense that it is less hierarchical and more partnership driven", Fleiner, Misic and Töpperwien (2005), p. 116.

353 Rhinow refers – as an example – to the preamble of the Federal Constitution, which states that the *Vielfalt in der Einheit* should be preserved, Rhinow and Schefer (2009), p. 121.

354 Fleiner, Misic and Töpperwien (2005), p. 26.

355 Rhinow and Schefer (2009), p. 125.

As to certain issues, cantonal autonomy has been constitutionally determined. The fields of cantonal autonomy are:

1. *Political autonomy* (*Organisationsautonomie*): the cantons have the discretion to establish their own political system and political structure, which includes the autonomy to have their own cantonal constitution and legislation.
2. *Task autonomy* (*Aufgabenautonomie*): the cantons have the autonomy to determine how to fulfil their duties (Article 43 FC).
3. *Financial autonomy* (*Finanzautonomie*): the cantons are entitled to determine their own financial policy (Article 47 FC).
4. *Implementation autonomy* (*Umsetzungsautnomie*): the cantons have the discretion as to how to implement federal legislation into cantonal legislation (Article 46 (3) FC).
5. *Treaty autonomy*: the cantons have the ability to conclude treaties with other cantons or foreign entities (Articles 48 and 56 FC).

As a consequence of the principle of loyalty or solidarity,[356] the *Bund* is obliged to guarantee cantonal discretion as much as possible, for instance by supporting them financially. The nature of cantonal sovereignty, however – it is shared sovereignty – implies that the above-mentioned autonomies may be restricted by (or: shared with) the *Bund*, which is true. For example, the autonomy to establish a cantonal constitution is restricted by the constitutional duty to establish a democratic constitution (Article 51 FC). The restrictions on cantonal legislation will show in particular important characteristics of the relationship between the *Bund* and the cantons, which are of relevance in view of this comparative research. These characteristics are:

A. *Federal law precedes cantonal law*: it is a constitutional rule that federal law precedes cantonal law (Article 49(1) FC). The precedence of federal law stimulates the uniformity of legislation, which in turn improves legal certainty.
B. *Cantonal law may not infringe federal law*: the principle of precedence means that cantonal law may not contravene federal law, upon invalidity with retroactive effect. This also applies to inter-cantonal treaties, known as concordats (Article 48(3) FC). Concordats may be concluded with regard to any issue that falls within cantonal competence,[357] with the restriction that they may neither contravene any federal law and interests, nor any constitutional law, nor the rights of other cantons.[358] The cantons are, nonetheless, allowed to

356 Supra note 350.

357 Häfelin, Haller and Keller (2008), p. 368.

358 Fleiner, Misic and Töpperwien (2005), p. 129.

establish deviating rules that go further than the preceding federal rules, as long as they serve the aims of the initial provisions.[359]

C. *The* Bund *is prohibited from taking measures outside its competency*: A second consequence of the principle of precedence regards the prohibition for the *Bund* to take legal measures in violation of its competency.[360]

D. *Implementation in accordance with federal law*: the cantons are obliged to implement any federal legislation into cantonal legislation. Although they have a margin of discretion as to exactly how to implement the federal norms, they are bound by the restriction that cantonal legislation should be in accordance with federal legislation (Article 46 FC).

E. *Interpretation in conformity with federal law*: furthermore, regarding the interpretation of legislation implemented in the cantons, Article 49 FC implies a duty to interpret cantonal law in conformity with federal law (*Bundesrechtskonformen Interpretation*)[361] and with the federal Constitution (*verfassungskonforme Auslegung*).[362]

F. *Inter-cantonal law binds the joining cantons*: once concluded, the joining cantons are obliged to apply the provisions of the concordat (Article 48(5) FC). Since the federation can become party as well, a concordat may also bind the *Bund* (Article 48(2) FC).

These rules on federal-cantonal and inter-cantonal relationships have obviously affected the precise modelling of cooperation procedures between federal and cantonal judicial authorities. The basic rules concerning judicial cooperation in criminal matters are laid down in the single Penal Code. The cantons are obliged to comply with these provisions. Concerning measures of mutual legal assistance, however, the cantons have agreed on inter-cantonal rules that go further than the Penal Code provisions. In the following, we will study in depth which possibilities exist for federal and cantonal judicial authorities to take over a judicial decision handed down in another jurisdiction of the country, and to enforce that decision within the domestic legal order. Initially, however, the basics of the Swiss criminal justice system will be outlined.

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359 BGE *122* (1996) I 85 (87). See also S. Wehrenberg, 'Zur Aufhebung der Regel «locus regit actum» durch das Konkordat über die Rechtshilfe und die interkantonale Zusammenarbeit in Strafsachen', in: *Nachdenken über den demokratischen Staat und seine Geschichte. Beiträge für Alfred Kölz*, Zürich: Schulthess Juristische Medien, 2003, p. 321 and H. Müller, 'Das Rechtshilfekonkordat in der Praxis', *Schweizerische Zeitschrift für Strafrecht* (115) 1997, p. 5.

360 Rhinow and Schefer (2009), p. 154; Häfelin, Haller and Keller (2008), p. 345.

361 Rhinow and Schefer (2009, pp. 109, 157.

362 Häfelin, Haller and Keller (2008), p. 44 *et seq.*

3. THE SWISS CRIMINAL JUSTICE SYSTEM

3.1. BASIC PRINCIPLES

One of the basic principles of the Swiss criminal justice system is the *ex officio* principle (*Offizialprinzip*), which determines that only the state is entitled and obliged to prosecute offences. As a result, prosecutions are mostly initiated by the public prosecutor, who represents the state. There are some exceptions to the *ex officio* principle, for instance where the offence may only be prosecuted upon a formal complaint from the victim (*Antragsdelikt*). Closely related to the *ex officio* principle are the principles of legality (*Legalitätsprinzip*) and opportunity (*Opportunitätsprinzip*). The principle of legality entails a duty to prosecute any offence if there are sufficient grounds to suspect a person of having committed it. In some cantons, the application of the legality principle is restricted by the principle of opportunity, which leaves the prosecutor a degree of discretion to drop a charge. Under the future uniform Code of Criminal Procedure, this opportunity principle will be applicable in all cantons equally. A person may not be prosecuted or sentenced twice for the same offence (*ne bis in idem Grundsatz*) (Article 4, Protocol No. 7 to the ECHR; Article 14(7) ICCPR).

Once a prosecution has started, all authorities involved are obliged to search for the truth, as results from the principle of instruction (*Untersuchungsgrundsatz*). To establish the division between the different authorities, and, simultaneously, to guarantee they nevertheless cooperate, the principle of accusation (*Akkusationsprinzip* or *Anklagegrundsatz*) requires the prosecutor to formally accuse the suspect before the judge is able to hand down a decision.[363] In court, the suspect is considered innocent until he is proved to be guilty (*Unschuldsvermutung*) (Article 32(1) FC). No decision may be taken, unless the suspect has been given the opportunity to express his view (*Grundsatz des rechtlichen Gehörs*) (Articles 29(2) and 32(2) FC). Moreover, it follows from Article 29(1) 1 FC as well as the ECHR that the authorities are obliged to hand down a decision within a certain reasonable period of time (*Beschleunigungsgebot*). An appeal may be lodged against any decision in order to get it reviewed by a higher court (Article 32(3) FC). Under the new uniform Code of Criminal Procedure these procedural rights will also be laid down (Articles 3-11 FCCP).

3.2. SOURCES OF LAW

The sources of Swiss criminal law and criminal procedure are to be found in federal as well as cantonal legislation. In the following, the most important pieces of federal

[363] Hauser, Schweri and Hartmann (2005), pp. 222-225.

legislation will be considered, insofar as they are relevant for criminal law and criminal procedure. Attention will then be paid to cantonal legislation of major importance for criminal justice.

3.2.1. Federal sources of law

Swiss legislation is founded on the federal Constitution (*Bundesverfassung*, FC*)*.[364] With regard to criminal law and criminal procedure, it contains several fundamental rules. Article 123(1) FC determines that the *Bund* is competent to pass legislation in the fields of both substantive and procedural criminal law. Furthermore, it prohibits certain acts in the context of criminal justice, such as capital punishment or torture (Article 10 FC), and guarantees various procedural rights for individuals, such as the right to appeal and the presumption of innocence (Articles 29-32 FC). In this context, it is also important to mention the European Convention on Human Rights (ECHR)[365] – considered to have constitutional value[366] – and the International Covenant on Civil and Political Rights (ICCPR)[367] – although the rights this entails are not individually enforceable and do not differ essentially from the rights entailed in the ECHR.[368]

As from 1942, Swiss substantive criminal law, defining criminal offences and determining possible sanctions, has been unified. It can currently be found primarily in the Swiss Penal Code (*Strafgesetzbuch*, PC)[369] automatically applies to all cantons (Article 123(1) FC in conjunction with Article 49(1) FC). The basic principle is that criminal offences are pursued by the competent canton. There are, however, some offences prosecution of which is left to the federal authorities (Articles 336-337 PC), offences such as terrorism, political offences or cross-border crime. If such a crime is allegedly committed, the federal Code of Criminal Procedure (*Bundesgesetz über die Bundesstrafrechtspflege vom 15. Juni 1934*, FCCP) applies. The Penal Code distinguishes between *Verbrechen*, *Vergehen*, and *Übertretungen*. The last category concerns offences punishable by a financial penalty only (Article 103 PC). In contrast, *Verbrechen* can be penalised by more than three years imprisonment,

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364 Adopted on 18 April 1999, into force on 1 January 2000, thereby replacing the Constitution of 1874.

365 Ratified by Switzerland in 1974.

366 S. Trechsel and M. Killias, 'Criminal Law' in: F. Dessemontet and T. Ansay (eds.), *Introduction to Swiss Law*, The Netherlands: Kluwer Law International, 2004 (3rd edition), p. 246; see also from the same authors in the same publication: 'Criminal Procedure', p. 271.

367 Ratified by Switzerland in 1992.

368 N. Schmid, *Strafprozessrecht. Eine Einführung auf der Grundlage des Strafprozessrechtes des Kantons Zürich und des Bundes*, Zürich: Schulthess, 2004 (4th edition), p. 16.

369 Adopted on 21 December 1937.

while *Vergehen* are offences punishable by a financial penalty, or a maximum of three years in custody (Article 10 PC).

In addition to the PC, several criminal law provisions are provided for in specific federal codes (Article 333 PC). The Military Penal Code (*Militärstrafgesetz vom 13. Juni 1927*) and the Military Code of Criminal Procedure (*Militärstrafprozess vom 23. März 1979*) have established a military criminal justice system to be applied by military courts. The Administrative Penal Code (*Bundesgesetz über das Verwaltungsstrafrecht vom 22. März 1974*) entails general rules on administrative offences.

Another important federal source of law is the case law of the Federal Supreme Court (*Bundesgericht*) in Lausanne,[370] which has the highest judicial power in Switzerland (Article 188(1) FC).[371] The basic rules for the organisation of the federal judicial system are to be found in the Federal Law on the Judicial System (*Bundesgesetz über das Bundesgericht vom 17. Juni 2005*, FLJS). Lastly, of relevance are the case law of the European Court of Human Rights (ECtHR), customary law and legal doctrine.[372] As to the decisions of the Federal Supreme Court and the ECtHR, they contribute to the establishment of a minimum level of uniformity in criminal law throughout the different cantons.[373]

3.2.2. Cantonal sources of law

Being sovereign entities in principle, each Swiss canton is entitled to have its own constitution and legislation (political autonomy, based on Article 3 FC),[374] although restricted by the rule of precedence of federal law. With respect to criminal justice, the cantonal constitutions used to contain certain fundamental rights, as well as provisions on criminal procedure and the organisation of the judicial system.[375]

As mentioned above, sources of substantive criminal law are mainly to be found in the Swiss Penal Code, which is a federal code that applies to all cantons equally. Alongside this, cantonal criminal law still exists, though only in areas of minor

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370 It has a separate department on insurances: the Federal Insurance Court in Lucerne.

371 Of course, complaints against decisions of the Federal Supreme Court can be brought before the European Court of Human Rights.

372 Schmid (2004), pp. 17-20; Trechsel and Killias (2004), pp. 271-272.

373 M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (diss. Tilburg), Nijmegen: Wolf Legal Publishers, 2000, p. 916.

374 P. Tschannen, *Staatsrecht der Schweizerischen Eidgenossenschaft*, Bern: Stämpfli Verlag AG, 2007 (2nd edition), p. 241 *et seq*.

375 Hauser, Schweri and Hartmann (2005), pp. 23-24. As mentioned here as well, the cantonal fundamental rights are of minor importance; see also Schmid (2004), pp. 8-9.

importance, such as breaches of public order or tax violations (Article 335 PC[376]).[377] Sources of procedural criminal law, however, are mainly cantonal. Switzerland has 27 criminal justice systems: each canton and the *Bund* have established their own code of criminal procedure. Because of the varying cultural backgrounds of the cantons, these codes differ markedly as to their form and content. As an illustration, the large canton of Zürich has a quite detailed code of over 500 articles,[378] while 175 articles suffice for the small canton of Appenzell Innerhoden,[379] while the canton of Zug has a code of just 102 articles.[380] Rationally, a cantonal code of criminal procedure applies to cantonal judicial proceedings, while the Federal Code of Criminal Procedure applies to criminal proceedings that fall within the competence of the federal authorities.

Anyhow, important changes are on the cards. In 2000, legislation on criminal procedural law became a federal competence (Article 123(1) FC), just as happened earlier with legislation on substantive law matters. The adoption of the Swiss Penal Code in the 1940s was the starting point for the discussion on unification of Swiss procedural law as well, which was then still a cantonal competence. At the moment, a single Code of Criminal Procedure (*Schweizerische Strafprozessordnung*, draft CCP)[381] is expected to enter into force on 1 January 2011. Nevertheless, the constitutional change of 2000 left specific parts of the criminal justice system to the competence of the cantons, such as the organisation of the cantonal judicial system, the course of decisions in the courts and the execution of sanctions (Article 123(2) PC); provisions on these matters are found in a variety of cantonal regulations and other measures. Akin to cantonal legislation, it may be foreseen that cantonal legislation on criminal procedure will remain to a limited extent, akin to legislation on criminal law. It is thus foreseen that, to a limited extent, cantonal rules of criminal procedure will remain to exist, akin to cantonal criminal law.

Cantonal case law is a further source of Swiss criminal law and criminal procedure. After all, the majority of offences, criminalised in the federal Penal

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376 This article does restrict the cantons to *Übertretungsstrafrecht* only. Furthermore, cantonal legislation on substantive criminal law may of course not contravene the Penal Code and other Federal legislation (Art. 335(1) Penal Code).

377 Trechsel and Killias (2004), pp. 249-250.

378 Zürcher Strafprozessordnung (Code of Criminal Procedure) of 4 may 1919, ZH-Lex: http://www2.zhlex.zh.ch/appl/zhlex_r.nsf/WebView/C32BAACE6E4CB628C12575D8004274B6/$File/321_4.5.19_65.pdf (last accessed on 3 September 2010).

379 Gesetz über die Strafprozessordnung (Code of Criminal Procedure) of 27 April 1986, Kanton Appenzell Innerhoden online – Gesetzessammlung: http://www.ai.ch/dl.php/de/4638437b2abb1/312.000.pdf (last accessed on 3 September 2010).

380 Strafprozessordnung für den Kanton Zug (Code of Criminal Procedure) of 3 October 1940, Gesetzessammlung BGS: http://www.zug.ch/behoerden/staatskanzlei/kanzlei/bgs/3-strafrecht-strafprozess-strafvollzug (last accessed on 3 September 2010).

381 Draft of 5 October 2007.

Code, are enforced at the cantonal level. With that aim, they follow the local rules of criminal procedure (Article 338 PC) within a locally organised judiciary system (Article 191b FC).

A final source of law to be mentioned here regards the Concordat on Mutual Legal Assistance and Inter-Cantonal Cooperation of 2 November 1992 (the Concordat), which will be described in detail later on (Section 4.3).

3.3. JUDICIAL AUTHORITIES

Criminal procedures mostly take place at the cantonal level. Although the *Bund* is competent to pass legislation on matters of substantive and procedural criminal law, procedural law still varies from canton to canton, and the *Bund* also has to follow its own rules of criminal procedure. In addition, the cantons and the *Bund* still remain competent to pass their own legislation on the organisation of the judicial system. Obviously, it differs from jurisdiction to jurisdiction as to which authorities have been instituted and what competences these authorities are assigned. The following will give a short description of the investigation authorities (3.3.1), the prosecuting authorities (3.3.2), and the judiciary (3.3.3), both at the cantonal and the federal level. Final attention will be given to federal and cantonal jurisdiction in criminal cases (3.3.4).

3.3.1. Investigating authorities

Since there are currently 26 cantonal judicial systems in Switzerland, there are 26 cantonal police organisations too. In addition, some large cantons also have municipal police forces.[382] The individual cantons have carried out the organisation of their police forces in all its facets: competences, education and training, uniform, and so on.[383] In most cantons – generally speaking the German-speaking cantons – the police forces consist of a Criminal Division (*Kriminalpolizei*), a Security Division (*Sicherheitspolizei*), a Traffic Division (*Verkehrspolizei*) and a Division of Administration and Logistics (*Administration und Logistik*).[384]

At the federal level, the investigation (*Ermittlung*) of federal offences falls within the responsibility of the Federal Department of Justice and Police (*Eidgenössische Departement für Justiz und Polizei*), under the authority of whom both the Federal Office of Police (*Bundesamt für Polizei*, fedpol) and the Federal Office of the Attorney General (*Bundesanwaltschaft)* carry out the investigatory tasks in practice. Concerning the latter, the Attorney General is mainly responsible for the investiga-

382 Hauser, Schweri and Hartmann (2005), p. 92.

383 Brienen and Hoegen (2000), pp. 917-918.

384 Hauser, Schweri and Hartmann (2005), p. 92.

tion of offences against the *Bund* or its interests, organised crime, financial crime and offences across inter-cantonal and international borders (Article 104 FCCP, Articles 336 and 337 PC). It is supported by fedpol, which is since 2002 competent to investigate allegations of certain serious crimes (corruption, white-collar crime and organised crime) under the supervision of the Attorney General. However, the primary task of fedpol is to serve the cantonal and international police forces, it being a centre for information, coordination and analysis.

3.3.2. Prosecuting authorities

After closing the first stage of investigation (*Ermittlung*), the competent prosecuting authority has to decide whether preliminary investigation (*Untersuchung* or *Voruntersuchung*) is needed and whether to bring the case before a competent court (*Anklage*). It would be outside the scope of this section to describe the whole variety of cantonal prosecuting authorities; it suffices to make some general notes. Two basic models are to be distinguished: the French-Austrian system of the examining judge (*Untersuchungsrichtermodell*) and the German system of the public prosecutor (*Staatsanwaltmodell*).[385] The difference between models occur especially in the pre-trial stage of criminal proceedings; since, during the trial stage, almost all cantons and the *Bund* similarly for the public prosecutor is responsible for presenting the case in court.

The system of the examining judge is the most popular, especially in the French-speaking and Romansh-speaking cantons. It is characterised by a twofold pre-trial procedure. The first phase overlaps the investigation procedure (*Ermittlungsverfahren*), for which the cantonal prosecutor is responsible; through district prosecutors under his supervision, he coordinates the police investigation and decides whether to start a preliminary investigation. If so, the case is referred to the examining judge and the second phase starts. At this point, the public prosecutor no longer has a role, since it is up to the examining judge to lead the preliminary investigation and to decide whether to bring the case before the court.

In contrast, the system of the public prosecutor provides the cantonal prosecutor with exclusive responsibility for supervising criminal proceedings from beginning to end; he is also tasked with leading the preliminary investigation and thus deciding whether to bring the case before the court. In most cantons, the cantonal prosecutor supervises the activities of a number of district attorneys. Although this system is less popular than the system of the examining judge, the new single Code of Criminal Procedure builds on this model.

The prosecution of offences under federal jurisdiction – offences against the *Bund* or its interests, organised crime, financial crime and offences across inter-cantonal and international borders (Articles 336 and 337 PC) – follows the basic principles

[385] Hauser, Schweri and Hartmann (2005), pp. 93-98; Trechsel and Killias (2004), pp. 272-273.

of the system of the examining judge.[386] The investigation activities take place under the supervision of two Deputy Attorney Generals and the Federal Attorneys, who in turn work under the supervision of the Attorney General. After the decision to continue proceedings, the Federal Office of the Attorney General has to assign the case to the federal examining judge (*eidgenössische Untersuchungsrichter*) at the Federal Criminal Court in Bellinzona. He will lead the preliminary investigation, the outcome of which will form the basis for the decision as to whether to halt or continue proceedings (Article 108 FCCP in conjunction with Article 113 FCCP).

3.3.3. Judiciary

The cantonal authorities are competent to rule in cantonal matters (Article 338 in conjunction with Articles 336 and 337 PC), as well as in federal matters after being assigned by the Attorney General (Articles 18 and 18bis CFCP) (see Section 3.3.4), which in fact means that most criminal offences are tried at the cantonal level.[387]

As mentioned earlier, the organisation of the judiciary differs from canton to canton (Article 123(2) FC). Nonetheless, a few basic features can be given. Most cantons have a Trial Court as court of first instance and a Court of Cassation (*Kassationsgericht*) as court of second instance. In some cantons the court of second instance is a Court of Appeal (*Kantonsgericht* or *Obergericht*); then the Court of Cassation is the court of third instance. In addition, some cantons have special courts for juvenile offenders (*Jugendgericht*). It varies throughout the cantons as to what kind of offences are accessible in appeal and appeal in cassation.

The highest judicial power in Switzerland rests with the Federal Supreme Court in Lausanne. Its main task is to serve as a court of last instance in matters of cantonal criminal law. If all legal remedies at cantonal level are exhausted, the defendant or the prosecutor can lodge a plea of nullity, which tasks the Criminal Law Chamber of the Federal Supreme Court to review the interpretation of substantive criminal law, mainly regarding the Penal Code. Defendants are also allowed to lodge a constitutional law appeal at the Federal Supreme Court, which may concern all alleged violations of due process guaranteed in the federal Constitution and the ECHR.

Furthermore, the Federal Supreme Court serves as a court of appeal for decisions of the Federal Criminal Court (*Bundesstrafgericht*) in Bellinzona (Article 80(1) FLJS), which is in operation since 1 April 2004 to enlighten the Federal Supreme Court.[388] It primarily judges offences in first instance that fall within the jurisdiction of the *Bund*. Finally, any person who claims to be a victim of a violation of his

386 If prosecution has been transferred to the cantonal level, the suing activities will follow the procedural rules of the assigned canton (Articles 18-18bis FCCP, Articles 336-337 PC).

387 Hauser, Schweri and Hartmann (2005), pp. 48-50.

388 Rhinow and Schefer (2009), pp. 572, 568; Hauser, Schweri and Hartmann (2005), p.46.

fundamental rights and guarantees set out in the ECHR may lodge an application with the ECtHR on condition that all national remedies are exhausted.

3.3.4. Federal and cantonal jurisdiction

It follows from the above-mentioned sections that breaches of the Penal Code used to be sued at cantonal level, on the basis of the cantonal code of criminal procedure (Article 338 PC). Only where offences are specifically left into federal jurisdiction, are the federal authorities responsible for the criminal proceedings and the execution of sanctions imposed. These mainly concern offences against the *Bund* or its interests, such as supporting criminal organisations, financing terrorism or political offence (Article 336 PC). These may also concern offences committed in a foreign country or in more than one canton (Article 337 PC). Of course, breaches of the Military Penal Code and the Administrative Penal Code also fall within federal jurisdiction. If the *Bund* has jurisdiction over a case, the Federal Code of Criminal Procedure (FCCP) applies.

However, the *Bund* may decide to assign a specific canton to deal with a individual federal case, or a case that falls within both federal and cantonal jurisdictions (Articles 18 and 18bis FCCP),[389] as long as the underlying offence has been mentioned in Articles 336-337 PC. This mostly concerns cases of marginal importance. The assigned canton is entitled, even obliged, to take over the case. The *Bund* may transfer its responsibility either over the criminal proceedings as a whole, or over the trial phase only (Article 18(3) FCCP). The leading canton has to apply its local rules of criminal procedure on the proceedings as well as on the execution of a sanction. However, the leading canton has to consider the provisions concerning delegated cases of Articles 247 to 265 FCCP.

Duplication of criminal jurisdiction between federal and cantonal authorities can occur,[390] for instance because the different authorities classify the same crime differently. In practice, such situations are mostly readily solved by the Attorney General's decision to either put the case at the disposal of the cantonal authorities (this solution is chosen most often[391]), or to make a federal case out of it (Article 18(2) FCCP). Jurisdictional overlap between the authorities of different cantons can also occur, even quite easily. Such situations are, however, solved by means of clear and relatively detailed statutory regulations on which of the 26 cantons has jurisdiction in a specific case (Articles 339 to 348 PC). The basic rule assigns the canton on whose territory the alleged offence is committed. Were the crime to be committed on several territories, the first canton to start a prosecution is attached jurisdiction over the case (Article 340 PC). Were any jurisdictional to conflict arise,

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389 Hauser, Schweri and Hartmann (2005), pp. 48-50; Schmid (2004), p. 117.

390 Hauser, Schweri and Hartmann (2005), p. 51.

391 Idem.

the Federal Criminal Court has the competence to decide on it and to assign the competent jurisdiction (Article 18(4) FCCP, Article 345 PC).

4. MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS?

4.1. JUDICIAL COOPERATION IN CRIMINAL MATTERS: FROM REQUEST TO DIRECT INTERVENTION

It follows from the nature of Swiss federalism – cooperative federalism – that federal and cantonal powers are obliged to assist each other (Article 44 FC) in order to contribute to the objectives of the Swiss federation (see Section 2.3). The duty to cooperate in criminal matters is laid down in several articles. Article 356(1) PC is the most fundamental with the largest field of application. It instructs all federal and cantonal authorities, whether judicial or non-judicial, to assist the judicial authorities in matters of criminal law, irrespective of the seriousness of crime – after all, *Strafsachen* means *Verbrechen*, *Vergehen*, and *Übertretungen* (Section 3.2.1):

> "*In Strafsachen, auf die dieses Gesetz oder ein anderes Bundesgesetz Anwendung findet, sind der Bund und die Kantone gegenseitig und die Kantone unter sich zur Rechtshilfe verpflichtet*".

Article 27 FCCP especially regards criminal cases (*Strafsachen*) under federal jurisdiction; it restates that all cantonal and federal (and municipal) authorities, both judicial and non-judicial, are obliged to support the judicial authorities of the *Bund* in the progress of criminal proceedings:

> "*Die Behörden des Bundes, der Kantone und der Gemeinden leisten den mit der Verfolgung und Beurteilung von Bundesstrafsachen betrauten Behörden in der Erfüllung ihrer Aufgabe Rechtshilfe*."

Furthermore, Article 252 FCCP obliges all cantonal powers to grant legal aid to any canton assigned with the prosecution and trial of a federal criminal case (*Strafsachen*):

> "*Die Behörden eines Kantons haben denjenigen der anderen Kantone in Bundesstrafsachen im Verfahren und beim Urteilsvollzug Rechtshilfe zu leisten*".

Of final importance is the 1992 Concordat on Mutual Legal Assistance and Inter-Cantonal Cooperation in Criminal Matters (the Concordat).[392] Its field of application

[392] Concordat on Mutual Legal Assistance and inter-Cantonal Cooperation in Criminal Matters, 5 November 1992, 250.100.

is, however, restricted to judicial cooperation between cantonal powers only; it does not cover cooperation with federal authorities, between police authorities or other authorities that might be involved in the prosecution and trial of a criminal case. In the broad sense of the term, "judicial cooperation in criminal matters" encompasses any operation of any judicial authority in the course of criminal proceedings, whether before, during or after trial.[393] But in the narrow sense it only concerns judicial activities for the purpose of obtaining evidence, such as search and seizure, the interrogation of witnesses and experts and the blocking of bank accounts.[394] The latter form, usually referred to as mutual legal assistance, is the subject of the 1992 Concordat.

Since its very beginning, cooperation in criminal matters has been part of the Swiss legal tradition.[395] In the earliest centuries of the Swiss federation, police and judicial cooperation, both in its horizontal and vertical relationships, took place voluntarily; there was no basic duty for a party to comply with a request. Cooperation was based on several sources of law. Alongside federal legislation, provisions were to be found in customary law, inter-cantonal treaties or statements from the erstwhile federal legislative and executive Council (*Tagsatzung*).[396] Over time, these inter-cantonal treaties and federal statements became increasingly important, because of their unifying effect on the legislation of the different members of the Swiss federation.[397]

In 1809, the Swiss cantons concluded a concordat on inter-cantonal legal assistance in criminal matters, containing fairly exhaustive provisions on extradition and other forms of legal assistance. In 1810 and 1812, two concordats on police cooperation followed. With the entry into force of the Federal Code on Extradition of 1852 (*Bundesgesetz über die Auslieferung von Verbrechern oder Angeschuldigten*), inter-cantonal extradition was for the first time directly based on the federal

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393 "*[j]ede Massnahme, um die eine Behörde im Rahmen ihrer Zuständigkeit in einer hängigen Strafverfolgung für die Zwecke dieser Verfolgung ersucht wird*", BGE *86* (1960) IV 136 (139.1).

394 E.g. G. Piquerez, 'Le concordat sur l'entraide judiciaire et la coopération intercantonales en matière pénale', *Revue fribourgeoise de jurisprudence*, 1994, pp. 5-6: "l'entraide *au sens large*" and "l'entraide *au sens étroit*". See also: P. Cosandey and G. Piquerez, *Concordat sur l'entraide judiciaire et la coopération intercantonales en matière pénale. Rapport explicatif et commentaire du 1er septembre 1992*, Bulletin du Grand Conseil neuchâtelois, February 1994, p. 1710; furthermore BGE *85* (1959) I 103 (106.2).

395 A detailed overview of cooperation instruments between the Swiss cantons as from the first alliance between Uri, Schwyz and Unterwalden has been given by L. Colombi, 'De l'extradition en matière pénale et de police dans les relations entre les cantons suisses', *Zeitschrift für Schweizerisches Recht*, (6) 1887, pp. 453-525.

396 R. Trüb, *Die interkantonale Rechtshilfe im Schweizerischen Strafrecht*, Zürich: Juris Verlag Zürich, 1950, pp. 26-28; Ph. Thormann, 'Die Rechtshilfe der Kantone auf dem Gebiete des Strafrechts', *Zeitschrift für Schweizerisches Recht*, (47) 1928, pp. 186a-187a; also supra note 393.

397 Trüb (1950), pp. 33-34.

Constitution.[398] A basic duty of extradition had in the meantime been constitutionally created, which ordered the federal legislator to design the necessary rules, which resulted in the 1852 Extradition Law. The Extradition Law contained an exhaustive list of extraditable offences. Its field of application was, however, extended several times by way of inter-cantonal concordats.[399] As codified in both the then current federal Constitution and the 1852 Extradition Law, refusal to extradite was only possible in the case of a political or press offence.[400] Today, this remains unchanged.

Up to 1942, judicial cooperation in criminal matters was regulated by the Federal Code on Extradition and the different concordats. However, for several reasons, the existing cooperation system was criticised quite frequently and sharply. The abundance of regulations was said to cause too much inconvenience and non-transparency. In addition, the wide variations in cantonal substantive criminal law would hinder the effectiveness and efficiency of cooperation.[401] It was felt that all problems would be solved by creating a uniform Penal Code. From 1942 onwards, the basic rules on cooperation were included in Articles 356 *et seq.* of the federal Penal Code, complemented by the additional provisions of the FCCP, and partly elaborated by the Concordat of 1992. Which rules must be followed depends on the jurisdiction and the authorities involved. In this chapter, we will scrutinise if and to what extent judicial cooperation in Switzerland enables or prescribes the different jurisdictions to give legal force to judicial decisions in criminal matters handed down by a judicial authority in another jurisdiction of the country. A distinction is made between the traditional regime, primarily regulated in the Penal Code (4.2), and the modern regime of the inter-cantonal Concordat (4.3).

4.2. TRADITIONAL JUDICIAL COOPERATION: MUTUAL RECOGNITION OF ARREST WARRANTS, ORDERS TO APPEAR, AND JUDGMENTS

As was mentioned, Articles 356 to 362 PC provide a set of minimum rules,[402] complemented by some provisions concerning the cooperation in federal criminal

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398 Idem, p. 38.

399 Ph. Thormann, 'Die Rechtshülfe der Kantone auf dem Gebiete des Strafrechts' (referat), *Zeitschrift für Schweizerisches Recht*, (47) 1928, p. 54a.

400 J. Schollenberger, *Bundesverfassung der Schweizerischen Eidgenossenschaft*, Berlin: Verlag von O. Häring, 1905, pp. 457-462.

401 For instance: Thormann (1928a), p. 27a; Thormann (1928b), pp. 188a-190a, 195a-197a; G. Werner, 'De l'exécution intercantonale des jugements des Tribunaux pénaux suisses', *Zeitschrift für Schweizerisches Recht*, (27) 1908, p. 530.

402 Although this view is quite common, even confirmed by the Federal Supreme Court in BGE *122* (1996) I 85, Wehrenberg (2003), p. 328 has his doubts on whether these are meant to be minimum provisions.

procedures and the 1992 Concordat on inter-cantonal cooperation.[403] The minimum rules of the Penal Code prescribe cooperation on request: starting with a request from one party (the requesting authority) to another (the requested authority), the latter has to decide whether or not it will comply with the request. It is settled case law that judicial cooperation on the basis of the Penal Code may be asked for all types of cooperation, as they are usually distinguished in legal doctrine. It encompasses the extradition of suspected and sentences persons, the execution of sanctions and mutual legal assistance.[404]

Two types of legal aid are explicitly mentioned (Article 356(1), second sentence PC). The first is the enforcement of arrest warrants (*Haftbefehle*), aiming at the pre-trial detention of suspects, or the detention of sentenced persons (*Untersuchungshaft* or *Sicherungshaft*).[405] The second concerns orders to appear (*Zuführungsbefehle*), that are addressed to suspects, sentenced persons, witnesses or experts.[406] Such warrants are determined to have legal force on the entire territory of Switzerland: "*Insbesondere sind Haft- und Zuführungsbefehle […] in der ganzen Schweiz zu vollziehen*." For suspected and sentenced persons against whom either an arrest warrant or an order to appear has been issued, the Penal Code has laid down the right to be heard by the requested authorities before being transferred (Article 357(4) PC). The main purpose of such a hearing is to verify the person's identity and to avoid other errors.[407]

In addition to the explicit mention of arrest warrants and orders to appear to be mutually recognised, the Federal Supreme Court explicitly reiterated in 1992 that any judgment imposed by a Swiss judge would be enforceable throughout the entire Swiss federation:

> "*tout jugement passé en force, rendu en vertu du code pénal suisse, est exécutoire sur tout le territoire suisse en ce qui concerne les amendes, les frais, les confiscations, les dévolutions à l'État et les dommages-intérêts*".[408]

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403 M. Pieth, 'National report of Switzerland', in: M. Delmas-Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States. Penal Provisions for the protection of European Finances* (French title: *La mise en oeuvre du Corpus Juris dans les États Membres. Dispositions pénales pour la protection des Finances de l'Europe*), Antwerp-Groningen-Oxford: Intersentia, 2001, p. 61; Müller (1997), p. 5; Piquerez (1994), p. 6.

404 E.g. BGE *85* (1959) I 103 (106.2); BGE *86* (1960) IV 136 (139.1).; BGE *102* (1976) IV 217 (220.2).

405 Hauser, Schweri and Hartmann (2005), p. 326. As amply confirmed by the Federal Supreme Court's extensive elaboration in BGE *118* (1992) IV 371, Article 356(1) second line PC regards the process of extradition of suspects and sentenced persons.

406 These orders are mentioned as *Vorführungsbefehle* by Hauser, Schweri and Hartmann (2005), see e.g. pp. 193, 293, 331.

407 BGE *118* (1992) IV 371 (375).

408 BGE *118* (1992) IV 371 (393).

On the condition that permission is granted, Article 359(1) PC enables the judicial authorities of the requesting canton or *Bund* to operate on the territory of another canton, thereby following the rules of the canton where the activities take place (Article 359(2) PC). The consent of the latter is not required in urgent cases, which urgency has to be assessed by the requesting authorities. The requested canton should be informed afterwards. The requested canton is basically obliged to allow the activities of the foreign authorities on its own territory. This was considered to be relatively far-reaching, especially in the early years of the Penal Code. On the one hand, it restricts cantonal territoriality, but it expands it on the other hand.[409]

The Penal Code regime prescribes direct contact between the involved authorities (Article 357(1) PC); written requests should be sent directly to the authority competent to decide on them. Furthermore, arrest warrants may be sent by telecommunication, provided that a written confirmation will follow immediately afterwards (Article 357(3) PC). Legal aid should be granted free of charge in principle, though technical and scientific reports should be paid by the requesting authorities (Article 358(1) PC).

4.2.1. Federal jurisdiction

In cases where federal competence is given, the Federal Code of Criminal Procedure contains some additional provisions regarding cooperation in criminal matters, between both judicial and non-judicial authorities. Of course, it also provides procedural rules on pre-trial detention, the interrogation of suspects, witnesses and experts, and so on. As given, Article 27 FCCP is considered the key article. It determines that all cantonal and federal authorities, whether judicial or non-judicial, are obliged to support the federal judicial authorities in criminal proceedings. It explicitly mentions the delivery of information (*die Erteilung benötigten Auskünfte*) and the inspection of documents (*die Einsicht in amtliche Akten*)[410] as activities liable for legal assistance. Furthermore, subsequent provisions oblige the cantons to grant legal aid free of charge and to put court rooms, as well as prison cells for pre-trial detainees, at the *Bund*'s disposal (Articles 28 and 29 FCCP). As such, these provisions rather address the practical support activities, normally being granted by cantonal and federal non-judicial authorities,[411] instead of enabling or obliging the mutual recognition of judicial decisions. Therefore, these provisions are not relevant to this research.

When the *Bund* decides to delegate its jurisdiction to a certain canton, the latter is held to take over the criminal case (Article 247(1) and (3) FCCP), on the basis

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409 Trüb (1950), p. 87.

410 Concerning existing information only, see M.J.J.P. Luchtman, *Grensoverschrijdende sfeercumulatie. Over de handhavingssamenwerking tussen financiële toezichthouders, fiscale autoriteiten en justitiële autoriteiten in EU-verband*, Nijmegen: Wolf Legal Publishers, 2007, p. 562.

411 Luchtman (2007), p. 562.

of its local rules of criminal procedure (see also Section 3.3.4). All expenses are reimbursed by the *Bund*. Recovered fines accrue to the canton (Article 253 FCCP). However, the provisions on delegated jurisdiction actually do not regulate the mutual recognition of judicial decisions; here, it rather involves the phenomenon called transfer of proceedings.

In contrast, Articles 239 to 243 FCCP do concern the mutual recognition of judicial decisions. These provisions concern the execution of sanctions imposed by the federal judge. Such sanctions are executed on the territory of the canton that is assigned to do so in the federal judgment (Article 241 FCCP). Article 240(2) FCCP explicitly obliges cantons to execute federal sanctions, after being assigned, on the basis of their cantonal rules. All costs made in the execution are reimbursed by the *Bund* (Article 241(2) FCCP). After the recovery of a financial penalty, the canton must transfer the collected money to the *Bund* (Article 243(1) FCCP).

4.2.2. The principle of locus regit actum

The traditional cooperation procedure under the regime of the Penal Code is characterised by the principle of *locus regit actum*: requests are executed on the basis of the law of the requested (or: executing) party, even where the activities are actually accomplished by the requesting authorities (Article 359(2) PC). If, for instance, the prosecuting authorities of Zug want to search certain premises on the territory of Tessin in order to seize documents and data, they have to apply the procedural rules on search and seizure of Tessin, where the documents and data are located. According to the Federal Supreme Court, this means that the requested authorities are allowed to determine the precise nature and shape (*Art und Form*) of the required activities, only if they are actually executed.[412]

The principle of *locus regit actum* is not absolute, since the requested authorities that have to decide whether to grant the request are not allowed to examine the merits of the underlying criminal case (*materielle Prüfung*). A person's guilt or innocence may not be verified, nor may the allowance, appropriateness, or necessity of the requested measure be considered under its local rules. The only question that should be asked, concerns the competence of the requested authority to execute the request (*formelle Prüfung*), which is especially important with regard to coercive measures.[413]

The principle of *locus regit actum* is further restricted by the rule not to discriminate between the interests of the other cantons and the *Bund*. The Federal Supreme Court has repeated several times that it would violate the essence of Article 356 PC (formerly Article 352 PC) if cantons were to apply their local rules

412 BGE *119* (1993) IV 86 (88-91); BGE *121* (1995) IV 311 (315.2b).

413 E.g. BGE *119* (1993) IV 86 (88-90). See also: Hauser, Schweri and Hartmann (2005), p. 199; Trüb (1950), pp. 77-78; Luchtman (2007), pp. 564-565.

differently in the inter-cantonal relationships than in their internal relationships (intra-cantonal), or if local rules are interpreted indiscriminately in order to avoid the execution of the request.[414]

The interpretation of the *locus regit actum* principle, as described above, which resulted in its limited application, has made the requesting authorities almost fully responsible for the activities of the executing authorities. In principle, just complaints regarding the actual execution deeds of the required activity are to be challenged on the territory of the requested party.[415]

The application of the principle of *locus regit actum* has proved to be problematic in practice, especially in view of Article 359 PC. It is hardly possible to get acquainted with the procedural rules of all 26 cantons. The lack of knowledge about and experience with a "foreign" criminal procedure may increase the risk of error. Not only in the specific situation of Article 359 PC, but also in general problems may arise if one criminal procedure appears to have followed several procedural systems on different points. According to Müller, the supervision of whether all procedural requirements are followed is much harder to accomplish, especially for the defence, which is problematic in view of legal certainty.[416]

Given that assistance depends on the compliance of the requested authority, which is subject to several conditions and may be refused if these conditions are not fulfilled,[417] Cornu pointed out that judicial authorities have therefore often preferred to send a request to the local judicial authorities, instead of operating themselves.[418] Making the requesting authorities responsible for the execution would decrease the risk of error, since they may use the rules they are familiar with. But, the fact remains that the criminal procedure might ultimately have followed differing criminal procedures.

4.2.3. Refusal grounds

An exception to the principle of obliged cooperation is laid down in Article 356(2) PC: it provides a ground to refuse to enforce an arrest warrant if the offence that underlies the request is a political offence or a press offence. Then, the requested

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414 BGE *87* (1961) IV 138; BGE *119* (1993) IV 86 (88); BGE *123* (1997) IV 157 (162). See also: Luchtman (2007), p. 564.

415 BGE *119* (1993) IV 86 (90). Nevertheless, if the requested canton provides full legal remedies for all aspects of cooperation in criminal matters in its cantonal Code of Criminal Procedure, it may not restrict itself to questions of *formelle Prüfung* only, BGE *117* (1991) IA 5. In the relationships between the cantons, however, this decision has been replaced by Article 19(2) of the Concordat.

416 Wehrenberg (2003), p. 322 and Müller (1997), p. 7. See also the Supreme Court's reflexions on *locus regit actum* in BGE *122* (1996) I 85 (89).

417 P. Cornu, 'L'application du concordat sur l'entraide judiciaire dans la pratique des autorités de poursuite pénale', *Schweizerische Zeitschrift für Strafrecht*, (115), 1997, pp. 36-37.

418 Cornu (1997), p. 36.

authorities may refuse to extradite a suspect or sentenced person, on the condition that they will prosecute the suspect or execute the judgment themselves.[419]

Furthermore, the application of the *locus regit actum* rule may under certain circumstances result in the refusal of incoming requests. Although restricted by the prohibition of *materielle Prüfung*, as well as by the rule of non-discrimination of others' interests, the requested authorities are still allowed to determine themselves how precisely to execute a request (*Art und Form*).[420] In a concrete case, this would give rise to conflict, for instance where the local rules provide privileges or immunities. Such issues are elements of the nature and type of judicial activities, which are thus left to the assessment of the requested authorities and would possibly lead to a refusal.[421]

4.3. THE INTER-CANTONAL CONCORDAT

In the 1990s, the Penal Code provisions were considered insufficient to combat crime in Switzerland in modern times. According to Pieth, they even had the opposite effect of hindering prosecution, for example in cases of drug trafficking. The increasing trans-cantonal crime, especially organised crime and economic crime, required another approach: "It was felt that cooperation between the inter-cantonal judicial powers had to be established in such a way that cantonal (territorial) frontiers no longer interfered with prosecution".[422]

Initially, three possible solutions were proposed to simplify the inter-cantonal cooperation in criminal matters:

1. the total harmonisation of criminal procedure throughout the entire Swiss federation; or
2. the design of a concordat to enable the direct intervention on the territory of another canton; or
3. the creation of a federal jurisdiction.[423]

At that time the second option was preferred, which Siebert characterised as "*la solution la plus respectueuse de la souveraineté cantonale*".[424] In 1992, the cantons

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419 Hauser, Schweri and Hartmann (2005), p. 199.

420 Supra note 410.

421 BGE *121* (1995) IV 311 (315.2b).

422 M. Pieth (2001), pp. 61-62; also Piquerez 1992, pp. 63-64; and Cosandey and Piquerez (1994), rapport explicatif, p. 1707.

423 Cosandey and Piquerez, rapport explicatif (1994), p. 1709.

424 C. Siebert, 'L'évolution du modèle Suisse de l'entraide judiciaire et de la coopération intercantonale en matière pénale', in: J.A.E. Vervaele (ed.), *European Evidence Warrant. Transnational Judicial*

adopted the Concordat on Mutual Legal Assistance and Inter-Cantonal Cooperation in Criminal Matters (the Concordat),[425] which was approved by the *Bund* in 1993. Being an inter-cantonal instrument, it does not apply to federal-cantonal relationships but only those among the cantons. It is further, in principle, restricted to criminal prosecutions for violations of the Penal Code and other federal laws containing provisions of substantive and administrative criminal law.[426] Moreover, the Concordat covers a limited field of application; in contrast to the Penal Code, the Concordat does not address all types of judicial cooperation. As pointed out by Piquerez, it has only set up rules on mutual legal assistance: "*C'est l'entraide au sens étroit. C'est cette forme d'entraide qui est l'objet du concordat …*".[427] After all, the Concordat itself speaks about "*Verfahrenshandlungen*",[428] which are acts aiming at the obtaining of evidence.[429] There is no limit on the type of acts appropriate for mutual legal assistance. The canton may apply all procedural acts foreseen by its cantonal law.[430] Examples of measures that may be used for obtaining evidence on the territory of another canton are the search of premises and persons, the seizure of objects and assets, the blocking of bank accounts, the interrogation of witnesses and expert opinions and technical supervision measures.[431]

For the purpose of the efficient combat of crime among the cantons, the Concordat has simplified the traditional cooperation procedure of the Penal Code by reducing formal intermediate steps. It established a single homogeneous cooperation

Enquiries in the EU, Antwerp-Oxford: Intersentia, 2005, p. 103. Today, the first and third options have also been worked out. Regarding the first option, a uniform Code of Criminal Procedure is drafted and expected to enter into force within a few years (see Section 3.2.2). As to the third option, several Federal Units are created for the combat of certain offences, for instance: *Zentralstelle zur Bekämpfung des organisierten Verbrechens, die Zentralstelle zur Bekämpfung des unerlaubten Betäubungsmittelsverkehr*.

