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Some Reflections on The Mutual Recognition as a Mode of Governance in EU Justice and Home Affairs

ABSTRACT *- The introduction of the principle of mutual recognition in EU Justice and Home Affairs co-operation has been associated with a "revolution" in internal security co-operation and has raised as many expectations as concerns. This article aims at analyzing the origins of this principle of mutual recognition. This will be done in the context of the European cooperation in criminal matters and the project of a European criminal law.*

1. The aim of my paper is to analyze the potential of mutual recognition as a governance mode in EU Justice and Home Affairs. In the first part, I will introduce the principle of mutual recognition from historical perspective. In the second part, I will conduct a theoretical analysis about mutual recognition as a general concept of the EU law, the difference between traditional cooperation and mutual recognition and conditions of mutual recognition.

2. The European Union acquired its first modest competences in criminal matters as a result of the Maastricht Treaty (1992) but only the Treaty of Amsterdam on the European Union (EU), which came into force on May 1st, 1999, states that the EU must be maintained and developed 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[1].

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1 For an survery of the evolution in the development of instruments of mutual legal assistance in criminal matters between the member states of the EC, from until the TEU, see R. de Gouttes: De l'espace judiciaire européen à l'epace judiciaire penal paneuropéen, in Mélanges offerts à Georges Levasseur. Droit penal, droit européen, Paris 1992, p. 3-22; W. Perron: Perspective of the Harmonization of Criminal Law and Criminal Procedure in the

One year earlier, in June 1998, the Cardiff European Council recognized the need to enhance the ability of national legal systems to work more closely together in criminal, as well as civil matters and asked the European to identify the scope for greater mutual recognition of judicial decisions. This concept was officially launched during the EU presidency at lunch by the Home Secretary Mr Jack Straw. It is worth to mention that one of UK officials described the principle of mutual recognition as an action where "decisions taken in one member state should be accepted as valid in any other member state and put into effect on a reciprocal basis". Moreover, the UK - one of the countries pressing hardest for mutual recognition - suggests that the approach is based on "tolerance of diversity on the basis of mutual confidence and trust in each others' legal systems, as opposed to insistence of uniformity for its". It is clear that the UE did not think much about harmonization because in the EU Presidency document from 1998 we read: "In this context, a possible approach, comparable to that used to unblock the single market, would be to move away from attempts to achieve detailed harmonisation to regime where each Member State recognised as valid the decision of another Member State's Courts in the criminal area with the minimum of formality"[2]. That was only the beginning. In the first Action Plan, adopted by the European Council on December 3rd, 1998, the Council was asked to initiate a process with a view to facilitate mutual recognition of decisions and enforcement of judgments in criminal matters.

After the Amsterdam Treaty entered into force, police and judicial cooperation in criminal matters remained in the intergovernmental, third-pillar domain, and thus was not covered by the European Community legislation manners. The adoption of major legal measures in these policy areas, such as common positions, framework decisions, decisions taken by the Council and conventions, continues to be by unanimous vote, on the initiative of the member states and the Commission. Especially,

European Union, in E. J. Husabø, A. Strandbakken (eds.): Harmonization of criminal law in Europe, Antwerpen – Oxford 2005, p. 5-13; H. Satzger: Die Europäisierung Stafrecht, p. 210-653; B. Hecker: Europäisches Strafrecht, Berlin, Heidelberg, New York 2007, p. 3-26, 119-364; H. Satzger: Internationales und Europäisches Strafrecht, Nomos Verlagsgesellschaft: Baden-Baden 2008, passim; A. Eser: Wege und Hürden transnationaler Strafrechtspflege in Europa, in Bundeskriminalamt Wiesbaden (Hrsg.), Verbrechensbekämpfung in europäischer Dimension, Wiesbaden 1992, p. 21-53; K. Tiedemann: EG und EU als Rechtsquellen des Strafrechts, in Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, Berlin-New York 2001, p. 1401-1413; S. 1401, 1406; K. Tiedemann: Europäisches Gemeinschaftsrecht und Strafrecht, NJW 1993, 23; T. Weigend: Strafrecht durch internationale Vereinbarungen, ZStW 1993, p. 774; H. Jung: Strafverteigung in Europa, Strafverteidiger 1990, Nr 11, s. 509; M. Jimeno-Bulnes: European Judicial Cooperation in Criminal Matters, European Law Journal 2003, Vol. 9, p. 620; J.A.E. Vervaele: European Criminal Law and General Principles of Union Law, Research Papers in Law 2005, nr 5, p. 1-3; A. Klip: Harmonisierung des Strafrechts – eine Fixe Idee, Neue Zeitschrift für Strafrecht 2000, p. 626-630; A. Klip, H. Van der Wilt (eds.): Harmonisation and Harmonising Measures in Criminal Law, Amsterdam 2003, passim.; M Delmas-Marty: Global Crime Calls for Global Justice, European Journal of Crime and Criminal Justice 2002, p. 286; B. Huber (Hrsg.), Das Corpus Juris als Grundlage eines Europäischen Strafrechts, Freiburg 2000, passim; U. Sieber: Zu einem Europäischen Modellstrafgesetzbuch losgelöst vom Corpus Juris, Juristen Zeitung 1997, p. 369;

2 H. G. Nilsson: Mutual trust or mutual mistrust?, in La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area, eds. G. de Kerchove, A. Weyembergh, Bruxelles 2005, p. 30.

the new tool - framework decision - is an instrument shaped after the first pillar's directive. Similar to the directive, it is binding upon the Member States as to the result to be achieved, but leaves the choice of form and method to the national authorities. But other than directives, framework decisions are expressly stipulated to not entail direct effect.

On October 15-16th, 1999 in Tampere, the European Council held a special meeting on the creation of an area of freedom, security and justice in the European Union, which led down official strategy paper on the prevention and control of organization crime for the new millennium. This paper contains some points about mutual recognition. In point 33 we read that "Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities". Further, in point 35 the European Council declares that "the formal extradition procedure should be abolished among the Member States as far as persons are concerned who are fleeing from justice after having been finally sentenced, and replaced by a simple transfer of such persons, in compliance with Article 6 TEU. Consideration should also be given to fast track extradition procedures, without prejudice to the principle of fair trial. The European Council invites the Commission to make proposals on this matter in the light of the Schengen Implementing Agreement" and that "the principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there".

The European heads of state decided to make mutual recognition the "cornerstone" of judicial cooperation since they could not agree on harmonization measures. However, abolishing the territoriality principle in favor of mutual recognition reflects "a genuine paradigm shift" in judicial cooperation between member states[3] or even a "revolution"[4]. Mutual recognition was also considered (during the seminar

3 S. Peers: Mutual recognition and criminal law in the European Union: Has the Council got it wrong?, Common Market Law Review 2004, Vol. 41, Nr 5, p. 919.

4 N. Wichmann: The Participation of the Schengen Associates: Inside or Outside?, European Foreign Affairs Review 2006, Vol. 11, p. 94-96.

on mutual recognition which was held on March 29-30th, 2001 in the Castle) to be a "breakthrough", something "innovating" or Copernicus revolution[5].

3. Five years after the European Council's meeting in Tampere, the European Council adopted a new multi-annual programme to be known as the Hague Programme which set the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010. This new programme takes into account the final evaluation made by the Commission on the Tampere programme. In which we read that the objective of the programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies[6].

The European Council considers that the common project of strengthening the area of freedom, security and justice is vital to securing safe communities, mutual trust and the rule of law throughout the Union. Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole. An optimal level of protection of the area of freedom, security and justice requires multidisciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards. The European Council underlines the need further to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European Area for Justice will play in this respect. A number of measures have already been carried out. Further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition. It is of particular importance that borders between countries in Europe no longer constitute an obstacle to the settlement

5 H. G. Nilsson: Mutual Trust and Mutual recognition of our differences, in G. de Kerchove, A. Weyembergh (eds.): La reconnaissance mutuelle des décisions judiciaires pénales dans l'Union européenne, Bruxelles, 2001, p. 155.