425 Supra note 390.

426 It follows from Art. 2(2) of the Concordat that cantons may enhance the Concordat's field of application to cantonal criminal legislation. Although four cantons have used this possibility (see Annex 2 to the Concordat), the relevance of these declarations is negligible, since cantonal criminal provisions mainly concern so-called *Ordnungswidrigkeiten* (acts punishable – out of court – with administrative sanctions that fall outside the scope of criminal law and criminal proceedings), Müller (1997), p. 6.

427 Piquerez (1994), p. 6; see also Müller (1997), pp. 10-11.

428 2. Kapitel: Verfahrenshandlungen in einem andern Kanton; 3. Kapitel: Auf Verlangen eines andren Kantons vorgenommene Verfahrenshandlungen.

429 Piquerez (1994); p. 6; also Müller (1997), p. 10, who defined *Verfahrenshandlungen* as follows: "*Alle Handlungen und Anordnungen, welche die sachlich für die Prozessordnung zuständige Behörde nach dem Recht ihres Kantons trifft, um Beweismittel zu gewinnen*."

430 Müller (1997), pp. 10-11; different Piquerez (1994): "*tous les actes […] mentionnes dans le concordat*", p. 16. Since neither the text of the Concordat, nor the explanatory report give any indication for this opinion, Müller's view sounds more reasonable to me.

431 Pieth (2001), pp. 63 *et seq;* Müller (1997), pp. 22 *et seq.*

procedure. As such, it has provided a more automatic procedure for the mutual acceptance and enforcement of judicial decisions handed down in another canton (Chapter 3, Articles 15-23 Concordat). In addition to this, the Concordat has also introduced the possibility of direct intervention, allowing the authorities of one canton to operate directly on the territory of another canton on the basis of their own domestic code of criminal procedure (*forum regit actum* principle, Chapter 2, Articles 3-14 Concordat). The introduction of the direct intervention regime is the main innovation of the Concordat. It may be regarded as the first step to the creation of "*une sorte d'«espace judiciaire suisse»*".[432]

The Concordat does not prescribe which regime should be followed in certain cases; cantons may choose what they prefer in a particular case (Article 1 Concordat):

> "*Das Konkordat bezweckt die effiziente Bekämpfung der Kriminaliät durch Förderung der interkantonalen Zusammenarbeit, indem es insbesondere a. den Untersuchungs- und Gerichtsbehörden die Kompetenz gibt, Verfahrenshandlungen in einem andern Kanton durchzufren […]; b. die Rechtshilfe in Strafsachen erleichtert*".

Of course, the minimum rules on judicial cooperation in the Penal Code still apply, although only complementarily.[433] The Concordat has simply enhanced the traditional field of application on certain points. Today, all cantons adhere to the Concordat; the last canton, Tessin, has joined the instrument in 1996 (Annex 2 to the Concordat). The practical importance of the Concordat exceeds the value of the Penal Code provisions to a large extent, since most offences are dealt with at cantonal level. And, if legal aid is needed, it mostly involves mutual legal assistance, to be given by another canton.

4.3.1. General rules facilitating mutual legal assistance between cantons

In order to serve quick and efficient cooperation between cantons, the Concordat obliges all cantons to assign a central unit (Article 24 Concordat) which has to be notified in various situations under the Concordat. In the case of direct intervention, the authorities of the canton where the criminal prosecution has started (the leading canton) must inform the central unit of the canton where the activities will take place (the host canton) (Article 3(2) and (3) Concordat). This also applies if the assistance of local police authorities is needed (Article 6 Concordat). If the authorities of the leading canton, while operating on the host canton's territory, discover a crime being committed there, they have to notify the central unit of the host canton as well (Article 11 Concordat). And, the same must be done if they have

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[432] Cornu (1997), p. 32.

[433] Cornu (1997), p. 33.

doubts about the competence of particular authorities (Article 15(2) Concordat). The central units that are assigned by all 26 cantons are listed in Annex 1 to the Concordat. In most cantons, a prosecution service or an investigation judge, at least a prosecuting authority, has been allotted for this task.[434]

4.3.2. The simplified procedure on request: facilitating the inter-cantonal recognition of evidence warrants

The Concordat has simplified the traditional request procedure of the Penal Code (Articles 15-23 Concordat), regarding the following situation: judicial authorities of a certain canton (the requesting canton) issue a request for legal assistance to another canton (the requested canton) for the purpose of obtaining evidence for use in criminal proceedings. The request may address, for instance, court orders on search and seizure, court orders on the blocking of bank accounts, or court orders on the interrogation of certain witnesses or experts.

The Concordat determines that a written request should be issued via a written form (*Ersuchungsschreiben*), in the language of either the requesting canton or the requested canton. (Article 15(1) Concordat). Furthermore, although legal assistance should be granted free of charge in principle, expenses incurred for the translation of documents, for the use of interpreters, writs of summons, expert investigations, scientific activities and the transports of detainees should be paid by the requesting canton (Article 23(1) Concordat), in addition to the obligation of paying for technical and scientific reports (following Article 358(1) PC). These legislative changes should be explained as facilitating the traditional cooperation between cantons, since the executing canton is presumed to be more willing to grant its aid in an accurate and rapid way if such important expenses can be reimbursed. Furthermore, given that reimbursement includes expenses made for the translation of documents and the use of interpreters, it appears that the Concordat would avoid language differences hindering mutual legal assistance in criminal matters as much as possible, by at least allowing the executing canton to reimburse the requesting canton for these costs.

The traditional principle of *locus regit actum* still applies. The executing authorities apply the rules they knows best. In view of the aforementioned criticisms about the practical application of this traditional principle, Article 17 of the Concordat has to be regarded as an improvement. It allows the requesting canton to become involved in the actual execution of its own request on the territory of the requested canton. It can be considered to be a midway between Article 359 PC on the one hand – enabling the judicial authorities of the requesting canton to operate on the territory of another canton, with permission, thereby following the rules of the latter canton – and the possibility of direct intervention – enabling the judicial authorities of the leading canton to search premises and to seize evidence on the territory of

[434] Pieth (2001), p. 62.

the host cantons, without permission required (see next Section). Though it is true that the possibility of Article 17 of the Concordat does not solve the problem of having differing procedural rules in the course of one criminal procedure, it may nonetheless contribute to monitoring the compliance with procedural requirements during the different stages and acts of the criminal procedure (see also Section 4.2.2).

In addition, in the context of the restricted application of the *locus regit actum* principle, in particular because of the prohibition of examining the merits of an incoming case, Article 19 of the Concordat can also be considered an improvement. It determines that complaints regarding complying with the request as well as the actual enforcement of the requested activities must be brought before the court of the requested canton; for all other aspects, especially substantive law aspects, legal remedies must be sought in the requesting canton. According to the Federal Supreme Court, this provision guarantees both the interests of the authorities and the person involved.[435]

Finally, in view of increasing cooperation and at the same time adequately guaranteeing the suspects' rights, the Concordat prescribes that a right to be heard (ex Article 357(4) PC) should also be executed with regard to persons otherwise detained in the pre-trial stage (thus outside the contexts of arrest warrants and orders to appear). Such a hearing has to take place within 24 hours after being arrested and should be accompanied by being informed on the reasons and legal grounds for the arrest (Article 21 Concordat).

4.3.3. Direct intervention: beyond mutual recognition

Much more revolutionary is the introduction of the possibility of direct intervention (Articles 3-14 Concordat). It enables the judicial authorities of the canton where the criminal proceedings started (the leading canton) to accomplish their tasks on the territory of another canton (the host canton), thereby following their local rules of criminal procedure (*forum regit actum*). Without prior permission, on its own costs and using its own language, the judicial authorities of the leading canton may search premises, hear witnesses or held court sessions outside its own territory, on the sole condition that they notify the host canton beforehand or, in urgent cases, *post factum*.

The host canton is obliged to tolerate the operations of the leading canton; there is no place for refusal on any ground, even if the operations of the leading canton violate the law of the host canton: "*auch dann, wenn das Recht des Handlungskantons die Durchführung einer nach dem Recht des sachzuständigen Kantons zulässigen Verfahrenshandlung geradezu verbietet*".[436] The host canton is even obliged to put its local police force at the disposal of the authorities of the leading canton, if necessary

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435 BGE *120* (1994) IA 113, pp. 118-119. This point is more extensively dealt with in Section 5.3.

436 Müller (1997), p. 17.

for the execution of the activities. The necessity for a police force would especially come up in cases of coercive measures; they would be assigned and supervised by the local authorities of the host canton.[437]

The direct intervention regime really means a simplification of the cooperation procedure. The initiating canton is no longer tasked to issue a request and to await its uncertain outcome. The canton in which the evidence is sought is no longer burdened with the task of executing a request in favour of a criminal case of another jurisdiction. Since the authorities of the leading canton are allowed to follow their domestic rules on the territory of the host canton (*forum regit actum*), the risk of mistakes would decrease. Furthermore, it serves legal certainty that the criminal proceedings can now be based on the procedural rules of one criminal justice system. Given this, it would also be easier for all parties involved to keep an eye on the compliance with procedural requirements.[438]

Nevertheless, although the direct intervention regime may be easier to proceed by the authorities of the leading canton, it will be less sure for the suspected person involved, who will then be subjected to strange rules of criminal procedure.[439] In addition, the regime of direct intervention could be problematic in view of the significant differences in cantonal procedural laws (*Inkompatible Institute der kantonalen Prozessordnungen*). By means of a few examples Müller demonstrates that these problems are not totally new in the context of inter-cantonal cooperation, nonetheless intensified by the possibility of direct intervention. For instance, cantons where house searches are not allowed by night are now obliged to provide their police forces for just such an activity.[440] Nonetheless, the problems related to the different codes of criminal procedure will be solved in the near future, since the single Code of Criminal Procedure is expected to enter into force as from the start of 2011.[441] It will be interesting to see how the issue of judicial cooperation in criminal matters has been drawn up in the proposed instrument.

4.4. JUDICIAL COOPERATION AND MUTUAL RECOGNITION IN THE SINGLE CODE OF CRIMINAL PROCEDURE

The possibility of one uniform code of criminal procedure has long since been on the agenda, but the entry into force of the uniform Penal Code in 1942 reinforced

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437 Pieth (2001), p. 63; Müller (1997), p. 12-14; Piquerez (1994), p. 18.

438 Cornu (1997), p. 39; Müller (1997), p. 7; again BGE *122* I 85 (1996), p. 89.

439 Wehrenberg (2003), p. 324.

440 Müller (1997), pp. 16-19.

441 E.g. P. Müller, "Auf dem Weg zu einer Vereinheitlichung des Strafprozessrechtes – eine Zwischenbilanz", *Zeitschrift des Bernischen Juristenvereins*, 1999, pp. 287-288.

the discussion. It nevertheless took another 50 years, before a first concept was presented, drawn up by the Federal Department of Justice and Police.[442] Today, a final text is available; the Swiss Code of Criminal Procedure is expected to come into force in 2011.[443]

Concerning judicial cooperation, the Code of Criminal Procedure continues the line developed over the last decades, especially regarding renewals of the Concordat. The definition of *Rechtshilfe* (Article 43(4) CCP) has to be regarded as the implementation of case law of the Federal Supreme Court. Being obliged to cooperate in the course of criminal proceedings, the federal and cantonal authorities have to communicate directly and in principle to grant legal aid free of charge. The cooperation would start either on request (Articles 49-51 CCP) or by the direct intervention of the authorities of the leading canton or the *Bund* on the territory of another canton (Articles 52-53 CCP). Obviously, as soon as this code comes into force, the debate as to conflicting rules of criminal procedure will have lost its relevance as a result of which intensive cooperation forms such as direct intervention will surely be facilitated.

5. ASSESSING THE EU PARAMETERS

In Chapter 3, the scope of the mutual recognition principle in the context of EU cooperation in criminal matters was determined by assessing the different framework decisions and directives in the light of seven parameters (Chapter 3, Section 3). As explained, these parameters were formulated as a tool to determine the effectiveness of mutual recognition instruments: each parameter relates to a legal element supposed to be of essential influence on the successful functioning of mutual recognition. In Chapter 3, this resulted in the identification of a number of issues that are still having a hindering effect on the full application of the mutual recognition principle in the European Union (Chapter 3, Section 4).

Now that the possibilities regarding mutual recognition in the Swiss federation have been examined, the outcomes will be assessed in the light of these parameters. This will give an insight into how certain issues playing a role in developing a mutual

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442 "Aus 29 mach 1. Konzept einer eidgenössischen Strafprozessordnung", Bericht der Expertenkommission «Vereinheitlichung des Strafprozessrechts», Eidgenössisches Justiz- und Polizeidepartement, Berne, December 1997.

443 "Neue Prozessordnungen treten am 1. Januar 2011 in Kraft", Medienmitteilungen, Eidgenössisches Justiz- und Polizeidepartement, 31.03.2010, available at the following link: http://www.ejpd.admin.ch/ejpd/de/home/dokumentation/mi/2010/2010-03-31.html (last accessed on July 22, 2010). For a more elaborated overview of the unification process see F. Wicki, 'Die Schweizerische Strafprozessordnung aus der Sicht des Gesetzgebers', *Schweizerische Zeitschrift für Strafrecht*, (125) 2007, pp. 218-228; also S. Gless, "Aus 29 mach 1" – die jüngsten Bemühungen um die Vereinheitlichung des Strafverfahrens in der Schweiz', *Zeitschrift für die gesamte Strafrechtswissenschaft*, (113) 2001, pp. 419-426.

recognition system within the European Union are approached in Switzerland. The results will serve the ultimate goal of this research, which is to derive lessons from the Swiss example for the future of mutual recognition in the field of judicial cooperation in criminal affairs between EU Member States.

5.1. THE SERIOUSNESS OR "TRANS-BORDERNESS" OF THE UNDERLYING OFFENCE

It has been demonstrated that the provisions on cooperation in criminal matters are to be found in the Penal Code, the Federal Code on Criminal Procedure, and the Concordat (Section 3.2). The Penal Code's cooperation provisions apply to "*Strafsachen, auf die dieses Gesetz oder ein anderes Bundesgesetz Anwendung findet*" (Article 356(1) PC); the Federal Code on Criminal Procedure has used the word "*Bundesstrafsachen*" (Article 27 and 252 FCCP); the Concordat, finally, has regarded "*Verfahren, in denen materielles Bundesstrafrecht (Strafgesetzbuch und andere Bundesgesetze) anwendbar ist*" (Article 2(1) Concordat). It is, therefore, clear that the cooperation provisions are only applicable to federal offences, as penalised in the federal Penal Code primarily, and in the Military Penal Code and the Administrative Penal Code additionally.

Consequently, the provisions on cooperation do not concern offences that are criminalised through cantonal laws,[444] with the result that a duty of cooperation does not exist if the offence that underlies a request is a cantonal offence. As held by the Federal Supreme Court in 1959, this conclusion does not prevent cantonal authorities granting each other legal assistance on the basis of inter-cantonal treaties, which was still common practice in the early years of the 20th century. However, from the unification of criminal law in 1942 onwards, mutual cooperation in cantonal criminal cases has lost most of its relevance; cantonal substantive criminal law currently exists in areas of minor importance only (Section 3.2.2).[445]

In conclusion, neither the severity of the offence, nor its trans-border implications play any role in the provisions on cooperation in criminal matters. It means that, in turn, the inter-jurisdictional acceptance and enforcement of judicial decisions handed down in another Swiss jurisdiction can concern any judicial decisions, irrespective of what offence underlies the judicial decision. After all, with regard to the seriousness of crime, the reference to (*Bundes*)*Strafsachen* encompasses all federal offences, either *Verbrechen*, *Vergehen* or *Übertretungen* (see Section 3.2.1). A canton could thus be obliged to enforce a fine, but also a custodial sentence. And a canton may ask legal assistance in prosecuting an ordinary theft, but also in suing three suspects in a very complicated murder case. Moreover, the cooperation

444 BGE *85* (1959) I 103 (106.2).

445 BGE *85* (1959) I 103 (109.4).

provisions do not require the federal offences to have trans-border effects, neither in the sense that a crime has been committed in more than one jurisdiction, nor in the sense that the crime has been committed by or to a non-resident. It is true that the increased number of trans-cantonal crimes has been a main reason to strengthen judicial cooperation, especially amongst cantons mutually, but the intensified rules still apply to all federal offences.

5.2. REQUIRING DOUBLE CRIMINALITY

In Switzerland, the principle of double criminality plays no role in the vertical and horizontal relationships between the cantons and the *Bund*. Since the federal Penal Code has come into force, substantive criminal law in Switzerland is applicable in all jurisdictions uniformly: what behaviour is considered criminal, and how this is expressed in legal penalisations is identical for the entire Swiss federation. As a result, the question of whether an offence is criminalised in both the requesting canton and the requested canton is irrelevant.

Obviously, the situation was different before the entry into force of the single Penal Code. At that time, the cantons had their own cantonal penal codes[446] which were widely divergent.[447] In the context of inter-cantonal extradition, which then took place on the basis of the 1852 Extradition Law, the Federal Supreme Court had determined that extradition under this law was only allowed where the underlying offence was cumulatively mentioned in the exhaustive list of offences liable for extradition (see Section 4.3.1), and was regarded as criminal under the law of both cantons.[448]

Although this may appear quite reasonable under the former situation with various penal codes, Thormann criticised the application of dual criminality in the inter-cantonal context fundamentally at the time. In his view, a dual criminality requirement would contravene federal law if the obligation of extradition could be avoided just because of the fact that the involved canton did not criminalise the underlying conduct. After all, the extradition duty is federally determined and exists independently of cantonal legislation:

> "*Die Auslieferungspflicht ist also eine bundesrechtliche und von der kantonalen Gesetzgebung unabhängige. […] Es braucht also bloss ein Kanton in seiner Gesetzgebung ein Auslieferungsvrebrechen als straflos zu erklären, um sich*

[446] These cantonal penal codes were not codified in each canton, at least not at the end of the 19th century, Thormann (1928a), p. 27a.

[447] These differences will be commented on more extensively under Section 5.4.

[448] Thormann (1928b), p. 189a.

einer bundesgesetzlich garantierten Auslieferungspflicht zu entziehen. Ich glaube nicht dass dies richtig ist."[449]

Though quite interesting from an historical point of view, Thormann's criticism has lost its practical value with the entry into force of the Swiss Penal Code in 1942.

5.3. SPECIFIC ARRANGEMENTS FOR THIRD PARTIES, VICTIMS AND SUSPECTS TO SAFEGUARD THEIR RIGHTS IN THE CONTEXT OF MUTUAL RECOGNITION PROCEEDINGS

In the context of judicial cooperation in criminal matters, specific arrangements are provided for with regard to suspected persons and persons who are otherwise involved in criminal proceedings, for instance experts and witnesses. It is self-evident that such provisions are meant to secure certain individual interests of persons who are in a vulnerable position, even more so where the criminal proceedings would take placed across borders. In the following, an overview is given of those specific provisions. Being designed in the context of judicial cooperation in criminal matters, they automatically apply to the context of inter-jurisdictional acceptance and enforcement of judicial decisions.

With regard to victims of crimes, however, the cooperation provisions do not supply specific arrangements. But, general provisions are nevertheless provided for, which are briefly attended to below.

5.3.1. Suspects

The minimum rules of the Penal Code about traditional cooperation in criminal matters have established for suspected (and convicted) persons the right to be heard before being extradited (Article 357(4) PC). In the context of inter-cantonal mutual legal assistance, such a right also exists for pre-trial detainees and those who must appear before the examining magistrate for reasons outside of extradition; after being arrested, a hearing has to take place within 24 hours. In addition, the suspect has to be informed of the reasons and legal grounds for his arrest (Article 21 in conjunction with Article 20 Concordat).

The Concordat – to reiterate: applicable to measures for the purpose of gathering evidence only – further determines that complaints regarding evidence-gathering activities have to be challenged either in the requested canton or in the requesting canton depending on the complaint. As to the acceptance and indeed enforcement of the requested activities, for example a house search by night, the suspect can

[449] Thormann (1928b), p. 189a.

go to court in the requested canton. But concerning other aspects of the case, especially substantive law aspects such as the appropriateness of the search order, the suspect can seek justice in the requesting canton (Article 19(2) Concordat). As a result, a suspect may be compelled to lodge his applications separately. This would oblige the suspect to make extra efforts and to be aware of where to complain. Nevertheless, if only for its clarity, this provision is regarded as an improvement, both for the suspect and for the authorities involved. It is true that the minimum rules of the Penal Code already prohibited the requested authority from examining the merits of an incoming case (Section 4.2.1), the extent of this prohibition was nonetheless unclear now and then. After all, the Federal Supreme Court had allowed the requested canton to examine a case on its merits and thus to deal with substantive law complaints, if allowed by its cantonal code of criminal procedure.[450] With the Concordat, however, it became quite clear for the involved authorities which complaints they are allowed to deal with and which they are not. In addition, according to the Federal Supreme Court, this situation is more advantageous for the suspect than may be immediately apparent: the assessment of a certain complaint is now left to the court of the directly responsible canton, which has best knowledge and information on the specific aspect of the proceedings.[451]

The disadvantage for the suspect of being obliged to make extra efforts is alleviated and compensated for by Article 19(1) and Article 18 of the Concordat. The first provision gives the suspect the possibility to lodge his application in either the language of the requested or the requesting canton. The second provision further compensates the suspect by compelling the executing authorities (of the requested canton) to inform the suspect on the available legal remedies, including the competent authority and the time-limits for appeal.

The latter duty also applies in the context of direct intervention: Article 12 of the Concordat obliges the executing authorities, which are now the authorities of the leading canton, to inform the suspect in such a way too. The remedy at law may be applied in the language of either the leading canton or the host canton (Article 13 Concordat).

Under this direct intervention regime, the suspect's language preferences are further conceded to by Article 5(3) and Article 8(1) of the Concordat. The latter provision guarantees the suspect to be summoned in the language of its home canton. The former provides an exception to the rule that the authorities of the leading canton would operate using their own language (Article 5(1) and (2) Concordat); if the person involved does not understand this language, he would be given a translator or interpreter free of charge.

Finally, if the authorities of the leading canton want to search premises and seize objects and data themselves on the territory of another canton, they need a written

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450 E.g. BGE *117* (1991) IA 5.

451 BGE *120* (1994) IA 113, pp. 117-118.

and briefly motivated judicial decision. This decision may follow *post factum* in urgent situations only (Article 10 Concordat).

5.3.2. Third parties

The minimum rules of the Penal Code have determined that witnesses who are summoned to testify in a certain criminal case are entitled to receive a reasonable amount of money in advance for travel expenses (Article 359(3) PC). Under the direct intervention regime, the advance for travel expenses is also provided for, not only in favour of witnesses, but in favour of experts too (Article 8(2) Concordat). In addition, this article further guarantees both witnesses and experts to be summoned in the language of their home canton (Article 8(1) Concordat).

5.3.3. Victims

The Swiss federation has laid down a constitutional obligation to support and compensate victims of crimes (Article 124 FC). As a result, several federal legal measures have been initiated and adopted, such as the Victim Support Act of 1993 (*Opferhilfegesetz*).[452] This contains specific arrangements for victims of sexual and violent offences, mainly to improve their legal position. It has been implemented in the cantons. In order to help the authorities to determine the level of financial compensation in a specific claim, the Victim Support Regulation (*Opferhilfeverordnung des Bundesrates*) was adopted in 1992.[453] [454] Although these initiatives can be considered positive,[455] it would be untrue to state that they are prompted in order to facilitate the better cooperation in criminal matters between federal and cantonal judicial authorities. As far as the author knows, nothing has been undertaken in this context with regard to victims of crime in particular.

5.4. COMMON MINIMUM STANDARDS TO FACILITATE THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS

Under the foregoing parameters, several provisions are mentioned that have introduced minimum standards, meant for the better cooperation in criminal

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[452] The 1993 Act has been replaced by the Victim Support Act of 2007, which entered into force on 1 January 2009.

[453] This Regulation has been replaced in the meantime by the Victim Support Regulation of 2008, in force since 1 January 2009.

[454] For further details on the position of crime victims in Switzerland, see Brienen and Hoegen (2000), pp. 913-950 (Chapter 23).

[455] Idem.

matters between federal and cantonal authorities, or amongst cantonal authorities mutually. However, the advantages of these provisions relate to the enormous advantages of the unification of substantive criminal law in Switzerland in the first half of the last century. These advantages are attended to elsewhere in this section (especially Sections 5.2 and 5.5).

Moreover, the imminent entry into force of a single code of criminal procedure will bring a number of benefits too. Below, both unification processes are addressed with a special focus on the question of whether cooperation in criminal matters has influenced the debates and legislative proposals.

5.4.1. The unification process of substantive criminal law

Up until 1942, the Swiss cantons had their own penal codes, which all developed separately. The different legal developments were influenced by different foreign criminal codes, mainly from Germany, France and Italy. The same applies to foreign case law and legal doctrine; for the interpretation of criminal law provisions, cantonal judges also looked to their neighbouring countries as well, where of course the geographical location of the canton of trial and its official language determined which foreign country was mainly influential. Against this background it is hardly possible to speak about *the* development of Swiss criminal law.[456]

As a consequence, there existed noticeable differences between the cantonal codes, as demonstrated by Stooss in one of the first publications on the approximation of substantive criminal law in Switzerland.[457] There were significant differences in provisions on complicity, accessory, legitimate self-defence, prescription, and so on. Furthermore, with regard to criminal sanctions, Thormann points out that these were markedly diverging as well; most extremely, some cantons allowed the death penalty, whereas other cantons at the same time had already abolished it.[458] Also, a few cantonal codes had divided offences into *Verbrechen*, *Vergehen* and *Übertretungen*, while the other cantons only recognised *Vergehen* and *Übertretungen*. Logically, which behaviour was regarded as criminal and which behaviour was accepted also differs from one canton to another.

To illustrate this last point, some examples are borrowed from Stooss, especially concerning behaviour in the moral and ethical sphere. For instance, whereas the German-Swiss cantons had criminalised sexual behaviour in incestuous relationships as well as in same-sex relationships, the French-Swiss cantons had restricted their

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456 E. Hafter, *Lehrbuch des Schweizerischen Strafrechts. Allgemeiner Teil*, Berlin: Verlag von Julius Springer, 1926, pp. 26-30. Also C. Stooss, *Zur Vereinheitlichung des Strafrechts in der Schweiz. Welche Anforderungen stellt die Kriminalpolitik an ein eidgenössisches Strafgesetzbuch?*, Basel/Geneva: H. Georg's Verlag, 1891, pp. 3-4.

457 Stooss (1891), pp. 3-6.

458 Thormann (1928a), p. 27a.

prosecution authorities to pursue unacceptable sexual behaviour only if committed in public, which in fact excluded incest and homosexuality. As another example, compulsory prostitution was regarded as an offence in almost all cantons, except in Geneva and Tessin, where procurers were only prosecutable if their prostitutes were minors. Furthermore, In Geneva, adultery was not punishable, whereas it was in Vaud. There has been wide variations in the criminalisation of religious offences as well, for instance concerning blasphemy. But because of certain provisions in the federal Constitution, most divergences were gradually abandoned, at least on paper.

Here is not the place to elaborate on all of these points. However, the general and brief overview as given above shows that the variations in cantonal penal codes were not marginal, but fundamental. In the context of cooperation in criminal matters, several legal thinkers therefore advocated the creation of a single penal code in the early years of the 20th century. Thormann, for instance, stated in 1928: "*eine wirkliche befriedigende Lösung könne nur durch die Vereinheitlichung des schweizerischen Strafrechtes gefunden werden*".[459]

However, the need for a uniform criminal code as such had already been expressed explicitly some decades earlier, around the 1870s, by the Swiss association for penal law and detention law, supported by the Swiss association of jurists. In their view, a single criminal code would primarily improve and further develop Swiss criminal and detention law. Because modern times needed a reform of substantive criminal law, the best results could be achieved by the adoption of a federal instrument that would apply to all the cantons the same.[460] It appears from the 1918 communication of the Federal Council that such a reform did include an overall revision of cooperation in criminal matters generally:

> "*Die Hebung dieser Mängel* [related to the 1852 Extradition Law] *ist so sehr notwendig für die Durchführung des Strafgesetzbuches, dass es geboten erscheint, die Auslieferung und das ganze Rechtshülfewesen gründlich umzugestalten*".[461]

A first step towards a draft Penal Code was taken in 1890, when Stooss launched a first comparative study on cantonal criminal law. It was followed by several drafts and explanatory reports, designed by a small committee of experts. As a prerequisite for the success of the project, a constitutional ground was created in the federal Constitution. The former Article 64bis (currently Article 123) FC enabled the *Bund* to pass legislation in the field of substantive criminal law. From that time on

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459 Thormann (1928b), p. 195a; also p. 197a; see further Werner (1908), p. 519

460 C. Stooss, *Motive zu dem Vorentwurf eines Schweizerischen Strafgesetzbuches. Allgemeiner Teil*, Basel/Geneva: Verlag von Georg & Co, 1893.

461 Botschaft des Bundesrates an die Bundesversammlung zu einem Gesetzesentwurf enthaltend das schweizerische Strafgesetzbuch vom 23. Juli 1918, Schweizerisches Bundesblatt, no. 32, 7 August 1918 (vol. 70), Bd. IV, p. 83.

renewed drafts for a uniform criminal code followed, ultimately resulting in the Swiss Penal Code of 21 December 1937.[462] After being approved by the Federal Assembly, the new Penal Code came into force at the start of 1942. As worded by the Federal Council in its 1918 communication, the new code was an answer to the increased number of crimes; instead of combating crime with cantonal tools, forces were combined.[463]

The creation of a single penal code in Switzerland attracted some criticism during its drafting stage. But the discussion did not so much concern the objective of a uniform criminal code as its content. To accomplish one single code out of 26 cantonal codes was one side of the coin; the other side was to realise a fundamental reform of substantive criminal law in Switzerland, as an answer to the needs of changing times.[464] The latter attracted most criticism; there were – for instance – differences of opinion on the minimal requirements of the new code, the treatment of juvenile offenders and the hierarchy between punishment goals such as retribution and rehabilitation.[465] The discussions did not end at the time the Penal Code entered into force in 1942; from that time onwards, it has been amended quite often, whether to a small extent or to its fundamental aspects.

Although, as mentioned, the primary concern of the unifying process was to reform criminal and detention law as such, an overall reform of the cooperation system was also meant to be part of it.[466] It appears from the 1918 communication of the Federal Council that it even proposed some minimum changes: provisions on cooperation should be codified federally; the competent authorities should communicate directly, instead of via governmental organs; the extradition duty with regard to both suspected and sentenced persons should be enhanced to all offences criminalised federally; and provisions on cooperation should entail the most important guarantees for suspects and sentenced persons, such as the right to be heard.[467] The exact provisions that resulted from these drafts are almost identical to today's set of rules of the Penal Code (Articles 356-362 PC).

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462 Bundesblatt, no. 52, 29 December 1937 (vol. 89), Bd. III, pp. 625-735.

463 Botschaft des Bundesrates an die Bundesversammlung zu einem Gesetzesentwurf enthaltend das schweizerische Strafgesetzbuch vom 23. Juli 1918, Schweizerisches Bundesblatt, no. 32, 7 August 1918 (vol. 70), Bd. IV, Schlussbestimmungen, p. 100.

464 Idem, Section 3, p. 5; see also Stooss (1891), p. 8.

465 A discussion took place in a Swiss Journal in 1893 and 1894, see: E. Thurneysen, 'Zum Vorentwurf zu einem schweizerischen Strafgesetzbuch. Allgemeiner Teil', *Zeitschrift für Schweizer Strafrecht* 1893, pp. 369-388; A. Merkel, Über Hernn Thurneysens Kritik des Vorentwurfs zu einem schweizerischen Strafgesetzbuch', *Zeitschrift für Schweizer Strafrecht* 1984, pp. 1-13; E. Thurneysen, 'Zum Vorentwurf zu einem schweizerischen Strafgesetzbuch. Eine Replik', *Zeitschrift für Schweizer Strafrecht* 1894, pp. 261-266. C. Stooss, 'Thurneysens Bedenken gegen den Vorentwurf zu einem schweizerischen Strafgesetzbuch', *Zeitschrift für Schweizer Strafrecht* 1894, pp. 173-182.

466 Supra note 459.

467 Idem.

5.4.2. Towards a uniform code of criminal procedure

It has been mentioned that the approximation of criminal procedure has been subject of discussion for many years in Switzerland (Section 3.2.2). The adoption of the single Penal Code in 1937 already intensified the debate, but without any result; apparently, the time was not yet ripe. However, the theme came back on the agenda in the 1990s, in the context of increasing trans-border crime. It was felt that the instruments of that time were not adequate in a time of retreating national and cantonal borders. Not only were the differences in cantonal procedural rules regarded as hindering cooperation between cantonal authorities, but also between cantonal and foreign authorities, which were confronted with diverging procedural rules in one country.[468]

At certain points, the difficulties decreased, for instance with the adoption of the 1992 Concordat, which has been widely addressed in this chapter. As from its application, practitioners and academics are quite positive about the advantages of the Concordat, especially the possibility of direct intervention. Another helpful measure has been the extended federal jurisdiction in 2002 with regard to certain categories of crime such as organised crime, terrorism and money laundering, but also in cases where more cantons are involved, without a clear sign of which canton would be entitled to prosecute the crime.[469] Nevertheless, neither the Concordat nor the federal specialisation units solved the problem of conflicting rules of criminal procedure. A growing number of academics and practitioners therefore pleaded for a harmonised code of criminal procedure. The debate came more political as from 1994, when seven cantons requested a single code of criminal procedure through the Council of States in the Federal Assembly.[470]

Harmonisation of criminal procedural law was at that time not totally new in Switzerland. It has become normal practice that cantons looked outside their cantonal borders in the framework of projects revising their codes of criminal procedure. On top of this, several federal initiatives were taken with provisions on criminal procedure, for example the federal law on Victim Support (*Opferhilfegesetz*) and the well-known Concordat. In addition, federal and ECtHR case law has led to a certain degree of approximation of procedural provisions.[471]

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468 "Aus 29 mach 1. Konzept einer eidgenössischen Strafprozessordnung", Bericht der Expertenkommission «Vereinheitlichung des Strafprozessrechts», Eidgenössisches Justiz- und Polizeidepartement, Berne, December 1997, pp. 13, 21-23; see also: Müller (1999), pp. 286-288.

469 F. Riklin, 'Die Strafprozessreform in der Schweiz', *Goltdammer's Archiv*, 2006, p. 499; Gless (2001), p. 419; see also Section 4.3.

470 Müller (1999), p. 286; "Aus 29 mach 1. Konzept einer eidgenössischen Strafprozessordnung", Bericht der Expertenkommission «Vereinheitlichung des Strafprozessrechts», Eidgenössisches Justiz- und Polizeidepartement, Berne, December 1997, p. 22.

471 Riklin (2006), p. 498.

After the adoption of several motions to open real work on this point, a first step was taken by the assignment in 1994 of a Committee of Experts by the Federal Department of Justice and Police. They presented a first concept in 1997, "*Aus 29 mach 1*". It appears from this document that the growth of crime, especially trans-border crime, was still regarded as the most important reason for a harmonised code of criminal procedure. However, in its efforts to combat crime more effectively and efficiently, the Committee of Experts paid attention to other elements as well. After all, a single code would simplify the further development of Swiss criminal procedural law in the future too, since new federal case law or ECtHR case law would need just one implementing procedure, which would also have positive financial side effects. Moreover, a single code of criminal procedure would strengthen legal security and legal equality.[472]

In "*Aus 29 mach 1*", the Committee of Experts presented its initial choices for the new single code. Because of the enormous differences between the 26 cantonal codes, the basics of criminal procedure were to be reviewed totally. A key issue was the arrangement of the pre-trial stage of criminal proceedings. It has been mentioned earlier that throughout Switzerland two basic models can be distinguished, both with two sub-models (see Section 3.3.2). The French-Austrian system of the examining judge can be split into the *Untersuchungsmodell* I and *Untersuchungsmodell* II; the German system of the public prosecutor can be distinguished between *Staatsanwalt-modell* I and *Staatsanwaltmodell* II.[473] In addition, as was the case in the framework of creating a single penal code, the opportunity was also used to introduce some new elements, such as plea-bargaining and crown witnesses.[474] The results as presented in "*Aus 29 mach 1*" were discussed in hearings with representatives of science and legal practice, completed in 1998.[475] The most fundamental preparatory work was now done; results started to become visible.

In 2000, legislation on criminal procedural law became a federal competence (Article 123(1) FC). In 2001, a first draft Federal Code of Criminal Procedure was launched by the Federal Assembly,[476] ultimately resulting in the final draft of 2007 that will enter into force in 2011. According to the final text, pre-trial criminal proceedings will follow the *Staatsanwaltmodel* I. The creation of this single code is accompanied by a single code of criminal procedure for juvenile delinquents.

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472 "Aus 29 mach 1. Konzept einer eidgenössischen Strafprozessordnung", Bericht der Expertenkommission «Vereinheitlichung des Strafprozessrechts», Eidgenössisches Justiz- und Polizeidepartement, Berne, December 1997, pp. 21-27. Also Müller (1999), pp. 286-287.

473 The different sub-models are clearly and briefly explained in Gless (2001), pp. 421-423.

474 "Eine Strafprozessordnung ist diesbezüglich mehr als die Summe ihrer Einzelheite", Riklin (2006), p. 500.

475 "Aus 29 mach 1. Hearings zum Bericht der Expertenkommission 'Vereinheitlichung des Strafprozessrechts'", Bundesamt für Justiz, July 1998.

476 Vorentwurf zu einer Schweizerischen Strafprozessordnung, Bundesamt für Justiz, Bern, June 2001.

5.5. DIRECT OR INDIRECT ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS

The question of whether a decision can and must be enforced directly or indirectly primarily relates to the execution of final sanctions that are imposed outside the territory of the executing authorities. In Switzerland, a request for the execution of such a sanction should be complied with in principle. There is no ground to change a sanction as to its nature or duration before actually executing it. The possible sanctions that may be imposed on convicted persons, as well as the imposition conditions are exhaustively determined in the 1942 uniform Penal Code.

It is worth noting that under the former 1852 Extradition Law, which allowed extradition for execution purposes, conversion of sanctions was not possible. A canton that was requested to extradite a person for the purpose of undergoing a sanction in the requesting canton, was allowed to refuse extradition at that time, if the person involved was a resident. But, as a consequence, the refusing canton was required to execute the sanction itself. Although cantons in such situations were confronted with unknown sanctions, they were not entitled to convert the sanction into a enforceable one. No other choice was left other than to extradite the person.[477]

5.6. GROUNDS TO REFUSE RECOGNITION OF FOREIGN JUDICIAL DECISIONS

Obviously, the developments on unification of criminal law in Switzerland have influenced the number of grounds for refusal that currently exist in the context of cooperation in criminal matters. As mentioned above (Section 5.4.1), the facilitation of cooperation between cantonal and federal authorities was part of the unification project preparing the entry into force of the Swiss Penal Code in 1942. The idea was that common provisions on substantive law would reduce the need for grounds for refusal to a significant extent. What was more: grounds to decline cooperation should be removed completely. And, if one or more grounds for refusal were preserved, their invocation should not lead to the impunity of suspected and sentenced persons. Striving for the removal of cooperation obstacles as much as possible also included the ambition to remove the bottlenecks for law enforcement as much as possible.

The current grounds to refuse cooperation have only been mentioned briefly (Section 4.2.3). Below, they are elaborated on more extensively.

5.6.1. Refuse a request for extradition

Within the context of inter-cantonal extradition, only two kinds of offences are regarded with reservation: political offences and press offences. The current result

[477] Thormann (1928a), p. 46a.

of the reservations towards these offences is laid down in Article 356(2) PC. It provides an optional ground to decline the inter-cantonal extradition of suspected or sentenced persons, if the underlying offence is regarded a political or press offence. The consequence of such a refusal, however, is that the refusing canton is obliged to take over the prosecution of the offence, or the execution that has been imposed. Refusal would thus not lead to the impunity of the person involved.[478]

For the same reason that just two grounds for refusal are provided for in the context of inter-cantonal extradition, these grounds for refusal should be widely interpreted, according to the Federal Supreme Court. This may seem quite illogical. Would not the objective of Swiss-wide validity of arrest warrants and the removal of grounds for refusal rather imply a strict interpretation of Article 356(2) PC? Is it not true that the stricter grounds for refusal are applied, the stronger cooperation will be?

The highest court of Switzerland decided otherwise in a 1992 decision, where Jura was requested to extradite a sentenced person to Berne in order to undergo a custodial sentence there. The convicted person, however, sought political asylum in Jura, on which ground Jura was considering whether it could decline the extradition to Berne. Of course, the Federal Supreme Court stated clearly that refusal would require Jura to execute the custodial sentence on its own territory,[479] in line with what has been mentioned. But it also elaborated on the interpretation of the term "political offence" in the context of inter-cantonal extradition. The Court based its reasoning on the historical developments on substantive criminal law and the future developments on procedural criminal law in Switzerland. It stated that delicate issues on extradition have been largely reduced with the entry into force of the Penal Code in 1942 – and will be reduced even more after the entry into force of the single Code of Criminal Procedure. For that reason, cantons should presume that violations of the Penal Code are prosecuted and tried on the basis of the same principles and fundamental ideas throughout the entire territory of Switzerland, irrespective of the individual canton that has jurisdiction in a specific case. The term "political offence" must therefore be widely interpreted – and by analogy the term "press offence" too[480] – even more in view of the fact that refusal of extradition on this ground would not result in the impunity of the person involved, but rather implies for the refusing canton the take-over of the responsibility for prosecution or execution.[481] [482]

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478 BGE *118* (1992) IV 371 (379, 385-386).

479 BGE *118* (1992) IV 371 (379, 385-386).

480 BGE *118* (1992) IV 371 (385).

481 BGE *118* (1992) IV 371 (384).

482 This is very different in the international extradition practice, as pointed out by the Federal Supreme Court too. In the international context, a political offence probably leads to the impunity of the person involved, because of the wide diverging criminal law systems and rules in the different states. The refusal of extradition to a foreign state, on the ground that a political offence underlies

In conclusion, in a federation such as Switzerland, a canton that is requested to extradite a suspect or sentenced person to another canton in respect of a crime that is considered a political or press offence has two choices: it can either decline the transfer of the person involved and fulfil its prosecution or execution tasks, or recognise the arrest warrant and extradite the person involved to the authorities of the requesting canton.[483] Using older words, Article 356(2) PC could be summarised as follows: *aut dedere aut judicare* and *aut dedere aut punire*.

5.6.2. Refusal as consequence of the locus regit actum *principle*

Grounds to decline the recognition and enforcement of judicial decisions other than arrest warrants are codified neither in the Penal Code, nor in the Federal Code on Criminal Procedure, nor in the Concordat. Cantonal and federal authorities have an absolute duty to support each other. It has been shown that this duty primarily follows from the Penal Code provisions, and secondarily – with regard to the inter-cantonal relationships only – from the Concordat. It has also been stated that most requests are executed following the law of the executing authorities, on the basis of *locus regit actum*. Only where a canton, on the basis of the Concordat and within the context of mutual legal assistance, has chosen to operate itself on the territory of another canton (direct intervention), *locus regit actum* is replaced by *forum regit actum*.

Because authorities mainly follow the traditional request procedure of the Penal Code or the request procedure of the Concordat, the *locus regit actum* principle continues to play an important role in the context of judicial cooperation in criminal

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the extradition request, does not have the consequence of taking over the prosecution or the execution. That is rather up to the refusing state itself. But, in view of the enormous differences in legislation, declined extradition used to result in the impunity of the suspected or convicted person. The term political offence may therefore not be interpreted in analogy to its interpretation in the context of international extradition practice. After all, in that context, political offence is interpreted restrictively; only under strict conditions can an offence be termed a political offence. It is at least clear that political motives behind an offence are not enough, BGE *118* (1992) IV 371 (382-384). See also H. Schultz, *Das schweizerische Auslieferungsrecht*, Basel: Verlag für Recht und Gesellschaft AG, 1953, pp. 415-422.

483 The Federal Supreme Court is very clear on this point in BGE *118* (1992) IV 371 (386-387), in contrast to the literal text of Article 356(2) PC (formerly Article 352(2)). These provisions determine that due to an underlying political or press offence the extradition of both suspects (*Beschuldigten*) and sentenced persons (*Verurteilten*) may be declined. But, the consequences of such a refusal oblige the refusing Canton to prosecute the suspect (*die Beurteilung des Beschuldgten*) itself, without mentioning the duty to execute the sanction imposed on the sentenced person. As held by the Federal Supreme Court, however, the latter addition must be deduced from the principle of *ne bis in idem*, which prohibits not only double prosecution, but also double punishment for the same facts. The former Article 352(2) PC could not be interpreted as banning a second prosecution, but allowing double punishment; such a meaning would fundamentally contravene the Federal Constitution and the ECHR.

matters. Although restricted, it means in brief that it is up to the requested authorities how to execute a request, which measure to use and under what conditions (nature and shape, *Art und Form*).[484] And this may lead under certain circumstances to the non-acceptance of a judicial decision handed down in another jurisdiction, since in a specific case, the recognition of an incoming request could conflict with the nature and shape of the measure that should be taken in order to execute the request. The only example the author is aware of, concerns a request from Tessin to Zürich about hearing a Zürcher parliamentarian as a witness. The parliamentarian, however, pleaded immunity as a member of the parliament, and did not testify in court. For this reason, Zürich refused further assistance. According to the Federal Supreme Court, such a refusal is allowed, since questions on witness privileges and immunities concern the nature and shape of the judicial activity and are thus at the discretion of the requested canton, which is Zürich in this case.[485]

5.7. LIABILITY ARRANGEMENTS IN THE EVENT OF ACQUITTAL

The *Bund* (in the FCCP) and all 26 cantons (in their local codes of criminal procedure) have their own rules on restitution to accused persons, after being acquitted, or after their case being dismissed.[486] In most jurisdictions, such persons have a legal title to be compensated financially, if the underlying requirements are met.[487]

The most important object of financial compensation concerns unjustified custody (*ungerechtfertigte Haft*).[488] The state's liability for damages in that case follows either from its constitutional duty to guarantee personal freedom, or from a specific legal provision. The latter, for instance, applies to cases under federal jurisdiction and follows from Article 122 FCCP. Currently, the legal right to be compensated for damages after being acquitted encompasses more than simply unjustified custody; it applies to all elements of damage suffered in the course of criminal proceedings by acquitted persons, such as the lack of salary or profit, defence expenses, travel expenses, and so on.[489] The prosecuting authorities and the court will determine the right to restitution in the dismissal decision or the clearing judgment respectively.

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484 Sections 4.2.2 and 4.2.3.

485 BGE *121* (1995) IV 311 (315.2b).

486 Though, in the future, restitution provisions will be made uniform; the draft CCP entails a separate section on *Entschädigung und Genugtuung* of *Beschuldigte Personen* (10. Titel, 3. Kapitel, 1. Abschnitt, Articles. 429-432).

487 Hauser, Schweri and Hartmann (2005), p. 569.

488 Unjustified custody (*ungerechtfertigte Haft*) must be distinguished from unlawful custody (*rechtswidrige Haft*). A legal title to restitution for unlawful custody follows from international law, such as Art. 5(5) ECHR. See Hauser, Schweri and Hartmann (2005), p. 569.