6 The Hague Programme: Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice, Brussels, 10 May 2005 COM(2005)184 final, p. 8.

of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality. In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established. Strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. In this regard, networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, should be supported by the Union. Exchange programmes for judicial authorities will facilitate cooperation and help develop mutual trust. An EU component should be systematically included in the training of judicial authorities.

The European Council recalls that the comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle as well as the execution of final sentences of imprisonment or other (alternative) sanctions should be completed and further attention should be given to additional proposals in that context.

4. The principle of mutual recognition was also highlighted as the basic principle cooperation in the Treaty establishing a Constitution for Europe. Article III-270 says that judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States. European laws or framework laws shall establish measures to: (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; (b) prevent and settle conflicts of jurisdiction between Member States; (c) support the training of the judiciary and judicial staff; (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to

proceedings in criminal matters and the enforcement of decisions. In addition, 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, European framework laws may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a European decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Until today some framework decisions based on the principle of mutual recognition have been adopted, e.g. framework decisions on European Arrest Warrant, framework decisions on taking orders freezing property or evidence, framework decisions on the application of the mutual recognition for financial penalties and framework decisions on mutual recognition as regards confiscation orders. There are also some different proposals on the table within the existing framework, especially the framework decision on ne bis in idem, the framework decision on mutual recognition of decision on disqualifications, and the framework decision on the European Evidence Warrant. This last proposal is interesting since it gives a clear indication of an intention to exchange the traditional regime of mutual assistance within the EU by single body of law based on the principle of mutual recognition.

5. Having given this general background and in order to keep the article within acceptable limits, I will now give some comments on the principle of mutual recognition. First of all, I want to state that the principle of mutual recognition is not a new concept but it was taken from the first pillar, where it had been developed to enhance fundamental freedoms and facilitate the single market[7]. The contours and constraints of this principle were developed in subsequent case-law. Cassis de Dijon (1979)[8]

7 See L. Gormley: Quantitative restrictions and measures having equivalent effect. Cassis de Dijon and the Communication from the Commission, European Law Review 1981, vol. 6, p. 454; M. Juppe: Die gegenseitige Anerkennung strafrechtlicher Entcheidungen in Europa, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien 2007, p. 39-40: S. Braum: Das Prinzip der gegenseitigen Anerkennung. Historische Grundlagen und Perspektiven europäischer Strafrechtsentwicklung, Goltdammer's Archiv für Strafrecht 2005, Nr 12, p. 687-688; S. Gleß: Zum Prinzip der gegenseitigen Anerkennung, Zeitschrift für die gesamte Strafrechtswissenschaft 2004, Band 2, p. 354-356; T. Konstadinides: The perils of the „Europeanisation" of extradition procedures in the EU. Mutuality, fundamental rights and constitutional guarantees, Maastricht Journal of European and Comparative Law 2007, Nr 2, p. 381-382.

8 Up to then, the Cassi sale was forbidden in Germany, as the German law envisaged a mandatory minimum alcohol content (at least 32°) for alcoholic beverages to be marketed: strangely enough, the proliferation of low alcohol percentages was thought to induce an addiction towards alcohol more than highly alcoholic beverages. This provision hampering the import of the Cassis de Dijon originating in France - with an alcohol percentage of 15/20% - was alleged to protect German consumers, but in fact was likely to protect the interest of beer

was the starting point of a whole new policy, which was based upon mutual recognition in combination with minimum harmonisation. A 1979 decision by the European Court of Justice interpreting the Treaty of Rome provided, at least with regard to products, the legal basis for the Commission's approach of mutual recognition. At issue was an article of the treaty that prohibits not only quantitative restrictions on imports but also "all measures having equivalent effect" in trade between member countries. In Cassis de Dijon, the Court found that Germany could not prohibit the import of a liqueur that was lawfully produced and sold in France solely because its alcohol content, which was clearly labeled, was too low for it to be deemed a liqueur under German law. The Court ruled that, even though German national rules would have applied equally to domestic and imported products, a member state may create a barrier to the import of a product only when such a barrier is necessary to satisfy "mandatory requirements" such as the prevention of tax evasion, the protection of public health, the ensuring of fairness in commercial transactions, and the protection of consumers. Moreover, any such rule must be an "essential guarantee" of the interest that is allowed to be protected. Without such a justification, a member state may not apply its own national rules to imported products that are lawfully produced and sold in other member states. The Member States cannot apply certain specific details of national regulation to intra-EC imports of goods, if the objective or effect of the relevant law in other Member States is equivalent to that of the importing country. The idea behind mutual recognition is that all Member States care for their citizens and cannot be assumed to produce for instance unsafe or unhealthy products, merely because technical specifications differ. Hence the principle of mutual recognition plays a pivotal role in the internal market since it ensures free movement of goods (and services) without making it necessary to approximate/harmonise national legislation. Since free movement of goods is essential to the internal market, it is not surprising that the burden of proof of 'non-equivalence' of objectives is on the Member State which is unwilling to allow the import of the products concerned. Where the regulatory objective or effect is not equivalent, free movement can be impeded. In such cases, however, the Treaty offers a remedy to the free movement by allowing for the approximation of precisely those objectives or effects under Article 95 EC (ex Article 100a EC), under qualified majority voting.

In other words, although the Court in Cassis de Dijon did not use the term, member states, by accepting each other's laws regarding the production and sale of a product, are to be governed by the principle of mutual recognition. In subsequent judgments overturning British standards for milk, German standards for beer, French standards for milk, and Italian standards for pasta, the Court has continued to

producers, see L. Gormley: Quantitative restrictions and measures having equivalent effect. Cassis de Dijon and the Communication from the Commission, European Law Review 1981, vol. 6, p. 454.

apply the test set forth in Cassis de Dijon. With these decision, as well as with rulings in other areas, the Court has continued to play an important role in implementing the internal market program. I think that Cassis de Dijon was introduced to substitute or at least complement the cumbersome and detailed harmonisation process, all too often victim of the unanimity requirement, which characterised the European Community at that time. Goods and services lawfully produced or performed according to the legislation of the country of origin had henceforward to be accepted in other Member States, and admitted to their market, unless the Member State of destination was able to invoke a valid justification ground.

6. The principle of mutual recognition, by revealing the acceptance of the sovereignty of European Member States and of their rules on a perfectly equal basis, not only is already operational in many fields, but it is also potentially applicable in various others, from economics to law, from private markets to Welfare States. Indeed, I share Jacques Delors' idea included in the White Paper on the completion of the internal market[9] that "mutual recognition of national provisions, according to agreed procedures, should be the fundamental principle" on European markets. A new approach based on the respect of different national regulations is, therefore, emerging: each legislation has its own (same and different) ways to protect public interests. Thus, harmonisation must limit itself to minimum, sometimes only optional, standards and has to concern only fundamental aspects. In addition, mutual recognition, being an instrument of competition in regulation, in the end leads to regulation convergence within the European Union without any top-down harmonisation process. Reciprocal recognition of technical rules, procedures and certificates within the EU assumes that there exists a similarity in the level of protection of different Member States or as Nicolaďdis[10] thinks there exists "equivalence", "compatibility" or at least "acceptability" of the counterpart's regulatory system.

To this end, the adoption of the principle of mutual recognition in the European labour markets and Welfare States would not mean denying the "equality of treatment" objective, but criticising its current European interpretation. Something different should be proposed, whereby the identities of single citizens coming from different Member States and the national legislations peculiarities would be respected.