489 Hauser, Schweri and Hartmann (2005), p. 570.

In principle, the party where the relevant activities took place, is held liable. In cases of delegated jurisdiction, however, the *Bund* remains responsible for all damages in the event of acquittal.[490]

It must be recognised, however, that these liability arrangements do not specifically relate to cooperation in criminal matters and the recognition of out-of-jurisdictional judicial decisions.

6. CONCLUDING REMARKS

The principal aim of this chapter was to examine the Swiss approach regarding those issues that within the European Union were identified as issues hindering the full application of the mutual recognition principle to the area of judicial cooperation in criminal matters. It has been demonstrated that within the Swiss federation, any judicial decision handed down in the domestic legal order of the *Bund* or one of the cantons has legal force throughout the entire territory of the country. All Swiss jurisdictions are obliged to comply with this; after all, the different members of the Swiss federation are constitutionally obliged to work together and to support each other in order to contribute to the fulfilment of the national or cantonal obligations and purposes. Only under very limited circumstances, are the requested authorities allowed to decline compliance with the incoming request.

The basic set of rules enabling the mutual acceptance and enforcement of each other's judicial decisions, laid down in the uniform Penal Code, follows the principle that the measures taken in order to comply with the request must follow the procedural rules of the executing jurisdiction (*locus regit actum*). Only within the context of inter-cantonal mutual legal assistance for the purpose of obtaining evidence, are the authorities of an initiating canton allowed to follow their domestic rules of criminal procedures on the territory of a host canton, without its permission required (regime of direct intervention, regulated in the 1992 inter-cantonal Concordat).

In the Swiss federation, the costs made for the enforcement of judicial decisions handed down outside the domestic legal order are in principle paid by the executing jurisdiction. However, expenses incurred for technical and scientific reports, the translation of documents, the use of interpreters, writs of summons, expert investigations, scientific activities and the transports of detainees have to be taken care of by the requesting party. Moreover, where a certain canton decides, pursuant to the 1992 Concordat, to explore evidence gathering activities on the territory of another canton, all costs are for the leading canton.

Substantive criminal law in Switzerland is unified; the same Penal Code applies to all cantons and the *Bund* equally. As a result, neither the issue of double criminality,

490 BGE*126* (2000) IV 203.

nor the issue of *exequatur* play any role in the sphere of mutual acceptance and enforcement of judicial decisions and judgments. In addition, several grounds for refusal playing a role within the European Union have become irrelevant in the Swiss context, such as the age of suspects and sentenced persons, prescription terms and *ne bis in idem*. Although judicial cooperation in general, and mutual recognition of judicial decisions in particular are still complicated as a result of the existence of 26 cantonal and one federal codes of criminal procedure, problems will be solved as from 2011; the uniform Code of Criminal Procedure will then enter into force.

In order to protect the position of vulnerable groups of people who get involved in the trans-cantonal cooperation in criminal affairs, some specific arrangements have been provided for as to suspects, witnesses and expert witnesses. With regard to victims, the general federal rules apply. For suspects who are confronted with criminal prosecutions against them, but who are ultimately acquitted, no specific liability arrangements have been provided for those suspects who were involved in trans-border prosecutions. All jurisdictions have their own rules on this issue.

With the outcome of this chapter, the next question is: what lessons can be derived from the Swiss example for the future of mutual recognition of judicial decisions in criminal affairs between the Member States of the European Union? This will be dealt with in Chapter 6.

CHAPTER 5

RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS: THE CASE OF AMERICA

1. INTRODUCTION

The United States of America (hereafter: USA, US or America) is a federation consisting of 50 states and a federal district. It also governs several territories that are not part of a state. The USA comprises an enormous territory and is one of the biggest countries in the world. To a large extent, the 50 states are sovereign and autonomous entities; they have structured their own legislative, executive and judicial powers and they have enacted their own constitution and legislation. In addition, the states are also mutually divergent in size, geography, culture and ethnicity, and amount of population.

Being a federation consisting of autonomous states, America is long since familiar with the phenomenon of crime across state lines (interstate crime). The experience that has been developed to combat interstate crime might be of use for the future of mutual recognition between the autonomous Member States of the European Union, in which framework several obstacles occur (Chapter 3). The aim of this chapter is to examine how these obstacles are approached in the American practice of cooperation in criminal affairs, particularly the acceptance of judicial decisions coming from another state jurisdiction or the federal jurisdiction.[491]

I will start with a general overview of the American federation, including some historical developments, its political structures and the key features of American federalism (2), followed by a description of the basic characteristics and leading principles of the American criminal justice system (3). Subsequently, I will attend to the cooperation practices between federal and state law enforcement authorities in the context of criminal matters, that is to say those practices that enable the

[491] The role that the authorities of the federal district and the territories play in the context of cooperation in criminal matters is not part of this study.

authorities of one US jurisdiction to accept and enforce a judicial decision handed down in another US jurisdiction (4). From this perspective, I will then approach the way America deals with the troubling issues that have been identified in the context of mutual recognition of judicial decisions in criminal affairs between the EU Member States, as formulated in Chapter 3 (5). This chapter will close with some concluding remarks (6).

2. THE UNITED STATES OF AMERICA

2.1. HISTORICAL DEVELOPMENTS[492]

The United States of America was recognised as an independent nation as from 4 July 1776, when 13 British colonies, located along the Atlantic coast, declared independence from Great Britain's control. These former colonies, now states, subsequently entered into a formal confederation by drafting the Articles of Confederation which became effective in 1781. In the new union that they formed, each state established a government of its own; the union was granted weak powers.

Soon after, the Articles of Confederation led to great discontent among the "Federalists", who preferred more power being given to the union. Despite being severely opposed by the "Antifederalists", who feared a strongly empowered central government particularly in the absence of a bill of rights, a new constitution was proposed at the Philadelphia convention in the summer of 1787. The new government established through this constitution followed the Montesquieu philosophy of separated powers, distinguishing a legislative, an executive and a judicial branch of government. Up until today, the American federal and state political institutions are structured along these lines.

It took until June 1788 to get the new Constitution ratified in the required minimum of nine states. The first five states – Delaware, Pennsylvania, New Jersey, Georgia and Connecticut – ratified the Constitution within a period of just over a month, but subsequent ratifications took more time. Massachusetts became the sixth state to join the union in February 1788, followed by Maryland in April 1788 and South Carolina in May 1788. New Hampshire ratified the Constitution in June 1788 as number nine, which resulted in the official launch of the United States of America.

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[492] This summary is based on a number of books and articles: M. Farrand, *The Development of the United States. From Colonies to a World Power*, London: T.C. & E.C. Jack, Ltd., 1919; R. Middlekauf, *The Glorious Cause. The American Revolution, 1763-1789*, Oxford University Press, 1982, pp. 622-664; M. Tushnet, *The Constitution of the United States of America. A Contextual Analysis*, Oxford: Hart Publishing, 2009, pp. 9-41; J. Thomson, 'Must All Join? America, 1788; Europe, 2004', *Occasional Paper*, RAND Corporation, 2004. It is completed with information from the official websites of the federal and state governments, all via www.usa.gov.

Virginia followed quickly, followed by New York in July 1788. North Carolina delayed its ratification until November 1789. The last former colony, Rhode Island, joined the United States in May 1790. In 1791, statehood was given to Vermont, a region, which until then had caused disputes between New Hampshire and New York that both claimed the territory. Soon after, Kentucky split off from Virginia and achieved statehood in 1792. Moreover, after the official start of the United States of America, Congress proposed ten amendments to the Constitution which should guarantee certain freedoms and rights, such as the freedom of religion, the freedom of speech, the freedom of press and the right to keep and bear arms. These amendments, usually referred to as the Bill of Rights, were adopted in December 1791.

In the early national period, the United States of America gradually increased the number of states. Tennessee was admitted as a state in 1796, followed by Ohio in 1803 and Louisiana in 1812. The subsequent expansion developments were mainly influenced by the then hot topic of slavery. As part of a political compromise, the admission of each "slave" state had to be balanced by the admission of a "free" state. A free Indiana joined the nation in 1816 with a slave Mississippi in 1817. And a free Maine achieved statehood in 1820 with a slave Missouri in 1821. When the Civil War broke out in 1861, the United States consisted of 34 states: Alabama, Arkansas, Michigan, Florida, Texas, Iowa, Wisconsin, Minnesota, Oregon and Kansas had also become states in the meantime. In addition, California was placed under American control as a result of the 1848 Treaty of Guadelupe-Hidalgo, which ended the Mexican-American War, and achieved statehood in 1850. During the Civil War, a 35th state was created when West Virginia split off from Virginia. Nevada entered the nation in 1864. During all these years, the slavery issue had been high on the national political agenda; it took up until 1865, shortly after the end of the Civil War, before the Thirteenth Amendment to the Constitution abolished slavery. This provision was part of the so-called Second Bill of Rights, which also include the Fourteenth and Fifteenth Amendments, respectively protecting certain fundamental rights and guaranteeing the right to vote without regard to race.

Shortly after the Civil War ended, Nebraska entered the United States of America in 1867, followed by Colorado in 1876. The nation was now building its economy very successfully. The Spanish-American War in the 1890s and the American involvement in World War I in 1917 and 1918 set the country up as an important military power. In the meantime, the number of states continued to increase. North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, and Utah received statehood before the turn of the century, followed by Oklahoma, New Mexico and Arizona in the first years of the new 20th century.

America's wealthy period, also called the Progressive era, continued until the crash of the stock market in 1929. During the Great Depression, many people lost their jobs and homes, and international trade decreased. Better days came after World War II and the Cold War. Prosperity and optimism were combined with a renewed ideology – as an answer to these wars – on civil freedoms, separation and discrimination. The 1950s were characterised by some landmark decisions of

the United States Supreme Court (the Warren Court) on segregation issues, and a very successful civil rights movement – with Rosa Parks and Martin Luther King as its most prominent representatives. During this period, the last two states were founded when statehood was given in 1959 to Alaska and Hawaii.

Since then, America has consisted of 50 states. All have their own constitutions and are sovereign to a large extent. They are further divided into several local governmental entities, such as cities, towns and counties. Precisely how these municipal entities are structured differs from state to state.[493] Before gaining statehood, most states were American territories, partially self-governing areas with a non-voting delegate in the House of Representatives. The country still possesses such territories in the Pacific and the Caribbean (e.g. the Virgin Islands, the Northern Mariana Islands, American Samoa, Puerto Rico). In addition, the federal District of Columbia of Washington (Washington, DC) is also a territory. It serves as the permanent capitol of the country, where the heads of the three branches of federal government are seated – the President, Congress and the US Supreme Court. Although united in one nation, the states and the territories widely diverge in size, population, culture and geography. There is no official language, but the vast majority of inhabitants speak (American) English. Spanish is the second language, spoken particularly in the south-west.

Today, the United States of America is regarded as a major world power. It plays an important role in international affairs and was a founding member of both the United Nations (UN) and the North Atlantic Treaty Organization (NATO). In the last decade, the country went through very tough times. Under the Presidency of George W. Bush, the "9/11" terrorist attacks on the twin towers in New York and the Pentagon in Washington, DC shocked the world. All eyes were on the country for years as it launched a "war on terrorism", invaded Afghanistan and Iraq, and implemented strong rules on surveillance, prosecution and detention inside and outside the country against suspects of terrorism. The 2008 election of President Barack Obama, who tried to point the country in a new direction, put the nation again in the centre of attention; being the first African American President of the US, his election is regarded as a breakthrough.

2.2. POLITICAL INSTITUTIONS

As mentioned above, the national and state powers of the United States are constitutionally separated into a legislative, an executive and a judicial branch. At the state level, the precise organisation of political institutions varies. At the federal level, the legislative powers are vested in a two-branch Congress which comprises the Senate

493 L.G. Sager, 'The Sources and Limits of Legal Authority', in A.B. Morrison (ed.), *Fundamentals of American Law*, New York: Oxford University Press, 1996, p. 28.

and the House of Representatives. The Senate includes two Senators from each state and it thus represents the states equally, while in the House of Representatives the states are represented based on the size of population.

The highest executive power is given to the President, who is elected for four years. In carrying out his executive tasks, the President is advised by his Cabinet, consisting of the Vice-President and the heads of 15 executive departments.

The Supreme Court is the highest judicial body of the United States. It primarily serves as a court of appeal and reviews decisions taken by state courts of last instance, as well as decisions taken by lower federal courts. As to the latter, Congress has established a system of lower federal courts in response to the possibility granted by the Constitution (US Const. Article III, Section 1). At the trial level, there is at least one district court within each state.[494] With regard to the appeal stage, federal courts of appeals are located in 13 judicial circuits throughout the United States.[495] From here, review may be sought in the Supreme Court that – due to its small size of nine members – selects cases on its own discretion.[496]

2.3. AMERICAN FEDERALISM

In the federal system of America, the states are sovereign. Their sovereignty is, however, not absolute; part of the states' sovereignty was transferred to the federal level, such as the power to tax and the power to regulate interstate commerce (US Const. Article I, § 8). All other powers, that is to say those powers not constitutionally delegated to the federal level nor prohibited by them to the states, fall under the jurisdiction of the states (police power, Tenth Amendment), which in practice concern almost all domestic matters. As a result, two distinct levels of government exist: the federal government and the state governments. Between those spheres, powers may overlap.

It is not crystal clear how to characterise American federalism. Some authors argue in favour of "cooperative federalism", while others believe in "dual federalism". The dual federalism approach regards federalism primarily through the lens of state sovereignty and the Tenth Amendment. It stresses the allocation of exclusive and non-overlapping[497] authority between the national and state governments and

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494 There are 89 district courts for the states. In addition, there is one district court for the District of Columbia and one for Puerto Rico (28 US Code, Chapter 5). There are also district courts in the American territories, although these district courts are not based on Article III of the Constitution.

495 Eleven circuits are provided for the states (First to Eleventh Circuit), one for the District of Columbia and one for the Federal Circuit (28 US Code, Chapter 3).

496 W.B. Fisch, 'Constitutional Law', in D.S. Clark and T. Ansay, *Introduction to the Law of the United States*, The Hague: Kluwer Law International, 2002 (2nd edition), p. 54.

497 For this reason, American federalism is not dual federalism according to R.A. Schapiro, 'From Dualist Federalism to Interactive Federalism', *Emory Law Journal* 56 (2006), p. 7. See also F.D. Drake

considers the courts as key players in maintaining the lines between the different powers.[498] On the other hand, in the cooperative federalism approach, the federal government and the state governments are considered to be partners who can work together for the advancement of policy goals.[499] In my view, it is reasonable that features of both forms of federalism are simultaneously present in US history, though cooperative elements and dual elements are alternately brought to the surface either through legislation or Supreme Court case law.[500] Moreover, as I will show later on in this chapter, what features of federalism dominate can also depend on the area of law; in the area of criminal law, competitive elements play an essential role.

The respective sovereigns of the American federation can work together on the horizontal level (amongst states) as well as on the vertical level (federal versus state authorities). In the context of horizontal cooperation, the Constitution obliges the states to support each other in the enforcement of their respective laws. Firstly, the states are constitutionally obliged (US Const. Article IV, § 1, cl. 1) to give full faith and credit to the public acts, records and judicial proceedings of every other state (Full Faith and Credit Clause). Because this clause does not apply to penal law, it is complemented by the second constitutional duty, namely that states must extradite fugitives from justice to their home states (Extradition Clause, US Const Article IV, § 2, cl. 2).[501] Aside from these obligations, the states are further encouraged to join with each other as they are allowed to enter into agreements or compacts, in principle with the consent of Congress (US Const. Article 1, § 10, the Interstate Compact Clause). Such compacts may not increase state powers at the expense of the federal government.[502] Once Congress has granted consent, the interstate compact converts into federal law; as such, interstate compacts legally bind all joining states.[503]

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and L.R. Nelson in their introduction to *States' Rights and American Federalism. A Documentary History*. Westport, Connecticut: Greenwood Press, 1999, pp. xix-xxi.

498 E.g. Schapiro (2006), p. 4.

499 Drake and Nelson (1999), p. xx, Schapiro (2006), p. 8.

500 See also Drake and Nelson (1999), pp. xix-xxi; C.L. Westover, 'Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy', *Marquette Law Review* 88 (2005), pp. 693-749; Schapiro (2006), pp. 1-18.

501 W.L. Reynolds and W.M. Richman, *The Full Faith and Credit Clause. A Reference Guide to the United States Constitution*, Westport, CT: Praeger, 2005, pp. 90-91.

502 P. Hay and R.D. Rotunda, *The United States Federal System: Legal Integration in the American Experience*, Milano: A. Guiffrè, 1982, p. 190.

503 J.F. Zimmerman, *Interstate Cooperation. Compacts and Administrative Agreements*, Westport, CT: Praeger, 2002, p. 51. The tool of interstate compacts should not be confused with uniform laws and model codes. Being in fact legislative proposals, uniform laws and model codes do not legally bind the joining jurisdictions; they have still full discretion as to how to implement the proposed provisions into state law.

2.4. FEDERAL AND STATE RELATIONSHIPS

In the US, like in most federally structured systems, the boundaries between federal and state authority are continuously debated. It is hardly possible to sum up exhaustively and exactly what powers are reserved to the states and the federal institutions respectively, but the most important basics are sketched out here.

The federal government is a government of limited powers. It only has those powers that are expressly delegated to it by the Constitution (enumerated powers doctrine). All other powers may be exercised by the states – that is to say by the people, who may decide through a majoritarian decision or legislation whether to delegate or to deny that powers to the government of the state they live in[504] – providing it does not violate a constitutional provision (Tenth Amendment). This does not preclude states from acting in the same field. States remain free to create their own rules that exceed federally established minimum norms and state judges may interpret state constitutional provisions in such a way as gives greater protection to their citizens, as given by the federal Constitution: "the essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mould. As the standards for civil commitment may vary from state to state, procedures must be allowed to vary as long as they meet the constitutional minimum".[505]

The Necessary and Proper Clause (US Const. Article 1, § 8) is of additional importance. It allows the federal government to take a certain legal measure, though not specifically brought under its jurisdiction, if this measure is "appropriate" to make effective one of the enumerated powers (doctrine of implied powers).[506] All measures not implied in the Necessary and Proper Clause remain the responsibility of the states.

Federal legal provisions that are validly enacted pre-empt state provisions (US Const. Article 6, cl. 2). This rule is called the Supremacy Clause; after all, it has constitutionally been determined that the Constitution, all federal laws made in pursuance thereof, as well as treaties, constitute the "supreme Law of the Land", by which all federal and state judges are bound. As a result, state law that conflicts

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504 K.T. Lash, 'A Textual-Historical Theory of the Ninth Amendment', *Stanford Law Review* 60 (2007-2008), pp. 913-914.

505 Addington v. Texas, 441 US 418, 431 (1979). In this regard, several scholars have observed that through the past decades, judges are increasingly moved to exceed the constitutional floor in the interpretation of state constitutional provisions and as such try to protect the individual rights of their citizens more stringently. This movement is called 'judicial federalism' or 'new federalism'. See on this phenomenon: Westover (2005), pp. 693-749; R.K. Fitzpatrick, 'Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights', *New York University Law Review* 79 (2004), pp. 1833-1872; R.T. Shepard, 'The Maturing Nature of State Constitution Jurisprudence', *Valparaiso University Law Review*, 30 (1996), pp. 421-457.

506 M'Culloch v. Maryland, 17 US 316 (1819). See also Hay and Rotunda (1982), pp. 36-40.

with federal law cannot be upheld and state legislation that is passed in order to enable new federal legislation must conform to the new rules. The same applies to state constitutional law, even if it contravenes the lowest federal provisions.[507]

3. THE AMERICAN CRIMINAL JUSTICE SYSTEM

In this section, the basics of American criminal justice will be outlined as an intermediate step towards the examination of cooperation processes in criminal matters (Section 4). Because American criminal justice is primarily characterised by the number of jurisdictions that are basically independent from each other – all 50 states and the federal government have their own system of criminal law – it is not possible to describe in depth the complete variety of the different systems; this would also fall outside the scope if this book. Therefore, only the most important features will be described briefly.

3.1. BASIC PRINCIPLES

The American criminal justice system is an adversarial system: on the basis of the materials presented by two parties (the prosecution and the defence), the truth of the case is determined by an impartial decision maker, often a tandem of a jury and a judge. It is constitutionally determined that basically all federal and state criminal cases must be tried by a jury (US Const. Article III, § 2, cl. 3; Sixth Amendment[508]). The parties are responsible for the investigation of the facts, the calling of possible (expert) witnesses, and the presentation of issues in court.

One of the basic principles of the American criminal justice system is the principle of legality or the principle of *nullum crimen nulla poena sine lege*, which is part of the constitutional Ex Post Facto Clause (US Const. Article 1, § 9, cl. 3).[509] The legality principle means that no crime can be committed and no punishment can

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507 Sager (1996), p. 31.

508 Originally, the first ten amendments to the Constitution (the Bill of Rights) were binding on the federal government only and not on the state governments. But the Due Process Clause of the later Fourteenth Amendment has been used by the Supreme Court as a means to "incorporate" the original Bill of Rights guarantees and apply them to state governments as well, with the exception of the grand jury clause of the Fifth Amendment and the civil jury clause of the Seventh Amendment. As a result, the guarantees mentioned in this Section must be protected in state criminal proceedings too. For more information on this incorporation process, see e.g. J.A. Barron and C.T. Dienes, *Constitutional Law in a Nutshell*, St. Paul, MN: Thomson/West (Nutshell Series), 2005 (6th edition), pp. 189-192; or J. Dressler, *Understanding Criminal Procedure*, New York: Matthew Bender, 1997 (2nd edition, 2000 reprint), pp. 41-48.

509 E.M. Wise, 'Criminal Law', in D.S. Clark and T. Ansay, *Introduction to the Law of the United States*, The Hague: Kluwer Law International, 2002 (2nd edition), pp. 140-141.

be imposed without previous penal law provisions. Once prosecuted or convicted, the same person may not be prosecuted or convicted a second time for the same offence within the same jurisdiction (the double jeopardy clause, Fifth Amendment). Furthermore, a person may not be compelled in any stage of the criminal proceedings to give evidence that is likely to incriminate himself (privilege against self-incrimination, Fifth Amendment). To ensure the practical protection of this privilege, the Supreme Court established some procedural safeguards that became widely known as the "Miranda warning" and which must be read to the arrested suspect before being interrogated by the police.[510]

Within the criminal justice system – and particularly during a criminal trial – the discovery of the truth is considered a fundamental goal.[511] But in achieving this goal, certain constitutional limitations on governmental action exist to protect the individual. Premises may be searched, objects may be seized and persons may be arrested, but only if there is probable cause (Fourth Amendment). Evidence obtained in violation of this rule might be inadmissible in court (exclusionary rule).[512]

Pending the court proceedings, the defendant may remain in police custody, or, after the payment of a sum of money (bail), go home to await trial. To avoid an actual pre-trial punishment through unfair denial of bail, excessive bail is constitutionally prohibited (Eight Amendment).[513] To be tried, the defendant must be formally charged, commonly by a grand jury indictment.[514] During his first appearance in the trial court, the defendant will be asked to enter a plea of guilty or not guilty (plea bargaining). In most cases, the plaintiff pleads guilty and the trial is not held;[515] otherwise, the judge will set a trial date. When trial starts, a fair hearing in court is guaranteed by the Sixth Amendment, which requires that the defendant will be adequately informed of the charges against him; confronted with witnesses against him and entitled to cross-examine them; able to obtain witnesses in his favour; entitled to be assisted by counsel; and tried by an impartial jury. On the basis of the same amendment, the defendant also enjoys the right to a speedy and public trial. During criminal proceedings, the defendant is presumed to be

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510 Miranda v. Arizona, 384 US 436 (1966). The precise wording of the Miranda warning has not been prescribed, but it must address the right to remain silent, the right to an attorney and that one will be appointed if the suspect cannot afford one, J.H. Israel and W.R. LaFave, *Criminal Procedure: Constitutional Limitations in a Nutshell*, St. Paul, MN: Thomson/West (Nutshell Series), 2006 (7th edition), pp. 211-217. Elaborating on this: LaFave, Israel, and King (2004), pp. 337-379 and Dressler (1997), pp. 387-432.

511 W.R. LaFave, J.H. Israel, and N.J. King, *Criminal Procedure*, St. Paul, MN: Thomson/West (Hornbook Series) 2004 (4th edition), pp. 26-27.

512 Mapp v. Ohio, 367 US 643 (1961).

513 B. Neuborne, 'An Overview of the Bill of Rights', in A.B. Morrison (ed.), *Fundamentals of American Law*, New York: Oxford University Press, 1996, p. 111.

514 Neuborne (1996), p. 106.

515 LaFave, Israel, and King (2004), p. 21.

innocent, until his guilt is proved beyond reasonable doubt.[516] If the defendant is unanimously found guilty by jury, the judge has to determine a proportionate[517] sentence; no cruel and unusual punishments may be imposed. Also, fines may not be excessively high (Eighth Amendment).

3.2. SOURCES OF LAW

Criminal law in the US is mainly to be found at the state level, since on the basis of the Tenth Amendment to the Constitution (all powers that are not specifically assigned to the federal government are reserved to the states) the states are primarily authorised to establish their own criminal justice system (Sections 2.3. and 2.4). The federal government has only limited powers with regard to the area of criminal law. Nonetheless, as a result of the federal structure of the nation, there are federal sources of law that are binding on the state governments as well, for instance the Constitution. The most important sources of federal and state criminal law are considered below. They all regard statutory sources, which might sound surprising since the American legal system is a common law system,[518] but with regard to the area of criminal law, common law provisions have lost almost all practical value: only in a limited number of states do common law crimes play a role today.[519] Also, the rules of criminal procedure have been comprehensively codified.[520]

3.2.1. Federal sources of law

The Constitution of America applies nationwide. With regard to criminal law, it has set some overarching standards that bind all federal and state jurisdictions in the exercise of their legislative powers and the enforcement of criminal law. Most of these standards have been mentioned in the previous section (3.1), such as the principle of legality, the presumption of innocence, the ban on excessive punishments, and so on. These standards are minimum norms: state legislatures may adopt provisions that exceed the minimum level and grant more protection to the individual than prescribed by the federal Constitution.[521]

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516 Idem, pp. 26-27.

517 Neuborne (1996), pp. 111-112.

518 E.g. G. Hughes, 'Common Law Systems', in A.B. Morrison (ed.), *Fundamentals of American Law*, New York: Oxford University Press, 1996, pp. 9-25.

519 T. Reinbacher, *Das Strafrechtssystem der USA. Eine Untersuchung zur Strafgewalt im föderativen Staat*, Berlin: Duncker & Humblot, 2009, p. 128; J.B. Jacobs, 'Criminal Law, Criminal Procedure, and Criminal Justice', in A.B. Morrison (ed.), *Fundamentals of American Law*, New York: Oxford University Press, 1996, p. 295.

520 LaFave, Israel, and King (2004), pp. 35-38.

521 Jacobs (1996), p. 306; See also supra note 503.

Federal criminal law and procedure has not been codified in comprehensive codes, probably because of the jurisdictional limits on what the federal government can do in dealing with crime. Those limits mean that certain behaviour may be criminalised only if necessary for the purpose of protecting the direct interests of the federal government. In such cases, Congress's legislative authority is derived from (or: implied within[522]) its enumerated powers. However, having said that, Congress has based a number of enactments in one of the enumerated powers, especially in the past few decades – also in cases where the federal statute aims at the protection of interests that are not directly federal.[523] This has resulted in a quite broad scope of coverage of federal criminal laws.

With regard to substantive criminal law, federal crimes are codified in Title 18, Part I of the United States Code (USC). They mostly concern behaviour that was previously penalised at state level, from homicide to genocide, and from gambling to terrorism.[524] If those crimes are prosecuted at the federal level, the criminal proceedings will be governed by the Federal Rules of Criminal Procedure (Federal Rules).[525]

Federal case law is another important source of federal criminal law. Of final relevance are the basic rules for the organisation of the federal judicial system, which are laid down in Title 28 USC entitled "Judiciary and Judicial Procedure".

3.2.2. State sources of law

Being autonomous parts of the American federation, each state is independently entitled to have its own constitution and legislation, on condition that they do not infringe federal law (Supremacy Clause, US Const. Article 6, cl. 2). The state constitutions contain several procedural rights for persons involved in criminal proceedings; occasionally, these provisions exceed the minimum level of protection granted by the federal Constitution.

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522 Remember the implied powers doctrine of the Necessary and Proper Clause (US Const. Article I, § 8).

523 Abrams and Beale have demonstrated that the enumerated powers most often used to base federal laws on are the commerce power, the taxing power, and the postal power, see N. Abrams and S.S. Beale, *Federal Criminal Law and its Enforcement*, St. Paul, MN: Thomson/West (American Casebook Series), 2006 (4th edition), pp. 19-108.

524 Moreover, through the Assimilative Crimes Act (18 US Code, § 13), the federal government can punish an act or an omission committed within a federal area (e.g. Washington, DC) and that, although not criminalised by any enactment of Congress, has been made punishable by the law of the state in which the federal area is situated. See J.A.W. Lensing, *Amerikaans strafrecht*, Gouda: Quint bv., 1996, pp. 14-15.

525 Title 18, Part II US Code is titled "Criminal Procedure", but almost all provisions directly refer to the Federal Rules of Criminal Procedure. Those Federal Rules were launched by the Supreme Court and thereafter passed by Congress, Jacobs (1996), p. 305.

Most states have a comprehensive set of substantive criminal laws, including definitions of criminal offences, general principles of criminal responsibility, provisions on excuses and justifications as well as sentences.[526] About two-thirds of the states have been influenced by the 1962 Model Penal Code (MPC) of the American Law Institute (ALI), a prestigious law reform organisation.[527] Some states adopted the MPC in whole, others in part.[528] The state rules of procedural criminal law are, in turn, influenced by the above-mentioned Federal Rules; about half of the states have procedural rules that are borrowed from this federal source of law.[529] But ultimately, the rules on criminal law and criminal procedure diverge noticeably from state to state.[530]

Another primary source of law concerns the case law of state courts. With regard to the organisation of the judiciary, many states have extensive court rules, either with state-wide or with local application.[531]

3.3. JUDICIAL AUTHORITIES

The primary responsibility for enacting and enforcing criminal laws remains with the states, or at a lower level with the local governments within a state. Although the importance of federal criminal law is undisputed, especially with regard to criminal behaviour on the territory of different states, federal criminal law enforcement actually covers a very small part of the total number of prosecutions in the country.[532] The vast majority of criminal procedures take place under the responsibility of state judicial authorities. At both levels, complete judicial systems have been organised, within which investigating authorities, prosecuting authorities and the judiciary exercise their powers. The precise organisation of the respective judicial systems varies from state to state.[533]

The following will describe the state judicial authorities – very generally – as well as the federal judicial authorities. In addition, some attention will be given to federal and state jurisdiction in criminal matters and to the issue of overlapping jurisdiction.

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526 Jacobs (1996), pp. 295-296.

527 American Law Institute, *Model Penal Code and Commentaries*, Philadelphia, 1985.

528 Jacobs (1996), p. 296.

529 LaFave, Israel, and King (2004), p. 6.

530 Idem, p. 5; Jacobs (1996), p. 296.

531 LaFave, Israel, and King (2004), p. 37.

532 Abrams and Beale (2006), pp. 2-4; LaFave, Israel, and King (2004), p. 4.

533 Clark and Ansay (2002), p. 340.

3.3.1. Investigating authorities

All states have their own police organisations that either operate independently or have been brought under a state department of Public Safety, headed by a state Attorney General. State police organisations are characterised by a decentralised structure.[534] City police and county police (sheriffs) are concerned with local crime, while state police agencies exercise state-wide authority over all other crimes and the major state highways. Those state police agencies may be organised in one State Police, or be subdivided in agencies such as the State Bureau of Investigation (SBI), the State Highway Patrol, the State Bureau of Narcotics, the State Park Police, and so on. The specific division of competences between city police, county police and state police differs from state to state.

Criminal investigations of federal offences are most often carried out by the Federal Bureau of Investigation (FBI), the most well-known law enforcement agency of the US Department of Justice. Today, emphasis is on the investigation of organised crime, including drug trafficking, white collar crime and terrorism.[535] As to the investigation of narcotic offences, the FBI often carries out joint operations with the Drug Enforcement Administration (DEA), which is also part of the Justice Department. The DEA investigates the trafficking of drugs between different states or across the national borders and develops federal programmes for combating drug offences. Other prominent law enforcement agencies of the federal government are, in the Justice Department, the Bureau of Alcohol, Tobacco, and Firearms, and, in the Department of Homeland Security, the Secret Service and the Customs Service. Of final relevance is the United States Marshal Service in the Department of Justice, which is *inter alia* responsible for locating and arresting federal fugitives, maintaining custody of federal prisoners and carrying out the federal witness protection programme. The federal law enforcement agencies are located throughout the country, but all have their headquarters in Washington, DC. Those agencies that are in the Justice Department are supervised and directed by the Office of the Attorney General.

Very early in the investigation stage, both at the state and federal level, a judge will become involved. A suspect who has been arrested either by a state, city or county police officer or by a federal investigation officer must be brought before a magistrate judge. At the state level, such courts are usually known as municipal courts, county courts, district courts or justice of the peace courts.[536] At the federal level, such courts are simply called magistrate courts (Federal Rules, Rule 5). At this initial appearance, the magistrate judge must decide on the basis of a complaint – which is the initial charging instrument, signed by the victim or the

534 Jacobs (1996), pp. 294-295.

535 Abrams and Beale (2006), p. 7.

536 LaFave, Israel, and King (2004), p. 7.

investigating officer – whether there is probable cause that a crime was committed (*actus rea*) and that the defendant is responsible (*mens rea*) for the crime. If the magistrate judge decides in the affirmative, he must decide on pre-trial release and bail if the defendant is suspected of having committed a misdemeanour – the category of less serious offences, such as petty theft, punishable by less than one year imprisonment – and still remains in custody. Whatever his decision may be, the defendant has to await his trial before the magistrate court.[537] With regard to suspects of felonies – the more serious offences, such as murder, punishable by imprisonment of one year or more – the defendant has the right to a preliminary hearing before a magistrate judge[538] prior to being formally charged by the state or federal prosecutor, and to be bound over to the trial court.

3.3.2. Prosecuting authorities

On the basis of the magistrate's decision that there is probable cause in a felony case, and following the preliminary hearing in the magistrate court, the next step is up to the prosecuting authority of the involved state: it has to decide whether to dismiss or to institute the felony charges. In general, each state prosecution service is headed by a state Attorney General, who supervises several prosecutors usually known as district attorneys, state's attorneys, prosecuting attorneys, or county attorneys.[539] In most states (the "information" states), the prosecutor can simply institute the felony proceedings by "information": he sets out a list of charges to replace the initial complaint and he bounds the case over to the trial court.[540] In 22 states (the "indictment" states), however, the prosecutor is obliged to involve a grand jury before he is able to start the felony proceedings. This grand jury, typically a group of 23 persons, screens the felony charges and issues or refuses the indictment, which is the formal accusatory instrument that replaces the complaint.[541] Only on the basis of an indictment can the prosecutor bound the felony case over to the trial court.

The prosecution of crimes under federal jurisdiction is carried out by US Attorneys, who are accountable to the Office of the Attorney General in the Justice Department of the federal government. There are 93 US Attorneys situated within the federal judicial districts throughout the state territories. Each US Attorney is the chief federal prosecutor within the jurisdiction of a specific district and is

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537 Idem.

538 LaFave, Israel, and King (2004), pp. 18-19.

539 Abrams and Beale (2006), pp. 13-14; LaFave, Israel, and King (2004), p. 7.

540 Jacobs (1996), p. 313. Also LaFave, Israel, and King (2004), p. 19.

541 Four of those indictment states are "limited indictment states", which means that a grand jury indictment is only required for the offences punishable by the most severe punishments, LaFave, Israel, and King (2004), p. 19. For an extensive overview of the Grand Jury Review in criminal proceedings, see pp. 404-430.

supported by self-selected Assistant US Attorneys. To institute the prosecution of a federal crime, the federal prosecutor must basically follow the same steps as a state prosecutor. With regard to felony cases, the federal system is an indictment jurisdiction: a grand jury indictment is required before the federal trial can start (Federal Rules, Rule 7).

3.3.3. Judiciary

If charges have not been dismissed and the defendant has not entered a guilty plea, the criminal case will be adjudicated in a court of law. It has been mentioned that the bulk of criminal proceedings take place at the state level. Each state has organised its own judiciary. Although there are variations amongst the states, some key features can be given. Most states have a general trial court as court of first instance for felony cases, which is commonly known as the district court, the circuit court, or the superior court.[542] In most states, an initial appeal against the conviction by the general trial court can be lodged at the intermediate appellate court, while a last review can be granted by courts of last resort, often known as the state supreme court. Some states have only two instances; the first appeal is also the final appeal, to be lodged at the state court of last instance.[543] Things are different in misdemeanour cases, where the magistrate court serves as the court of first instance and review may be sought at the general trial court (although in some states the case is dealt with as a new case, *de novo*).[544]

At the federal level, federal district courts serve as courts of first instance. They are located in the federal judicial districts throughout the country. Under certain circumstances, misdemeanours may in the first instance be tried in a magistrate court (18 US Code, §3401). Appeals against decisions of the federal district courts may be lodged at the federal courts of appeals, which are stationed in the 13 judicial circuits of the country. From here, review may be sought at the federal Supreme Court, the highest judicial body of the United States. The federal courts are primarily authorised to hear a case where the parties involve citizens of different states or American citizens and foreign citizens ("diversity" jurisdiction) as well as cases where issues of federal law are at stake ("federal question" jurisdiction).[545] In a few limited matters, the Supreme Court has original jurisdiction and may hear cases in first instance, such as cases affecting ambassadors, other public ministers, and consuls, and cases in which a state is a party. As to disputes between two or more

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542 LaFave, Israel, and King (2004), p. 7.

543 A.B. Morrison, 'Courts', in A.B. Morrison (ed.), *Fundamentals of American Law*, New York: Oxford University Press, 1996, p. 59.

544 LaFave, Israel, and King (2004), p. 23 and p. 1273.

545 See Sager (1996), p. 34, from whom I also borrowed the terms "diversity" jurisdiction and "federal question" jurisdiction.

states, the Supreme Court's jurisdiction is original, but exclusive too (28 US Code, § 1251). The Supreme Court's role is especially of influence where the interpretation of federal constitutional law is at stake. Since its landmark decision in *Marbury* v. *Madison*,[546] the Supreme Court is considered to have the power of constitutional review. Due to its small size of only nine members, the Supreme Court has to select the cases it wants to decide on, and which cases are denied review.[547]

3.3.4. Federal and state jurisdiction; overlapping jurisdiction

As a basic principle, state governments respond to breaches of state criminal law, while violations of federal criminal law are taken on under the auspices of the federal government. However, daily practice is not as easy. Over the last few decades, the number of federal crimes has increased greatly. This has resulted in a large number of duplicating grounds of jurisdiction for certain behaviour: a state ground and a federal ground. The key question is where to bring the charges, which is not an issue of prosecutorial discretion only. The final decision of where to start proceedings is also influenced by several other considerations, such as competition factors (for example in cases that enjoy a lot of media attention), practical matters (such as the current caseload and manpower or the existing relationships between federal and state agencies), and policy grounds.[548]

The question as to which forum should be chosen is not always the key issue though, because it might be possible to start prosecutions against a person who has been or is currently being prosecuted for the same conduct in another jurisdiction (dual sovereignty rule).[549] In such cases, the most striking issue is of course which jurisdiction prevails. Due to the fact that such successive proceedings are in most jurisdictions not in line with the criminal policy, the problem of forum choice must be dealt with more often. To solve this problem, it might be helpful if the authorities of both jurisdiction would work together, for example through cross-designation (which means that a federal prosecutor is temporarily appointed as a state prosecutor or vice versa for the specific case in hand)[550] or by setting up formal or informal collaborative investigations.[551]

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546 5 US 137, 2 L.Ed. 60 (1803).

547 W.B. Fisch, 'Constitutional Law', in D.S. Clark and T. Ansay, *Introduction to the Law of the United States*, The Hague: Kluwer Law International, 2002 (2nd edition), p. 54.

548 Abrams and Beale (2006), pp. 795-807.

549 Abrams and Beale (2006), pp. 807-835.

550 Abrams and Beale (2006), p. 796.

551 Abrams and Beale (2006), p. 797.

4. MUTUAL RECOGNITION OF JUDICIAL DECISIONS IN CRIMINAL MATTERS?

It is an indissoluble part of American federalism that the 50 states must owe full faith and credit to each other's public acts, records and judicial proceedings (US Const. Article IV, § 1, cl.1). The rationale behind the Full Faith and Credit Clause was put aptly in *Milwaukee County* v. *M.E. White Co* as:

> "[T]o alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of origin".[552]

An exception to the Full Faith and Credit Clause, however, exists with regard to criminal law. This "penal law exception"[553] is rooted in the statement of Chief Justice Marshall in the *The Antelope* that "[t]he Courts of no country execute the penal laws of another".[554] It has followed from subsequent Supreme Court decisions that this exception applies to the criminal laws[555] of other countries as well as of other states.[556] It is, particularly from a political point of view, considered undesirable if states were obliged to prosecute and convict fugitives who allegedly committed a crime on the territory of another state: the offended sovereign is the proper place to right a wrong, and provides the best position for judicial authorities to exercise their discretion. In addition, there is the practical consideration that states are not eager to take the financial burden of caring for the detainees and prisoners of another state.[557]

Instead of being obliged to recognise and enforce the criminal laws of other states as well as decisions thereof, the states are held to return on demand fugitives found within their jurisdictional borders towards the state from which they fled (US Const. Article IV, § 2, cl. 2). This obligation is commonly referred to as the Extradition Clause. With respect to the Full Faith and Credit Clause, the Extradition

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552 296 US 268, 276-277 (1935).

553 See for further pieces of writing on the penal law exception: P.B. Kutner, 'Judicial Identification of "Penal Laws" in the Conflict of Laws', *Oklahoma Law Review* 31 (1978), pp. 590-634; M.W. Janis, 'The Recognition and Enforcement of Foreign Law: *The Antelope's* Penal Law Exception', *International Lawyer* 20 (1986), pp. 303-308.

554 23 US 66, 123 (1825).

555 Here, "criminal" and "penal" are used as synonyms, following Reynolds and Richman (2005), p. 90.

556 *State of Wisconsin* v. *Pelican Ins. Co. of New Orleans*, 127 US 265, 290 (1888); *Huntington* v. *Atrill*, 146 US 657, 668 (1892).

557 Reynolds and Richman (2005), p. 91.

Clause is regarded as complementary: "civil laws may need to be enforced in other states, but criminal laws must be enforced at home".[558] The Extradition Clause is the sole constitutional provision that explicitly obliges the states to support each other in the fight against crime. The other ways of interstate, but also federal-state cooperation in criminal affairs are not imposed on the states constitutionally, but are either created in formal reciprocity statutes and interstate compacts or agreements, or occur informally amongst acquainted law enforcement agencies.[559] In addition, some uniform laws have been created, as a possible guidance to the states that are willing to work together in the area addressed.

The ultimate goal of this chapter is to examine what the EU can learn from the American experience in the field of accepting and enforcing each other's judicial decisions and judgments. However, as mentioned above, no constitutional or otherwise nationwide obligations of mutual recognition exist in the American federation. Neither does American law provide for one single system of cooperation that is governed by covering principles and rules. For that reason, this section will deal with the existing cooperation devices in the USA that are akin to existing cooperation instruments in the EU. It will as far as possible only focus on tools enabling the acceptance and enforcement of judicial decisions taken in another jurisdiction. Both the tools that apply among states and those that apply between state and federal authorities will be covered. But the many regional and bilateral devices for interstate cooperation will not be attended to; only instruments with nationwide – or nearly nationwide – application are dealt with.

4.1. INTERSTATE EXTRADITION

On the basis of the Extradition Clause of the federal Constitution (US Const. Article IV, § 2, cl. 2), the authorities of one state (the asylum state) must surrender persons found within their jurisdiction to another state (the demanding state) in whose jurisdiction they are charged with a crime, provided that such persons have fled from the latter state in order to avoid justice:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled. Be delivered up, to be removed to the State having Jurisdiction of the Crime."

[558] Idem.

[559] J.F. Zimmerman, 'Introduction: Dimensions of Interstate Relations' *Publius: The Journal of Federalism* 24 (1994), p. 3.

This process is typically referred to as "interstate extradition" or "interstate rendition".[560] From its very beginning, the extradition tool, which initially found a basis in the Constitution's predecessor (the Articles of Confederation), has been a means to serve justice by preventing any state from becoming a safe haven for criminals.[561]

Because the Extradition Clause is not self-executing[562] – it does not prescribe the precise method or form, nor does it assign the proper authorities – the rendition process has been further regulated by a federal statute, currently embodied in the 1948 Federal Extradition Act (18 US Code, § 3182). The Federal Extradition Act governs extradition between states, but also between a state and a territory or district. It does not apply to extradition between state and federal authorities. These days, however, the Federal Extradition Act is no longer the primary instrument to be used in interstate rendition proceedings, which is to say in the relationships between states where other procedures have been created.[563] Over time, all states have created their own provisions on interstate rendition. As these sets of rules were widely divergent, the National Conference of Commissioners on Uniform State Laws and the Interstate Commission on Crime adopted in 1936 the Uniform Criminal Extradition Act, which applies across almost the entire country.[564] The Uniform Criminal Extradition Act contains an extensive set of stipulations, which together have a broader range than the federal rules provide for. Both regimes will be attended to below.

4.1.1. Extradition based on federal law

As mentioned above, the duty for states to extradite fugitives on the demand of another state follows directly from the federal Constitution's Extradition Clause. This clause applies to all kinds of crime; the Constitution explicitly mentions "treason"

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560 I use extradition and rendition as interchangeably terms, although there are some authors with the opinion that those terms have differing meanings. See e.g. J.B. Moore, *A Treatise on Extradition and Interstate Rendition*, Boston: The Boston Book Company, 1891, pp. 819-824, who finds that the term extradition refers to the surrender of persons between different countries, while the term rendition should be reserved for the surrender of fugitives between American states. Spear, however, does speak about "extradition", both for the international and the domestic surrender procedure, see S.T. Spear, *The law of extradition, international and interstate*, Albany: Weed Parsons, 1885 (3rd ed.). Today, these terms are mostly used as synonyms, as I have done.

561 Spear (1885), pp. 284-285. Similarly worded by K. Bunch and R.J. Hardy, 'Continuity or Change in Interstate Extradition? Assessing *Puerto Rico* v. *Branstad*', *Publius: The Journal of Federalism* 21 (1991), p. 56.

562 Moore (1891), pp. 840-842; Spear (1885), pp. 285-286.

563 H.W. Horowitz and L.W. Steinberg, 'The Fourteenth Amendment – Its Newly Recognized Impact on the "Scope" of *Habeas corpus* in Extradition', *Southern California Law Review* 23 (1950), fn. 1 on pp. 441-442.

564 Infra note 598.

and "felony", but adds "all other crime", which thus includes misdemeanours.[565] It is, however, limited to persons who are considered to be "fugitives from justice".