9 European Commission, 14 June 1985

10 K. Nicolaïdis: Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services, in Liberalization of Trade in Professional Services, OECD Publications 1997, passim; K. Nicolaïdis: Non-Discriminatory Mutual Recognition. An Oxymoron in the New WTO Lexicon, in Th. Cottier, P.C. Mavroidis (eds): Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law, The University of Michigan Press, 2000, pp. 267-301;

Even though the principle of mutual recognition was globally speaking welcomed by all economic actors and even though it gave a real boost to the creation of the internal market, its case-by-case approach revealed the precarious position of the economic actors, who were often forced to undergo costly and time consuming judicial procedures to win the battle and get their products or services recognized in other Member States. It became clear that mutual recognition was not an alternative to harmonisition, but rather a complementary tool, and that harmonization remained necessary for cases in which divergences in legislation and lack of equivalence precluded the principle of mutual recognition from playing its role[11].

I agree with P. Asp about the development of criminal law cooperation within the EU, when he writes that "perspective on the mutual recognition actually invites a comparison between the existing situation within European criminal law and the situation as regards the free movement of goods, etc. when the work on the internal market started some 30 or 40 years ago. The integration of criminal law is developing in a way which to some extent resembles as regards internal market questions started. As soon as one leaves the surface there are, of course, huge differences between the areas - but (…) this comparison could give a hint of the possible dynamics of the cooperation that in now starting to take shape"[12].

In F. Scharpf's opinion on the consequences of the gap between positive and negative integration[13], supporters of the race-to-the-bottom argument claim that mutual recognition forces states with higher standards on labour and environmental law to change to lower standards due to competitive pressures caused by countries with lower standards and similar effects might be observed in judicial cooperation[14]. Nevertheless, some scholars make the opposite argument, saying that mutual recognition might also lead to a race to the top when consumers favor high quality products[15]. For example S. Lavenex points out that mutual recognition in judicial cooperation does not lead to liberalisation but strengthens the governmental sphere: "What used to be a tool of liberalization in one sector might become an instrument of governmentalisation in another one". She argues that "in the single market inte-

11 M. Fichera, Ch. Janssens: Mutual recognition of judicial decisions in criminal matters and the role of the national judge, ERA Forum 2007, Nr 8, p. 177–202.

12 P. Asp: Mutual Recognition and the development of criminal law cooperation within the EU…, p. 29; S. Peers: Mutual recognition and criminal law…, p. 5–36; S. Alegre, M. Leaf: Mutual Recognition in European Judicial Cooperation…, p. 201–217.

13 F. Scharpf: Autonomieschonend und gemeinschaftsverträglich: Zur Logik der europäischen Mehrebenenpolitik, MPIFG Working Papers 1993 Nr 9, p. 1-22.

14 B. Schünemann: Europäischer Haftbefehl und EU-Verfassungsentwurf auf schiefer Ebene - Die Schranken des Grundgesetzes, Zeitschrift für Rechtspolitik 2003, Nr 6, p 185-189; W. Wagner: Europäisches Regieren im Politikfeld Inneres und Justiz, in T. Ingeborg (ed.): Die Europäische Union: Governance und Policy-Making, Wiesbaden 2008, p. 323-342;

15 D. Vogel: Trading up: Consumer and Environmental Regulation in a Global Economy, Cambridge 1995.

gration, mutual recognition eases the cross-border movement of societal interaction, thus contributing to processes of liberalization and socialization. The private sphere and the rights of individuals engaged in trade and consumption are enhanced while the regulatory scope of the member states is reduced. In the case of judicial co-operation in Justice and Home Affairs, in contrast, the introduction of mutual recognition does not expand the rights of individuals vis-á-vis the state. On the contrary, it facilitates the cross-border movement of sovereign acts exercised by states' executives and judicial organs. The relationship between the principle of mutual recognition and the balance between state and society, liberalization and sovereignty is thus reversed"[16].

7. According to the EU's concept of mutual recognition in Justice and Home Affairs, in which the national judiciary becomes the central actor in judicial cooperation, it is no longer the foreign ministry's decision whether to comply with a request. Politicians are no longer allowed to interfere. The judge of the national judicial authority who is in charge and who has a duty to accept foreign decisions as equivalent, plays the main part in this performance. Moreover, judicial cooperation now is a purely judicial procedure, it is characterized by direct contact from judge to judge. This leads to the emergence of a transgovernmental network of national judges[17]. As a result, mutual recognition creates a legal system of horizontal cooperation which operates with more or less precise and binding rules. In addition, a mutual recognition system leads to a horizontal transfer of sovereignty since a member state is no longer in full control of the law which applies on its territory.

In criminal law, the member states accept final judicial decisions, e.g. an arrest warrant or other decisions laying down sanctions issued under the law of that state. Hence those benefiting from mutual recognition are not societal actors but state representatives. As stated in Justice and Home Affairs discussion paper by the Finnish Presidency: "The advantages of mutual recognition over traditional forms of international co-operation are considerable ... As a result of the application of the principle of mutual recognition, judicial decisions can be enforced much more quickly and with greater certainty. The amount of discretion is reduced, as is the scope of grounds for refusal"[18]. It means that State A takes the decision and this decision is recognised and enforced in State B. In Justice and Home Affairs, recognition means

16 S. Lavenex: Mutual recognition and the monopoly of force: limits of the single market analogy, Journal of European Public Policy 2007, vol. 14, Nr 5, p. 765.

17 A.M. Slaughter: A New World Order, Princeton 2004, p. 34-35.

18 Informal JHA Ministerial Meeting Tampere, 20–22 September 2006. Follow-up to the mutual recognition programme: Difficulties in negotiating legislative instruments on the mutual recognition of judicial decisions in criminal matters, and possible solutions, 4 September 2006.

that a "member state not only recognizes a law as being equivalent but recognizes the judicial act in its interpretation of all relevant provisions in a given case"[19].

It is clear that the concept of mutual recognition and mode of traditional judicial cooperation are different. Traditional judicial cooperation is about State A requesting assistance from State B and the decision is being taken in State B. In general terms, this mode underlines the prominent role of bureaucrats and state officials below the level of government representatives in establishing networks with their counterparts in other member states. Additionally, traditional judicial cooperation in criminal matters is based on a variety of international legal instruments, which are overwhelmingly characterised by what one might call the "request"-principle: One sovereign state makes a request to another sovereign state, who then determines whether it will or will not comply with this request. Sometimes, the rules on compliance are rather strict, not leaving much of a choice; on other occasions, the requested state is quite free in its decision. In almost all cases, the requesting state must await the reply to its request before it gets what its authorities need in order to pursue a criminal case. This traditional system is not only slow, but also cumbersome, and sometimes it is quite uncertain what results a judge or prosecutor who makes a request will get. Thus, borrowing from concepts that have worked very well in the creation of the Single Market, the idea was born that judicial cooperation might also benefit from the concept of mutual recognition, which, simply stated, means that once a certain measure, such as a decision taken by a judge in exercising his or her official powers in one state has been taken, that measure - in so far as it has extranational implications - would automatically be accepted in all other member states, and have the same or at least similar effects there[20].

In mutual recognition the starting point is completely different because decisions of foreign judicial authorities such as e.g. arrest warrants are recognized and enforced in the host state (executing State). Thereby, member states accept to cooperate in the enforcement of other States' systems of law. As a result, the law of one country takes effect on the territory of another EU country; territory and national jurisdiction are no longer identical. Mutual recognition is a governance instrument which aims at managing diversity by avoiding demanding harmonization[21]. Moreover, the national authorities of the host country agree to recognize and possibly enforce foreign law. The judicial authority does not have many possibilities to refuse

19 S. Lavenex: Mutual recognition and the monopoly of force: limits of the single market analogy, Journal of European Public Policy 2007, vol. 14, Nr 5, p. 765.

20 Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Criminal Decisions, COM (2000) 495 final, 26 July 2000, Brussels, p. 2.

21 K. Nicolaïdis: Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services, in Liberalization of Trade in Professional Services, OECD Publications 1997, passim

a foreign enforcement order, it must be executed. On the other hand, the concept of mutual recognition goes hand in hand with a certain degree of standardisation of the way states do things. Such standardisation indeed often makes it easier to accept results reached in another state.