The machinery for the execution of the Extradition Clause was laid down in the implementing 1948 Federal Extradition Act (18 US Code, §3182). It requires the governor or chief magistrate of the demanding state to issue a formal request to the asylum state's executive authority for the extradition of a certain person who allegedly has fled to that state. Such a formal demand must be accompanied by a certified (copy of) indictment or an affidavit (attestation) made before a magistrate, in accordance with domestic law, charging the person with having committed a crime. It may also include a copy of the trial record if the sought person has been convicted.[566] In reply, the executive authority of the asylum state to which the sought person has fled, must cause the person to be arrested – through the issuance of an arrest warrant – and secured. The accused person is not entitled to be heard before the executive authority, but he can be offered a hearing at this stage of the extradition process. The asylum state's executive authority should subsequently inform the demanding state's governor or another competent authority and prepare the transmission of the arrested fugitive, awaiting an agent from the demanding state to receive and transport the fugitive.[567] If such an agent does not appear within 30 days from the time of the arrest, the asylum state may discharge the detainee. All costs made in the extradition process must be covered by the demanding state (18 US Code, § 3195).

The demanding state's authority is explicitly assignedto: the governor or the chief magistrate. The competent authority of the asylum state has not been specified: the Federal Extradition Act just mentions the executive authority. On both sides, however, extradition practices have long since been in the hands of governors.[568] For this reason, the executive authorities of both the demanding state and the asylum state will hereafter be termed governors.

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565 Also against this phrase's historical background, see F. Kopelman, 'Extradition and Rendition. History-Law-Recommendations', *Boston University Law Review* 14 (1934), pp. 627-628.

566 Although it cannot be derived from the literal text of §3182 that extradition may also be demanded for the purpose of executing a sentence imposed on a convicted criminal, such is assumed to be embodied, since several authors seems to include this kind of extradition. See e.g. Note, 'Interstate Rendition and the Fourth Amendment' *Rutgers Law Review* 24 (1969-1970), pp. 551-552: "Rendition […] will be employed to return an indicted or unindicted suspect for trial, as well as to return one already convicted of crime for punishment". See also Notes and Comments, 'Extradition *Habeas corpus*', *Yale Law Journal* 74 (1964-1965), p. 78: "A man is held pending extradition to a state where he is wanted to stand trial or to finish a prison term from which he escaped".

567 18 US Code, §3182 *in conjunction with* §3194.

568 E.g. Spear (1885), pp. 291, 299. See further the description of the extradition procedure given by Kopelman (1934), pp. 634-639.

4.1.1.1. Fugitive from justice

An essential condition for extradition based on federal law is that only fugitives are extraditable. The factual question as to whether a certain person should be considered a fugitive is up to the determination of the asylum state. It is established case law that to consider an accused person as a fugitive, it is not necessary that the person has left the demanding state in order to avoid prosecution; the motive for departure does not matter.[569] Even the fact that the authorities of the demanding state were informed of or consented with the departure,[570] or that the accused person escaped the demanding state due to fear for mob violence,[571] do not change this. But a person who has never physically been present in the demanding state, can never be considered to be a fugitive from justice, neither does a constructive presence suffice to determine fugitivity. The constitutional and federal rules are confined to persons who have been actually present in the demanding state.[572] It is minimally required that the accused person in the demanding state has committed material steps towards accomplishing a crime, and afterwards was found in another state irrespective of whether he completes the crime in that or another jurisdiction.[573]

4.1.1.2. Mandatory extradition and gubernatorial discretion

The asylum state's duty to surrender a fugitive to the demanding state is in principle absolute. Only if the official demand does not comply with constitutional and federal law requirements may the transmission of a person be justly declined. To challenge the extradition demand and to prove the non-compliance, the accused person can apply a writ of *habeas corpus* to the asylum state appeal courts or the federal courts.[574] The constitutional and statutory conditions that may be challenged through such a *habeas corpus* include: (1) whether the extradition documents are in proper form; (2) whether the applicant is the person named in the extradition requisition; (3) whether he has been substantially charged with a crime in the demanding state; and (4) whether he is a fugitive from justice.[575] If those requirements are met, the accused person must be returned to the demanding state.

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569 E.g. *Drew* v. *Thaw*, 235 US 432 (1914). According to the Californian state court, this is not changed by the fact that the accused person escaped the demanding state because of fear for mob violence, *Glass* v. *Becker*, 25 F.2d 929 (Circuit Court of Appeals, 9th Circuit 1928). See also 18 USCA §3182.

570 *Bassing* v. *Cady*, 208 US 386 (1908).

571 E.g. *Glass* v. *Becker*, 25 F.2d 929 (Circuit Court of Appeals, 9th Circuit 1928).

572 E.g. *Hyatt* v. *People of State of New York*, 188 US 691 (1903). See further USCA §3182.

573 E.g. *Strassheim* v. *Daily*, 221 US 280 (1910). See further 18 USCA §3182.

574 Horowitz and Steinberg (1950), p. 441-458.

575 *Michigan* v. *Doran*, 439 US 282, 289 (1978); *Pacileo* v. *Walker*, 449 US 86 (1980).

As a first result, it follows that rendition may not be refused on the ground that the alleged crime is not punishable in the asylum state. This has explicitly been determined in the 1860 case of *Kentucky* v. *Dennison*, where the Supreme Court held:

> "that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or the policy of the laws of the State to which the fugitive has fled."[576]

The Supreme Court based its reasoning on the primary purpose of the constitutional Extradition Clause, which is to "preserve harmony between States […] whose mutual interest it was to give each other aid and support whenever it was needed."

It secondly follows that constitutional rights aiming at the protection of criminal suspects cannot be invoked in extradition proceedings; the alleged violation of those rights are not challengeable through an extradition *habeas corpus* petition in the asylum state courts or the federal courts.[577] Of main relevance here are the Fourth Amendment's guarantee against unreasonable search and seizure and the requirement of probable cause,[578] but the Sixth Amendment's right to assistance of counsel, and the Eight Amendment's right not to be subjected to cruel and unusual punishment have also been argued to be available to the extraditable person.[579] Although such constitutional rights are considered fundamental to protect the criminal suspect in an ordinary criminal process within one jurisdiction, they are not susceptible to bar extradition. The same applies to pre-trial defences, such as pleas of innocence and pleadings on the defectiveness of the criminal process (defective pleadings).[580] With regard to both kinds of defence, pre-trial defence and defence based on constitutional rights, the Supreme Court has held that they are to be challenged in the courts of the demanding state.[581] This must be understood from the Supreme Court's view that extradition proceedings are not to be regarded as the first phase of criminal proceedings which would contribute to the determination of the defendant's guilt or innocence. Extradition proceedings are rather "summary

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576 65 US 66, 103 (1860). Reaffirmed in *Taylor* v. *Taintor*, 83 US 366, 375 (1872).

577 Bunch and Hardy (1991), p. 62.

578 Note, 'Interstate Rendition and the Fourth Amendment', *Rutgers Law Review* 24 (1969-1970), pp. 551-590.

579 B.S. Brier, 'The Indigents Right to Appointed Counsel in Interstate Extradition Proceedings', *Stanford Law Review* 28 (1975-1976), pp. 1039-1071; D.L. Ross, 'Future Irreparable Harm: A Ground for Release in Federal Extradition *Habeas corpus* Proceedings', *Washington & Lee Law Review* 25 (1986), pp. 300-308.

580 *California* v. *Smolin*, 482 US 400, 411-412, (1987), in which the extraditee argued that the affidavit that formed the basis for indictment was fraudulent; see further Bunch and Hardy (1991), p. 58.

581 *California* v. *Smolin*, 482 US 400, 412, (1987); *Pacileo* v. *Walker*, 449 US 86,88 (1980); *Sweeney* v. *Woodall*, 344 US 86, 90 (1952).

proceedings", providing a preliminary step to secure the defendant's presence in the demanding state's trial court: "It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt".[582] Any other approach would be contrary to the very purpose of the constitutional Extradition Clause, which was "intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offence was committed",[583] designed "to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land."[584]

Nonetheless, the absolute character of the rendition obligation was in question for a long period. After all, in the 1860 case of *Kentucky* v. *Dennison*, in which Kentucky challenged the refusal of extradition by Ohio, the US Supreme Court established that the Federal Extradition Act constituted a "moral obligation" of the asylum state to comply with the constitutional clause without room for discretion. This obligation, however, was not enforceable by the federal government, as the Supreme Court held.[585] The decision received an enthusiastic welcome from the governors of asylum states, who interpreted it as a possibility to exercise greater discretion as to extradition requests.[586] It resulted in an increased number of denials based on non-constitutional grounds related to the merits of a specific case, such as the unreasonableness of rendition, or the alleged or expected violations of due process in the demanding state. Furthermore, some governors refused rendition on the basis of substantive defences of the fugitive against the crimes he was charged with, for instance including alibi evidence or insanity.[587] In this period, room was also left for weighing extra-legal aspects, for instance the pressure of public opinion in sensitive cases. None of it helped the efficiency of interstate rendition.[588] Moreover, especially in cases where the refusal of the asylum state's governor was based on due process violations in the demanding state, or where no adequate explanation

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582 *In re Strauss*, 197 US 324, 332-333 (1905). Following the same line, see *Biddinger* v. *Commissioner of Police of State of New York*, 245 US 128, 132 (1917) and more recently *Michigan* v. *Doran*, 439 US 282, 288 (1978).

583 *Michigan* v. *Doran*, 439 US 282, 288 (1978).

584 *Biddinger* v. *Commissioner of Police of State of New York*, 245 US 128, 133 (1917).

585 65 US 66, 67 (1860).

586 Bunch and Hardy (1991), pp. 55-56.

587 See the 1950s study 'Interstate Rendition: Executive Practices and the Effects of Discretion', *Yale Law Journal* 66 (1956), pp. 103-115. Based on this, also G.K. Wanlass, 'Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion?', *Brigham Young University Law Review* (1980), pp. 398-399, and Bunch and Hardy (1991), pp. 55-57.

588 Bunch and Hardy (1991), p. 56.

of the refusal decision was given, the mutual relationships between the involved states were negatively affected.[589]

The *Kentucky* decision was overturned by the Supreme Court in the 1987 case of *Puerto Rico* v. *Branstad*. This case arose from a conflict between the territory of Puerto Rico[590] and Iowa: the latter declined to return a fugitive to Puerto Rico based on the alleged absence of a fair trial in Puerto Rico. Iowa stated that Puerto Rico was unable to invoke federal judicial authority in order to compel the Iowa governor to comply with the Puerto Rican extradition request. Puerto Rico challenged the Iowa refusal in the federal courts and this led to the Supreme Court's overruling decision that the federal courts do have authority to compel state governor's performance in the mandatory duty of the Extradition Clause to return fugitives upon demand.[591]

Understandably, the *Branstad* outcome has not been warmly received by governors, who saw their discretionary powers eroded.[592] Of course, asylum state's governors remain authorised to refuse the transfer of a person on the grounds on which federal courts are permitted to release *habeas corpus* petitioners.[593] Furthermore, it will always be true that due to the specific circumstances of a case, surrender can legitimately be refused for pragmatic reasons. For instance, in *Taylor* v. *Taintor*, the US Supreme Court held that surrender may be refused if the person sought has been put in prison in the asylum state. In such a case, the governor of the asylum state may decide to give priority to the demands of domestic law.[594] But that *Branstad* decreased the influence of the asylum state's governor over extradition cannot be denied. For this reason, post-*Branstad* governors employed the option of case-to-case negotiations with demanding state officers in order to exert influence.[595]

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589 'Interstate Rendition (1956), pp. 110-111. Uphold in the later publications of Wanlass (1980), pp. 398-399 and Bunch and Hardy (1991), p. 56.

590 Puerto Rico is not a state, and it is true that the federal Constitution only refers to 'states'. However, Puerto Rico has joined the Uniform Criminal Extradition Act, which applies to both states and territories. So, according to the Supreme Court, Puerto Rico "may invoke the power of federal courts to enforce against state officers rights created by federal statutes, including equitable relief to compel performance of federal statutory duties", 483 US 219, 230 (1987).

591 *Puerto Rico* v. *Branstad*, 483 US 219 (1987). See for analyses of this case: Bunch and Hardy (1991); R.E. Davis, '*Puerto Rico* v. *Branstad*: Restoration of Integrity for the Constitution's Extradition Clause', *Cumberland Law Review* 19 (1988-1989), pp. 109-129; J.P. Dinan, '*Puerto Rico* v. *Branstad*: The End of Gubernatorial Discretion in Extradition Proceedings', *University of Toledo Law Review* 19 (1987-1988), pp. 649-682.

592 Bunch and Hardy (1991), pp. 60-61.

593 Supra note 572.

594 83 US 366 (1872).

595 Bunch and Hardy (1991), p. 65.

4.1.1.3. No rule of specialty

Interstate rendition does not protect the fugitive against being prosecuted in the demanding state for crimes not explicitly mentioned in the official demand for rendition. Such a limitation is quite common in the law of international extradition, where it is typically referred to as the rule of specialty. In the context of interstate rendition, however, the existence of such a specialty rule has long since been rejected by the Supreme Court:

> "No purpose or intention is manifested to afford [fugitives] any immunity or protection from trial and punishment for any offenses committed in the state from which they flee. On the contrary, the provision of both the constitution and the statutes extends to all crimes and offenses punishable by the laws of the state where the act is done".[596]

The Supreme Court explained its view in terms of a fundamental difference between international extradition and interstate rendition. While in the context of international extradition, the respective countries as independent sovereigns are allowed to subject their responsibilities and duties to a limitation such as the specialty rule, the state jurisdictions are bound by "the supreme law of the land", which has not burdened the demanding state with any condition or limitation as to litigating the fugitive.[597] Thus imagine an extraditee who is transported from the asylum state to the demanding state for the purpose of being prosecuted in the demanding state for the crime of armed robbery. He may subsequently also be prosecuted for the crime of assault, irrespective of whether the alleged assault took place before, after or during the alleged commitment of armed robbery, and also regardless of whether the charge of assault was already brought against the extraditee at the time of issuing the extradition demand for armed robbery.

4.1.2. The Uniform Criminal Extradition Act

In 1936, the National Conference of Commissioners on Uniform State Laws (NCCUSL), together with the Interstate Commission on Crime (ICC) adopted the Uniform Criminal Extradition Act (UCEA). Currently, this act is wholly or partly agreed to by 48 states (not by Mississippi and South Carolina) and by the territories of Puerto Rico and the Virgin Islands.[598] Since it applies almost US-wide,

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596 *Lascelles* v. *Georgia*, 148 US 537, 542 (1893); reaffirmed in *Biddinger* v. *Commissioner of Police of State of New York*, 245 US 128, 132-133 (1917); *Michigan* v. *Doran*, 439 US 282, 287-288 (1978).

597 *Lascelles* v. *Georgia*, 148 US 537, 545 (1893).

598 The most recent list of party states that I found is included in the 2009 Maryland Extradition Manual, Appendix A, to consult on http://www.sos.state.md.us/Services/MD-ExtraditionManual2009.pdf (last accessed on 25 February 2010).

the UCEA has succeeded in bringing uniformity to many procedural elements of interstate extradition. Moreover, it has widened the scope of extradition based on constitutional and statutory provisions. The UCEA is a combination of codified case law of the US Supreme Court,[599] registered rules based on common practice, and some new elements. Below, the most important clarifying (and deviating) aspects will be attended to.

4.1.2.1. Requisition documents and authorities involved

The UCEA provides relatively detailed stipulations on the issues of required documents and competent authorities. Whenever a state wants to realise the return of a person charged with a crime or convicted of a crime in this state, a written application must be presented to the governor of the state for the requisition of this person (UCEA § 23). Such an application must *inter alia* cite the name of the person; the crimes charged against him or he was convicted of; the state in which he is allegedly residing; and the approximate time, place and circumstances of either its commission, or the escape from confinement, or the breach of the terms of bail, parole, or probation. The authorities competent to present a written application for requisition to the demanding state's governor are – depending on the intended purpose of extradition – prosecuting attorneys, parole boards, wardens of institutions and prisons, or sheriffs of the county from which escape was made.

With the required documents to be attached, a request for extradition shall, upon the governor's endorsement, be forwarded to the governor of the asylum state (UCEA § 23 in conjunction with § 3). Which documents must be attached to such an official demand depends on the specific purpose of extradition. If extradition is sought for the purpose of prosecution, the demanding state shall enclose either a copy of an indictment or an affidavit, together with a copy of any warrant issued thereupon. Such an indictment or affidavit must substantially charge the person sought ("charge test"[600]). If extradition is demanded for the execution of a sentence, the official demand shall be accompanied by a copy of the judgment of conviction, or of a sentence imposed in execution thereof, together with a written statement that the sought person has escaped confinement, or has broken the terms of bail, probation or parole (UCEA § 23 in conjunction with § 3).

Having received the requisition for extradition, the governor of the asylum state may call in the Attorney General or any prosecuting officer to investigate or to assist in investigating the requisition, before deciding on the question of whether

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599 See for instance UCEA § 20 that prohibits the asylum state's authorities to inquire into the guilt or innocence of an accused person in extradition proceedings. This follows from established case law of the US Supreme Court, see supra note 580.

600 J.J. Murphy, 'Revising Domestic Extradition Law', *University of Pennsylvania Law Review* 131 (1982-1983), p. 1114.

the claimed person will be surrendered or not (UCEA § 4). If the governor decides to comply with the demand, he shall issue an arrest warrant, which must be state sealed, and be directed to a peace officer, or to any other person competent to execute the warrant (UCEA § 7). This peace officer or other person is permitted to arrest the sought person, potentially with the aid of other peace officers and competent persons (UCEA § 8). On arrest, the sought person shall be taken before a judge of a court of record, who shall inform him of the demand, the charges against him, and his right to be assisted by legal counsel. If during this hearing the claimed person expresses his desire to challenge the legality of arrest, the judge shall fix a reasonable time within which a writ of *habeas corpus* can be applied.[601] Both the prosecuting officer of the county in which the extraditee is arrested and secured and the receiving agent of the demanding state must be informed of such an application and of the time and place of the hearing (UCEA § 10).

4.1.2.2. Fugitives and non-fugitives

As mentioned, the Extradition Clause and the Federal Extradition Act only provide for the interstate extradition of fugitives (Section 4.1.1.1). This ordinary extradition situation is covered by UCEA § 2, explicitly referring to the constitutional and federal legislation. In addition, however, UCEA § 6 allows the interstate extradition of persons who were not in the demanding state at the time the alleged crimes were committed, and who are therefore not considered "fugitives from justice". This provision addresses the constructive presence of a person in the demanding state,[602] a situation precluded under federal law.[603] The typical example of constructive presence appears where person X who is standing in state A fires at person Y who is standing in state B, from the effects of which person Y dies.[604] Another example of constructive presence occurs where the leader X of a criminal gang who stands in state A sends person Z to state B in order to violate the laws of that state.[605] The state having jurisdiction of the crime in the two situations described is state B, where the crime was committed. Under the Constitution and the Federal Extradition Act,

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601 It has not been defined which issues may be raised at the extradition hearing, which has been criticised by Murphy (1982-1983), p. 1110. However, I assume that most states will follow the guidelines of *Michigan* v. *Doran*, 439 US 282, 289 (1978) and *Pacileo* v. *Walker*, 449 US 86 (1980), see Section 4.1.1.2.

602 C.E. Glander, 'Practice In Ohio Under The Uniform Criminal Extradition Act', *Ohio State Law Journal* 8 (1942), p. 268.

603 Supra note 570.

604 Referred to as "the problem of 'extraterritorial' crime" by F.R. Black, 'Interstate Rendition as Applied to a Person Brought Involuntarily into the Surrendering State', *American Institute of Criminal Law & Criminology* 29 (1938-1939), pp. 320-321. See also Glander (1942), p. 268.

605 P.W. Green, 'Duties of the Asylum State under the Uniform Criminal Extradition Act', *American Institute of Criminal Law & Criminology* 30 (1939-1940), p. 311.

however, person X could not be extradited to state B; since person X has never been physically present in the state B, he could not be considered a fugitive therefrom.[606] This hiatus has now been addressed by the UCEA.

4.1.2.3. Arrest prior to extradition demand and warrantless arrest

Under the Federal Extradition Act, the executive authority of the asylum state is obliged to cause the arrest of a person claimed by another state, but only upon the receipt of the correct documents (18 US Code, §3182). Such is also the point of departure for the asylum state's governor acting under the UCEA (§§ 2-3, 7). In practice, however, a state requests the asylum state's governor to arrest a person before having forwarded the proper extradition papers. Such is permitted under UCEA § 13, but applies to fugitives only. If the requested governor complies with it, the person sought is possibly already in custody or on bail at the time the official requisition is issued. [607] Furthermore, UCEA § 14 authorises the arrest of a person by any peace officer or a private person, provided that the arrest is based on reasonable information that the arrestee is charged in any state with a crime punishable by death or imprisonment for a term exceeding one year. Such a warrantless arrest must immediately be followed by taking the arrestee before a judge or magistrate, where a complaint must be made against the arrestee on oath, explaining the ground for arrest. Hereafter, the proceedings will continue as if the arrestee was arrested on a warrant.[608]

4.1.2.4. Waiver of extradition proceedings

Under UCEA § 25A, a person whose extradition is sought may voluntarily waive his right to an extradition hearing and the possibility of challenging the requisition through a writ of *habeas corpus*, by giving his consent to being returned to the demanding state. Such a waiver must be written and be made in the presence of a judge of any court of record in the asylum state. Other waivers of extradition appear in statutes which possibly operate in tandem with the UCEA, particularly the Interstate Agreement on Detainers and the Interstate Compact for Adult Offender Supervision (Sections 4.2 and 4.6 respectively).

606 Idem.

607 This provision and practice thereon was held to be legitimate by the US Supreme Court long ago, see Green (1939-1940), p. 308.

608 Green (1939-1940), pp. 309-311.

4.1.2.5. Revising efforts

In 1982, the UCEA was withdrawn from recommendation by the NCCUSL, because it had approved a superseding act: the 1980 Uniform Extradition and Rendition Act. This new act should solve the cumbersomeness and complexity of the UCEA and it should be adapted to today's technological developments.[609] However, up until today, the Uniform Extradition and Rendition Act has only been adopted by North Dakota. As a consequence, interstate extradition is still primarily governed by the UCEA. Nevertheless, two interesting aspects will be mentioned briefly.

First of all, the most striking characteristic of the 1980 Uniform Extradition and Rendition Act is the division made between the extradition procedure, similar to the UCEA procedure (Article III), and the less cumbersome rendition procedure (Article IV). The simplification of the rendition procedure particularly lies in the number of authorities involved: only a prosecutor and a judge in both the asylum state and the demanding state are required. The proposed rendition procedure would, however, have a limited scope; it would only apply to crimes punishable by death or imprisonment for a term exceeding one year, and would not cover the return of fugitives at that time prosecuted or imprisoned in the asylum state.

Secondly, in the context of extradition for prosecution purposes, the new act would replace the "charge test" of UCEA § 3 by the more stringent "probable cause test". The UCEA extradition procedure requires the documents to "substantially charge" the accused person, whereas the new extradition procedure would demand an arrest warrant based upon a decision that there is probable cause to believe that a crime has been committed by the accused person (Article III, § 3-101 and comments, § 3-102).[610]

4.2. INTERSTATE AGREEMENT ON DETAINERS

Before the creation of the Interstate Agreement on Detainers, prosecutors readily filed a detainer on a person who was at the time imprisoned in another state, without taking steps to prosecute before the prisoner's release. This practice is likely to have negative consequences for the inmate; the unresolved charges can easily obstruct prisoner treatment opportunities and rehabilitation programmes, because correctional officials might assume a greater escape risk for an inmate with outstanding detainers.[611]

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609 Prefatory Note to the Uniform Extradition and Rendition Act.

610 See on this: Murphy (1982-1983), pp. 1113-1115.

611 L.W. Abramson, 'The Interstate Agreement on Detainers: Narrowing its Availability and Application', *New England Journal on Criminal and Civil Confinement* 21 (1995), p.1; D. Genet, 'Courts v. Governors: Prisoners Torn Between States: Who should determine their fate?', *Pace Law Review* 16 (1995-1996), p. 157.

In 1969, the very reason to design such an instrument came about due to the decision of the Supreme Court in *Smith* v. *Hooey*, where it was held that the Sixth Amendment's right to a speedy trial must always be guaranteed by the states, even when the charged person is still serving a term of imprisonment in another jurisdiction.[612] Subsequently, in 1970, the Interstate Agreement on Detainers was signed by Congress and most state legislatures. The agreement is currently codified in the Interstate Agreement on Detainers Act (18 USC App. 2), since the United States has entered into the agreement as a party.[613] Today, the agreement applies nationwide.

The Interstate Agreement on Detainers Act (IADA) aims at solving the problems for the inmate created by outstanding detainers – based on untried indictments, complaints or information – by setting up a cooperation procedure between state and federal jurisdictions (IADA § 2, Article I). However, the IADA not only favours the prisoner, it also serves the prosecutor by providing a means to secure suspects who are concurrently incarcerated in another jurisdiction and to cause them to be tried before expiration of the original sentence.[614] Both the person incarcerated in a first jurisdiction (sending jurisdiction) and the prosecutor in a second jurisdiction (receiving jurisdiction) are entitled to invoke the IADA.

A prisoner who desires final disposition of any unresolved charges against him may, during confinement in the sending jurisdiction, forward a request for that purpose to the receiving jurisdiction (IADA § 2, Article III(a)). Such a request must enclose a certification of the official having custody of the inmate, setting forth his exact status (including, for instance, the terms of his imprisonment, the time served and the time to be served). If any outstanding detainer appears in the receiving jurisdiction, the prosecutor of that jurisdiction is obliged to bring the inmate to trial within 180 days.

A prisoner forwarding a request for final disposition must be aware of the significant consequences of such a request. The first consequence relates to the uncompleted term of imprisonment in the sending jurisdiction. It is quite conceivable that the sending jurisdiction wants to be sure of the prisoner coming back to undergo the remaining period of the custodial sentence. A prisoner's request is therefore assumed to include his consent to the voluntarily return to the sending jurisdiction's prison as soon as the criminal proceedings in the receiving jurisdiction have come to an end (IADA § 2, Article III(e)). The second consequence for the prisoner to be aware of relates to the criminal proceedings in the receiving jurisdiction. To ensure the receiving jurisdiction having disposal of the prisoner after his term of imprisonment in the sending jurisdiction is complete, the prisoner's request for final disposition is

612 393 US 374 (1969).

613 The United States has entered the agreement on its own behalf and on behalf of the District of Columbia, IADA § 2.

614 Abramson (1995), p. 3.

automatically considered to be a waiver of extradition; as soon as the prisoner has completed his term of imprisonment in the sending jurisdiction, his return to the receiving jurisdiction will take place with no possibility of challenging it.

The IADA may also be invoked by any prosecutor in whose jurisdiction unsettled charges exist against a prisoner incarcerated in another jurisdiction (sending jurisdiction). The prosecutor may present the appropriate authorities of the sending jurisdiction with a written request for temporary custody or availability (IADA § 2, Article IV(a)). The sending jurisdiction's authorities must decide within 30 days whether or not to honour the request. During this period of 30 days, the prisoner may contest the legality of his delivery (IADA § 2, Article IV(d) in conjunction with (a)). Disapproval of the request must automatically result in dismissal of the unresolved charges supporting the outstanding detainers (IADA § 2, Article V(c)). If the request is complied with, the inmate will be put at the disposal of the receiving jurisdiction's prosecutor, after which trial proceedings must start within 120 days (IADA § 2, Article IV(c)). Failure to meet this time limit must lead to dismissal (IADA § 2, Article V(c)).[615]

While residing in the receiving jurisdiction, time being served on the sentence will be carried over. Good time credits, however, will only be earned by the prisoner if allowed by the law and practice of the sending jurisdiction (IADA § 2, Article V(f). The receiving jurisdiction is responsible for the prisoner from the time that he is received in custody until he is returned to the sending jurisdiction. This includes the payment for all costs of transporting, caring for, keeping and returning the prisoner, unless the jurisdictions involved have agreed otherwise (IADA § 2, Article IV(h)).

The application and interpretation of the IADA has been challenged in several state and federal courts in recent decades. As it turns out, the act does not apply to pre-trial detainees against whom a detainer has been lodged in another jurisdiction. After all, a pre-trial detainee is not regarded as "serving a term of imprisonment" and with the trial ahead of him, the pre-trial detainee has not sufficient interest in the uninterrupted course of rehabilitation and treatment programmes.[616] Revocation detainers, imposed on persons who have breached the terms of parole or probation, are not covered by the IADA; such a charge "does not accuse an individual with having committed a criminal offense in the sense of initiating a prosecution".[617]

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615 Though, Abramson (1995) demonstrates that several courts have refused to comply with the rule of dismissed charges in the context of facing this time limit.

616 *United States* v. *Reed*, 620 F.2d 709 (9th Circuit 1980), *cert. denied*, 449 US 880 (1980); Abramson (1995), pp. 9-10.

617 *Carchman* v. *Nash*, 473 US 716, 725 (1985); Abramson (1995), pp. 11-13.

4.3. ADMISSIBILITY OF EVIDENCE OBTAINED IN ANOTHER US JURISDICTION

In a country where citizens may easily cross internal state borders, and crimes are frequently committed outside the home state or on the territories of more than one state, it is quite conceivable that in a criminal case part of the evidence is in the hands of the authorities of another jurisdiction. Moreover, due to the large number of overlapping grounds of jurisdiction – there is often a state ground as well as a federal ground to prosecute a crime – it may occur that, for instance, federal authorities have searched the defendant's house while the state ultimately will lead the prosecution. The fundamental question in this regard is whether and under what circumstances a state or federal court can use evidence that has been obtained in another US jurisdiction. Before dealing with this question in depth, it must be acknowledged that the issue of cross-border gathering and admissibility of evidence is approached quite differently in the USA compared to the European Union. It would be untrue to suggest that for the purpose of nationwide evidence admissibility, legal tools provide for the mutual recognition of evidence warrants or such like. I have nevertheless chosen to attend to the American approach to the matter, just because the issue is such a sensitive and difficult issue within the European Union.

It is necessary to observe that, generally speaking, the obtaining of evidence is subject to the Fourth Amendment guarantee for criminal defendants against unreasonable search and seizure. Searches must be based on a search warrant, to be issued by a magistrate only upon probable cause, and describing the place to be searched and the persons or things to be seized. It is in this context, the context of search and seizure, that the debate on the admissibility of evidence, whether obtained locally or in another jurisdiction, has been developed and that the US Supreme Court created a remedy to those defendants who became victims of unreasonable search and seizure: the exclusionary rule. It all started with the Supreme Court's landmark decision in *Weeks* v. *United States*. At issue in this case were a warrantless search of the defendant's house and the subsequent seizure of several items by federal officials, obviously in contravention of the Fourth Amendment. Would the items nevertheless be admissible as evidence in court? The Supreme Court unanimously answered in the negative; it held that evidence seized by federal officials in a manner that violated the Fourth Amendment was inadmissible in federal criminal trials.[618] Later on, the Supreme Court adopted several exceptions to the exclusionary rule, for instance in habeas corpus proceedings, in grand jury proceedings or where the officials involved relied in "good faith" on a search warrant that afterwards appeared invalid (good

[618] 232 US 383 (1914). Reaffirmed in *Silverthorne Lumber Co*. v. *United States*, 251 US 385 (1920).

faith exception).[619] Today, the exclusionary rule is considered a "judicially created remedy",[620] rather than being "constitutionally mandated".[621]

The earliest exclusionary rule was a "federal exclusionary rule".[622] It only covered the actions of federal officials in federal criminal prosecutions.[623] As a result, illegally state-seized evidence was admitted in federal courts without problems, provided that federal officials did not participate in the search and seizure actions (silver platter doctrine).[624] And, since the federal exclusionary rule did not apply to state prosecutions, federal officials tried to avoid the negative consequences of the federal exclusionary rule by presenting on a reverse silver platter the unconstitutionally seized evidence to state courts, who usually admitted it.[625] Furthermore, it was common practice that evidence, illegally seized by the officials of a sister state, being introduced on an interstate silver platter, was accepted and used in the courts of the prosecuting state.[626]

Obviously, the restrictive application of the exclusionary rule to actions by federal officials in federal criminal trials has only encouraged federal authorities to cooperate with state authorities in order to circumvent the constitutional obligations on search and seizure, or to select the most advantageous forum in terms of prosecution.[627] The problems have increased as several states started to develop their own domestic exclusionary rule, which were mutually diverging.[628] Despite the positive consequence that federal officials were less easily able to present illegally seized evidence to the courts of these states, this development has simultaneously caused many differing approaches to the question at issue here. The complicating state of play of that time seemed to reach an end with the Supreme Court decisions of *Elkins*[629] and *Mapp* v. *Ohio*.[630] In the 1960 *Elkins* case, the Supreme Court first has

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619 J. Dressler and A.C. Michaels, *Understanding Criminal Procedure: Investigation*, Lexis Nexis Matthew Bender & Company Inc., 2006 (4th edition), pp. 386-400.

620 *United States* v. *Calandra*, 414 US 338, 348 (1974).

621 *Pennsylvania Board of Probation and Parole* v. *Scott*, 524 US 357, 363 (1998).

622 J.W. Diehm, 'New Federalism And Constitutional Criminal Procedure: Are We Repeating The Mistakes Of The Past?', *Maryland Law Review.* 55 (1996), p. 226.

623 *Weeks* v. *United States*, 232 US 383, 398 (1914).

624 T. Quigley, 'Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions', *Arizona State Law Journal* 20 (1988), p. 315-318; see also Diehm (1996), pp. 229-230.

625 Quigley (1988), pp. 319-321.

626 Quigley (1988), pp. 321-324.

627 Diehm (1996), p. 229.

628 Diehm (1996), p. 230. According to Quigley (1988), in 1960 only five states had judicially adopted exclusionary rules, p. 321.

629 364 US 206 (1960).

630 367 US 643 (1961).

deemed the silver platter doctrine unconstitutional; unconstitutionally state-seized evidence was no longer admissible in federal courts. The Court held that it created problems not foreseeable at the time of *Weeks*, but which were at the time no longer justifiable: "The very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts".[631] Federal courts were thus obliged to inquire into the unreasonableness of search and seizure irrespective of whether the items were seized by state or federal officers, but rather in considering whether the need for deterrence and the upholding of judicial integrity would urge the exclusion of evidence in particular cases,[632] today frequently described as finding the balance between deterrence benefits on the one hand and the substantial social costs of excluding the evidence on the other hand.[633]

Shortly after, in the 1961 *Mapp* case, the Supreme Court took a second step towards a harmonised exclusionary rule by deciding that it was applicable to the states as well, via the Fourteenth Amendment's Due Process Clause.[634] As a result, evidence obtained through unreasonable search and seizure in terms of the Fourth Amendment ought to be declared inadmissible, no longer only in federal courts, but in any court of the United States. After all, in the Court's words "[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches".[635]

However, subsequent developments, usually referred to as "new federalism", have brought an end to the short period of post-*Mapp* harmony: as from the 1970s, state courts have increasingly interpreted their state constitutions to require more protection to their citizens than required under the minimum standards of the federal Constitution.[636] As demonstrated elaborately by Diehm, new federalism has also affected search and seizure situations and as such the topic of evidence admissibility. Currently, many variations exist in state laws, for instance concerning the interpretation of probable cause as a requirement for the issuance of a search warrant, the adoption or rejection of the good faith exception,[637] whether a warrant

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631 364 US 206, 221 (1960).

632 Idem, at 217, 222-223. About the two justifications for the exclusionary rule – deterrence and judicial integrity – see Dressler and Michaels (2006), pp. 369-371.

633 *United States* v. *Leon*, 468 US 897 (1984); *Pennsylvania Board of Probation and Parole* v. *Scott*, 524 US 357 (1998); *Hudson* v. *Michigan*, 547 US 586 (2006).

634 367 US 643, 655-656 (1961). With *Mapp*, the Supreme Court overruled *Wolf* v. *Colorado*, 338 US 25 (1948).

635 367 US 643, 658 (1961).

636 This movement has been referred to earlier, see supra note 503.

637 See, for instance, an article about the rejection of the good faith exception by the Pennsylvania Supreme Court because the exception would infringe Pennsylvania constitutional law: K. Gormley, 'The Pennsylvania Constitution after *Edmunds*', *Widener Journal of Public Law* 3 (1993-1994), pp. 55-76.

is required in order to search automobiles, and so on.[638] In so doing, the question is no longer always limited to whether a search must be considered unreasonable in terms of the federal Constitution, but in a number of cases search and seizure actions are further required to meet the conditions of the state constitution too. As shown below, this has led to a fragmented way of dealing with the admissibility of evidence seized in another jurisdiction.

In federal criminal prosecutions, the situation is most clear. Since *Elkins* and *Mapp*, all evidence that has been seized unreasonably in terms of the federal Constitution, will in principle be excluded, irrespective of whether the proof was gathered by federal officials or state officials. After all, "[t]he test is one of federal law".[639] State-seized evidence that does meet the conditions of the federal Constitution, but violates the local law of the state involved, will ordinarily not be excluded solely on this ground.[640] A different approach would hinder the enforcement of federal laws and the creation of uniformity throughout federal courts.[641]

But then the question arises as to whose exclusionary rule applies in the courts of a prosecuting state, the forum court, which is confronted with evidence seized by federal officials, or sister state officials. The answer is obvious as to evidence obtained in violation with the federal Constitution: such evidence must in principle be excluded, because all evidence obtained unreasonably in terms of the Fourth Amendment must in principle be excluded in any court of the United States, including state courts, irrespective of who seized the items.[642]

But what if the evidence has been seized in violation of the stricter requirements of the prosecuting state? Whose rules would be applicable then? Four possible situations may occur here:

1. The evidence was seized illegally according to the rules of the search jurisdiction and would also be considered to be obtained illegally according to the rules of the forum state;
2. The evidence was obtained illegally under the rules of the search jurisdiction, but would be regarded as legally seized under the rules of the forum state;
3. Officials of the forum state participated in an illegal search and seizure on the territory of another jurisdiction; and

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638 Diehm (1996), pp. 238-241.

639 364 US 206, 224 (1960).

640 K.J. Melilli, 'Exclusion of Evidence in Federal Prosecutions on the Basis of State Law', *Georgia Law Review.* 22 (1987-1988), pp. 667-740; R.S. Range, 'Reverse Silver Platter: Should Evidence that State Officials Obtained in Violation of a State Constitution be Admissible in a Federal Criminal Trial?', *Washington & Lee Law Review* 45 (1988), pp. 1499-1526; Diehm (1996), pp. 255-256.

641 Range (1988), p. 1500.

642 Supra note 639.

4. The evidence was obtained legally according to the rules of the search jurisdiction, but would be considered to be illegal if officials of the forum state had done the search and seizure.

Authors have demonstrated that state courts have approached this question in various ways, prioritising differing interests. There are courts that do use the exclusionary rule perspective in its most original form. They try to analyse the case in terms of best serving the purposes of the exclusionary rule, for example whether the exclusion of evidence would serve the deterrent purpose of the exclusionary rule and whether exclusion would be necessary to uphold judicial integrity.[643] Under this perspective, evidence is ordinarily excluded in situations 1 and 3, but admitted in situations 2 and 4.[644] However, there are also state courts that continue to apply their domestic rules, irrespective of who carried out the search and seizure (state law perspective). In fact, they do not restrict themselves to whether evidence should be excluded or admitted, but also determine whether the evidence must be considered illegally seized.[645] Other states have based their decisions on the conflicts of law theories[646] – borrowed from civil law – by considering the interests of the search state and the forum state, for instance whether the use of domestic law would offend the comity and relationship with the search state and how close the actual search state's relationship with the crime committed is.[647] And, there are state courts that refuse to apply domestic law towards federal officials who have operated in their jurisdiction because it would infringe federal supremacy, whereas other state courts do apply their rules to such federal agents.[648] After all, the forum state court is free to use its own way of determining whether or not to admit "foreign" evidence as long as exclusion is not compelled by the federal Constitution.

The inevitable conclusion is that evidence seized unconstitutionally is approached in a uniform way: such evidence will in principle not be admitted in the federal and state courts. However, with regard to evidence obtained in violation of local law, which often sets a higher level of protection for the defendant, state courts have developed divergent jurisprudence. And, in this context, the federal courts

643 In the early years of the new federalism movement, this analysis was common in state courts, see R. Tullis and L. Ludlow, 'Admissibility of Evidence Seized in Another Jurisdiction: Choice of Law and the Exclusionary Rule', *University of San Francisco Law Review* 10 (1975-1976), pp. 67-91. See also B. Latzer, 'The New Judicial Federalism and Criminal Justice: Two Problems and a Response', *Rutgers Law Journal* 22 (1990-1991), pp. 874-877

644 Quigley (1988), pp. 322-323; Tullis and Ludlow (1975-1976), pp. 90-91.

645 W.R. LaFave, *Search and Seizure. A Treatise on the Fourth Amendment*, St. Paul, Minn: West Publishing Co. (1996), p. 150; Latzer (1990-1991), pp. 877-878.

646 LaFave (1996), pp. 140-155. Latzer (1990-1991), pp. 873-874; Quigley (1988), pp. 321-322.

647 E.G. *People* v. *Saiken*, 49 Ill. 2d 504, 275 N.E.2d 381 (1971).

648 Diehm (1996), pp. 252-253.

have generally taken yet another position by refusing the exclusion of evidence on the sole ground that it has been seized in violation with the law of the search state. These enormous differences between the various US jurisdictions cause problems that had seemed to disappear with *Elkins* and *Mapp*, but that have returned with the new federalism era. The main problems are related to the daily practice of law enforcement authorities, especially those who are involved in interstate or federal-state joint investigations. After all, it is impossible for law enforcement authorities to be familiar with the legal rules and court interpretations of so many jurisdictions. In addition to the uncertainty this might bring, it also might encourage officials to circumvent the more stringent requirements in a tactical way (forum shopping).[649] For instance, in situations where a crime can be investigated by state authorities as well as by federal authorities, state officials could try to avoid the more stringent requirements of state evidence law by introducing the illegally seized evidence in a federal court, since that federal court would probably not exclude the evidence solely because it has been obtained in violation of state law. In view of that, joint federal-state investigations might even designate only federal agents in order to ensure the admissibility of evidence in federal courts or in the courts of states that do not feel compelled to apply state rules to federal officials.[650] This means that the silver platter issue has returned.[651] Furthermore, it might easily result in unequal treatment in one jurisdiction of defendants who are in an identical or similar situation.[652]

4.4. RENDITION OF WITNESSES

It occasionally happens that in a criminal proceeding or investigation, testimony is desired of a person who resides in another state. Whereas in-state witnesses would be subpoenaed to testify, out-of-state witnesses cannot be compelled to appear directly; the subpoena powers of a state do not apply extraterritorially unless the witness has been summoned while in the state where the criminal prosecution takes place.[653] Needless to say this might lead to very unsatisfying and frustrating situations. Not surprisingly, a uniform law has been adopted on this subject. In 1936, the NCCUSL approved the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Attendance of Witnesses Act, AWA).[654] All 50 states and the District of Columbia have adopted the text of this uniform act, or similar provisions.

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649 Quigley (1988), p. 313.

650 Diehm (1996), p. 247.

651 Mentioned by Diehm (1996), pp. 246-247.

652 Diehm (1996), p. 257.

653 Notes, *Minnesota Law Review* 31 (1946-1947), p. 707.

654 11 U.L.A. 1.

Under the Attendance of Witnesses Act, a judge or a grand jury in one state (demanding state) can obtain live testimony of a person who is outside the state, either because he is a non-resident, or because he is absent at the time. To that end, a demanding state's judge may present a certificate to any judge in the county of the state where the witness is found (delivering state), provided that such state has enacted similar legislation – the Attendance of Witnesses Act applies in reciprocity.[655] The certificate must show that a criminal prosecution is pending, or that a grand jury investigation has started or will start in due course, and that the desired person is a material witness whose presence is required for a specified number of days.

In response to such a certificate, the judge of the delivering state will first order the desired person to appear at a hearing (AWA § 2). At such a hearing, the judge of the delivering state may serve a summons on the witness, unless he determines that the witness is not material and necessary,[656] or that the issuance of a summons would cause undue hardship to him (AWA §§ 2-3). Such a summons may have the form of an order or notice requiring the witness to appear and testify in the courts of the demanding state, or it may be a subpoena (AWA § 1). While it is obvious that this provision covers the *subpoena ad testificandum* (the means for securing the attendance of a witness, either to pre-trial proceedings, or court hearings, or trials[657]) several state courts have held that the issuance of a *subpoena duces tecum* (a court writ compelling a person to attend the trial and to produce certain books and records, for instance medical records, in his possession[658]) is also authorised under this provision.[659]

The demanding state's certificate can recommend that the desired witness be taken in immediate custody and to be delivered to the demanding state's authorities to assure his attendance in the demanding state's courts. Then, the judge of the delivering state may, instead of issuing an order to appear, direct the witness to be brought before him for an immediate hearing. Being satisfied of the desirability of custody and delivery, the judge, instead of serving a subpoena or summons, can decide to order that the witness be taken into custody and delivered to the authorities of the demanding state forthwith (AWA § 2).

To return to the ordinary situation, disregarding the summons is punished according to the laws of the delivering state, being the state that has issued the order (AWA §§ 2-3). A witness obeying the summons, who in pursuance thereof

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655 98 C.J.S. Witnesses § 16.

656 A witness is material and necessary if the evidence to be obtained by his testimony would be relevant, significant and admissible in the courts of the demanding state, 98 C.J.S. Witnesses § 18 (see accompanying case law).

657 98 C.J.S. Witnesses § 20.

658 98 C.J.S. Witnesses § 32.

659 J.M. Zitter, 'Availibility under uniform act to secure the attendance of witnesses from without a state in criminal proceedings of subpoena duces tecum', 7 A.L.R.4th 836 (annotation 1981).

moves to the demanding state is exempted from arrest or being served a writ as to matters arising prior to his arrival (AWA § 4).

The out-of-state witness must be offered financial compensation (AWA § 2). In principle, such compensation must be tendered by the party summoning the witness, thus the prosecution authorities of the demanding state or the defendant. Among the state courts, there have been differences of opinion as to whether an exception must be made as to indigent defendants. Time and again, state courts refused to pay the required fee for witnesses at public expense.[660] However, since the 1970s, courts seem to judge increasingly in favour of the indigent defendant, probably since the federal district court in *Preston* v. *Blackledge* held that "the fact that the petitioners were indigent should create no bar to securing the attendance of these witnesses under the Uniform Act".[661] After all, defendants cannot be denied such a fundamental right as the hearing of witnesses outside the state.

4.5. INTER-JURISDICTIONAL TRANSFER OF PRISONERS

The cross-border long-distance movement of detained persons was a rare phenomenon in US early history; only state prisons existed and federal prisoners were to be confined in a state prison in their state of residence. However, due to the immense overcrowding in state prisons after the Civil War and as a result of the creation of federal prisons in the early 1900s, federal prisoners were increasingly housed far away from a home state.[662] Because this was considered undesirable, states and territories, as the years went by, established instruments to solve the problem and to facilitate the housing of prisoners near their home.[663] Such practices became further formalised with the creation of two regional compacts and one national compact, still in force today: the New England Interstate Corrections Compact, the Western Interstate Corrections Compact and the Interstate Corrections Compact. These compacts address the interstate transfer of prisoners and all aim at the "mutual development and execution of […] programs for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material

660 J. Tinney, 'Making the Indigent Pay to Obtain Out-Of-State Witnesses', *University of San Fracisco Law Review* 1 (1966-1967), pp. 326-331.