Further, in traditional international judicial cooperation in criminal matters, the double criminality requirement is of considerable important. P. O. Träskman states that "a review of the literature on this issue has little to offer us. Often, the authors satisfy themselves simply with noting that double punishment either is or is not required, without giving any details on the reasons for this"[22]. The reason for this importance would appear to be that states wish to establish a responsibility for their territory. In relation to jurisdiction there are three possible rationales behind the principle of double criminality. First, it could be argued that the principle is based on the principle of legality. The argument would be that the principle of legality is violated if someone is punished for an act that is not criminalized at the place of commission. Second, the principle of double criminality could be based on the principle of non-intervention, which means that states should not interfere with the internal affairs of other states, i.e. that state A should not convict a person for having done something on the territory of state B if B does not prohibit it and the act does not have any other implications for state A. Third, one could also argue that the principle of double criminality finds its basis in the interests of the individual, and in states' duties to respect those interests. The idea would be that the individual should be given freedom to make use of the liberties granted by the state on the territory of which the individual is situated[23].

With mutual recognition, it would seem that all this is about to change if state A is to accept the decisions of state B, without calling them into question in any way. There is no longer a place for the double criminality requirement. In my opinion, the double criminality is against the concept of mutual recognition – it should therefore not apply.

8. Lastly, I would like to mention of the conditions for mutual recognition, which I think are very important and probably worth more attention than I will give them here. As described in the literature[24], four conditions need to be met: a) the dif-

22 Should We Take the Condition of Double Criminality Seriously?", in: Jareborg (ed.) Double Criminality. Studies in International Criminal Law 1989 p. 145.

23 P. Asp. A. von Hirsch, D. Frände: Fundamental Thoughts on the Principle of Double Criminality, in Ein Gesamtkonzept für die europäische Strafrechtspflege, Upssala 2006, p. 484-492; P. Asp. A. von Hirsch, D. Frände: Double Criminality and Transnational Investigative Measures in EU Criminal Proceedings: Some Issues of Principle, Zeitschrift für Internationale Strafrechtsdogmatik 2006, Nr 11, p. 512-520.

24 J. Sievers: The European Arrest Warrant and the potential of mutual recognition as a mode of governance in EU Justice and Home Affairs, Paper to be presented at the EUSA Tenth Biennial International Conference Montréal,

ferent national actors need to have reciprocal trust in the quality of the foreign law, the legal system and the reliability and trustworthiness of foreign judicial authorities, b) national criminal law and criminal procedures need to be accepted as equivalent, c) national criminal law and criminal procedures need to be compatible, and d) an institutional support structure is needed to reduce transaction costs.

The European Commission stresses that mutual trust is an important element, not only trust in the adequacy of one's partners rules, but also that these rules are correctly applied. Based on this idea of equivalence and the trust it is based on, the results the other state has reached are allowed to take effect in one's own sphere of legal influence. On this basis, a decision taken by an authority in one state could be accepted as such in another state, even though a comparable authority may not even exist in that state, or could not take such decisions, or would have taken an entirely different decision in a comparable case. Recognizing a foreign decision in criminal matters could be understood as giving it effect outside of the state in which it has been rendered, be it by according it the legal effects foreseen for it by the foreign criminal law, or be it by taking it into account in order to make it have the effects foreseen by the criminal law of the recognizing state[25]. It is obvious that mutual recognition can only work efficiently in a climate of trust among the participating states[26]. I agree with J. Sievers that "when another state is supposed to cooperate in the enforcement of other State's systems of law, trust and confidence in the correct application of rules and procedures are essential. Given that mutual recognition of judicial decisions touches upon citizens' fundamental rights, the required degree of trust is notably higher than in the Single Market"[27].

I think that the mutual recognition is not manifesting a blind eye to a foreign law and judicial authority but it as about placing full faith and trust in the foreign legal system and in the judges. I agree with S. Alegre that trust requires a degree of faith in the other, particularly where the rights of individual are concerned, so mutual trust must be based on mutual knowledge that such trust is reasonable[28].

In addition, the member states need to accept each other legal systems as equally legitimate. Legislators and national judges need to acknowledge that a common

Canada, 17-19 May 2007, p. 6-10.