661 332 F. Supp. 681, 685 (US District Court, E.D.N.C.1971). For a subsequent state court ruling, see e.g. *State* v. *Harris*, 47 Or.App. 665, 615 P.2d 363. See further about *Preston* v. *Blackledge*: P.B. Dundas, 'Out-Of-State Witnesses and Compulsory Process: The Indigent Defendant's Rights', *Washington & Lee Law Review* 29 (1972), pp. 383-393.

662 M.A. Lilly and J.H. Wright, 'Interstate Inmate Transfer After *Olim* v. *Wakinekona*', *New England Journal on Criminal & Civil Confinement* 12 (1986), pp. 73-74.

663 Idem, p. 74.

sources" (Article I).[664] In addition, 18 USC § 5003 enables, as from its enactment in 1952, the transfer of persons convicted in state courts to the Federal Bureau of Prisons to be housed in a federal institution.[665]

The federal provision 18 USC § 5003 has limited scope; it only covers the inmate's transfer from the state to the federal level. But, the possibility it lays down applies nationwide, as opposed to the three compacts, none of which has been joined by all jurisdictions. The National Interstate Corrections Compact has been signed by 39 states, DC and by Congress; the New England Interstate Corrections Compact has seven signatory jurisdictions, namely six north-eastern states and Congress; eleven states and Congress are party to the Western Interstate Corrections Compact.[666] Nonetheless, all 50 states are party to at least one of those instruments and Congress has joined all three compacts, as a result of which the compacts together cover both the interstate and federal-state transfer of prisoners across the entire nation.[667] The respective provisions of the three compacts are very similar.[668]

On the basis of 18 USC § 5003 or pursuant to one of the compacts, inmates may be transferred from the sending state to another state (receiving state) for various reasons, such as overcrowding, special education or treatment needs, protection of the inmate or the institution, or to stay close to family. It follows from a 2006 survey of the National Institute of Corrections (NIC)[669] that transfers are most often made because custody is at risk, either because the inmate poses a threat to the institution's safety and security (e.g. by misconduct), or because the inmate is in danger and needs to be protected against other inmates. Following closely on

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664 This means: Article I in all three interstate compacts. Because the texts of these compacts are very similar to each other, even as to the numbering of articles and sub articles, the reference to compacts provisions is limited to one article number or, whenever there is a difference in numbering to two article numbers at a maximum.

665 Though enacted in Part IV, titled Correction of Youthful Offenders, 18 USC § 5003 is not limited to juvenile offenders, M.A. Millemann and S.J. Millemann, 'The Prisoner's Right to Stay Where he is: State and Federal Transfer Compacts Run Afoul of Constitutional Due Process', *Capital University Law Review* 3 (1974), p. 224, fn. 8.

666 Based on information from the Interstate Compact Database of the National Center for Interstate Compacts, available at http://www.csg.org/knowledgecenter/Old%20Pages/ncic/database/search.aspx (last accessed on March 16, 2010).

667 However, the compacts still speak of states, thereby covering the state jurisdictions, but also the jurisdictions of the District of Columbia and the federal government (Article II(a) or Article II(1) in the respective compacts). For this reason, and also for practical reasons, the term 'state' will be used in this section for all US jurisdictions.

668 The only difference is that the two regional compacts (the Western and New England ones) enable the joining jurisdictions to arrange by contract that a specific part of a penal or correctional institution in one state be reserved for use by inmates coming from the other joining jurisdictions (Article III(2) Western Interstate Corrections Compact resp. Article III(b) New England Interstate Corrections Compact).

669 *Interstate Transfer of Prison Inmates in the United States* (February 2006, US Department of Justice, National Institute of Corrections, Information Center), Longmont, Colorado: 2006.

this category, are those made for family reasons; if a prisoner is housed near his family, it may indirectly serve his rehabilitation if family visits are facilitated and family ties can be maintained.[670]

In view of this, it goes without saying that an inmate who has been transferred may suffer either positive or negative consequences.[671] Positive consequences are obvious for the inmate whose transfer was initiated for family reasons. Positive consequences may also arise for the inmate who is, for instance, offered a more adequate treatment programme in a penal or correctional institution in another state, surely facilitating his rehabilitation. But negative consequences possibly accompany, or even dominate, the positive one, especially where transfer is to protect the inmate, or to protect the safety and security of the institution. Then, the possible separation from family, friends and counsel as well as the interruption of rehabilitative programmes may have a negative impact on the prisoner. Furthermore, a transfer could result in the denial of parole opportunities and the revocation of earned "good time" credits and thereby in a longer period of confinement. It seems thus that a prisoner's transfer to another state might relatively easily obstruct the final goal of rehabilitation, one of the main aims of the interstate compacts.

Inmate transfer is ordinarily based on a contract between the sending and receiving states pursuant to either 18 USC § 5003(a), or one of the interstate compacts (Article III). Such a contract should determine the conditions of confinement of the transferred inmate as to duration of confinement, participation in employment programmes, delivery and retaking of the inmate, reimbursement and payment to be made to the receiving state, and so on. As to reimbursement, the starting point for any such contract is that the sending state pays all costs and expenses incurred by the receiving state for housing the transferred inmate. The precise conditions and procedures used for the transfer of inmates depend of the jurisdictions involved, although certain procedural duties and rights have been provided for in the interstate compacts.

Under the regime of these compacts, it has been explicitly determined that the transferred inmate remains within the sending state's jurisdiction during the time of confinement; the receiving state can only act "as agent for the sending state" (Article IV(a) or Article IV(1)). In the exercise of its judicial powers, the appropriate authorities of the sending state are entitled to have access to the receiving institution and the transferred prisoner at all reasonable times, and also to remove the prisoner from the receiving state's institution for transfer to an institution within the sending state or for any other purpose in accordance to domestic law, such as release on probation or parole, or discharge (Article IV(b-c) or Article IV (2-3)).

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670 *Interstate Transfer of Prison Inmates in the United States* (2006), pp. 12, 14-15.

671 Millemann and Millemann (1974) have described the consequences of transfer in detail, pp. 229-240. See also S.J. Fox, 'Interstate Corrections and Penal Legislation', *Boston University Law Review* 42 (1962), pp. 57-70.

The only exception to this rule occurs when the inmate is pending a criminal charge or has been formally accused in the receiving state; in such a case, the receiving state's consent is required as long as the proceedings are pending (Article V(a) or Article V(1)). The receiving state is obliged to inform the sending state through regular reports of the transferred inmate's conduct and progress (Article IV(d) or Article IV(4).

An inmate transferred to another state pursuant to one of the interstate compacts has the right to be treated in a "reasonable and humane manner" and "equally with such similar inmates confined in the same institution". Moreover, the transferred inmate must be guaranteed the same legal rights, hearings and benefits and be subject to the same obligations, as if he had been housed in the sending state. A transferred prisoner coming to the end of his term will in principle be released on the territory of the sending state, although upon agreement of both the sending and receiving states as well as the prisoner, he may be released elsewhere, provided that the expenses for his return to the sending state are paid by the sending state (Article IV(e-i) or Article IV(5-9)). If, however, during confinement, the inmate escapes from the receiving state's institution, he is considered a fugitive from both the sending and the receiving state, although the sending state – within which jurisdiction the inmate continues to fall – is responsible for initiating extradition proceedings (Article V(b) or Article V(2)).

The sending state and the receiving state, when entering into a contract with each other, have to determine to what extent the sending state will compensate the receiving state for the incarceration, extraordinary medical and dental expenses, facilities, programmes, treatments and extras not included in the normal maintenance of prisoners (Article III(a) or Article III(1)).

4.5.1. Transfer of prisoners and due process requirements

It has been mentioned that the inmate may suffer serious drawbacks from being incarcerated elsewhere. It has long been debated whether the interest of prisoners in such a position would deserve constitutional protection and if so, to what extent. A series of case law – mainly developed in the context of prisoner's rights in general and applicable to transferred prisoners as well – has thrown light on this issue. While traditionally prisoners had no rights and were considered "slaves of the state",[672] and challenges by inmates were ordinarily rejected, they were recognised as having constitutional rights as from the 1960s and 1970s.[673] These rights include due

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672 L.S. Branham, *The Law and Policy of Sentencing and Corrections*, St. Paul, MN: Thomson/West (Nutshell Series), 2005 (7th edition), p. 214.

673 Various social and legal developments influenced this change, such as the bad conditions discovered in several prisons, the change of the Supreme Court's composition into the "Warren Court" and its subsequent decisions interpreting the scope of civil rights more broadly and introducing the incorporation doctrine whereby certain constitutional provisions were declared applicable to

process rights,[674] which are of special relevance in the context of prisoner transfer, since liberty is one of the interests protected by the Fourteenth Amendment's due process clause:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The question has arisen as to whether due process, and particularly the prisoners' liberty interests, requires certain procedural safeguards (for instance, hearings or review proceedings) to be guaranteed in the context of a prisoner's transfer to another penal or correctional institution. To answer this question, it is necessary to distinguish between constitutional liberty interests and state-created liberty interests. As to liberty interests included in the Constitution itself, it has been determined by the Supreme Court that these do not preclude a state from transferring an inmate from one prison to another; in other words, the due process clause does not in itself protect the prisoner against interstate transfer between different prisons. Where this was initially held in the context of inmates' transfer within one state,[675] it was later applied to interstate transfer of prisoners too:

> "Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State".[676]

After all, the Supreme Court considers the difference between intrastate and interstate prison transfer as "a matter of degree, not of kind".[677] As a consequence, the sole fact that a prisoner is transferred to a penal or correctional institute in another state, does not entitle him to procedural requirements such as a hearing. This is not altered by the fact that the transfer would result in any serious drawback ("grievous loss"[678]), or any adverse change in confinement conditions, as long as the Constitution is not violated. There may be several legitimate reasons to confine a prisoner in another

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the states. See for a more elaborated list and explanation as to these contributing developments, Branham (2005), pp. 215-218.

674 As from the 1970s, the Supreme Court started to recognise that states were to protect prisoners by affording them due process of law, e.g. *Morrissey* v. *Brewer*, 408 US 471 (1972), *Wolff* v. *Mc.Donnell*, 418 US 539 (1974).

675 *Meachum* v. *Fano*, 427 US 215, 225 (1976), reaffirmed in *Montanye* v. *Haymes*, 427 US 236, 242 (1976).

676 *Olim* v. *Wakinekona*, 461 US 238, 245 (1983).

677 Id. at. 248.

678 *Meachum* v. *Fano*, 427 US 215, 225 (1976).

prison, possibly a prison in another state; the competence of the state to initiate a transfer follows from the conviction that has imposed a custodial sentence on the prisoner involved.[679]

Nevertheless, it may be that the state from which a prisoner in an individual case is transferred has itself created a liberty interest worthy of due process protection. For instance, in *Wolff* v. *McDonnell*, Nebraskan law provided that "good-time credits" earned by a prisoner were to be upheld after transfer and that only for serious misbehaviour the right to "good time" was forfeitable. In such a case, the due process clause requires the state of Nebraska to guarantee, by way of providing minimum procedures, that good-time credits are upheld for the transferred prisoner with good behaviour.[680] Since *Sandin* v. *Conner*, however, a violation of such a state regulation by a state prison's official is no longer considered as giving rise to a liberty interest protected by the due process clause, as long as it does not impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life".[681] Such "atypical and significant hardship" was constituted in *Wilkinson* v. *Austin*, where a group of prisoners were placed in the highest security prison of Ohio. Being confined in this prison meant extreme isolation: prisoners remain in their cells for 23 hours a day, any communication with other inmates is prevented due to solid metal doors with metal strips along their sides and bottoms, visits are rare and only conducted through glass walls, placement is for an indefinite period of time and parole is not granted while incarcerated at this prison. The Supreme Court determined that these elements are sufficient to impose an "atypical and significant hardship" on the inmates in relation to normal Ohioan prison life.[682] As such, the procedure followed by Ohioan prison officials to determine who will be placed in the high security prison had to meet the procedural requirements of due process, which it did.

However, if due process protection applies – because state law has created a liberty interest – what minimum procedures are then demanded? This question is not easily answered, because the Supreme Court has not exhaustively listed such procedural requirements; only the right to be informed and the opportunity to be heard are considered minimally required throughout several holdings.[683] It is the court's task to determine the procedural safeguards required in an individual case by balancing (a) the weight of the private interest at issue; (b) the interests of

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679 E.g. *Meachum* v. *Fano*, 427 US 215, 225 (1976).

680 *Wolff* v. *McDonnell*, 418 US 539, 557 (1974).

681 *Sandin* v. *Conner*, 515 US 472, 484 (1995). A elaborate analysis of this case has been given by J.T. Keyes, 'Banishing Massachusetts Inmates to Texas: Prisoner Liberty Interests and Interstate Transfers After *Sandin* v. *Conner*', *New England Journal on Criminal & Civil Confinement* 23 (1997), pp. 603-640.

682 *Wilkinson* v. *Austin*, 545 US 209, 223-224 (2005). On this case: Branham (2005), pp. 292-293.

683 Keyes (1997), p. 638.

government that would be influenced by applying the procedural safeguards; and (c) the value of the respective safeguards.[684]

4.6. INTERSTATE TRANSFER OF SUPERVISION

All 50 states, the District of Columbia, and the territories of Puerto Rico and the Virgin Islands have accepted the Interstate Compact for Adult Offender Supervision (Supervision Compact, SC), which aims at the national control of interstate movement of specified adult offenders.[685] This compact was developed on the initiative of the National Institute of Corrections in partnership with the Council of State Governments. It supersedes the 1937 Interstate Compact for the Supervision of Parolees and Probationers.[686]

Prior to 1937, no national machinery was available for cooperating in this field. The common rule was that adult offenders under supervision – at that time, only probation and parole were possible supervision devices – stayed in the state of conviction, irrespective of whether this was their home state too.[687] However, because it was felt that the rehabilitation of probationers and parolees was often considerably facilitated by transfer to another state, for instance because of family ties or better job opportunities, states tried to cooperate informally, for instance through gentlemen's agreements.[688] Although the need for a formal cooperation tool was satisfied with the creation of the Interstate Compact for the Supervision of Parolees and Probationers,[689] the increasing mobility of people and the upcoming popularity of alternative sanctions required a mechanism adjusted to the needs of modern times and clearly defining the mutual responsibilities of states.[690]

In this regard, the current Supervision Compact is considered an improvement. One of its most typical innovations is the creation of a supra-state body with

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684 Branham (2005) referring to *Mathews* v. *Eldrigde*, 424 US 319, 321 (1976). See also Keyes (1997), p. 638.

685 http://www.interstatecompact.org/LinkClick.aspx?fileticket=CLrLZ0FsMHw%3d&tabid=143 (last accessed on March 4, 2010). The statutes of all joining jurisdictions are available through the following link: http://www.interstatecompact.org/StateDocs/StateDocuments.aspx (last accessed on March 4, 2010).

686 Text included in The Handbook on Interstate Crime Control, Chicago, Illinois: The Council of State Governments, 1966, pp. 1-31.

687 M.L. Buenger and R.L. Masters, 'The Interstate Compact on Adult Offender Supervision: Using Old Tools to Solve New Problems', *Roger Williams University Law Review* 9 (2003-2004), p. 107

688 Idem; see also the introduction notes to the Interstate Compact for the Supervision of Parolees and Probationers, the Handbook on Interstate Crime Control, supra note 686.

689 E.A. Burkhart, 'Interstate Cooperation in Probation and Parole', *Federal Probation* 24 (1960), pp. 24-30.

690 Buenger and Masters (2003-2004), pp. 108-109.

administrative and enforcement powers: the Interstate Commission for Adult Offender Supervision (the Interstate Commission), which consists of representatives (Compact Administrators) from every party to the compact (SC Articles III and IV). The Interstate Commission is *inter alia* authorised to manage the interstate transfer of adult offenders; to design statutory rules to be followed by state authorities as well as by-laws with regard to its own functioning; and to impose fines, fees or other costs on states that fail to comply with the rules (SC Article V).

In the exercise of its powers, the Interstate Commission created a regulatory system that applies to the interstate movement of adult offenders: the ICAOS Rules.[691] Those rules cover all categories of adult offenders, not only parolees and probationers, but also those under pre-trial supervision and those with an alternative sentencing status.[692] The supervision of such offenders may, under certain well-determined conditions, be transferred from the state of conviction (the sending state) to another state (the receiving state). These conditions include the following aspects: (a) the offender has at least 90 days of supervision remaining; (b) he has a valid supervision plan; (c) he has substantially observed the terms of supervision in the sending state; and (d) either is a resident of the receiving state, or has resident family there willing and able to support him, while employment is available too (Rule 3.101). In addition, where the underlying offence is a misdemeanour, it should be provided that at least one year of supervision remains, instead of 90 days, and that the offence concerns the use or possession of a firearm, a sexual offence that requires registration in the sending state, physical or psychological harm, or a second or subsequent conviction for driving while under the influence of drugs or alcohol (Rule 2.105). If those conditions are met, the receiving state is obliged to take over supervision. If not, transfer of supervision may nevertheless occur if the receiving state consents to it (Rule 3.101-2).

The process of transferring the supervision of an offender starts with the issuance of a transfer request by the sending state through an electronic information system (Rules 3.102, 3.105 and 3.107). This transfer request must be accompanied by several documents, such as a detailed description of the offence, the conditions of supervision, a photograph of the offender, and so on (Rule 3.107). The receiving state must decide on the request within 45 days; incompleteness of the transfer request is a mandatory reason for rejecting it (Rule 3.104). If the receiving state accepts the request, its reply to the sending state must include reporting instructions. Subsequently, the sending state and the receiving state can agree on the travel

691 Interstate Commission for Adult Offender Supervision, *ICAOS Rules*, last updated on March 1, 2010, and available at: http://www.interstatecompact.org/LinkClick.aspx?fileticket=bqpt53W3oQ0%3d&tabid=89 (last accessed on March 4, 2010). In addition, those Rules provide for a system of uniform data collection (ICAOS Rule 2.102) and victim notification (ICAOS Rule 3.108).

692 Buenger and Masters (2003-2004), p. 121.

procedure to get the offender to the receiving state within 120 days; were this term to expire, the receiving state may withdraw its acceptance (Rule 3.104-1(b-c)).

The receiving state shall supervise the transported offender according to its own law, as for the supervision of similar offenders sentenced domestically (Rule 4.101). But the sending state remains responsible for collecting the offender's financial obligations, such as fines, or court costs (Rule 4.108). During the supervision period, the receiving state shall contact the sending state at least annually with a progress report (Rule 4.106). The sending state is allowed to take the offender back at any time, unless he has been charged with a subsequent criminal offence in the receiving state and the receiving state has not consented to the return (Rule 5.101). If a new conviction for a felony offence is pronounced in the sending state, or if the offender has committed at least three significant violations of the supervision conditions, the sending state is obliged, upon request of the receiving state, to take the offender back (Rules 5.102 and 5.103). The cost of return must be borne by the sending state, except that the receiving state is responsible for the cost of incarceration pending the offender's return to the sending state (Rule 5-106).

If the receiving state discovers significant violations of supervision conditions made by the offender, it must inform the sending state within 30 days. The sending state will decide on the action to be taken. In the meantime, the receiving state may take the offender into custody (Rules 4.109-409-1). Regarding a probationer or parolee, the violation of supervision conditions will possibly result in the revocation of conditional release by the sending state. In such a case, the probationer or parolee is, before the final decision is taken in the sending state, entitled to a "probable cause hearing", near the place where the violation occur (Rule 5.108).

Of final relevance is the automatic waiver of extradition as a consequence of interstate transfer of supervision. An offender who has escaped from the receiving state to another state cannot claim his right to an extradition hearing in the other state and must accept return to the sending state at any time (Rule 3.109).[693]

4.7. TAKING ACCOUNT OF PRIOR CONVICTIONS FROM OTHER US JURISDICTIONS

The criminal justice systems of all US jurisdictions, both federal and state, provide for recidivist laws. Such laws mainly enable the judge to impose a more severe sentence on repeat offenders. Under those statutes, the judge is also allowed to rely on prior convictions imposed by the courts of another US jurisdiction: a Maryland judge may increase an offender's sentence because convicted earlier, irrespective of

[693] Advisory Opinion 2-2005 of the Interstate Commission, March 4, 2005, available at: http://www.interstatecompact.org/Portals/0/library/legal/advisoryopinions/AdvisoryOpinion_2-2005_FL.pdf (last accessed on March 5, 2010).

whether the previous conviction stems from a Maryland judge, a New York judge or a federal judge. The judge's reliance on prior convictions imposed in the court of another US jurisdiction raises issues of extraterritoriality and interpretation, but is a tradition that goes back to the seventeenth century.[694] Today, the taking account of earlier convictions delivered throughout the country is facilitated through an electronic communications network that has integrated the various criminal record systems.[695]

Because no uniform or interstate instrument exists, states are free to determine if and how, in a specific case, a prior conviction should be taken into account. Not surprisingly, different approaches have been adopted, roughly classifiable under the internal approach, the modified internal approach and the external approach.[696]

Under the internal approach to prior convictions, those coming from another US jurisdiction would be completely ignored. This method is currently no longer used in any jurisdiction. Most jurisdictions have embraced a modified internal approach, under which certain elements of foreign convictions are examined for their appropriateness in applying a more severe sanction.[697] Such elements are, for instance, related to how the offence is classified domestically (felony or misdemeanour) or to the length of punishment. To what extent a foreign conviction element should be akin to domestic law differs from state to state. The stricter state laws are the more complex for a judge to weigh the foreign conviction.

The remaining jurisdictions have accepted the external approach, which only focuses on whether the penalty imposed on the repeat offender would result in the application of domestic recidivist law. The Model Penal Code, heavily relied on by the states in revising their criminal codes,[698] has adopted it,[699] which might also explain the number of states having agreed to it.

5. ASSESSING THE EU PARAMETERS

In Chapter 3, the scope of the mutual recognition principle in the context of EU cooperation in criminal matters was determined by assessing the different framework

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694 As demonstrated by W.A. Logan, 'Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime', 73 *University of Cincinnati Law Review* 73 (2005), pp. 1618-1620. See also *Parke* v. *Raley*, 506 US 20, 26-27 (1992).

695 J.B. Jacobs and D. Blitsa, 'Sharing Criminal Records: The United States, the European Union and Interpol Compared', *Loyola of Los Angeles International and Comparative Law Review* 30 (2005), p. 157.

696 W.A. Logan, 'Horizontal Federalism in an Age of Criminal Justice Interconnectedness', *Pennsylvania Law Review* 154 (2005-2006), pp. 267-278.

697 Logan (2005-2006), pp. 269-278.

698 See Section 5.2.2.

699 MPC (U.L.A.) § 7.05. See also MPC Commentaries, Part I, vol. 3, p. 363.

decisions and directives in the light of seven parameters (Chapter 3, Section 3). As explained earlier, these parameters were formulated as a tool to determine the effectiveness of mutual recognition instruments: each parameter relates to a legal element supposed to be of essential influence on the successful functioning of mutual recognition. In Chapter 3, the assessment of the EU instruments resulted in the identification of a number of issues that still have a hindering effect on the full application of the mutual recognition principle in the European Union (Chapter 3, Section 4). As given in the Introduction to this chapter, the main goal of the comparative law research with the United States of America is to examine how the EU issues are approached in America. Now the foregoing sections of this chapter have scrutinised how the federal and state jurisdictions in America give effect to each other judicial decisions in criminal affairs, it is time to assess these practices in the light of the EU parameters, even those that have appeared to be of no effect on the functioning of the mutual recognition in the EU. The results will serve the ultimate goal of this research, which is to derive lessons from the American example for the future of mutual recognition in the field of judicial cooperation in criminal affairs between EU Member States.

5.1. THE SERIOUSNESS OR "TRANS-BORDERNESS" OF THE UNDERLYING OFFENCE

Inter-jurisdictional cooperation in criminal affairs in the United States of America may occur irrespectively of the crime that underlies a suspicion or conviction. None of the instruments that aim at the enforcement of a decision taken in another jurisdiction have precluded a specific category of offences, for instance minor offences, nor are they restricted to crimes with cross-border implications. Of course, in the context where a nationwide, interstate or otherwise more or less uniform instrument is completely lacking – this applies to the issue of admitting or excluding evidence obtained in another jurisdiction as well as in the area of taking account of previous convictions coming from another jurisdiction – the rules of the forum jurisdiction might be restricted to special kinds of offences, but such a restriction has not been provided for in the national or interstate instruments. The Extradition Clause of the federal Constitution has even made clear that the extradition duty applies to all kinds of crime, mentioning "treason", "felony" and "all other crime" (Section 4.1.1).

5.2. REQUIRING DOUBLE CRIMINALITY

It is difficult to say to what extent the double criminality requirement plays a role in the legal instruments dealt with in this chapter. Only in the context of interstate extradition, has requiring double criminality been explicitly rejected as a possible ground for refusal. After all, the literature shows that in the past the governor of

the asylum state, to which the alleged criminal was fled, refused to comply with an extradition demand because the charged crime was not punishable domestically. Such a ground has, however, long been determined insufficient to refuse extradition to another state. In the 1860 case of *Kentucky* v. *Dennison*, the Supreme Court based its reasoning on the aims of the constitutional Extradition Clause, which is to "preserve harmony between States […] whose mutual interest it was to give each other aid and support whenever it was needed." It concluded:

> "that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or the policy of the laws of the State to which the fugitive has fled."[700]

Shortly after, the Supreme Court reaffirmed this approach in the cases of *Taylor* v. *Taintor*, where it was held that "[e]very violation of the criminal laws of a State is within the meaning of the Constitution, and may be made the foundation for a requisition."[701] Today, the issue of double criminality thus no longer plays a role in the context of interstate extradition. [702]

Yet, although in the framework of the remaining legal instruments nothing has been provided as to the preservation or rejection of the double criminality requirement, it might be too easy to conclude that the issue does not play any role here too. After all, extradition between states is based on a constitutional duty, while all other instruments completely fall within the legislative and executive authority of the states. It thus might be that in practice the requirement functions as a ground to refuse a request from another state every now and then. However, I have no insight whether, and if so, to what extent, this is the case, I have found no information about it in legal or academic sources, although it seems that the issue causes no great controversy.

5.3. SPECIFIC ARRANGEMENTS FOR THIRD PARTIES, VICTIMS AND SUSPECTS TO SAFEGUARD THEIR RIGHTS IN THE CONTEXT OF MUTUAL RECOGNITION PROCEEDINGS

In the United States of America, no nationwide tools exist with the aim of safeguarding the rights of those involved in the extra-jurisdictional enforcement of judicial decisions in criminal matters. This is due to the fact that a single mechanism as

700 65 US 66, 103 (1860).

701 83 US 366, 375 (1872).

702 See also Moore (1891), pp. 828-831; Spear (1885), pp. 349-351.

to the enforcement of each other's judicial decisions is not provided for; the rules are rather scattered throughout separate federal and state statutes, uniform laws and interstate compacts. Throughout these separate instruments, however, some specific arrangements occur with regard to suspects, witnesses (considered to be third parties) and victims of crime.

5.3.1. Suspects

The issue of a person's rights and the protection against violation of such rights in the context of interstate and federal-state cooperation have been debated and brought into court in the context of a person possibly or actually being transferred to another jurisdiction: extradition, prisoner transfer and the transfer of supervision. In these areas, the basic rule is that alleged violations of constitutional rights as well as substantial matters of due process must be challenged in the courts of the state where the criminal proceedings or the actual execution or supervision takes place. Before attending to the jurisprudence in these areas, it must be emphasised that in the United States of America, all persons in custody have a constitutional, undeniable right to apply a writ of *habeas corpus* in order to challenge the legality of their detention in terms of the federal Constitution, or laws of treaties of the United States (US Const. Article I, § 9, cl. 2 and 28 US Code §2241-2266).[703]

In the context of federal extradition proceedings (Section 4.1.1), the assumption that defences must be put up in the courts of the demanding state, means that a pre-extradition hearing is not automatically provided, in contrast to extradition based on the Uniform Criminal Extradition Act, which provides for a hearing for the purpose of informing the extraditee of the extradition demand, the charges against him and his right to be assisted by legal counsel (Section 4.1.2). To challenge the legality of his arrest, the extraditee can apply a writ of *habeas corpus*, but only to question the conditions that an extradition demand statutorily must meet, namely: (1) whether the extradition documents are in proper form; (2) whether the applicant is the person named in the extradition requisition; (3) whether he has been substantially charged with a crime in the demanding state; and (4) whether he is a fugitive from justice.[704] The alleged violation of any other constitutional procedural right, such as the protection against unreasonable search and seizure, the requirement of probable cause, the right to assistance of counsel, and so on, as well as pre-trial defences, are only challengeable in the courts of the demanding state. Extradition proceedings are considered "summary proceedings" to secure the attendance of the suspect at the criminal proceedings in the demanding state.[705]

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703 LaFave, Israël, and King (2004), pp. 1312-1321.

704 *Michigan* v. *Doran*, 439 US 282, 289 (1978); *Pacileo* v. *Walker*, 449 US 86 (1980).

705 *In re Strauss*, 197 US 324, 332-333 (1905). Following the same line, see *Biddinger* v. *Commissioner of Police of State of New York*, 245 US 128, 132 (1917) and more recently *Michigan* v. *Doran*, 439

In conclusion, the alleged violation of constitutional rights, though considered fundamental to protect the suspect against governmental actions, cannot bar the extradition of the suspect to the demanding state.

Neither can the violation of constitutional rights bar the transfer of an inmate for the purpose of being detained in a penal or correctional institute of another jurisdiction (Section 4.5.1). It is true that the position of inmates is protected constitutionally today and that states are bound by the requirement not to deprive any person of liberty without due process of law, but such applies to the conditions of confinement in general, not to the interstate transfer. The fact that a prisoner is being transferred to another state does not mean that certain procedural safeguards, such as a hearing, must be guaranteed; this does not follow from the Constitution.[706] The situation might be otherwise, however, where the sending state involved has created a liberty interest at the domestic level that requires certain procedural requirements. But which procedural rights will apply in a particular case depends on (a) the weight of the private interest at issue; (b) the interests of government that would be influenced by applying the procedural safeguards; and (c) the value of the respective safeguards.[707] It is up to the court of the sending state to balance these elements in a particular case and to determine which procedural rights must be met as a minimum to protect the liberty interest at stake. These might include the right to be informed and the right to be heard.[708]

A similar situation appears in the context of supervision transfer (Section 4.6). Of course, the transfer request issued by the sending state must meet several requirements, related to, *inter alia*, the remaining supervision period and the enclosure of a valid supervision plan. Compliance with those requirements, let alone compliance with constitutional procedural rights, are not challengeable in the courts of the sending state by the offender. It seems that the decision as to whether to transfer the supervision of an offender on whom a supervision measure has been imposed, is considered an issue between the competent authorities of the sending state and the receiving state, with no room for the offender's view. Only the probationer or parolee whose conditional release might be revoked by the sending state because of violation of the supervision conditions (for instance by committing a new crime) is entitled to a so-called "probable cause hearing" near the place where the violation occurs, which usually is the receiving state (Rule 5.108 Supervision Compact). This opportunity is not reserved for transferred probationers and parolees only, but has been developed in the context of probation and parole revocation in general.[709]

US 282, 288 (1978)

706 *Olim* v. *Wakinekona*, 461 US 238 (1983); *Meachum* v. *Fano*, 427 US 215 (1976).

707 Branham (2005) referring to *Mathews* v. *Eldrigde*, 424 US 319, 321 (1976). See also Keyes (1997), p. 638.

708 Keyes (1997), p. 638.

709 *Morrissey* v. *Brewer*, 408 US 471 (1972) and *Gagnon* v. *Scarpelli*, 411 US 778 (1973).

Because revocation will entail a deprivation of liberty in the sense of the Fourteenth Amendment's due process clause, and as such means "a grievous loss", as the US Supreme Court has held, the parolee or probationer must be protected by certain procedural safeguards.[710] Such a protection will, however, not be equal to the level of protection provided in a regular criminal prosecution; after all, revocation is not regarded as being part of a criminal prosecution, as issues will arise after the sentencing stage. The liberty interest at stake here is, therefore, restricted and conditional, which justifies that the rights provided in revocation proceedings are limited too: "revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions".[711] In concrete terms, the probationer or parolee who is suspected of having violated the conditions imposed, is first entitled to a "probable cause hearing" or "preliminary hearing" near the place where the alleged violation has occurred. Secondly, as soon as probable cause has been determined, the probationer or parolee has to await, possibly in prison, the "final revocation hearing". At both hearings, as held by the Supreme Court, the probationer or parolee is minimally entitled to: (1) written notice of the alleged violations; (2) disclosure of non-privileged or non-confidential evidence regarding the alleged violation(s); (3) the opportunity to be heard in person and to present witnesses and documentary evidence relevant to the alleged violation(s); and (4) the opportunity to confront and cross-examine adverse witnesses, unless the hearing officer determines that a risk of harm to a witness exists.[712] These requirements have been literally copied by the writers of the Supervision Compact (Rule 5.108(d)). In the context addressed by this instrument, the probable cause hearing will typically held in the receiving state since the violation of probation or parole conditions will often occur on its territory. The nature of this hearing, meant to determine probable cause, leaves no room for the probationer or parolee to address alleged violations of due process rights in the actual revocation; these matters must be kept for the final revocation proceedings in the sending state.[713] A possible issue might concern the non-assistance by appointed counsel for indigent probationers and parolees. In this regard, the Supreme Court has held that such a right is not automatically constitutionally mandated in all revocation proceedings; it depends on the circumstances of a particular case whether due process would require that the assistance of counsel is provided. The

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710 *Morrissey* v. *Brewer*, 408 US 471, 482 (1972).

711 Idem, at 480.

712 *Gagnon* v. *Scarpelli*, 411 US 778, 786 (1973). See also Branham (2005), p. 170.

713 Advisory Opinion 2-2005 of the Interstate Commission, March 4, 2005, available at: http://www.interstatecompact.org/Portals/0/library/legal/advisoryopinions/AdvisoryOpinion_2-2005_FL.pdf (last accessed on April 5, 2010).

Court has again based its reasoning on the difference between criminal trials and revocation proceedings.[714]

In the sphere of admissibility of evidence obtained in another jurisdiction, specific arrangements for the suspect have not been provided. However, the suspect is always protected by the constitutional guarantee against unreasonable search and seizure. After all, it has been shown that this guarantee applies nationwide; any evidence obtained in violation of the federal Constitution is in principle inadmissible in any federal or state court (Section 4.3). Though it is true that this protection was not specifically designed in view of the interstate and federal-state exchange of evidence, it has an important value for those suspects who are involved in such inter-jurisdictional proceedings.

5.3.2. Third parties

The only instrument that – overtly – provides mechanisms for safeguarding the rights of third parties is the Attendance of Witnesses Act, which covers the position of witnesses in criminal proceedings outside the home state (Section 4.4). Such out-of-state witnesses are – as part of the usual process prescribed in the uniform act – provided a hearing before a judge of the delivering state. This hearing aims at determining whether in a particular case the desired witness is indeed material and necessary, and whether it would not cause undue hardship to him to issue a summons to appear and testify in the courts of another state (AWA §§ 2-3). The witness who is served a summons, and that obeys it and appears in the courts of the demanding state is guaranteed exemption from arrest or summons related to crimes or other matters arisen prior to his arrival in the demanding state (AWA § 4). Furthermore, he is entitled to receive financial compensation for travel costs as well as a fee of five dollars for each day that his attendance in the demanding state is required (AWA § 2).

5.3.3. Victims

In the United States of America, victims' rights legislation is provided for in the federal criminal justice system as well as in almost every state jurisdiction.[715] At federal level, the rights of victims of crime are laid down in Rule 60 of the Federal Rules of Criminal Procedure and 18 US Code § 3371. These provisions include, most importantly, the right for victims to attend the criminal trial and the right to be heard on the issues of release, plea or sentencing. The responsible authorities in the federal government are directed to take action in order to comply with these provisions. At the state level, rules on victims' rights are widely divergent,[716]

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[714] *Gagnon* v. *Scarpelli*, 411 US 778, 787-791 (1973). Branham (2005), pp. 170-172.

[715] LaFave, Israël, and King (2004), p. 35.

[716] Idem.

though the 1973 Uniform Crime Victims Reparation Act has brought about a level of uniformity among states.

With regard to victims of crime in the context of inter-jurisdictional cooperation, no special arrangements have been provided for other than in the context of supervision transfer (Section 4.6). Pursuant to the Supervision Compact, known victims must be informed of the decision to transfer supervision of the offender. Furthermore, victims must also be notified of subsequent movements of the offender (a change of address, temporary travel permission, a return to the sending state, and so on) and of significant violations of the supervision conditions. Both the sending state and the receiving state are responsible for informing the victims they know to reside on their respective territories. In order to facilitate compliance with this rule, the receiving state must report to the sending state the information and occurrences that victims are entitled to be notified of (Rule 3.108). As it is quite conceivable that victims might have safety concerns related to the transfer of the supervision of offenders, they have the right to be heard and to comment (by phone, fax or mail) on decisions to transfer the supervision of offenders to a receiving state, a subsequent receiving state, or back to the sending state. The victims' responses will be considered by the state that must decide on the issuance of a transfer request and their seriousness might lead to the imposition of special supervision conditions on the offender. At any time, the expressions of victims must remain confidential (Rule 3.108-1). In situations where the offender has requested to return to the sending state and the case is considered victim sensitive, the sending state has to deal with the request only after the victim has been given the opportunity to effectuate his right to be heard or to comment (Rule 4.111(c)).

5.4. COMMON MINIMUM STANDARDS TO FACILITATE THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS

It is obvious that the existence of common or uniform norms of criminal law and criminal procedure may facilitate the enforcement of judicial decisions that are handed down in another jurisdiction. In the United States of America a number of uniform norms have been provided for in the various cooperation instruments that have been dealt with in this chapter. Most cooperation procedures have been regulated through uniform laws or interstate compacts. Such accompanying uniform standards do not, however, address fundamental elements of substantive and procedural criminal law. In these fields, the states have primary competence. The 50 state jurisdictions all have their own rules of criminal law and criminal procedure, as do the federal jurisdiction and the jurisdiction of the District of Columbia.

A minimum level of common procedural criminal law standards, however, follows from the US Constitution – since the US Supreme Court has through

the Fourteenth Amendment's due process clause made applicable to the states most of the provisions of the Bill of Rights – and some congressional legislation. Nevertheless, this could never prevent the different governments from designing deviating domestic rules, as long as they did not infringe federal constitutional law. While it is true that the rules of criminal law and criminal procedure diverge widely among the different federal and state jurisdictions, some equivalence has nevertheless been established through the tools of uniform laws and model codes, proposed by organisations such as the National Conference of Commissioners on Uniform State Laws (NCCUSL)[717] or the American Law Institute (ALI).[718] Thanks to the efforts of these organisations, groups of academic scholars, lawyers and judges have discussed principles of law and have influenced the law, including criminal law, through drafting and adopting model or uniform statutes. Although the federal and state legislatures are free to adopt or reject such proposals, their existence has encouraged governments to revise domestic law, to change it, or to look across state borders to see how other jurisdictions approach certain issues. The main efforts in the fields of core substantive and procedural criminal law are briefly attended to now.

As to substantive criminal law, the 1962 Model Penal Code[719] (MPC) has played an important role in the reform of substantive criminal law in the USA; the main influence of the MPC is that most states currently have a codified and structured comprehensive criminal code based on well-chosen legal principles, which they did not have before 1962.[720] Because the states, in reforming their domestic criminal code, were primarily inspired by the MPC, many similarities among the state codes exist, especially the provisions related to general principles of liability and the definitions of specific offences.[721] The MPC has also influenced the federal rules of substantive criminal law, although this has not resulted in a comprehensive federal criminal code.[722] That there are still variations between the different penal codes of the country is not surprising given that the MPC was never created for the purpose of unification of harmonisation of criminal law. The many divergences between the penal codes include issues of minor importance, but also some fundamental issues. The most well-known example of a fundamental difference between the various penal codes regards the death penalty. Whereas 13 states have currently abolished the death penalty, capital punishment is still allowed under the criminal codes of 37 states and the federal government. Other fundamental differences mainly concern

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717 http://www.nccusl.org.

718 http://www.ali.org.

719 American Law Institute, *Model Penal Code and Commentaries*, Philadelphia, 1985.

720 P.H. Robinson and M.D. Dubber, 'The American Model Penal Code: A Brief Overview', *New Criminal Law Review* 10 (2007), especially pp. 320-323.

721 Idem, p. 326.

722 R.L. Gainer, 'Federal Criminal Code Reform: Past and Future', *Buffalo Criminal Law Review* 2 (1998-1999), pp. 45-159.

behaviour in the moral, ethical and sexual spheres. For instance, some states have penalised marital rape, while other states have maintained the marital immunity rule for rape committed by the husband of the victim. Another example regards gay marriage, prohibited in most states, but legal in an increasing number.[723]

In the field of criminal procedure, it is true that several models have influenced many state codes of criminal procedure. Most influential are the Federal Rules of Criminal Procedure (and some other federal statutes) as well as the Standards for Criminal Justice of the American Bar Association (ABA).[724] However, the degree of uniformity that has come about in the field of criminal procedure is less than in the area of substantive criminal law; efforts have been undertaken for greater uniformity, but without much success.[725] As a result, it would be untrue to speak of approximation in this area of law.[726] Academics give several reasons to explain the lack of urgency felt in the states to strive for more uniformity in the field of criminal procedural law. A first explanation is that the shortage of uniform standards of criminal procedure does not hinder the economic and social development of individuals, as is the case in the field of commercial law; a general level of uniformity has been achieved here.[727] A second reason would be that similarity with the aim of reciprocity is not considered to be necessary other than for a few aspects (for instance extradition).[728] Thirdly, the urge for common norms of criminal procedure would be lacking since in practice most crimes will not be investigated or prosecuted in more than one jurisdiction.[729] Being a highly political field of law, criminal procedure is predominantly approached at the state level, rather than from the national level.[730]

5.5. DIRECT OR INDIRECT ENFORCEMENT OF FOREIGN JUDICIAL DECISIONS

The question of whether judicial decisions are to be enforced directly or indirectly (by means of a validation procedure) is especially relevant with regard to the execution of final sanctions. In the American federation, provisions on how to execute a

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723 An overview of the most fundamental differences has recently been given by Reinbacher (2009), pp. 129-140.

724 Idem, pp. 137-138. See also LaFave, Israël and King (2004), p. 6.

725 E.g: the 1931 Code of Criminal Procedure of the American Law Institute, or the Standards for Criminal Justice of the American Bar Association.

726 J. Israël, 'Federal Criminal Procedure as a Model for the States', *Annals of the American Academy of Political and Social Science* 543 (1996), pp. 130-143.

727 Israël (1996), p. 133.

728 Idem.

729 Idem.

730 Israël (1996), p. 134.

decision that was originally handed down in another jurisdiction are to be found in the interstate compacts on the inter-jurisdictional transfer of prisoners as well as in the interstate compact on the transfer of supervision of adult offenders.

In the context of inter-jurisdictional transfer of prisoners (Section 4.5), the three interstate compacts determine that the transferred inmate must be treated equally with inmates in a similar situation, confined in the same institution in the receiving state. But at the same time, the transfer may not result in the deprivation of any legal right, any hearing, or any other benefit, nor in the removal of any obligation that he would have had if housed in the sending state (Article IV in all compacts). For instance, if the prisoner is entitled to a hearing according to the laws of the sending state, such hearing can be held before sending state's authorities, or before receiving state's authorities as agreed by the sending state. The receiving state is obliged to facilitate the proceeding of any such hearing (Article IV(f) or (6)). Were the prisoner to have a person (e.g. a parent or guardian) who is entitled under the sending state's laws to represent and advise him, such a person may not be denied or impeded in the exercise of his tasks (Article IV(i) or (9)).

In the context of interstate transfer of supervision of offenders (Section 4.6), it is explicitly determined that the receiving state must supervise the transferred offender according to its own rules, and equally with offenders in a similar situation, who were sentenced in the receiving state (Rule 4.101 SC).[731] So an offender, whose transfer to the receiving state has been decided, must comply with the offender registration requirements and DNA testing conditions of the receiving state (Rule 4.104 SC).

5.6. GROUNDS TO REFUSE RECOGNITION OF FOREIGN JUDICIAL DECISIONS

The topic of grounds for refusal has indirectly been attended to under point 5.2. As demonstrated, the issue of double criminality does not constitute a ground to refuse the extradition of a fugitive to another state. It has also been concluded that the issue of double criminality seems to have no conflict with the other cooperation mechanisms attended to in this chapter; none of them included an explicit provision on dual criminality. However, are there any other grounds on the basis of which judicial decisions coming from another state or from the federal authorities may be, or must be, refused recognition and enforcement?

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[731] See also Advisory Opinion 5-2006, April 4, 2006, where the Interstate Commission determined that a sex offender risk level or community notification may not be established on transferred offenders by the receiving state, if such would not have been established if the offender had been sentenced in the receiving state. This opinion is available at the following link: http://www.interstatecompact.org/Portals/0/library/legal/advisoryopinions/AdvisoryOpinion_5-2006_ND.pdf (last accessed on April 9, 2010).

With regard to some judicial decisions, there is ample room for discretion. Regarding the determination of whether to take into account a prior conviction that has been imposed in the courts of another jurisdiction (see Section 4.7), there exists no higher rule on how to deal with this question, nor have any efforts been made to achieve uniformity. As a result, states have adopted their own rules on how to approach "foreign" prior convictions in the course of new domestic criminal proceedings.

Secondly, there is considerable discretion on the question as to whether or not to use evidence in court that has been obtained in another jurisdiction; courts are free to choose how to approach evidence that has been seized illegally according to their own rules, or according to the rules of the other jurisdiction or according to both laws. The sole exception regards evidence gathered in violation of the Fourth Amendment; such unconstitutionally seized evidence may not be admitted in any federal or state court of the country (see Section 4.3).

In the course of other decisions, there seems to be less room for discretion, if only because several instruments determine specific requirements to be fulfilled. Such requirements concern on the one hand the paperwork involved: for instance requests that aim at the transfer of supervision of an offender, such as an offender who is released on parole, must be accompanied by a list of documents, including a detailed description of the offence and the conditions of supervision (Rule 3.107 Supervision Compact). These requirements are, on the other hand, related to the person or to the crime he (allegedly) committed: for instance, only persons considered "fugitives from justice" are extraditable in principle (US Const. Article IV, § 2, cl. 2; UCEA § 2). It can be assumed that non-compliance with such requirements would result in a refusal to grant the demanded legal support. Where requests are made on the basis of interstate compacts, it is even assumed that in such circumstances refusal is mandatory; after all, interstate compacts have the same legal force as federal law and as such pre-empt conflicting state law. This assumption is confirmed by the fact that the incompleteness of a request for the transfer of the supervision of an offender is determined to be a mandatory reason to reject the request (Rule 3.104 Supervision Compact).

In addition to the above-mentioned grounds for declining the execution of a judicial decision handed down in another jurisdiction, no grounds for refusal have been explicitly formulated in the instruments. Does this mean that a request issued in full compliance with the applicable conditions may never be declined? Such a conclusion would be too blunt. Especially in those contexts where the states cooperate on the basis of uniform laws, their sovereignty remains unaffected. Only where constitutional or pre-empting federal obligations are at stake, might refusal be more problematic. But such a constitutional duty has only been provided for in the context of extradition: the mandatory character of the Extradition Clause has led to the explicit rejection of discretional gubernatorial powers to decline the extradition of a fugitive to another state (see Section 4.1.1.2).[732] But even in this context, the

[732] *Kentucky* v. *Dennison*, 65 US 66, 103 (1860); *Puerto Rico* v. *Branstad*, 483 US 219 (1987).

specific circumstances of a case might enable the governor of the asylum state to decline nonetheless.[733]

The foregoing seems to imply that even double jeopardy does not constitute a ground for refusal. This is true, insofar as double prosecutions and double punishments are not prohibited constitutionally. The double jeopardy clause, contained in the Fifth Amendment to the US Constitution, protects any person against multiple prosecutions and multiple punishments for the same offence. It states literally: "[N] or shall any person be subject for the same offence to be twice put in jeopardy of life or limb". Although these words might suggest otherwise, the clause applies to prosecutions for all crimes, irrespective of the punishment that is risked.[734]

Rooted in American history, and even dating back to ancient times,[735] the double jeopardy provision is considered a fundamental protection against the burdens of being prosecuted, tried and convicted a second time:

> "The underlying idea […] is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty".[736]

As from 1969, the constitutional guarantee against double jeopardy has been found fully applicable to states too. In various ways, every state currently provides for a double jeopardy protection, either in its constitutional or statutory law. The extent to which these state and federal laws prohibit multiple prosecutions and multiple punishments diverges considerably. Those differences concern, for instance, the determination of whether two offences should be considered "the same offence", but also whether a prior federal or sister state prosecution should bar a second prosecution.[737] This last issue will be focused on for a while below.

Although the double jeopardy clause is a constitutional guarantee, to be protected by the federal government as well as state governments, it does not prohibit a person being prosecuted twice in different US jurisdictions. In other words, the constitutional double jeopardy guarantee applies within the borders of each US sovereign, not within the borders of the whole country. The US Supreme Court has

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733 E.g. *Taylor* v. *Taintor*, 83 US 366 (1872).

734 *Ex Parte Lange*, 85 US 163, 170-173 (1873).

735 LaFave, Israël, and King (2004), p. 1178; see for a more elaborate description of the history of double jeopardy in the USA: D.S. Rudstein, *Double Jeopardy: A Reference Guide to the United States Constitution*, Westport, CC: Praeger Publishers, 2004, pp. 1-35.

736 *Green* v. *United States*, 355 US 184, 223 (1957).

737 LaFave, Israël, and King (2004), p. 1207.

held such several times, first in the 1922 case of *United States* v. *Lanza*.[738] In this case, Lanza and others were convicted for the manufacture, transport and possession of intoxicating liquor in violation of Washington state law, and were subsequently prosecuted by federal authorities for having violated federal law by conducting the same acts. A federal district court held such incompatible with the double jeopardy, but in appeal the Supreme Court reversed the decision. It reasoned that the commitment of a crime is an offence against the "peace and dignity" of both the federal government and the state government, and that both, as independent sovereignties, were allowed to prosecute and punish such an offence;[739] after all, when the same act violates the laws of two distinct sovereigns, the offender has committed two offences.[740]

This theory, commonly referred to as the dual sovereignty doctrine, has subsequently been affirmed several times, also in those situations where a state prosecution followed a prior prosecution by the federal government. In *Bartkus* v. *Illinois*,[741] the defendant was acquitted in a federal court on a charge of robbery of a federally insured savings and loan association. Shortly after his acquittal, the defendant was convicted in an Illinois court for the same act. The Supreme Court again based its reasoning on the dual sovereignty doctrine and added a "practical justification" to uphold this theory, stating that rejecting the dual sovereignty rule would enable the federal authorities to prevent a severe sentence, e.g. capital punishment, to be imposed in a state court by prosecuting the defendant for a comparatively minor offence. To allow this, would deprive the states of their autonomous responsibilities and powers to maintain order within their own boundaries and as such infringe upon the essences of American federalism:

> "It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the states".[742]

But what if two states prosecute the same person for the same act? Those were the circumstances of *Heath* v. *Alabama*,[743] in which two states had jurisdiction over the murder of a young woman. Two men hired by her husband kidnapped her in Alabama; her dead body was later found in Georgia. In a Georgian court, the victim's husband pleaded guilty to murder and was sentenced to life imprisonment. In an

738 260 US 377 (1922). Reaffirmed several times, see e.g. *Screws* v. *United States*, 325 US 91 (1945) and *Abbate* v. *United States*, 359 US 187 (1959).

739 Idem, at 382.

740 Idem, at 383 (citing amongst others *Moore* v. *Illinois*, 55 US 13, 20 (1852)).

741 359 US 121 (1959).

742 Idem, at 137.

743 474 US 82 (1985).

Alabama court, he was subsequently be sentenced to death for the same murder. However, the US Supreme Court rejected the claim that such was in contravention of the constitutional protection against double jeopardy. Again, it applied the dual sovereignty doctrine, reasoning that two states must be considered two separate sovereigns, because each state derives its power to prosecute and to punish an offender "from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment".[744] As a result, the Georgian court's conviction of life imprisonment did not bar the Alabama authorities from initiating proceedings for the same conduct and to impose a more severe sentence on the defendant.

Though the US Supreme Court still maintains the dual sovereignty rule, it has provoked a lot of criticism, and still does. One main point of criticism is the focus on the governmental interests, while the interests of the accused have been faded into the background. Justice Black, for instance, stated in his dissenting opinion in *Abbate* v. *United States* that:

> "It is just as much an affront to human dignity, and just as dangerous to human freedom, for a man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the offense".[745]

More recent critics have argued that the dual sovereignty doctrine ignores the fact that today, unlike in the past, the federal and state governments are increasingly joined by common interests in combating crime.[746] This is especially the case in the context of drug offences.[747] Given this situation, the approach that any offence that violates the laws of more than one jurisdiction should be regarded as two offences can be questioned.[748] Braun has further argued that the dual sovereignty rule is built on the misconception that states have sovereignty, while according to him it is the American people who possess sovereign power.[749]

Though, as shown above, the constitutional double jeopardy clause does not prohibit a second prosecution or punishment by another US jurisdiction, multiple

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744 Idem, at 89. As a consequence of this reasoning, the dual sovereignty doctrine does not apply within one state, for instance in the case of successive state and municipal prosecutions, see *Waller* v. *Florida*, 397 US 387 (1970).

745 *Abbate* v. *United States*, 359 US 187, 203 (1959). See further his dissenting opinion in *Bartkus* v. *Illinois*, 359 US 121, 150-164 (1959).

746 D.A. Braun, 'Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism', *American Journal of Criminal Law* 20 (1992-1993), p. 68

747 As demonstrated by S. Guerra, 'The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement And Double Jeopardy', *North Carolina Law Review* 73 (1995), pp. 1159-1209.

748 Braun (1992), p. 68.

749 Braun (1992), p. 9, 26.

prosecutions and punishments are nonetheless in practice often barred. At the federal level, the cases in which the government will initiate proceedings against persons who have already been prosecuted by the authorities of a state are limited, as appears from internal guidelines, called the "Petite policy".[750] It sets forth that a federal prosecution, following a prior prosecution based on "substantially the same act(s) or transaction(s)" may only follow if: (1) the matter involves a substantial federal interest, (2) that has been left demonstrably not vindicated in the prior prosecution; (3) and if the government believes that the defendant's conduct constitutes a federal offence, for which the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. If these prerequisites are satisfied, the federal authorities may, upon approval by the appropriate Assistant Attorney General, start a second prosecution. However, individuals cannot invoke in court the violation of this "Petite policy", it being an internal guideline from the government.[751]

Most states have, either through their state constitution or through state statutory law, also limited or restricted the possibility of criminal prosecutions where the defendant has been previously prosecuted by another jurisdiction.[752] Although the precise extent to which these state constitutions and statutes prohibit a second prosecution varies widely,[753] it occasionally happens in practice that a state government will initiate a criminal prosecution following a prior federal or state prosecution. With regard to the first situation, most states have interpreted their state law as barring a criminal prosecution where the defendant has already been subject to a previous federal prosecution (*Bartkus* situation).[754] As to the second situation, jurisdictional overlap between two or more states is especially rare, due to the territorial principle on the basis of which in most cases just one state has jurisdiction over an alleged offence.[755]

5.7. LIABILITY ARRANGEMENTS IN THE EVENT OF ACQUITTAL

As far as I know, no provisions exist on the liability of US jurisdictions when, in cases with cross-border implications, the occasion arises that a person is acquitted of a charge of crime.

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750 This name refers to the case of *Petite* v. *United States*, 361 US 529 (1960). The "Petite policy" is included in the United States Attorneys' Manual, Title 9, Chapter 9-2.031.

751 United States Attorneys' Manual, Title 9, Chapter 9-2.031(F); see also Rudstein (2001), p. 87.

752 LaFave, Israël, and King (2004), p. 1207; R.J. Allen and J.P. Ratnaswamy, '*Heath* v. *Alabama:* a Case Study of Doctrine and Rationality in the Supreme Court', *Journal of Criminal Law & Criminology* 76 (1985), pp. 823-824.

753 Idem.

754 LaFave, Israël, and King (2004), p. 1207.

755 LaFave, Israël, and King (2004), p. 1207.

6. CONCLUDING REMARKS

The goal of this chapter, as with the foregoing chapter focusing on the Swiss federation, was to show the American approach to those issues that within the context of the European Union were concluded to be issues hindering the full implementation of the mutual recognition principle into the area of judicial cooperation in criminal affairs. It appears that within the American federation, extradition requests issued by the federal government or one of the 50 states must be complied with by the authorities of the requested jurisdiction; the US Constitution provides a mandatory duty to extradite fugitives from justice upon demand. With regard to other judicial decisions and judgments handed down in any stage of criminal proceedings, no constitutional duties exist. The mutual possibilities have been laid down in either interstate compacts, or uniform laws, or have fully remained the discretion of the respective jurisdiction; these legal instruments rather create possibilities instead of mutual obligations, sometimes applying between the states and the federal government, otherwise applying in the interstate relationships only. The different instruments *inter alia* concern the transfer of prisoners, the transfer of supervision measures imposed on adult offenders and the rendition of witnesses.

The result is a quite fragmented set of legal instruments and possibilities, with no umbrella idea, view or principle concerning when and how to give legal force to a judicial decision handed down by a judicial authority of another US jurisdiction. As a consequence, almost all issues borrowed from the European Union parameters are approached very fragmentarily as well. Throughout the several tools, variations occur as to the specific arrangements provided for suspects as well as to the number and nature of refusal possibilities. Furthermore, whereas some instruments contain specific arrangements for suspects, third parties and victims, other instruments do not. Some instruments do not mention the possibility to refuse the enforcement of the out-of-jurisdiction judicial decision, while other instruments explicitly do, for instance by means of requiring the mandatory fulfilment of certain conditions and paperwork. And, whereas the double criminality requirement has been clearly prohibited by the US Supreme Court from playing a role in the context of extradition, the issue has not been addressed to in the frameworks of the other legal instruments.

The issue of costs, however, is approached very comprehensively in the various legal instruments. All legal instruments contain provisions on who should bear the costs of execution of a judicial decision handed down outside the territory of the executing party. All these provisions have designated the same party as being responsible for the financial part of the deal, namely the party under whose auspices the judicial decision in hand was handed down. As a result, the jurisdiction that enforces a "foreign" judicial decision need not, in principle, pay the costs necessary to enforce the judicial decision indeed, such as transport costs, food, rehabilitation programmes, and so on.

There are two kinds of judicial decisions within the European Union governed by the principle of mutual recognition, that within the American federation are, nonetheless, not covered by the above-mentioned legal instruments. The first are evidence decisions. The question of whether evidence gathered on the territory of another jurisdiction, or under the responsibility of another jurisdiction, should be allowed in domestic courts is primarily a matter of state law. Only if evidence appears to be seized in violation of the constitutional guarantee against unreasonable search and seizure are courts obliged to exclude it. Secondly, neither is there an interstate or nationwide agreement on how to deal with the existence of previous convictions handed down by a criminal judge of US jurisdiction. Whether such prior convictions are taken into account in the course of new criminal proceedings, for instance for the aim of applying recidivist provisions, differs from state to state and the federal government.

Within the American federation, all states and the federal government have their own rules of criminal law and criminal procedure. Although efforts have been made to achieve a certain level of common norms, there are many divergences between the different criminal justice systems. These differences relate to both minor and fundamental issues.

With the outcome of this chapter, the next question is: what lessons can be derived from the American example for the future of mutual recognition of judicial decisions in criminal affairs between the Member States of the European Union? This question will be dealt with in Chapter 6.

CHAPTER 6

ANALYSIS: THE EUROPEAN UNION, SWITZERLAND AND THE UNITED STATES OF AMERICA COMPARED

1. INTRODUCTION

It has been demonstrated in Chapter 3 that in the relationships between the Member States of the European Union, the practice of accepting and enforcing each others' judicial decisions are highly intensified from the proclamation of the principle of mutual recognition as the future cornerstone of judicial cooperation in criminal affairs.[756] Efforts have been made to apply this principle to several kinds of judicial decisions handed down by any judge in any Member State at any stage of criminal proceedings. The principle of mutual recognition currently applies to custodial sanctions, financial penalties, probation measures, alternative sanctions, confiscation orders, arrest warrants, certain evidence warrants, pre-trial supervision measures, and, finally, the existence of previous convictions for the purpose of taking them into account in the course of new criminal proceedings. In addition, efforts are being made to cover all evidence warrants, and also to apply the mutual recognition principle to protection orders.[757] With regard to these judicial decisions and judgments, the EU Member States are prescribed – through separate framework decisions and directives – to handle the foreign decisions as if they were handed down in their domestic legal order.

Although meant to apply fully and automatically, the implementation of such a pure mutual recognition has turned out to be hard to achieve. Until today, there are several matters that continue to have a hindering effect. These have been identified in Chapter 3 and concern:

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[756] Tampere Conclusions, no. 33.

[757] An elaborate overview of all final and draft instruments on mutual recognition is given in Section 3.2.

1. the existence of grounds for refusal and the incoherent approach towards grounds for refusal as reflected in all mutual recognition instruments;
2. the failure to abolish or substantially limit the requirement of double criminality;
3. the failure to fully do away with the *exequatur* procedure;
4. the struggle to create a comprehensive set of minimum common standards, especially concerning procedural rights and human rights;
5. the *ne bis in idem* provisions of the mutual recognition instruments and the simultaneous developments towards a uniform guarantee against double prosecution for the same offence.

Proceeding from the hypothesis that the European Union could learn from the experience built up in federally organised countries, the approach in Switzerland and the USA has been focused on (Chapters 4 and 5 respectively). In this chapter, the differences and similarities as to the matters listed above will be set out (2). This overview will serve as a launch pad for the further exploration and interpretation of the differences and similarities (3), after which final conclusions will be drawn on what the EU can learn from the Swiss and American experience with the inter-jurisdictional recognition and enforcement of judicial decisions and judgments (4).

2. THE OBSTACLES AND BOTTLENECKS IN IMPLEMENTING MUTUAL RECOGNITION: THE EUROPEAN UNION, SWISS AND AMERICAN APPROACHES SIDE BY SIDE

2.1. REFUSAL GROUNDS

In principle, granting the executing Member State discretion to decide whether or not to recognise a judicial decision coming from an issuing Member State contravenes the very idea of mutual recognition. Ideally, any judicial decision handed down by a judge of a Member State would have legal force on the entire territory of the "European judicial area". Such an ambitious goal was, however, not considered realistic, if only because legal requirements were to be provided with the aim of protecting individual rights (e.g. to protect the individual against a second prosecution). As such, there is a fundamental difference between the situation in which a Member State can decline to enforce a foreign custodial sanction because the person involved has been sentenced already for the same offence, and the situation in which enforcement would be refused because the sanction could not be imposed according to domestic rules; whereas the first ground relates to the protection of

the individual primarily, the second ground is related to national preferences of criminal law and as such to national sovereignty. Until today, several possibilities are still provided throughout the different legal instruments to decline recognition. But generally speaking, it is true that with regard to those grounds for refusal particularly related to issues of national sovereignty, efforts have been made to try to abolish them or to limit their scope. This can be illustrated with three examples:

1. Offences of a political nature have been totally abolished from the list of grounds for refusal in the European Union, no matter what type of activity is concerned;

2. The requirement of double criminality – this requirement is not always formulated as a ground for refusal, but in practice it functions as such – has been abolished as to 32 acts; if the underlying offence corresponds with one of these acts, recognition may not be refused on the ground that the act is not penalised domestically. This limitation applies to all mutual recognition instruments. One deviating rule applies in the context of evidence gathering without the need to carry out a search or a seizure; then, double criminality may not be verified by the executing Member State, irrespective of what offence underlies the foreign evidence warrant;

3. Whereas Member States traditionally had full discretion in cases where their own nationals were involved, such a reason is no longer considered justified under the regime of mutual recognition. This does not mean that the person's nationality may not play any role; the framework decision on the European arrest warrant, for instance, enables the executing Member State to refuse the surrender of a national for reasons of executing a custodial sentence or detention order, on the condition that the executing Member State will execute the judicial decision itself in accordance to domestic law. But a person's nationality may be taken into account in order to serve the individual's interests – whose rehabilitation opportunities are best served in his home country – and not from the perspective of the executing Member State's sovereignty.

What about grounds for refusal in the Swiss federation? It has been shown that in that country, judicial decisions handed down by any Swiss judge are in principle valid on the entire Swiss territory. There are, nevertheless, some limited grounds on which the requested federal or cantonal authorities are allowed not to enforce the judgment or decision handed down in another Swiss jurisdiction. One ground for refusal is included in the minimum rules of the Penal Code: extradition requests may be refused if the offence underlying the request is a political or press offence. It is noteworthy that this ground relates to jurisdictional sovereignty. A refusal on this ground may, however, not result in the impunity of the sought person; the refusing jurisdiction is obliged to undertake the prosecution or the execution of the judgment

domestically. Requests may further be declined as a result of the application of the *locus regit actum* principle. This principle prescribes that requests are executed on the basis of the law of the requested party, applies in most cooperation cases; only where a canton has chosen the direct intervention route may it apply its local rules on the territory of the other canton. Where *locus regit actum* applies, the requesting authorities are still entitled to assess which measure to use in order to execute the incoming request and under what conditions. At that stage, the requesting authorities may come to the decision that the request cannot be executed at all, for instance because an immunity provision applies.

In the American federation, no specific grounds for refusal have been codified in the various legal instruments. It was demonstrated in Chapter 5 that with regard to several kinds of judicial decisions, only a non-obligatory uniform code has been created (on the interstate rendition of out-of-state witnesses) or that no national or interstate device exists at all (namely concerning the admissibility of evidence obtained in another US jurisdiction and the taking account of previous convictions handed down in another US jurisdiction). Just because of the lack of binding obligations in these areas, the different jurisdictions have maintained ample room to decide whether to comply with a request or to reject it. In contrast, less discretion exists in the sole area where a constitutional cooperation duty exists: the mandatory character of the constitutional Extradition Clause has led to the explicit rejection of discretional gubernatorial powers to decline the extradition of a fugitive to another state. Furthermore, in those areas where interstate agreements are in force (the inter-jurisdictional transfer of prisoners, the interstate transfer of supervision of adult offenders and the prosecution of persons housed in another jurisdiction's penal institution against whom outstanding detainers exist), broad discretion seems less obvious too. Being federal law, the obligations included in interstate compacts pre-empt state law and as such limit the sovereign powers of states.

Besides the different kinds of grounds for refusal between the EU, Switzerland and the USA, there is yet another difference. Whereas the Swiss grounds for refusal are conveniently arranged, the grounds for refusal in the EU are a quite fragmented set. This can partly be attributed to the fact that the mutual recognition principle has been implemented step by step, covering one kind of judicial decision at a time; then, it is obvious that some grounds for refusal do not appear in all instruments. But as to other grounds for refusal, there is no logic in choosing to include the ground in one instrument, while it is left out from another instrument (several concrete examples have been given in Chapter 3, Section 3.6). In the American federation, such a step-by-step approach has been followed too, and, as mentioned, grounds for refusal are hardly codified in the legal instruments. Here, no clear overview exists as to the discretion of jurisdictions as well as to the exact grounds on which refusal is allowed or prohibited.

Summarising the foregoing, the inevitable conclusion is that in the European Union, efforts have been made to limit the discretion of the executing party by

reducing those grounds for refusal closely connected to national sovereignty. At the same time, a very sovereignty-related ground for refusal, that of political and press offences, is maintained in the context of Swiss extradition, although a refusal on this ground may never result in the impunity of the person involved. For the rest, issues of cantonal or federal sovereignty may not lead to refusing the enforcement of out-of-canton judicial decisions. In the USA, however, there remains ample room to refuse the enforcement of out-of-state judicial decisions because of reasons closely related to state or federal sovereignty, with the only clear exception of interstate extradition. It being a constitutional duty, no discretion is left to the governor of the executing state; the fugitive must be extradited to the requesting jurisdiction.

2.2. THE DOUBLE CRIMINALITY REQUIREMENT

Within the context of the European Union, the issue of double criminality has been hotly debated in the recent past, due to the fact that with the introduction of the mutual recognition principle, efforts have been made to gradually abolish the requirement of double criminality. The first steps have been taken; all mutual recognition instruments contain a list of descriptions of criminal behaviour. If a Member State is confronted by a judicial decision from another Member State, and the offence underlying this foreign judicial decision corresponds with one of these legal classifications, the executing Member State may not refuse to recognise and enforce the judicial decision on the ground that the act is not criminalised domestically. Furthermore, if the foreign judicial decision is a warrant to gather certain evidence for which the executing Member State does not have to carry out a search or a seizure, double criminality may not be verified at all, even if the offence underlying the evidence warrant falls outside the scope of the 32 classifications. However, because this abolishment largely applies to offences which were already penalised in all Member States, it may be questioned whether the double criminality requirement has been limited.[758]

In contrast to the European Union context, the issue of double criminality does not play such a sensitive role in the Swiss and American federations. This is obvious in the Swiss context, where as a result of the entry into force of a single Penal Code, dual criminality has lost its relevance. In the American situation, however, there are considerable differences in definitions of criminal offences and sanctions. Nonetheless, the mandatory character of the constitutional Extradition Clause has been interpreted as prohibiting the refusal of an extradition request on the ground that the offence underlying the request does not constitute an offence according to the laws of the requested state. In the context of other instruments and

[758] See for instance A. Klip, *European Criminal Law. An Integrative Approach*, Antwerp: Intersentia, 2009, p. 335.

ways of cooperation, it is difficult to say whether or not double criminality plays a role. Regarding cooperation devices, the precise administration of which is left up to the states' autonomy, as well as to matters for which no national or interstate device exists, it is possible that considerations of this nature play a role now and then. But I have no indications to suppose that the matter of dual criminality is considered controversial.

In summary: attempts have been made in the EU to limit the Member States' discretion to take into account national ideas of what must be considered criminal. This issue is no longer relevant in the Swiss context from the entry into force of the single Penal Code. In the USA, the requested jurisdiction is only prohibited from considering local beliefs of what should be prosecuted and tried in the context of interstate extradition; for the rest, it is assumed that such local ideas may be weighed without limitations.

2.3. THE EXEQUATUR PROCEDURE

As a result of the introduction of the mutual recognition principle in the European Union, the exequatur procedure is under pressure. The idea of mutual recognition implies the direct enforcement of each other's judicial decisions without enabling the Member States to convert them into national decisions or to adapt them to national standards. Aiming at the fast and automatic enforcement of European judicial decisions anywhere in the European judicial area, it is obvious that intermediate formalities, such as the exequatur procedure, would hinder the full application of the principle of mutual recognition. However, under limited circumstances, conversion of a judicial decision is nonetheless possible (see Chapter 3, Section 3.5). The adoption of conversion provisions was partly prompted by practical considerations. As to foreign financial penalties, for instance, the executing Member State may change the foreign penalty into a national one if the original penalty is wholly or partly not enforceable in the legal order of the executing Member State, and upon the issuing state's consent. It could be questioned whether the maintenance of such practical solutions for practical problems are fundamentally incompatible with the principle of mutual recognition. But this is different for other conversion provisions, especially those adopted in the context of custodial sanctions, probation decisions, alternative sanctions and pre-trial supervision measures, where the executing Member State may adapt the sanction if it is incompatible with the law of the executing state, either in terms of its duration, or in terms of its nature. These provisions show that the exequatur procedure is not in the least dead.

In the American federation, conversion has been shown to play a role lesser than in the European Union, at least in the form of legislative provisions. The matter of conversion would be of relevance in the context of prisoners' transfer as well as the transfer of supervision measures. For both aims, interstate compacts – and thus

federal obligations – have been created. However, it is not clear to what extent the jurisdictions are allowed, on the basis of these interstate compacts, to adapt the final sentence into a domestic one. That this issue has not been regulated either indicates that it is left within the discretion of the executing jurisdiction, or that the issue of conversion causes no controversy. The exact reason is not clear from the available sources.

In contrast to the above situations, the issue of conversion is totally irrelevant in the context of Switzerland. As a result of the entry into force of a single Penal Code in 1942, the possible sanctions as well as the conditions under which these sanctions may be imposed are identical throughout the whole country.

Recapitulating the foregoing, the later mutual recognition instruments enable Member States to convert judicial decisions handed down in other Member States for reasons related to national sovereignty, namely the incompatibility of the foreign sanction with domestic law. Such a conversion is assumed to be allowed without restrictions in the USA, whereas the relevance of this issue is lacking in the Swiss context.

2.4. COMMON MINIMUM STANDARDS

In the European Union, instruments on mutual recognition do not entail accompanying minimum common standards of criminal law or criminal procedure. Whereas the first draft framework decision on the European evidence warrant did, the final version of this instrument no longer includes such common standards. It is common to design framework decisions and directives with the sole aim of harmonising a specific matter. Such initiatives have been taken several times with the passing of the years both with regard to substantive criminal law and procedural criminal law, the latter including general principles of law and human rights (see Chapter 3, Section 3.4). In addition, international instruments, such as the European Convention on Human Rights and Fundamental Freedoms have had the effect of constituting a minimum level of common standards. But until today, the differences in criminal law and criminal procedure vary widely from Member State to Member State. It is true that with the entry into force of the Lisbon Treaty, the Union has obtained broader competences to harmonise criminal law (Article 83 TFEU) and criminal procedure (Article 82 TFEU). But the Union does not aim at the full harmonisation (unification) of criminal law. As to criminal procedure, only minimum rules may be adopted, and only insofar as necessary to facilitate mutual recognition. Such minimum standards must take account of the differences in national legal traditions and national criminal justice systems. In the area of substantive criminal law, minimum standards only may apply. Although not explicitly related to the application of the mutual recognition principle, the minimum harmonisation of substantive criminal law cannot be an objective in itself; it may only concern areas

of particularly serious crimes with a cross-border dimension. And the establishing of such minimum rules has to be justified by the nature or impact of the offence, by a special need to combat the offence on a common basis, or by the need to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures (Article 83 TFEU).

In the American federation, the legislative instruments that aim at the mutual acceptance and enforcement of judicial decisions, in spite of their harmonising effect on cooperation procedures, do not include (minimum) common standards serving the facilitation of cooperation. In the field of criminal law, the states are primarily competent to pass legislation; and currently there are many differences among the state criminal justice systems. Nevertheless, a certain level of standardisation results from the US Constitution and some congressional legislation. In addition, some equivalence has followed as a result of the adoption of model codes and uniform laws. A totally different situation applies in Switzerland, where the *Bund* is competent to pass legislation in the field of criminal law and criminal procedure. A single Penal Code already applies since 1942, while a single Code of Criminal Procedure will enter into force in 2011.

In view of what precedes, it appears that national and local traditions, choices and preferences as to criminal law play an important role in the EU and the USA respectively.

2.5. *NE BIS IN IDEM* AND MUTUAL RECOGNITION

In the European Union, the application of the principle of mutual recognition is interpreted by the European Court of Justice as prohibiting double prosecutions on the entirety of the Member States' territories. The issue of multiple prosecutions is governed by the so-called principle of *ne bis in idem*, codified in various legal instruments. Most protect the individual against double prosecutions for the same criminal offence, but only within one jurisdiction. The only *ne bis in idem* provision with transnational implications is Article 54 CISA: it prohibits the EU Member States from prosecuting an individual if that person has already been prosecuted for the same offence in another Member State. This provision has also been developed into a uniform notion, thanks to the ECJ. Therefore, Article 54 CISA can be said to contain a European guarantee against double prosecutions for the same offence throughout the European judicial area. Given this, it automatically provides a ground to refuse the recognition of a foreign judicial decision if the offence underlying the request has been prosecuted earlier or is currently be prosecuted.

Nevertheless, all framework decisions and directives implementing the mutual recognition principle mention the *ne bis in idem* principle in the list of grounds for refusal, though in various ways; some instruments *oblige* the Member States to refuse recognition if such would infringe *ne bis in idem*, while other instruments

allow the Member States to refuse. In their entirety, the *ne bis in idem* provisions included in the mutual recognition instruments do not correspond with the scope of the CISA obligation.

In the Swiss federation, the principle of *ne bis in idem* also applies on the entire territory of the country; once prosecuted or sentenced in one canton or by the federal authorities, a person cannot be prosecuted or sentenced again in any cantonal or federal jurisdiction. A contrary approach is followed in the USA, where the constitutional guarantee against double jeopardy is explained as applying within the borders of one US sovereign. As such, the double jeopardy clause does not prohibit multiple prosecutions and multiple punishments, as long as these take place in different jurisdictions. In practice, however, state constitutions, state statutory laws and state or federal internal guidelines do bar such multiple prosecutions and multiple punishments, as a result of which they rarely occur.

Recapitulating: whereas in Switzerland one national *ne bis in idem* principle applies, and in the European Union this principle is clearly developing towards a uniform notion covering all judicial decisions handed down in the European Union, the USA follows another approach. Though it must be emphasised that double prosecutions and double punishments rarely occur in practice, the constitutional double jeopardy has been interpreted as applying within the borders of each US jurisdiction separately, instead of nationally.

2.6. PROVISIONAL CONCLUSION

It follows from the preceding section that with the aim of facilitating the mutual acceptance and enforcement of each others' judicial decisions in criminal matters, the entities of the respective systems are all encouraged to give up a smaller or larger degree of national, cantonal or state sovereignty. In the different systems, this has had various outcomes, as expressed in the approach to grounds for refusal (either in terms of their very existence, or in terms of the nature of grounds for refusal, or in terms of the umbrella approach towards grounds for refusal); the *exequatur* procedure; common minimum norms; and the interpretation and application of the *ne bis in idem* principle. As to these themes, it can be concluded that the American states have been left most discretion, while the Swiss cantons have transferred most of their sovereign powers towards the *Bund*. Both conclusions still correspond with Sieber's characterisation in a 1997 publication, in which he described the Swiss model as a combination of unification and cooperation, as distinct from the American model with its strong emphasis on decentralisation and the limited powers of the federal government.[759] In the middle position are the European Union

[759] U. Sieber, 'Memorandum für ein Europäisches Modellstrafgesetzbuch', *Juristenzeitung* 52 (1997), p. 372.

Member States: compared to the Swiss cantons, the Member States remain with more sovereign powers, but from an American approach, less sovereign powers are transferred to the central authority.

This also appears to correspond with the extent to which in the three systems either a comprehensive or a fragmented approach exists on the issue of accepting and enforcing each others' judicial decisions. In the USA, where the respective states have been left with most sovereign rights, a variety of legislative instruments exist with regard to different judicial decisions. This set of legislative instruments has established mutually divergent procedures, obligations and rights for the actors and persons involved. This is the case, even without talking about informal practices of cooperation (these have not been attended to in this research). In Switzerland, where the cantons have transferred most sovereign powers to the federal level, in comparison to the EU and the USA, a comprehensive system is provided. The minimum rules governing cooperation in criminal affairs, including the acceptance and enforcement of judicial decisions handed down in another Swiss jurisdiction, are codified in a single Penal Code. In addition to these minimum rules, a more intensified regime of cooperation has been created for obtaining evidence on the territory of another canton. All these provisions are governed by the constitutional duty to cooperate. Such an umbrella approach seems to exist as well in the European Union as well, which has the middle position. This assumption is, however, only partly true. Although the legislative instruments – namely framework decisions and directives – are all based on one and the same principle, namely the principle of mutual recognition, they nonetheless contain several variations concerning, for instance, the number and nature of grounds for refusal and the possibility of conversion.

The question arises as to how to explain and value these differences. It being clear that the federal or non-federal structure of a system is not of decisive importance – after all, such would have resulted in a much more similar outcome for the federations of Switzerland and the USA – the explanation must rather be sought in the material design of Switzerland and America. To that end, a few irrevocably connected elements have to be attended to next. The initial focus will lie on the Swiss and American situation, being the two cases for comparison. The outcome will subsequently be set alongside the EU context.

3. THE FUNDAMENTAL SIMILARITIES AND DIFFERENCES EXPLAINED AND ASSESSED

3.1. EXPLAINING THE SWISS CHARACTERISTICS

Regarding federal-cantonal as well as inter-cantonal recognition and enforcement of judicial decisions in criminal affairs, the Swiss cantons have sacrificed many of their sovereign powers. These have partly been transferred towards the federal level,

and partly been given up within the inter-cantonal relationships by tolerating the operations of authorities of another canton on their own territory (in the framework of the 1992 Concordat).

The transfer of cantonal sovereign powers towards the *Bund* is part of Swiss federalism. Being united as one nation, the Swiss cantons are sovereign, but only insofar as their sovereignty is not restricted by the federal Constitution. After all, the federal Constitution has from the beginning attributed certain powers to the federal government; as to these powers, legislation pre-empts cantonal law. All powers not explicitly constitutionally delegated to the *Bund* are left with the cantons. In those areas where the *Bund* has competency, legal measures are not necessarily taken, because the *Bund* is bound by the principle of subsidiarity: what can be accomplished at the cantonal level should be left with the cantons (Article 5a in conjunction with Article 43a FC).

The residual powers of the Swiss cantons have diminished over the years. History has shown a gradual centralisation; with the entry into force of each new version of the federal Constitution more and more competences were attributed to the federal level.[760] This demonstrates that the powers of central authority are difficult to restrain, although cantonal sovereignty has been guaranteed constitutionally; the degree of shared competences (that is: shared with the federal government[761]) has grown gradually.[762] This has resulted in subsequent developments, three of which are of utmost importance of understanding the Swiss approach to the inter-jurisdictional enforcement of judicial decisions in criminal affairs.

First, the competence to pass legislation in the fields of substantive and procedural criminal have shifted to the federal level; as from the end of the 19th century, the area of substantive criminal law has become a federal matter, while in 2000 procedural criminal law legislation was given a constitutional basis too. This has resulted in the enactment of a single Penal Code and in the adoption of a single Code of Criminal Procedure. The federal competence and the adoption of Swiss-wide instruments explain why there is such a comprehensive approach on the issue of cooperation in criminal affairs. The application of a single penal code has simply resulted in single cooperation rules. In addition, although substantive

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760 H. Kristoferitsch, *Vom Staatenbund zum Bundesstaat? Die Europäische Union im Vergleich mit den USA, Deutschland und der Schweiz*, Vienna: Springer, 2007, pp 140-144; U. Häfelin, W. Haller, and H. Keller, *Schweizerisches Bundesstraatsrecht: die neue Bundesverfassung*, Zürich: Schulthess, 2008, pp. 19, 53. Later on in his book, Kristoferitsch concludes that constitutional provisions on the sovereignty of the cantons have proved to be ineffective.

761 Not all powers transferred to the federal level remain exclusively federal (as is the case in Article 58 FC: "*Der Einsatz der Armee ist Sache des Bundes*"); rather, in many areas, the cantonal and federal government share competency, for instance in the field of education reform: "*Bund und Kantone sorgen gemeinsam im Rahmen ihrer Zuständigkeiten für eine hohe Qualität und Durchlässigkeit des Bildungsraumes Schweiz*" (Article 61a FC).

762 Kristoferitsch (2007), p. 286.

criminal law did not primarily grow from a wish to simplify inter-jurisdictional cooperation in criminal affairs – the first priority at that time was a fundamental reform of substantive criminal law which was considered best achieved through the creation of a single criminal code – the accompanying uniform rules on this cooperation have obviously facilitated the practice of accepting and enforcing each other's judicial decisions. It explains why issues such as double criminality and *exequatur* have lost their relevance and no longer obstruct cooperation practices. Moreover, issues of procedural law will also be solved in the near future. As demonstrated in Chapter 4, the proposals for and the adoption of a single Code of Criminal Procedure has – in contrast to the single Penal Code – evolved out of the desire to solve the problems of conflicting rules on criminal procedure. These problems, which particularly affect the suspect's position, have been shown as being especially related to the *locus regit actum* principle: the fact that in the course of one criminal procedure, differing rules from differing criminal justice systems might be used is regarded as being at odds with legal certainty. In addition, *locus regit actum* increases the risk of procedural mistakes in those situations where, on the basis of Article 359 PC, the issuing authorities execute their own request, but on the territory of another canton applying the procedural rules of this canton. Although it is true that the introduction of *forum regit actum*, allowing the authorities of one canton to gather evidence on the territory of another canton on the basis of its domestic rules of criminal procedure, did solve the problems in inter-cantonal relations that are described above, the problem of conflicting rules have continued to exist. Not only are the host authorities obliged to tolerate on their territory the application of alien rules, they might even be obliged to provide assistance to the actions of the leading authorities. Obviously, as soon as the Code of Criminal Procedure enters into force, both the problems related to *locus regit actum* as well as the issues related to *forum regit actum* will fade away.

A second point of importance, also related to the foregoing point, concerns the issue of non-overlapping jurisdictional powers. In Switzerland, the existence of federal criminal law does not imply the parallel existence of cantonal criminal law. Rather, because criminal law and criminal procedure have become wholly federal matters, federal criminal laws – as from the moment they enter into force – precede cantonal criminal laws;[763] federal criminal laws are in principle executed at the cantonal level, by cantonal authorities (Article 338 PC). The federal authorities are only allowed to pursue specific kinds of criminal offences, such as political offences and terrorism (Article 336 PC). With regard to these crimes, cantonal authorities are not allowed to act. As such, there basically is a clear separation between federal criminal jurisdiction and cantonal criminal jurisdiction. It has been mentioned (Chapter 4, Section 3.3.4) that a duplication of criminal jurisdiction between federal and cantonal authorities as well as between cantonal authorities might occur, but in

[763] With the exception of areas of minor importance (Article 335 PC).

most cases it is clear which jurisdiction is competent to deal with a case. There is no disguising the fact that this strict separation of jurisdictional powers in Switzerland does facilitate the mutual acceptance and enforcement of judicial decisions handed down in another jurisdiction, in the sense that at least in the context of deciding who will pursue a case, competitive considerations are unlikely to play a substantive role.

The foregoing considerations about the federalisation of Swiss criminal law, as an element of the centralisation of powers in the Swiss federation, have been accompanied by a third development, namely the emphasis on the notion of cooperation, since part of Swiss federalism is the continuing tension between cantonal autonomy and permanent integration.[764] These strains have intensified with the centralisation developments. To counterbalance the decreased cantonal autonomy, current Swiss constitutional law has placed more emphasised on the aspect of cooperation between the *Bund* and the cantons.[765] As such, Swiss federalism today is often characterised as "cooperative federalism"[766] – the aspect of cooperation is primarily incorporated in the legal principle of federal loyalty or federal solidarity (*Bundestreue*, Article 44 FC).[767] This principle obliges the federal and cantonal authorities not only to grant each other mutual assistance and support (Article 44(1) and (2) FC), but also to resolve disputes through mediation and negotiation (Article 44(3) FC).[768] The principle of federal loyalty is further expressed in several other constitutional provisions,[769] and has formed the basis for the codification of various legal provisions. This applies likewise in the area of criminal law: as demonstrated in Chapter 4, the Penal Code contains a broad obligation, addressed to both federal and cantonal authorities, both judicial and non-judicial authorities, to grant each other mutual assistance in all criminal affairs (Article 356(1) PC).

Both the federalisation of criminal law and criminal procedure as well as the clear division of jurisdictional powers – even in cases of overlapping jurisdiction – are to be understood in the light of this cooperative approach. It also applies to the transfer of cantonal sovereign powers in the context of inter-cantonal mutual legal assistance, regulated in the 1992 Concordat. This instrument enables the authorities of one canton (the leading canton) to operate on the territory of another canton (the host canton) thereby applying the procedural rules of the leading canton (direct intervention based on the principle of *forum regit actum)*. Needless to say the degree

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764 R. Rhinow and M. Schefer, *Schweizerisches Verfassungsrecht*, Basel: Helbing & Lichtenhahn Verlag, 2009, p. 121.

765 Häfelin, Haller and Keller (2008), p. 53, 281, 361; T. Fleiner, A, Misic, and N. Töpperwien, *Swiss Constitutional Law*, Kluwer Law International, 2005, p. 26, 120.

766 Häfelin, Haller and Keller (2008), p. 360 *et seq*; Fleiner, Misic and Töpperwien (2005), p. 117.

767 Häfelin, Haller and Keller (2008), p. 326; Fleiner, Misic and Töpperwien (2005), p. 116.

768 This provision is by Häfelin, Haller and Keller (2008) characterised as "eine Friedenspflicht", p. 326.

769 Häfelin, Haller and Keller (2008), p. 326.

of autonomy that would potentially be given up, is quite large and revolutionary. The Concordat's content is adopted in the future single Code of Criminal Procedure. As mentioned earlier, the problems that accompany the execution of the Concordat and which are related to the existence of different codes of criminal procedure will be solved with the entry into force of this single instrument. The revolutionary steps taken with the adoption of this Concordat illustrate the cooperative approach the cantons take in principle. Such an approach is likely to be inspired by the emphasis placed on cooperation, support, loyalty and solidarity, both legally and in practice.

Given this, it might be surprising that Article 356(2) PC provides a ground to refuse an extradition request issued by another jurisdiction if the underlying offence is a political or press offence. Such a ground seems to be closely related to domestic sovereignty. It is a common ground for refusal in the spheres of traditional international extradition, but removed from the list of grounds for refusal in the context of EU surrender. It seems all the more strange that the federal Supreme Court has interpreted the term "political offence" – and by analogy the term "press offence" – more widely than it is interpreted in the international context.[770] However, as follows from the Court's explanation, this has to do with the fact that in Switzerland, criminal proceedings are assumed to be based on the same principles and fundamental ideas. Moreover, a refusal on these grounds may never result in the impunity of the sought person – as is the case internationally. The refusing jurisdiction is obliged to prosecute or sentence the person domestically. In its reasoning, the Supreme Court emphasised this cooperative relationship between the different jurisdictions, which again stems from the idea of cooperative federalism.

3.2. VALUE OF THE EU CONTEXT

The explanation of Swiss characteristics shows several reasons why the Swiss example is appropriate for comparison with the European Union. This applies despite the fact that in Switzerland criminal law can be enforced both by federal and cantonal authorities, it being a fundamental difference with the EU situation: European criminal law is always enforced on the Member State level. There is no supranational European criminal justice system, with European prosecutors and European criminal judges who are able to start European criminal proceedings. Although this is an important difference between the EU and Switzerland, the deciding factor in concluding that the Swiss example can be compared with the European Union is more fundamentally the nature of Swiss federalism and the exact relations between the several jurisdictions.

After all, the jurisdictional powers of the several jurisdictions in Switzerland are relatively clearly separated, first because the federal authorities have only jurisdiction

[770] Chapter 4, Section 5.6.1.

as to specific crimes (such as terrorism or international crimes), and, secondly, because federal rules (contained in the Penal Code) determine quite clearly which jurisdiction is competent in a specific case. It has been mentioned that for this reason, competitive considerations on the question of who will take the case are very unlikely to play a role. Rather, Swiss federalism is cooperative federalism. This is constitutionally expressed through a principle of loyalty, which is embodied to in the area of criminal law by means of the obligation, addressed to all federal and cantonal authorities, to assist each other in matters of criminal law. As described in the foregoing section, the emphasis on cooperation in Switzerland has grown with consecutive versions of the federal Constitution, to counterbalance the gradually decreasing powers of the cantons.

As with the Swiss situation, developments in the European Union have also shown a gradually growing accent on the purpose and need for stronger cooperation. This has happened while successive treaties – from Maastricht to Lisbon – as well as ECJ case law have shown a gradual expansion of central powers over the years.[771] Not only have more and more powers been transferred to the European level (centralisation), but also where original Third Pillar competences gradually transferred to the First Pillar regime (communautarisation).[772] This has been fully described in Chapter 2, but can best be summarised by bringing to mind the complete merger of the First Pillar and the Third Pillar with the entry into force of the Lisbon Treaty in 2009: the pillar structure has been abolished and all areas of competence, including the traditional intergovernmental area of police and judicial cooperation, are now brought under the single supranational structure of today's European Union.

Under the former pillar regime, the EC Treaty had already laid down a principle of Community loyalty in Article 10:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

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771 A clear overview up until 2001 has been given by J.D. Donahue and M.A. Pollack, 'Centralization and its Discontents; The Rhythms of Federalism in the United States and the European Union', in: K. Nicolaidis and R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, New York: Oxford University Press, 2001, pp. 95-116; see also, especially with regard to criminal law, Klip (2009), pp. 17-20 (Sections 3.3 and 3.4).

772 These developments are clearly described in: Kapteyn & VerLoren van Themaat, *The Law of the European Union and the European Communities*, Alphen aan den Rijn: Kluwer Law International, 2008 (4th edition), pp. 30-44.

This principle of Community loyalty (or: Community solidarity) is commonly considered to express a general principle of mutual cooperation; it is often also referred to as the principle of loyal cooperation.[773] It does not apply only in the vertical relationship between the Community and the Member States (as the wording of Article 10 EC might suggest), but also in the horizontal relationships between the respective Member States.[774] Under the heading of this principle, several kinds of more specific obligations exist, many of which have been developed in ECJ case law. For instance, on the basis of this principle, Member States are obliged to set aside national legislation that would conflict with the application of Community law, and also to ensure the effective protection of rights provided for in Community law.[775]

Although it was for a long time uncertain whether the principle of Community loyalty would also apply in the field of police and judicial cooperation in criminal matters, the ECJ decided in the affirmative in its landmark *Pupino* case. The proceedings of this case centred on the question of whether the national Italian judge would be obliged to interpret its national rules of criminal law in such a way that they would comply with the relevant framework decision, as applied in the context of First Pillar directives. The Court held that such a duty of interpretation in conformity applied in the Third Pillar too.[776] It based its reasoning on the principle of loyal cooperation:

> "It would be difficult for the Union to carry out its task effectively if the principle of loyal cooperation, requiring in particular that Member States take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under European Union law, were not also binding in the area of police and judicial cooperation in criminal matters".[777]

Today, under the post-pillar regime of Lisbon, there applies a single principle of sincere cooperation, equally applicable in all areas of Union competence (Article 4(3) TEU):

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773 Kapteyn & VerLoren van Themaat (2008), pp. 153-155; J. Temple Lang, 'The Principle of Loyal Cooperation and the Role of the National Judge in Community, Union and EEA Law', *ERA-Forum*, 4 (2006), pp. 476-501.

774 Kapteyn & VerLoren van Themaat (2008), pp. 153-154.

775 For more detailed examples, especially inspired by case law, see Kapteyn & VerLoren van Themaat (2008), pp. 147-153; and also Temple Lang (2006), pp. 476-501.