25 Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Criminal Decisions, COM (2000) 495 final, 26 July 2000, Brussels, p. 4.

26 S. Alegre i M. Leaf: Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant, European Law Journal 2004, Vol. 10, nr 2, p. 201-217;E. Guild: Crime and the EU's Constitutional Future in an Area of Freedom, Security, and Justice, European Law Journal 2004, Vol. 10, Nr 2, p. 218-234; S. Peers: Mutual recognition and criminal law in the European Union…, passim.

27 J. Sievers: The European Arrest Warrant..., p. 8.

28 S. Alegre: Mutual trust – lifting the mask, in La confiance mutuelle dans l'espace pénal européen/Mutual trust in the European criminal area, eds. G. de Kerchove, A. Weyembergh, Bruxelles 2005, p. 43.

goal such as efficient criminal prosecution and fundamental rights protection may be attained in an equal measure by the different policies of the foreign state as well as different policies are not necessarily inferior. The entire legal system of the member state must be recognized by other states as equivalent and affording all the appropriate protections, notably in the area of fundamental rights[29]. The member states have basic values in their criminal systems which rest upon the protection of fundamental rights in Europe, especially by the European Convention on Human Rights. It would be reasonable the member states' judicial authorities would place mutual trust in each other's cooperation criminal matters.

The Court of Justice has also contributed to the creation of mutual trust and the principle of mutual recognition in several cases. In joined Cases C-187/01 and C-385/01 Gözütok and Brügge, the ECJ held that the ne bis in idem principle according to Art. 54 of the 1990 Schengen Convention implied that the Member States "have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied" (par. 33)[30].

Moreover, the legal system of one member state needs to be compatible with the formal rules and procedures of other member states. It may cause problems between very different systems, especially between common law and civil law countries.

A fourth condition for mutual recognition is an institutional support structure of judicial authority of member states. A. Héritier comparison of mutual recognition across different policy areas employs a rational-choice institutionalist framework. She argues that the adoption of mutual recognition depends on an activist court and on well-developed implementation rules. Thus, for mutual recognition as a new mode of governance to function, a support structure easing the requested equivalence is the key[31]. In theoretical reflections J. Sievers takes an institutional support requirement into consideration. In her opinion, these institutions foster the necessary trust; collect and provide information on foreign legal systems, help solve conflicts of jurisdiction and deal with problems arising from incompatibilities between justice systems[32]. And then, of course, institutional support structures of judicial authority of member states thereby mitigate the transaction costs arising from putting a mutu-

29 J. Sievers: The European Arrest Warrant…, p. 8.

30 Joined Cases C-187/01 and C-385/01, Criminal proceedings against Hüseyin Gözütok and Klaus Brügge, Judgment of the Court of Justice of 11 February 2003, [2003] ECR I-5689. Futhermore, the ECJ states explicitly that the area of freedom, security and justice implies mutual trust in each other's criminal justice systems, and that the validity of the ne bis in idem principle is not dependent upon further harmonization.

31 A. Héritier: Mutual recognition: comparing policy areas, Journal of European Public Policy 2007, Vol. 14, Nr 5, p. 800–813.

32 J. Sievers: The European Arrest Warrant…, p. 9.

al recognition system into work. She argues that the European Judicial Network and even more so Eurojust, can be regarded as institutional support structures to enhance EU judicial cooperation. S. Lavenex observes that mutual recognition may not carry far without the move towards truly supranational structures[33].

9. Based on the above presented remarks, I come to conclude that mutual recognition as a governance mode would enhance in cooperation criminal matters and build up the project "European criminal law". The analysis of policy statements, legislative instruments and case law shows that mutual recognition is clearly intended as an important mean of creating the Area of Freedom, Security and Justice but what the EU is confronted with regarding criminal matters today depends on the Community legislature, political statements and the Lisbon Treaty scenario, in which the Third Pillar and the First Pillar will merge.

33 S. Lavenex: Mutual recognition and the monopoly of force…, p. 776.