776 16 June 2005, Case C-105/03, *criminal proceedings against Maria Pupino*, [2005] ECR I-5285, par. 61.

777 16 June 2005, Case C-105/03, *criminal proceedings against Maria Pupino*, [2005] ECR I-5285, par. 42.

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".

Swiss federalism and the European Union thus share the cooperative approach towards cooperation in criminal affairs. This does not imply equality in all its facets. Whereas in Switzerland huge steps have been taken in the field of unification of penal legislation, the issue of (minimum) harmonisation of criminal law remains a sensitive issue in the European Union. In my view, the European Union is not aiming to adopt a single European Penal Code or a European Code of Criminal Procedure.

There is nonetheless a similarity between Switzerland and the EU regarding the adoption of common norms. As demonstrated in Chapter 4, the unification of procedural criminal law has indeed been prompted by the need for stronger and easier cooperation in criminal matters. This followed on the adoption of an inter-cantonal concordat that provides the far-reaching possibility of intervening directly on the territory of another canton. Both developments were part of the striving for simpler cooperation procedures.[778] In the foregoing section, this is explained in the light of the cooperative nature of Swiss federalism (Section 3.1).

In the European Union, such a combination between shared norms and intensified cooperation (through mutual recognition) has also developed. In recent years, minimum harmonisation of criminal law has increasingly been emphasised to facilitate the mutual recognition of judicial decisions handed down in another Member State.[779] Being initially considered to be alternative paths towards European integration, mutual recognition and harmonisation nowadays go hand in hand, in the sense that harmonised rules strengthens the level of mutual trust, which in turn serves the application of the mutual recognition principle.[780] This approach

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778 Within the context of unifying substantive criminal law, the goal of enhancing cooperation was not the primary concern, as has been dealt with in Chapter 4. But, obviously, the single Penal Code has included from its very beginning cooperation provisions. Moreover, the existence of single crime definitions and sanctions has facilitated inter-jurisdictional cooperation.

779 Chapter 2, Sections 2.2. and 2.3.

780 In this context, Weyembergh as well as Borgers (in reference), consider the support function of harmonisation: A. Weyembergh, 'The Functions of Approximation of Penal Legislation within the European Union', *Maastricht Journal of European and Comparative Criminal Law*, 12(2) (2005, pp. 155-170; M. Borgers, 'Functions and Aims of Harmonisation After the Lisbon Treaty: A European

continues in the Lisbon Treaty, as expressed in Article 82(2) TFEU:[781]

> "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, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules."

From the perspective of loyal or sincere cooperation, the attempts made by the ECJ for a uniform and EU-wide *ne bis in idem* principle speak for themselves. As demonstrated in Chapter 3 (Section 4.6), Article 54 CISA (prohibiting the Member States from initiating second prosecutions for the same offence) has in the past decade been further interpreted by the ECJ as being a uniform notion. After all, the further integration within the European Union – which is *inter alia* expressed in the development and application of the mutual recognition principle in the field of judicial cooperation in criminal matters – implies an EU-wide *ne bis in idem*. In view of this, it is surprising that a general EU-wide jurisdiction regulation does not exist in this field of cooperation.

For reasons related to the Swiss constitutional structure and the nature of Swiss federalism, the inter-jurisdictional validity of judicial decisions in criminal affairs in Switzerland can be compared to the implementation of the principle of mutual recognition of judicial decisions in criminal matters between the EU Member States.

3.3. EXPLAINING THE AMERICAN CHARACTERISTICS

The fact that – for inter-jurisdictional enforcement of judicial decisions – the American states have transferred fewer sovereign rights to the central level in comparison to the Swiss cantons and the EU Member States must in general be understood from the nature of American federalism, expressed in the vertical relationships between the federal government on the one hand and the state governments on the other. As shown in Chapter 5 (Section 2.3), no single statement suffices to characterise American federalism, due to an ongoing development in which different aspects are emphasised with the changing of times, generally fluctuating between centralisation and decentralisation movements.

The most important centralisation movements took place after the end of the Civil War and again during the New Deal period. As a result, compared to the early stages of the USA, the states have lost primary influence in several areas of government,

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Perspective', in: C. Fijnaut and J. Ouwerkerk (eds.), *The Future of Police and Judicial Cooperation in the European Union*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 347-355.

781 See also Borgers (2010), p. 352.

such as defence politics, slavery (abolished in 1865, Thirteenth Amendment) and the election of the Senate (now by the people, Seventeenth Amendment).[782] At that time, American federalism was mainly cooperative in nature; it was common that the state governments were moved in certain directions, often through financial programmes issued by the federal government.[783] As from the 1950s, however, the emphasis shifted from cooperation to coercion; the state and local governments had become more and more dependent from federal grants.[784] In addition, centralisation was essentially achieved by landmark decisions of the US Supreme Court, such as those in which it incorporated the original Bill of Rights guarantees by gradually applying them to the states.[785] As from the 1980s, an opposite movement towards decentralisation started under the Reagan government (New Federalism). Since then, states have regained control over several issues via federal legislation, but also via the Supreme Court (especially the Rehnquist Court), which since then has invalidated several federal laws for reasons of exceeding competence.[786]

These trends apply to the field of criminal law as well. While before the Civil War, federal criminal law commonly concerned behaviour against direct federal interests (e.g. crimes against the federal government), the federal government currently has criminal jurisdiction in many areas that were traditionally dealt with at the state level (such as mail fraud, the protection of minority people, drugs, kidnapping, sexual abuse of children, identity theft, etc.).[787] In the early years of federalising criminal law, the enactment of federal criminal laws was justifiable by the inability or unwillingness of states to prosecute certain crimes, and by the increased mobility of American people and the thereby increased number of multistate crimes. But Congress was often motivated by other concerns too, such as the public pressure to be tough on crime.[788] This was especially the case in the 1930s, and again in the late 1960s. Even today, criminal law continues to become federalised.[789]

It is true that in the meantime there have been some signs of slowing down the federalisation of criminal law. Of illustrative importance is the case in which the

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782 For instance: Kristoferitsch (2007), pp. 91-98 in particular.

783 Kristoferitsch (2007), p. 96.

784 Donahue and Pollack (2001), p. 88.

785 Kristoferitsch (2007), p. 97; D. Elazar, 'The US and the EU as Models', in: K. Nicolaidis and R. Howse (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union*, New York: Oxford University Press, 2001, p. 41.

786 Donahue and Pollack (2001), pp. 89-91. In 1995, in the landmark case of *United States* v. *Lopez*, 514 US 549 (1995), the Supreme Court invalidated a federal law for the first time in 60 years for reasons of exceeding congressional power under the Commerce Clause.

787 M.A. Simons, 'Prosecutorial discretion and prosecution guidelines: a case study in controlling federalization', *New York University Law Review* 75 (2000), pp. 902, 907.

788 Simons (2000), pp. 903-904.

789 Simons (2000), pp. 905-907; Donahue and Pollack (2001), p. 91.

Supreme Court for the first time in 60 years invalidated a federal law for reasons of exceeding congressional power: this was a criminal case. Based on its power to regulate interstate commerce (Commerce Clause, US Const. Article 1, § 8, cl. 3), Congress had adopted in 1990 the Gun-Free School Zones Act. This act prohibited the possession of a gun within one thousand feet of a school. The Supreme Court considered it as going beyond congressional competence under the Commerce Clause; gun possession in a school zone was not regarded as an economic activity substantially affecting interstate commerce.[790] The Court emphasised that the powers of Congress are limited to those powers enumerated in the federal Constitution, and that the scope of these powers must be viewed in the light of America's "dual system of government". These powers:

> "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that, to embrace them […] would effectually obliterate the distinction between what is national and what is local and create a completely centralized government".[791]

Although this decision was initially regarded as a breakthrough, the actual consequences of *Lopez* and some subsequent Supreme Court decisions have not shown a real slowing down of federal criminal law. Although in the aftermath of this case *Lopez*-based pleas were frequently challenged in the courts, the constitutionality of federal statutes was upheld in most cases.[792]

The fluctuations between centralisation and decentralisation have not been prevented from happening by the restraints on federal powers codified in the US Constitution. As described in Chapter 5 (Sections 2.3 and 2.4), the federal government is a government of limited powers. It has only those powers expressly delegated to it by the US Constitution and all powers not enumerated are in principle reserved to the states (Tenth Amendment). Only where appropriate for the effectuation on one of the constitutionally enumerated powers is the federal government allowed to take measures in areas falling outside the scope of these enumerated powers (Necessary and Proper Clause). In spite of the restraining purposes of these clauses, the federal government has often used them to enact federal criminal laws. This is also due to the fact that the federal competences are formulated in terms of specific goals, not infrequently in a quite vague and open manner leaving room for either broad or restrictive interpretation.[793] Given this, endless integration and legislative tools that

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790 514 US 549, 567 (1995).

791 Idem, at 557.

792 Abrams and Beale (2006), p. 42; R.W. Garnett, 'The New Federalism, the Spending Power, and Federal Criminal Law', *Cornell Law Review* 89 (2003-2004), pp. 1-94.

793 Garnett (2003-2004), p. 37; also compare with Kristoferitsch (2007), who has concluded the same for the European Union context, p. 231.

aim at restraining the powers of central authority have appeared to be ineffective, as history has shown.[794] The very broad interpretation of exclusive competences set forth (or: enumerated) in Article 8 of the US Constitution (the commerce power, the postal power and the taxing power in particular[795]) has resulted in the enactment of many criminal statutes, together establishing a wide range of federal crimes.[796]

If several constitutional provisions admit of different interpretations, how broad or how narrow competences are interpreted depends on the governing party as well as the composition of Congress. Another factor of importance concerns the composition of the federal Supreme Court. The nine members of this highest judicial body are appointed by the US president, with the advice and consent of the Senate (US Const. Article II, § 2, cl. 2). Obviously, the political preferences of the president and the Senate play a part in deciding who to nominate and appoint as a Supreme Court justice. In turn, the court's composition becomes evident in the content of its judicial decisions. Under Chief Justice Rehnquist, for instance, the decentralisation of federal authority was clearly expressed in a number of decisions in which the court blocked several federal laws.[797]

Although it must be emphasised that in the American federation the state powers and influences are still enormous – nearly all matters are left to the discretion of state and local governments – the fluctuations between federalisation and decentralisation must have affected the vertical relationships between the federal and state authorities in a negative way – not least because many federal crimes were not designed to protect a direct federal interest – stimulating a competitive relation between the different levels of government.

Here, the parallel structure of these governmental levels (dual federalism or "*föderale Parallelismus*"[798]) is of additional relevance. In the field of criminal law, parallelism means that the federal criminal justice system exists equally alongside the 50 state criminal justice systems. After all, if the federal government passes legislation in the field of criminal law, such laws must be enforced by the federal government itself through its own federal rules of criminal procedure. State criminal law and state criminal law enforcement do not fall within the constitutionally enumerated powers and are thus reserved for the states. This might seem to create a clear division of powers between the state and the federal levels of government.

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794 Kristoferitsch (2007), p. 284, who mentions the formulation of the so-called Welfare Clause: "The Congress shall have Power To […] pay the Debts and provide for the common Defence and general Welfare of the United States" (US Const. Article 1, § 8).

795 Abrams and Beale (2006), p. 20 *et seq.* An example of using the commerce power for criminal law purposes is the 1994 Violence Against Women Act (18 USC § 2247). The postal power was, for instance, used as a base for the mail fraud statute (18 USC § 1341). Most drugs laws have been based on the power to tax.

796 Abrams and Beale (2006), p. 20.

797 Donahue and Pollack (2001), pp. 91.

798 Sieber (1997), p. 373.

However, due to the fact that the federal government has interpreted the federal competences broadly in the past few decades, the current set of federal crimes overlap with state crimes to a large extent: "[I]t is hard to think of a crime under state law that cannot be prosecuted federally".[799] This dual structure of American federalism has obviously encouraged competition between state and federal law enforcement officers in particular, but also between law enforcement officers of the states mutually[800] as well as among federal law enforcement officers.[801]

The competition between federal and state prosecutors is even further intensified by the broad prosecutorial discretion they enjoy in deciding what crimes to pursue and which suspects to charge. Of course, the basic assumption must be that all prosecutors operating on the US territory are primarily motivated by the intention to combat crime and to bring the case for the most appropriate court. But other factors play an important role too. After all, prosecutors can be influenced by political aspects of a case, such as public pressure and the media sensitivity of cases.[802] This applies to state attorneys in particular; being locally elected,[803] the advantages of personally satisfying those who have chosen them are likely to play a role too, either intentionally or not. Federal prosecutors might also feel politically pressured, if only because the people might call for a federal trial given the fact that history has shown more severe sentences imposed on defendants compared with state sentences for comparable conduct.[804] In addition to political factors, organisational factors can also play a role, particularly in the mutual relationships between federal prosecutors – but of course affecting the federal-state prosecutorial relations as well – because the US Department of Justice allocates or removes jobs from the various US Attorneys Offices based on the number of prosecutions. This might easily drive federal prosecutors to bring federal prosecutions although in that individual case a state prosecution would be more appropriate.[805]

It is true that federal prosecutors are in a way limited in the full exercise of their prosecutorial discretion due to their actual capacity; federal resources (from police to prison) are relatively small in comparison to state resources.[806] As a result, the great majority of cases are dealt with at the state level. However, this does not alter the fact that federal prosecutors compete with federal prosecutor colleagues as well as with state prosecutors, and that such competition is all the more encouraged in a

799 Abrams and Beale (2006), p. 109.

800 Kristoferitsch (2009), pp. 275-276.

801 Simons (2000), p. 932.

802 Simons (2000), p. 932.

803 Abrams and Beale (2006), p. 13.

804 Simons (2000), p. 917.

805 Simons (2000), pp. 932-933.

806 Abrams and Beale (2006), p. 109.

system of dual federalism, with largely overlapping jurisdictional powers in which prosecutors have almost unlimited discretion.[807]

It is in this light that the interpretation of the Double Jeopardy Clause must be understood. After all, this constitutional guarantee against multiple prosecutions and punishments applies in each separate jurisdiction of the United States, whether a state jurisdiction or the federal jurisdiction, rather than applying nationwide. As described previously, the Supreme Court, in interpreting this clause, has based its reasoning on the idea of "dual sovereignty": each jurisdiction, being a separate and independent sovereign, is competent to prosecute and punish any offence that violates its laws, irrespective of whether the same facts have been prosecuted or tried previously in another jurisdiction.[808] In fact, the same crime can be considered to be committed as many times as a criminal law is violated. According to the Supreme Court, another interpretation of the Double Jeopardy Clause would hinder the different sovereigns in the country from exercising their powers of full autonomy, which in turn would contravene American federalism.[809] That in practice multiple prosecutions and punishments occur only rarely does not alter the fact they may and do happen,[810] as a direct result of the structure of American federalism with concurrent jurisdictions.[811]

In my view, the *leitmotiv* of sovereignty, autonomy and concurrency explains the lack of coherency in the approach towards the inter-jurisdictional enforcement of judicial decisions in criminal matters as well as the lack of obligatory regimes in this field. With regard to the lack of coherency, the issue of inter-jurisdictional enforcement in the USA is not regulated under a single nationwide system. There rather exists a plurality of instruments and a multitude of possibilities, regulated in differing kinds of legal instruments with varying degrees of binding force. Only with regard to interstate extradition is cooperation duty laid down in the federal Constitution. As to this form of cooperation, a relatively obligatory regime exists, being equally applicable at all levels of government.

Other tools aiming at the mutual enforcement of judicial decisions are regulated in either interstate agreements or uniform laws. Whereas interstate agreements bind the joining states as federal laws, uniform laws do not bind the joining states

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807 To a certain extent, competition by federal prosecutors – and thus further federalisation of criminal law – is controlled through the means of prosecutorial guidelines and the practice of joint operations, see Simons (2000), pp. 933-963 respectively Abrams and Beale (2006), p. 119.

808 *United States* v. *Lanza*, 260 US 377, 382-383 (1922). Reaffirmed several times, see e.g. *Screws* v. *United States*, 325 US 91 (1945) and *Abbate* v. *United States*, 359 US 187 (1959).

809 *Bartkus* v. *Illinois*, 359 US 121, 137 (1959).

810 A 1996 publication speaks of "fewer than 50 dual prosecutions each year", H. Litman and M. D. Greenberg, 'Dual Prosecutions: a Model for Concurrent Federal Jurisdiction', *Annals of the American Academy of Political and Social Science* 543 (1996), p. 77.

811 In a system of "strict fixed spheres", such an explanation of double jeopardy would be inconsistent, according to Litman and Greenberg (1996), p. 79.

at all, but rather provide a model. The whole set of legislative instruments reflects standards and procedures that are mutually divergent; there is nothing to suggest that the overall topic of interstate and inter-jurisdictional cooperation in criminal matters is approached in umbrella terms.

Furthermore, the topics of evidence admissibility and the taking account of previous convictions are all the more viewed in various ways, each jurisdiction prioritising its own interests. As to these subjects, no cooperative instruments have been created. Only with regard to evidence seized in violation of the federal Constitution, does a single approach apply, thanks to the Supreme Court's case law; such evidence is in principle inadmissible in any federal or state court. For the rest, the different jurisdictions have created their own rules.

The lack of obligatory regimes in this field is also quite obvious if viewed with the emphasis on independent sovereignty, it being a domestic matter when and how to enforce criminal law through the own rules of criminal procedure. Sovereign powers are not easily passed into other hands, since the state and federal governments do not want to be hindered in the exercise of their competences. This explains why the legal tools at stake – with the exception of extradition law – contain hardly any obligatory provisions, but leave ample room for discretion. Furthermore, the lack of a general (for instance constitutional) obligation to cooperate in matters of criminal law explains why the topic is approached on an *ad hoc* basis, with the result of a quite fragmented set.

3.4. VALUE IN THE EU CONTEXT

The foregoing section presents several reasons as to why it is relevant to compare the American approach towards inter-jurisdictional enforcement of judicial decisions in criminal affairs to the European Union approach on mutual recognition of such judicial decisions. This applies despite the existence of several differences.

One of these differences relates to the dual structure of American federalism. As in Switzerland, criminal law in American can be enforced both by federal and state authorities. However, whereas criminal law in Switzerland is almost always federal criminal law, dominantly enforced by cantonal authorities, American criminal law is characterised by the existence of independent state and federal criminal justice systems that function autonomously. Federal criminal law is enforced by federal law enforcement authorities and federal judicial authorities, in the course of federal criminal proceedings. State criminal law is enforced by law enforcement agents and judicial authorities of the state involved, in a separate state criminal proceeding. In the European Union, criminal law is always enforced on the Member State level. There is no supranational European criminal justice system, with European prosecutors and European criminal judges who are able to start European criminal proceedings, autonomously from what is happening at the Member State level.

In spite of this dissimilarity, it is all the more interesting to look at the *rationale* behind the dual structure of American criminal law. Concerning criminal matters, there is a strong emphasis on the autonomous sovereignty of the various US jurisdictions. Authorities do not want to be hindered in the exercise of their powers by the previous or simultaneous exercise of powers by law enforcement authorities of another jurisdiction. It has resulted in a large degree of overlapping federal and state jurisdictional powers, without the existence of a nationwide regulation on which jurisdiction is entitled to prosecute a crime in an individual case. Such a regulation would even be unimaginable, given the Supreme Court's interpretation of the Double Jeopardy Clause; it has held several times that an act that breaks the criminal law of more than one jurisdiction, is considered to be a crime in each of these jurisdictions separately. Being independent sovereigns, each jurisdiction whose law is broken by the act, is allowed to prosecute the crime. Double Jeopardy applies only within one jurisdiction thus, instead of nationwide (Chapter 5, Section 5.6).

The existence of overlapping jurisdiction must sound familiar to EU lawyers. After all, the Member States' jurisdictional powers over criminal offences may easily overlap. Obviously, overlap occurs only between the respective Member States, given the absence of a European criminal justice system. The large degree of jurisdictional overlap is partly the result of the widespread extensive interpretation of the traditional territoriality principle in many Member States. Territorial jurisdiction is no longer automatically restricted to national territory only, which is due to the fact that some crimes are very difficult to localise (for instance, cybercrime).[812] Jurisdictional overlap may further occur as a result of additional grounds to start prosecutions. These additional grounds may, for instance, concern the nationality of the alleged criminal, the nationality of the victim of an alleged offence outside his home country, or the sole nature of the alleged crime which could be a ground for jurisdiction all over the world. As in the USA, the large degree of overlapping jurisdictional powers between the EU Member States is not accompanied by Union-wide jurisdiction criteria for the purpose of determining which Member State should have primary jurisdiction in an individual case. At the same time, the issue of multiple prosecutions is approached quite differently in the European Union, as compared to the USA.

How overlapping powers are approached and dealt with in the American federation is closely related to the strong emphasis on federal and state autonomy in the field of criminal law. This is not only expressed in the Supreme Court's interpretation of the constitutional Double Jeopardy Clause. At least as important are the competitive relationships between federal-state, state-state, and federal-federal law enforcement authorities. As was shown, this competition was even further encouraged by political and financial aspects. It is obvious that such competition suits a dual system as

[812] T. Vander Beken, G. Vermeulen, S. Steverlynck, and S. Thomaes, *Finding the Best Place for Prosecution*, Antwerpen/Apeldoorn: Maklu, 2002, pp. 11-12.

the USA with its large overlap of jurisdictional powers and its emphasis on local sovereignty, and in which mutual cooperation is constitutionally obliged only with regard to interstate rendition, while for the rest, states are free to decide whether to cooperate or not, and to what extent. However, would this fit in the European Union context as well?

Being a relatively young institutional structure, the integration process is at a relatively young stage too. Nevertheless, the developments over the last few decades – from Maastricht to Lisbon – have shown a gradually growing accent on the purpose and need for stronger cooperation, as described in Section 3.2 of this chapter. The developments towards mutual recognition and towards a uniform notion of *ne bis in idem* are to be explained in this perspective. As such, the American approach appears to contravene the approach of the European Union, as it is codified in treaties and secondary legislation.

At the same time, however, it would be unrealistic to ignore that up until today European influences on national criminal law continues to be evaluated with much scepticism. Criminal law is still regarded as an area of law closely connected to national sovereignty and culture. In spite of the theoretical and legislative striving for closer cooperation and further harmonisation of criminal law and criminal procedure, the differences between the different criminal justice systems of the Member States are enormous. These variations exceed the number of divergences between state and federal criminal laws, as the Member States represent many more legal traditions than the states of America. The US jurisdictions and the EU Member States are both characterised by a strong devotion to local sovereignty and autonomy regarding matters of criminal law, as a result of which common standards are very difficult to agree on.

The inevitable conclusion of this analysis must be that the American example is worth comparison with the European Union. The American approach as to the inter-jurisdictional enforcement of judicial decision in criminal matters contains lessons for the future of mutual recognition in the European Union. These lessons will be formulated in the next section.

4. LESSONS FOR THE FUTURE OF MUTUAL RECOGNITION IN THE EUROPEAN UNION

In Chapter 3, I identified five matters that have a hindering effect on the implementation of mutual recognition, as a principle originally meant to be applied as automatic as possible. In the previous chapters, I examined how the enforcement of judicial decisions handed down in another jurisdiction is approached in the federations of Switzerland and the USA. The ultimate question for this part of the book is what lessons can be derived from these federal examples in view of the further development of mutual recognition in the European Union. In replying to this question, I have primarily adhered to the five issues formulated in Chapter 3.

In addition, however, some extra issues have come to light as well. These will also be included in this section.

4.1. COHERENCY

Throughout the entirety of framework decisions and directives implementing the mutual recognition principle, several incoherencies have been demonstrated. I have shown the incoherent approach towards grounds for refusal provided for in the various legal instruments. In addition, I have demonstrated the incoherency between on the one hand *ne bis in idem* as it is expressed in the mutual recognition instruments and on the other hand the struggle for a uniform notion with cross-border application. Moreover, I have described the variations between instruments enabling a kind of validation procedure before the execution of a foreign final decision (*exequatur*), and instruments obliging the direct enforcement of such judicial decisions.

These incoherencies might seem somewhat surprising, given that all mutual recognition instruments are based on one and the same principle: the principle of mutual recognition itself. However, it is obvious that the step-by-step approach, used to implement the principle of mutual recognition, has done no good in terms of coherency. Given that for each specific kind of judicial decision, a new framework decision or directive was adopted, incoherency as to grounds for refusal and validation procedures may easily have arisen from the negotiation debates amongst EU legislators; different proposals often require different actors to reach consensus. Incoherency can also be the expression of an *ad hoc* approach; each new proposal concerns another type of judicial decision for which other individuals are responsible. Yet another factor likely to cause incoherencies is the possible absence of umbrella ideas on, for instance, whether all grounds for refusal should be removed, which grounds for refusal should be maintained, whether and in what form Article 54 CISA should be given expression in the mutual recognition instruments, etc.

The most influential aspect worth mentioning here surely relates to the erstwhile pillar structure of EU law. After all, until the entry into force of the Lisbon Treaty, the area of police and judicial cooperation was governed by the intergovernmental regime of the so-called Third Pillar, where decisions needed unanimity to be adopted. The creation of this intergovernmental pillar was at that time a consensus-oriented – though temporary – solution for the Member States' reservations about giving up parts of their sovereignty in the specific area of criminal law. Being an area of law that was kept outside the European Union for a relatively long period of time, police and judicial cooperation were recognised as being matters of common interest until 1992. By designing a separate regime for these matters, the Member States had greater room to assert their individual influence; because unanimity was required to adopt instruments on mutual recognition, one single Member State could veto specific provisions or an entire proposal. It was under the regime of this Third Pillar that most mutual recognition instruments (namely framework decision)

were initiated and adopted. It is likely that at that time, sovereignty considerations clearly influenced the level of incoherency throughout the whole set of mutual recognition instruments.

That there is a link between incoherency and sovereignty has been confirmed through the studies of Switzerland and the USA. The USA represents the one end of the spectrum. It appears that the American set of legal instruments aiming at inter-jurisdictional recognition lacks coherency to an even greater extent than in the European Union. Not by accident – the American states are found to have transferred the smallest degree of sovereignty to the federal level. Switzerland represents the other end of the spectrum. The Swiss cantons have transferred most of their sovereign powers to the federal level. This is clearly expressed in that matters of criminal law fall within the competences of the *Bund*; a uniform Penal Code, including provisions on the mutual enforcement of judicial decisions, applies nationwide. The obvious outcome is a large degree of coherency as to this matter. That the two federations are on opposite sides of the scale, at least where the topic of mutual enforcement of judicial decisions in criminal affairs is concerned, is related to the different kinds of relationships between judicial authorities: either the competitive relationships between American judicial authorities (except on extradition cases) or the cooperation duties between Swiss judicial authorities.

As was mentioned, the European Union can be categorised in between the American federation and the Swiss federation concerning the degree of sovereign powers transferred to the central level of government. Therefore, it is no surprise that the degree of coherency is positioned in between as well. There is, on the one hand, the notion of mutual recognition, launched in 1999 as the umbrella principle on which judicial cooperation in criminal matters should be based. On the other hand, however, there are incoherencies, as a result of the former Third Pillar regime.

The lesson to be drawn from the comparative perspective is that and how coherencies need to be solved and avoided in the future. After all, the existing level of incoherency throughout the entirety of mutual recognition is currently all the more unjustified. In today's institutional structure, the Union and the Member States are even more strongly obliged to work together in carrying out the tasks that flow from the treaties (principle of sincere cooperation). No longer have special regimes been created for the sensitive area of criminal law; the pillar structure has been abolished and all areas of competence are – generally speaking – governed by the same rules and procedures.

It goes without saying that incoherencies within a cooperation system are likely to have a negative effect on the actual cooperation practices. Where in different contexts, varying rules apply, it would be quite hard for practitioners to know exactly which rules apply in which situations. As a result, it will take much longer to get a grip on the different instruments available. Such would also increase the risk of mistakes, which in turn can have a negative effect on the suspect's position, on the continuation of prosecution, or on the relationships with the authorities of

the other jurisdiction. Moreover, incoherencies between legislative instruments and treaty provisions – such incoherencies exist concerning *ne bis in idem* – lead to confusion, not to mention the fact that such deviations are not justified in view of the Court's interpretation of the treaty provision at stake (Article 54 CISA). As such, it is clear enough that incoherencies hinder the application of the principle of mutual recognition as a covering principle.

To do justice to the principle of sincere cooperation and to do away with the negative aspects of incoherency that certainly hinder the mutual recognition and enforcement of judicial decisions, efforts must be undertaken to develop a comprehensive view on the issues of grounds for refusal and *exequatur*, and also on the transnational scope of *ne bis in idem*, nominally in line with ECJ case law.

4.2. THE VERY EXISTENCE OF REFUSAL GROUNDS

In Switzerland, all judicial decisions handed down in the course of criminal proceedings are valid and enforceable on the whole territory of the country. It has been concluded several times that this rule applies without great problems, mainly as a result of the existence of a single Penal Code. Most grounds for refusal, still playing a role in the EU context, have lost all relevance in Switzerland. This applies most clearly to grounds related to the double criminality requirement, the age of criminal responsibility, or prescription terms. However, also in Switzerland, there remain justified grounds on which the authorities of the requested jurisdiction may refuse to accept and enforce a judicial decision that stems from another jurisdiction.

The Swiss approach as to the existence of grounds for refusal teaches us that mutual recognition as such does not automatically exclude the existence of grounds for refusal anyhow. There will always remain situations in which the authorities of the requested jurisdiction will find justified grounds related to domestic procedural law to refuse an incoming request. In Switzerland, where differing codes of criminal procedure still apply, the requested authorities still determine which measure to use for the aim of executing a request and under what conditions execution would take place. In an individual case, this may lead to the conclusion that an incoming request cannot be executed and therefore must be refused. Given that there are 27 different criminal justice systems in the European Union, it would be realistic to accept that such situations will always occur and that as such some grounds for refusal are always justified. Striving towards automatic recognition without any room for grounds for refusal would be futile.

What appears as well from the Swiss example is the possibility to refuse an extradition request if the underlying offence is a political or press offence (Article 356(2) PC). However, the fact that such a refusal may not be followed by the impunity of the sought person demonstrates the cooperative approach in the Swiss federation. Because a refusal is not followed by the impunity of the sought person, the terms "political offence" and "press offence" are interpreted extensively. This

contains an important lesson for the EU approach towards grounds for refusal, especially characterised by abolishing or restricting those grounds related to national sovereignty. The Swiss example teaches us that sovereignty-related grounds for refusal would be not problematic with principles such as sincere cooperation and mutual recognition, as long as the consequences of such a refusal would satisfy the issuing Member State's desire to prosecute or punish the person involved.

4.3. THE POSITIVE EFFECT OF HARMONISED RULES ON THE FUNCTIONING OF THE MUTUAL RECOGNITION PRINCIPLE SHOULD NOT BE OVERESTIMATED

According to EU policy makers and legislators, mutual recognition of judicial decisions in criminal matters presumes mutual trust, not only in the adequacy of the respective criminal justice systems, but also in the correct application of rules by the law enforcement authorities of each Member State. Today, however, the level of confidence between the Member States is considered unsatisfactory, particularly in view of the functioning of the mutual recognition principle. In this regard, there is a strong belief in the positive effect of harmonised rules; common norms are assumed to strengthen mutual trust in the European Union and, in turn, to facilitate the application of the principle of mutual recognition. In the Lisbon Treaty, this is expressed in that minimum rules of procedural criminal law may only be established with the aim of facilitating the mutual recognition of judicial decisions (Article 82(2) TFEU). And, whereas minimum rules of substantive criminal law do not need to facilitate the principle of mutual recognition, it is widely assumed that shared definitions of crimes and harmonised rules on criminal sanctions will also facilitate the principle of mutual recognition.[813]

It appears from the example of the Swiss federation that shared rules on substantive criminal law do indeed solve some of the problems that occur in the context of the European Union. After all, with the entry into force of a single Penal Code, the issues of double criminality and *exequatur* were no longer able to obstruct the inter-cantonal and federal-cantonal mutual enforcement of judicial decisions; the relevance of these issues simply disappeared as the definition of criminal offences as well as sanctions were equally formulated and equally applicable on the whole territory of the Swiss federation. Moreover, the forthcoming entry into force of a single Code of Criminal Procedure will solve several procedural law issues. It goes without saying that the acceptance by the court in one canton of evidence obtained in another canton is easier in a federation where rules of criminal procedure are no

[813] The current state of European substantive and procedural criminal law has already been attended to in Chapter 2 and will not be reiterated here.

longer in conflict among the several jurisdictions. The same applies to tolerating the intervention of law enforcement authorities of another canton on own territory. In conclusion, a clear lesson that can be derived from the Swiss example is that uniform definitions of criminal offences as well as uniform provisions on sanctions do indeed solve some of the issues currently considered to hinder the full application of mutual recognition.

Nonetheless, it would be too simple to state that the European Union must overcome such obstacles in a similar way, namely by adopting a European penal code and a European code of criminal procedure. Such a statement would totally neglect the complexity of the issue of harmonisation in the EU context. Under the regime of the previous treaties, there was a strong battle on this issue, more specifically on the question whether Community (First Pillar) law provided a competence to pass legislation in the field of substantive criminal law.[814] With the abolishment of the pillar structure – as a result of the entry into force of the Lisbon Treaty – there is more clarity on this point. However, the Union's competence to pass legislation in the field of criminal law and criminal procedure is limited. A first limitation concerns the fact that approximation of criminal law in the EU has always meant and still means minimum harmonisation and not unification. Furthermore, the competence of the Union to pass legislation in the field of substantive criminal law is limited to selected areas of crime,[815] and can only be exercised if necessary because of the nature or impact of the offences, or if there is a special need to combat such crime on a common, EU-wide basis (Article 83(1) TFEU). The legislative competence in the field of procedural criminal law is limited in that minimum rules of criminal procedure may only be established with the aim of facilitating the mutual recognition of judicial decisions (Article 82(2) TFEU).[816] Due to these restrictions, it is inconceivable that the EU legislator will work on single codes.

The question arises as to whether the current obstacles to full mutual recognition, which are due to diverging criminal justice systems, can be tackled by means of establishing common *minimum* norms. Would an enhanced list of minimum definitions of criminal offences indeed facilitate the abolishing of the double criminality requirement?[817] It is well-known that throughout the different mutual recognition

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814 This battle has been decided by the ECJ, which has given an extensive interpretation of Community (First Pillar) competences in the field of criminal law at a time that this area was still governed by the intergovernmental Third Pillar: 13 September 2005, Case C-176/03, *Commission* v. *Council*, [2005] ECR I-7879; 23 October 2007, Case C-440/05, *Commission* v. *Council*, [2007] ECR I-9097.

815 Terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime.

816 The Treaty explicitly mentions rules on the admissibility of evidence, the rights of individuals in criminal procedure, and the rights of victims of crime.

817 As asked for in the Stockholm Programme, see: Council, "The Stockholm Programme, An open and secure Europe serving and protecting the citizens", OJ *0*4.05.2010, C 115/15.

instruments, the double criminality requirement has already been partly abolished. However, because this largely applies to offences which were already penalised in all Member States, it may be questioned whether the double criminality requirement has been limited indeed.[818] And even where other definitions would be agreed on, these will always be minimum definitions, as a result of which divergences will continue to exist. In addition, Member States are not at all ready to give up national preferences on the penalisation of behaviour in the ethical sphere, such as on abortion or euthanasia.

Furthermore, would minimum rules on penal sanctions indeed push back the *exequatur* procedure? It appears that the initial intention to abolish the *exequatur* procedure in a system governed by the principle of mutual recognition has been reconsidered in the meantime. First, it appears that there will always be situations in which the executing state is simply unable to execute the foreign sentence or measure in its original form, as an obvious result of the various national criminal codes. But, secondly, it has been demonstrated that some more recent mutual recognition instruments (EEO, ESO, PD/AS) seem to re-open the door for conversion by determining that the executing Member State may adapt the foreign sentence or measure for reasons of incompatibility with fundamental principles of domestic law (Chapter 3, Section 3.5). Would the adoption of common sanctions result in the superfluity of these exceptions? Such common rules will always be minimum rules, as a result of which divergences will continue to exist.

And, would minimum norms of procedural law indeed strengthen mutual trust? In the recent years, the debate has concentrated on the establishment of minimum common norms regarding procedural safeguards for the suspect. The failure to establish a general legal instrument on procedural rights in criminal proceedings has recently been followed by the creation of a "roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings".[819] This roadmap aims at the step-by-step creation of minimum procedural rights. By addressing the procedural rights step-by-step, the Council assumes that overall consistency will best be ensured. The first measure taken action on concerns the issue of translation and interpretation. A directive on this issue was recently adopted.[820] The next three issues to be regulated through directives are the right of the suspect to be informed about his rights and charges (a proposal has just been launched[821]), the right to legal advice and legal aid, and the right to communicate with relatives, employers and

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818 See for instance Klip (2009), p. 335.

819 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ 4.12.2009, C 295/1.

820 Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings, OJ 26.10.2010, L 280/1.

821 Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings, COM(2010) 392/3.

consular authorities. However, even if the roadmap route is followed completely, these will always be minimum standards. A Member State that believes a higher level of protection is necessary would surely be unhappy to extradite a person to the Member State that "only" complies with the minimum norms. Furthermore, potential minimum norms will address issues that are relatively insignificant in comparison to the enormous differences between the basic structures of criminal procedure. As a result, divergences will always continue to exist.

Finally, would minimum rules on the admissibility of evidence indeed address the mutual use in court of evidence obtained on the territory or under the auspices of another Member State? In this field, further initiatives are expected; the European Commission has recently consulted the Member States on the question of whether common standards should be designed to secure the admissibility of evidence that has been obtained in another Member State.[822] However, again because of the fact that such admissibility rules will always be minimum rules, differences between the national rules will continue to exist. Later on in this chapter, it is argued that other solutions are more promising in approaching the problem of evidence admissibility.

It is clear that uniformity brings several advantages over multiformity. However, this conclusion does not justify the argument that the degree of multiformity relates to the number of obstacles hindering the implementation of the mutual recognition principle. Where divergences exist in the definitions of criminal offences, double criminality remains a sensitive issue, irrespective of whether the differences are huge or relatively small. In other words: regarding the influence of shared norms on the functioning of the principle of mutual recognition, there is a sharp dividing line between uniformity and multiformity. Between unlimited multiformity and restricted multiformity, however, the influence of shared norms varies much less.

This is confirmed by the American example. It has been shown that in America, criminal legislation is hardly harmonised. The federal and state governments have their own criminal justice systems. It is true that minimum standards of procedural rights follow from the US Constitution: all jurisdictions are obliged to guarantee compliance with these minimum standards. Moreover, a certain level of equivalence has been established through model legislation (uniform laws and model codes). Such model legislation is, however, not binding on the states or the federal government; each jurisdiction is free to adopt or reject the models, either wholly or partly. Because of the variations regarding criminal offences and sanctions, double criminality and *exequatur* can play a role in the interstate and federal-state mutual enforcement of judicial decisions. However, only in the context of extradition – this follows a constitutional obligation – has the absence of dual criminality explicitly been rejected as a ground to refuse extradition to another jurisdiction. The issue has not been attended to in the context of other judicial decisions, but

[822] Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final, par. 4.2.

it is difficult to say whether or not double criminality plays a role. Especially it regarding cooperation devices the precise administration of which is left up to the states' autonomy, as well as to matters for which no national or interstate device exists, it is possible that considerations of this nature play a role now and then. But I have no reason to suppose that the matter of dual criminality is considered controversial. Such an open conclusion applies to the issue of validation procedures as well. None of the instruments give any indication whether validation procedures are prohibited or allowed.

In comparison to American criminal law, the EU Member States' criminal justice systems vary much more widely.[823] However, despite the relatively small differences between the respective US criminal justice systems, I have found no indication that these differences must be overcome, for instance by recognising the criminalisation of behaviour in another jurisdiction, or the enforcement of an unknown sanction imposed on the convicted in another jurisdiction. Moreover, it is questionable as to whether a stronger approximation of criminal law and criminal procedure within the USA would intensify the interstate and federal-state cooperation in general and the inter-jurisdictional enforcement of judicial decisions in criminal matters in particular. Much depends from the willingness of governments and law enforcement authorities to cooperate and to support each other in combating crime and in the execution of sanctions. In the USA, the mutual relationships are characterised by a competitive approach as well as the assignment of money based on the number of prosecutions and election considerations. The role played by these mutual aspects are of greater influence on the functioning of horizontal and vertical cooperation and enforcement of judicial decisions than the adoption of common norms would ever be.

As was mentioned, uniformity of criminal law and criminal procedure is an unrealistic prospect for the European Union; multiformity of national criminal law will continue to exist in the future. Given this, the facilitating affects of common minimum norms should not be overestimated.

4.4. AN EU-WIDE *NE BIS IN IDEM* PRINCIPLE SHOULD BE ACCOMPANIED BY STRONG EFFORTS TO AVOID AND SOLVE CONFLICTS OF JURISDICTION

An important lesson to learn from the comparison with Switzerland and the USA concerns the close relationship between the trans-border application of *ne bis in idem* and the availability of a jurisdiction mechanism.

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[823] Examples of topics as to which fundamental differences exist between the Member States of the European Union are: lay justice, the election or designation of public prosecutors and the moment as from which there is a right to be assisted by a lawyer.

In the framework of international and European cooperation in criminal affairs, the prohibition of multiple prosecutions and multiple punishments was traditionally applied within the borders of one jurisdiction. As a result, a German conviction for the import of drugs from Spain did not prevent the Spanish authorities from convicting the same person for export of the same drugs to Germany. Currently, however, things have changed in the mutual relationships between the EU Member States. The incorporation of the Schengen *acquis* into the legal order of the European Union has brought along a *ne bis in idem* principle with transnational implications, aimed at protection from multiple prosecutions and multiple punishments throughout the entire territory of all Member States together (Article 54 CISA). In addition, the principle has increasingly developed into a uniform notion, to be interpreted equally in all Member States.[824] As demonstrated in Chapter 3, the introduction of the mutual recognition principle has played an important role here. The ECJ has interpreted the *ne bis in idem* principle in the light of mutual recognition and the free movement of persons. *Ne bis in idem* is mutual recognition and mutual recognition implies *ne bis in idem*, especially in view of the fact that the obligation to mutually recognise judicial decisions handed down in another EU Member State has not been made conditional upon the existence of common rules of criminal law and criminal procedure.[825] It has resulted in that, for instance, out-of-court settlements concluded by a prosecutor in a certain Member State bar a second prosecution in another Member State, as long as such a settlement discontinues any further proceedings for the same offence. The ECJ concluded so, irrespective of whether or not the laws of the second Member State would allow the prosecution to conclude such an out-of-court settlement without the involvement of a court.[826] In addition to Article 54 CISA, the Charter of Fundamental Rights includes a *ne bis in idem* prohibition, binding on the Member States as from the entry into force of the Lisbon Treaty (Article 50 CFR).

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824 This has expressly been confirmed quite recently in the *Mantello* decision: 16 November 2010, Case C-261/09, *proceedings concerning the execution of a European arrest warrant issued in respect of Gaetano Mantello*, available at http://curia.europa.eu/, par. 38. It is therefore quite strange that several mutual recognition instruments still provide a violation of *ne bis in idem* as an optional refusal ground. This indicates that *ne bis in idem* should just be protected by refusing cooperation. However, in the Court's view, Article 54 CISA obliges the Member States to guarantee *ne bis in idem*.

825 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345, par. 32-33; 28 September 2006, Case C-467/04, *criminal proceedings against Guiseppe Francesco Gasparini and Others*, [2006] ECR I-9199, par. 29-30; 28 September 2006, Case C-150/05, *Jean Leon van Straaten* v. *The Netherlands and Italy*, [2006] ECR I-9327, par. 43; 9 March 2006, Case C-436/04, *criminal proceedings against Leopold Henri van Esbroeck*, [2006] ECR I-2333, par. 35; 18 July 2007, C-288/05, *criminal proceedings against Jürgen Kretzinger*, [2007] ECR I-6441, par. 33.

826 11 February 2003, Joined Cases 187/01 and 385/01, *criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, [2003], ECR I-1345.

It is obvious that a transnational application of *ne bis in idem* limits national sovereignty; in those cases where the same offence was already prosecuted in another Member State, the national prosecution service of the second Member State can no longer fully exercise its own discretionary powers. However, an approach other than described above would be unjustified, in view of the ongoing European integration and the growing emphasis on mutual cooperation and loyalty. How would it be possible to give real substance to these notions if Member States would on the one hand be obliged to apply mutual recognition of judicial decisions and judgments, while at the same time would be allowed to initiate a second prosecution for offences already prosecuted or finally disposed of in another Member State?

Departing from the perspective of these notions, however, raises the subsequent question of how it could be justified that the European Union legal framework still lacks a Union-wide jurisdiction mechanism, providing detailed jurisdiction criteria? It is true that an instrument on this issue has been adopted recently.[827] This 2009 framework decision, however, can by no means be considered to be useful and satisfying. It only obliges the Member States to enter into direct consultations if there are grounds for believing that parallel proceedings are being conducted in another Member State. Such consultations must aim at agreeing on a solution to avoid negative consequences arising from such parallel proceedings. However, the framework decision has neither formulated Union-wide applicable jurisdiction criteria, nor has it provided a binding obligation on the Member States to decide on one jurisdiction to concentrate criminal proceedings.

What about jurisdiction criteria in federal countries? The comparison with Switzerland and the USA has presented two different outcomes. The Swiss example is at one end of the spectrum. The applicable legal framework provides a country-wide principle of *ne bis in idem* as well as a legal mechanism with the aim of determining which jurisdiction has the competence to lead the prosecution in an individual case. This tool applies in addition to the strict separation of jurisdictional powers between the federal and cantonal governments. Given that in most cases cantonal authorities have jurisdiction over a crime, the basic rule assigns the canton on whose territory the alleged offence is committed. If the crime were committed on several territories, the first canton to start a prosecution is attached jurisdiction over the case. If any jurisdictional conflict were to arise, the Federal Criminal Court has the competence to decide on it and to assign the competent jurisdiction. At the other end of the spectrum, there is the American example, providing a guarantee against double jeopardy but only within the borders of one jurisdiction and lacking any jurisdiction mechanism. Due to the large extent of overlapping jurisdictional powers, the prosecuting authorities of the several jurisdictions are encouraged to compete with each other in order to get a case, or even – although this rarely

827 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, *OJ* 15.12.2009, L 328/42.

happens – to start simultaneous criminal proceedings against the same person for the same offence.

In view of this, is it not all the more strange that the EU provides a transnational and uniform principle of *ne bis in idem*, while a jurisdiction mechanism is lacking? After all, the reciprocal cooperation between EU Member States is clearly encouraged through the mutual recognition of judicial decisions in criminal affairs and the included obligation to refrain from or to discontinue proceedings where another Member State has previously finally disposed of the case. At the same time, however, the Member States are encouraged to compete with each other in individual cases by trying to be the first to start prosecuting activities.[828] As was mentioned, jurisdictional powers of the Member States overlap to a large degree. Due to the absence of a legislative tool to determine which Member State has primary jurisdiction to prosecute an individual crime, today's practice focuses on the Member State which takes the first initiative.[829] This stimulates the states to focus exclusively on national interests, instead of making a balanced decision about the best place for prosecution, thereby weighing not only the interests of the national government, but also those of the suspected person as well as third parties and victims involved.

In conclusion, I believe that a Union-wide jurisdiction mechanism should be adopted in addition to the transnational and uniform *ne bis in idem* principle. Such a mechanism should provide detailed criteria on which Member State has primary competence in what circumstances of a specific case. It would be in line with the principle of sincere cooperation, as provided in Article 4(3) TFEU, and also in view of this principle's background (see Section 6.2.2). In cooperative relationships, competitive considerations as to the question of who will lead the case will not obviously play an important role.

4.5. MUTUAL LEGAL ASSISTANCE: THE ADVANTAGES OF TRADITIONAL SOLUTIONS

The legal framework for mutual legal assistance in criminal matters comprises a set of legal instruments with bilateral, regional or multilateral application. As from the launch of the principle of mutual recognition in 1999, efforts have been made to establish a separate regime for mutual legal assistance between the EU Member States. Based on the mutual recognition principle, any Member State should in principle be obliged to search premises, to block bank accounts, to freeze assets and also to transfer the obtained evidence to another Member State without the need for intermediate checks.

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828 This has also been mentioned, though not as an outcome of comparative law research, by Klip (2009), p. 423.

829 Klip (2009), pp. 315, 423.

Today, the traditional legal instruments are, in the relationships between the EU Member States, partly replaced by the Framework Decision on the European evidence warrant (EEW). This instrument applies the principle of mutual recognition to cross-border evidence gathering and the transfer of such evidence towards the issuing Member State. Its scope is still limited, because it covers existing evidence only; evidence warrants cannot be issued to conduct interviews, to take statements, to initiate other types of hearings or to obtain evidence in real time (Article 4 EEW). However, in due course these kinds of evidence are expected to be governed by the principle of mutual recognition as well. A number of Member States have initiated a proposal for a directive on the European investigation order (EIO).[830] This draft aims at the mutual recognition of any investigative measures issued by another Member State. Nearly all kinds of evidence are covered; only interception and transmission of telecommunications have been excluded.

One of the most difficult issues related to mutual assistance in practice concerns the admissibility of evidence that has been obtained abroad in the courts of the issuing state. The evidence rules of the different criminal justice systems vary considerably and this applies likewise in the European Union context. For that reason the European Commission has expressed its intention to work on common standards on evidence gathering in the near future.[831]

Surely, common standards would solve some problems related to conflicting rules of criminal procedure. However, such standards would always be minimum standards; divergences will remain if Member States decide to exceed this minimum level. In addition, the existence of shared rules on evidence gathering will not solve the issue of how to determine in an individual case the probative value of evidence that has been obtained abroad. To approach this problem, the Swiss example teaches us that it would be better to follow the path started under the traditional instruments than to apply pure mutual recognition. I will focus on two options that I believe would facilitate the use of evidence in the courts of the issuing Member State. The first option is to enable the issuing party to prescribe certain procedures and formalities to be observed by the executing authorities. The second option is to allow authorities of the issuing state to be present during the execution of their own request for mutual legal assistance.

It appears from the comparative law study of Switzerland that both options are provided for in the legal framework for mutual assistance. The 1992 inter-cantonal Concordat demonstrates the shift from *locus regit actum* to *forum regit actum*. If one canton desires to secure certain evidence or to investigate certain premises on the territory of another canton, the first canton may decide that its own rules of criminal procedure will apply, though on the territory of a second canton. This option,

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830 Council Document No. 9145/10 of 29 April 2010.

831 Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, COM(2009) 624 final.

however, can only be effectuated by the authorities of the first canton themselves, on the only condition that the second canton is notified of their activities. This method is referred to as direct intervention. Here, the *forum regit actum* rule is explicitly connected to the presence of authorities of the issuing party; furthermore, the issuing authorities are at the same time the executing authorities.

Also where requests are executed on the more common basis of *locus regit actum* – thus following the rules of the canton where the investigative measures are actually executed – the role of the issuing authorities in the execution of their own request has become more active with the adoption of the Concordat. Under the traditional regime of the Penal Code, the issuing authorities of one canton are allowed to operate on the territory of a second canton, but only upon the consent of and applying the rules of this second canton. It has appeared that this possibility was rarely used, especially because of the unfamiliarity with procedural rules of other cantons. With the entry into force of the Concordat, a compromise was achieved by enabling the issuing authorities to become actively involved in the execution of a request for mutual legal assistance, instead of operating themselves. After all, if the issuing states would prefer to execute the request themselves, they can use the method of direct intervention whereby they can follow domestic rules of criminal procedure.

The very idea of mutual recognition contravenes *forum regit actum* elements as well as the possibility of issuing authorities being present in the executing jurisdiction. Built on the assumption of mutual trust, a request from the issuing Member State to attend the execution of investigative measures in the executing Member State would be an expression of distrust. In addition, if the issuing authority prescribed certain formalities to be observed by the executing Member State, it would easily be interpreted as if the issuing Member States would not consider the criminal justice system of the executing Member State as being equivalent to its own. Furthermore, the unfamiliarity with foreign formalities are likely to cause a delay of execution and at the same time increase the risk of procedural errors. However, the undoubted truth of these downsides neglects the fact that such a theoretical approach would in practice unnecessarily hamper the admissibility of evidence in the courts of the issuing state. And for the judge, it would be more difficult to determine the probative value of such evidence; how to assess proceedings that are totally unfamiliar and which are only a part of a whole criminal justice system? The Swiss example shows that developments towards intensified cooperation regimes combined with increased intrusion by cantonal sovereignty are at the same time accompanied (or: counterbalanced) by the possibility for authorities of the issuing jurisdiction to become more actively involved in the actual gathering of evidence.

Both options are not new in the traditional legal framework for mutual legal assistance. Both the 2000 EU Convention on Mutual Assistance in Criminal Matters

(EU Convention, Article 4)[832] as well as the Second Additional Protocol (Article 8) to the 1959 European Convention on Mutual Assistance in Criminal Matters (ECMA) enable the issuing party to prescribe some procedures and formalities to be complied with by the executing party.[833] As such, both instruments demonstrate tentative steps towards application of (a weak form of) the *forum regit actum* principle.[834] The presence of the authorities of the issuing state is also provided for. The starting convention in this respect, the 1959 ECMA, determines that upon the prior consent of the requested state, letters rogatory may be executed in the presence of authorities of the requested state (e.g. an examining magistrate or an investigating officer, but also interpreters and translators) (Article 4 ECMA).

To what extent are both options provided for in the new EU legal framework for mutual legal assistance, especially as this framework should be governed by the principle of mutual recognition? The framework decision on the European evidence warrant enables the issuing authorities to indicate formalities and procedures that should be complied with by the executing Member State (Article 12 EEW). As such, it demonstrates a partial shift to *forum regit actum* as well, in line with the traditional instruments on mutual legal assistance. Only if the application of the mentioned formalities and procedures would violate fundamental principles of the law of the executing state may their observance be refused. Furthermore, the indications may not concern additional coercive measures, which would be executed following the rules of the executing Member State (Article 12 last sentence EEW). However, the presence of representatives of the issuing state during the execution of an evidence warrant has not been mentioned. It means that after the implementation of the EEW into the Member States' national legislation, authorities of the issuing Member State are no longer able – whether passively or more or less actively[835] – to attend hearings or to inspect premises to be searched. This must be considered a drawback of the new framework. The big advantage of having the issuing authorities present is that they have best knowledge of the criminal case at stake and know best what to request and what to search for. It is not surprising that this option, as provided for in the ECMA, is often used in practice.[836] As a result of the fact that the execution

832 Convention of 29 May 2000.

833 Council of Europe Convention of 20 April 1959, second additional protocol of 8 November 2001. However, the protocol is of minor importance as a restricted number of states have ratified it, see http://conventions.coe.int, last assessed on 18 March 2009.

834 Van Daele has elaborated on this point in: D. van Daele, 'Mutual assistance between Belgium, France, Germany and the Netherlands: A comparative analysis of possibilities and difficulties', in: C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Leiden: Martinus Nijhoff Publishers, 2010, pp. 131-168. See also: D. van Daele, T. Spapens, and C. Fijnaut, *De strafrechtelijke rechtshulpverlening van België, Duitsland en Frankrijk aan Nederland*, Antwerpen/Oxford: Intersentia, 2008, pp. 113-120.

835 Van Daele, Spapens, and Fijnaut 2008, pp. 126-129.

836 Van Daele (2010), pp. 149-151.

of the investigative measures takes place in the attendance of authorities of the issuing state, it is obvious that the probative value of the evidence obtained can be determined in court more easily.

The unfortunate absence of a provision enabling the presence of issuing authorities is possibly temporary. The above-mentioned proposal for a European investigation order opens up new perspectives. Its draft text enables the issuing Member State to request that its authorities may assist in the execution of an EIO in support of the authorities of the executing Member State. Unless it would violate the fundamental principles of law of the executing Member State, such a request must in principle be complied with (Article 8(3) EIO). It is strongly recommended this article be included in the final text of the directive.

4.6. WHO PAYS THE BILL? MONEY ISSUES SHOULD NOT BE UNDERESTIMATED

Giving effect to judicial decisions involves several costs, such as for the primary necessities of life during confinement, for the hiring of interpreters and translators during criminal proceedings, for mental treatment, for rehabilitation programmes, and so on. The application of the principle of mutual recognition in the area of criminal law means that the respective Member States are in principle obliged to give legal force to any judicial decision handed down in the legal order of another EU Member State and to deal with that judicial decision as if it were handed down in the domestic legal order. It appears from the different framework decisions and directives, this includes the payment of costs related to the execution of the foreign judicial decision. As a result, the executing Member State has to pay any expenses arising on its own territory, for the execution of a foreign custodial sanction, a foreign pre-trial supervision measure, a foreign probation decision, a foreign arrest warrant or other judicial decisions handed down in another EU Member State.

The consequences of this can well be illustrated with the example of the framework decision on the European Enforcement Order. This instrument aims at the mutual recognition of judgments imposing a custodial sentence or a measure involving deprivation of liberty for the purpose of their enforcement in the home state of the convicted person. The draft version of this instrument proposed that the executing Member State should bear the costs of execution (Article 19 EEO).[837] During discussions in the Dutch Parliament, the money issue was constantly brought

[837] Initiative of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the European Enforcement Order and the transfer of sentenced persons between Member States of the European Union, OJ 15.06.2005, C 150/9.

up.[838] It appears from a 2008 report that the number of Dutch citizens confined in foreign prisons is high compared to citizens of other EU Member States. Most of them are convicted for drug-related crimes. In recent years, the number of Dutch persons in foreign detention has increased even further.[839] As a result, the framework decision at stake is excepted to have important financial consequences for the Dutch government, not only because of the number of persons eligible for transfer to the Netherlands, but also because of the severity of sanctions usually imposed for drug-related offences committed in other Member States. The Dutch government has nevertheless accepted the final version of the framework decision, according to which all costs, except those related to the transfer of the sentenced person, are to be borne by the executing Member State (Article 24 EEO).[840]

In the context of evidence gathering, some changes seem to be on the cards. The draft directive on the European investigation order contains a few specific provisions for certain investigative measures. Where a person held in custody needs to be temporarily transferred, either to the issuing Member State, or to the executing Member State in order to be able to execute the desired investigative measure, the draft directive proposes assigning the issuing Member State all costs related to the transfer (Article 19(9) draft EIO, Article 20(6) draft EIO). However, the executing Member State remains responsible for all other costs, including those arising from the detention of the person originally held in custody in the issuing Member State (Article 20(6) draft EIO). Where a person residing on the territory of the executing Member State needs to be heard by the issuing Member State by means of a video conference, it is explicitly determined that the latter has to refund to the former the costs related to the video link, the remuneration of interpreters, and allowances to witnesses and experts including travelling expenses (Article 21(8) draft EIO). It remains to be seen whether these proposals will be adopted.

In Switzerland and the USA, the money issue as described above is regulated very differently. In America, the party under whose auspices the judicial decision was handed down is in principle responsible for any costs that arise in the executing jurisdiction. Such has explicitly been determined in the legal instruments dealt with in this research. As to the Swiss federation, it is true that all costs made for the enforcement of judicial decisions handed down outside the domestic legal

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838 E.g: Letter from the Dutch Ministry of Justice to the parliamentary committee of the Dutch Senate for the Justice and Home Affairs Council, 12.08.2008, available at the following weblink: http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2008/08/12/kaderbesluit-strafvonnissen-waarbij-vrijheidsstraffen-of-tot-vrijheidsbeneming-strekkende-maatregelen-zijn-opgelegd.html (last accessed on 02.08.2010). See also: Letter from the Dutch Minister of Justice to the Dutch House of Representatives, 24.06.2006, Kamerstukken *II*, 2005/06, 23 490, nr. 420.

839 F. Miedema and S. Stoltz, *Vast(gelopen) in den vreemde. Een onderzoek naar het hoge aantal Nederlanders in buitenlandse detentie*, Nijmegen: ITS/Radboud Universiteit Nijmegen/WODC, 2008 (summary available in English).

840 Council Framework Decision 2008/909/JHA of 27 November 2008, OJ 05.12.2008, L 327/27.

order are in principle to be paid by the executing jurisdiction. However, several money-consuming activities are determined to be reimbursable with the jurisdiction. Here it is striking that the more close cooperation is, the more expenses can be reimbursed by the executing party. After all, the Penal Code addresses only scientific and technical reports to be paid by the requesting party, whereas the 1992 Concordat has added a list of other activities, namely the translation of documents, the use of interpreters, writs of summons, expert investigations, scientific activities and the transport of detainees. If a canton decides, pursuant to this concordat, to explore evidence-gathering activities on the territory of another canton, it has to pay all costs itself.

The question of who should pay what costs is a delicate, sensitive topic in the context of trans-border cooperation. This applies all the more in the field of criminal law. Criminal law is an area of law very closely related to politics, including financial politics. Financial choices made by governments might be difficult to explain to voters. In this perspective, who can blame authorities for being less than eager to take over the burden of another state, especially where support and help would imply a financial burden too? Is it not conceivable that governments are not willing to imprison persons convicted by another government, given that the imprisonment costs are indirectly paid through the people? Furthermore, in view of the workload of police forces and prosecutions services in many Member States, is it not obvious that governments do not want to burden them anymore, if they did not receive any financial compensation? It is true that these dilemmas and questions are of political nature. Obviously, politicians often feel they cannot ignore them. From a political point of view, it is important to create public support for legislative initiatives.

The following question arises: would Member States be more willing to accept and enforce a foreign judicial decision without applying intermediate checks and adaptation procedures if they would be financially compensated for any expenses arising during enforcement? It appears from the comparison with Switzerland and the USA, that the money issue is approached similarly in both federations, irrespective of whether the rules of criminal law and criminal procedure are divergent (USA), or to a large extent uniform (Switzerland). Furthermore, those instruments that in Switzerland aim for closer cooperation and more automatic enforcement of judicial decisions have broadened the list of reimbursable activities. I therefore would advance the thesis that the mutual recognition of judicial decisions in criminal matters in the EU will be facilitated if all costs related to the execution of the judicial decision were paid by the Member State in whose criminal justice system the judicial decision was handed down. In effect, this means mutual recognition in a weakened form: at least as to its financial facets, the foreign judicial decision is no longer dealt with as if it was handed down in the domestic legal order.

Translations and interpretation costs should surely be included. Under the intensified cooperation regime between the Swiss cantons, expenses for the translation of documents and the use of interpreters have *inter alia* been added to

the list of reimbursable expenses. This subject is of current interest in the European Union context. The Member States have initiated a proposal for a directive on the right to interpretation and translation in criminal proceedings, which has recently been adopted by the Council and the European Parliament.[841] This directive aims at the creation of common minimum rules that apply to all Member States equally, and exceeding the minimum level prescribed by the ECtHR.[842] It *inter alia* strives to provide a right to written translations of essential documents (Article 3); the possibility for oral translations or oral summaries to be sufficient is formulated as an exception to the general rule of written translations (Article 3(7)). Needless to say this may impose financial burdens on the Member States, in particular on those in which oral translations are sufficient.[843] For this reason, Member States favour oral translations and oral summaries of essential documents instead of written translations.[844]

Nonetheless, the directive strives for the creation of common minimum norms, being more protective than the current ECHR norms. Stronger protection is assumed to improve the application of the principle of mutual recognition. After all, the multitude of official languages in the European Union does not make things easier. Here, it may be emphasised that in comparison to Switzerland and the USA, the number of languages spoken in the European Union is extremely high, even more in view of its surface area. Following my statement that financial compensation for the executing authorities would facilitate the application of the mutual recognition principle, the issuing Member State should pay translation and interpretation costs. Referring to the Swiss and American examples, I believe that the creation of common standards as such is not a magic wand to serve mutual recognition. To an important extent, it also depends on who pays for giving effect to the common

841 OJ 18.03.2010, C69/1. This is the Member States initiative. There is also a proposal for a directive on the same subject initiated by the European Commission (COM(2010) 82 final). However, the provisional agreement reached in May 2010 was based on the Member States' submission. The text adopted has been published yet in OJ 26.10.2010, L 280/1.

842 To avoid language problems in the course of criminal proceedings or surrender procedures against foreign suspects or sentenced persons, it follows from Article 6 ECHR that interpretation and translation services must be provided. Such services may be provided orally, written translation of documents is not required, according to the European Court of Human Rights. See the cases of *Hermi* v. *Italy* (Grand Chamber), 18 October 2006, Application No. 18114/02 (par. 70), and *Protopapa* v. *Turkey*, 24 February 2009, Application No. 16084/09 (par. 80).

843 This is confirmed in an Impact Assessment made by the European Commission, Brussels, 08.07.2009, SEC(2009) 915.

844 See for instance the opinion of the Dutch government, explained in a letter from the Dutch Ministry of Justice of 28 May 2010, pp. 3-4, available at: http://www.eerstekamer.nl/eu/behandeling/20100528/brief_van_de_minister_van_justitie/f=/vifkls60s5jm.pdf (last accessed on 2 August, 2010). See also the opinion of the Austrian

standards. Unfortunately, the adopted directive assigns the executing Member State to pay the costs of interpretation and translation (Article 4).[845]

5. CONCLUDING REMARKS

The comparison between the European Union, Switzerland and the USA has resulted in the formulation of six lessons that need to be taken into account by European legislators regarding the further development of judicial cooperation in criminal matters between the EU Member States.

Initially, the comparison has predominantly focused on differences related to grounds for refusal, the double criminality requirement, the possibility of conversion of sanctions, the existence of common standards of criminal law and criminal procedure and the issue of coherent legislation in each of the three systems. After all, these issues have been identified as hindering elements in the process of implementing the principle of mutual recognition as to judicial decisions in criminal matters. However, in analysing the differences, some additional findings falling outside the scope of the issues mentioned have come up.

On the basis of the analysis made in this chapter, it can be concluded that pure mutual recognition is a utopia, even in long-existing systems such as Switzerland and the USA. It appears that close cooperation does not automatically exclude sovereignty-related considerations from playing a role in the executing jurisdiction, as long as the obligation of reciprocal cooperation and mutual loyalty are satisfied. There are different recommendable ways to comply with the idea of sincere cooperation in the European Union. A first relates to the high degree of overlapping jurisdictional powers in the horizontal relationships between the Member States combined with the developments towards an EU-wide and uniformly interpreted prohibition of multiple prosecutions and punishments. In view of this, mutual competition should be further discouraged by means of creating EU-wide rules on the determination of jurisdiction in individual cases.

A second way to promote compliance with the principle of sincere cooperation and the application of mutual recognition would include the development of an umbrella approach towards the possibility of conversion (*exequatur*) of sanctions as well as on which grounds for refusal should be listed throughout the entirety of mutual recognition instruments. In view of the negative impact incoherencies have on cooperation in practice, it has been argued that the existence of incoherencies does not fit in the EU context, in which the Member States are bound by the obligation of sincere cooperation.

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[845] See also the provisional agreement between the Council, the Commission and the Parliament on the text of the directive of May 2010.

In addition, the money issue needs to be reconsidered. It is obvious that Member States are not eager to take over the financial burden of another Member State, not to mention the financial burden of a criminal case. It should not be underestimated how mutual recognition would be facilitated by making the issuing Member State responsible for at least the most expensive aspects related to the execution of its own judicial decisions in another Member State.

Furthermore, regarding the execution of evidence warrants and investigation orders, it is recommended not to do away with traditional solutions enabling the authorities of the issuing jurisdiction to become involved in the actual gathering and obtaining of evidence on the territory of another Member State. Although violating the very idea of mutual recognition, the later stage of admitting such evidence in the courts of the issuing Member State justifies the use of traditional solutions.

In this framework, it has been argued that the positive effect of adopting minimum standards of criminal law and criminal procedure has not to be overestimated. In contrast to the facilitative impact of uniform rules, minimum rules will always be accompanied by divergences. In addition, in view of the limited competences provided for in the Lisbon Treaty to create common minimum norms, these will always affect relatively small parts of the national criminal justice systems, rather than harmonising its basic structures. As a result, the miracles resulting from the existence of uniform codes of criminal law or criminal procedure cannot be expected to follow from the adoption of minimum standards in the European Union.

EPILOGUE

Mutual recognition is never absolute, whether it is applied in the field of economic integration, or whether it functions in the field of civil or criminal law. In the *Cassis de Dijon* judgment, the ECJ not only introduced the obligation for Member States to guarantee the unhindered access of goods coming from any other Member State, it also provided the Member States with a tool to balance the requirements of the internal market and the needs of general interests, such as public health, by means of the rule of reason.

However, an important difference between mutual recognition in the internal market, compared to mutual recognition as to judicial decisions, concerns the requirement of compliance with the rules and procedures of the Member State of origin. After all, whereas mutual recognition as to, for instance, goods means the acceptance of foreign goods produced and marketed *in accordance to the regulations and procedures of another Member State*, as if these foreign goods were national goods. The italicised phrase emphasises a condition for mutual recognition not being required regarding the mutual recognition of judgments in civil, commercial, and criminal affairs; the Member State in which recognition is sought of a judicial decision is not in its decision bound by the obligation to only recognise judicial decisions the delivering of which complies with the national rules of civil or criminal procedure of a Member State.

Equivalence (or: compatibility) is presumed to exist either between the quality standards, or the civil law systems, or the criminal law systems of the different EU Member States. Were, however, this presumption to prove unjustified, a way out is not provided for in the field of criminal law, in contrast to the other fields of competence. The exceptions provided for in the internal market are applicable just in those cases where equivalence between the national standards of the Member States involved would appear to be lacking. Then, the rule of reason may be invoked, or the public policy exception may serve as the final way out. A public policy exception has also been provided for regarding several kinds of judicial decisions in civil or commercial matters, namely in those cases where the level of comparability between the domestic legal standards and the legal standards of the delivering Member State are considered to be insufficient.

Such a solution has not been provided for in the field of criminal law. Equivalence between the Member States' national criminal justice systems is presumed to exist, mainly for the reason that all Member States have acceded to the European Convention on Human Rights. The Member States have not been left to think differently as to this point; such may not obstruct the free movement of judicial decisions in criminal matters. This applies while in this field of law the variations between the Member States' rules of criminal law and criminal procedure are enormous and, also, frequently touch upon fundamental issues. This obviously relates to the multitude of legal traditions available in the several Member States, which in turn connects to the existing socio-cultural differences.

The variations between the EU Member States are much bigger than between the Swiss cantons or between the American states. The existing criminal justice systems in both federal countries are more homogeneous in relation to each other than are the criminal justice systems of the EU Member States. Given the size of the EU territory, the degree of variations is huge in comparison to the Swiss and American federations. In this context, it should be mentioned that in the European Union, the practice of cooperation across internal borders is made yet harder, particularly in view of its relatively small surface area, by its 23 official languages. After all, in a small country such as Switzerland it is already surprising that four languages have an official status, whereas in the USA, being one of the biggest country of the world, the majority of the people speak the same language.

The comparison with federal countries has shown that mutual recognition is not a guarantee for close and automatic cooperation, even in federations in which the various criminal justice systems are relatively homogeneous. In the federal countries to which the European Union has been compared, the mutual acceptance of judicial decisions handed down in another jurisdiction is characterised by either full equivalence – in the sense of uniformity – or by not requiring or supposing equivalence at all. As to the first category, an important feature of the Swiss situation regards the existence of a uniform penal code and the entry into force in due course of a uniform code of criminal procedure. As was shown, the existence of uniform definitions of criminal offences and of criminal sanctions has facilitated the inter-jurisdictional enforcement of judicial decisions. And, the future application of uniform provisions of procedural criminal law are likewise facilitating.

However, full equivalence between the various criminal justice systems has not automatically resulted in the full application of pure mutual recognition. On the contrary, the subsequent steps towards closer cooperation between the federal and cantonal authorities of the Swiss federation have been accompanied by two other elements: first, the possibility for authorities of the issuing state to become actively involved in the execution of domestic judicial decisions concerning evidence-gathering (e.g. the search of premises) have been enhanced, and, secondly, it appears that the closer cooperation has to be, the greater the expense incurred by

the issuing jurisdiction itself. Both elements mentioned here contravene the idea of pure mutual recognition, but simultaneously are regarded as tools to improve the actual enforcement of judicial decisions handed down in another jurisdiction. As such, they can be seen as counterbalancing the movement towards closer and more obligatory cooperation in criminal affairs.

It appears that the American system is not based on the presumption of equivalence regarding the inter-jurisdictional acceptance and enforcement of judicial decisions in criminal matters. An overview has been given of the variety of legal instruments providing for possibilities to take over the enforcement of a judicial decision handed down in another jurisdiction of the country. Together, these instruments contain a fragmentary set of options, either obligatory or non-obligatory, either applying to all jurisdictions or to a selection. It has been concluded that the US jurisdictions remain discretionary to a very large extent, with the only exception being interstate extradition; based on a constitutional clause, the states are almost fully obliged to comply with an extradition request from another state.

The absence of equivalence between the criminal justice systems of the US jurisdictions as well as the absence of presumed equivalence, and the fact that equivalence is not regarded necessary relates to a strong emphasis on sovereignty regarding matters of criminal law. Mutual competition is even encouraged by the fact that federal and state jurisdictional powers overlap to a very large extent. Criminal offences are almost always punishable under the criminal law of both the federal government and at least one state government.

Within the European Union, the jurisdictional powers of the various Member States largely overlap as well, mainly resulting from an extensive interpretation of the traditional territoriality principle in many Member States. In the absence of a Union-wide mechanism to determine the jurisdiction to prosecute in individual cases, competition between the Member States is encouraged. It has been argued that this violates the very principle of sincere cooperation as laid down in the Lisbon Treaty. After all, the Member States of the European Union are obliged to support each other in carrying out the tasks following from the Lisbon Treaty. In view of the developments towards a Union-wide *ne bis in idem* principle, the creation of a Union-wide instrument on the determination of jurisdiction has been strongly recommended.

As in the European Union, the area of cooperation in criminal affairs in Switzerland is also characterised by the cooperative approach. As was mentioned, the Swiss government has taken enormous and successful steps into the direction of uniform provisions of criminal law and criminal procedure. However, given that uniformity is an unrealistic goal in the European Union context – harmonisation is always minimum harmonisation – the high expectations from common minimum standards of substantive and procedural criminal law must be tempered. The clear advantages of uniform rules will not automatically be copied as soon as more minimum standards are adopted in the EU context. Given that a minimum

level of common norms is the highest achievable goal, much also depends on the willingness of the Member States to cooperate and assist each other in daily practice.

In this respect, it is quite a drawback that in most situations of obliged mutual recognition, the bill must be paid by the executing Member State. Furthermore, though in line with the very idea of mutual recognition, this is a situation likely to result in the levelling down of procedural rights for suspects and vulnerable groups of people. Can we expect a Member State to pay highly expensive interpreters and translators for a suspect in a criminal case initiated by another Member State? Can we expect a Member State to hire at its own costs special agencies in order to hear children or mentally disabled persons if that Member State has zero interest in prosecuting the case? One might answer in the affirmative. But then, one should not underestimate the likeliness that in such situations the executing Member State having to pay for the desires of another Member State, may easily cut corners. As such, in view of smooth cooperation and good relationships between the Member States, it has been argued that another division of costs, in the sense that at least the highest costs are in principle paid by the issuing Member State, would serve the application of mutual recognition.

Following the same line of reasoning, the most recent proposals aiming at the mutual recognition of investigation orders and evidence warrants that mention enhanced possibilities for the issuing authorities to become involved in the actual gathering of evidence on the territory of another Member State deserves strong support. Although contravening the very idea of mutual recognition, the traditional instruments as well as the Swiss example have shown the importance of this in view of the ultimate use of evidence gathered abroad in the courts of the issuing Member State.

Mutual recognition cannot be absolute. Though it may work quite well as a leading principle, it must be applied in a flexible manner, in order to comply with the very goals of the Lisbon Treaty and the duty of sincere cooperation.

SUMMARY

INTRODUCTION

This study focuses on the principle of mutual recognition of judicial decisions in criminal matters in the European Union. It is based on the following central question:

> How should the principle of mutual recognition of judicial decisions in criminal matters be defined and interpreted and how should this principle be applied in the future?

It appears from this question that the purpose of this study is twofold. For that reason, this book is divided into different parts. Whereas the first part aims at defining and interpreting the principle of mutual recognition in the field of criminal law, the purpose of the second part is to examine the usefulness of mutual recognition in facilitating judicial cooperation in criminal matters between the Member States of the European Union. The parts are connected by a transitional part.

PART I. DEFINING MUTUAL RECOGNITION IN THE EUROPEAN UNION: BETWEEN COMMUNITY LAW AND UNION LAW

In the first part of this book, a comparison is made between mutual recognition in the field of criminal law on the one hand, and mutual recognition in the internal market and the field of civil and commercial law on the other hand. The aim of this part is to create a clear definition of mutual recognition in the context of criminal law. It appears that mutual recognition can be defined in differing ways: either with the focus on the consequences of recognition (consequential meaning), or on the specific subject of recognition (methodical meaning).

Chapter 1 starts with a description of the origins of the principle of mutual recognition in the context of the free movement of goods. In 1979, the Court of

Justice of the European Union (ECJ) decided that Germany was not allowed to refuse the import of the French liqueur Cassis de Dijon for the reason of a too low alcohol percentage; such a refusal would hinder the free movement of goods. Rather, goods that are produced and marketed in accordance with the regulations and procedures of one Member State of the European Union must in principle be admitted on the market of any other Member State, irrespective of whether the foreign regulations and procedures differ from domestic regulations and procedures. This idea is commonly referred to as the principle of mutual recognition. Gradually, this principle has also been applied to the other internal market freedoms, namely the free movement of persons, services, and capital. After all, to complete the internal market, restricting the exercise of these other freedoms is in principle prohibited too. In this context, several legislative instruments have been adopted, for instance on the recognition of diplomas and professional qualifications, on the recognition of companies and on the recognition of driving licences.

Focusing on the consequences in the internal market, mutual recognition is defined as the acceptance of foreign products, services, professional qualifications, companies and firms, driving licences, and so on, originated, manufactured, marketed, formed or issued in accordance to the regulations and procedures of another Member State, although these may differ from the domestic regulations and procedures, as if these were national products, services, professional qualifications, companies and firms, driving licences, and so on.

This definition differs from the consequential definition of mutual recognition in the field of civil and commercial law; after all, the principle of mutual recognition has also been made applicable to judicial decisions handed down in the course of civil and commercial matters. Several legislative instruments in this field of law have been adopted, relating to, *inter alia*, matters of divorce, marriage annulment, insolvency issues or uncontested pecuniary claims. It appears in this context that mutual recognition implies the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State as if these judicial decisions were delivered in the domestic legal order, even though they could never have been so delivered. Here, in comparison to the internal market, mutual recognition will often include enforcement. In addition, whereas in the context of the internal market, mutual recognition is made conditional upon the requirement that, for instance, foreign goods are originated and manufactured "in accordance to the regulations and procedures of another Member State", judicial decisions in civil and commercial matters are rather to be recognised irrespective of whether the judicial decision at issue could have been delivered in the national legal order of the executing Member State.

On a level other than the mere consequences of mutual recognition, the principle has also been defined while focusing on the specific subject of recognition. This methodical meaning can be subdivided in so-called "substantive law recognition" and "procedural law recognition". Procedural law recognition is the mode of

recognition that relates to documents with legal force. The document, for example a judgment of a court, together with its legal force forms the subject of recognition; the judgment will be taken over and enforced. In contrast, substantive law recognition is the mode of recognition that relates to the mere application of foreign justice in the domestic legal order. A legal fact originating from foreign law (e.g. a legal status) is attached legal effects domestically; ultimately, the legal fact in question is the subject of recognition.

In the internal market as well as concerning judicial decisions in civil and commercial affairs, mutual recognition has various methodical meanings: the subject of recognition may concern substantive law elements as well as procedural law elements. Procedural law recognition is the main recognition method in the field of civil and commercial law, given that it predominantly concerns judgments, being documents with legal force, being recognised. However, procedural law recognition occurs in the internal market as well, particularly in the fields of driving licences and professional qualifications. Substantive law recognition is the main mode of recognition in the internal market trade of goods; it generally concerns quality or technical standards that have to be recognised in order to accept foreign goods on the national market. In addition, in the field of civil law, substantive law recognition occurs as to the civil status of persons; then, the legal fact of a certain civil status (e.g. being married) is the subject of recognition.

As from 1999, the principle of mutual recognition was transferred from the above-mentioned fields of EU competence – in the pre-Lisbon era these fields were governed by the supranational First Pillar of Community law – to the area of criminal law – regulated under the erstwhile intergovernmental Third Pillar. **Chapter 2** examines how to define mutual recognition in this specific field of competence. Here, the question has arisen of how to characterise the relationship between the various fields of EU competence in the light of the then existing institutional structure of the European Union; although it is true that since the entry into force of the Lisbon Treaty, this pillar structure belongs to the past, the analogy or dissimilarity between the several fields of EU competence needs to be further explored in order to fully understand today the backgrounds of mutual recognition in the erstwhile Third Pillar, and to be able to formulate the meaning of the principle in the field of criminal law.

The key outcome of this examination is that the introduction and implementation of mutual recognition on judicial decisions in criminal affairs serves the development of the area of freedom, security and justice, as envisaged in EU law. Indirectly, developing this area contributes to the very fundamental goals of the European Union. There is a close connection between the area of freedom, security and justice on the one hand and the internal market area without internal borders on the other hand; the latter area includes the former area.

As a result, to define the principle of mutual recognition in the context of criminal matters, inspiration is provided in the other fields of EU competence. Focusing on

its consequences, mutual recognition has the same meaning as in the context of civil law. After all, both fields of law are characterised in that mutual recognition may include the enforcement of the foreign judicial decision, and without it being required that the foreign judicial decision has been delivered in accordance with the procedural rules of the issuing Member State. Therefore, the consequential meaning of mutual recognition of judicial decisions in criminal matters is the acceptance and, where necessary, the enforcement of judicial decisions delivered in another Member State, as if these judicial decisions were delivered in the domestic legal order, even though they could never have been so delivered.

The methodical meaning of recognition in the field of criminal matters is mainly procedural law recognition. In most situations, the executing Member State will receive from the issuing Member State a certificate accompanied by the underlying judicial decision. This certificate, being a document with legal force, is the subject to be recognised by the executing Member State. Only where mutual recognition addresses the consequences of earlier foreign convictions in the course of new criminal proceedings does mutual recognition mean substantive law recognition. Then, the subject of recognition is the mere existence of a previous conviction, being a legal fact to be applied in the legal order of another Member State.

The fact remains, however, that the special character of criminal law in comparison to economic trade, free movement of persons, or civil and commercial law justifies the need for an external approach regarding the functioning of the principle in practice. This special character mainly relates to the fact that mutual recognition of judicial decisions in criminal matters predominantly brings restrictive effects for the individual, even though benefits may be included too. These restrictions may even result in the deprivation of freedoms and liberty. For that reason, it has been argued that mutual recognition in the context of criminal cases needs a higher degree of mutual confidence, although at the same time it is harder to strengthen the level of trust. It is assumed that this results in several criminal law-related obstacles that hinder the implementation of mutual recognition in the field of criminal law (Transitional Part). As to such issues, how the Swiss federation and the American federation approach the inter-jurisdictional acceptance and enforcement of judicial decisions in criminal matters will be examined (Part II).

TRANSITIONAL PART. THE IMPLEMENTATION PROCESS OF THE PRINCIPLE OF MUTUAL RECOGNITION IN THE FIELD OF CRIMINAL LAW: THE IDENTIFICATION OF OBSTACLES AND BOTTLENECKS

This part of the book contains one chapter, **Chapter 3**. It provides a bridge between the first and the second parts. Its main purpose is to conclude what matters have a

hindering effect on the implementation and application of the principle of mutual recognition in the field of criminal law. To that end, it starts with an overview of the different framework decisions and (draft) directives implementing the principle of mutual recognition on judicial decisions in criminal matters. It appears that the principle of mutual recognition currently applies to custodial sanctions, financial penalties, probation measures, alternative sanctions, confiscation orders, arrest warrants, certain evidence warrants, pre-trial supervision measures and, finally, the existence of previous convictions for the purpose of taking them into account in the course of new criminal proceedings. In addition, efforts are made to cover all evidence warrants, and also to apply the mutual recognition principle to protection orders.

Subsequently, to measure the scope of mutual recognition and to identify the dominant obstacles and bottlenecks that hinder the functioning of the principle of mutual recognition in matters of criminal law in the European Union, all these framework decisions and (draft) directives are assessed in the light of seven parameters. These parameters address the most characteristic requirements of working together effectively on the basis of mutual recognition: (1) the seriousness or "trans-borderness" of the underlying offence; (2) the requirement of double criminality; (3) specific arrangements for third parties, victims, and suspects to safeguard their rights in the context of mutual recognition proceedings; (4) common minimum standards to facilitate the mutual recognition of judicial decisions; (5) direct or indirect enforcement of foreign judicial decisions; (6) grounds to refuse recognition of foreign judicial decisions; and (7) liability arrangements in the event of acquittal.

This assessment gives an overview of the progress towards full application of the recognition principle in the field of criminal law; as such, it identifies what matters in particular still have a hindering effect on the process towards enhanced mutual recognition in criminal matters. These matters are listed below:

1. the very existence of grounds for refusal and the incoherent approach towards grounds for refusal as reflected in the entirety of mutual recognition instruments;
2. the failure to abolish or substantially limit the requirement of double criminality along the line;
3. the failure to fully do away with the *exequatur* procedure;
4. the struggle to create a comprehensive set of minimum common standards, especially concerning procedural rights;
5. the *ne bis in idem* provisions of the mutual recognition instruments and the simultaneous developments towards a uniform guarantee against double prosecution for the same offence.

PART II. MUTUAL RECOGNITION IN THE FEDERATIONS OF SWITZERLAND AND THE UNITED STATES OF AMERICA: LESSONS FOR THE EUROPEAN UNION

The second part of the book investigates how the obstacles identified in Chapter 3 are dealt with in the context of recognition and enforcement of judicial decisions between the Swiss jurisdictions as well as between the American jurisdictions. The aim of this part is to find out what lessons the Swiss and American examples can bring for the future of mutual recognition within the European Union context. The instruments that exist in both federations are assessed in the light of the seven EU parameters.

Chapter 4 describes the possibilities in the Swiss federation as to recognition and enforcement of judicial decisions in criminal matters handed down in another (federal or cantonal) jurisdiction of the country. As a general rule, any judicial decision handed down in the domestic legal order of the *Bund* or one of the cantons has legal force throughout the entire territory of the country. All jurisdictions of the country are obliged to comply with this state of things; after all, the different members of the Swiss federation are constitutionally obliged to work together and to support each other in order to contribute to the fulfilment of the national or cantonal obligations and purposes. Only under very limited circumstances are the requested authorities allowed to decline compliance with the incoming request.

The basic set of rules enabling the mutual acceptance and enforcement of each other's judicial decisions, laid down in the uniform Penal Code, follows the principle that the measures taken in order to comply with the request must follow the procedural rules of the executing jurisdiction (*locus regit actum*). Only within the context of inter-cantonal mutual legal assistance for the purpose of obtaining evidence are the authorities of an initiating canton allowed to follow their own domestic rules of criminal procedures on the territory of a host canton without its permission required (regime of direct intervention, regulated in the 1992 inter-cantonal Concordat).

The Swiss situation is assessed in the light of the seven EU parameters. In summary, a main finding is money-related. In the Swiss federation, incurred costs for the enforcement of judicial decisions handed down outside the domestic legal order are in principle paid by the executing jurisdiction. However, expenses incurred for technical and scientific reports, the translation of documents, the use of interpreters, writs of summons, expert investigations, scientific activities and the transports of detainees have to be taken care of by the requesting party. Moreover, where a certain canton decides, pursuant to the 1992 Concordat, to carry out evidence-gathering activities on the territory of another canton, all costs are for the leading canton. In fact, this means that the most costly activities are reimbursable to the initiating jurisdiction.

Another main finding relates to the existence of shared rules. In Switzerland, substantive criminal law has been unified as from 1942; the same Penal Code applies to all cantons and the *Bund* equally. Also, most complications related to the law of criminal procedure will be solved as from 2011, when the uniform Code of Criminal Procedure will enter into force.

Chapter 5 describes the possibilities in the American federation as to recognition and enforcement of judicial decisions in criminal matters handed down in another (federal or state) jurisdiction of the country. It appears that extradition requests issued by the federal government or one of the 50 states must be complied with by the authorities of the requested jurisdiction; the US Constitution provides a mandatory duty to extradite fugitives from justice upon demand. With regard to other judicial decisions and judgments handed down in any stage of criminal proceedings, no constitutional duties exist. The mutual possibilities have been laid down in either interstate compacts, or uniform laws, or have fully remained at the discretion of the respective jurisdiction; these legal instruments rather create possibilities instead of mutual obligations, sometimes applying between the states and the federal government, sometimes applying in the interstate relationships only. The different instruments inter alia concern the transfer of prisoners, the transfer of supervision measures imposed on adult offenders and the rendition of witnesses.

As a result, the American example shows a quite fragmented set of legal instruments and possibilities, without providing an umbrella idea, view or principle concerning when and how to give legal force to a judicial decision handed down by a judicial authority of another US jurisdiction. As a consequence, almost all issues borrowed from the European Union parameters are also approached in a very fragmentary way. Throughout the several tools, variations occur as to the specific arrangements provided for suspects as well as to the number and nature of possibilities for refusal. Furthermore, whereas some instruments contain specific arrangements for suspects, third parties and victims, other instruments do not. Some instruments do not mention the possibility of refusing the enforcement of the out-of-jurisdiction judicial decision, while other instruments explicitly do so, for instance by means of requiring the mandatory fulfilment of certain conditions and paperwork. And, whereas the double criminality requirement has been clearly prohibited by the US Supreme Court from playing a role in the context of extradition, the issue has not been addressed in the frameworks of the other legal instruments.

The issue of costs, however, is approached very comprehensively in the various legal instruments. All legal instruments contain provisions on who should bear the costs for the execution of a judicial decision handed down outside the territory of the executing party. All these provisions have designated the same party as being responsible for the financial part of the deal, namely the party under whose auspices the judicial decision was handed down. As a result, the jurisdiction that enforces a "foreign" judicial decision need not, in principle, pay the costs necessary to enforce

the judicial decision, such as transport costs, food, rehabilitation programmes, and so on.

There are two kinds of judicial decisions within the European Union governed by the principle of mutual recognition that within the American federation are, nonetheless, not covered by the above-mentioned legal instruments. The first concerns evidence decisions. The question of whether evidence gathered on the territory of another jurisdiction, or under the responsibility of another jurisdiction, should be allowed in domestic courts is primarily a matter of state law. Only if evidence appears to be seized in violation of the constitutional guarantee against unreasonable search and seizure are courts obliged to exclude it. Secondly, neither is there an interstate or nationwide agreement on how to deal with the existence of previous convictions handed down by a criminal judge of US jurisdiction. Whether such prior convictions are taken into account in the course of new criminal proceedings, for instance for the aim of applying recidivist provisions, differs from state to state and the federal government.

Within the American federation, all states and the federal government have their own rules of criminal law and criminal procedure. Although efforts have been made to achieve a certain level of common norms, there are many divergences between the different criminal justice systems. These differences relate to both minor and fundamental issues.

Having studied the mutual acceptance and enforcement of extraterritorial judicial decisions in criminal matters within the Swiss and American federation, and having examined how these federations deal with the bottlenecks in mutual recognition between European Union Member States, the question arises as to what lessons can be drawn for the future of mutual recognition in the European Union. The purpose of **Chapter 6** is to derive such lessons from the Swiss and American examples. To that end, this chapter starts with the different approaches set side by side, followed by an explanation and evaluation of these differences. As to the Swiss example, its value for the EU context specifically lies in that both Switzerland and the EU share a cooperative approach towards cooperation in criminal affairs. The American example is worth comparing with the EU as well, despite the fact that the rationale behind the American approach contravenes the cooperative approach of the European Union. The value of the American example predominantly relates to the large degree of overlapping federal and state jurisdictional powers, without the existence of a nationwide regulation on which jurisdiction is entitled to prosecute a crime in an individual case, in relation to the strong emphasis on federal and state autonomy and the competitive relationships between federal-state, state-state and federal-federal law enforcement authorities.

On the basis of the analysis made in this chapter, it can be concluded that pure mutual recognition is a utopia, even in long-standing systems such as Switzerland and the USA. It appears that close cooperation does not automatically exclude sovereignty-related considerations from playing a role in the executing jurisdiction,

as long as the obligation of reciprocal cooperation and mutual loyalty is satisfied. There are different recommended ways to comply with the idea of sincere cooperation in the European Union. A first one relates to the high degree of overlapping jurisdictional powers in the horizontal relationships between the Member States combined with the developments towards an EU-wide and uniformly interpreted prohibition of multiple prosecutions and punishments. In view of this, mutual competition should be further discouraged by means of creating EU-wide rules on the determination of jurisdiction in individual cases.

A second way to promote compliance with the principle of sincere cooperation and the application of mutual recognition would include the development of an umbrella approach to the possibility of conversion (*exequatur*) of sanctions as well as on which grounds for refusal should be listed throughout the entirety of mutual recognition instruments. In view of the negative impact incoherencies have on cooperation in practice, it is argued that the existence of incoherencies does not fit in the EU context, in which the Member States are bound by the obligation of sincere cooperation.

In addition, the money issue needs to be reconsidered. It is obvious that Member States are not eager to take over the financial burden of another Member State, not to mention the financial burden of a criminal case. It should not be underestimated how mutual recognition would be facilitated by making the issuing Member State responsible for at least the most costly expenses related to the execution of its own judicial decisions in another Member State.

Furthermore, regarding the execution of evidence warrants and investigation orders, it is recommended not to do away with traditional solutions enabling the authorities of the issuing jurisdiction to become involved in the actual gathering and obtaining of evidence on the territory of another Member State. Although in violation with the very idea of mutual recognition, the later stage of admitting such evidence in the courts of the issuing Member State justifies the use of traditional solutions.

In this framework, it has been argued that the positive effect of adopting minimum standards of criminal law and criminal procedure has not to be overestimated. In contrast to the facilitative impact of uniform rules, minimum rules will always be accompanied by divergences. In view of the limited competences provided in the Lisbon Treaty to create common minimum norms, these will always affect relatively small parts of the national criminal justice systems, rather than harmonising its basic structures. As a result, the miracles resulting from the existence of uniform codes of criminal law or criminal procedure cannot be expected to follow from the adoption of minimum standards in the European Union.

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